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Table of Contents

Case and Comment: Quantum Damages

Case and Comment: Procedure

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Editorial

By the time you read this the new Discount Rate will have been announced. Such a fundamental change is a reminder that we specialise in an area of law that is constantly evolving. This makes it imperative that we all remain abreast of changes and innovations in all aspects of our work. With this in mind, I am delighted to include within this issue two articles that consider innovations in how Mesothelioma cases are litigated. Michael Rawlinson QC provides an insight into how practitioners are including and, more specifically, attempting to fund, claims for immunotherapy, and John-Paul Swoboda considers the case of *Carey v Vauxhall Motors Ltd*,[1] the first reported decision that successfully claimed for secondary exposure to asbestos.

We also lead with an article by Lauren Sutherland QC, one of the claimant's team in *Montgomery v Lanarkshire Health Board*.[2] Her review not only considers the detail of the Supreme Court's decision to abandon medical paternalism but also critiques subsequent cases and the apparent reluctance of courts to abandon the *Bolam* test when considering the issue of consent.

Unsurprisingly, given the tragedy of Grenfell Tower, significant changes are also being made to the regulation of fire safety. Katherine Metcalfe considers the development of a new regulatory regime with the establishment of a new Joint Competent Authority and the implications for stakeholders both here and in Scotland and Northern Ireland.

With the introduction of GDPR last year, personal data and its protection are now at the forefront of business management and risk. Craig Murray considers the detailed requirements of GDPR and reflects on the on-going case of *Various Claimants v Wm Morrison Supermarkets Plc*.[3] Are we heading for strict liability for employee breaches under GDPR?

In light of recent interlocutory skirmishes over the use of expert life expectancy evidence, it is timely that Dr John Corless provides an article with considers a clinician's approach to life expectation. His approach reminds us of the prevalence of old data in some areas of risk and cautions against double counting deductions in life expectation given that many comorbidities, including smoking, are necessarily already included in life tables.

We are also lucky to include two insightful articles providing case studies of litigated catastrophic injury cases. Harry Trusted's article provides a claimant "birds-eye view" of his team's approach to both liability and quantum in a difficult and unusual cerebral palsy birth injury case, quantum aspects including consideration of the enduring difficulties concerning *Roberts v Johnstone*.[4] Then we have a jointly written article by both sides of traumatic brain injury case where David Withers; Helen Kanczes; and David Fisher highlight the merits of the Serious Injury Guide and how it can be used to excellent effect when litigators engage fully with its spirit of cooperation.

Finally, Steve Rowley provides an overview of the insurance market for ATE policies, highlighting the need for close partnerships between providers and solicitors as well as the need for innovation in case management to ensure such products are available in the future.

[1] *Carey v Vauxhall Motors Ltd* [2019] EWHC 238 (QB).
[2] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11; [2015] A.C. 1430.
[3] *Various Claimants v Wm Morrison Supermarkets Plc* [2017] EWHC 3113 (QB); [2018] 3 W.L.R. 691; on appeal [2018] EWCA Civ 2339; [2019] 2 W.L.R. 99.
[4] *Roberts v Johnstone* [1989] Q.B. 878; [1988] 3 W.L.R. 1247.

With all this change and innovation there can be no rest for injury lawyers. However, I hope you have had (or are about to have) a well-earned holiday, ready to be fresh for the inevitable upheaval Brexit will bring, whether it is at Halloween or beyond.

Jeremy Ford
General Editor

Montgomery: Myths, Misconceptions and Misunderstanding

Lauren Sutherland QC*

Birth defects; Bolam test; Clinical negligence; Consent to treatment; Doctors; Expert witnesses; General Medical Council; Informed consent; Medical advice; Scotland

> "The patient's trust that his consent to treatment will not be misused is an essential part of his relationship with his doctor."[1]

In 2015, the Supreme Court issued the landmark decision in *Montgomery v Lanarkshire Health Board*[2] which has clarified, from a legal perspective, the nature of the relationship between doctor and patient on issues of information disclosure in the UK.

The unanimous decision of the Supreme Court at last gave effect to the guidance issued by the General Medical Council ("GMC") on consent, which had been available since the 1990s but was largely ignored by the courts and lawyers in the UK when they advanced and decided their consent cases.

Following the decision in *Montgomery*, UK law is now consistent with the GMC professional guidance and the law on patient consent found in other common law jurisdictions such as Canada and Australia. Margaret Brazier has commented that the decision has swept away the last vestiges of legal endorsement of medical paternalism in the UK.

There are those who said *Montgomery* made no difference in the UK since English law had moved on following the decision of the Court of Appeal in *Pearce v United Bristol Healthcare NHS Trust*.[3] In this article, the writer suggests that the law could not move to a truly patient focus test in line with the test found in Australia and Canada without the decision of the Supreme Court in *Montgomery*.

However, what is clear is that the decision was a wake-up call to Health Boards, Trusts, Royal Colleges and the medical and legal profession requiring all of them to examine more closely their practices in relation to the issue of disclosure of information to patients. This article aims to consider the arguments advanced in *Montgomery*, the decision of the Supreme Court and the trend of decisions following it as lawyers and doctors try to come to grips with what the decision actually means.

The GMC Guidance

The guidance issued by the GMC on patient consent was an essential component of the argument made before the Supreme Court in *Montgomery* by those representing the claimant. The guidance is formulated by doctors for doctors and recognises the fact that patient consent is also a question of professional ethics.

As long ago as 1995, the GMC provided that doctors should "listen to their patients and respect their views", "give patients the information they ask for or need about their condition, its treatment and prognosis" and "respect the right of patients to be fully involved in decisions about their care".[4]

* Lauren Sutherland QC of Ampersand Chambers, Edinburgh was part of the claimant team in *Montgomery* in the Supreme Court and for many years has taught doctors and dentists on consent. A former solicitor she specialises in Clinical and Professional Negligence, Fatal Accident Inquiries, Personal Injury and Human Rights issues in Medical Law.

[1] *Handbook of Medical Ethics British Medical Association* (BMA, 1984).

[2] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11; [2015] A.C. 1430.

[3] *Pearce v United Bristol Healthcare NHS Trust* [1999] E.C.C. 167; [1999] P.I.Q.R. P53.

[4] Good Medical Practice 1995, 2001, 2006, 2013.

In 1998, the GMC issued specific guidance for doctors on seeking patient's consent to ensure that there was *voluntary decision making*.[5] The focus in this guidance was on respecting patient autonomy and a patient's right to decide whether or not to undergo any medical intervention.

There was a recognition that consent is not an isolated event but requires continuing dialogue between the doctor and the patient and that the amount of information patients required may vary. Factors relevant to the decision-making process were said to be the complexity of the treatment, the nature of the condition, the risks associated with the treatment or procedure and the patient's own wishes.

The guidance also defined for practitioners the risks that should be discussed with the patient. According to the GMC Guidance there should be a discussion about any serious or frequently occurring risks, and any lifestyle changes which may be caused by, or necessitated by, the treatment. When counselling patients, doctors were encouraged to do their best to find out about a patient's individual needs and priorities. The GMC understood that patient centred factors may also affect the decision of the patient.

Importantly, as early as 1998, the GMC advocated a patient centre test in terms of the risks that should be discussed with patients. The 1998 guidance provided that the doctor "should provide patients with appropriate information which should include an explanation of any risks *to which they may attach particular significance*". The doctor should not withhold information necessary for decision-making unless the doctor considers that disclosure of the information would cause serious harm.

In 2008, the GMC provided updated guidance on consent and provided a basic model to be applied to all patients who have capacity to make decisions for themselves. The focus in this patient centred guidance was on joint decision making with patients and doctors working together to make decisions on the healthcare needs of individuals.[6]

The 2008 guidance provides that the doctor uses specialist knowledge and experience to identify which investigations or treatments are likely to result in overall benefit to the patient but it is the patient who makes the choice about their own healthcare decisions. The GMC does not suggest that the duty to provide information is qualified by professional practice.[7]

The guidance provides that "The doctor explains the options to the patient, setting out the potential benefits, risks, burdens and side effects of each option, including the option to have no treatment". It is the patient who then weighs up the options and also any *non-clinical issues* that are relevant to them. The guidance clearly recognises that factors personal to the patient are relevant to the decision-making process. The GMC emphasise that the patient has a right to refuse an option for a reason that may seem irrational to the doctor or for no reason at all.

To enable effective discussions to take place with patients it is provided that a doctor must tell a patient if an intervention or treatment might result in a serious adverse outcome, even if the likelihood is very small. Patients should also be told about less serious side effects or complications if they occur frequently, and explain what the patient should do if they experience them. In this guidance, the GMC have set out clearly how a doctor defines what is a "material risk" that requires to be discussed with a patient.

What is of interest is that in setting a professional standard for information disclosure the GMC did not follow the UK law as defined in *Sidaway v Board of Governors of the Bethlem Royal Hospital*[8] a legal test formulated by lawyers to test information disclosure by doctors.

As the GMC Guidance developed, it moved further away from the duty imposed by law and the effect was that in the UK there were two different standards applicable from the 1990s until the decision of the Supreme Court in *Montgomery* finally resolved the conflict.

[5] *Seeking Patients Consent: Ethical Considerations 1998* (GMC, 1998).
[6] *Consent: Patients and Doctors Making Decisions Together 2008* (GMC, 2008).
[7] *Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R. 582; [1957] 2 All E.R. 118 or *Hunter v Hanley* 1955 S.C. 200; 1955 S.L.T. 213.
[8] *Sidaway v Board of Governors of the Bethlem Royal Hospital* [1984] Q.B. 493; [1984] 2 W.L.R. 778.

The GMC appeared as interveners in the Supreme Court in *Montgomery* and the court clearly took account of their view in coming to its conclusion in this case:

> "The submissions on behalf of the General Medical Council acknowledge, in relation to these documents, that an approach based upon the informed involvement of patients in their treatment, rather than their being passive and potentially reluctant recipients, can have therapeutic benefits, and is regarded as an integral aspect of professionalism in treatment."[9]

The underlying principles and "informed consent"

The second important change following *Montgomery* was the unanimous recognition by the court of the *individual patient's* right to make *informed choices*. The court prioritised the individual patient's right to autonomy or self-determination and recognised in law their right to be involved in, and to make choices about their healthcare.

There was an understanding that the right of the individual patient is distinct from the right of the hypothetical reasonable patient and that an individual patient might legitimately make choices the hypothetical reasonable patient might not do.

In this area of information disclosure there are two main underling principles. The first is that the decision whether to undergo a medical procedure or not is ultimately the decision of the patient and not the doctor. The second is that every person has the right to determine what shall be done with their own body. Both stem from the basic right to self-determination which in some countries is constitutionally protected and in others is protected by common law.

The basic right entitles the patient to know when there are reasonable options for treatment and to information on the risks and benefits of each option. The whole process is about patient choice.[10]

For many years, lawyers and doctors have used the term *informed consent* to describe a situation where a patient is said to have been given appropriate information. This term developed in US jurisprudence and was actually specifically designed to expand the liability of doctors.[11]

In *Salgo v Leland Stanford Junior University Board of Trustees*,[12] it was initially held that a doctor had a duty to disclose any facts to form the basis of *intelligent* consent and then the term *informed consent* was used. This was picked up in the UK in *Chatterton v Gerson*.[13] In *Sidaway*, Lord Scarman correctly recognised that strictly speaking it is a misnomer to use the term informed consent. To obtain *real* or *valid* consent a patient has to be informed. The High Court of Australia in *Rogers v Whitaker*[14] rejected what they described as the somewhat amorphous phrase "informed consent" and the Supreme Court in Canada have been cautious in the use of the term.

The adoption of the term and its use in the UK has led to a flawed understanding where the quality of the disclosure is implied from the quality of the decision. The term fails to recognise that in the information disclosure case the main focus is *choice*. The concept of patient autonomy or self-determination recognises that a patient has a right to their own opinion, and choices and to make decisions based on their own personal values and beliefs.

Patient self-determination can only be protected where a patient is able to make a meaningful choice, on the basis of adequate information on the available treatments or therapies and the risks and benefits of each.

[9] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 at [78].
[10] *St George's Healthcare NHS Trust v S (Guidelines); R. v Collins Ex p. S (No.2)* [1999] Fam. 26; [1998] 3 W.L.R. 936; *Airdale NHS Trust v Bland* [1993] A.C. 789; [1993] 2 W.L.R. 316; *R. (on the application of Burke) v GMC* [2005] EWCA Civ 1003; [2006] Q.B. 273.
[11] Professor Sheila McLean, *A Patient's Right to Know: Information Disclosure, the Doctor and the Law* (Dartmouth Publishing Co Ltd, 1989).
[12] *Salgo v Leland Stanford Junior University Board of Trustees* 317 P2d 170 (Cal, 1957).
[13] *Chatterton v Gerson* [1981] Q.B. 432; [1980] 3 W.L.R. 1003.
[14] *Rogers v Whitaker* [1992] 109 A.L.R. 625.

In *Montgomery*, the Supreme Court embraced the ethical principles and recognised that patient choice could only be protected if a patient was able to make a meaningful choice, on the basis of adequate information on the options available to them and the risks and benefits of those options. It was said:

> "patients are now widely recognised as persons holding rights, rather than as the passive recipients of the care of the medical profession. They are also widely regarded as consumers exercising choices."[15]
>
> "The social and legal developments which we have mentioned point away from a model of the relationship between the doctor and the patient based upon medical paternalism."[16]
>
> "It is now well recognised that the interest which the law of negligence protects is a person's interest in their own physical and psychiatric integrity, an important feature of which is their autonomy, their freedom to decide what shall and shall not be done with their body."[17]

Some writers have suggested that patients do not wish to make choices about their medical care particularly in a situation where they have a serious illness and that the decision in *Montgomery* is in fact harmful to patients. They argue that there is justification for withholding information from patients based on the "do no harm" principle or benevolent deception.

This argument proceeds on a fundamental misunderstanding of the decision. The court did not suggest that patients should be forced to make choices when they did not want to do so. The patient who wishes the doctor to make a decision on the treatment options continues to be protected. They have a right to make the choice that they wish to have no information. The decision does not require force feeding of information to unwilling patients. The court also endorsed what they described as a therapeutic exception which is also recognised in Canada and Australia and by the GMC in their guidance.

The introduction of a patient focused test to the UK law on information disclosure

Prior to *Montgomery*, the House of Lords in *Sidaway* did not embrace a patient focused test in the area of consent. The majority view in *Sidaway* was that the *Bolam* test should be applied in the first instance, however, the decision did permit a departure from the professional practice test in certain circumstances.

Following *Sidaway*, there were a number of inconsistent English decisions some of which were heavily criticised.[18]

There was then a move to recognise the right of the patient in the UK in the decision of the Court of Appeal in *Pearce v United Bristol Healthcare NHS Trust*[19] where Lord Woolf MR relied primarily upon Lord Bridge's approach in *Sidaway*. The Master of the Rolls (with whom Roch and Mummery LJL agreed) provided:

> "that if there is a significant risk which would affect the judgement of *a reasonable patient*, then in the normal course it is the responsibility of the doctor to inform that patient of that significant risk, if the information is needed so that the patient can determine for him or herself as to what course he or she should adopt."[20]

[15] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 at [75].
[16] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 at [81].
[17] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 at [108].
[18] *Blyth v Bloomsbury HA* [1993] 4 Med. L.R. 151 CA: *Gold v Haringey HA* [1988] Q.B. 481; [1987] 3 W.L.R. 649; *McAllister v Lewisham and North Southwark HA* [1994] 5 Med. L.R. 343 QBD; *Smith v Turnbridge Wells HA* [1994] 5 Med. L.R. 334; *Gascoine v Sheridan* [1994] 5 Med. L.R. 437; *Doughty v North Staffordshire HA* [1992] 3 Med. L.R. 81; *Newell and Newell v Goldenberg* [1995] 6 Med. L.R. 371.
[19] *Pearce v United Bristol Healthcare NHS Trust* [1999] E.C.C. 167; [1999] P.I.Q.R. P53.
[20] *Pearce v United Bristol Healthcare NHS Trust* [1999] E.C.C. 167; [1999] P.I.Q.R. P53 at 59.

Following *Pearce* in *Wyatt v Curtis*[21] it was noted that Lord Woolf's formulation refines Lord Bridge's test by recognising that what is substantial and grave are questions on which the doctor's and patient's perception may differ and the doctor must have regard to the patient's view.

In *Chester v Afshar*,[22] Lord Steyn cited with approval Lord Wool MR's judgment in *Pearce* emphasised that in modern law medical paternalism no longer rules and that a patient had a prima facie right to be informed of a small but well established risk of injury. He went on to identify patient autonomy and dignity as the legal interests protected by the obligation to obtain consent.

In *Al Hamawi v Johnston*,[23] reference was made to the GMC Guidance and it was said that advice should be balanced and tailored to the individual patient. In *Birch v University College London Hospital NHS Foundation Trust*,[24] the court held that a patient should be told of the comparative risks of alternative procedures.

The test found in *Pearce* is not the test formulated by the Supreme Court in *Montgomery*. In setting out the new UK test the Supreme Court were clear in pointing to decision of the High Court of Australia in *Rogers v Whitaker* as refining the test formulated by both Lord Scarman and Lord Woolf MR:

> "The correct position, in relation to the risks of injury involved in treatment, can now be seen to be substantially that adopted in Sidaway by Lord Scarman, and Lord Woolf MR in Pearce *subject to the refinement* made by the High Court of Australia in *Rogers v Whitaker*."[25]

What then is a material risk?

The test of materiality post *Montgomery* is replicated from the decision of the High Court of Australia in *Rogers v Whitaker* as follows:

> "A doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment and of any reasonable alternative or variant treatments."

A risk is material if the circumstances of the particular case, a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it (the objective limb of the test) or if the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it (the subjective limb of the test).

It is important to note that the test found in *Rogers v Whitaker* is a two-limbed test. The first limb of the test applies to objective criteria and focuses on the requirements of a reasonable or ordinary person in the patient's position. The second, subjective limb recognises that a patient may not be reasonable and allows the courts to consider the particular patient and their requirements or fears (reasonable and unreasonable). This is subject to the caveat that the medical practitioner is or ought to be aware of those considerations. If a patient has special needs or concerns and this was known to the doctor, this would indicate that special or additional information was required.

Cases following *Montgomery* did not always recognise the two-fold test. In *A v East Kent Hospitals University NHS Foundation Trust*,[26] there was recognition of the two-fold test and the fact that there is no suggestion in the decision that there was a duty to warn of theoretical risks. Whereas in *FM (By his Father and Litigation Friend GM v Ipswich Hospital NHS Foundation Trust*,[27] focus was on the judgement of a

[21] *Wyatt v Curtis* [2003] EWCA Civ 1779.
[22] *Chester v Afshar* [2004] UKHL 41; [2005] 1 A.C. 134.
[23] *Al Hamawi v Johnston* [2005] EWHC 206 (QB); [2005] Lloyd's Rep. Med. 309.
[24] *Birch v University College London Hospital NHS Foundation Trust* [2008] EWCH 2237 (QB); (2008) 104 B.M.L.R. 168.
[25] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 at [87].
[26] *A v East Kent Hospitals University NHS Foundation Trust* [2015] EWHC 1038 (QB); [2015] Med. L.R. 262.
[27] *FM (By his Father and Litigation Friend GM) v Ipswich Hospital NHS Foundation Trust* [2015] EWCH 775 (QB).

reasonable person only. The decision of the court in *Thefaut v Johnstone*[28] recognised that there was a subjective element to the test.

The Supreme Court adopted the test on materiality directly from *Rogers v Whitaker*. For those who wish to understand the concept it is useful to consider the case law which has developed in both Canada and Australia in this area.

In both Canada and Australia, the likelihood of the risk occurring is seen as a distinct concept from the gravity of the risk. A practitioner must disclose a risk where the incidence of the risk is high or the where the outcome would have serious consequences but the incidence is low.[29]

The Australian courts are reluctant to allow medical statistics to confine or extend the proper standard of care as the view is that this would involve handing over the scope of the duty of disclosure to expert medical evidence.

The Supreme Court in *Montgomery* appeared to be of a similar view on the use of statistics:

> "… the assessment of whether a risk is material cannot be reduced to percentages. The significance of a given risk is likely to reflect a variety of factors besides its magnitude: for example, the nature of the risk, the effect which its occurrence would have upon the life of the patient, the importance to the patient of the benefits sought to be achieved by the treatment, the alternatives available and the risks in those alternatives. The assessment is therefore fact-sensitive, and also sensitive to the characteristics of the patient."[30]

On the question of a significant or material risk the GMC Guidance is in line with the Australian and Canadian decisions. The guidance provides that risks can take a number of forms but will usually include side-effects, complications, or failure of an intervention to achieve a desired aim. Included in the risks to be discussed are common risks with minor side effects but also rare but serious adverse outcomes with the possibility of resulting in permanent disability or death.[31]

Post *Montgomery*, in *Duce v Worcestershire Acute Hospitals NHS Trust*,[32] the Court of Appeal considered the question of material risks and rightly pointed out that a doctor cannot be expected to advise a patient of risks that were not known to the medical profession at that time.

Separation of the information disclosure case

A further important change following *Montgomery* was a recognition that it was legitimate in law to separate the disclosure of information to patients from the duty of the doctor in the area of diagnosis and treatment.

In *Sidaway*, Lord Scarman was alive to this important distinction and said:

> "In a medical negligence case where the issue is as to the advice and information given to the patient as to the treatment proposed, the available options and the risk, the court is concerned primarily with the patient's rights. The doctor's duty arises from the patient's right. If one considers the scope of the doctor's duty by beginning with the right of the patient to make his own decisions whether he will or will not undergo the treatment proposed, the right to be informed of significant risks and the doctor's corresponding duty are easy to understand, for the proper implementation of the right requires that the doctor be under a duty to inform the patient of the material risks inherent in the treatment."

[28] *Thefaut v Johnstone* [2017] EWHC 496 (QB).

[29] *White v Turner* (1981) 31 O.R. (2d) 773 (Ont. H.C.J); *Dickson v Pinder*; *Hribar v Wells* (1995) 64 SASR 129; *Rogers v Whittaker* [1992] 109 A.L.R. 625; *Videto v Kennedy* (1981) 125 D.L.R. (3d) 127 (Ont. CA).

[30] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 at [89].

[31] *Consent: Patients and Doctors Making Decisions Together* (GMC, 2 June 2008).

[32] *Duce v Worcestershire Acute Hospitals NHS Trust* [2018] EWCA Civ 1307; [2018] P.I.Q.R. P18.

In Australia and Canada, the courts have held for some time that there is a fundamental difference between diagnosis and treatment and the provision of advice and information. The Supreme Court in *Montgomery* referred to the Canadian case of *Reibl v Hughes*[33] which provided:

> "The issue under consideration here is a different issue from that involved where the question is whether the doctor carried out his professional activities by applicable professional standards. What is under consideration here is the patient's right to know what risks are involved in undergoing or foregoing certain surgery or other treatments."[34]

In its decision, the Supreme Court accepted that there is a fundamental difference between the doctor's role in diagnosis and treatment and their role in discussing with the patient any recommended treatment and the risks and benefits of the alternatives to treatment:

> "The 'informed choice' qualification rests on a fundamentally different premise: it is predicated on the view that the patient is entitled to be told of the risks where that is necessary for her to make an informed decision whether to incur them."[35]

> "… it is a non sequitur to conclude that the question whether a risk of injury, or the availability of an alternative form of treatment, ought to be discussed with the patient is also a matter of purely professional judgement. The doctor's advisory role cannot be regarded as solely an exercise of medical skill without leaving out of account the patient's entitlement to decide on the risks to her health which she is willing to run (a decision which may be influence by non-medical considerations). Responsibility for determining the nature and extent of a person's rights rests with the courts, not with the medical profession."[36]

Does the *Bolam* test have any place in our modern law on consent?

Having identified that the underlying principle is one of patient self-determination and choice, that the court recognised this is separate from the duty of the doctor in diagnosis and treatment, the question is does the *Bolam* test have any application to the modern law on information disclosure?

The decision in *Sidaway* was never a full endorsement of the use of the *Bolam* test but it continued to be applied in practice as was seen in the initial hearing in *Montgomery* where the expert opinion for the defenders was that not all ordinarily competent Consultant Obstetricians would have warned of the risks of mechanical problems in labour and shoulder dystocia at the projected foetal weight.

Sir John Donaldson in the Court of Appeal judgment and Lord Scarman in the House of Lords in *Sidaway* recognised the importance of patient autonomy in the consent case. Lord Scarman focused on the issue of a patient's right and said if the professional test were deemed appropriate then the implication of this was disturbing as:

> "It leaves the determination of a legal duty to the judgement of doctors … It would be a strange conclusion if courts should be led to conclude that our law, which undoubtedly recognises the right of the patient to decide whether he will accept or reject the treatment proposed, should permit the doctors to determine whether and in what circumstances a duty arises, requiring the doctor to warn his patients of the risks inherent in the treatment which he proposed."

Why is the *Bolam* test not appropriate in the area of patient consent? If a patient could only be advised of the options that other professionals thought was reasonable this would act as a filter and continue to

[33] *Reibl v Hughes* (1978) 89 D.L.R. (3d) 112.
[34] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 at [894]–[895].
[35] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 at [61].
[36] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 at [83].

allow the medical profession to determine what options were available, and what information should be given in relation to the risks and benefits of the options.

The test would be more concerned with a test of professional consensus and standards rather than with the rights of patients. Professor Kennedy recognised that in this situation the professional standard of disclosure would unreasonably subordinate the interests of the patient to the whim of the medical community.[37] The validity of consent is then tested not by what patients want to know but what doctors decide patients can be permitted to know.

In Australia and Canada, the *Bolam* test has been rejected in the area of information disclosure. In *Broduer v Provincial Health Services Authority*,[38] it was noted that the Supreme Court in Canada had specifically rejected the professional standard of disclosure as it was not for the physician to decide what should or should not be disclosed to a particular patient. In *Rayner v Knickle*,[39] it was said that what was reasonable depends on the risks and benefits of the options, the availability of the option, and whether it is reasonable in the context of the management of the particular patient.

Seney v Crooks[40] provided that the scope of the duty did not require the doctor to advise of fringe alternatives or alternative medicine practices. However, the fact that a doctor simply preferred one treatment over another did not relieve them of the obligation to advise of other acceptable and known procedures. It was also provided that reasonable alternatives may also include procedures which other physicians may recommend but the treating doctor may not.

However, it was doubted in *Bucknam v Kostuik*[41] whether a doctor was under a duty to inform a patient of a procedure which in their own mind was an entirely unreasonable procedure to undertake. The Canadian courts have also endorsed the view that a patient should be informed of a known treatment which other doctors, in the same specialty, consider to be superior, even if the doctor does not agree with that view.

In the Supreme Court in *Montgomery*, it was argued that the professional practice test is not a legitimate basis for reaching conclusions which affect the rights of patients. There is no consideration of the patient's interests in the *Bolam* test. In this area of the law, the courts have a primary role in delivering independent judgments on how patient autonomy can be respected. The medical profession should not be permitted to filter information or to substitute their own best medical judgments for the informed decision of the patient.

It has been argued since *Montgomery* that the Supreme court did not remove the *Bolam* or *Hunter v Hanley* test from the question of information disclosure in law. It is the writer's contention that this argument proceeds upon a fundamental misunderstanding of the key underlying principles applicable to this area of the law.

In the information disclosure case the key issues are *patient choice*, *patient self-determination* and *individual autonomy*. These basic rights are frustrated by the use of a professional practice test that seeks to filter information. The claimant's submission before the court was that the test had no application at all to information disclosure.

The Supreme Court correctly identified the problem with using a professional practice test in the area of information disclosure:

> "Furthermore, because the extent to which a doctor may be inclined to discuss risks with a patient is not determined by medical learning or experience, the application of the Bolam test to this question is liable to result in the sanctioning of differences in practice which are attributable not to divergent

[37] Professor Kennedy, "The Patient on the Clapham Omnibus" (1984) 47 M.L.R. 454.
[38] *Broduer v Provincial Health Services Authority* 2016 BSCSC 986 (CanLII).
[39] *Rayner v Knickle* (1988) 47 C.C.L.T. 141 72 Nfld.
[40] *Seney v Crooks* (1998) 166 D.L.R. (4th) 337 (Alta. CA).
[41] *Bucknam v Kostuik* (1983) 3 D.L.R. (4th) 99 (Ont. H.C.).

> schools of thought in medical science, but merely to divergent attitudes among doctors as to the degree of respect owed to their patients."[42]

Lady Hale held:

> "Once the argument departs from purely medical considerations and involves value judgements … it becomes clear … that the Bolam test, of conduct supported by a responsible body of medical opinion, becomes quite inapposite."[43]

The Supreme Court heralded the death of *Bolam*:

> "It follows that the analysis of the law by the majority in Sidaway is unsatisfactory, in so far as it treated the doctor's duty to advise her patient of the risks of proposed treatment as falling within the scope of the Bolam test, subject to two qualifications of that general principle, neither of which is fundamentally consistent with that test. It is unsurprising that courts have found difficulty in the subsequent application of Sidaway, and that the courts in England and Wales have in reality departed from it; a position which was effectively endorsed, particularly by Lord Steyn in *Chester v Afshar*. *There is no reason to perpetuate the application of the Bolam test in this context any longer*."[44]

Despite the clear indications in *Montgomery*, the UK courts appear to be loathe to depart from a test formulated in the 1950s when considering consent cases and have continued to permit expert evidence on what risks should be discussed applying the *Bolam* test.

In *David Spencer v Hillingdon Hospital NHS Trust*,[45] the court applied the *Bolam* test with the added gloss that the court should pay regard to what the ordinary sensible patient would expect to have been told. The approach was criticised in *Thefaut v Johnstone*[46] where it was not accepted that the *Montgomery* test was a variant of the *Bolam* test.

In *Grimstone v Epsom and St Helier University Hospitals NHS Trust*,[47] expert evidence was led by the defendants on what a responsible body of orthopaedic surgeons would have done. In *Lucy Diamond v Royal Devon & Exeter NHS Foundation Trust*,[48] the court considered expert evidence about what risks should be disclosed. In *Crossman v St George's NHS Trust*,[49] it was argued that the duty included a duty imposed on the patient to ask questions which completely flies in the face of the duty of the doctor to provide sufficient information to the patient to enable them to make an informed decision.

In *KR v Lanarkshire Health Board*,[50] the focus was only on the first limb of the test. In *Lunn v Kanagaratnam*,[51] it was recognised that the GMC Guidance set out the essential information a patient was entitled to expect. In *Inglis v Brand*,[52] the court appeared at first to consider the issue applying the *Hunter v Hanley* test and found there was no negligence. The court then applied the *Montgomery* test.

In *Taylor v Dailly Health Centre*,[53] the claimant argued that a doctor had a duty to advise the deceased of the risk of Acute Coronary Syndrome ("ACS") and her options to exclude it. The defenders argued that there was a distinction between the doctor's role when considering possible investigatory or treatment options and discussion of recommended treatment options. The court appeared to conclude that there was

[42] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 at [84].
[43] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 at [115].
[44] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 at [86].
[45] *David Spencer v Hillingdon Hospital NHS Trust* [2015] EWHC 1058 (QB).
[46] *Thefaut v Johnstone* [2017] EWHC 496 (QB).
[47] *Grimstone v Epsom and St Helier University Hospitals NHS Trust* [2015] EWHC 3756 (QB).
[48] *Lucy Diamond v Royal Devon & Exeter NHS Foundation Trust* [2017] EWHC 1495 (QB).
[49] *Crossman v St George's NHS Trust* [2016] EWHC 2878 (QB); (2017) 154 B.M.L.R. 204.
[50] *KR v Lanarkshire Health Board* [2016] CSOH 133; 2016 G.W.D. 31-556.
[51] *Lunn v Kanagaratnam* [2016] EWHC 93 (QB).
[52] *Inglis v Brand* [2016] S.C. Edin. 63.
[53] *Taylor v Dailly Health Centre* [2018] CSOH 91; 2018 S.L.T. 1324.

in this case no issue of possible discussion of alternatives and in that situation *Montgomery* did not apply and reverted to applying the *Hunter v Hanley* test.

The GMC do not suggest that any such filter should be applied. In 2016, the Royal College of Surgeons issued new guidance on consent following *Montgomery*.[54] In the Introduction to the Guidance the College stated: "It should be noted that the Bolam principle still applies in all other aspects of clinical practice apart from consent."

In the sixth edition of *Medicine, Patients and the Law*[55] under the heading "Bye bye Bolam" it is stated that the Supreme Court in *Montgomery* has ended decades of judicial deference to medical paternalism and "has forthrightly rejected any role for the Bolam test in information disclosure".

What is the role of the expert witness in the information disclosure case?

Many lawyers continue to grapple with the role of the expert witness in a post *Montgomery* world. In *AH v Greater Glasgow Health Board*,[56] Lord Boyd considered the pleadings in four actions arising out of personal injuries it is alleged were sustained by either vaginal tape used for stress urinary incontinence and mesh used to treat pelvic organ prolapse.

It was accepted by parties that following *Montgomery* the alternatives to be offered to patients must be reasonable however, it was argued by the defenders that what was a "reasonable" alternative for treatment must be judged by the professional practice test found in *Bolam* and in *Hunter v Hanley* and that the court should hear expert evidence on this question. The pursuers argued that what is "reasonable" should to be determined by reference to what a patient might find reasonable after a full discussion of the treatments and what was available and that it was not a matter for experts.

In his decision, Lord Boyd preferred the submissions of the defenders that the *Hunter v Hanley* and *Bolam* tests continued to apply in cases of consent post *Montgomery*. He therefore accepted that doctors were entitled to filter information given to patients on the basis of what other doctors considered reasonable but concluded that a doctor could not withhold information about a reasonable alternative treatment and the risks associated with that on the basis of their own preference.

The writer suggests that post *Montgomery* experts can still provide the court with factual evidence on what were the reasonable options available at the relevant time. However, what they should not be allowed to do is to determine those options by reference to the *Bolam* or *Hunter v Hanley* test. To do so reverts to the pre-*Montgomery* position whereby information is filtered by professional practice. It is not for the experts to decide which of the reasonable options for treatment the claimant would have selected. That is a matter for the court.

Conclusion

In the 1980s, Canada introduced a patient-focused test to their law, and in 1992, the Australian High Court in *Rogers v Whitaker* introduced, what was at the time, the most patient-orientated doctrine of consent amongst the common-law jurisdictions. In the UK, the GMC has been encouraging its doctors to respect the rights of individual patients since the 1990s.

However, the UK law has consistently failed to protect the rights of the individual patient with undue deference to medical paternalism. *Sidaway* did provide the House of Lords with an opportunity to modernise the law but the time was not right for a complete rejection of the role of doctors in making decisions on what information patients could be given.

[54] *Consent: Supported Decision-Making: A Guide to Good Practice* (Royal College of Surgeons, 2016).
[55] M. Brazier and E. Cave, *Medicine, Patients and the Law*, 6th edn (Manchester University Press, 2016).
[56] *AH v Greater Glasgow Health Board* [2018] CSOH 57; 2018 S.L.T. 535.

Following the decision in *Montgomery*, the medical profession has been proactive in reviewing their guidance. The GMC are currently reviewing and updating their guidance on consent and on 27 October 2016, the Royal College of Surgeons produced comprehensive guidance on consent post *Montgomery* for their members.

In the UK, there has been a flurry of legal cases following the decision in *Montgomery* and lawyers continue to argue about the effect of *Montgomery* despite the clarity of the decision from the Supreme Court. There appears to be a trend to attempt to mitigate the effect of the decision and return to old recognised concepts born in an era when medical paternalism was considered to be acceptable.

A patient centred approach to consent has been embraced in Australia and Canada for many years and some would argue has resulted in less litigation and better care. The decision in *Rogers v Whittaker* appears to have been largely ignored by UK lawyers despite the fact that the Supreme Court directed that this is the approach to be used. There continues to be an over fondness for the *Bolam* test allowing medical profession to determine what information should be given to patients.

The UK law should function to protect the rights of individuals and it should do so without undue deference to the medical profession. The doctor who follows his/her professional guidance will be protected in law and those who do not do so will be vulnerable.

In *Montgomery*, the Supreme Court recognised that what they proposed was a significant change and also that the change may not be welcomed by all. They noted that in departing from the *Bolam* test, this may reduce the predictability of the outcome of litigation, however, it was felt that a degree of unpredictability could be tolerated as a consequence of protecting patients from exposure to risks of injury which they would otherwise have chosen to avoid as "respect for the dignity of patients requires no less".[57] It is now time for UK lawyers and courts to listen to this message.

[57] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 at [93].

Building a Safer Future: Reform of Fire and Building Safety

Katherine Metcalfe*

Building regulations; Fire precautions; Housing; Local authorities' powers and duties; Premises; Scotland

Abstract

Fire safety is never far from the headlines at present. In this article, Katherine Metcalfe, reviews fire safety responsibility for premises and the implications if the recommendations of the Hackitt Review, which was commissioned by the UK Government to review building regulations and fire safety, are implemented.

Fire safety duties: The basics

Fire safety in England and Wales is governed by the Regulatory Reform (Fire Safety) Order 2005 ("RRO").[1] The RRO sets out a number of fire safety duties which apply to almost all buildings, places and structures, other than individual private homes. They apply to the shared areas of blocks of flats and to houses in multiple occupation. These are referred to collectively as "premises" in this article.

Those responsible for premises must:

- take general fire precautions;
- undertake a suitable and sufficient fire risk assessment and review it regularly;
- have appropriate arrangements in place to manage fire safety;
- install appropriate firefighting equipment, fire detectors and alarms, and maintain these systems;
- appoint at least one competent person to provide fire safety advice and assistance; and
- provide fire safety information and training to employees working in the premises.

Breaches of fire safety law are investigated and enforced by the fire and rescue authority for the geographical location of the premises, except on construction sites, where the HSE take the lead. Failure to comply with these duties is a criminal offence if that failure puts people at risk of death or serious injury in case of fire. The maximum penalty is an unlimited fine or a custodial sentence of up to two years for individuals. Failures could also give rise to the fire and rescue authority serving an enforcement notice requiring fire safety improvements, or a prohibition notice restricting the use of premises until serious fire safety issues have been resolved.

Civil liability for breach of statutory fire safety duties is excluded by the legislation. However, failure to comply with such duties might well be indicative of negligence on the part of the responsible person.

The responsible person

Fire safety duties fall primarily on the "responsible person", but they can also apply to persons in control of premises.

* Legal Director at Pinsent Masons.

[1] Regulatory Reform (Fire Safety) Order 2005 (SI 2005/1541).

The identity of the responsible person is determined by the RRO art.3 and depends on how the premises are used. The provisions are summarised in this table:

Use of Premises	Responsible Person
Workplace	Employer
Not a workplace, but controlled by someone in connection with a trade, business or undertaking	The person in control
Any other use	The owner

Importantly, the RRO art.5(3) specifies that a person is deemed to be in control where any contract or tenancy imposes maintenance, repair or safety obligations for the premises upon them.

In complex buildings which contain premises occupied by multiple organisations, or where there is potentially more than one person or organisation in control, determining the identity of the responsible person can be complex and challenging for the fire and rescue authority.

Fire safety duties: Elsewhere in the UK

Fire safety in Scotland is governed the Fire (Scotland) Act 2005 and the Fire Safety (Scotland) Regulations 2006.[2] The law is very similar to the RRO, but there are some significant differences:

- Instead of a "responsible person", legal duties under the Scottish legislation fall to "duty holders", essentially the employer and anyone in control of premises. There can be more than one duty holder for premises, and their duties overlap so that they must coordinate their fire safety activities.
- The definition of "premises" in Scotland does not include the shared areas of blocks of flats, so that there is no obligation to conduct a fire risk assessment for such buildings.

In Northern Ireland, the Fire and Rescue Services (Northern Ireland) Order 2006[3] and the Fire Safety Regulations (Northern Ireland) 2010[4] are the relevant legislation. In substance, the legislation is the same as the Scottish legislation, save that the duty holder or responsible person role is known as the "appropriate person".

The role of Building Regulations

Pure "fire safety" legislation is primarily aimed at the ongoing management of occupied buildings. How those buildings are constructed and modified over their lifecycle has just as crucial a role to play in protecting the people who live and work in them from fire. That is the remit of building regulations, enforced by Local Authority Building Control departments.

Again, building regulation is a devolved matter. In England and Wales, building work must meet the requirements of the Building Regulations 2010.[5] Guidance on how to comply with the Building Regulations is contained within Approved Documents. The UK Government is responsible for updated the English Approved Documents. Approved Document B deals with fire safety. The Welsh Government is responsible for Approved Documents in Wales and the Welsh Approved Document B contains some differences.

[2] Fire Safety (Scotland) Regulations 2006 (SSI 2006/456).
[3] Fire and Rescue Services (Northern Ireland) Order 2006 (NISI 2006/1254).
[4] Fire Safety Regulations (Northern Ireland) 2010 (NISI 2010/325).
[5] Building Regulations 2010 (SI 2010/2214).

In Scotland, building work must meet the requirements of the Building (Scotland) Regulations 2004.[6] Guidance on how to comply with the Regulations is contained within the Building Standards Technical Handbooks 2017. There are separate handbooks for domestic and non-domestic buildings.

In Northern Ireland, the rules are contained within the Building Regulations (Northern Ireland) 2012.[7] Guidance on how to comply with the Regulations is contained within Technical Booklets, also from 2012. Technical Booklet E deals with fire safety.

Housing legislation

A third strand of regulation in this area can be found in housing legislation. This regulates fire safety in domestic premises, which are generally excluded from the RRO, unless they are a home in multiple occupation.

In England and Wales, the Housing Act 2004 contains a requirement that local authorities keep under review the conditions of residential buildings in their area. Authorities are able to check the condition of buildings by conducting assessments under the Housing Act's risk assessment system, the Housing Health and Safety Rating System. Where hazards, including fire safety hazards, are identified the Local Authority has a range of enforcement options at its disposal. At the end of 2018, the UK Government issued guidance clarifying how this system could be used to compel building owners to remove combustible cladding from buildings.

In Scotland, the Housing (Scotland) Act 2006 requires landlords to maintain buildings to a minimum standard. This covers various fire safety aspects, such as fire and carbon monoxide detection and warning systems.

Proposed reform

These complex and overlapping systems have been criticised for failing to create clear accountability for fire and building safety.

The fire in Grenfell Tower, London in June 2017 has been the driver for wholesale review of building regulations and fire safety. Recognising the urgency, the UK Government has embarked upon that process ahead of the outcomes of the ongoing criminal investigation by the Metropolitan Police and the Grenfell Tower Public Inquiry chaired by Sir Martin Moore-Bick.

Dame Judith Hackitt, former Chair of the Health and Safety Executive, was commissioned by the UK Government to review the system of building regulation and fire safety in England and Wales. Her final report, published on 17 May 2018, recommends a wide-ranging and ambitious package of building and fire safety reforms.

Hackitt's final report sets out the principles for a new regulatory framework which she considers will drive cultural change and the right behaviours in relation to fire safety. Emphasis is placed on a clear model of risk ownership, and the new regulatory framework she proposes is to be "outcomes-based" rather than following a prescriptive regulatory approach.

The recommendations apply to multi-occupancy, higher risk residential buildings, which the report defines as buildings of more than ten storeys. The report recommends that the Government considers extending the new system to other buildings used as living accommodation where people sleep, including care homes, hospitals, hotels, prisons, halls of residence and boarding schools. Some of the recommendations would apply to an even wider range of buildings.

[6] Building (Scotland) Regulations 2004 (SSI 2004/406).
[7] Building Regulations (Northern Ireland) 2012 (NISI 2012/192).

A new model of risk ownership

This new regulatory system will be overseen by a Joint Competent Authority ("JCA"); a formal mechanism through which Local Authority Building Standards and the Fire and Rescue Authorities will work with the Health and Safety Executive in a much more integrated way. The new JCA will act as a "gatekeeper", whose approval is required at certain "gateway points" in order to obtain planning permission, start building work and start occupation.

The JCA's work as gatekeeper and reviewer of the safety case will be done on a full cost recovery basis, underpinned by a fee charging regime.

The JCA will have new enforcement powers, including the power to serve formal improvement and prohibition notices, and ultimately to pursue prosecution of those who fail to comply with their duties.

New information and "safety case" requirements

A central plank of this new system is the creation, maintenance and handover of key information, the so-called "golden thread". Those involved in the construction of buildings must prepare and hand over a digital record, a "fire and emergency" file, full plans, and a construction control plan. The building duty holder would also have to complete a pre-occupation "fire risk assessment" and a resident engagement strategy before the building could be occupied. Together, this information will form a "safety case" for the building, which would have to be reviewed at least every five years, and more often if modifications are proposed to the building.

The report envisages retrospectively creating safety cases for existing buildings, which will require an information gathering exercise to build the data record and reconstruct the design intent for building safety. Hackitt recognises that this will be an enormous task, and proposes a phased programme of work on a prioritised basis.

More rigorous oversight of duty holders

Where the new regime applies, the JCA must be notified of the identity of the "duty holder" before a building is occupied. This must be the owner or superior landlord. This duty holder role applies to the whole building, and would overlap with responsible person duties for any individual premises within the building.

The duty holder will have to nominate a competent building safety manager to be responsible for the day-to-day management of the building, and to act as a point of contact for residents.

The duty holder will have an overarching responsibility to take such safety precautions as may reasonably be required to ensure that building safety risk is reduced so far as is reasonably practicable. This duty will operate in a similar way to the duties under health and safety legislation to ensure the health, safety and welfare of employees. It will be a criminal offence to fail to comply.

Residents will be given a voice under this new system, as promised by Hackitt in her interim review. The duty holder will have an obligation to ensure that there is a resident engagement strategy, and that residents receive information on fire safety in an accessible manner. However, with that voice will come responsibility. Clearer obligations will also be imposed on residents to cooperate with the duty holder and to ensure that they take any action required within their own flats, for example, ensuring that fire compartmentation is maintained to a suitable standard.

Progress to date

The Government has stated its commitment to implementing Hackitt's proposals, publishing its implementation plan just before Christmas 2108. Many of the proposals will require further consultation and for the central elements of the new system, this will begin this Spring.

In the meantime, the UK Government will quickly set up a joint regulators' group to trial elements of this new system ahead of any new proposed legislation. The new joint regulators' group will bring together the key players who will ultimately form the recommended JCA to test out different ways for them to work together to find the optimal solution.

The Government has already announced a ban on the use of combustible cladding on the external walls of new high-rise buildings over 18m in height with effect from 21 December 2018. It has now published additional calls for evidence on the fire safety Approved Document B technical guidance accompanying the building regulations which closed on 1 March 2019; and on how residents and landlord can work together to keep buildings safe which closed on 12 February 2019.

An industry work group looking at fire and building safety competence across all construction professionals will report imminently.

Reform in Scotland

The Scottish Government set up two reviews of fire and building safety in September 2017, in response to the Grenfell Tower fire and a number of public sector construction projects where significant defects were identified post-completion. The recommendations of the Cole review of compliance and enforcement, and the Stollard review of fire safety, unsurprisingly echoed many of the themes from the Hackitt Review. They will be introduced by way of changes to the building regulations, and to the oversight and enforcement regime.

A ban on the use of combustible materials on the external walls of certain new high-rise buildings will be introduced in Scotland this year. The proposed Scottish ban appears to go further: it will apply to buildings of over 11m in height, compared to 18m in England and Wales; and will also apply to entertainment and assembly buildings, as well as residential care homes and hospitals of any height. Aluminium composite material ("ACM") used for cladding on these buildings must be of European classification A2 or above.

The proposals include extending the mandatory installation of sprinklers in flatted accommodation and in larger multi-occupancy dwellings, and those where care is provided. New residential buildings above 18m in height will also be subject to new standards for evacuation, including sound alerts and a requirement for at least two escape stairwells.

Owners or developers of new high-risk buildings in Scotland will be required to prepare and maintain a documented compliance plan for the building, from pre-application phase to completion. This plan will set out the verifier planned inspection regime. Owners of existing high-rise buildings will be required to capture and maintain safety critical information in an electronic database.

New, specific fire safety guidance will be developed for residents of high-rise domestic buildings, while guidance for fire risk assessments will also be introduced. The enforcement guidance will be strengthened.

The "golden thread of information" for new buildings in Scotland will take the form of a documented compliance plan for the design and construction phases of a building, with more stringent verification to ensure that buildings are constructed in accordance with the approved design.

For existing buildings, developing and populating a database to capture and maintain safety critical information is an important step, but the work involved in that should not be underestimated.

It is unclear when similar action will follow in Northern Ireland as building regulations are a devolved matter for the NI Assembly and the Department of Finance. The Northern Ireland Assembly has been in

a period of suspension since January 2017 and no intention has been announced to introduce legislation via direct rule. As a result, the Building Regulations and Technical Booklets in Northern Ireland have not been updated since the fire in Grenfell Tower to reflect the output of the UK Government's Building Safety Programme.

Conclusions

Fire and building safety is in a period of rapid development. Whilst the principles of the new regulatory regime are becoming clearer, there is much work to do to develop the finer detail. Governments throughout the UK must maintain momentum if the sort of wholesale cultural and regulatory change which Hackitt recommends is to be implemented effectively.

Carey v Vauxhall Motors Ltd: Secondary Victim Mesothelioma Claims, the Law and its Development

John-Paul Swoboda*

LT Asbestos; Breach of duty of care; Causation; De minimis; Mesothelioma; Working environment

Mr Carey worked as a maintenance electrician in the Vauxhall/Bedford Trucks Dunstable plant in the 1970s. He married Mrs Carey in August 1976. It was his case that he regularly came into contact with asbestos in the course of his work, that he wore overalls which he sometimes took home and that his wife, Mrs Carey, laundered those overalls. This is, for anyone who practices in asbestos litigation a not unfamiliar scenario and these types of cases are often referred to as secondary exposure claims or simply overalls claims. This article looks at the legal pathway which permits "secondary exposure" claims and considers how this type of litigation might evolve in the future.

The "secondary exposure" legal pathway and its development

The duty not to cause injury by exposure to asbestos does not stop at the factory gate. The Court of Appeal stated in *Margereson v JW Roberts Ltd*:[1]

> "there is nothing in the law that circumscribes the duty of care by reference to the factory wall … if the evidence shows with respect to a person outside the factory that he or she was exposed to the knowledge of the defendants, actual or constructive, to conditions in terms of dust emissions not materially different to those giving rise within the factory to a duty of care, then I can see no reason not to extend to that extramural neighbour a comparable duty of care."

Margerson was a case where a factory in Armley in Leeds left asbestos powder outside the factory gates in close proximity to the factory. This led to the unfortunate circumstances where children would play with the unattended asbestos outside the factory by throwing it at each other. This child's play had tragic consequences for Arthur Margereson and Marjorie Hancock who, as a result of this innocent play, suffered from mesothelioma decades later.

A series of facts of critical importance came to light by late 1965: it began to be understood there was no safe level of exposure and that cross contamination between individuals (typically but not always) by way of contaminated clothing posed a risk of mesothelioma to whomever inhaled the asbestos fibres from the contaminated article. This crystallisation of the dangers of asbestos and the risk it posed to anyone who came into contact with it, even in extremely small doses, is shown by the following selection of publications: on 25 July 1964 a leading article in the British Medical Journal was entitled *Asbestos and Malignancy* and stated "… all exposure to asbestos dust should be considered as hazardous"; Newhouse and Thompson published their ground-breaking paper on 11 February 1965 in which they stated "There seems little doubt that the risk of mesothelioma may arise from both occupational and domestic exposure to asbestos"; the *Sunday Times* Article, "The Killer Dust" from 31 October 1965 (which is often considered to be the watershed moment) described domestic cases of mesothelioma and stated "The most usual history was that of the wife who used to wash her husband dungarees or work clothes"; the 1966 Annual Report

* 12 King's Bench Walk.

[1] *Margereson v JW Roberts Ltd* [1996] Env. L.R. 304; [1996] P.I.Q.R P358.

of HM Chief Inspector of Factories on Industrial Health presented to Parliament in August 1967 which stated, "the only safe course is to eliminate the escape of asbestos into the air".

It is the synthesis of the *Margerson* principle and the knowledge, from 1965, that there was no safe level of exposure which allows for secondary exposure claims. *Maguire v Harland & Wolff Plc*[2] was an attempt to synthesise those principles and bring a secondary exposure claim. The Court of Appeal, as shown in the extracts below, appeared to approve of the argument which underpins secondary exposure claims but found that the secondary exposure of Teresa Maguire in 1960, was just too early for a successful secondary exposure claim.

> "… In truth, the alarm did not sound until late 1965, when it began to be appreciated that there could be no safe or permissible level of exposure, direct or indirect, to asbestos dust. Thereafter, the learning curve about the risks arising from familial exposure was fairly steep …
>
> The principle approved in *Margereson* and *Hancock* in relation to environmental exposure to asbestos dust has potential application to cases of familial exposure. In summary, 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 …"

One may have expected that following *Maguire* there would have been further litigation relating to secondary exposure claims but it took until 2018 and the Scottish case of *Gibson v Babcock International Ltd*[3] for the matter to be considered by the Outer House of the Court of Session. Lardy Carmichael in that case stated:

> "I consider that from 31 October 1965 at latest, the defenders ought reasonably to have foreseen that a risk of injury arose to persons in the position of the deceased by reason of their employees transporting asbestos dust home on their clothing."

In the jurisdiction of England and Wales the issue of secondary exposure claims was considered in *Carey v Vauxhall Motors Ltd*,[4] a case where the secondary exposure took place from the mid to late 1970s. Perhaps unsurprisingly given what had come before, Vauxhall did not contest that it owed Mrs Carey a duty of care even though she had no direct relationship with them. The judge in *Carey* considered the defendant was right to make the concession and the case focused on whether Mrs Carey's exposure was sufficient to put the defendant in breach of duty.

The judge in *Carey* defined the standard of care in secondary exposure cases when stating:

> "… all employers [post October 1965] are subject to the duty to take reasonable care to prevent exposure of its employees, and members of their families, from inhaling the asbestos that might cause mesothelioma. The court has to consider whether [the defendant] fulfilled its duty to take reasonable care by taking all practicable measures to prevent [the person liable to second hand exposure] from inhaling asbestos dust, through contact with their employee … in light of the known risk that asbestos dust, if inhaled, might cause mesothelioma."

Accordingly, where the exposure is post October 1965 any exposure which is more than de minimis (which in practical terms means more than background levels of asbestos given there is no identified safe level of exposure) is likely to lead to a finding of negligence so long as the defendant cannot prove it took all practicable measures, irrespective of whether the victim is an employee or experiences second hand exposure.

[2] *Maguire v Harland & Wolff Plc* [2005] EWCA Civ 1; [2005] P.I.Q.R. P21.
[3] *Gibson v Babcock International Ltd* [2018] CSOH 78; 2018 S.L.T. 886.
[4] *Carey v Vauxhall Motors Ltd* [2019] EWHC 238 (QB).

The case of *Carey* has developed the common law in two ways: as the first reported successful secondary exposure case in England and Wales, it has confirmed that secondary exposure claims are legitimate and winnable; it has shown there is no difference in the standard of care owed by the alleged tortfeasor as between the primary and secondary victim exposed to asbestos as the duty in both cases is to reduce the level of exposure to the lowest level practicable. The second development has the more profound consequences, in this author's opinion for the reasons discussed below.

The future evolution of the common law

It is tempting (but wrong) to conclude that, in the context of asbestos litigation, once history has been decided through the decisions of the courts then there is no ability to reinterpret key historical facts. However, although historians continue to debate matters from the past and the continual pouring over documents, and the unearthing of new documents can lead to new historical conclusions it is right to note that in the context of asbestos litigation claimants have a structural bias which acts to make it harder for any reinterpretation of history to give rise to a more favourable result for defendants. This structural bias arises from the legal principle articulated in *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd*:[5]

> "… the overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know …"

Accordingly, whilst alleged tortfeasors may be able to find historical documents to suggest that they were unaware of the dangers of asbestos or secondary exposure, the court will be unable to ignore the documents already in public domain in litigated cases which show a contrary position. In other words, an alleged tortfeasor is unlikely to improve their situation by discovering a document which shows they did not have the knowledge of the dangers of asbestos accepted to be publicly available. On the contrary, if a claimant can show that the employer had greater than average knowledge or that the publicly available information was available earlier to that alleged tortfeasor, they might be able to move the clock back when assessing the standard of care owed. However, to be able to move the clock back for a secondary exposure claimant, prior to October 1965, would, in my opinion, be hard given the decision in *Maguire* and would require previously unearthed contemporaneous documentation which suggested the historical interpretation in *Maguire* was wrong or that the particular employer had greater knowledge than the defendant in *Maguire*.

On the premises that the following historical facts and legal principles remain unimpeached (reasonably prudent employers would have known there was no safe level of exposure to asbestos post October 1965; reasonably prudent employers would have known of the risk of asbestos transfer by October 1965; reasonably prudent employer should have reduced levels of asbestos exposure to the lowest level practicable from October 1965 at the latest; and that there is no difference in the standard of care owed by a tortfeasor as between the primary and secondary victim) it is difficult to see how any exposure, of a secondary victim, which is more than de minimis post October 1965 would not give rise to a breach of duty. The necessary implications of a primary victim being able to transfer a more than de minimis level of asbestos to a secondary victim is that the primary victims exposure was: (a) more than de minimis; and (b) that all practicable measures to prevent transfer (such as prohibition on leaving with contaminated clothing and mandatory showering after exposure to asbestos fibres) were not taken (as it is hard, if not impossible, to see how a primary victim could be left with asbestos fibres impregnated in their clothes or elsewhere where all practicable measures are taken). This leads this author to the tentative conclusion that the real fight in secondary exposure claims in the future is likely to revolve around whether the primary and/or secondary victim was exposed to asbestos at all.

[5] *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd* [1968] 1 W.L.R. 1776 at 1783; 5 K.I.R. 401.

The GDPR and *Various Claimants v William Morrison Supermarkets Plc*: The Do's and Don'ts of Personal Injury Practice

Craig M. Murray*

Data breach; Data protection; Personal injury; Subject access requests; Vicarious liability

Personal injury legal practice is generally a high-risk area in relation to data protection because of the volume and sensitive nature of personal data which are "processed" in advancing or defending a claim. Recent decisions in the law of data protection need to be read in the new context of the Data Protection Act 2018 and the General Data Protection Regulation. This article will briefly review how personal injury practice is affected by data protection generally, and consider how practice and litigation in this area might develop.

The GDPR

Most provisions of the Data Protection Act 2018 ("DPA 2018") have now been in force for a little over a year. The DPA 2018 requires a radical change in the way in which all businesses deal with data concerning individuals, even those in the already highly regulated field of legal services, where maintaining client confidentiality has always been fundamental.

The basis of the DPA 2018, Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data ("GDPR"),[1] is intended to give effect to the protection of the data of natural persons as a normative right under the Charter of Fundamental Rights of the European Union and the Treaty on the Functioning of the European Union. The GDPR extends the nature and scope of data protection rights and obligations, aiming to elevate the importance of protecting those rights to the level of the corporate board.[2] In particular, it widens the scope for liability in damages for data breaches and substantially increases the Information Commissioner's Office ("ICO") power to apply financial penalties (up to 20 million euros or 4% of turnover, whichever is higher[3]).

The GDPR repealed the Data Protection Directive 95/46 ("the Directive"),[4] but adopts and supplements the familiar core principles (abbreviations in parentheses):

- personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject ("lawfulness, fairness and transparency");
- personal data shall be collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes ("purpose limitation");
- personal data shall be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ("data minimisation");
- personal data shall be accurate and every reasonable step must be taken to ensure that personal data that is inaccurate are erased or rectified without delay ("accuracy");

* Barrister and Advocate.

[1] Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46 [2016] OJ L119/1.

[2] J. Castro-Edwards, *EU General Data Protection Regulation: a guide to the new law* (London: Law Society, 2017), p.3.

[3] DPA 2018 s.157; GDPR art.38.

[4] Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L31/281.

- personal data shall be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed ("storage limitation"); and
- personal data shall be processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidentally loss, destruction or damage, using appropriate technical or organisational measures ("integrity and confidentiality").

Most data processed in a personal injuries ("PI") claim will be either: "personal data", by which a person can be identified; or "special category data",[5] which includes data on the ethnic or racial origin of an individual, their health, their sex life, and their sexual orientation. There is a general prohibition on processing special categories data, but an exemption applies where the processing is necessary for establishing, exercising or defending legal claims.

The lawfulness, fairness and transparency principle is not fully defined in the GDPR or in case law. It is, however, implicit in the requirement of lawfulness that the processing of personal data can be justified as "necessary", a concept familiar in European Convention on Human Rights art.8 jurisprudence. For most data processed by parties in a PI claim, this will be uncontroversial as much of the data will be provided by the claimant. However, the investigation of a claim by enquiry agents, for example using social media searches or surveillance, will result in the collection of personal data (and possibly special category data) which is unknown to the claimant. Before such data is processed, the processing must be "necessary". It is suggested that there must therefore be an objective basis for reasonable suspicion that a claim is not genuine in some particular before such an enquiry could lawfully be instructed.[6]

There is a general prohibition on transferring personal data, but this is also subject to an exemption where the transfer is necessary for establishing, exercising or defending legal claims. Where special category data is sent to a data processor, a medical expert for instance, the client should be informed of the use to which their data will be made.

Where a data controller requires processing of personal data by a person acting on its behalf, it may only use a data processor able to offer sufficient guarantees to implement technical and organisational security measures to ensure that the processing meets the requirements of the GDPR and ensures the protection of the rights of the data subject.[7] This due diligence must be contained in a contract between the data controller and the data processor, and would apply to expert witnesses, enquiry agents or surveillance agents instructed in a PI case.

The storage limitation principle gives rise to the question of how long is necessary in data retention. This is to be answered on a case-by-case basis, depending on the specific legal or business reasons for retention of the data. It will rarely be justifiable to hold personal data in a form that permits the identification of individual data subject for an unlimited period. It has been suggested that most documents need to be retained for at least 6 years, or up to 24 years in respect of a minor.[8] In the ordinary PI case, an individual's medical records could not justifiably be retained for as long as it might be prudent to retain a correspondence file or court papers file.

Data protection precautions

The integrity and confidentiality principle requires a legal practice to have robust technological and organisational measures in place to protect the personal data held by the business. GDPR art.32 specifies that the level of security should be appropriate to the risk.

[5] Previously "sensitive personal data" under the Data Protection Act 1998 ("DPA 1998").
[6] Association of British Insurers, *Guidelines on the instruction and use of private investigators*, September 2014.
[7] GDPR art.28.
[8] A. Matthews, *Data Protection Toolkit*, 2nd edn (London: Law Society, 2019), p.142.

Many organisational and technological data protection precautions will already be familiar to those in PI practice:

- employees should be recruited, trained and (to the extent appropriate) monitored so as to apply data protection principles in their work;
- data processors must be trained in their obligations to handle data appropriately;
- encryption of laptops and portable devices;
- secure storage of all personal data and access by only those who need access for necessary business purposes;
- sufficient organisational steps to prevent cybercrime;
- ensuring all IT systems are robust, including suitable back-up;
- employees must not discuss a client's affairs in public, or otherwise breach confidentiality by passing information to unauthorised third parties; and
- the correct document must be sent to the correct person at the correct address.

A legal practice should retain documentary evidence of compliance with the principles of the GDPR. The best practice is to have a "papershield": a compilation of documented processes, policies and records, which taken as a whole demonstrate compliance with GDPR.[9] It may be necessary to have a range of policies, covering different aspects of data protection practice.

A law firm with a substantial PI practice will have a core activity of large-scale processing of special categories of data, and should appoint a Data Protection Officer ("DPO"). If the firm decides that it does not require a DPO, that decision should be recorded in writing.

A Data Protection Impact Assessment ("DPIA") is required before collecting personal data from a source other than the individual concerned and where a privacy notice will not be given to that person. In PI practice, a social media investigation of another party or surveillance of any individual should be the subject of a DPIA.

Subject access requests

Under the Data Protection Act 1998 ("DPA 1998") s.6, individuals had the right to make "subject access requests" to data controllers for a description of the personal data held by the data controller, the purposes for which that data had been or was to be processed and the recipients to whom the data had been or was to be disclosed. If the data controller failed to properly comply with the request, the data subject could apply to the court for an order requiring compliance. The purpose of such request was to place the individual "data subject" in the position of knowing what sort of information was held on them, so as to assert more substantive data rights. The broad discretion of the court in such applications was held to be "wide and untrammelled".[10]

In the case of *Durrant v Financial Services Authority*,[11] the Court of Appeal held that the purpose of a subject access request was to enable the data subject to check whether processing of data was unlawfully infringing his privacy, and if so, to enable the data subject to take steps to protect his privacy. A subject access request was not an automatic key to any information, readily accessible or not, of matters in which he might be named or involved.[12]

In the recent case of *Ittihadieh v 5–11 Cheyne Gardens RTM Co Ltd*,[13] the Court of Appeal considered subject access requests under the DPA s.7 in two cases. In the first case, the judge at first instance held

[9] A. Matthews, *Data Protection Toolkit*, 2nd edn (London: Law Society, 2019), p.92.
[10] *R. (on the application of Lord) v Secretary of State for the Home Department* [2003] EWHC 2073 (Admin) per Mumby J.
[11] *Durrant v Financial Services Authority* [2003] EWCA Civ 1747.
[12] *Durrant v Financial Services Authority* [2003] EWCA Civ 1747 at [27].
[13] *Ittihadieh v 5–11 Cheyne Gardens RTM Co Ltd* [2017] EWCA Civ 121; [2018] Q.B. 256.

that it would be disproportionate to exercise discretion to make an order to compel further disclosure. In the second case, the judge declined to exercise discretion because an order would have served no useful purpose. The Court of Appeal held that the DPA imposed an implied obligation on a data controller to carry out a reasonable and proportionate search for personal data in response to a data subject access request. The principle of proportionality could not justify a blanket refusal to comply with such a request, but it could limit the scope of the efforts a data controller would have to take in response. The court held that the discretion was not "untrammelled", but was to be exercised in furtherance of the purpose for which it had been conferred and strike a balance between the right of the data subject to have access to his data and the interests of the data controller on the other.

Under the GDPR, a data subject has a range of substantive rights, complimentary to subject access requests: a right to be informed of data processing, a right to restrict processing, a right to rectification, and a right to erasure. Perhaps long after a PI action has come to an end, a claimant might consider making a data access request, to identify what personal data is held by other parties or their solicitors. The retention of copy medical records of another party could probably not be justified for substantially longer than the period of limitation. If the data controller is in breach of the storage limitation principle, the data subject is entitled to have the data erased, and potentially, damages.

Data breaches

A personal data breach is a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed.[14]

A major innovation of the GDPR is to place an obligation on any data controller or data processor to notify the ICO of a personal data breach, unless it is unlikely to result in a risk to the right and freedoms of individuals.[15] If the breach is serious, the data controller should also inform the data subject of the breach.[16]

A firm must have effective processes to identify, report, manage and resolve any personal data breaches. It has been recommended that legal practices introduce robust data breach detection, investigation and internal reporting procedures.[17] Staff should be trained in what to do in the event of a breach.

A data processor is only liable for a data breach on the ground that it "has not complied with obligations of [the GDPR] specifically directed to processors or where it has acted outside or contrary to lawful instructions of a controller".[18]

Remedies

Where a data subject's rights have been infringed by a data controller, he or she is entitled to damages for material damage (pecuniary loss) or non-material damage (including distress or embarrassment). The concept of damage under the GDPR is wider than that under domestic law and is to be broadly interpreted in a manner consistent with the jurisprudence of the Court of Justice of the European Union and the European Court of Human Rights.[19]

There is joint and several liability of data controllers and data processors for damage. Either can avoid liability if it can establish it was not in any way responsible for the event giving rise to the damage.

[14] GDPR art.4(12).
[15] GDPR art.33.
[16] GDPR art.34.
[17] A. Matthews, *Data Protection Toolkit*, 2nd edn (London: Law Society, 2019), p.93.
[18] GDPR art.82(2).
[19] GDPR recital (146); see also *Enrico Petillo v Unipol* (C-371/12) EU:C:2014:26; [2014] 3 C.M.L.R. 1; and *Vidal-Hall v Google* [2014] EWHC 13 (QB); [2014] 1 W.L.R. 4155. cf. DPA 1998 where compensation for "distress" was only available if the individual also suffered damage.

Various Claimants v Wm Morrison Supermarkets Plc[20]

The defendants, a supermarket chain, were asked by their external auditors to provide payroll data, so that the integrity of that data could be checked. A senior internal auditor, Mr Skelton, was given the task of transmitting the payroll data of nearly 100,000 employees to the external auditor. Before he did so, he surreptitiously copied the data onto a personal data stick. He waited for several weeks before posting the data on the internet, using a file-sharing application to conceal his identity. A short time later, he anonymously posted CDs containing the data to three newspapers. Mr Skelton had been disciplined by the defendants some six months previously and held a grudge against them. It was his intention in deliberately publicising the data to cause financial and reputational damage to the defendants. He was later convicted on a charge under the Computer Misuse Act 1990 and sentenced to a period of eight years' imprisonment.

In a claim against the defendants for damages by 5,518 employees whose data had been made public by Skelton, it was asserted that the defendants had primary liability for breach of the DPA 1998 and at common law, and vicarious liability for the actions of Skelton.

Langstaff J held that, applying *Ittihadieh*,[21] a data controller is a person who makes decisions about how and why personal data are processed. Where another person, in this case Skelton, was processing data for his own purposes, he would separately be a data controller under the DPA 1998. There was no provision in the DPA 1998 or the Directive so as to require the defendants, as data controllers, to be strictly liable for the subsequent disclosure by a third party which it had neither facilitated nor authorised. Rather, it was Skelton himself who was subject to the duties under the DPA 1998.[22]

The obligation on the defendants, as data controllers, was to take appropriate technical and organisational measures against unlawful or unauthorised processing. The standard of "appropriate" was subject to the state of technology available and the cost of such measures. A balance was to be struck between the significance and cost of preventative measures on one hand, and the significance of the harm which might be caused by a data breach on the other.[23] Although not so worded in the DPA 1998 or the Directive, a test of "reasonable care" was indicative of the correct standard.

Langstaff J held, however, that Skelton's breach of his obligations under the DPA 1998 and in committing the common law torts of breach of confidence and misuse of private information gave rise to vicarious liability of the defendant as they were committed in the course of his employment. There was an unbroken thread which linked Skelton's work to his unlawful actions in committing the data breach.

On the responsibility of a data controller, Langstaff J said:

> "I cannot, however, construe either the Directive or the DPA [1998] as requiring a data controller to be responsible even without fault for the subsequent disclosure by a third party of some of the information given to it. [The Directive does] not suggest that once a person holds information relating to others as a data controller that person is automatically to be liable for any disclosure by a person who is not acting on behalf of the data controller in making it."

The defendants appealed[24] on the grounds that: (i) vicarious liability could not apply to breaches of the DPA 1998; and (ii) the wrongful acts of Skelton had not occurred in the course of his employment. On appeal, neither party challenged the judge's finding that Skelton was the data controller under the DPA

[20] *Various Claimants v Wm Morrison Supermarkets Plc* [2017] EWHC 3113 (QB); [2018] 3 W.L.R. 691; on appeal [2018] EWCA Civ 2339; [2019] 2 W.L.R. 99 ("*Morrison's*").
[21] *Various Claimants v Wm Morrison Supermarkets Plc* [2017] EWHC 3113 (QB); [2018] 3 W.L.R. 691 at [70].
[22] *Various Claimants v Wm Morrison Supermarkets Plc* [2017] EWHC 3113 (QB); [2018] 3 W.L.R. 691; [2018] 3 W.L.R. 691 at [50].
[23] *Various Claimants v Wm Morrison Supermarkets Plc* [2017] EWHC 3113 (QB); [2018] 3 W.L.R. 691 at [68].
[24] *Various Claimants v Wm Morrison Supermarkets Plc* [2018] EWCA Civ 2339; [2019] 2 W.L.R. 99.

1998. Nor did the claimants challenge the judge's dismissal of the claims for breach by the defendants of their duties under the DPA 1998.[25] The Supreme Court granted permission to appeal on 15 April 2019.

Of significance to those in PI practice, Langstaff J heard opinion evidence from the defendants that it was impossible for any sizeable data controller to completely exclude the risk that data might be compromised by an outside hacker or criminal exploitation by insiders.

The precautions used by the defendants in *Morrison*'s were:

- only a limited number of employees had access to the data;
- the data was held in a secure internal environment, using proprietary software;
- any use of the data could be tracked;
- only senior employees had access to what was a limited number of data sticks;
- the data sticks used by the defendants and their external auditors were encrypted;
- the laptop used by Skelton was encrypted; and
- Skelton was a highly skilled employee, and by inference in the judgment, was considered reliable and trustworthy in the performance of his work duties.

The general points which can be taken from Langstaff J's analysis are:

- The fact a degree of technological security may be achievable, but has not been implemented, does not itself amount to a failure to reach an appropriate standard of security.
- In striking a balance between the significance of the cost and the harm which might arise, a higher standard is likely to apply where the number of individuals likely to be affected is greater.
- In any system which permits human access to data there are inevitably risks that data might be misprocessed, mishandled, or disclosed without authority. The question is whether the data controller took such precautions as appropriate to prevent a data breach.
- Of the various precautions desiderated by the claimants, the absence of monitoring of Skelton's IT use seems to have come closest to giving rise to a breach of the data protection principles. Langstaff J accepted the unchallenged evidence of the defendant that such monitoring would not have been appropriate. That factual proposition might well be challenged in future cases.

Discussion

The standard of care required of a data controller under the DPA 1998 was described by Langstaff J as being that "appropriate" in balancing the cost of precautions and the risks of a data breach. That remains the standard required of data controllers by the GDPR art.32(1), but art.32(4) contains the following obligation:

> "The controller and processor shall take steps to ensure that any natural person acting under the authority of the controller or the processor who has access to personal data does not process them except on instructions from the controller."[26]

The language used to describe the duty in the GDPR art.32(4) is stricter than the equivalent provision in the Directive. In a personal injury the word "ensure" connotes strict liability, because liability will attach to a failure to obtain a desiderated outcome. It might be postulated that the GDPR art.32(4) is intended to obtain the outcome that authorised third parties shall not process personal data unless expressly

[25] *Various Claimants v Wm Morrison Supermarkets Plc* [2018] EWCA Civ 2339; [2019] 2 W.L.R. 99 at [35].

[26] The equivalent provision in the Directive art.17, required that a data processor be subject to a contractual obligation to act only on instructions from the data controller and under the data protection obligations incumbent on the data controller.

authorised. This would make the data controller or processor liable for deliberate data breaches by "insiders" under their instruction. Such a construction would acknowledge that the data controller has decided to engage the insider, whether as an employee or contractor, and has given that person access to the personal data. In other words, this would be vicarious liability for breach of the GDPR.

If that reading of the standard applied by art.32(4) is correct, under the GDPR the defendants in *Morrison*'s would have been found liable for Skelton's deliberate data breach. There is no EU law authority on the point, and the GDPR makes fairly liberal use of the word "ensure", sometimes as part of a contextual test of what is "appropriate", sometimes not. It could therefore equally be argued that something less than strict liability would apply. However, one must also take account of the defence in art.82(3): that the data controller shall be exempt from liability "if it proves that it is *not in any way* responsible for the event giving rise to the damage" (emphasis added). The onus of establishing that defence is on the data controller and the evidential threshold is clearly intended to be very high.

When read in context, the apparently strict connotation of art.32(4) and the high evidential threshold for the defence under art.82(2) suggest that the GDPR has moved away from a liability test indicative of "reasonable care" where a rogue employee or data processor commits a deliberate data breach.

The Court of Appeal in *Morrison*'s observed there have been many instances reported in the media in recent years of data breaches on a massive scale, which might, depending on the facts, lead to a large number of claims against the relevant company for potentially ruinous amounts.[27] The strict(er) approach to liability and the widened definition of damage under the GDPR suggest that litigation in this area will become more common. There have been, as yet, no reported cases of psychiatric injury caused by data breaches. It seems likely there will not be long to wait.

[27] *Various Claimants v Wm Morrison Supermarkets Plc* [2018] EWCA Civ 2339; [2019] 2 W.L.R. 99 at [78].

The Winds of Change for Legal Expenses Insurance

Steve Rowley*

After the event insurance; Data sharing; Law firms; Legal expenses insurance; Personal injury

The fortunes of legal expenses insurers and personal injury and/or clinical negligence solicitors are closely linked, with both operating in an environment where premium income and profit costs are driven solely by winning cases.

If you think about After the Event ("ATE") legal expenses, then the success and failure of underwriting this line of business depends on the expertise of solicitors in being able to select and win the right cases.

In this article I'll share with you some of the challenges that ATE insurers have to contend with in the market today, and I'm sure you'll see some similarities which law firms also face:

PROCEDURE

- **Getting paid:**

  ATE is the only class of insurance where no premium is collected if the case doesn't win, and a claim against the policy for disbursements and opponent costs can still be made. It's a little known fact that, in addition to the claims cost, ATE insurers also have to pay Insurance Premium Tax ("IPT") on unsuccessful cases, even though no insurance premium has been collected. The reason for this is due to the policyholder having had the benefit of cover. Therefore, the winners in a successful claim where we do get premium paid really do have to pay for those whose cases are unsuccessful.

- **The insurance cycle:**

  ATE insurance usually works on a five to seven year cycle and it's difficult to predict the accuracy of pricing until three to four years into an agreement. Thus, the quality and expertise of the solicitor firm is a key factor to ensuring that there are adequate risk selection protocols in place.

- **Product design:**

  There is a regulatory duty on the design of all insurance products, and ATE is no different. Insurers must be responding to a customer's need and pricing must be fair. With ATE insurance being distributed by solicitors, insurers are one step removed from the end customer. It's therefore important to understand how the ATE policy fits within a solicitor firm's proposition.

  There is already a need for a change in the cover requirements for specialist firms that handle high end multi-track personal injury cases. For these types of claims there is a greater need for more tailored ATE solutions based on individual risks, with variable indemnity limits, as opposed to an homogenous, open market ATE product.

- **Legal changes:**

  A period of further reforms is on the horizon, with the Civil Liability Act 2018 on road traffic accident ("RTA"), employers' liability ("EL") and public liability ("PL") injury claims

* Allianz.

and longer term uncertainty in respect of clinical negligence ("CN") fixed recoverable costs (recoverability of CNATE insurance premiums for expert reports will be retained).
There is therefore a fundamental question hanging over ATE insurers as they strive to square off the paradigm to produce proportionate premium models that cover the cost of claims and still deliver an acceptable financial return, particularly in fast track.
For ATE insurers and solicitors, it's all about certainty and predictable outcomes, although some challenges are more unique to ATE providers. This includes the need for critical mass where there are adequate insured case volumes to generate sufficient premiums to pay the claims during the five to seven year cycle.

- **Market forces:**

  Over the last couple of years, a different solicitor market is starting to evolve. There are currently 730 specialist PI (including CN) firms regulated by the Solicitors Regulation Authority ("SRA") which accounts for 7% of all law firms in the UK. However, 30% of all PI and CN cases are handled by just 12 firms, leaving 70% of cases to be handled by the remaining 718 firms.[1]
  With the continued pressure on profit costs, it is no wonder that many law firms have decided to either close, cease handling PI work or have consolidated with another. This is likely to be a continuing trend until we see the PI and CN markets stabilising and we see some clarity in teh ramifications of proposed reforms.

- **The insurance cycle:**

  This isn't such a big feature for legal expenses (compared to property and casualty insurance but is still an area which needs consideration. When the market is soft, competition is at its greatest, leading to low premiums. In a hard market (which often follows significant losses through a surge in claim costs) those insurers who are well capitalised can take advantage to grow their business by raising premiums to post solid earnings.

- **The long game:**

  As a line of insurance risk, ATE, by its very nature, has a "long tail" meaning that until those cases written at day one can become realised as earned (in other words, won), we need to plot a careful course to ensure we meet our financial plans and deliver a profitable return to shareholders.

So, in a market which, on the face of it, appears to be contracting, where does all this leave ATE insurance?

Despite ongoing legal reforms, there will continue to be accidents and medical mistakes being made, resulting in injury caused by the negligence of another party. Allianz is committed to this market long term and will continue to find solutions that ensure claimants are adequately protected against the financial perils of bringing a legal action.

The importance of any reform(s) is that claimants continue to receive adequate compensation for the pain, suffering and loss they have endured, which means receiving an adequate share of any damages recovered. Here are some approaches that ATE insurers and solicitors can utilise together to make ATE insurance more sustainable in the long term:

[1] IRN Research, UK Personal Injury Market 2018.

- **Reducing costs:**

  This can be achieved through innovative ways of stripping out unnecessary cost without there being any detrimental effect to the way a customer's claim is handled. Insurers' premiums are driven by critical mass (the risk pool) and the cost of claims (albeit in the ATE market the claims cost is further complicated by not receiving a premium in lost or abandoned cases).
  For CN, the burning question for ATE insurers is whether any recoverability of the ATE premium will still exist if fixed recoverable costs are introduced. If recoverability is removed then the premium expectation moves from defendant to claimant and if claims costs remain the same, then the premium requirements to cover the risk will also be constant. So, there is a clear need for ATE insurers and claimant solicitors to work more closely in an open and transparent way to look at costs and how these are driving the premium.

- **Shared data:**

  This is going to be key in driving efficiencies to improve win rate and aid the early abandonment of cases before costs escalate out of control. At ALP, we've developed sophisticated technology to support our key partners' decision making. Solicitor firms are recognising that this can help them to improve their profit cost returns and ensure that they're not one of the casualties of reform uncertainty.

- **Spotting trends earlier:**

  Being able to accurately predict underlying trends faster, either through shared data or by understanding defendant behaviour, particularly in CN, will enable ATE products and pricing to be more dynamic, enabling solicitors to respond more quickly to gain first mover advantage though a better understanding of risk.

With so much change and uncertainty forecast, it's important that solicitors take time to assess the market of ATE providers and actively challenge and question them on their underwriting governance and principles to understand from where their capital for writing insurance is coming from.

Solicitors need to be confident that the insurer they're recommending to their customers has the credibility and financial solvency to be supporting them and their customer when that long running claim finishes in seven years. Solicitors and ATE insurers' fortunes are closely linked, so insurers need to understand solicitors' businesses and be committed both financially and in a way that helps them gain greater insight to move their business forward.

Finally, we should not forget the value that Before the Event ("BTE") legal expenses can bring for low value personal injury claims. With the Civil Liability Act 2018 reforms coming into force, the viability of ATE in the low end damages market is questionable, as there comes a point where you can't reduce the cost any further and you can't increase what you take from damages. This creates the potential for a move towards a more traditional insurance facility through BTE legal expenses, as this may represent the most cost effective method to ensure customers are adequately protected.

The market is ever changing and insurers and solicitors must work together to ensure the continuing success of legal expenses insurance which is integral to worry free litigation for deserving claimants.

How the Serious Injury Guide 2015 Works in Practice

David Fisher

David Withers*

Helen Kanczes

Brain damage; Case management; Guidelines; Insurers; Personal injury claims; Rehabilitation; Road traffic accidents

In this case study, the authors, seek to recap over the key principles in the Serious Injury Guide 2015 ("the Guide") and explain, through a case study, how it can be mutually beneficial for all stakeholders in any litigation.

The Serious Injury Guide 2015

The Serious Injury Guide 2015 ("the Guide") seeks to put those claimants who have sustained life changing injuries at the forefront of the litigation. The Guide compliments the Rehabilitation Code 2015.

The Guide is not mandatory. Certain claimant solicitors and insurance companies have become signatories to the Guide and commit, on behalf of their organisations, to comply with the principles and ethos. For insurance companies, this will extend to solicitors that they instruct.

The aims of the Guide are to resolve liability as quickly as possible, to provide early access to rehabilitation for claimants to maximise their recovery where it would be beneficial, to resolve claims cost effectively and proportionately and within an agreed timeframe, and to create an environment of mutual trust, transparency and collaboration.

Case study

The injured person is referred to as "Simon" throughout this article to protect his identity. This is not his real name. The defendant is not named to protect their identity.

In early 2017, Simon sustained catastrophic injuries following a road traffic incident. The incident circumstances are not relevant to what the authors seek to achieve in this note, apart from to say that liability was not clear-cut. The defendant driver was primarily at fault, however, Simon accepted that he held a proportion of the responsibility for the very unfortunate incident and the resulting injuries.

Simon was treated at the Queen's Medical Centre for one month. He was then transferred to Royal Derby Hospital where he remained for a period of six months. He received life-saving treatment. He was diagnosed as suffering from a severe traumatic brain injury. His Glasgow Coma Score was 5/15 at the scene of the incident. A CT scan identified left frontal and parietal haemorrhages alongside the presence of a thalamic haemorrhage which indicated a diffuse axonal brain injury.

An initial notification letter and a letter before action were sent quickly to AXA to enable them to undertake their investigations without delay. In the letter, Irwin Mitchell indicated a preference to deal

* David Withers of Irwin Mitchell LLP, Helen Kanczes of Clyde & Co and David Fisher of AXA Insurance Plc.

with the claim in accordance with the Guide. AXA were represented by Peter Whitehead and Helen Kanczes of Clyde & Co LLP.

Within days, there was dialogue between the parties. The criminal proceedings were ongoing. Despite that, AXA agreed to fund rehabilitation assessments, without prejudice to liability at that stage. The parties also agreed to attend a road map meeting. There was acceptance that face-to-face contact, on catastrophic injury cases, is particularly useful to build an effective working relationship, identify the central issues and plan a way forward.

In attendance at the way forward meeting, were David Fisher (AXA Insurance); Peter Whitehead and Helen Kanczes (Clyde & Co LLP); David Withers (Irwin Mitchell); and Simon's parents. Simon was unable to attend as he remained in hospital.

At the meeting, there was a commitment to putting Simon at the centre of the process. AXA and Clyde & Co LLP gave a further commitment to funding rehabilitation, despite liability being, at that stage, unclear and there remaining the possibility of a complete defence to Simon's claim. Although there was some disagreement between the parties as to whether the Rehabilitation Code would cover adaptions to Simon's family home in the form of a garage renovation (so Simon could live downstairs), these issues were resolved sensibly and the purpose and scope of the Code was explained to Simon's parents who were, understandably, concerned about Simon's return home.

The parties agreed that no Pt 36 offers should be made at least until they had had a Joint Settlement Meeting. As a result of this agreement, Simon was willing to allow the insurer's solicitors to attend the multi-disciplinary team meetings.

A Case Manager was instructed by the parties on a joint basis, under the Rehabilitation Code. She was able to arrange input from a variety of different disciplines to include; neurophysiotherapy, speech and language therapy, neuropsychology and occupational therapy. All therapists had a focussed approach and worked with Simon to achieve his main goals of improving his speech and mobility. Funding was made available for Simon to instruct a "buddy" with a background in psychology, to support and help him access the community. Funds were also made available for other alternative therapies, which, whilst not believed to have any proven physical benefits, were helpful for Simon as they improved his psychological wellbeing and helped him relax.

Both solicitors attended 10 multi-disciplinary team meetings over the course of the claim, in person. Simon was also present at every subsequent meeting with his mother. This allowed an open dialogue to form between the parties and gave both solicitors a better insight into Simon's needs, which, in turn, allowed AXA to give better consideration to the recommendations put forward by the Case Manager.

Disclosure was made frequently as were interim payments on account of damages generally. There were regular additional face-to-face and telephone discussions between the legal teams, to narrow the issues. An agreement was reached in terms of the medico-legal disciplines, with AXA and Clyde & Co LLP agreeing to instruct only the core experts (Neurology, Neuropsychology, Neuropsychiatry, Orthopaedic and Care), reserving their position on the more peripheral disciplines until such time as the claimant has served his evidence. This meant Simon did not have to undergo unnecessary examinations.

The criminal investigation was ongoing. The parties managed to secure early disclosure from the police in accordance with the National Policing Guidance issued by the College of Policing. This enabled the parties to discuss the issue of liability. There was acceptance on behalf of Simon and his legal team at Irwin Mitchell LLP that there would be contributory negligence. A sensible position was adopted. The parties had a number of informal discussions about the percentage reduction that should apply. An apportionment was subsequently agreed at 70:30, in Simon's favour.

At the request of Simon's solicitors, the parties negotiated a costs settlement at this point, which resolved Irwin Mitchell's costs up until the date when the liability apportionment was agreed. The negotiations

were dealt with quickly and sensibly, resulting in a rapid conclusion and prompt payment of a large interim payment on account of costs.

Despite having resolved liability on a 70:30 basis, AXA continued to fund the rehabilitation programme at 100%, showcasing their genuine commitment to maximising Simon's recovery. This enabled Simon to engage in his rehabilitation without worrying about paying for therapies at 100%, only to recover 70% from the defendant.

Simon had significant right sided weakness, decreased tone and ataxia. When discharged from the hospital Simon struggled with his balance and required a wheelchair to mobilise. Simon also had reduced voice strength and slurred speech due to vocal cord palsy from his brain injury. Due to the input of early rehabilitation, Simon was able to mobilise independently, increase the strength of his upper limbs and improve the clarity of his speech; all of which will have a great effect on Simon's quality of life for the foreseeable future.

After Simon had benefited from rehabilitation for approximately 12 months, the parties' solicitors agreed to pencil in a date for a Joint Settlement Meeting to take place in a further 12 months' time (near to the 2nd anniversary of the incident). The parties' solicitors scheduled telephone discussions frequently to update each other about key evidential developments and to ensure that the parties closely communicated. They also discussed the case at the multi-disciplinary team meetings.

The likely issues to be relevant at the Joint Settlement Meeting (care, deterioration, accommodation, Court of Protection) were identified and the parties focussed their efforts on securing evidence to ensure that there was a meaningful discussion at the meeting. Both parties had a significant amount of expert evidence. Simon's legal team also obtained a significant amount of documentary and witness of fact evidence.

Just after the second anniversary of the accident, the parties attended a Joint Settlement Meeting. A sensible and fair agreement was reached in terms of damages, which provided Simon with a large lump sum along with a periodical payment, to cover future care and case management. The settlement took into account both parties' positions on the key issues.

The outstanding legal costs were also negotiated on the day, meaning that both parties could leave the meeting with certainty as to their positions, subject to a few procedural steps that were required, namely; discharging the litigation friend. Simon had, in part through the effective rehabilitation that he had received, regained capacity to litigate and to manage his property and financial affairs.

Showcasing their commitment one final time on this case, AXA agreed to fund the rehabilitation at 100% for a further three months until the procedural aspects of the case had concluded.

The early settlement gave Simon the ability to move on with his life relatively soon after the incident. He now has plans to purchase the property of his dreams and continue focussing on maximising his quality of life.

Comments from the relevant stakeholders

Simon, the injured individual, said:

> "The whole case process certainly is not an easy one, considering that I was still recovering, and I had contact with the legal team from a very early stage. All the team from both Clyde & Co and AXA really put me at ease with everything. There were times when I was extremely anxious with the process and about what was required of my family and I. That said, at every point one of the team were there for me and I felt in control at all times. This, I would say, had a positive effect on my cognitive recovery.
>
> Being in a strong position with work prior to the accident meant that I was a strong person and I gained a lot from making arguments for or against something if necessary and being able to say no

if I wanted/needed. Helen from Clyde & Co made it so that it did not feel as if it was an us vs them situation. We worked together to achieve my goals at my pace.

Together my family, Irwin Mitchell, Clyde & Co and AXA have enabled me to make a huge recovery from something that was life changing for both my family and I."

David Withers, Partner at Irwin Mitchell LLP who represented Simon, said:

"The way that this case was dealt with was very refreshing. There was frequent dialog between the parties' legal teams and AXA. AXA seemed genuinely committed to improving Simon's quality of life through effective rehabilitation. They even funded items throughout the case that they did not think would make a huge difference, but which were important to Simon. I was particularly impressed with the Defendant's Solicitor, Helen Kanczes. Despite advocating the insurer's best case throughout the litigation, she focussed on the key issues, raising their best points as and when required, whilst remaining pleasant, friendly and easy to deal with throughout. At the end of the litigation, Simon's family even said that they would be sad not to see the Defendant's Solicitor any more at the multi-disciplinary team meetings.

There were huge benefits to both parties as a result of utilising the Serious Injury Guide and complying with the ethos. The legal costs were significantly less than in most catastrophic injury cases because of the sensible approach taken by all and the early rehabilitation which was implemented. The issues were identified at an early stage and the parties focussed their efforts on resolving those issues. We disagreed about the right points. The Defendant team were in the loop about the rehabilitation and understood Simon's priorities. It was really refreshing to see how effective the Guide can work in practice for the benefit of the catastrophic injured person and their families, but also for other stakeholders to the litigation."

Helen Kanczes, Senior Associate at Clyde & Co LLP, who represented AXA jointly with Peter Whitehead (Partner), said:

"At the outset, we agreed with Irwin Mitchell we would handle Simon's case in accordance with the Serious Injury Guide. This meant the parties were able to resolve various liability and quantum issues in a smoother and more open way than normal, whilst ensuring Simon's reasonable needs were met under the Rehabilitation Code in order to maximise his recovery. Having the opportunity to meet Simon and his treating team on a regular basis, meant we were better able to consider the recommendations being made and better advise AXA on funding. Simon's instructing solicitor, David Withers, was refreshingly cooperative, sensible and approachable throughout. This meant we were able to narrow the issues quickly and work positively and collaboratively in respect of rehabilitation and then settlement, something which benefited all involved.

Simon's case highlights the benefits of the Serious Injury Guide and Rehabilitation Code. The Guide and Code should apply to all cases however, there will be those where the parties' positions are so entrenched it makes adherence to them impossible. That said, in appropriate cases, where both parties are committed to acting collaboratively and has a common aim of attempting dispute resolution, there are clear benefits to both parties in acting in accordance with the Serious Injury Guide and Rehabilitation Code in practice.

We are pleased Simon is now able to move on with his life and we wish Simon and his family, all the best for the future."

David Fisher, Catastrophic and Injury Claims Technical Manager and AXA's lead for the Guide, said:

"the claimant sustained a significant injury. To settle the claim at around the two-year mark, to the satisfaction of all, evidences what can be achieved when working collaboratively. Contributory

negligence was a real issue in this case and a meaningful reduction was agreed long before settlement. Whilst it will not apply in every case, I think to continue to fund rehab in full ultimately paid dividends not just to me as the paying party but also for claimant who was realistic in what he wanted and you could see it making a difference in helping him maximise his independence."

Immunotherapy: Promise and Problems

Michael Rawlinson QC*

Kate Boakes**

Max Archer***

LT Damages; Indemnities; Life expectancy; Lump sum awards; Medical treatment; Mesothelioma; Periodical payments orders

Mesothelioma seems to be changing. So are the therapies which are deployed against it. The purpose of this paper predominantly is to deal with the latter aspect, but it is necessary to start with the former.

Mesothelioma remains perhaps the most frightening manifestation of asbestos disease: the cancer of the linings of the chest and peritoneum. The first harbingers of the condition are a dry cough which does not go away and a sudden shortening of breath often associated with nagging pain in the chest or shoulders. Early interventions are invasive and unpleasant. Open biopsies; bronchoscopies; thoracoscopy; chest drains and the removal of litres of fluid from the lung (followed by a talc pleurodesis) are the norm. Thereafter, comes the cyclical grind of (usually) six cycles of chemotherapy, a therapy whose side effects can far outweigh the initial symptoms of the disease itself. The length of life increase associated with a full course of palliative chemotherapy (which usually lasts for 18 weeks) is around 16 weeks. Most practitioners in this area will be familiar with the client who declines chemotherapy due to its lack of overall efficacy. Death arises after ever increasing amounts of pain, breathlessness, and debility. Towards the end of life, the use of fentanyl and morphine pumps to combat pain, lead to disorientation, long periods of unconsciousness and withdrawal of sentience within the victim.

At this stage, the first of the two changes are encountered. Until recently, the death following provision of the early palliative steps almost universally occurred over a period of just six-nine months. That does not seem to be the case in perhaps (in our collective but necessarily subjective experience) half of all mesothelioma cases now encountered, especially where the diagnosis is epithelioid mesothelioma. The disease is relatively more indolent albeit perhaps with a greater tendency to sudden death. It remains fatal and the end stages remain the same but the period after the initial palliative steps is lengthening by a few months on average.

This phenomenon, if real, means that when a new collection of therapies, referred to collectively here as "immunotherapy", have emerged, there may be, in increasing numbers of cases, a greater period of time in which to deploy them. Immunotherapy has changed the landscape of treatment for mesothelioma. For the first time, sufferers are being offered the realistic prospect of treatment which may, albeit in a minority of cases, improve their life expectancy quite significantly.

Immunotherapy treatment

"Immunotherapy" is a portmanteau word used by lawyers to describe a broad range of therapies. Immunotherapy drugs are those which effectively unmask the presence of the cancer to the body's own immune system. Other therapies are "lumped in" with immunotherapy drugs (properly so-called) because

* 12 King's Bench Walk, Temple, a General Editor of *Asbestos: Law and Litigation* (Sweet & Maxwell, publication date August 2019).
** 12 King's Bench Walk, Temple and contributor to *Asbestos: Law and Litigation* (Sweet & Maxwell).
*** 12 King's Bench Walk, Temple and contributor to *Asbestos: Law and Litigation* (Sweet & Maxwell).

they raise precisely the same issues of proof, cost and difficulty in securing administration in practice. An example of the latter is bevacizumab "Avastin", which is a biological agent that attacks the blood supply to the cancer. In the rest of this paper we shall use "immunotherapy" to cover drugs of both types.

Mesothelioma sufferers cannot obtain immunotherapy treatment through the NHS. Where the National Institute for Health and Care Excellence ("NICE") have approved the use of the treatment on the NHS for other cancers, it is not offered as a treatment for mesothelioma. Mesothelioma sufferers can therefore only obtain immunotherapy either on a clinical trial or by paying for the treatment privately. The difficulty with the former is threefold:

- trials have admission criteria that may not be met (or having been commenced onto the trial, are no longer met) by a particular sufferer;
- the trials may be centred on hospitals which are too far for the sufferer to travel to; and
- some trials may administer, in randomised blind testing, placebo as control. Sufferers are often reluctant to "miss out" on the chance of taking immunotherapy by being provided with the placebo.

Recovering the cost of treatment

The majority of mesothelioma sufferers opt to undergo immunotherapy treatment privately. This being the case, can the cost of immunotherapy be recovered in a civil claim? The issue for the court is not the cost of the treatment: in the event that the victim's treating oncologist recommends immunotherapy the reasonableness of undergoing the treatment is likely to be accepted. The difficulty is that it is impossible to predict the duration of the treatment that the victim will undergo and therefore the amount that it will cost. These uncertainties flow from the difficulty in predicting how the victim will tolerate the treatment and how long they will survive. The further difficulty is that private providers of immunotherapy usually require money upfront for each round of treatment.

Victims require a form of award from the court that allows the cost of immunotherapy treatment to be paid by the defendant as and when the treatment is administered. The usual course is that a privately instructed *but treating* oncologist will recommend that a particular drug be administered every two, three or six weeks (depending on the drug); a blood test is taken at home a few days prior to administration and sent by the private healthcare provider to the oncologist for review to ensure that the drug remains suitable; the healthcare provider then administers the drug at home and the cycle is repeated with CT scans every two to three months to monitor the effect upon the cancer. This repetition lasts until there is either unacceptable toxicity or an advance in the tumour. Alternative immunotherapy drugs are then considered until such time as the claimant's general condition becomes so debilitated that it appears that the immune system has been fatally compromised by the cancer and hence that there is no longer a role for immunotherapy at all.

The limits on the court's jurisdiction to make an award that meet this need has required the representatives of claimants and defendants alike to seek to take a pragmatic approach to the funding of immunotherapy. This has not always been an easy exercise. There are three forces which act as a barrier:

- The inadequacy of the framework of substantive and procedural law to cover a circumstance where at the time that the case is otherwise ready to settle or be heard on the issue of quantum:
  - — it cannot yet be known whether that individual claimant is one of the small proportion of mesothelioma sufferers who will benefit from immunotherapy;
  - — it cannot be known for how long such benefit will last;
  - — it cannot be known which drug or combination of drugs will provide that benefit (and the regime may change from one to another over time; and
  - — what the cost of the regime will be from time to time.

- The clear suspicion harboured by some insurers and their representatives that claimants' lawyers are using immunotherapy provision and its complications as an excuse to cost build.
- The desire by many victims to try any recommended drug therapy, however experimental, in order to extend their lives.

Below we set out the approaches that have been suggested (and utilised), when seeking to meet the needs of the parties consistent with court rules, and their respective merits.

A lump sum award

This is where the court simply estimates the total likely value of the cost of future therapy and multiplies it by a reducing factor to represent the chance that the provision is in fact used. The difficulty with a lump sum award is that the claimant will inevitably be either over or under compensated and perhaps to a very large degree. Neither situation is desirable. However, in the case of under compensation, this is particularly so. Under compensation would occur where the treatment had been effective for longer that the award made on a risk basis, had anticipated. The cost of further treatments would not be covered by the compensation made and the risk would be that the further treatment could not be afforded and would be terminated prematurely. This in turn could lead to a date of death earlier than would have occurred had compensation for immunotherapy been sufficient. This is an exceptionally unattractive position.

A periodical payment order ("PPO")

The court may make a PPO pursuant to the Damages Act 1996 s.2. However, the guidance as to the appropriateness of such an order, contained in the CPR Pt 41, presents some difficulties. CPR 41.8(1)(b) requires that a PPO must specify the amount awarded for future medical treatment and CPR 41.8(3) sets out that:

> "Where an amount awarded under paragraph (1)(b) is to increase or decrease on a certain date, the order must also specify—(a) the date on which the increase or decrease will take effect; and (b) the amount of the increase or decrease at current value."

Where treatment is imminent or already underway, the requirements under CPR Pt 41 that the cost and dates must be specified might well be met. However, the uncertainty inherent in immunotherapy arguably offends these requirements where the treatment has not started or is not imminent: the cost and dates will simply not be known. Even where it has started, the variability in future treatment renders it difficult to put the situation into the relatively lighter straight-jacket of a variable PPO. This permits for only one variation on the happening of a specific factual trigger and more than one may be needed. In the past, we have agreed variable PPO orders subject to agreement that the liberty to apply will be utilised should a second change of regime subsequently occur. That would terminate the PPO and the matter would come back to Court afresh for a traditional application for interim damages.

The issue of the appropriateness of a PPO came before the court in *Howard v Imperial London Hotels Ltd*.[1] The claim for a PPO was brought before the court without having been previously claimed in the proceedings and without the experts having the opportunity to address the issues that might allow the court properly to determine its application. The claimant asked for a PPO in respect of future immunotherapy with a provision for repayment to the defendant of any surplus funds held on trust at the end of the treatment. The Master refused to order a PPO, acceding to the defendant's request for payments to be made directly to the treating oncologist:

[1] *Howard v Imperial London Hotels Ltd* [2019] EWHC 202 (QB).

> "drawing upon interim payments to fund immunotherapy in the circumstances of a case such as this, where the Claimant's life expectancy is very limited, is by far the more flexible and appropriate tool than a PPO."

Howard should not preclude parties seeking a PPO in appropriate circumstances (the background to the decision must be borne in mind). Equally, notwithstanding *Howard* and the apparent difficulties that CPR Pt 41 represents, there is nothing to stop parties from agreeing a mechanism by which payment is made by a defendant for treatment that resembles a PPO.

Repeated applications for interim payments

Following judgment, the claimant may make an application for an interim payment for the cost of immunotherapy. The claimant may request payment covering a short duration of treatment (as per CPR 25.7(4) such an application is unlikely to cover long periods of time). In the case of treatment that has started or is imminent, repeated applications would likely be necessary to cover the ongoing costs of treatment. Where treatment has not yet begun the parties may stay the issue of future treatment indefinitely to allow future applications for interim payments. The necessity of repeated applications means that this option is unlikely to be attractive to either the parties or the court but it remains an important—perhaps the most important—"back stop" power available to the parties.

An indemnity

The defendant may agree to the claimant in respect of the costs of future treatment. The advantage of these agreements is their potential flexibility, the parties can agree terms to their own mutual benefit. However, disagreements may subsequently arise over terms. This was the case in *Hague v BT Plc*.[2] The parties disagreed whether the course of treatment that the claimant was to undertake was within the terms of the indemnity agreement and clinically reasonable. The Master found in the claimant's favour and declared that the defendant was obliged to pay for the treatment under the terms of the agreement. Clearly, disagreements over terms have the ability to delay the release of funds, causing the claimant potential difficulties. Such delays have been encountered in practice and the difficulty this creates is that the healthcare providers can then threaten to withhold provision pending payment. An interruption of treatment could lead to deterioration in the victim's condition which then precludes any further immunotherapy at all. There are often two further aspects to the indemnity agreements offered by insurers which are objectionable to claimants and their advisors: first, that in case of disputes, it leaves often an acutely unwell individual to liaise directly with an insurer on the one hand and the healthcare provider on the other. Secondly, insurers will seek to preserve the right of "claw back" should they, or the court, consider a treatment to have been unreasonable retrospectively. Whilst this is not in itself objectionable, what renders it so is that failure to agree specific terms when reasonableness may be deemed, such as where it has been recommended by a UK-based Oncologist and where the drug has passed Stage 2 trials. The problem this creates is that a chilling effect settles on some victims who will not undertake experimental treatment recommended to them in good faith by an oncologist for fear of the (objectively highly) remote risk that a court were to find this unreasonable and of the insurers' subsequent request for claw back. This is clearly unacceptable.

[2] *Hague v BT Plc* [2018] EWHC 2227 (QB).

A trust-float agreement

A float agreement involves a defendant making payments into a trust administered by a third party that ensures there is a permanent float to pay for the claimant's ongoing treatment. Each payment out by the trust to the health care provider is met by a counter-vailing payment in to the trust by the insurer. The float (usually three months cost) ensures that in case of dispute, cash remains to pay the healthcare provider pro tem. The benefit of the agreement to the victim is that a flexible arrangement is set up that allows for change of drugs regimes and the sure and certain knowledge that the cash will always be available. The benefit of the agreement to the insurer is that upon cessation of treatment, the money in the float is returned. On this basis, the insurer can never be required to compensate more than is actually spent. A trust-float is more complex than a simple indemnity agreement and comes with additional costs in administering the trusts. However, practice shows that these costs are fairly modest and it is perhaps surprising that some insurers are resistant to this approach. It is necessary when advising to consider the tax implications of the float.

Conclusion

This is an evolving area. There are insurers and defendant panel solicitors who are taking a pragmatic and imaginative approach. Such arms-length partnership, where it can be established, is always gratefully received by the victims, who appreciate the peace of mind of knowing that whatever is recommended by their treating physician will be paid for as required perhaps more than any other aspect of compensation. The list of structures which may meet both sides needs are not closed and the search for innovation continues.

Mesothelioma is changing and so is the litigation surrounding it.

The Assessment of Life Expectancy in Medicolegal Claims: A Clinician's Perspective

Dr John Corless*

Industrial diseases; Life expectancy; Lung; Personal injury claims

Introduction

Roger Daltry of rock band The Who sang that he hoped that he died before he got old, while more recently Robbie Williams proclaimed that he hoped he was old before he died. While the wishes of these ageing rock stars are interesting, the truth is that determining when any one individual might die is extraordinarily difficult.

The estimation of life expectancy in an individual is a common component of personal injury claims. Often the assessment of this parameter is on a "but for" basis, for example assessing what an individual's life expectancy would have been but for the development of mesothelioma.

Unfortunately, no single reference or table exists that can definitively determine the precise life expectancy for any one individual. As such, there will always be an element of subjectivity to such an assessment. How this assessment should be performed is the subject of a range of opinion discussed in this article.

In this article, I will set out my own perspective based on my clinical experience and my background of assessing medicolegal claims for occupational lung disease and life expectancy over more than 15 years. I am not an actuary or an epidemiologist.

Key steps in determining life expectancy

1. Assess life table data for the individual.
2. Assess the individual's burden of comorbidity and smoking history in comparison to the *average population* to determine if adjustment is required.
3. Use a range of resources to determine the magnitude of any adjustment.
4. Be aware of common pitfalls when applying information from medical research data, epidemiological data and life insurance methodology to life tables and the average population.

Which life table?

The starting point for an assessment of life expectancy is an appropriate life table. The year of the life table used should correspond to the year being assessed, for example an assessment of a "but for" life expectancy for an individual that died in 2018 should be made based on a 2018 life table.

A confusing array of life tables are available and it is important that the correct table is chosen. Data relating to life expectancy can be expressed in various forms and without great care it is very easy to accidentally choose the wrong table.

In assessing a medicolegal claim in the UK, the life table used should generally:

- Be derived from data produced from the Office for National Statistics ("ONS").
- Be in the form of a cohort life table.

* MBChB, FRCP (Lond & Edin), FCCP, MEWI, Consultant Physician in Respiratory and General (Internal) Medicine, Wirral University Teaching Hospital.

A *cohort* life table shows the probability of a person from a given cohort dying at each age over the course of their lifetime.[1]

Books of life tables will also often include *period* life tables. Period life tables use mortality rates from a single year and assume that those rates apply throughout the remainder of a person's life and therefore do not allow for projected future changes to mortality rates.

The most up to date ONS cohort data is available via their website,[2] although great care needs to be taken to ensure one is looking at the correct table. Pragmatically, my practice is to rely on the life table reproduced each year in Facts and Figures[3] which is updated annually and represents the latest available official projections of life for the UK making allowances for expected future changes in mortality for individuals of specified ages.

The Facts and Figures tables represent a more recent projection of mortality than those used to prepare the 7th Edition of the Ogden Tables.

It is noteworthy that the ONS tables from 2018 report lower expectations of life at most ages than those quoted in the Ogden Tables. The reasons for this recent fall in life expectancy are not fully understood. Theories that have been proposed include the effects of austerity, but at present there is insufficient evidence to draw any firm conclusions regarding the fall in life expectancy.

Nature of the average population

There are no definitive resources that clearly describe the disease burden in the average population and one must therefore rely on a range of sources to assess this.

Overall level of comorbidity

A very important publication in the comorbidity literature is the work of Barnett published in the *Lancet* in 2012.[4] In this large study, data was analysed from 1.75 million people living in Scotland. It was found that the mean number of significant comorbid conditions was 2.6 in individuals in the age range 65–84 and 3.62 at age 85 and older. While one could draw issue with some of the conditions that were listed as comorbidities, this paper does give a reasonable overview of the burden of disease in the population.

Other studies have shown similar results. Glynn[5] analysed Irish population data and reported that in males, the mean number of chronic conditions was 2.41, 3.1 and 3.5 in the age ranges 60–69, 70–79 and 80 and over respectively. Vogeli[6] found that 62% of Americans over the age of 65 have more than one chronic condition.

Smoking history

A large proportion of the older population would have been smokers. In 1974, for example, 51% of men were smokers, with each smoker consuming an average of around 20 cigarettes daily.[7]

[1] See *https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/lifeexpectancies/methodologies/periodandcohortlifeexpectancyexplained* [accessed 18 July 2019].

[2] See *https://www.ons.gov.uk/* [accessed 18 July 2019].

[3] *Facts and Figures 2018/19* (Sweet and Maxwell), pp.18–19.

[4] K. Barnett and S. W. Mercer, "Epidemiology of multimorbidity and implications for health care, research, and medical education: a cross-sectional study" [2012] *The Lancet* Vol 380; 9836: 37–43.

[5] L. G. Glynn, "The prevalence of multimorbidity in primary care and its effect on health utilization and cost" [2011] *Family Practice* 28:516–523.

[6] C. Vogelli, "Multiple Chronic Conditions: Prevalence, Health Consequences, and Implications for Quality, Care Management and Costs" J. Gen. Intern. Med. 22 (Supp.3): 391–395.

[7] "Smoking statistics who smokes and how much" October 2013 at *www.ash.org.uk* [accessed 18 July 2019].

Lifestyle factors, e.g. obesity

A significant proportion of the older adult population are obese or overweight (discussed below).

Is any adjustment necessary?

The most important factor to consider when reviewing a life table and the crux of many issues in medicolegal claims is that a life table sets out data for an *average population*, not for a population that has no comorbidity or that has never smoked. Particularly in older age groups, the population considered in life table data will inevitably have a range of comorbidity and smoking histories that are effectively already factored in to the life expectancy results.

In determining if the claimant is at excess risk, one should attempt to compare their total burden of comorbidity with that of an average peer, not with an individual with no comorbidity.

This key factor is often not fully accounted for in medicolegal cases (or in Brackenridge; see below). Often it is suggested that there should be a reduction for *every* comorbid condition, which is not methodologically correct.

Prior to making any adjustment to life expectancy, it is therefore vital to make an assessment of the magnitude of an individuals' burden of risk from comorbidity (and smoking) and then to compare this to an average population of peers. This is admittedly a subjective analysis.

The assessment of excess risk in comparison to the average peer is illustrated in Figure 1.

This demonstrates that the excess risk is the difference between the risk in an average peer and the claimant, not between an individual with no comorbidity and the claimant.

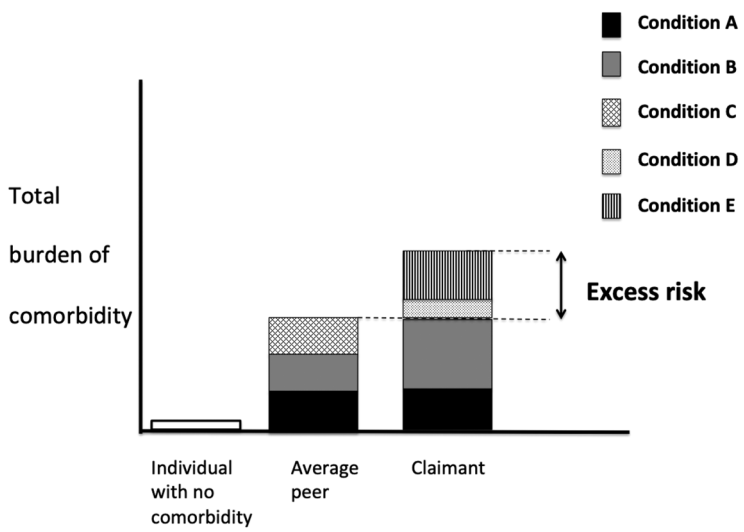

Figure 1

In reviewing this further consider the life expectancy of "Mr A" who is a 70-year-old man with:

- treated hypertension;
- treated hyperlipidaemia; and
- a history of smoking more than 30 years previously.

His burden of comorbidity would probably be no more than that expected in an average population of peers and his smoking history is probably no more than that expected in an average peer. As such, it would not be appropriate to reduce life expectancy in this situation.

Clearly if an individual had a burden of comorbidities much greater than that expected in an average peer, one would need to make an adjustment for the excess risk.

If Mr A also had angina and diabetes, an adjustment would be needed to account for the excess risk of these additional conditions.

It is also possible that an individual may have a lower burden of risk than the average population. For example, if a 70-year-old had never smoked and had no comorbidity, their life expectancy would be *greater* than that quoted for the average population and a positive adjustment would need to be made.

The Brackenridge text

A common practice amongst medical experts is to use the methodology often referred to as the "rating of substandard lives" which is derived from the life insurance industry. This methodology makes incremental reductions to an individual's life expectancy for each comorbid medical condition. The text Brackenridge is typically used as a basis for this.[8]

Brackenridge was last published in 2006 and is fundamentally a book written for the life insurance industry. It would not be familiar to or used by doctors not involved in medicolegal practice.

The proposed methodology works as follows:

- Standard risk is assigned a value of 100%.
- "Unfavourable risk factors" or "impairments expected to produce excess mortality" are then added to that, e.g. a risk factor said to increase mortality risk by 50% is stated as "+ 50", leading to a total rating of "+ 150".
- The calculated total risk can then be applied to a second table that deals with the magnitude of adjustment to be made for any given age. An updated version of this second table has since been published.[9]

While it may seem initially attractive to have a reference text to aid this assessment, in my opinion, this methodology has significant flaws when applied to medicolegal claims as it is potentially overly-simplistic and fails to allow for the effect of the average burden of comorbidity described above.

The text does have some merit when considering how to deal with excess risk but also has a number of very significant limitations:

- The stated purpose of the text is to provide advice to the insurance industry and thus try to mitigate risks associated with life insurance underwriting. It was not written with the intention of informing medicolegal claims.
- When assessing older individuals who would be unlikely to apply for life insurance, this issue is particularly relevant.
- There is an element of bias in the book's methodology in that it only ever reduces life expectancy for comorbidity. There is no circumstance described in Brackenridge whereby an individual's life expectancy could be better than average.
- The text is now over 12 years old and many of the papers it relies on are even older. It therefore will not factor in any potential survival benefits from improved medical science and practice during the last decade.

[8] D. C. Brackenridge, R. S. Croxon and R. Mackenzie, *Brackenridge's Medical Selection of Life Risks* 5th edn (2006).

[9] D. Bowen-Jones, "Prediction of Life Expectancy in Individuals in the United Kingdom Using Current Cohort Tables" [2014] J. Insur. Med. 44:164–169.

- The potential adverse confounding effect of using very old medical references is illustrated in figure 2. This sets out the date profile of the 187 medical references relied upon in the chapter of Brackenridge dealing with coronary artery disease. Some of these references date back to the 1950's. Figure 3 overlies the approximate dates of key medical advances in cardiac practice. It demonstrates that many of the papers relied upon in Brackenridge were written prior to these key medical advances and as such data within them may no longer be valid for a 2019 population. Of particular note, there has been a paradigm shift in the management of acute myocardial infarction [heart attack] since approximately 2007 with the introduction of primary angioplasty. Patients with this condition were previously given thrombolytic drugs. Now most people would be taken straight to the nearest regional cardiac centre and have immediate angioplasty with a much better outcome.
- The book does not clearly explain the methodology of how the various medical sources quoted are used to produce the risk adjustment tables in individual chapters.
- The methodology used is variable. In some chapters, clear tables are used to explain various adjustments for life expectancy. Other chapters simply have a narrative on the topic. Very few chapters describe data for individuals aged over 65.
- There has also been a significant increase in the prevalence of various conditions (such as diabetes and obesity) in the background population since 2006. Diabetes UK data [references] reports that the number of people in the UK has increased from approximately 1.9 million in 2006 to 3.5 million in 2016.

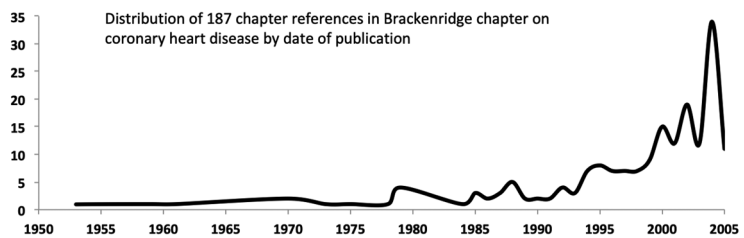

Figure 2

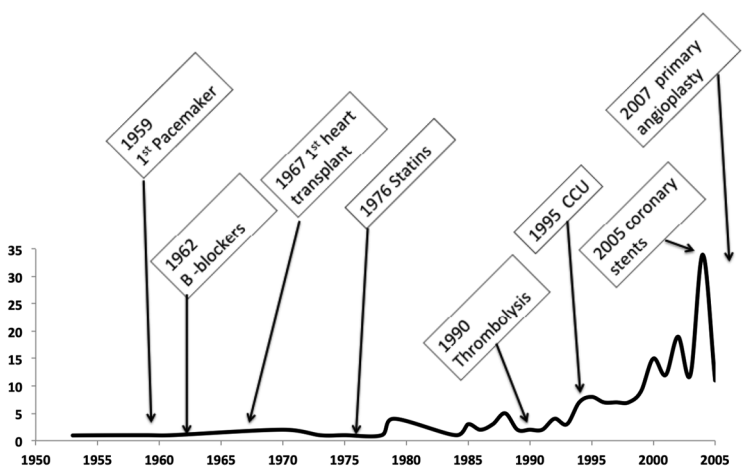

Figure 3

My opinion on the method of adjustment

In my opinion, adjustment for an individual's excess risk has to rely on a cautious analysis of a range of literature (see below) and on the clinical experience of the expert. It will often be necessary to consult published research data. Brackenridge can be of some value providing its limitations are acknowledged and allowed for.

Application of research data to an individual

This issue is fundamental when assessing the relevance of scientific data on a particular medical condition or in relation to smoking history.

Consider the example of Mr B who is a 70-year-old man who had comorbid conditions comprising:

- treated hypertension;
- treated hyperlipidaemia;
- a history of stopping smoking more than 30 years previously; and
- he is morbidly obese with a body mass index ("BMI") of 42 Kg/M^2 (a normal BMI is 18.5–24.9 Kg/M^2).

When consulting the medical literature on obesity, an authoritative publication in the *Lancet*[10] found that a BMI of 40–45 Kg/M^2 would be associated with a reduction in life expectancy of 8–10 years in comparison to an individual with normal body weight. The study population had an average age of 46.

When assessing how to apply this *Lancet* data to Mr B's life expectancy as quoted in a life table, one needs to recall that one is assessing how Mr B differs from an average peer, not from an individual of normal body weight. One therefore needs to consider what proportion of the background population is overweight or obese.

Data from NHS digital in 2015 reported that 33% of men aged 65–74 were obese and a further 44% were overweight.[11] Given that:

- a large proportion of the population are obese or overweight; and
- Mr B is much older than the average age in the study population,

the adjustment made to Mr B's life expectancy for his obesity, would need to be much less than the quoted 8–10 years from the *Lancet* paper.

Assessment of smoking history

Smoking can have a major impact on life expectancy. A landmark paper by Doll[12] found that on average, men born between 1900–1930 who continued to smoke died around 10 years younger than lifelong non-smokers. Cessation at age 60, 50, 40, or 30 years gained, respectively, about 3, 6, 9, or 10 years of life expectancy. A paper by Callum[13] provides further helpful information on the impact of smoking in different age groups.

While these data are helpful, care is needed when applying them in medicolegal claims, for similar reasons to those described in the assessment of comorbid conditions above:

[10] "Prospective Studies Collaboration. Body-mass index and cause-specific mortality in 900,000 adults: collaborative analyses of 57 prospective studies" [2009] *Lancet* 373: 1083–1096.

[11] See *http://digital.nhs.uk/pubs/hse2015* [accessed 18 July 2019].

[12] R. Doll, R. Peto, J. Boreham and I. Sutherland, "Mortality in relation to smoking: 50 years' observations on male British doctors" [2004] B.M.J. 328;1519–1533.

[13] C. Callum, "The UK Smoking Epidemic" [1998] London Health Education Authority.

(a) The question the Doll paper addresses is the difference in life expectancy when comparing a population of current or ex-smokers with a population of never smokers.
(b) The assessment in a medicolegal claim is different, as the key comparison is between an individual and an average population of peers, many of whom will also have been former smokers.

Data from ASH describes that in the mid-1970s, 51% of men were smokers, with each smoker consuming an average of around 20 cigarettes daily.[14] As such the difference in life expectancy in (b) would be much less than the difference in (a).

This matter was considered in the guidance document produced by the Department of Trade and Industry to compensate coal miners for chronic obstructive pulmonary disease ("COPD").[15] The medical reference panel for this document comprised three eminent chest physicians (Drs Rudd, Moore-Gillon and Britton). The guidance on estimation of life expectancy in this document advised that standard life expectancy should be reduced by just one year if an individual had smoked in the last 10 years.

Specifically, the guidance stated that average life expectancy for the whole population:

> "… includes both smokers and non-smokers which is why the adjustments you have made to take account of smoking history [are] modest compared with the difference there would be between an entire population of smokers and an entire population of non-smokers."

In my opinion, it may be possible to refine the smoking-related risks of an individual further. The increased risk to an individual from smoking predominantly relates to three broad areas:

- an increased risk of smoking-induced malignancy, particularly lung cancer;
- an increased risk of coronary artery disease; and
- an increased risk of COPD.

If it could be shown that a claimant definitively had not developed COPD or coronary artery disease by the time they reached later life and particularly if they had stopped smoking, one may be able to reduce the estimation of their future risks in relation to smoking.

Further pitfalls in the assessment of life expectancy

Risk of extrapolation

Medical research is usually performed to assess a specific question. In order to maximise the chances of providing a clear answer, the study populations are often highly selective. One commonly sees that older individuals are excluded from research trials or individuals are chosen who have little or no comorbidity. There is therefore a potential risk in extrapolating too closely research findings if the study population differs too greatly from the average population.

Double counting

If adjusting for specific conditions, the potential for overlap and double counting needs to be considered. This can be a particular issue if one of the risks associated with a condition have already eventuated. Consider for example if adjusting for hypertension. The main effect of this condition is an increased risk of vascular disease. If the individual concerned with hypertension already has evidence of significant

[14] "Smoking statistics who smokes and how much" October 2013 at *www.ash.org.uk* [accessed 18 July 2019].
[15] Coal Miners Handling Agreement at *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/48285/7232-claims-handling-agreement-for-the-chronic-obstruct.pdf* [accessed 18 July 2019].

vascular disease such as coronary disease, renal disease, cerebrovascular disease, then the risks of hypertension have already eventuated. As such it would not be correct to make a full adjustment for hypertension and for the conditions it has caused.

Asymptomatic/incidental coronary disease

A common issue in life expectancy claims is how to assess coronary artery disease, that is not associated with any symptoms in life or when found incidentally at post mortem in older individuals. When assessing the relevance of asymptomatic/incidental coronary disease, a number of factors need to be considered:

- There is high level of background coronary disease in the older population (which will therefore already be factored in to life table data to some extent). In my experience, it is extremely common to find some coronary artery disease in the post mortems of older men who have died of mesothelioma. A post mortem study by Roger[16] demonstrated that 59% of individuals aged over 60 had significant coronary artery disease. Tuzcu[17] found that 85% of individuals aged over 50 had coronary atherosclerosis.
- Coronary disease not associated with symptoms represents a much lower risk than coronary disease that is of sufficient functional magnitude to cause symptoms of angina (chest pain) due to coronary ischaemia in life.
- Pijls[18] studied 325 individuals with an asymptomatic or functionally insignificant coronary stenosis of at least 50% and randomised them to either angioplasty/stenting or observation. The study concluded that the risk that a haemodynamically non-significant stenosis would cause death or acute myocardial infarction is <1% per year and is not decreased by insertion of a cardiac stent.
- Assessment of the appearance of coronary arteries at post mortem does not necessarily correlate with the level of functional impairment that was present during life.[19]
- When assessing on a "but for" basis in a fatal case (such as mesothelioma), one needs to consider that had the individual gone on to develop symptoms of progressive coronary artery disease later in life, there is every possibility that they would have been a candidate for treatment with angioplasty or other similar techniques.

Conclusion

The estimation of life expectancy in a single individual is an extraordinarily difficult task. The starting point of a life table is a sound platform to begin from. As one starts to estimate any adjustments from standard life tables, the assessment becomes increasingly subjective, there is an almost infinite amount of published data one could consider and there are numerous pitfalls and problems that can occur from extrapolating data from other sources as described above.

Ultimately it falls to the instructed expert to explain clearly how they have reached their conclusions and what sources they have relied upon, however the four-step process described in this article provides a template for a robust method of assessing life expectancy and for avoiding potential pitfalls in making any adjustment to standard life tables.

[16] Roger, "Time trends in the prevalence of atherosclerosis: a population-based autopsy study" [2001] Am. J. Med. 110(4):267.
[17] Tuzcu, "Circulation" [2001] 103:2705–2710.
[18] Pijls, "Percutaneous Coronary Intervention of Functionally Nonsignificant Stenosis" [2007] J.A.C.C. Vol.49 No.21.
[19] J. M. Mann and M. Davies, "Assessment of the severity of coronary artery disease at post mortem examination. Are the measurements clinically valid?" [1995] Br. Heart J. 74: 528–530.

A Complex Cerebral Palsy Claim

Harry Trusted*

Gemma Osgood**

LT Birth defects; Cerebral palsy; Clinical negligence; Duty of care; Measure of damages; Settlement

This article is about a boy, who we will call John, who was born in 2004. A confidentiality order applies to this case so certain details have been changed to avoid recognition. Although in some ways, the case was typical of others of its type, we felt that the story of the litigation would be of interest to readers. This is partly because there were some aspects which were characteristic of such cases and some others which presented unusual challenges to the parties and their representatives.

John's mother Jane was nearly 40 years old when he was born. He was her first child. She was a prescription methadone user at the time of the pregnancy and she had abused heroin some years earlier. Jane's social circumstances were difficult because her relationship with the father ended before John was born.

John was due in December 2004. In June 2004, Jane had a fall and was taken to hospital. An ultrasound showed a normal fetus with an anterior placenta and no evidence of a bleed. Bed rest and analgesia were prescribed and Jane was discharged without an overnight stay.

When Jane was 30 weeks pregnant (September 2004), she went into premature labour. She attended the maternity unit of her local district hospital (which we shall refer to as the Barset Hospital). On arrival at the Barset Hospital, Jane was noted to have a cervix 2–3 cm dilated and she was considered by Registrar Jones to be in labour. The Registrar concluded that Jane should be transferred to a larger hospital better equipped to deal with premature babies.

An ambulance was called at 5.40pm and arrived at 7.40pm. As we explain below, the labour had progressed significantly during this interval and the words "Too Late" were written next to the ambulance arrival time. Jane remained at the Barset Hospital and this is where John was born.

Jane was monitored with a cardiotocograph ("CTG") and there were no abnormalities at first. At 6.00pm, she was seen by Midwife Smith ("MW Smith") who was in charge of her care thereafter. MW Smith noted that the fetal heart rate was 120–140 and that as of 6.30pm the contractions were becoming stronger and Jane was distressed and required Entonox. By 6.45pm, the cervix was recorded as being 6cm dilated.

At about this time, Registrar Jones was bleeped by MW Smith. Jane overheard the conversation between Jones and Smith. The gist of it was that the midwife did not think that Jane should be transferred to the larger hospital because of the risk of giving birth in the ambulance. The Registrar did not agree and insisted that the transfer was appropriate. Jane thought that both Jones and Smith were becoming angry. It appeared from the notes that the Registrar played no further part in the birth of John and no Witness Statement was provided by him.

After the time at which Jane said this argument occurred, the midwife took a number of clinical decisions which (as the defendant Trust admitted) should not have been made without medical input.

* Harry Trusted is a barrister at Outer Temple Chambers. He has extensive experience of clinical negligence and personal injury claims, acting for claimants and defendants, specialising in higher value claims such as neonatal injury, wrongful birth, paralysis and amputation cases. Harry is the Secretary of the Ogden Working Party and a founder editor of Facts and Figures.

** Gemma Osgood is a Senior Associate in Clarke Willmott's Southampton office. She has specialised in clinical negligence claims for over 11 years. Gemma has been involved in a number of significant cases including *Bailey v MOD* when she first qualified. She also has extensive inquest experience and was involved in representing a number of the families at the Gosport War Memorial inquests in 2009.

At 7.00pm, Jane was moved to the delivery suite and at 7.20pm, it was noted that the cervix was 10 cm dilated. Shortly thereafter, the midwife performed an Artificial Rupture of Membranes ("ARM").

Between 7.16pm and 7.40pm (when a fetal scalp electrode ("FSE") was applied) the CTG trace became increasingly abnormal with a loss of variability which was especially worrying given John's prematurity.

As well as applying the FSE, at 7.40pm the midwife started running Syntocinon at 6 ml/hour. Presumably this was intended to accelerate the birth.

The CTG became gradually more abnormal with an increased baseline and worsening decelerations. At 8.00pm, the midwife increased the Syntocinon to 12 ml/hr. By this time, the CTG was showing some decelerations down to just 68 beats per minute (markedly abnormal). At this time, the midwife noted that she had asked Registrar Jones to review. He did not in fact attend until after John was born.

At 8.10pm, Jane had started active pushing. At 8.15pm, the Syntocinon dose was increased to 24 ml/hr and at about this time, the paediatricians (although not the Obstetric Registrar) attended. John was eventually born at 8.36pm and given to the paediatric team.

John's post-delivery APGAR scores were 5 at one minute, 7 at five minutes and 8 at 10 minutes. He was intubated at one minute and transferred to the Special Care Baby Unit. Cord blood gases showed evidence of acidosis with arterial base excess of -11 mmol/litre. John was transferred to a more specialist hospital where he received appropriate post-natal care. Three weeks after birth, it was noted that his head circumference had fallen relative to his birth cohort and was now on the 0.4 centile (very low).

At just over two years old, John was diagnosed as suffering from four upper limb cerebral palsy with spasticity affecting the lower limbs more than the upper limbs and the left side more than the right.

An MRI scan in 2008 showed that John had Periventricular Leukomalacia ("PVL") which indicates damage to the white matter of the brain at a gestational age of between approximately 26 and 34 weeks.

The progress of the legal claim

Jane went to see Gemma Osgood ("GTO") at her then firm of Blake Lapthorn in February 2012. Legal Aid was obtained for an initial report from an obstetrician. He was supportive of a claim on the basis that the midwife should not have performed an ARM, should not have applied an FSE and should not have prescribed Synoticinon. None of the steps were appropriate and all of them required authorisation by a doctor in any event.

A neuro-radiologist was also instructed and he confirmed that John's disabilities were caused by PVL which was a consequence of brain damage during the window within which he was born.

In March 2014, GTO instructed Harry Trusted ("HT") (junior counsel at Outer Temple Chambers) to advise in conference. The lawyers met Jane and the obstetrician to discuss the liability questions. At this stage, there were two obvious concerns:

- Might the possible defendant establish that in fact John had been injured by his mother's drug addiction rather than by negligence at the time of birth?
- Was Jane's evidence about the argument between the midwife and the registrar right given that (unsurprisingly) there was no record of this in the medical records?

The conference was positive and we concluded that Jane was a credible and sensible woman. She had avoided illegal drug use for many years and her methadone had been strictly prescribed. The treating doctor supported her contention that frequent drug tests had shown no evidence of abuse. On close questioning, her evidence about the dispute between clinicians was firm. Additionally, our expert obstetrician was surprised that the midwife had done various things without any apparent medical input. This indirectly supported Jane's account of events.

In March 2014, HT advised the Legal Services Commission that funding should be extended to cover the costs of a midwife's report. This was duly obtained and a midwife was instructed. The supportive report was sent by the expert to GTO in July 2014.

Following further discussions, HT drafted Particulars of Claim in the autumn of 2014 which were sent accompanying a Letter Before Action. The allegations were that John's PVL had been caused by Midwife Smith's breaches of duty as follows:

- Wrongly (and absent instructions from a doctor) performing the ARM at 7.20pm.
- Wrongly (and absent instructions from a doctor) giving and then increasing Syntocinon.
- Failing to call an obstetrician from 7.15pm onwards despite the poor CTG trace of a premature baby, the administration of syntocinon, and the ARM.
- Wrongly applying the FSE at 7.40pm.
- Wrongly failing to call for any medical review until 8.00pm despite the rapidly worsening CTG trace.

The causation case was that no competent doctor would have authorised ARM, syntocinon, or application of FSE. Further that any competent doctor would have come to see Jane at intervals of no more than 10 minutes. As of 7.50pm, it would have been apparent that the CTG warranted continuous observation and as of 7.58pm, Jane would have been taken to theatre for a forceps delivery which would have occurred by 8.13pm (23 minutes before the actual delivery at 8.36pm).

The Letter of Response was received (after numerous extensions) in March 2016. It followed the same form as the subsequent Defence. The defendant's case was as follows:

- It was accepted that John's disabilities were caused by PVL.
- It was denied that there was any disagreement between the midwife and obstetrician.
- It was denied that there was any failure to communicate between the two clinicians.
- It was denied the ARM was negligent or outwith Midwife Smith's competence.
- It was accepted that the use of syntocinon was not clinically justified.
- It was accepted that the application of an FSE was inappropriate.
- It was denied that there was any need for midwife to call the obstetrician earlier than she did (at 8.00pm).
- It was denied that even if a clinician had attended, there would have been any alteration in management. Consequently, on the defendant's case, John would still have been born at 8.36pm irrespective of the breaches of duty admitted.

It was apparent from the pre-action correspondence that liability would not be agreed. Alternative Dispute Resolution (or similar) was not considered at this point because it was plain that the defendant intended to contest the claim. Consequently, proceedings were started, Particulars of Claim were served on 10 June 2016 and a Defence was served on 16 September 2016 in much the same terms as the pre-action correspondence.

Since the Defence was settled by Leading Counsel, it was decided that John should also have the benefit of a silk in charge of the legal team and Christopher Gibson QC was instructed following an extension of legal aid in the summer of 2016.

We felt that since considerable time had elapsed since John's birth and his mother's financial circumstances were difficult, it would be best to seek a trial on all issues so as progress the case as quickly as possible.

The progress of the liability case

As of the time of service of proceedings, the Claimant's liability expert team was complete. Both parties had evidence from midwives dealing with breach of duty. Neurologists, neuro-radiologists and obstetricians were instructed to consider the causation issues.

Breach of duty

There was substantial agreement between the midwifery experts. It was common ground that the ARM, FSE and Syntocinon should not have been used unless authorised by a doctor. There was no evidence in the notes of any such authorisation.

More generally, the midwives agreed in the joint statement that the doctors should have been involved in the labour. There were some differences of view as to the classification of the worsening CTG trace so that the claimant's expert thought that review was mandatory at 7.48pm whereas the defendant's expert thought the doctor should have been called by 8.00pm. In practice, this was a narrow point which probably would not have affected the outcome of the claim.

Causation

The neuro-radiologists agreed that MRI scans showed that John had PVL. They were unable to attribute a precise cause but could state that it arose from a damaging hypoxic event which occurred around 26–34 weeks' gestational age.

The neurologists agreed that there was no overt evidence of intra-uterine insult although this could have been occult. They deferred to the neonatologists on the question of whether John had encephalopathy after he was born and agreed that that the prematurity may have itself contributed to the PVL. The only significant point of difference was that the defendant's expert thought that John's PVL was caused only by prematurity, inflammatory factors and hypocarbia.[1] Conversely, the claimant's expert felt that these combined with a period of perinatal hypoxia (for which, subject to resolution of the liability issues, the defendant was potentially responsible).

The neonatologists also agreed that there was no evidence of any antenatal hypoxic event. An issue arose as to whether John's brain damage was caused by hypocarbia (arising non-negligently while he was in SCBU). There is no agreed definition of hypocarbia, and the experts differed as to whether the CO2 levels were recorded were consistent with readings consistent with hypoxia.

The neonatologists also agreed that the creatinine and urea levels in the post-natal period were indicative of perinatal hypoxic-ischaemic renal impairment. Ultimately, the neonatologists divided along "party" lines with the expert instructed by the claimant's solicitors concluding that absent any peri-natal or postnatal infection, and given the renal abnormalities, the probability was that John had been injured as a result of a hypoxic-ischaemic insult prior to birth. In her view, this accounted for the moderate fetal acidosis on blood gas values and the neonatal impairment. She considered that the grossly abnormal CTG prior to birth was consistent with this although she deferred to the obstetricians for comment on the details of the CTG readings.

The defendant's neonatologist thought that the CTG changes were imprecise, especially because John was premature (30 weeks). In his view, the renal derangement and cord gas abnormalities were relatively mild. He considered that the cause of the PVL was prematurity, hypocarbia and (perhaps) occult infection. In response to this, the claimant's expert maintained her view that there was no evidence of any such infection and that the large majority of 30-week babies were born without PVL.

[1] Suboptimal levels of Carbon Dioxide in the blood.

Unusually in a case of this type, the obstetricians were not dealing directly with breach of duty because, as all agreed, the midwife had not involved the obstetrician until a late stage. However, the critical questions on causation were what the CTG trace showed from 7.30pm onwards and what steps the obstetrician would have taken to accelerate delivery if he had been called earlier.

The classification and description of CTG traces is often a problem in these cases. This is because the trace is sometimes unclear and because the classifications ("normal", "abnormal" and "pathological") are dependent on assessing features such as decelerations, variability and accelerations which can be hard to define. Consequently (as with John's claim) experienced consultants may disagree as to the interpretation. The obstetrician instructed by the claimant's solicitors concluded that as of 7.40pm, there were widening and deepening decelerations with almost no accelerations. Consequently, from this time onwards, he considered that the trace was pathological and required urgent obstetric review.

The obstetrician instructed by the defendant accepted that as of 8.00pm, the decelerations were becoming more significant (if not clinically pathological) and as of 8.10pm he agreed that there were prolonged decelerations.

The obstetricians agreed that full dilatation was achieved by 8.10pm but they disagreed as to what would have happened if the Registrar had been called at that time (or half an hour earlier, per the claimant's case that the CTG trace was pathological at 7.40pm).

Apart from the question of timing, the principal issue between the obstetricians was whether or not forceps would have been used to expedite delivery. The claimant's position was that forceps would have been used at any time from 7.40pm onwards whereas the defendant's expert considered that they would not have been. The experts disagreed as to whether it is ever appropriate to use forceps on a baby born at 30 weeks' gestation. It was therefore the defendant's case that even if the obstetrician had been called earlier and the Syntocinon stopped, the overall result (birth at 8.36pm per vaginam) would have been the same.

The key liability issues

There were two points that stood out after the Joint Statements had been finalised, namely:

- **Had John been injured perinatally?**

  This was the disagreement between the neurologists and the neonatologists as set out above.

- **If the obstetrician had been called earlier, would forceps have been used?**

  This was the key point between the obstetric experts.

It is unusual in a case of this value and complexity to have two such relatively short issues. There was no denial that the midwife was in breach of duty (although there was an issue about the time at which she should have sought medical help). All agreed that the midwife's use of ARM, FSE, and Syntoncinon were inappropriate without medical authorisation. These features suggested that Jane's evidence about the argument between Midwife Smith and Registrar Jones was probably accurate (although denied in the Defence).

Ultimately, assessment of liability litigation risk would depend on the parties' respective view of which experts' opinions were likely to prevail. Although the Defence had significant weaknesses, the claimant would still have to prove his case.

Quantum issues

Experts were instructed in the fields of neurology, educational psychology, care, physiotherapy, accommodation, deputyship costs, speech and language therapy ("SLT") and assistive technology ("AT").

Whereas the liability experts had significant differences of view, the quantum evidence was less contentious. Partly because of that, the quantum experts never prepared joint statements and the settlement was reached and approved on the basis of their exchanged reports. Schedules were exchanged before the settlement meeting in July 2018 using that evidence.

All agreed that John is a profoundly disabled boy. He will need lifelong care and support. He will never work. Although he can speak, his cognition is badly impaired. He will never walk and his upper limbs are also impaired to some extent. He is doubly incontinent. There is controlled epilepsy. Life expectancy is impaired. These cases are always problematic but the neurologists agreed that John will probably live to the age of 50.

Although the figure for PSLA was not agreed by the parties, the midpoint of the Schedules disclosed a figure of about £335,000. Since there was no 10% uplift (because John was legally aided), this equates to the top figure for paralysis/brain damage derived from the 14th edn of the *Judicial College Guidelines* pp.3 and 5. It marks the global severity of John's disabilities, his comparatively long life expectancy and a degree of insight since although his cognition is impaired, the ability to speak signifies a relatively high level of mental awareness.

Although the interval between John's birth and the date of settlement was more than 14 years, the absence of any admission of liability meant that there had been no interim payments. Consequently, the past losses were relatively small and the large majority (about £150,000) was non-commercial care provided by John's mother Jane. The remaining items were miscellaneous expenses such as travel and medical costs. The total claim for past loss was just over £250,000 with interest of just under £20,000. Even with a claim as old as this, interest rates are now so low that they add comparatively little to the special damages.

Future losses other than costs of care

For settlement purposes, the lawyers advising John and Jane concluded that the valuation of items other than costs of care (see below) was broadly as follows:

Case management was virtually agreed at	£645,000
Aids and Equipment (approx. midpoint of expert figures)	£240,000
Travel and Transport	£200,000

The Counter Schedule allowed almost nothing for travel and transport on the basis that there will be minimal additional mileage because of John's disabilities. We thought that the court would have accepted that John will need a special vehicle. However, we reduced that claim because John and Jane would have had some motoring costs anyway.

Accommodation (capital claim)

As readers will know, this is a difficult and unpredictable area of law. The negative discount rate means that prima facie claims pursuant to the principles of *Roberts v Johnstone*[2] will fail. This was the consistent with the decision of Lambert J in *Swift v Carpenter*[3] now part heard in the Court of Appeal. After that case was heard at first instance, in *LP v Wye Valley NHS Trust*,[4] HH Judge McKenna, sitting as a Deputy High Court Judge awarded an interim payment of damages which included an allowance for the additional capital costs of accommodation. The judge accepted submissions from counsel for the claimant that

[2] *Roberts v Johnstone* [1989] Q.B. 878; [1988] 3 W.L.R. 1247.
[3] *Swift v Carpenter* [2018] EWHC Civ 2060.
[4] *LP v Wye Valley NHS Trust* [2018] EWHC 3039 (QB).

(following the reasoning of HH Judge Peter Curran QC in *Porter v Barts Health Care NHS Trust*[5]), the trial judge would probably allocate a lump sum sufficient to allow the claimant to be suitably housed. That reasoning suggests that some judges will be minded to allow the capital claims, subject to appellate clarification of the law.

Our overall view (subsequently endorsed by the judge on approval), was that if an offer was made that allowed realistic sums for all other sums of loss and included a suitable discount for liability risks, it would be unwise to take the case to trial in the hope of recovering a significant capital accommodation claim.

Consequently, our valuation of the remaining capitalised future claims was as follows:

Accommodation (other claims)	£750,000
This was a rough midpoint of the expert evidence.	
Physiotherapy	£100,000
We concluded that the court would accept that John will need lifelong physiotherapy, especially for his legs which have needed surgery to correct scoliosis.	
Occupational Therapy (virtually agreed)	£75,000
SLT (agreed at about)	£5,000
Orthotic Boots	£25,000
The Defence asserted that the boots were not needed and/or if needed, John would access NHS provision. We concluded, however, that the need would be shown and that John would be entitled to private provision because of the scarcity of NHS services.	
Education	£35,000
There was a claim of more than half a million pounds for private education. We did not think that this would be substantiated since John was likely to remain in an excellent state school. Both the educational psychologists and John's mother Jane agreed that the staff have done their best to make John's life as good as it can be. Our figure allowed for the possibility of legal costs in the event of an issue as to local government funding.	
Earnings	£660,000
We did not consider that any claim for "lost years" would succeed since John is most unlikely to have any surviving dependents. The calculation was to age 50. As is usual in these cases, we took median earnings figures and discounted for the costs of earning a living and non-mortality risks.	
Assistive Technology (mid figure)	£35,000
Holidays (mid figure)	£120,000
Court of Protection (mid figure)	£750,000
Miscellaneous (mid figure)	£75,000
TOTAL (of these items only)	*£3,715,000*

Future care claims

The parties agreed that periodical payments would be appropriate for future care costs. This was potentially difficult because of the liability discount (see below) but the great advantages of this means of compensation cannot be ignored. In particular, with a claim of this type, life expectancy is highly unpredictable so that there is an obvious risk that too much or too little money will be paid if there is a capital sum. Additionally, a periodical payment does not depend on fluctuations in the discount rate and frees a claimant's family concerns about returns from investment and changing tax rates.

[5] *Porter v Barts Health Care NHS Trust* [2017] EWHC 3205 (QB).

As might be expected, the differences between the experts were small. There was some discrepancy as to the hourly rates and the detail of night care provision. However, the realistic midpoints of the evidence were as follows:

Ages 14–18	£100,000pa
Ages 19–59	£125,000pa
Age 59+	£185,000pa

The first phase includes the time that John will be at school and therefore some of his care will be provided there at no cost to him or Jane. The paid care will involve a carer when he is not at school and a sleeping carer at night. The second phase reflects his middle years when he will be at home all the time, with one carer available at all times and sleeping care at night. The final phase deals with age 60 onwards when because of increasing infirmity and difficulty with transfers, two carers will be needed. We noted that although the life expectancy is only until the age of 50, there is a significant chance that John will in fact live well beyond this time. Consequently, it was necessary to provide for the higher level of final periodical payment even if that may ultimately prove hypothetical.

Following a Round Table Meeting in July 2018 at which no settlement was reached, the claimant's solicitors made an offer along the lines of the figures set out above with a 25% discount for liability risks. We included this discount because we believed that the defendant would defend the case to trial if necessary and if its expert evidence was accepted, John's claim would fail. A 75% offer gave a substantial capital sum and allowed for workable periodical payments because Jane would still be able to access local authority support. Our offer was accepted by the defendant in August 2018.

The settlement was approved in October 2018 more than 14 years after John's birth. In the interval, John and Jane had endured considerable hardship. They lived in an isolated place with little support from others in accommodation which was poorly suited to John's disabilities. The settlement will greatly improve the family's circumstances and the periodical payments will provide lifelong security for John's care needs.

Outstanding features of the case

Jane's social history was difficult. Her previous drug addiction problems were not directly relevant to the claim but might have impacted a judge's view of her credibility. We considered that her account of the argument between the midwife and obstetrician was believable and consistent. We infer from the settlement that the defendant's team also thought that Jane's evidence would probably be accepted.

In our view, the claimant would probably have had the better of the disagreements between liability experts. Although the quantum was not agreed, there was overlap in the schedules and middle figures could be found for most of the substantial items. Our silk, Chris Gibson QC, shrewdly reminded us of the observations of Toulson LJ in *Supershield v Siemens*[6] at [28] as follows:

> "… Megarry J once described the law reports as charts of the wrecks of unsinkable cases …"

These wise words still have contemporary relevance. We believe that a good settlement was achieved which will provide lifelong security for John.

[6] *Supershield v Siemens* [2010] EWCA Civ 7; [2010] 2 All E.R. (Comm) 1185.

Case and Comment: Liability

Goldscheider v The Royal Opera House Covent Garden Foundation

(Court of Appeal (Civil Division); Sir Brian Leveson, McCombe LJ and Bean LJ; 17 April 2019; [2019] EWCA Civ 711)

Noise at work—reasonable practicability—Compensation Act 2006—personal protective equipment

Breach of statutory duty; Causation; Employers' powers and duties; Health and safety management; Hearing impairment; Noise; Performers; Personal protective equipment; Risk assessment

The claimant, a professional viola player, claimed for damages sustained whilst working at the Royal Opera House in Covent Garden, London on Saturday 1 September 2012. He was seated directly in front of the brass section of the orchestra during a rehearsal of Wagner's Ring Cycle. The claimant alleged that during the afternoon rehearsal he was exposed to noise levels which created a risk to and resulted in injury to his hearing, namely acoustic shock. He continued to suffer from injury after the incident which he alleged had prevented his return to music.

The claimant relied upon breaches of the Control of Noise at Work Regulations 2005 ("the 2005 Regulations")[1] pleaded as follows:

> "In the afternoon of Friday 31 August 2012 and all day on Saturday 1 September 2012, the orchestra (including the claimant) were in the orchestra pit rehearsing Richard Wagner's 'Die Walküre'.
>
> As a result of the way that the conductor (at all material times acting in the course of his employment by the Defendant) arranged the orchestra, the Claimant was positioned immediately in front of a group of about 18 to 20 brass players.
>
> As a result of the sound level at which the orchestra was directed to play and the length of time for which it was directed to do so, the Claimant was likely to be and was exposed to noise at a level which reached or exceeded 87dB(A), alternatively 85dB(A), alternatively 80dB(A) when averaged over 8 hours (or for substantial periods of time) and/or which reached or exceeded a peak sound pressure level of 140dB(C), alternatively 137dB(C), alternatively 135dB(C).
>
> The Claimant was provided with and was wearing hearing protection. However, it was insufficient to prevent his exposure to a harmful amount of noise."

The breaches specifically alleged were as follows:

> "(i) A failure to make a suitable and sufficient assessment of the risk to the health and safety of the claimant from noise (Regulation 5(1));
>
> (ii) Failure to eliminate, at source, the risk to the claimant's hearing posed by his noise exposure, or, if that was not reasonably practicable, to reduce that risk to as low as reasonably practicable (Regulation 6(1));
>
> (iii) Although the claimant was likely to be exposed to noise at or above an upper exposure action value ('EAV') (namely 85 dB(A)Lepd) or a peak sound pressure of 137 dB(C), failure to reduce his noise exposure to as low a level as reasonably practicable by establishing and

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

implementing a program of organisational and technical measures, other than the provision of personal hearing protectors (Regulations 6(2));

(iv) Failure to ensure that the claimant was not exposed to noise which, despite the attenuation afforded by personal hearing protectors, exceeded an exposure limit value (namely 87 dB(A)Lepd) or a peak sound pressure of 140 dB(C) (Regulation 6(4));

(v) As the orchestra pit was in a place where the claimant was likely to be exposed to noise at or above an upper EAV (85 dB(A)Lepd) or peak sound pressure of 137 dB(C), failure to ensure that the orchestra pit was designated a Hearing Protection Zone, demarcated and identified by appropriate signage and the claimant was not to enter without wearing suitable personal hearing protectors (Regulation 7(3));

(vi) Failure to ensure that the hearing protection provided to the claimant was fully and properly used (Regulation 8);

(vii) Failure to provide the claimant with suitable and sufficient information, instruction and training (Regulation 10)."

Court of Appeal

The defendant appealed the finding of the judge at first instance that they were liable for a breach of statutory duty[2] that had caused the injury to the claimant. That appeal was intervened in by the Association of British Orchestras, the Society of London Theatre and the UK Theatre Association, although they were not permitted to adduce fresh evidence.

The court noted that the decibel scale was logarithmic, so that each 3db increase involves a doubling of the sound energy, with the example given being:

> "A speed of 91 mph is only about 7% faster than a speed of 85 mph; but a noise level of 91 dB(A) creates sound pressure quadruple that created by a noise level of 85 dB(A)."

The claimant as a viola player was directly in front of the bass section of the orchestra and the noise levels were recorded at 91dB as opposed to the statutory exposure action value ("EAV") limit of 85dB.

In 2008, the Health and Safety Executive published a document entitled "Sound Advice: Control of Noise at Work in Music and Entertainment" following consultation with an industry working group that the Defendant was a member of. The document was said to provide practical guidelines on the control of noise at work in music and entertainment. Regulation 6(1) imposed a duty on the defendant to reduce the risk from exposure to noise to the lowest level reasonably practicable. In turn, reg.6(2) required that once noise levels were likely to be above the EAV a duty was imposed to reduce noise to as low a level as reasonably practicable by means of a programme of organisational and technical measures (excluding the provision of hearing protectors). Those requirements do not exclude the music or entertainment industries from their effect.

The evidence showed that the claimant had been exposed to 91dB(A) which is quadruple the 85dB(A) of the EAV. The critical question became whether the defendant had reduced exposure to the lowest level reasonably practicable, and in any event, below 85dB(A).

In considering this question the court confirmed that the burden is on the employer where it has been shown that they are in breach to establish the defence of having taken all reasonably practicable steps to avoid that breach.[3] It should be noted, though, that the court expressly stated that they did not have to consider the effect of the Enterprise and Regulatory Reform Act 2013 s.69 as it did not apply in this case given that the breach pre-dated it's coming into effect.

[2] Control of Noise at Work Regulations 2005 (SI 2005/1643) regs 6(1), 6(2), 7(3), and 10(1).

[3] *Baker v Quantum Clothing Group Ltd* [2011] UKSC 17; [2011] 1 W.L.R. 1003 and *Nimmo v Alexander Cowan & Sons Ltd* [1968] A.C. 107; [1967] 3 W.L.R. 1169 applied.

The duties under regs 6(1) and (2) stand separately from the requirements of reg.7, so:

> "The duty under Regulation 6(2) is to reduce exposure to as low a level as is reasonably practicable by measures excluding the provision of personal hearing protectors (PHPs). If the Defendant establishes that it took all reasonably practicable steps then the debate moves on to Regulation 7. But if it does not, the Claimant establishes his case before one even gets to Regulation 7. It is not a defence to the claim under regulation 6 to say that if the claimant had worn PHPs throughout the rehearsal, or whenever loud music was being or was about to be played, his exposure to noise would never have reached 85 dB(A)."

The defendant could not establish that the judge below had erred in finding the breaches of regs 6(1) and (2). The evidence showed that the noise measurement of 92dB at one rehearsal had been reduced to 83dB post injury. The claim that this was due to less noisy sections being rehearsed, or that it was stop/start in nature were not established by evidence. The pit had been reconfigured to allow extra space, a measure identified in the guidance to reduce noise levels, had not caused a reduction in the artistic standard. Whilst changes in a workplace after an accident do not retrospectively determine liability it was noted that it makes it very difficult to prove that all reasonably practical steps had been taken in relation to the accident or injury.

The defendant's reliance on the Compensation Act 2006 s.1 was of no help. Had they been able to demonstrate that nothing more could have been done other than to abandon the performance it may have assisted.

Neither did the defendant's arguments on foreseeability assist. They attempted to draw a distinction between foreseeability of long term harm, from the breach of the EAV, and that the exposure could cause sudden injury. That was irrelevant in law. The Regulations were enacted to protect employees against the risk of injury from exposure to noise at work:

> "It was foreseeable that if the upper exposure action value was exceeded by a factor of four the musicians would suffer injury to their hearing. Once the Defendant has failed to show that it reduced the noise exposure to as low a level as was reasonably practicable, and that it took all reasonably practicable steps to reduce it to 85 dB(A), the fact that the foreseeable risk was of long term rather than traumatic injury is in our view neither here nor there: *Hughes v Lord Advocate* [1963] A.C. 837; *Page v Smith* [1996] 1 A.C. 155."

The defendants were in breach of regs 6(1) and (2). Given the concern related to the comments made by the judge in relation to hearing protection, the court went on to consider reg.7.

The finding that the pit should have been designated a Hearing Protection Zone and marked accordingly was sound. Regulations 7(3)(a) and (b) were said to be "categorical and appear to us to admit of no exceptions".

However, reg.7(3) which relates to the provision of hearing protection is qualified by the words "so far as is reasonably practicable" and "reasonably practicable" is not the same as "physically practicable". We accept the ROH's case that it was not reasonably practicable for players in their orchestra pit to perform if they were to be required to wear PHPs at all times.

Accordingly, the findings on breach of reg.7(3) and consequent breach of reg.10(1) were set aside.

In relation to the duty to risk assess under reg.5 it had been breached as it did not consider the expected level, type and duration of exposure including peak sound pressure; and did not have a review once rehearsals continued. The criticism of the risk assessment for not imposing more stringent requirements as to hearing protection was not supported. The breach was causative of the injury. It could not be argued that the rehearsal was merely the occasion for the injury rather than the cause of it. The failure to take the steps necessary to reduce the exposure to the lowest level reasonably practicable did not preclude a defence

based on causation, but not on the facts here. A colleague developed similar symptoms and as a matter of common sense, the failure to reduce the levels was the factual cause of the injury.

Likewise, medical causation was established. This was precisely the type of dispute a trial judge was best placed to assess, having heard the evidence.

The concern expressed by the interveners as to the wider ramifications of the decision were unfounded. The issue here was related to the space available in the pit and measures taken post accident addressed that to give a marked reduction in the sound pressure exposure.

Appeal dismissed.

Comment

In most workplaces, noise is an unwanted by-product of the work being undertaken, whether that be road repairs or manufacture of products in a factory setting. By contrast, in an orchestra, noise is the deliberate and desired objective of the work. Notwithstanding these distinctions, the 2005 Regulations apply to all workplaces subject to derogation. For this reason, this case generated a lot of publicity at both first instance and on appeal, and it makes interesting reading for keen musicians. In summary, it makes sense that appropriate steps should be taken to avoid hearing damage in employed musicians; indeed such damage for musicians may have more profound consequences than for, say a factory worker.

The application of the 2005 Regulations for the music industry was carefully considered in the HSE's *Sound Advice* publication, so there can be little excuse for if orchestras fail to apply the Regulations. The particular problem for opera or theatre orchestras is that they perform in a "pit" where they are forced to be close together, and where the sound is intensely concentrated. Special consideration is therefore required to protect the musicians. In the present case, even though it was recognised that the defendant had taken a number of steps to mitigate the noise levels, they had clearly failed to establish that "all practicable steps" had been taken to reduce the risk of noise exposure. If they had wished to make good the defence of "all practicable steps" they might have sought to show that the levels experienced by the claimant were regularly reached in performances of Wagner operas at the ROH whatever the configuration of the pit, whatever the number of brass instruments used, and whoever is conducting. Or they may have sought to show that to keep within upper EAV limits would mean that Wagner could not be performed at all at the ROH, or that his works could only be performed in a way which would compromise artistic standards to an unacceptable extent, such evidence potentially invoking the Compensation Act 2006 s.1. The defendant did not establish such things, and to the contrary, the evidence proved that significant reductions in noise could be and were achieved by modest alterations to the orchestra set up without detriment to artistic standards. One concession accepted by the Court of Appeal, however, was that whilst the pit should be considered a Hearing Protection Zone where ear protection is mandated, the use of protection could not be mandatory at all times given the consequence that some musicians would be unable to perform: for example brass players who suffer the phenomenon of occlusion caused by blowing an instrument whilst wearing earplugs, or the claimant himself who would be unable to hear adequately during quieter tracts of music. The requirement was qualified by what was reasonably practicable.

Practice Points

- For most musical venues and bands, space and the concentration of sound will not be the problem it is for the ROH. But all employers of musicians need to comply with the 2005 Regulations notwithstanding that *noise* is the desired objective of their enterprise. Reference to the HSE's *Sound Advice* document should be had for such employers.

- It is still necessary for a claimant to prove that a breach of duty to take steps to reduce the risk of injury to the lowest level reasonably practicable was causative of the injury sustained (see *West Sussex CC v Fuller*[4]).
- There remains a question as to whether or not the Compensation Act 2006 s.1 alters the common law as laid down in *Tomlinson v Congleton BC*.[5] An interesting discussion of the issue is to be found in *Clerk & Lindsell* at para.8-180.[6]

Nathan Tavares QC

Kadie Kalma v (1) African Minerals Ltd (2) African Minerals (SL) Ltd (3) Tonkolili Iron Ore (SL) Ltd

(QBD; Turner J; 19 December 2018; [2018] EWHC 3506 (QB))

Torts—international law—police—civil unrest—damages—demonstrations—duty of care—malicious prosecution—mining industry—Sierra Leone—third party acts—use of force—vicarious liability

LT Joint liability; Malicious prosecution; Mining industry; Negligence; Personal injury claims; Police; Tortious liability; Vicarious liability

The claimants claimed damages against the defendant mining company for injuries and loss allegedly caused during two incidents in 2010 and 2012 in villages in Sierra Leone.

The first incident had arisen out of a protest by villagers who were objecting to the clearing of farmland to facilitate mining operations. The claimants alleged that the Sierra Leone police ("SLP") had responded to the protest with extreme violence, which the defendant had encouraged and participated in. The second incident arose from a strike organised by the defendant's employees about their treatment, pay and conditions. It was alleged that over a two-day period the SLP responded with extreme violence on the defendant's instructions and with their assistance. The allegations included the defendant's complicity and direct involvement in assault, false imprisonment, rape and murder. Six lead claimants were selected to facilitate the disposal of claims in relation to several claimants.

The claims were brought under several heads: (i) vicarious liability for torts alleged to have been directly committed by the defendant's employees and officials; (ii) vicarious liability for torts committed by the SLP; (iii) the defendant's accessory liability in acting in furtherance of a common tortious design with the SLP; (iv) liability for tortious acts carried out by the SLP in response to "some direction, or procuring or direct request or encouragement" on the defendant's part; (v) malicious prosecution; (vi) negligence in, for example, failing to take adequate steps to prevent the SLP from committing torts against the claimants; and (vii) breach of a non-delegable duty in respect of an extra hazardous activity carried out negligently by the SLP as an independent contractor of the defendant.

The court dealt with the issues of: employee vicarious liability; non-employee vicarious liability; accessory liability; procurement liability; malicious prosecution; negligence; breach of non-delegable duty.

[4] *West Sussex CC v Fuller* [2015] EWCA Civ 189.
[5] *Tomlinson v Congleton BC* [2003] UKHL 47; [2004] 1 A.C. 46.
[6] *Clerk & Lindsell on Torts*, 22nd edn (Sweet and Maxwell, 2018), para.8-180.

Employee vicarious liability

There was no dispute that the defendant was vicariously liable for the acts of its employees carried out in attempts to respond to the challenges generated by the unrest even if such acts were seriously criminal as alleged. However, the claimants had not established that the employees against whom such allegations were raised were, themselves, guilty of free-standing tortious conduct.

Non-employee vicarious liability

The contention that the defendant was vicariously liable for the torts of the SLP was unsustainable. Save for six officers permanently stationed at the mine, in respect of whom there was no evidence of wrongdoing, the officers involved were performing duties which extended far beyond the narrow parameters of the business activity of the defendant.

Accessory liability

To establish accessory liability it was necessary, but not sufficient, to prove that the defendant had facilitated the tort, *Fish & Fish Ltd v Sea Shepherd UK*[1] followed. In addition, it had to be demonstrated that the defendant and the tortfeasor shared a common tortious design. The defendant's provision to the SLP of vehicles and drivers was insufficient to facilitate the SLP's tortious conduct to an extent that was more than de minimis. However, the court was not satisfied that the defendant had intended the SLP to act tortiously at any stage.

Procurement liability

The defendant had not incited or procured the SLP to act tortiously. Although some employees on the ground were anxious that the police should deal with the protesters robustly they had not exhorted them to unlawful behaviour including false arrest, battery or tortious damage to property.

Malicious prosecution

The first ingredient to be satisfied was that the claimant was prosecuted by the defendant. The claimants fell at that hurdle. Those who were prosecuted in the aftermath of the 2010 incident faced charges which had been set in motion by the police. The evidence did not support the conclusion that the case against any of them was based on matters exclusively within the knowledge of the defendant's employees and that it would have been virtually impossible for the police to have exercised any independent discretion or judgment on the matter, *Martin v Watson*[2] followed.

Negligence

The defendant relied on the general rule that there was no liability in negligence for the criminal acts of third parties. There were exceptions to that rule, namely that: (a) the defendant created the source of danger which would not otherwise have existed. In the instant case the generic danger of the police causing injury and loss was not created by the defendant; (b) the third party who caused the damage was under the supervision or control of the defendant. The defendant exercised no such supervision or control; and (c) the defendant had assumed a responsibility to the claimant which lay within the scope of the duty that was alleged. The claimants occupied homes in the vicinity of the mine and were policed by officers who,

[1] *Fish & Fish Ltd v Sea Shepherd UK* [2015] UKSC 10; [2015] A.C. 1229.
[2] *Martin v Watson* [1996] A.C. 74; [1995] 3 W.L.R. 318.

for the most part, would not have been there, but for the defendant's activities. However, those factors fell far short of establishing an assumption of responsibility for the actions of the police, *Mitchell v Glasgow CC*[3] followed and *Robinson v Chief Constable of West Yorkshire*[4] considered.

Breach of non-delegable duty

The claimants had to prove that the police officers who caused them injury, loss and damage were acting as independent contractors for the defendant and that the activities they were undertaking were exceptionally dangerous whatever precautions were taken. With the possible exception of the officers stationed at the mine itself, the police were not acting at any time as independent contractors of the defendant.

The claims were, accordingly, dismissed.

Comment

This case is another in a series of actions brought in the Courts of England and Wales for harm suffered in African states. They usually reflect a hostile county and defective court system believed to deny access to justice and a UK based defendant or parent company. They are incredibly challenging claims to prosecute. They involve hostile environments with severe logistical challenges to engage both claimants and witnesses; often at some risk to the lawyers bringing the claims. Almost all these cases portray considerable inhumanity to the claimant victims but reflect the courts applying legal judgment in clinical and unemotional ways. Most often they contain significant cross-border issues such as jurisdiction and applicable law. Instead it was the more conventional issue of vicarious liability and the level of control managed by parent companies of their subsidiaries.

In November 2015, this claim was started om behalf of 142 villagers against the mining firm Tonkolili Iron Ore Ltd and its parent African Minerals Ltd, then based in England alleging complicity in police crackdowns in Sierra Leone in 2010 and 2012. In 2010, the villagers protested against the clearing of farmland to facilitate the mining operations whilst in 2012, mine workers organised a strike protesting against working conditions at the mine site. On each occasion it was alleged the company encouraged the police to use violence to quell the protests. It was said the defendant was both complicit and directly involved in assault, false imprisonment, rape, and murder.

The company denied responsibility for the police actions and initially claimed that the English and Welsh court lacked jurisdiction over events taking place in Sierra Leone. The court determined it would and could hear the case because Tonkolili Iron Ore was a former subsidiary of the London based African Minerals.

Matters started well for the claimants such that by January 2017, 101 claims were settled, leaving 41 left to proceed in court. On the claimants' application the court agreed to grant anonymity for security reasons, and in February 2018, the trial judge travelled to Sierra Leone to hear the victims who were unable to obtain UK visas; satisfied that their evidence was best heard in person rather than by video link. The claimants' lawyers said this was believed to be the first time a High Court hearing would proceed in an overseas country in which the human rights abuses are alleged to have taken place by a UK-based company.

The judgment graphically summed up the factual basis for the claim:[5]

> "In November 2010, and again in April 2012, matters came to a head. Disputes between AML and members of the community prompted a significant overreaction from some members of the Sierra Leone Police ('SLP') whose response to disruptive protests and threats against the personnel, property

[3] *Mitchell v Glasgow CC* [2009] UKHL 11; [2009] 1 A.C. 874.
[4] *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4; [2018] A.C. 736.
[5] *Kadie Kalma v (1) African Minerals Ltd (2) African Minerals (SL) Ltd (3) Tonkolili Iron Ore (SL) Ltd* [2018] EWHC 3506 (QB) at [4].

> and business of AML soon degenerated into violent chaos during the course of which many villagers were variously beaten, shot, gassed, robbed, sexually assaulted, squalidly incarcerated and, in one case, killed."

At first reading one could be forgiven for wondering why the claimants thought a court was ever likely to hold the defendants accountable for the actions of the state police where they were independent. However, as one works through the judgment the judge made a series of findings that lead one to wonder how, despite these, he did find in favour of the defendants:

> "[t]here is no dispute that the defendant did not carry out or document any risk assessment relevant to its relationship with the police."[6]

He found that the defendant "failed to take reasonable steps to follow recognised minimum standards"[7] whilst also deciding that some of the defendant's witnesses repeatedly lied about their support to the police[8] which included paying, housing and feeding them,[9] as well as providing transport for them and indeed accompanying police during the relevant occasions and acknowledging that "the police would appear to have been unduly deferential to the wishes of the defendant with respect to the making of arrests, the granting of bail and the like".[10] The judge also noted that the defendant repeatedly bribed the police apparently because this was expected![11]

Nevertheless, the judge also found that the police committing violence weren't regularly stationed at the mine and importantly there was no contractual obligation, nor money for specific services[12] and the incidents were not at the mine or regularly committed. However, the judge felt that the use of police was essential:

> "without a significant police presence, it was more likely than not that the defendant would simply not have been able to carry out its undertaking."[13]

> "if the defendant had not paid for these services they would either not have been provided or, at best, would have been woefully inadequate."[14]

Against this odd fact finding of some culpability of the defendant through its representatives, the judge applying these facts to the issues of vicarious liability did not find the defendant liable.

On employee vicarious liability, whilst noting that some of the defendant's witnesses actually gave themselves false alibis these were for actions the judge did not accept were proven. Thus it seems unfortunate that these employees lied for no good reason.

Moving into non-employee vicarious liability, initially stating the obvious the judge reflected on the background to this situation:

> "I readily accept that the relationship between the defendant and the police was far removed from what would be considered to be appropriate in England and Wales. Nevertheless, it was not so relevantly different as to establish a relationship akin to employment. In particular:

[6] *Kadie Kalma v (1) African Minerals Ltd (2) African Minerals (SL) Ltd (3) Tonkolili Iron Ore (SL) Ltd* [2018] EWHC 3506 (QB) at [318].
[7] *Kadie Kalma v (1) African Minerals Ltd (2) African Minerals (SL) Ltd (3) Tonkolili Iron Ore (SL) Ltd* [2018] EWHC 3506 (QB) at [323].
[8] *Kadie Kalma v (1) African Minerals Ltd (2) African Minerals (SL) Ltd (3) Tonkolili Iron Ore (SL) Ltd* [2018] EWHC 3506 (QB) at [230], [241], and [258].
[9] *Kadie Kalma v (1) African Minerals Ltd (2) African Minerals (SL) Ltd (3) Tonkolili Iron Ore (SL) Ltd* [2018] EWHC 3506 (QB) at [219], [227].
[10] *Kadie Kalma v (1) African Minerals Ltd (2) African Minerals (SL) Ltd (3) Tonkolili Iron Ore (SL) Ltd* [2018] EWHC 3506 (QB) at [302(iii)].
[11] *Kadie Kalma v (1) African Minerals Ltd (2) African Minerals (SL) Ltd (3) Tonkolili Iron Ore (SL) Ltd* [2018] EWHC 3506 (QB) at [304].
[12] *Kadie Kalma v (1) African Minerals Ltd (2) African Minerals (SL) Ltd (3) Tonkolili Iron Ore (SL) Ltd* [2018] EWHC 3506 (QB) at [372].
[13] *Kadie Kalma v (1) African Minerals Ltd (2) African Minerals (SL) Ltd (3) Tonkolili Iron Ore (SL) Ltd* [2018] EWHC 3506 (QB) at [279].
[14] *Kadie Kalma v (1) African Minerals Ltd (2) African Minerals (SL) Ltd (3) Tonkolili Iron Ore (SL) Ltd* [2018] EWHC 3506 (QB) at [203].

(i) The police were discharging a public duty in responding to the criminal conduct of protesters during the course of both incidents. Their authority was derived from the constitutional powers and responsibilities placed upon them for this purpose
Thus the SLP were not acting on behalf of the defendant at the relevant time. The fact that the defendant was, over the relevant periods, the main potential beneficiary of the exercise of this function in the Tonkolili area cannot recharacterise its essential basis.

(ii) The involvement of the police with the defendant during both incidents was relatively transient and unstructured in a way which was inconsistent with the contention that they were acting as part of the business activity of the defendant."[15]

The judge therefore touched upon the unusual situation of dual vicarious culpability and the rare event of the judge citing standard text books.

> "It cannot be argued that, at any stage, the SLP ceased to be vicariously liable for the torts of its officers. Accordingly, it would have to be shown that the SLP and the defendant shared dual vicarious liability. Although the concept of dual vicarious liability has been recognised by the Court of Appeal in *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2006] Q.B. 510, such a finding should not be made too readily. I adopt and respectfully agree with the observation in *Clerk and Lindsell on Torts* 22nd edn at para.6-25 that 'although the dual vicarious liability device produced a just result in Viasystems it now requires that we be very cautious that it is not over-used, for its over-use could well threaten the principle that one cannot be held liable in respect of the torts of an independent contractor'."

Viasystems held that a worker can have more than one employer at the same time. May LJ said:

"46. In summary, therefore, there has been a long-standing assumption, technically unsupported by authority binding this court, that a finding of dual vicarious liability is not legally permissible. An assumption of such antiquity should not lightly be brushed aside, but the contrary has scarcely been argued and never considered in depth. This is not surprising, because in many, perhaps most, factual situations, a proper application of the *Mersey Docks* principles would not yield dual control, as it so plainly does in the present case. I am sceptical whether any of the cases from this jurisdiction which I have considered would, if they were re-examined, yield dual vicarious liability. Even *Mileham* is not transparent.

47. I conclude below in considering contribution that, if the relevant relationships yield dual control, it is highly likely at least that the measure of control will be equal. An equal measure of control will not often arise. Dual vicarious liability is most unlikely to be a possibility if one of the candidates for such liability is also personally at fault. It would be entirely redundant, if both were.

48. Academic commentary tends to favour the possibility of dual vicarious liability, but feels that authority constrains it. Other jurisdictions have reacted variously, giving no clear lead. Their decisions range from articulating the assumption to favouring or adopting dual liability.

49. In my judgment, there is, in a modern context, little intrinsic sense in, or justification for, the assumption. Multiplicity of claims is not a modern impediment. A contest between two defendants, where only one could be liable, is just as likely as a claim against the same two defendants, if both could be liable. The underlying basis for the assumption appears to be the notion, exposed as a device by Denning LJ in *Denham*, that, to find a temporary employer vicariously liable, you have to look for a transfer of employment. Although the nature and incidence of the employee's employment is plainly material, I do not read *Mersey Docks* as

[15] *Kadie Kalma v (1) African Minerals Ltd (2) African Minerals (SL) Ltd (3) Tonkolili Iron Ore (SL) Ltd* [2018] EWHC 3506 (QB) at [331].

> saying that these are the determinative matters in all cases. If, on the facts of a particular case, the core question is who was entitled, and in theory obliged, to control the employee's relevant negligent act so as to prevent it, there will be some cases in which the sensible answer would be each of two 'employers'. The present is such a case. In my judgment, dual vicarious liability should be a legal possibility, and I would hold that it is. It follows that I would allow this appeal to the extent of holding each of the second and third defendants vicariously liable for Darren Strang's negligence."

Here the judge determined there was no control over the police. He then turned to "accessory liability" and the Supreme Court ruling in *Sea Shepherd UK v Fish and Fish Ltd*.[16] Opponents of tuna fishing had caused damage to vessels. The appellant defendant company owned the ship from which the attacks were made, but denied responsibility for the damage caused.

Toulson LJ said that a defendant will be jointly liable for the tortious acts of the principal if the defendant: (i) acts in a way which furthers the commission of the tort by the principal; and (ii) does so in pursuance of a common design to do or secure the doing of the acts which constitute the tort. Sumption LJ agreed the joint liability if: (i) he has assisted the commission of the tort by another person; (ii) it is pursuant to a common design; and (iii) an act is done which is, or turns out to be, tortious.

Reading those comments and looking back on the findings of fact, again one could be forgiven for thinking the claimants should have won. The judge acknowledged the need to demonstrate both involvement and common design. But in arguably the most significant paragraph in the judgment, he ruled:

> "In this case, the defendant's provision of vehicles and drivers alone was sufficient to facilitate the tortious conduct of the SLP to an extent that was more than de minimis. *However, I am not satisfied that the defendant intended the police to act tortiously at any stage. I accept that those in authority in the defendant's organisation were understandably concerned that the disruptions to their undertaking were potentially extremely damaging to their prospects of commercial success. Nevertheless, I am satisfied that at all relevant times the solutions it was striving to apply were directed at conciliation and not at the deployment of unlawful means.* In particular, it would have been perfectly possible for the SLP to deploy the defendants' vehicles lawfully and it was no part of the defendant's plans that they should do otherwise. Similarly, the provision of cash, food, accommodation and drink although alien to what would be expected in the UK were pragmatic incentives and not bribes to achieve tortious ends. If, contrary to my findings of primary fact, any employee of the defendant, such as Yallan or Mr Dumbuya, who was not, at least, a member of its senior management team had entertained the requisite tortious intention then, by the application of Meridian, this would not suffice to enable the court to attribute such intention to the defendant." (emphasis added)

So the judge matched an active and supportive relationship, intention and tortious acts but still considered these were insufficient and added the bow to the present by saying if he was wrong the actions of individuals were insufficient. He used this same reasoning to dismiss "procurement liability".

Moving on to malicious prosecution he applied the same reasoning to excuse the defendants for the actions of the same defendant employees in assisting in the prosecutions and their lawyers becoming involved as well.

Having pleaded vicarious liability, as is so often the case, the claimants' also tried running the direct negligence of the defendant argument but with no more success. This was centred principally upon the duty to take reasonable care to prevent or limit the use and/or risk of excessive force, in dealing with the claimants' protests.

[16] *Sea Shepherd UK v Fish and Fish Ltd* [2015] UKSC 10; [2015] A.C. 1229.

Bearing in mind the judge had already separated the defendant's actions from the police whilst not exactly approving those, it was of little surprise when he ruled that the police had acted criminally. This in turn meant he could not realistically hold the defendant liable. If a third party is guilty of a criminal act then liability would not usually flow to the defendant in those circumstances save for the three exceptions highlighted at [346]:

> "… (i) where the defendant creates the source of danger which would not otherwise have existed; or
> (ii) where the third party who causes damage was under the supervision or control of the defendant; or
> (iii) where the defendant has assumed a responsibility to the claimant which lies within the scope of the duty that is alleged."

Of course, having exonerated the defendant from vicarious liability, the judge could not use any of these exceptions. Whilst the court did consider that the defendant could have done more with the police to reduce the risk of excessive force and mistreatment of the villagers and that its conduct fell short of compliance with international minimum standards, it found causation lacking. It determined that those steps to reduce the risk would not have had a material impact on the outcome of the unrest.

The judge's comments of sympathy to the claimants at the end of his judgment will have been of scant consolation to them or their lawyers.

Practice Points

- Assess every potential defendant for the means to satisfy a claim.
- Assess the likely jurisdiction for each potential defendant.
- Assess the applicable law for each potential defendant.
- Identify the limitation period for each likely jurisdiction.
- Identify the law on liability for each potential defendant.

Mark Harvey

Diamond v Royal Devon and Exeter NHS Foundation Trust

(CA (Civ Div); McCombe LJ, Floyd LJ, Nicola Davies LJ; 8 April 2019; [2019] EWCA Civ 585)

Causation—clinical negligence—duty to warn—informed consent—psychiatric harm—surgical procedures

Breach of duty of care; Causation; Clinical negligence; Duty to warn; Informed consent; Psychiatric harm; Surgical procedures

The claimant in a clinical negligence claim relating to the repair of a hernia, who had succeeded in establishing a breach of duty by the defendant, appealed against a finding that she would have consented to a particular type of repair, which was liable to affect future pregnancies, had she been properly informed of her options.

After undergoing spinal surgery, the claimant suffered a hernia requiring post-operative repair. The surgeon whom she consulted about the hernia elected to use a mesh-based repair procedure. That surgeon

did not advise the claimant as to the possibility of a suture repair, which carried a high risk of failure, or ask her if she intended to become pregnant in the future. The surgery was carried out in 2011.

In 2014, the claimant consulted another surgeon and claimed to be shocked and upset to learn that the mesh repair would carry a risk if she became pregnant. The claimant brought a claim alleging that she would have chosen to have a suture repair had she been informed of the pregnancy-related risks of a mesh repair.

The judge held that the surgeon's failure to provide appropriate information for the purpose of obtaining the claimant's informed consent amounted to a breach of duty as she should have been advised that a mesh repair might cause risk to any future pregnancy and that suture repair was an alternative, notwithstanding the high failure risk. The judge concluded, however, that had the claimant been properly advised it would have been irrational for her to opt for a suture repair. The claimant was, accordingly, awarded damages only for a two-month delay in identifying and treating the hernia.

The claimant's grounds of appeal were that: (1) the judge had; (a) erroneously applied a test of "rationality" when considering causation; and (b) erred in concluding that it was irrational for her to refuse the mesh repair; alternatively (2) the judge had wrongly rejected the claimant's claim for psychiatric injury; in the further alternative; and (3) the claimant's shock and distress were "intimately connected" to the failure to obtain properly informed consent, pursuant to the principle in *Correia v University Hospital of North Staffordshire NHS Trust*.[1]

On the issue of "rationality", the Court of Appeal held that the judge had asked himself the critical question of what the claimant would have elected to do in the knowledge that a mesh repair carried certain risks in the event of a pregnancy and that a suture repair was a possibility, albeit likely to fail. In considering what a reasonable person in the patient's position would attach significance to, account had to be taken of the particular event, *Montgomery v Lanarkshire Health Board*[2] followed. The judge had been scrupulous in his assessment of the claimant and of her evidence and had considered the clinical facts in the context of her character and circumstances. The judge had made the valid observation that recalling specific events or conversations was markedly different from attempting to reconstruct what a person's response would or might have been had that person been given certain information. The judge found that the claimant genuinely believed that she would have opted for the suture repair had she been provided with the relevant information and that her evidence accorded with that honestly held belief, but that it did not follow that that belief would have been the position at the material time. The judge had not, therefore, applied a single test of "rationality" to the causation issue and the evidence had provided a proper basis for the finding of fact which was made.

Turning to the argument that the judge had wrongly rejected the claim for psychiatric injury the Court of Appeal observed the claimant had suffered previous episodes of depression but had not claimed psychiatric injury consequent upon a failure to advise of the inability to carry a child in the presence of the mesh repair and there was nothing in her medical records relating to stress or anxiety attributed to any advice given. Furthermore, there had not been any psychiatric evidence before the judge to support a submission that it was her consultation with the surgeon which had triggered or exacerbated the pre-existing depressive symptoms and, accordingly, there was no basis for this ground of appeal.

On causation, the judgment in *Montgomery* did not support a proposition that failure to warn of a risk, without more, gave rise to a freestanding claim in damages. The Court of Appeal upheld the judge's finding that the claimant would have proceeded with the mesh repair even if she had been warned of the relevant risk and, accordingly, there was no basis for her third ground of appeal nor any basis for a contention that a failure to warn in 2011 was intimately connected with advice given in 2014.

The appeal was, accordingly, dismissed.

[1] *Correia v University Hospital of North Staffordshire NHS Trust* [2017] EWCA Civ 356; [2017] E.C.C. 37.
[2] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11; [2015] A.C. 1430.

Comment

The decision of the Supreme Court in *Montgomery*, whilst defining the nature of the duty owed by medical practitioners in respect of obtaining consent and the standard of care to be applied to that test, has resulted in no shortage of satellite litigation exploring the boundaries of the decision. This is of course due to the diverse factual situations that arise in medical treatment. Consent remains a live issue!

The claimant in this case brought a claim because she had not been properly informed about the choices of hernia repair available to her, or the consequence for future pregnancy. Some three years after the index surgery she was advised that she should not have further children due to the mesh repair. This information, shocking as it was, no doubt coloured her views on what decision she would have made at the outset given proper advice. It was common ground in the appeal that the "but for" test applied to consent cases, and Court of Appeal found that the judge had applied the law correctly to the facts. It was noted that lawyers and medico-legal experts are accustomed to putting hindsight to one side when analysing cases, but lay clients may find such objectivity more difficult. It was open to the trial judge to find that the claimant was likely to have opted for the mesh repair in any event, and he had been scrupulous in his analysis. He concluded:

> "… that the claimant genuinely believes and has convinced herself that she would have opted for a suture repair, if she had been provided with all the relevant information. Accordingly, what she said to me in evidence accords with her honestly held belief. But it does not of course, automatically follow that what she now believes to be the case would in fact have been the position at the material time."

In upholding the trial judge the Court of Appeal emphasised its reluctance to overturn findings of fact made at first instance, applying *McGraddie v McGraddie*,[3] and *Henderson v Foxworth Investments Ltd*.[4]

One element of the appeal (Ground 3) which continues to stir interest and misunderstanding relates to the question of whether non-disclosure of information by a doctor of itself can create a right for a patient to recover damages. On this issue, the claimant had cited *Chester v Afshar*[5] in support. In *Shaw v Kovac*,[6] however, Davis LJ[7] commented that there was nothing in the majority decision in *Chester* which indicated the availability of a free standing award for breach of duty in relation to informed consent. *Chester* was considered an exception to the normal principle of "but for" causation and required clear evidence, properly pleaded, that an operation or procedure would have been deferred, which was not the evidence in the present case. *Montgomery* itself lent no support for the proposition that a failure to warn of a risk or risks, without more, gives rise to a free standing claim in damages. *Chester* was also analysed in *Duce v Worcestershire Acute Hospitals NHS Trust*,[8] and *Correia v University Hospital of North Staffordshire NHS Trust*.[9] The upshot is that in the normal case a claimant must show that the breach of duty caused her to suffer injury, and *Chester* is not inconsistent with this.

The claimant in the present case pushed matters further by alleging that her shock, distress and depression was "intimately connected" to the failure to obtain properly informed consent such as to constitute harm. The Court of Appeal clearly rejected this contention not least because of the trial judge's finding that the claimant would have undergone the same operation even if properly advised.

The subject matter of this appeal, namely the use of mesh rather than a suture repair, may have some resonance in the burgeoning pelvic mesh claims where complications have arisen out of the use of

[3] *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 W.L.R. 2477.
[4] *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 W.L.R. 2600.
[5] *Chester v Afshar* [2004] UKHL 41; [2005] 1 A.C. 134.
[6] *Shaw v Kovac* [2017] EWCA Civ 1028; [2017] 1 W.L.R. 4773.
[7] *Diamond v Royal Devon and Exeter NHS Foundation Trust* [2019] EWCA Civ 585 at [61].
[8] *Duce v Worcestershire Acute Hospitals NHS Trust* [2018] EWCA Civ 1307; [2018] P.I.Q.R. P18.
[9] *Correia v University Hospital of North Staffordshire NHS Trust* [2017] EWCA Civ 356; [2017] E.C.C. 37.

polypropylene mesh in women to alleviate stress urinary incontinence or pelvic organ prolapse. In many of those cases, there appears to be the potential consent issues appear to arise with respect to the nature of information given to patients about the alternatives available.

Practice Points

- The *Montgomery* decision upholds the principle of the individual's autonomy when it comes to treatment decisions. What the treating surgeon thinks about the treatment options is important but should not override proper information and decision-making being given to the patient. As Lord Kerr said in *Montgomery*:

  > "An adult person of sound mind is entitled to decide which, if any of the available forms of treatment to undergo, and her consent must be obtained before treatment interfering with her bodily integrity is undertaken. The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments."[10]

- This case reminds us that causation of harm must still be established on conventional "but for" grounds. Breach of duty alone will not do. If the special exception based on *Chester v Afshar* is to be relied upon, the fact that treatment would have been delayed—if the claimant was properly consented—needs to be specifically pleaded and proved. The modified test in *Chester* treats a "but for" cause that was not an effective cause as a sufficient cause in the law in the "unusual" circumstance of the case.[11]

Nathan Tavares QC

Sandra Shelbourne v Cancer Research UK

(High Court (QB); Lane J; 9 April 2019; [2019] EWHC 842 (QB))

Injury by non-employee—risk assessments—tort—negligence—vicarious liability—Mohamud v Wm Morrison Supermarkets

LT Accidents; Alcoho; Duty of care; Employers' liability; Entertainment; Personal injury; Risk assessment; Vicarious liability

[1]The claimant, who was employed by the defendant as an animal technician, had attended a Christmas party on 7 December 2012 at the Cambridge Research Institute of Cancer Research UK. Each year a different department would be responsible for the organisation of the event. On this occasion, it had been undertaken by the Genomics department. The party consisted of a buffet, some "oversized" games, a ceilidh and a disco.

Access to the event was by ticket, that could be bought in advance and on the door. Entry, though, was limited to staff and their guests. A risk assessment had been conducted by Mr Hadfield, the head of the Genomics department:

[10] *Diamond v Royal Devon and Exeter NHS Foundation Trust* [2019] EWCA Civ 585 at [87].
[11] See Hamblen LJ in *Duce v Worcestershire Acute Hospitals NHS Trust* [2018] EWCA Civ 1307 at [66].
[1] *Mohamud v Wm Morrison Supermarkets Plc* [2016] UKSC 11; [2016] A.C. 677.

> "3 Mr Hadfield completed a risk assessment, in order to cover what he described as 'all the foreseeable hazards of an event at CRUK'. His principal concern was to prevent people returning to the laboratories, either during the course of the party or afterwards; so access to those areas was restricted after a particular time.
>
> 4 Prior to joining CRUK, Mr Hadfield worked at John Innes Centre in Norwich, where he was trained in the completion of risk assessments. As part of his CRUK role, he was also required on a regular basis to complete risk assessments in relation to his laboratory.
>
> 5 Mr Hadfield's statement records that the thinking behind the risk assessment for the Christmas party was to cover as many eventualities as possible regarding potential hazards and how to mitigate them. This included 'all the usual aspects of the event, including the oversized games, hard and uneven surfaces and collisions with other participants during activities'. Two additional security staff were on duty in order to prevent access to the laboratory."

A Mr Robert Beilik was a guest who had attended with a CRUK employee. It was accepted that he had been drinking at least from an early stage in the party. At around 10.30pm he approached the claimant on the dance floor and attempted to lift the claimant off the ground. He failed and she sustained a serious back injury. Prior to that, he had lifted three other women off the floor, without their consent, without harm being caused.

At a trial in Southend County Court, the claim against CRUK had been dismissed on the basis that CRUK was neither responsible in negligence or via vicarious liability for the actions of Mr Beilik. Permission to appeal was granted in relation to both findings.

Negligence

It was common ground that CRUK owed a duty of care, based on the case of *Everett v Comojo (UK) Ltd*,[2] where the Court of Appeal had found that the relationship between the management of a nightclub and its guests was one of sufficient proximity where a guest had attacked another guest, with Smith LJ saying:

> "32. It is a well-known fact that the consumption of alcohol can lead to the loss of control and violence both verbal and physical. Lord Faulks acknowledged as much. In the present case, Comojo's own risk assessment recognises the existence of those risks. It must be foreseeable to any licensed hotelier that there is some risk that one guest might assault another. The risk may be low in respectable members-only establishments and much higher in a night club open to the public. The assessment of the degree of risk, which will dictate what precautions have to be taken, will vary. There cannot be any rule of thumb to apply to all night clubs. But it does not seem to me that, given its own risk assessment, Comojo could seriously argue that the risk of such assault was so low that it could safely be ignored."

It was also recognised that *Everett* recognised that there was a degree of flexibility to the duty of care, or in other words what was required was very fact specific and that this was particularly the case where a defendant has a degree of control over premises, but the harm is caused by a third party, although present in the premises acts in a way that the defendant did not condone. This approach was echoed by Smith LJ in *Everett*:

> "33. In my view, it is fair, just and reasonable to impose a duty of care on the management of a nightclub in respect of injuries caused by a third party, provided that the scope of the duty is appropriately set."

[2] *Everett v Comojo (UK) Ltd* [2011] EWCA Civ 13; [2012] 1 W.L.R. 150.

Taking in to account the setting of the event the recorder had been right to conclude that the extent of the duty of care did not include putting in measures to guard against the actions of Mr Beilik. The risk assessment did acknowledge alcohol would be consumed but in the context of restricting access to laboratories. It did not follow that a risk assessment was then required in relation to alcohol generally:

> "… context is all-important. The CRUK Christmas party was an event for adults working in the scientific community in Cambridge, held at an Institute of the University. It took place against the background of there not having been any previous incident regarding inappropriate behaviour caused or contributed to by alcohol. Mr Weir submitted that that made no difference. Given the nature of the gathering, however, I disagree. It was reasonable at that time for CRUK's risk assessment and its other arrangements for administering the party to be informed by what had (or had not) happened in the past."

The fact that different measures were put in place post-accident was not necessarily determinative of the legal question of fault:

> "The reality is that hindsight has no such fixed characteristic. Whilst it may, on occasion, help inform a conclusion that, in retrospect, something could have been done to avoid the event that occurred, hindsight is not necessarily determinative of the legal question; namely, whether something ought reasonably to have been done."

The Recorder had not been wrong to find that the respondent took reasonable steps in the planning and operation of the party. No duty of care was breached. Nobody had complained about Beilik's behaviour before the incident, and there was nothing to suggest that the defendant running the party had been unable to adequately monitor what was happening. The suggestion that such a social gathering could only be adequately monitored by detached observers set the standard of care unreasonably high. In *Everett*, the Court of Appeal had adopted a carefully graduated analysis of what would be reasonable, and this was compatible with there being a difference between a nightclub with an ever present threat of danger and this event.

Vicarious liability

There was no challenge to the finding of the Recorder that Beilik "was a sufficiently integral part of the business of CRUK to render CRUK potentially vicariously liable for his acts and omissions".

What remained was a determination of the issues highlighted in *Mohamud v Wm Morrison Supermarkets Plc*:[3]

> "(a) What functions or 'field of activities' have been entrusted by the employer to the employee or, in everyday language, what was the nature of the job?
>
> (b) Was there a 'sufficient connection' between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice."

The Recorder's findings that Beilik was not compulsorily attending, that his attendance at the party was not connected with work he undertook and that the act of lifting the claimant had no connection with his research work led to a conclusion that it was not closely connected to his employment.

The claimant sought to recast that finding on the basis that the field of activities he had been entrusted with on the evening of the party was to:

[3] *Mohamud v Wm Morrison Supermarkets Plc* [2016] UKSC 11.

> "… interact with fellow partygoers in alcohol-infused revelry, leading to the setting aside of the ordinary boundaries of social interaction; all of which was authorised by CRUK for its own benefit, since it stood to gain from the enhancement of its employees' morale."

The benefit to the employer in organising a Christmas party is key to that, but the judge did not consider that to be representative of an average Christmas party organised by work:

> "I do not consider that this description of the average office or works Christmas party is one that the archetypal reasonable person would recognise as representing reality. As a general matter, it overstates the position of the employer and, conversely, seriously understates the motivation and autonomy of those attending the party."

The judgment of Asplin LJ in *Bellman v Northampton Recruitment Ltd*[4] to address the question broadly as "what is the nature of the job?", which drew on the guidance in *Mohamud*, did not mean that it was without boundaries:

> "The requirement to address the field of activities 'broadly' means what it says. It is not an acknowledgement that the concept has no boundaries. It is, rather, a direction to judges to look beyond the question of actual authority and examine 'a wider range of conduct than acts done in furtherance of [the employee's] employment' (*Mohamud* at [22])."

Beilik was not in a similar situation to *Mohamud*. Beilik was not at work when the incident occurred. His laboratory hours had ended well before the party. Whilst he was present in the same building as the laboratories the context was radically different. Vicarious liability was not imposed in *Bellman* because of a Christmas party, but because of what Mr Major represented at the time of the incident.

The evidence heard was that the party was not a reward to staff but organised by volunteers. To portray it otherwise created a partisan paradigm. The Recorder had not been wrong to identify the fields of activities as he had done and that, in turn, they were not sufficiently closely connected to the wrong that had occurred.

Appeal dismissed.

Comment

Having extended the bounds of the doctrine of vicarious liability well beyond employment relationships (in their strictest sense) in recent years, the anticipated raft of cases testing the new limits of the doctrine are now being heard. *Shelbourne* is the latest reported decision to include consideration of the scope of vicarious liability, but it will certainly not be the last.

Further, *Shelbourne* it is a reminder that the testing of new legal boundaries, although less frequent over time, will never retreat totally. *Shelbourne* was a case as much about the extent and scope of the common law duty of care as the current application of the doctrine of vicarious liability. As with vicarious liability, distributive and social factors underly such decision making, particularly in difficult cases such as this where the harm is caused in an environment over which the defendant had a degree of control but the harm stems from the actions of a third party without sanction by the defendant.

At first instance, it was found to be "fair, just and reasonable" to impose a duty of care between CRUK, through its employees voluntarily organising the party, and Mrs Shelbourne, as an attending employee. However, the scope of that duty had to be "appropriately set" and this was a question of law in the context of fact specific actions of the defendant. The court rightly had regard to the Compensation Act 2006 s.1 and took care to avoid simply descending into hyperbolic phrases such as "health and safety having gone mad" and "Christmas is cancelled" despite such assertions by CRUK.

[4] *Bellman v Northampton Recruitment Ltd* [2018] EWCA Civ 2214; [2019] 1 All E.R. 1133.

The fact that CRUK had conducted a risk assessment for the party framed the arguments on the scope of its duty. Practitioners are reminded of the very useful risk assessment defining case of *Allison v London Underground*.[5] Given the known provision of alcohol, Mrs Shelbourne used *Allision* to argue that the CRUK's "blueprint for action" should have included consideration of steps to control and manage the inappropriate behaviour of attendees, beyond the steps taken by the defendant. In short, given the context (an event for adults working in the scientific community in Cambridge with a background of no previous inappropriate behaviour caused or contributed to by alcohol) the risk assessment was deemed sufficient, limited as it was to alcohol being a factor to restrict attendees from returning to labs. Further, as Mr Beilik's behaviour was not deemed by other women who had been lifted on the dance floor as necessitating reporting his actions, it is perhaps unsurprising that the Recorder was found not to have erred in finding that CRUK took reasonable steps in planning and operating the party, despite the inevitable sympathy Mrs Shelbourne required for the serious back injury she suffered.

A discrete but useful highlight regarding risk assessments related to the role of hindsight in assessing the reasonableness of an assessment. CRUK expressed caution that hindsight should not be used to impose liability whereas Mrs Shelbourne argued that hindsight had the function of shedding light on what should have been done at the time the risk assessment was made. Lane J neatly summed up the role of hindsight as follows:

> "The reality is that hindsight has no such fixed characteristic. Whilst it may, on occasion, help inform a conclusion that, in retrospect, something could have been done to avoid the event that occurred, hindsight is not necessarily determinative of the legal question; namely, whether something ought reasonably to have been done."

As with breach of duty, ultimately Lane J was similarly restrictive in his consideration of whether CRUK could be vicariously liable for the actions of Mr Beilik. Mr Beilik was a visiting scientist, employed by the University of Cambridge at its Wolfson Institute Brain Injury Centre. He was not employed by CRUK but his involvement with the Institute permitted him to be at the party. Could his actions fall within the extended bounds of the doctrine of vicarious liability?

The recalibration of the doctrine of vicarious liability now focusses on wider principles that included enterprise liability; considerations of the burden of insurance; responsibility for the creation of risk; and social justice, in addition to the importance of control. The cases of *Various Claimants v Institute of the Brothers of the Christian Schools*[6] and *Cox*[7] were instrumental in framing how these wider principles could apply and having considered *Cox*, the Recorder at first instance in Shelbourne concluded that Mr Beilik "was a sufficiently integral part of the business of CRUK to render CRUK potentially vicariously liable for his acts and omissions".

In the absence of challenge to that finding, the now well know two-stage test in *Mohamud* had to be applied. Practitioners are reminded of the excellent article by Andrew Bell on "Recent Movements in Vicarious Liability".[8] In that article, the potential shortcomings of the *Mohamud* judgment are explored, not least the exchanging of a close connection test with a brittle causal concept of "unbroken sequence of events". However, Lane J recognised the "landmark" decision of *Mohamud* and the need to consider questions of "field of activities" and "sufficient connection".

Although CRUK had provided Mr Beilik with the opportunity to be at the party, the Recorder found that his actions at the party were not inextricably woven with the laboratory functions he undertook at CRUK's premises as a visiting scientist. Despite skilled argument attempting to broaden Mr Beilik's field of activities, that night, to include interacting with partygoers in alcohol-infused revelry which was

[5] *Allison v London Underground* [2008] EWCA Civ 71; [2008] I.C.R. 719.
[6] *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56; [2013] 2 A.C. 1.
[7] *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 66.
[8] A. Bell, "Recent Movements in Vicarious Liability" [2018] J.P.I.L. 4.

authorised by CRUK for its own benefit, Lane J was not persuaded that it fell within the broadly categorised boundaries he needed to consider. Significantly, Mr Beilik was not at work; was not doing the job he was paid to do at the time, and he was not required to attend the party.

Relying upon *Bellman*, as Mrs Sherbourne did, these findings would appear insufficient to bar a finding of vicarious liability. In *Bellman*, an assault took place after a Christmas party when the injured claimant was neither at work nor doing his job. Despite this, the Court of Appeal agreed that the control exercised by the controlling mind of the business, Mr Major, meant that the limited company employer was vicariously liable for the assault carried out by Mr Major. However, Irwin LJ specifically emphasised how unusual the facts of that case were and how it should not be understood to be sanctioning the imposing of vicarious liability in cases where assaults occur between colleagues, even if one colleague is markedly more senior than the other.

Here Lane J distinguished *Bellman*. He highlighted that the fact an employer organises a Christmas party did not, of itself, justify the imposition of vicarious liability, nor that it led to a late night drinking session. It was Mr Major's control of proceedings, at all material times, and his reaction to what he perceived as being a challenge to his authority which made the company vicariously liable. None of these factors applied to CRUK and as such the actions of Mr Beilik did not fall within his "field of activities" and social justice did not demand that vicarious liability attach to CRUK.

It, therefore, remains the position that employers do not simply become insurers for violent or other tortious acts by their employees absent convincing factual evidence that the same fall within the employee's field of activities and causally there is sufficient connection for social justice to merit the imposition of vicarious liability. Although the facts of Shelbourne were found to fall outside the broad assessment of "field of activities", there is no doubt that the doctrine of vicarious liability remains "on the move".[9]

Practice Points

- When considering the "field of activities" an employer entrusts an employee it is necessary to obtain detailed factual evidence of his role, with examples of past conduct if possible.
- The extension of the doctrine of vicarious liability, although considered broadly, is not boundless.
- Expect more cases on vicarious liability exploring the bounds of Toulson SCJ's test.

Jeremy Ford

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

Case and Comment: Quantum Damages

Folkes v Generali Assurances

(High Court of Justice Queen's Bench Division; Nicol J; 2 April 2019; [2019] EWHC 801 (QB))

Interim payments—damages—foreign jurisdiction—CPR 25.7—reasonable proportion

LT Foreign law; France; Interim payments; Lump sum awards; Periodical payments; Personal injury claims; Severe injuries

The claimant had sustained a severe brain injury when struck by a car in France in 2016. French law governed both liability and quantum.[1] Due to uncertainties in relation to prognosis the trial on quantum was to take place in 2020 at the earliest, notwithstanding an admission of liability had already been secured.

The procedural issue of the interim payment though was governed by English law.[2] That, in turn, required the court to consider the provisions of CPR r.25.7[3] which requires the court to consider what the likely amount of the final judgment will be and then constrain any order for an interim payment to a reasonable proportion of that sum.

The interim payment was said to be required as the claimant was seriously cognitively impaired and required long term rehabilitation. At the time of the hearing, he was taking part in a trial of independent living in a two-bedroom flat with a 24-hour support worker. Medical experts instructed on his behalf indicated that the trial, which had run for nine months to date should continue for another year or more. The only method of paying for that was via an interim payment, which he sought in the sum of £240,000. Interim payments of £351,788 had already been made. The insurer contested the application.

It was well established that an application for an interim payment should not be a mini-trial. It was also well established that the figure used for the likely future award excluded any element that would be by way of periodical payment order. In *Eeles v Cobham*,[4] Smith LJ said that:

> "A 'reasonable proportion' may well be a high proportion provided the assessment has been a conservative one. The objective is not to keep the Claimant out of his money but to avoid the risk of over-payment."

A sum of £103,767 was said to have been paid to his parents, the second and third defendants, to reimburse expenditure they had incurred on his behalf. The sums were recoverable via the claimant, but as a matter of French law, they had to be recovered by the parents who had incurred the expenditure. The claimant argued that they should be pragmatically viewed as sums paid on account to the parents. The court accepted the defendant's argument that such a pragmatic route could not be taken as the duty the court has to protected parties[5] precluded it. It would, therefore, be included in the figure for sums already received by the claimant for the purposes of the application.

[1] Regulation 864/2007 on the law applicable to non-contractual obligations [2007] OJ L199/40.
[2] Regulation 864/2007 on the law applicable to non-contractual obligations [2007] OJ L199/40 arts 1(3) and 15(d).
[3] CPR 25.7(1)(a) "… the defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the claimant" and 25.7(4) "The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment".
[4] *Eeles v Cobham Hire Services Ltd* [2009] EWCA Civ 204; [2010] 1 W.L.R. 409.
[5] CPR r.21.10.

Whilst French law makes the date of consolidation[6] crucial in assessing the damages awarded both in respect of pecuniary and non-pecuniary loss:

> "47 The Dintilhac guidelines (referred to in *Wall v Mutuelle de Poitiers*) distinguish between (a)(i) pecuniary loss before the date of consolidation, (ii) non-pecuniary loss before the date of consolidation, (b)(i) pecuniary loss after the date of consolidation and (ii) non-pecuniary loss after the date of consolidation.
>
> 48 In her later report dated 8th February 2019, Madame Witvoet says that, because Joshua is still in the process of recovery, the date of consolidation has not yet been reached and any assessment of permanent damage is premature. In those circumstances, she argues, the precise assessment of his pain and suffering, temporary functional disability, permanent functional disability and aesthetic damage cannot be gauged."

It was necessary for the court to undertake an assessment as the procedural matter of the application rested to be decided under English law. In doing so, the court relied upon the *Bareme* guidelines when assessing the likely permanent functional disability:

> "I will adopt a figure of 20% which is still a conservative estimate of Joshua's likely permanent functional disability. The age at which Joshua will reach consolidation is also somewhat uncertain. Here, however, the exercise is made easier because there is in the Bareme Guidelines (another tool which I understand is commonly used in assessing damages in France) a band between 21 and 30 years of age at the date of consolidation. It is reasonable to assume for present purposes that Joshua will still be within this age bracket at the date of consolidation."

Taking that into account, along with other heads of damage, the interim payments would total £591,788. For that figure to be no more than a reasonable proportion, the final capital award (excluding any periodical payments) would have to be around £660,000. Taking the required cautious approach to assessing those damages, the final award was likely to be around £370,378. It was therefore inappropriate to order the further interim payment sought.

Application dismissed.

Comment

Here we have an illustration of the procedural approach to interim payments under English law being applied in a case due to be quantified applying French damages. It is also a further example of the difficulties faced by seriously injured claimants seeking substantial interim payments, usually to meet an urgent care or housing need, when their damages may ultimately be paid in part by way of periodical payments.

The court's power to order interim payments

The courts have a discretionary power to order interim payments. In the High Court, this arises under the Senior Courts Act 1981 s.32. In the County Court, this power is provided for by the County Courts Act 1984 s.50. CPR r.25.7(1) sets out a number of conditions that must be satisfied if the court is to exercise its power to order an interim payment:

- the defendant must have admitted liability; or
- judgment must have been entered; or

[6] Described by the claimant's expert on French law as "… a medical term corresponding to the stabilization of the victim's state of health i.e. when the condition of the claimant cannot get neither worse nor better and the state of health is to be considered as definitive and permanent".

- the court is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money (other than costs) against the defendant.

Further, CPR r.25.7(4) provides that the court must not order an interim payment of more than a "reasonable proportion" of the likely damages. It follows that the court does have to have regard for what is likely to be the final judgment for damages, but that is not to say that an interim payment application should be treated like a mini-trial. The courts will adopt a cautious approach to the potential damages as they must take into consideration only those aspects of the damages claimed they can be confident the claimant will recover, and without the need for any form of detailed assessment of the factual or legal issues in dispute.

Interim payments and periodical payments

Of course, in larger cases (such as this) the ultimate award of damages will not necessarily be in the form of a simple lump sum. Rather, the court may also award some aspects of the claim in the form of a periodical payments order. The Damages Act 1996 s.2(2) permits a court to award periodical payments for future pecuniary loss in personal injury cases. The Court of Appeal set out guidance as to how interim payments should be approached in such cases in *Eeles v Cobham Hire Services Ltd*.[7] A unanimous Court of Appeal agreed endorsed a two-stage approach.

The first stage of the test requires the court to assess the likely amount of the final judgment omitting those heads of future loss which the trial judge might conceivably award by way of periodical payments. In other words, they must consider only those damages that will definitely be paid as a lump sum. Generally, this assessment will comprise of general damages, past financial loss and accommodation costs. The interim payment can only amount to a reasonable proportion of the lump sum elements of the claim, but as Smith LJ observed:

> "A 'reasonable proportion' may well be a high proportion provided the assessment has been a conservative one. The object is not to keep the claimant out of his money but to avoid the risk of over-payment."

The second stage of the *Eeles* approach applies only if the claimant is seeking a greater sum than the first stage would provide. The court can also go on to include in their assessment those further elements of future loss they can confidently predict will be capitalised by the trial judge. However, the claimant also has to show that there is a real and urgent need for the payment. Typically in practice, such need might arise from the need to purchase more suitable accommodation or to put in place a care regime.

A cautious assessment of the likely damages

The current case involved an interim payment made on behalf of a brain injured claimant in his early 20s. The claimant was left with significant impairments. He was a vulnerable individual and lacked mental capacity. Funds were sought to facilitate a period of independent living. The court had to consider the likely award of damages, which were to be assessed applying French damages.

French law also provides for damages to be assessed as both a lump sum and an equivalent to periodical payments. The issue was therefore whether the interim payment sought would exceed a reasonable proportion of the likely capital lump sum the claimant could expect to receive. Much was in dispute, including the like extent of care required and the type and cost of appropriate accommodation. The final prognosis was reportedly still uncertain (notwithstanding that the accident occurred some three years earlier). The available pool of damages was further diminished by the expenses incurred by other family

[7] *Eeles v Cobham Hire Services Ltd* [2009] EWCA Civ 204.

members on the claimant's behalf being excluded from the damages (as under French law those damages must be claimed separately by those individuals).

The judge carried out a really very cautious assessment of those heads of loss under French that were likely to be awarded to the claimant by way of a lump sum. The claimant had already had £351,788 in interim payments and was seeking a further £240,000, giving a combined total of £591,788. The judge concluded that the likely lump sum award, assessed in an abundance of caution, would be only around £370,000. The application was accordingly rejected as the amount requested would put the total interim payments above what the court considered to be a reasonable proportion of the damages.

The current case serves as a warning to those making such applications just how cautious the courts can be when considering what the lump sum award might be in a case involving a serious and life changing injury to the claimant.

Practice Points

- An application for an interim payment will only succeed if the court is satisfied that the party being asked to make the payment will ultimately be required to pay damages and the amount being requested does not exceed a reasonable proportion of those damages.
- If the damages might ultimately include an element to be paid by way of a periodical payment, the court can only order an interim payment of a reasonable proportion of the likely lump sum element of the final damages. Further, if the court is going to take into consideration elements of the claim that are not automatically bound to be paid as a capital sum, the claimant must demonstrate a real and urgent need for the funds.
- A *reasonable proportion* of the likely damages can still be a high proportion.
- When assessing the likely damages to be taken into consideration in an interim payment application, the court will apply a cautious approach. Such an application is not a trial and the court cannot be expected to resolve the major factual or legal issues in the claim.

Richard Geraghty

Doherty v Ministry of Defence

(QBD (Northern Ireland); 2 April 2019; [2019] NIQB 35)

Aggravated damages—causes of action—fatal accident claims—measure of damages—Northern Ireland—trespass to the person

LT Aggravated damages; Causes of action; Exemplary damages; Fatal accident claims; Measure of damages; Northern Ireland; Trespass to the person

The plaintiff brought a claim for aggravated damages on behalf of the estate of a victim of a fatal shooting ("the deceased") pursuant to the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1937.

The deceased had been shot on Bloody Sunday and died instantly. The deceased had not previously attended any civil rights marches. The defendant accepted that the deceased was an innocent victim and had admitted assault, battery and trespass to the person.

The issues were whether it was possible to award aggravated damages in the case of a victim who had died instantly as a result of being shot, and the appropriate amount of any such award.

The court held that the 1937 Act had changed the legal landscape in cases where the wrong inflicted upon the victim resulted in death. The Act permitted existing causes of action to survive the death of the victim, whereas previously those causes of action were extinguished on the victim's death. However, s.14(2)(a)(i) provided that "exemplary damages" were not recoverable where a cause of action survived for the benefit of a deceased person's estate.

There was a strong persuasive authority for the award of aggravated damages for the tort of trespass to the person in a fatal case: *Shah v Gale*[1] and *Ashley v Chief Constable of Sussex*.[2] Having regard to the weight of judicial opinion expressed in *Shah* and *Ashley*, it could be concluded, in principle, that an award of aggravated damages could be made even in circumstances where there was no personal injury claim and therefore no award of general damages for pain and suffering. Although it was not possible to adduce direct evidence as to the deceased's state of mind prior to being shot, on the balance of probabilities, in the context of a wholly innocent individual who was attending his first civil rights march and had become caught up in the events of Bloody Sunday, it could safely be assumed that a person of ordinary fortitude and lack of familiarity with such conditions as those prevailing in the immediate vicinity would have been filled with fear and dread, coupled with a strong sense of indignation and hurt at being the innocent victim of a blatant, unprovoked and unjust attack by members of the army: *Clinton v Chief Constable of the Royal Ulster Constabulary*.[3] The behaviour of the defendant's servants or agents responsible for the wrongful acts was exceptional and contumelious and was imbued with a degree of malevolence and flagrancy which was truly exceptional. Thus, the estate's claim for the injury to feelings suffered by the deceased resulting from the soldiers' tortious actions was clearly established in law and the compensation due to the estate should include aggravated damages.

Having regard to the fact that the deceased was killed instantly, the appropriate level of award was £15,000.

Comment

The general principle of law for the assessment of damages in personal injury cases is that the award of compensation should put the injured person back into the position they would have been in were it not for the harm caused to them. The aim of such damages is to provide full compensation to the claimant for their loss, not to punish the defendant. But notwithstanding these general principles, there are occasions when the courts are willing to award additional damages to reflect the aggravating features of the defendant's conduct. Such awards of *aggravated damages* are relatively unusual in the context of personal injury cases (most of which arise out of accidents) although they are often awarded in cases involving assault and battery, and in rape or sexual abuse claims.

The interesting feature of the current case is it involves an award of aggravated damages in a fatal claim where there was no accompanying award for pre-death injury.

Aggravated damages

Aggravated damages are intended to provide compensation for injury to feelings where the claimant's sense of injury arising from the defendant's wrongful act is "justifiably heightened by the manner in which or the motive for which the defendant did it".[4] The Law Commission's 1993 Consultation Paper "Aggravated, Exemplary and Restitutionary Damages" set out a useful summary of the preconditions the courts have generally required before making such an award:

[1] *Shah v Gale* [2005] EWHC 1087 (QB).
[2] *Ashley v Chief Constable of Sussex* [2008] UKHL 25; [2008] 1 A.C. 962.
[3] *Clinton v Chief Constable of the Royal Ulster Constabulary* [1999] N.I. 215.
[4] *Broome v Cassell & Co* [1972] A.C. 1027 at 1124; [1972] 2 W.L.R. 645.

- 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 as a result.[5]

An example of such an award is *GLB v TH*[6] where the claimant was a girl who had been sexually abused by her grandfather. In addition to an award of £67,500 for general damages for psychiatric injury, she was awarded a further £15,000 by way of aggravated damages for additional factors such as the breach of trust and emotional upheaval caused to her, and to take account of the impact upon her of the defendant's malicious conduct towards her after the allegations were raised, and his persistent denials of guilt and the resulting need for a trial.

The majority of personal injury cases are founded upon an allegation of negligence, and the necessary aggravating factors required to justify an award of aggravated damages would usually be absent. Indeed, it has been suggested by the courts that aggravated damages cannot be awarded in negligence claims,[7] although more recent judicial discussion of the issue has cast doubt on the existence of such a rule of law.[8] Such awards have been made by the courts for a broad range of tortious causes of action, including assault and battery, false imprisonment, discrimination and malicious prosecution cases.

It should be noted that an additional award of aggravated damages will not automatically be awarded in all assault cases. In *Richardson v Howe*,[9] Thomas LJ suggested that a separate award of aggravated damages should only be made in assault cases that are "wholly exceptional". Whilst the courts have subsequently tended to follow this approach, there are still many occasions when the courts have been willing to find that there are sufficient aggravating features of the defendant's behaviour—either in relation to the incident in question, or to their subsequent behaviour—to merit an award of aggravated damages in the context of a personal injury claim where damages are to be awarded for the injuries sustained.

Aggravated damages in fatal claims

What is of note about this current decision of the High Court in Northern Ireland is that it provides a relatively unprecedented example of an award of aggravated damages in a fatal claim.

The deceased was shot by the servants or agents of the defendant. His death was instant, which meant that there was no claim that could be brought by the deceased's estate for any pre-death pain and suffering. Nevertheless, the court was willing to find that the circumstances the deceased found himself in prior to his death, as a wholly innocent individual who was caught up in violent events, gave rise to sufficient aggravating features for an award of aggravated damages to be made. The fear and dread experienced by the deceased in the period leading up to his death, coupled with a sense of indignation at being the innocent victim of an unprovoked and unjustified use of military force, were held to be sufficiently exceptional and contumelious to merit an award of such damages.

Exemplary damages

It is important to draw a distinction between aggravated damages and exemplary damages, both of which are related to the defendant's conduct. Whilst the former are compensatory (for outrage and injury to feeling), the latter are punitive. Exemplary damages are expressly awarded to punish the defendant. As such, they run contrary to the general principle of restorative justice that underpins the assessment of damages in this jurisdiction. They are awarded only in very limited circumstances:

[5] "Aggravated, Exemplary and Restitutionary Damages" Law Commission 1993 Consultation Paper p.11 para.1.4, and also cited with approval by Lord Woolf MR in *Thompson v Commissioner of Police of the Metropolis* [1998] Q.B. 498 at 514; [1997] 3 W.L.R. 403.
[6] *GLB v TH* [2012] EWHC 3904 (QB).
[7] See *Kralj v McGrath* [1986] 1 All E.R. 54; (1985) 135 N.L.J. 913.
[8] See *Ashley v Chief Constable of Sussex* [2008] UKHL 25 per Lord Neuberger at [102]; [2008] 1 A.C. 962.
[9] *Richardson v Howe* [2004] EWCA Civ 1127; [2005] P.I.Q.R. Q3.

- in respect of unconstitutional, arbitrary or oppressive behaviour carried out by servants of the Government;
- for wrongful conduct calculated by the defendant in order to make a profit; and
- where expressly permitted by statute.[10]

The judge's factual conclusions in the current case—involving the actions of British soldiers on Bloody Sunday—would certainly amount to a finding of unconstitutional, arbitrary and oppressive behaviour by Government servants. So why did the court not also consider an additional award of exemplary damages in this case? The simple answer is that Law Reform (Miscellaneous Provisions) Act 1934 (and the equivalent legislation in Northern Ireland) expressly excludes any claim by the deceased's estate for exemplary damages.[11]

Practice Points

- In a cause of action founded in tort, it is possible to claim aggravated damages for feelings of distress or outrage resulting from the egregious circumstances in which the tort was committed, or in which its aftermath was subsequently handled by the defendant.
- Such aggravated damages can potentially be claimed by the estate of a deceased person in a fatal claim for the circumstances leading up to the death.
- Aggravated damaged should always be pleaded, setting out the grounds for claiming them in accordance with CPR r.16.4(c).
- In fatal cases, it is not possible for the deceased's estate to bring a claim for exemplary damages.

Richard Geraghty

Inglis v Ministry of Defence

(QBD; Peter Marquand; 8 May 2019; [2019] EWHC 1153 (QB))

Causation—hearing—loss of congenial employment—loss of earnings—measure of damages—occupational deafness—Ogden Tables—service personnel

Armed forces; Disabilities; Loss of congenial employment; Loss of earning capacity; Loss of earnings; Occupational deafness; Ogden tables; Personal injury

The court assessed the damages due to the claimant for the hearing loss which he had suffered as a result of exposure to noise while serving in the Royal Marines.

The court assessed damages in a personal injury claim brought by the claimant against the defendant, the Ministry of Defence.

The claimant was aged 39. He had joined the Royal Marines at the age of 17 in 1997. He left at the age of 32 in May 2012. During his service, he was exposed to noise from gunfire, grenades, explosive devices, helicopters and other aircraft. He claimed damages for hearing loss suffered during his service. The parties had agreed to resolve liability on an 80:20 apportionment in the claimant's favour. After leaving the Royal

[10] See *Rookes v Barnard* [1964] A.C. 1229 per Lord Devlin; [1964] 2 W.L.R. 269.
[11] Law Reform (Miscellaneous Provisions) Act 1934 s.2(a)(i).

Marines, the claimant secured employment in the maritime security industry. In 2016, he obtained a job providing security during the commissioning of an oil rig and then providing health and safety advice. In May 2017, he moved to his current employer, for whom he worked as a health and safety officer.

The issues included: whether, for causation purposes, the claimant left the Royal Marines because of his hearing loss or to take up more lucrative employment in the maritime-security industry; the extent of his hearing loss for the purpose of assessing general damages and his future employment prospects; whether he was "disabled" within the meaning used in the Ogden Tables; and whether his loss of earnings should be calculated on the basis of a lump sum for a handicap in the labour market (a *Smith v Manchester* award) or on the multiplier/multiplicand basis.

The claimant's evidence to the effect that he left the Royal Marines because of his hearing loss would be accepted. Among other things, he had real fears that he was at risk of a medical discharge.

On the extent of hearing loss the claimant's evidence was, again, accepted. The claimant could not hear properly without looking at the individual with whom he was talking. If the claimant went out to a bar, he had difficulty hearing conversation because of the background noise. The claimant could not hear a person talking in another room and he had difficulty hearing public announcements. The claimant had to have the volume turned up on the television and telephones. Even with his hearing aids, the claimant had difficulty in his work environment hearing conversations in meetings, speaking on the telephone and in meetings outside, including when working on-site. The claimant also had tinnitus, which affected his ability to sleep and was intrusive, although it was improved by his hearing aids. The impact of noise damage on his hearing was first identified in 2006 when he was in his mid-20s; he now had the hearing of a 70-year-old. An award of general damages of £25,000 was appropriate.

The claimant was "disabled" within the meaning used in the Ogden Tables. Among other things, the impact of his hearing disability was more than trivial and substantially limited his ability to carry out normal day-to-day activities.

On future loss of earnings it was agreed that if the claimant had not been affected by hearing loss, he would have remained in the Royal Marines until September 2019 and would then have worked in the field of health and safety for 30 years. This was not a case that was appropriate for a *Smith v Manchester* award. The uncertainties were not so many as to preclude the multiplier/multiplicand method. The claimant's injury had a more than minimal impact on his work and the evidence was available to determine an adjustment to the reduction factor without making a broad judgment. Future loss of earnings could be calculated on the conventional multiplier/multiplicand method. A reduction factor of 0.7 was appropriate. The parties had agreed the multipliers in the injured and uninjured scenarios and had agreed the total loss for future net earnings at £257,518 and an award would be made in that sum.

Amongst other heads of loss, the clamant was awarded £8,000 for the loss of congenial employment. That reflected the claimant having derived a lot of pleasure from his service and had commented that it was an "honour and privilege" to represent the Naval Service yet he only had seven years of service remaining when he left the Royal Marines.

Comment

Of particular interest in this first instance decision of the High Court is the way in which the issue of disadvantage on the open labour market was approached. The claimant here was in employment at the time of trial, indeed he was earning more than he had been when he was in the service of the defendant, having left the military voluntarily to take up more lucrative employment elsewhere. The court had to assess the impact of the claimant's injury (permanent hearing loss) on his future earnings throughout the remainder of his working life.

The traditional approach: Smith v Manchester awards

The traditional approach in such a scenario was for the court to consider a lump sum award to compensate the claimant for the fact it may take longer to obtain employment in the event that they become unemployed. Such an award was also intended to compensate for any loss of earning capacity; for the fact that the range of jobs open to the claimant will be restricted by their injuries when looking for alternative work and the salaries available may be lower. These awards take their name from the case of *Smith v Manchester*,[1] which was the first clear judicial recognition of such a discrete head of loss. The awards can be assessed by reference to earnings. For example, a court might award two years of the claimant's current net income. But more often than not the award was arrived at by little more than a judicial "finger in the air" approach.

The Ogden methodology

The publication of the 6th edn of the Ogden Tables in 2007 introduced a new methodology for assessing the impact of disability on future earnings. The suggested approach attempted to take into account the impact of disability on an individual's ability to remain in work, recognising that this varied according to their age, gender and educational achievements. A "reduction factor" could be applied to the multiplier for any period of future income loss to take into account these various factors as they apply to the individual claimant.

This methodology was applicable in cases where the claimant had a loss of income expected to continue into the future. But it could also be applied in situations where the claimant's ability to work was affected but they remained in work without any loss of income at that stage. As such, the Ogden methodology provided an alternative approach to the traditional *Smith v Manchester* award. It set out a more scientific and methodical approach which, many hoped, would produce greater consistency from the courts in the assessment of such damages. Moreover, the Ogden approach tended to result in a much higher figure than the lump sum awards arrived at by the courts under the traditional approach. It was a welcome alternative to the lump sum awards that were often simply plucked from the ether.

When is a Smith v Manchester award appropriate?

The Ogden approach is only applicable to cases where the claimant meets the criteria for being disabled under the Equality Act 2010. This means that they must have a physical or mental impairment that has a "substantial and long-term adverse effect on [their] ability to carry out normal day-to-day activities".[2] The explanatory notes to the Ogden Tables also specify that the illness or disability must have lasted or be expected to last over one year or is progressive. Their condition must also affect either the kind or the amount of paid work they can do.[3]

The Ogden approach was never intended to bring to an end the application of *Smith v Manchester* awards. The explanatory notes acknowledge that there will still be cases where a *Smith* award may still be applicable.[4] There will still be cases where the claimant is disadvantaged on the labour market but fails to meet the Ogden disability requirements.

What has proven to be controversial is the question of whether the Ogden methodology should be applied in all cases where the claimant meets the disability criteria but the degree of disability is at the lower range of the scale. This issue came before the Court of Appeal in *Billet v Ministry of Defence*.[5] The claimant met the criteria for disabled "but only just". Jackson LJ found that applying the Ogden

[1] *Smith v Manchester* (1974) 17 K.I.R. 1; (1974) 118 S.J. 597.
[2] Equality Act 2010 s.6(1).
[3] Ogden Tables, 7th edn, Explanatory Note para.35.
[4] See Ogden Tables, 7th edn, Explanatory Note paras 31 and 45(6).
[5] *Billet v Ministry of Defence* [2015] EWCA Civ 773; [2016] P.I.Q.R. Q1.

methodology resulted in an award that he considered would be "hopelessly unrealistic". He considered the approach that the courts had previously applied in similar situations, of discounting the Ogden reduction factor to diminish the impact of the disability, but he felt that was not the correct approach to take:

> "In the present case that exercise is no more scientific than the broad-brush judgement which the court makes when carrying out a *Smith v Manchester* assessment."[6]

Instead it was decided that a conventional *Smith v Manchester* should be applied.

Adjusting the Ogden reduction factor

It follows that the courts will not necessarily follow the Ogden approach where the disability is at the lower end of the spectrum. But it is also clear that the courts will not always be willing to apply the full Ogden reductions in cases further up the disability scale. Both before and after *Billet*, the courts have regularly adjusted the discount applied to the multipliers to reduce the impact of disability on the award. It should be noted that to do so is not necessarily contrary to the approach prescribed in the Ogden Tables. The explanatory notes acknowledge that it will be appropriate to adjust the discount in the Tables to take account of the particular claimant's disability.[7] But to do so also requires some caution and an understanding of the actuarial evidence and the methodology underpinning the reduction factors in the Tables.

It is important in this context to recognise what the reduction factor actually is. The figure is intended to represent the amount of time the claimant can expect to be in work in the future. So a claimant with a 0.5 reduction factor is only expected to be in work 50% of the time during the remainder of their working life.

The current case provides us with a further example of a court reducing the reduction factors so as to ameliorate the impact of the claimant being disabled on the award of damages for future earnings. The judge found that the claimant met the Ogden criteria for being disabled and that his disability had a particular impact on his ability to carry out his employment. The judge observed that the applicable reduction factor from the Tables of 0.58 would mean that the claimant could expect to be out of work for 12.6 of the next 30 years. The judge felt that was too much of a discount for a claimant who had already been successful in securing alternative employment and appeared attractive to potential employers. It was not thought likely that he would ever find himself out of work for so much time in the future. The reduction factor was adjusted to 0.7 (against a non-disabled reduction factor of 0.9).

A more nuanced approach?

It is worth noting that in reaching this decision the court here did take into consideration the previous commentary expressed in this journal as to the most appropriate approach that should be applied to the Ogden methodology and, in particular, as to how and when the reduction factors should be adjusted. In particular, the court acknowledged the comments of Dr Victoria Wass in her article "Discretion in the Application of the new Ogden 6 multipliers: the case of *Connor v Bradman and Company*".[8] Here Dr Wass makes the point that it is the severity of impact on employment rather than the severity of impairment per se which is relevant. She also observed that of all the different types of impairment, impaired mobility and mental health problems have the greatest negative impact on employment.

The court here also acknowledged Dr Wass' subsequent guidance on the correct approach to adjusting the discount.[9] Dr Wass argued that where an adjustment to the Tables was merited, it would be more

[6] *Inglis v Ministry of Defence* [2019] EWHC 1153 (QB) at [96].
[7] See Ogden Tables, 7th edn, Explanatory Note paras 31 and 32.
[8] Dr V. Wass, "Discretion in the Application of the new Ogden 6 multipliers: the case of Connor v Bradman and Company" [2008] J.P.I.L. 154–163.
[9] Dr V. Wass, "Ask the expert: William Latimer-Sayer asks Victoria Wass some questions about the practical application of the Ogden reduction factors" [2013] J.P.I.L. 36–45.

appropriate to stick with the disabled reduction factor (rather than making an arbitrary and impressionistic reduction to it) and instead to change one or more of the other relevant factors (age, gender, education or employment status). For example, where a judge feels that the figures in the tables overstate the impact that disability will have upon a particular claimant in the labour market, they might instead consider increasing their educational status so as to weight the reduction factors that way.

Of course, there must remain a good argument for saying that the default position for the courts should be the strict application of the Ogden reduction factors in all but the most exceptional cases. As Dr Wass argues, to adopt such an approach will provide greater consistency and certainty.[10]

Practice Points

- If a claimant meets the Ogden criteria for disability but the impact on their work is not significant then a court might make a *Smith v Manchester* award rather than adopt a multiplier/multiplicand approach adopting and applying an Ogden reduction factor.
- Even if the claimant meets the Ogden criteria for disability and their ability to work is impacted to a significant degree, the court may still seek to reduce the Ogden reduction factors.
- The reduction factors are supposed to represent the proportion of time the claimant can expect to be out of work in the future.
- Where consideration is being given to an adjustment to the Ogden reduction factors, broad reductions to the disabled figures should be avoided and consideration should instead be given to changing one or more of the other factors, such as educational status or age.

Richard Geraghty

[10] Dr V. Wass, "Billett v MOD and the meaning of disability in the Ogden Tables" [2015] J.P.I.L. 37–41.

Case and Comment: Procedure

Burnett v International Insurance Company of Hanover Ltd

(Court of Session (Inner House, First Division); [2019] CSIH 9)

Exclusion clauses—public liability insurance—Scotland

℔ Exclusion clauses; Public liability insurance; Pubs and bars; Scotland

The fourth defender insurers in an action raised by the widow of a man who died following an assault by a door steward reclaimed against a decision that they were bound to indemnify the pursuer.

The door steward was employed by a company who carried public liability insurance but that cover excluded liability arising out of "deliberate acts" by the insured or their employees. The door steward was tried on a charge of murder and ultimately convicted of assaulting the deceased by seizing him by the neck, forcing him to the ground, placing him in a neck hold and restricting his breathing.

The Lord Ordinary, applying the contra proferentem rule, and adopting the approach in *Hawley v Luminar Leisure Ltd*,[1] held that the exclusion clause only applied when the outcome which gave rise to liability was the intended objective. Death in the present case had been an unintended consequence of the assault and the fourth defenders had been obliged to indemnify the second defender employers in respect of their liability to the pursuer arising out of the death; the right had been transferred to, and vested in, the pursuer in terms of the Third Parties (Rights against Insurers) Act 2010 ss.1 and 3.

The fourth defenders argued that if their liability to the second defenders was not excluded entirely by virtue of the exclusion clause then it was limited to £100,000 by virtue of the wrongful arrest exclusion and extension clauses which provided indemnification for wrongful arrest carried out by any employee of the insured.

The Inner House dealt with arguments on the exclusion clause as well as the wrongful arrest and extension clauses.

Exclusion clause

The phrase "deliberate acts" in the policy was intended to cover acts which involved the insured, or his employees, doing something with the deliberate intention of bringing about a particular objective, notably the creation of liabilities for losses covered by the policy, and seen in this light, the exclusionary phrase did not cover a deliberate act of an employee, intended as one of restraint, which "accidentally" caused injury or death to the person restrained. In order for the exclusion to operate, the employee had to have deliberately intended to cause the death of, or at least serious injury to, the deceased, which was not the situation in the present case. It was essential to construe the exclusion clause as applicable only to cases where there was a deliberate decision to use excessive force to cause injury in order to give effect to the fundamental purpose of the insurance policy in the context in which it operated, the duties of door stewards would inevitably involve the use of some force and the intention to do so against a customer could not be a bar to liability or the policy would be deprived of a major part of its obvious commercial purpose. The agreed facts disclosed a serious degree of carelessness, and possibly recklessness, on the part of the door

[1] *Hawley v Luminar Leisure Ltd* [2006] EWCA Civ 18; [2006] I.R.L.R. 817.

steward but it could not be said that he brought about the death of the deceased through a deliberate act or wilful neglect or default that went beyond the intention to restrain a troublesome customer, *Hawley v Luminar Leisure Ltd*[2] and *Ronson International Ltd v Patrick*[3] considered.

Wrongful arrest and extension clause

The wrongful arrest and extension clauses were not applicable to the present circumstances: wrongful arrest, or detention, was a claim for damages to compensate for an interference with, and loss of, a person's liberty and any consequent affront to the person's dignity, and the losses claimed were not of this type; the claim made by the pursuer was rather based on the use of excessive force, not any attempt to arrest.

The reclaiming motion was refused.

Comment

The criminal court verdict gave an insight into the core of this insurance dispute. In convicting the bouncer of assault rather than murder it decided that the bouncer had not intended to kill Mr Grant but unfortunately his restraint methods were badly executed. Thus there was no intent.

This was an insurance coverage dispute and not one on vicarious liability. In following *Hawley*, the vicarious liability issue was dispensed with. There a nightclub was deemed by the Court of Appeal to have exercised sufficient control over the actions of a doorman supplied to it by a security company to render the nightclub the "temporary" employer for the purposes of vicarious liability.

Thus the issue centred upon the wording of the insurance policy available to be claimed upon and the usual exclusion for deliberate acts so commonly found in insurance contracts. With this comes the inevitable conflict between the victim seeking a remedy and the tortfeasor's desire to call upon an indemnity.

The claimant (pursuer) argued that the exclusion itself was ambiguous as to what was considered "deliberate". It was argued that one reading of the exclusion clause would mean that all assaults were excluded from the policy. Obviously, if this was correct, the policy would be of no use in indemnifying a security company involved in door security where claims arising from assaults would be frequent if not regular.

It has long been the case that the proper way to interpret a contractual clause was laid down in *Yorkshire Water v Sun Alliance & London Insurance*.[4] This provides that the words of the policy must be given their ordinary meaning and reflect the intention of the parties as well as the commercial sense of the agreement. As a result, the words must be construed in their context.

When undertaking that interpretation, if a literal reading leads to an absurd result or one that is otherwise manifestly contrary to the real intention of the parties then it should be rejected where an alternative more reasonable construction can be adopted without ruining the language used.

Finally, in contract interpretation, there is the *contra preferentum* rule. This means that where there is ambiguity in interpretation, it should be read for the benefit of the weaker party. In contractual claims, this is the insured.

If one then looked at the context for guidance on the interpretation of the contract then this was a policy covering a security company where it would be an occupational hazard, literally, that its employees could be found to have committed assaults in the course of their duties. The court decided that to exclude indemnity on this basis would be an absurd interpretation of the exclusion clause and would mean there would never be an indemnity available to the company to claim upon (or the victims directly) for any assaults.

[2] *Hawley v Luminar Leisure Ltd* [2006] EWCA Civ 18; [2006] I.R.L.R. 817.
[3] *Ronson International Ltd v Patrick* [2006] EWCA Civ 421; [2006] 2 All E.R. (Comm) 344.
[4] *Yorkshire Water v Sun Alliance & London Insurance* [1997] 2 Lloyd's Rep. 21; [1997] C.L.C. 213.

The court also examined what constituted a "deliberate act". Again in construction terms, the court accepted that "deliberate" must be considered from the employer of the doorman as well as the employee. Here the criminal court's finding of a lack of intention to cause the death of Mr Grant but simply to restrain him was relevant and avoided falling into the trap of the deliberate act.

The defendant's final catch-all submission was that the exclusion clause could still have some value in mitigating their potential outlay. They argued that a potential construction would be to require the deliberate act to be "unlawful" or at least "blameworthy." If the court would make that construction the defendant argued then this would have extended the exclusion clause to allow it to apply to the assault. However, the court could not see any link in the contract between the words "deliberate" and "unlawful". Without that the court saw no need to find another meaning to the wording.

Practice Points

- A proper risk assessment of a case for a claimant includes an assessment of the ability of the defendant to satisfy any claim for damages and costs.
- When advising a tortfeasor any policies of indemnity should be reviewed carefully to identify the available coverage to satisfy any successful claim.
- Representing a victim of any event that has the potential to be considered an intentional rather than negligent act requires careful consideration of the nature of the act and any impact upon issues of vicarious liability and available indemnities.

Mark Harvey

Liverpool Victoria Insurance Co Ltd v Zafar

(Court of Appeal (Civil Division); The Master of the Rolls, Hamblen LJ and Holroyde LJ; 19 March 2019; [2019] EWCA Civ 392)

Sentencing—contempt—medical experts—dishonesty—recklessness

LT Contempt of court; Custodial sentences; Expert witnesses; Independent experts; Medical evidence; Sentencing guidelines

On 5 October 2018, Garnham J found 10 grounds of contempt of court had been made out against Dr Zafar. The respondent was committed to prison for six months, with the execution of the order suspended for a period of two years. The appellant appealed, on the basis that the sentence was too lenient, with the permission of the judge.

Dr Zafar was a medical expert in a personal injury case. He revised his prognosis in a medical report by simply accepting his instructing solicitor's instruction to do so. There was no examination of the client or exercise of professional judgment. The judge found that the expert had been reckless as to the truth of the amendments and whether they would mislead the court.

This was said to be a serious offence involving dishonesty and/or recklessness. The criminal court guidelines in the Sentencing Council "Imposition of Community and Custodial Sentences Definitive Guideline" was a useful comparison, but not a precise analogy. The culpability of the contemnor and the harm caused or intended had to be considered. Then, the court should ask itself if a fine would be a

sufficient penalty. If it was not, then arguments that the fine being modest due to limited means would not suffice to make committal appropriate.

However, the deliberate or reckless making of a false statement in a document would usually be enough to warrant committal to prison. Culpability would have to be assessed on a case by case basis. Acting corruptly for financial gain would increase culpability but, even where there was an indirect financial motive (a desire for more work from a particular solicitor), or no financial motive, the offence remained serious because of the importance of the overriding objective and courts' reliance on expert witnesses. The identification of the falsity of the statement early, the size of the claim and the impact on the claim was immaterial, but if the claim was large that may be an aggravating factor.

Given the extent to which a court relies on an expert, it was doubted if there could be much difference between a reckless or a deliberate act despite the former being in principle less culpable. If the expert persisted in the false statement or attempted to cover it up that could be relevant.

Whilst there is a two year maximum sentence for contempt a period in excess of 12 months was a starting point.[1] Early admission, co-operation in an investigation of contempt by others, remorse, ill health, previous good character and an unblemished professional record were factors, but the court would have to decide the weight to attach. A professional's standing is the very thing that enables a court to trust them. Breach of trust was serious and would lead to severe sanctions.

Where an admission was made upon the issue of proceedings a 1/3 reduction would be appropriate. A sliding scale ending at 10% for admission at trial was then appropriate.

If a custodial sentence is made then it should be served immediately. The fact that an expert had been reckless rather than deliberate would not justify suspension.

The sentence was wrong, but it would be unfair to impose it on the Respondent given the guidance was not available at the time of sentence.

Comment

It is unacceptable for a medical expert to behave in the manner that occurred here. The courts are dependent upon experts and to an extent are reliant on the professional opinion that they give. Where misconduct is identified and proven then it is right that the courts treat the position very seriously.

The use of the contempt jurisdiction here was presumably on the basis that the insurer felt that it was important that the medical expert is publicly punished for that conduct. It was also important that the court protected the court process from the clear misuse of it.

It is also important that it is recognised that the incidence of such behaviour is likely to be very small and the courts have recognised that to be the case in relation to allegations of fraud.[2] It is helpful that the courts have made it very clear that when such behaviour is found it will be dealt with severely.

What this case should not be taken to be is an indication that a defendant can generally in cases of discontinuance look to the contempt process generally to pursue a party. First, evidentially proving contempt and obtaining permission to bring the proceedings remains a high bar. Secondly, in the case of a party who discontinues in the face of an allegation of fundamental dishonesty the rules provide the mechanism for the defendant to pursue that allegation before the court. The court has a discretion under CPR PD44 para.12.4(c)[3] to make provision for an allegation of fundamental dishonesty to be determined post discontinuance.

[1] *Liverpool Victoria Insurance Co Ltd v Bashir* [2012] EWHC 895 (Admin); [2012] A.C.D. 69.

[2] Lord Nicholls in *In re H (Minors)* [1996] A.C. 563 at 586; [1996] 2 W.L.R. 8 said that an allegation of dishonesty is a serious one. The more serious an allegation the less likely it is to be true. A defendant will need to provide strong evidence to prove it on the balance of probabilities.

[3] CPR PD44 para.12.4(c): "where the claimant has served a notice of discontinuance, the court may direct that issues arising out of an allegation that the claim was fundamentally dishonest be determined notwithstanding that the notice has not been set aside pursuant to rule 38.4."

Practice Points

- Fraud, whenever found and proven, will be treated seriously by the courts.
- The court process will be protected by the court wherever necessary.
- Where an expert recklessly or deliberately misleads the court then if permission is granted for contempt proceedings it is likely that a custodial sentence will be considered.

Brett Dixon

R & S Pilling T/A Phoenix Engineering (Respondent) v UK Insurance Ltd (Appellant)

(Lady Hale (President), Lord Wilson, Lord Hodge, Lady Arden, Lord Kitchin; [2019] UKSC 16)

Road Traffic Act 1988—s.14—compulsory insurance requirement—road or other public place—causation—motor insurance directives—use of a vehicle—purposive interpretation

Causation; Contract terms; EU law; Interpretation; Motor insurance; Third party insurance; Vehicles

On Saturday 12 June 2010, Mr Thomas Holden, a mechanical fitter employed by the Phoenix Engineering was working overtime at his employer's premises. The day before his car had failed its MOT due to corrosion on its underside. Having completed his first piece of work that day he asked his employer if he could use the loading bay at the premises to do some work on the car which would hopefully enable it to pass the MOT. His employer agreed. His intention was to weld some plates onto the underside of the car to deal with the corrosion.

He disconnected the car battery so there were no live circuits which the welding equipment might interfere with. He then used a fork-lift truck to push the car up on its side so that he could get at the underside. He used a grinder first to prepare the underside and then successfully welded a plate under the driver's side. He then reconnected the battery, started the car and moved it round the other way before disconnecting it again and lifting it up once more but now with the underneath of the passenger side exposed.

At this point he started to weld, but then his phone went and he stood up to take the call. As he did so, he saw flames inside the car. What had happened was that sparks from the welding had ignited flammable material inside the car including the seat covers. The fire spread and set alight some rubber mats lying close to the car. The fire then took hold in Phoenix's premises and adjoining premises and substantial damage was caused before it was extinguished.

Phoenix's insurer was AXA. It paid out to Phoenix and the owner of the adjoining property in excess of £2m. Being subrogated to Phoenix's rights, AXA made a claim against Mr Holden in the name of Phoenix for an indemnity in respect of the sums it has paid out. If Mr Holden had any insurance in respect of the claim, it was only through his ordinary car insurance effected with UK Insurance Ltd. UK Insurance applied for a declaration that the car insurance policy it had issued to Mr Holden did not cover the damage he had caused to property belonging to Phoenix while repairing his car.

The policy with the claimant provided cover for an individual who had an accident "in your vehicle" which killed or injured someone or caused damage to "their property" or "their vehicle". It stated that it provided the minimum cover required under UK and EU law. The insurer contended that its policy did not cover accidents involving the car on private premises or while it was being repaired.

At first instance, HH Judge Waksman QC held[1] that clause 1a of the policy booklet, which stated that coverage was provided "if you have an accident in your vehicle", was too narrow. He concluded that it should be interpreted as providing for coverage "if there is an accident caused by or arising out of your use of your vehicle", which reflected the words in the Road Traffic Act 1988 s.145(3)(a). He held that the repair to the car was not "use" of the vehicle within the policy and within s.145(3)(a), on the basis that the car was not being operated in any way at the time, but was immobile and raised partly off the ground. Observing that in *Vnuk v Zavarovalnica Triglav dd*[2] it had been held that "use" of a vehicle covered any use which was consistent with the "normal function" of that vehicle, he concluded that it was not a "normal function" of a car to undergo repair. The declaration was granted. The employer appealed.

In the Court of Appeal, the outcome was the opposite. In circumstances where the car, having failed its MOT, was driven to a private location to be repaired and was manoeuvred into position to enable the repairs to be affected, where the object of the repairs was to make the car safe to drive, and where the accident occurred by virtue of the repairs being undertaken. The circumstances in which the repairs were necessary and the purpose for which they were affected were entirely commonplace for drivers generally. In doing so they applied the decision of *Vnuk* to find that the use of the vehicle here was within the compulsory insurance requirement in s.145(3)(a).

Supreme Court

The question the court had to decide was:

- Whether the policy conferred on the insured owner of a vehicle an indemnity against liability for damage caused to the property of a third party which was caused by his acts when he was carrying out substantial repairs to his car in the commercial premises of his employer?
- What was the meaning of "damage … caused by, or arising out of, the use of the vehicle on a road or other public place" in the Road Traffic Act 1988 s.145, which defines the compulsory insurance requirements for the use of vehicles in such places?

The policy of insurance had to be construed so as to conform with the requirements of the Road Traffic Act 1988, which as far as was relevant to this appeal was whether Mr Holden was required to be insured to cover any liability in respect of damage to property "caused by, or arising out of, the use of the vehicle on a road or other public place …".

Section 145(3)(a) required the court to interpret the use of the noun "use" and the causal phrase "caused by, or arising out of". Both the Court of Appeal and HH Judge Waksman had concluded that s.145(3)(a) was not compatible with the Directive,[3] with the former applying a strained application of "use" to achieve compatibility. The Court of Justice of the European Union ("CJEU") had in *Vnuk*, *Rodrigues de Andrade v Salvador*[4] and *Torreiro v AIG Europe Ltd*[5] had confirmed that in EU law the use of a vehicle is not confined to a road or other public place.

That had been understood in prior domestic jurisprudence, but s.145(3)(a) could not be read down so as to comply with the jurisprudence of the CJEU.[6] That approach had been taken in *Lewis v Tindale*[7] by Soole J as well, on the basis that it would go against the grain and thrust of the legislation whilst raising policy implications not for the courts and imposing retrospective criminal liability under s.143.

[1] *UK Insurance Ltd v Holden* [2016] EWHC 264 (QB); [2016] 4 W.L.R. 38.
[2] *Vnuk v Zavarovalnica Triglav dd* (C-162/13) EU:C:2014:2146; [2016] R.T.R. 10.
[3] 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.
[4] *Rodrigues de Andrade v Salvador* (C-514/16) EU:C:2017:908; [2018] 4 W.L.R. 75.
[5] *Torreiro v AIG Europe Ltd* (C-334/16) EU:C:2017:1007; [2018] Lloyd's Rep. I.R. 418.
[6] As identified by Ouseley J in *RoadPeace Ltd v Secretary of State for Transport* [2017] EWHC 2725 (Admin); [2018] 1 W.L.R. 1293.
[7] *Lewis v Tindale* [2018] EWHC 2367 (QB); [2019] 1 W.L.R. 1785.

EU law does not require a court hearing a private dispute to disapply national law which it cannot interpret in a manner compatible with a directive which is capable of producing direct effect:[8]

> "In that case, the requirement for third party motor insurance cover in Irish road traffic legislation did not comply with the Directive. A motor insurance policy, which was a contract between private persons, reflected the Irish legislation. The CJEU held that the terms of the insurance policy were not to be disapplied, notwithstanding the failure to provide the cover which the Directive required; the person disadvantaged by this failure could instead seek compensation from the member state (para 56)."

On that basis, it was the provision in national law that had to be read in to the contract of insurance, not the requirements of EU law, meaning that the relevant use was "on a road or other public place".

Causation must also be considered. The words "arising out of" after "caused" makes it clear that there can be a causal link between use of a vehicle on a road and damage resulting from that use which occurs elsewhere. In *Romford Ice and Cold Storage Co Ltd v Lister*,[9] a case which concerned the interpretation of identical words in the Road Traffic Act 1930 s.36(1), the majority of the Court of Appeal (Birkett and Romer LJJ) held that an accident which occurred in the yard of a slaughterhouse did not arise out of use on the road. Romer LJ gave the following example to explain why stretching the wording to cover the facts of the case could not be done:

> "An accident is caused by the use of a vehicle on a road if it runs over a pedestrian at a zebra crossing; an accident arises out of the use of a vehicle on a road if it skids off the road and injures a pedestrian who is walking on the pavement."

If the legislation were amended to comply with EU law then the outcome would be different, but for the moment there had to be a reasonable limit to the length of the chain of causation. The court referred to *Malcolm v Dickson*,[10] a case about the remoteness of damage in a negligence claim, where Lord Birnam stated (544):

> "It is of course logically possible, as every schoolboy knows, to trace the loss of a battle, or even of a kingdom, to … the absence of a nail in a horse's shoe. But strict logic does not appear to me to be a safe guide in the decision of questions such as this."

The position was that:

> "… section 145(3) of the RTA must be interpreted as mandating third party motor insurance against liability in respect of death or bodily injury of a person or damage to property which is caused by or arises out of the use of the vehicle on a road or other public place. The relevant use occurs where a person uses or has the use of a vehicle on a road or public place, including where he or she parks an immobilised vehicle in such a place (as the English case law requires), and the relevant damage has to have arisen out of that use."

The correction needed to clause 1a was to give effect to the requirements of the Road Traffic Act was as follows:

> "We will cover you for your legal responsibility if you have an accident in your vehicle or if there is an accident caused by or arising out of your use of your vehicle on a road or other public place and …"

[8] *Smith v Meade* (C-122/17) EU:C:2018:631; [2019] 1 W.L.R. 1823.
[9] *Romford Ice and Cold Storage Co Ltd v Lister* [1956] 2 Q.B. 180; [1955] 3 W.L.R. 631.
[10] *Malcolm v Dickson* 1951 S.C. 542; 1951 S.L.T. 357.

The Court of Appeal in expanding the cover beyond the express terms of the contract and that required by domestic law was wrong.

In the view of the court, neither EU law nor domestic law supported the view that the carrying out of significant repairs to a vehicle on private property entails the "use" of the vehicle:

> "The English case law which interprets 'use' in the RTA as 'having the use of' makes good sense in the context of vehicles which have been left on a road or in a public place, where members of the public are likely to encounter them, but less sense if applied without qualification to vehicles located on private property. In ordinary language one would not speak of a person who is conducting substantial repairs to a stationary vehicle as 'using' that vehicle, but the presence of a vehicle on a road or other public place while the owner was carrying out such repairs would, in my view, fall within the mischief which section 145(3)(a) addresses. EU law now requires the extension of compulsory third party insurance to vehicles on private property to cover use of the vehicles as a means of transport, a concept which can include parked vehicles. I am not persuaded that a vehicle which is on its side being repaired on private property, such as a garage, is being used 'as a means of transport' as the CJEU jurisprudence requires."

However, that comment must be viewed as obiter given that the court had indicated that the point did not need deciding as the CJEU had held in *Smith v Meade* that domestic law governed the issue and the repair did not take place on a road or other public place.

The causal connection argued for (that the repair was related to getting the car back on the road) was too remote. It could be argued that the prior use of the vehicle was a "but for" or contributory cause of the need for repairs, but it did not follow that the property damage was caused by or arose out of the use of a vehicle in the required sense. It was Holden's negligence in not taking precaution against lighting flammable materials in the vehicle that caused the damage.

UK insurance were entitled to the declaration given by HH Judge Waksman. Appeal allowed.

Comment

Superficially this is a case about the narrow interpretation of a motor vehicle insurance policy. But it also raises wider questions of causation, the precise borders of public and private space, and the continuing uncertainty for the UK of potentially unhitching from European Law after nearly 50 years.

Lord Hodge in giving the judgment of the Supreme Court focuses on the issues of the interpretation of the insurance policy and whether it conferred an indemnity for the enormous property damage resulting from this private welding operation, as well as the meaning of the phrase "damage … caused by, or arising out of, the use of the vehicle on a road or other public place" in the Road Traffic Act 1988 s.145.

This case is also, of course, a standard "battle of the insurance companies". AXA made a subrogation claim in the name of Phoenix against the negligent mechanic, whose oversight started the extensive blaze, and whose only insurance was his routine motor insurance policy. Following a trial without any live evidence and what the appellate judges all indicate was a "clear and careful judgment" by HH Judge Waksman QC, the nub of the case at the Supreme Court is the interpretation of a policy which the Master of the Rolls had suggested in the Court of Appeal was "not happily worded". UKI's argument was that the policy did not cover a third party claim while the car was being repaired on private premises, while Phoenix contended that it covered accidents off-road and that in any event, the repair of a car was a "use" or "arising out of its use". There has been much litigation in the English courts on such terminology but also in this case the wording had to be construed not just against domestic legislation but also, currently, the European dimension. How long the latter applies remains to be seen.

Particularly germane to any interpretation of the policy documentation applicable to Mr Holden, the luckless mechanic working on his own car, is the context of compulsory third party liability insurance

since 1930 in the UK for "use" of a vehicle on the road. The current provision of the Road Traffic Act 1988 s.143(5)(a) sets out that it is a criminal offence not to have insurance cover:

> "… in respect of the death of or bodily injury to any person or damage to property caused by, or arising out of, the use of the vehicle on a road or other public place in Great Britain."

Lord Hodge notes, as did the learned judge at first instance, the clear delineation of usage "on a road or other public place", the latter expression added by the Motor Vehicles (Compulsory Insurance) Regulations 2000[11] in order to comply with EU directives. In that respect, the European perspective was already incorporated into domestic law, although Lord Hodge then delineates the wider perspectives of the subsequent consolidating Directive 2009/103 of the European Parliament and of the Council. Could that rather nebulous evocation of the Directive deal with this situation of negligent welding causing property damage, and particularly in the light of what the Court of Appeal indicated was "inadequate" wording in the policy booklet?

While HH Judge Waksman interpreted the policy as extending beyond roads and public places, for example, a vehicle crashing and causing private property damage to a building, he concluded that this accident had not arisen out of the "use" of the car; at the time it was being repaired, was immobile and was indeed partly off the ground to facilitate this manoeuvre. He also rejected any argument on causation. On the discussion of remoteness one is put in mind of the comment by Professor Glanville Williams that there is little use in a "but for test" which defines causation "so widely that it goes back to the primeval slime".

The Court of Appeal adopt a more purposive interpretation of the Directive, both in spatial geographical terms and also in building on what might be "objective" of the Directive in the light of *Vnuk v Zavarovalnica Triglav dd*, which was clearly to protect victims of accidents caused by vehicles. Indeed, the Master of the Rolls indicates that an analysis of the English authorities suggests that there might be "use" of a vehicle when it was parked or immobilised, so that there had been an error of principle by HH Judge Waksman in holding that the repair of a car is not "using" it for the purposes of the Road Traffic Act 1988 s.145(3)(a). Henderson LJ agreed with this view and added that he found that Commonwealth authorities from Australia and Canada, some of which take a broader approach to the interpretation of motor insurance policies, were also of assistance. Beatson LJ agreed with both judgments.

However, Lord Hodge in the Supreme Court countered these perspectives by emphasising the precise wording of s.145(3)(a), in that the liability must be "caused by, or arising out of, the use of a vehicle on a road or other public place". UKI attempted to circumvent this by a novel "two strand" argument, eliding documents, but Lord Hodge notes that he is "not persuaded" by this approach. Furthermore, he states that the Court of Appeal erred in interpreting the words "there is an accident involving your vehicle" instead of the phrase "you have an accident in your vehicle". That divergence was critically important.

Lord Hodge then drew attention to a wide array of cases in English Law on the term "use", all of which pointed towards "use of the vehicle on the road" in compliance with the statutory provision. While it was of course "necessary also to consider the jurisprudence of the CJEU on the Directive" that was limited if contra legem. HH Judge Waksman had concluded that s.145(3)(a) was not compatible with the Directive, whereas the Court of Appeal gave what Lord Hodge saw as "a strained interpretation" to the term "use" to achieve compatibility. As well as *Vnuk*, Lord Hodge indicated that there was also now a European case, subsequent to the Court of Appeal's determination in *Pilling*; in *Rodrigues de Andrade v Salvador* the "use" of a tractor engine was to spray herbicide and not as a "means of transport". That decision was subsequently affirmed in *Torreiro v AIG Europe Ltd* which affirmed that in EU law the location of the use of the vehicle under the Directive is not confined to a road or other public place as had been understood

[11] Motor Vehicles (Compulsory Insurance) Regulations 2000 (SI 2000/726).

in prior English jurisprudence. However, Lord Hodge then gives reasons under EU Law as to why s.145(3)(a) cannot be "read down" to comply with EU jurisprudence.

On the further issue of interpreting the causal phrase "caused by, or arising out of" the use of a vehicle on a road or public place there was also an extensive domestic jurisprudence, not least the leading case of *Romford Ice and Cold Storage Co Ltd v Lister*, where a majority of the Court of Appeal held that an accident in the yard of a slaughterhouse did not arise out of use on a road. In such circumstances, there is inevitably also a default to a "remoteness" argument. On this point, Lord Hodge notes that "there must be a reasonable limit to the length of the relevant causal chain".

There was then the suggestion that the courts could intervene to "cure a linguistic mistake". Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* stated that where the context and background of a contract drove the court to the conclusion that something must have gone wrong with the language that the parties had used, the court did not have to attribute to the parties an intention which a reasonable person would not have understood them to have had, but he emphasised that it required a strong case to persuade a court that something must have gone wrong with the language. While in hindsight something may "have gone wrong with the language" on this policy document Lord Hodge took the view that "this is one of those rare cases where the mistake is clear as is the intended meaning, so that a party to the agreement does not need to apply for rectification of the Policy". The document was necessarily written in "plain language".

In conclusion, Lord Hodge indicates that "neither English domestic case law nor the jurisprudence of the CJEU supports the view that the carrying out of significant repairs to a vehicle on private property entails the 'use' of the vehicle".

Practice Points

- An essential problem, in this case, was that, in the words of the Master of the Rolls, the booklet containing the terms of the motor insurance policy was "not happily worded".
- While focused on a construction of this policy document and the context of compulsory motor insurance under the Road Traffic Act 1988 s.145(3)(a), the Supreme Court makes it clear that a search for compatibility with European Union Directives will not permit a "strained interpretation".
- With the potential rupture of the UK leaving the EU there are also many wider policy issues of how English Law disengages from nearly half a century of Directives and EU jurisprudence, but it is apparent from this case that domestic courts will not necessarily apply EU Law without consideration of the wider context and in the light of domestic law.
- While this case may be "fact sensitive" and on the cusp of "remoteness" the adherence to the term "use" being confined to "use on a road or in a public place" may well have repercussions for personal injury and property claims which are adjudged to be, or become, "off road".
- Once again there is a demarcation line between "public" and "private" space in Road Traffic cases, which had become essentially erased in EU Law.

Julian Fulbrook

Herbert v HH Law Ltd

(Court of Appeal (Civil Division); The Master of the Rolls, Lindblom LJ and Asplin LJ; [2019] EWCA Civ 527)

Conditional fee agreements—ATE—solicitor own client costs—detailed assessment—100% success fees—informed consent

LT After the event insurance; Burden of proof; Informed consent; Personal injury claims; Solicitor and client costs; Success fees

The claimant, a client of the defendant law firm, had been injured in a road traffic accident. The case was funded by a conditional fee agreement that provided for payment on success of:

- the basic charges;
- disbursements;
- ATE premium; and
- a 100% success fee.

The claim was submitted via the RTA portal and the client accepted a Pt 36 offer of £3,400 plus costs. From that sum, the firm deducted £1,178, comprising costs of £829 and an ATE premium of £349.

The client then instructed new solicitors to challenge the billed costs, contending that the firm had not conducted a risk assessment justifying the 100% success fee. Upon assessment, the district judge reduced the success fee to 15%; held the ATE premium to be a solicitor's disbursement; and ordered the firm to pay the costs of the assessment.

The order of the District Judge was appealed by Hampson Hughes solicitors ("HH") contending as follows:

- following the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") they had no alternative but to charge 100% success fees in order to remain profitable and in business;
- risk was no longer a factor in setting the success fee;
- the client had contractually agreed to that 100% success fee which meant that it had been a cost incurred with the "approval" of the client within the meaning of CPR 46.9(3) and consequently it was reasonably incurred and reasonable in amount;
- the ATE premium was not a solicitor's disbursement; and
- the costs order should not have been made without investigation of their allegation that the new solicitors had obtained their retainer illegally via "cold calling" the client.

That appeal of the defendant law firm was heard before Soole J on 21 March 2018 and was dismissed. The matter came before the Court of Appeal on 3 April 2019.

The Court of Appeal

The grounds of appeal pursued at the hearing were that the judge:

- was wrong in law in his construction and application of CPR 46.9(3),[1] in particular misconstruing and misapplying the presumptions in CPR 46.9(3);

[1] CPR 46.9(3): "Subject to para.(2), costs are to be assessed on the indemnity basis but are to be presumed—

- was wrong in law in his construction and application of CPR 46.9(4),[2] in particular as permitting the court to reduce an agreed success fee on a solicitor and client basis by the court's own assessment of the degree of risk present in the case; and
- was wrong in law in characterising an ATE insurance premium as a solicitor's disbursement liable to assessment under the Solicitors Act 1974 s.70.

The success fee

CPR 46.(3) and (4) should be read together. CPR 46.9(3) gives rise to presumptions about the reasonableness or otherwise of costs on a detailed assessment of solicitor-client costs. Under (a) and (b) the presumption is that they are reasonably incurred and reasonable in amount under (c) that they are unreasonable.

The issue before the court was whether Mrs Herbert had either expressly or impliedly approved the imposition of the success fee and its amount so as to trigger the presumption in: (a) that it was reasonably incurred; and in (b) that it was reasonable in amount. Such approval should be informed in the sense that the approval was given following a full and fair explanation to the client.

If a client brings proceedings under the Solicitors Act 1974 s.70(1) then the client must state the point of dispute and the grounds for it. The solicitor wishing to rely on the presumptions to rebut the challenge has the burden to show that informed approval was given by the client of the success fee and the amount.

Once the solicitor has adduced that evidence the evidential burden shifts to the client to establish that there was no consent or it was not informed consent, but the overall burden to show informed consent rests with the solicitor.

HH relied on their retainer letter, the CFA and a document entitled "What You Need To Know" and the fact that the CFA was signed by her post receipt of those materials. This was not enough:

> "It was open to her to seek to show that the documentation relied upon by HH was inaccurate or misleading or, in some other respect, insufficiently comprehensive in an aspect material to her understanding of the nature or amount of the success fee."

Mrs Herbert contended that the information was misleading because it did not accurately describe how the success fee was set.[3] The documentation relied upon by the solicitors provided a clear and comprehensive account of her exposure to the success fee and other fees generally. Both the District Judge and Soole J had considered the point that the success fee in a CFA agreement is set normally on the basis of the risk incurred:

> "Soole J said (at [43] and [44]) that risk assessment was likely to be a primary factor when considering the success fee percentage increase on a solicitor client assessment; and (at [47]) that informed approval would require that HH clearly explained to Ms Herbert before she retained HH that, in providing for a 100% uplift (subject to the 25% cap), HH took no account of the risk in any individual case but charged that as standard in all cases."

The argument that the business model of charging a 100% success fee across the board to reach reasonable remuneration did not displace the requirement of informed consent. The client should have been told that

(a) to have been reasonably incurred if they were incurred with the express or implied approval of the client;
(b) to be reasonable in amount if their amount was expressly or impliedly approved by the client;
(c) to have been unreasonably incurred if—
  (i) they are of an unusual nature or amount; and
  (ii) the solicitor did not tell the client that as a result the costs might not be recovered from the other party."

[2] CPR 46.9(4): "Where the court is considering a percentage increase on the application of the client, the court will have regard to all the relevant factors as they reasonably appeared to the solicitor or counsel when the conditional fee agreement was entered into or varied."

[3] The setting of the success fee at 100% was said to have been done by the solicitors in order to reach a deduction of the maximum 25% of damages, plus ATE premium, to return what was said to be a reasonable profit post LASPO.

the success fee was set taking no account of risk and the evidence given on the need to set the success fee in that way was:

> "… insufficient to avoid the need, for the purposes of informed consent of the client under CPR 46.9(3)(a) and (b), to have told the client that the success fee of 100% took no account of the risk in any individual case but was charged as standard in all cases."

The fact that LASPO operated to cap the deduction at 25% of damages did not make the starting point of a 100% uplift any less unusual in nature or amount. Appeal on this point dismissed.

The ATE insurance premium

The ATE premium was not a solicitor's disbursement and therefore not liable to assessment under the Solicitors Act 1974 s.70. It was an item incurred on behalf of, and as agent for, the client.

In *Re Remnant*,[4] the issue was whether an item was a professional disbursement or "a mere cash payment" and followed in *Re Buckwell & Berkeley*[5] where the question was characterised as:

> "whether this large payment in cash has been made by the solicitors in their professional character as solicitors, or whether it has been made by them as agents independently of that character, just as a banker or any other agent might make disbursements for a client."

Put in this context it was clear that it is a solicitors' disbursement if:

- it is a payment which the solicitor is, as such, obliged to make whether or not put in funds by the client, such as court fees, counsel's fees, and witnesses' expenses; or
- there is a custom of the profession that the particular disbursement is properly treated as included in the bill as a solicitors' disbursement.

That is also reflected in the SRA Handbook Glossary 2012 where:

> "The expression 'disbursement' is there defined as meaning:
>
> > 'in respect of those activities for which the practice is regulated by the SRA, any sum spent or to be spent on behalf of the client or trust (including any VAT element)'
>
> The expression 'professional disbursement' is defined as meaning:
>
> > 'in respect of those activities for which the practice is regulated by the SRA, the fees of Counsel or other lawyer, or of a professional or other agent or expert instructed by you, including the fees of interpreters, translators, process service, surveyors and estate agents but not travel agents' charges.'"

The ATE insurance premium did not fall into those categories. This would accord with the finding of the Court of Appeal in *Hollins v Russell*[6] where the client's liability to pay the ATE premium was said to be derived from the contract of insurance not the contract with the legal representative.

Appeal allowed on this point, but it was noted that if the outcome (of not being able to challenge the premium under the Solicitors Act 1974 s.70) was deemed unsatisfactory then the Law Society and SRA could consider what they should do about that.

[4] *Re Remnant* 50 E.R. 949; (1849) 11 Beav. 603.
[5] *Re Buckwell & Berkeley* [1902] 2 Ch. 596.
[6] *Hollins v Russell* [2003] EWCA Civ 718; [2003] 1 W.L.R. 2487.

Comment

There are many who complain that successive governments have rendered solicitors more of a trade than a profession when it comes to their ability to earn a living whilst still imposing the old fashioned ethics of the professional. It is difficult to identify a free market more intensely policed than the legal profession. Where else is one's ability to charge subject to third party moderation where public funding is not involved? If a law firm was operating in a non-law market it could set its charges based purely on its own cost and profit features and the customer would vote with their feet. Well known purveyors of furniture sell their wares with inflated prices to allow the purchaser to have interest free credit for significant periods of time. If you wanted to operate at, say, a 30% profit margin and pitch yourself at the luxury market then you take your chance with the customers in that market accepting and choosing you. Supermarkets boast of their price challenges but when they are charging more for a standard household item than a rival there is no regulator or third-party moderator requiring them to inform the customer at the doors that they may find cheaper items elsewhere. And yet solicitors are subject to a charging regime dating back in one arena to the 13th century[7] and to the court acting as price fixer in another.

Many firms will have amended their pricing to deal with the commercial pressures brought about by LASPO. The pricing, in this case, was not hidden and indeed the court commended the firm on the clarity and accuracy of its written advice[8] and yet it emphasised the absence of informed consent in this pricing. A requirement not found in most other consumer bargains but it has to be acknowledged with modern judicial thinking on consumer service, as shown by the modernisation of what constitutes real consent in the field of medicine.[9]

Furthermore, the solicitor relied on the client's explicit approval of the 100% uplift, citing CPR r.46.9(3) which states:

> "costs are to be assessed on the indemnity basis but are to be presumed—
> (a) to have been reasonably incurred if they were incurred with the express or implied approval of the client;
> (b) to be reasonable in amount if their amount was expressly or impliedly approved by the client."

From the first hearing the consent issue was there the District Judge deciding that the presumption at CPR 46.9(3)(a) was rebutted because there was no clear evidence that the claimant had given "informed consent" to his lawyers to accept a potential charge of a success fee of 100% in what was considered a straightforward road accident claim, such that he allowed a success of 15%. It is worth remembering that under the pre-LASPO regime the fixed success fees in this type of case were staged at 12.5% and 100% at trial; reflecting the national average of the outcomes in these types of cases and the success fees needed to break even on the firm's basket of cases. It was common ground at this and subsequent hearings that the consent needed to be informed. The dispute was that the law firm thought the burden of proof fell to their former client.

The after the event policy premium was not before the court as it had not been included within the statute bill which was being assessed. The District Judge then assessed the cash account where the claimant argued that the premium should be removed because it was a professional disbursement which should appear within the statute bill.

Parts of this case may stretch the memories of some lawyers from their accounts studies at law school. The cash account looks at the monies paid by the solicitor for items not in the bill. The District Judge accepted the claimant's argument and assessed off the premium.

[7] Statute of Westminster 1275 established the indemnity principle.
[8] *Herbert v HH Law Ltd* [2019] EWCA Civ 527 at [48].
[9] See *Montgomery v Lanarkshire Health Authority* [2015] UKSC 11; [2015] A.C. 1430.

At the first appeal, Soole J upheld both decisions determining the position on the premium by ruling that its recoverability depended upon whether it was a client disbursement or a solicitor's disbursement. If it was the former it should be included in the cash account; if it was the latter it should be in the bill.

The District Judge had decided that the insurance policy was part of the package of services offered by the solicitor and part of their professional duty and curiously he found that the custom of the profession was that the policy was to be treated as a solicitor's disbursement.

In the final appeal, the Master of the Rolls upheld the decision on the success fee but reversed the decision on the question of the premium.

First to go unsurprisingly was the argument that the burden of proof fell to the client:

> "We consider that where, as here, the client brings proceedings under the Solicitors Act 1974 s.70(1), it is for the client to state the point of dispute and the grounds for it. If the solicitor wishes to rebut the challenge by relying on the presumption in CPR 46.9(3)(a) or (b), the burden lies on the solicitor to show that the pre-condition of the presumption, informed approval, is satisfied. Once the solicitor has adduced evidence to show that the client gave informed consent, the evidential burden will move to the client to show why, as a result of having been given insufficiently clear or accurate or comprehensive information by the solicitor or for some other reason, there was no consent or it was not informed consent. The overall burden of showing that informed consent was given remains on the solicitor."[10]

Many lawyers assumed that risk assessments were the tools to secure success fees pre-LASPO. In fact, of course, risk assessments were simply evidence of good lawyering and case planning. Thus even though the CPR requirement to have them no longer appears in the rules, many lawyers, including counsel, will still use them.

It was held here that the fixing of success fees in the context of CFAs had traditionally been related to an assessment of the risk of the individual proceedings. Although post LAPSO the Costs Practice Direction relating to assessment of risk had been revoked,[11] the Master of the Rolls considered the current CPR 46.9(4) as nevertheless being risk related:

> "… shows that it was envisaged that a success fee would be related to risk: the reference to the perception of the solicitor or counsel when the conditional fee agreement was entered into or varied closely reflects the language in the former 44PD para.511.7 and 48PD.6 para.54.5(2)."[12]

The obvious problem that provided to the appellants and indeed all lawyers seeking to justify high success fees is that the business model justification for 100% success fees on all cases, with client protection by way of the cap, does not fit with the risk of the case:

> "I do not consider that either HH's justification for its charging model or the 25% cap answer the point that in this country, in the context of a conditional fee agreements, the amount of a success fee is traditionally related to litigation risk, as reasonably perceived by the solicitor or counsel at the time the agreement was made. Across the broad range of litigation, it would be unusual for it not to be. It continues to be the case in those limited areas, such as publication and privacy proceedings and mesothelioma claims, where success fees are still recoverable from the losing party."[13]

The limited but no less important success for the profession was that the Court of Appeal went on to overturn the ATE premium decision:

[10] *Herbert v HH Law Ltd* [2019] EWCA Civ 527 at [38].
[11] CPR 44PD para.511.7 and 48PD.6 para.54.5(2).
[12] *Herbert v HH Law Ltd* [2019] EWCA Civ 527 at [50].
[13] *Herbert v HH Law Ltd* [2019] EWCA Civ 527 at [53].

> "It follows that a disbursement qualifies as a solicitors' disbursement if either (1) it is a payment which the solicitor is, as such, obliged to make whether or not put in funds by the client, such as court fees, counsel's fees, and witnesses' expenses, or (2) there is a custom of the profession that the particular disbursement is properly treated as included in the bill as a solicitors' disbursement."

The court acknowledged that the premium was not something the solicitor was obliged to deal with but was actually a price for an insurance contract between the client and the insurer. The Court of Appeal had previously commented in *BNM v MGN Ltd*[14] on the status of an ATE premium:

> "In any event, I do not consider that ATE insurance premiums fall within the natural meaning of 'expenses' of litigation. They have nothing to do with the cost of issuing and progressing the litigation, any more than the premiums on a householder's or car owner's insurance which contains litigation cover. Both before the event insurance and after the event insurance offset the risk of a person's financial exposure as a result of litigation but they are not expenses of the litigation itself."[15]

Perhaps controversially, the Master of the Rolls acknowledged the implications of his decision here on the premium which means that no client may ever challenge the premium on a Solicitors Act assessment. Pre-LASPO that was not so much an issue where the premium was expected to be recovered from the claimant's opponent, now where it often will be deducted from the client's compensation, it becomes much more important:

> "No doubt, if this outcome is considered unsatisfactory within the profession, the Solicitors Regulation Authority and the Law Society can consider what could be done to bring an ATE insurance premium within the principle as to what is a solicitor's disbursement."[16]

This decision will impact firms who historically followed the practice applied in this case. There have even been reports of claims farmer marketing for claimants whom they had referred to these same law firms, to invite them to challenge the deductions from their damages. There are already law firms marketing them as experts on solicitor practice and inviting instructions from former litigants wishing to check that not only did they receive adequate compensation but whether any deductions from their compensation were lawful or should be repaid.

It is important to remember that there is nothing to stop firms charging 100% deductions from claimants' damages in successful cases as here, provided the client has had this fully explained to them and they have expressly consented to the arrangement. Some wonder how one could ever properly justify this method of charging but in practice, many consumers really don't care. They want a simple and quick remedy; they want it costing them nothing if they lose. They don't care what it costs them if they win. Why do we think claims farmers have blossomed with payment protection insurance claims? Why should lawyers have their ability to compete be fettered? Because we still want to be a profession.

Practice points

- Risk assess every case regardless of contingent funding or not.
- The terms of any retainer with the client should be clear and fully explained to the client as well as evidenced on the file.
- If the success fee does not reflect the individual case risk then ensure the client understands and agrees to the basis for the success and indeed any deduction from their damages and in what circumstances and evidence this.

[14] *BNM v MGN Ltd* [2017] EWCA Civ 1767; [2018] 1 W.L.R. 1450.
[15] *Herbert v HH Law Ltd* [2019] EWCA Civ 527 at [73].
[16] *Herbert v HH Law Ltd* [2019] EWCA Civ 527 at [71].

- There should be a clear and evidenced explanation to why any insurance policy is recommended and how it is charged and in what circumstances.

Mark Harvey

Ferri v Gill

(QBD; Stewart J; 17 April 2019; [2019] EWHC 952 (QB))

Costs—fixed costs—personal injury claims—pre-action protocols—road traffic accidents

Costs; Fixed costs; Low value personal injury claims; Pre-action protocols; Road traffic accidents

The defendant appealed against a decision of a master that the claimant's costs should be subject to a detailed assessment.

On 26 January 2015, the claimant had been riding his bicycle when the defendant's opening car door struck him. The claimant, a self-employed builder and decorator, suffered injuries to his arm, abdomen, back, neck and left shoulder. The claimant was off work for a week and then had some reduction in his ability to work.

The claimant instructed solicitors who obtained a report from a general practitioner, who expected a full recovery within four months. On 29 January 2015, the claimant's solicitors completed a claim notification form under the pre-action protocol for low-value personal injury road traffic accidents with the defendant subsequently admitting liability and making an offer of £1,500.

The claimant instructed new solicitors who wrote on his behalf to say the claim was not considered to be a "fast track portal claim" on the basis that the claimant had suffered a serious shoulder injury, had an ongoing loss of earnings and required private treatment. The new solicitors obtained a report from an orthopaedic surgeon who diagnosed damage to the acromioclavicular joint and advised that the claimant be referred for corrective surgery. On 20 October 2016, the claimant underwent arthroscopic examination of his left shoulder with bursoscopy, arthroscopic sub-acromial decompression, arthroplasty and biceps tenodesis.

On 13 February 2017, the claim was settled by the defendant for £42,000.

The claimant sought more than fixed recoverable costs under Pt 45 and issued Pt 8 proceedings. Whilst Pt 45s.IIIA deals with fixed recoverable costs Pt 45.29J provides that if it considered that there were "exceptional circumstances making it appropriate to do so", the court will consider a claim for costs which was greater than the fixed recoverable costs.

The master found there were exceptional circumstances and ordered that the claimant's costs to be subject to a detailed assessment. The master held that a low bar should be set for a finding of exceptional circumstances and that exceptional circumstances were circumstances "which take [the case] out of the general run of the type of such a case". The master also stated that exceptionality should be measured by reference to both cases that were within the protocol and cases which had left it.

On appeal, the issues are whether the master had been right in her test of "exceptional circumstances" and whether she had been right in identifying the "basket" of cases against which a case had to be exceptional.

An expression such as "exceptional circumstances" had to take its colour from the setting in which it appeared: *R. v Soneji (Kamlesh Kumar)*.[1] Given the context of Pt 45.29J, the master had been wrong to set a low bar for a finding of exceptional circumstances. In *Hislop v Perde*,[2] decided after the master reached her decision, the Court of Appeal stated that "a test requiring exceptional circumstances [was] already a high one". Further, the policies underpinning the fixed-costs regime were providing certainty and it was expected that solicitors would take the rough with the smooth in a "swings and roundabouts" approach. The setting of those policy reasons, while allowing for exceptional circumstances as a departure from the regime, required a strict, not a "low bar", approach.

Turning to the appropriate basket for comparison by including cases which remained within the protocol, the master had used the wrong "basket" for comparison. Exceptionality had to be measured only against the cases that were covered by s.IIIA, namely those which had exited the protocol.

The appeal was allowed and the case remitted for reconsideration by a different master.

Comment

When establishing any protocol there are the same key questions:

- What goes in?
- When does it come out?
- Where does it go when it comes out?

Tied in with that second question is the desire to keep cases within the protocol to maintain the efficiency of the process. It would be unhelpful to create a protocol designed to deliver the efficient processing of a class of cases if it was as leaky as a sieve with exit from the process not being controlled. Inevitably escaping from the costs constraints of the low-value personal injury portals would be a popular tactic.[3] As a consequence, exit from the low-value protocols[4] is controlled by costs consequences and by a test of exceptional circumstances[5] which was under consideration in this case.

The court confirmed that the test of exceptionality is a high bar. That aspect of the decision is unsurprising as it follows the general theme that has developed in other cases where the court has considered escape from the low-value protocols.[6] In short, the courts have made it clear that they will closely police escape as there is a strong public policy benefit in those cases that were intended to stay within the protocols and thereafter to stay within the ex-portal fixed costs regime to stay there.

This judgment tightens the test even further as it makes it clear that the basket of cases which form the backdrop for deciding if the case before the court is "exceptional" for the purposes of the test in CPR 45.29J is not those cases that would ordinarily be within the protocol but those that have been it and left. So, that would include, for example. those cases where liability could not be resolved and the case had to leave the protocol and enter the fixed costs regime in Part 45s.III.

Whilst the reasons for such a high bar test are understandable in the context of the need for the system to operate it has led to a particularly harsh outcome in this case. This case should never have entered the low-value protocol system and the new solicitors did well in obtaining the correct level of compensation for the injured claimant. If the case had not entered the low-value protocol then the fixed costs regime would not have applied[7] and the test of exceptionality in Pt 45.29J would have been avoided.

[1] *R. v Soneji (Kamlesh Kumar)* [2005] UKHL 49; [2006] 1 A.C. 340.
[2] *Hislop v Perde* [2018] EWCA Civ 1726; [2019] 1 W.L.R. 201.
[3] Given the very low level of costs recoverable in such cases and the need to act in the client's best interests often by doing more work than is possible for that level of costs.
[4] The Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents and the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims.
[5] CPR 45.29J.
[6] *Hislop v Perde* [2018] EWCA Civ 1726; [2019] 1 W.L.R. 201 and *Qader v Esure Services Ltd* [2016] EWCA Civ 1109; [2017] 1 W.L.R. 1924.
[7] CPR Pt 45s.III applies the fixed costs regime to ex-protocol cases.

There was another missed opportunity to avoid the test of exceptionality that was missed. Following the decision in *Qader v Esure*,[8] Briggs LJ, as he then was, brought the issue of multi-track cases being caught by the fixed costs rules as they had started in the low-value protocol to the Civil Procedure Rule Committee.[9] An amendment was made to the rules to the effect that where a case had begun in the low-value protocols it would enter the fixed costs regime in s.III but would exit if and when it was allocated to the multi-track.[10]

As soon as it was clear that the matter was no longer suitable for the low-value protocol that should have been communicated to the defendant and it would have been prudent to have commenced proceedings. Once the case had been allocated to the multi-track it would have been outside the fixed costs regime and the test of exceptionality would not have been in issue.

Practice Points

- Cases should be carefully reviewed in relation to likely value before any decision is taken to place it in the low-value protocol system.[11]
- That should be undertaken by an experienced lawyer with knowledge of cases that would not ordinarily be within the low-value scheme.
- If there is a reasonable chance that damages will place the matter in the multi-track then a decision should be made to stay outside the protocol and that should be communicated to the defendant when the letter of claim is sent.
- If a case enters the low-value protocol and then has to exit as it becomes clear that it has become a multi-track case then this should be clearly communicated to the other party as soon as practicable.
- Proceedings should then be commenced with a view to the court confirming that the case is not suitable for the fixed costs regime by allocating the matter to the multi-track.

Brett Dixon

Antuzis v DJ Houghton Catching Services Ltd

(High Court of Justice Queen's Bench Division; Lane J; 8 April 2019; [2019] EWHC 843 (QB))

Director liability—bona fide—Companies Act

LT Breach of contract; Directors' liabilities; Employers' liability claims; Employers' liability insurance; Gangmasters; National minimum wage; Remuneration; Unlawful deductions from wages

The claimant agricultural workers applied for summary judgment in a claim brought against the first defendant company, the second defendant company secretary and third defendant company director.

The claimants were Lithuanian nationals who had come to the UK to work as chicken catchers on farms. Their employment was subject to the Gangmasters (Licensing) Act 2004 and complained that they were being exploited and working long hours for wages below the statutory minimum.[1] Specifically:

[8] *Qader v Esure Services Ltd* [2016] EWCA Civ 1109; [2017] 1 W.L.R. 1924.
[9] Lord Briggs was then the Deputy Head of Civil Justice and chaired the CPRC meetings.
[10] CPR 45.29B and 45.29D use the words "and for as long as the case is not allocated to the multi-track" to achieve that outcome.
[11] Often referred to as the portal.
[1] Prescribed by the Agricultural Wages Act 1948 and the Agricultural Wages (England and Wales) Order 2012 (SI 2012/107).

- they were frequently not paid sums shown on the wage slip;
- that the wage slips were fictional;
- payments were withheld as a form of punishment;
- holiday pay and overtime were not paid;
- deductions were unlawfully made for employment fees and rent; and
- one claimant had been denied bereavement leave.

Each of those complaints was made out, with the judge finding:

> "The claimants' evidence was also overwhelmingly demonstrative of the use made by D2 and D3 of the manifestly unsavoury and generally problematic individual known as Edikas Mankevicius ('Edikas'). The claimants' evidence shows that Edikas was used by the defendants as an enforcer, to ensure that chicken catchers followed what I have concluded was the gruelling and exploitative work regime that was being imposed upon them by the defendants."

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

Director liability

On 8 August 2018, Master Yoxall had ordered a trial of a preliminary issue; namely whether the second and third defendants were personally, jointly and/or severally liable to the claimants for the company's breaches of contract.

The general principle is that directors of a company will be liable for torts of a company that are committed at their direction.[2] The rule in *Said v Butt*[3] made that consideration more problematic when the act complained of was a breach of contract, where McCardie J made obiter comments:

> "But the servant who causes a breach of his master's contract with a third person seems to stand in a wholly different position. He is not a stranger. He is the alter ego of his master. His acts are in law, the acts of his employer. In such a case it is the master himself, by his agent, breaking the contract he has made, and in my view the action against the agent … must therefore fail just as it would fail if brought against the master himself for wrongly procuring a breach of his own contract
>
> …
>
> I hold that if a servant acting bona fide within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not become liable to an action of tort at the suit of the person who contract has thereby been broken. I abstain from expressing any opinion as to the law which may apply if a servant, acting as an entire stranger, wholly outside the range of his powers, procures his master to wrongfully break a contract with a third person."

That rule had been subject to much scrutiny in the years that followed. What mattered was the officer's conduct and intention in relation to the company, not the third party. That was the focus of the bona fide enquiry envisaged in *Said*.[4] That meant that the nature of the breach of the contract between the company and the third party is actually relevant as it informs the question of whether the officer has breached their duties towards the company.

The breaches included not paying wages in a manner that statute required, but that alone could not be determinative or directors would regularly face personal liability as many aspects of employment contracts have a statutory element. However, the duties under the Companies Act 2006 were relevant:

[2] *Rainham Chemical Works v Belvedere Fish Guano Co Ltd* [1921] 2 A.C. 465 followed.
[3] *Said v Butt* [1920] 3 K.B. 497.
[4] *Ridgeway Maritime Inc v Beulah Wings Ltd (The Leon)* [1991] 2 Lloyd's Rep. 611 applied.

> "… section 172 of the Companies Act imposes important duties on directors to act in good faith so as to promote the success of the company and, in so doing, to have regard to matters such as 'the likely consequences of any decision in the long term: the interests of the company's employees; the impact of the company's operations on the community; and the desirability of the company maintaining a reputation for high standards of business conduct'. Section 174 of the same Act imposes a duty on the directive to exercise reasonable care, skill and diligence.
>
> 119 The nature of the breach of contract is directly relevant to the determination of whether, in a particular case, a director has complied with section 172, as regards his or her duty to the company and the ultimate question whether inducing the breach is actionable against the director."

Breaches of statutory requirements are relevant to whether a director has complied with their duties under the Companies Act 2006 s.172 as they set the standard that society expects which is directly relevant to the impact breaching them would have reputationally on the company:

> "Accordingly, as a general matter, the fact that the breach of contract has such a statutory element may point to there being a failure on the part of the director to comply with his or her duties to the company and, by extension, to the director's liability to a third party for inducing the breach of contract. Whether such a breach has these effects will, however, depend on the circumstances of the particular case."

The company was 100% owned by the third defendant and the second defendant was company secretary who must act in the company's interests. They acted in breach of s.172 and s.174 even though they were acting within the authority of their positions. What they had done was not in the best interests of the company or employees. The inescapable conclusion was that they were unable to act in the way that they had on behalf of the company as a matter of law.

It may be that they had a desire to maximise profits (which they alone enjoyed) but it had catastrophic consequences for the company as its reputation declined so did its fortunes. They were not acting bona fide in relation to the company. That then required a consideration of *OBG Ltd v Allan*[5] in order to determine whether the second and third defendants, acting in their own right, were liable for inducing breach of contract. Lord Hoffmann in *OBG* stated:

> "To be liable for inducing breach of contract, you must know that you are inducing a breach of contract. It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must actually realize that it will have this effect. Nor does it matter that you ought reasonably to have done so."

A conscious decision to turn a blind eye would also be enough as the law treats it in these circumstances as being equivalent to knowledge of the fact.[6] Here, both the second and third defendants knew what they were doing was causing the company to be in breach of its contractual obligations to the claimants. The breaches they occasioned were central to the method by which the company was operating.

Judgment for the claimants.

Comment

In the 19th century, the pay of soldiers in the British army was nominally one shilling per day, but this was reduced by "stoppages" of up to sixpence (half a shilling) for their daily rations, and other stoppages

[5] *OBG Ltd v Allan* [2007] UKHL 21; [2008] 1 A.C. 1.
[6] *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1; [2003] 1 A.C. 469 considered.

for the issue of replacement clothing, damages, medical services etc. By 1847, this practice was restricted so that a soldier received at least one penny per day, regardless of all stoppages.

Even today some stoppages remain for food, accommodation and so forth. However, stoppages today are not as draconian as those of the 19th and early 20th centuries and certainly not as pernicious as the practices employed by the two directors at the centre of this case, Darrell Houghton and Jackie Judge.

Their company, DJ Haughton Catching Services Ltd, was a million-pound business which, allegedly, had a profit of some £650,000 and was entirely reliant on overseas labour, mainly Lithuanian. The working conditions were appalling and, arguably, bear some comparison to those of the 19th century soldier or factory worker. Some witnesses spoke of 100-hour weeks. At times, workers would only spend minutes or a couple of hours at home before being called out again. When working away, no accommodation was provided, and they had to sleep in the van; unless that is if the driver was asleep. They were under strict instructions not to wake the driver and on those occasions had to bed down with the chickens! The pay was stopped for various nefarious reasons including, it would seem, leaving a dirty mug in the sink; because a party had been held at one of the houses owned and operated by Judge; if it was thought that someone was drunk and for other inexplicable reasons. On one occasion, some chickens fell through a gap in the rotten floor of a chicken shed and died. Following this, the whole house of workers on site at the time was not paid. Witnesses spoke of it being usual not to be paid at all least once every one or two months.

When one witness started work for DJ Houghton Catching Services Ltd he weighed 100kg; when he left his weight had dropped to 67kg through "no rest or proper food". Another witness was not allowed to go to hospital after he hit his forehead at work and another was only allowed one day off to return to Lithuania to attend his mother's funeral. This was a physical impossibility.

Houghton and Judge also used the services of an enforcer called Edikas. On occasions, he would turn up at a property with bouncers and in short, Houghton and Judge used Edikas to psychologically intimidate the workers and to keep them under control. The practices employed by Judge and Houghton as directors of DJ Houghton Catching Services Ltd could be said to amount to an example of modern-day slavery.

While *Antuzis v DJ Houghton Catching Services Ltd* and others is essentially an employment law case dealing with the national minimum wage, working time regulations and regulation of Gangmasters, it may potentially have an impact in respect of employers' liability claims and could generally have quite far reaching consequences. In this context, it is worth repeating the pertinent sections of the Companies Act 2006:

"172— **Duty to promote the success of the company**

(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—

(a) the likely consequences of any decision in the long term,

(b) the interests of the company's employees,

(c) the need to foster the company's business relationships with suppliers, customers and others,

(d) the impact of the company's operations on the community and the environment,

(e) the desirability of the company maintaining a reputation for high standards of business conduct, and

(f) the need to act fairly as between members of the company."

Section 174 (Duty to exercise reasonable care, skill and diligence) goes onto say:

"(1) A director of a company must exercise reasonable care, skill and diligence.
(2) This means the care, skill and diligence that would be exercised by a reasonably diligent person with—
(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and
(b) the general knowledge, skill and experience that the director has."

These sections impose important duties on directors as distinct to the duties of the company for which someone may be a director. And this, in the context of personal injury claims, is the real relevance of this case.

As Lane J pointed out at [108] of his judgment, there is a general principle that the directors of a company will be liable for the torts of the company "committed at their direction". The position is slightly different in respect of breach of contract. Here, the *Said v Butt*[7] principle applies, as per McCardie J in his judgment:

> "I hold that if a servant acting bona fide within the scope of his authority procures or causes the breach of contract between his employer and a third person, he does not become liable to an action of tort at the suit of the person whose contract has thereby been broken."

However, Lane J contrasted the examples of the deliberate late payment of a supplier's invoice due to cash flow problems on the one hand and a restaurant company director who decides to serve horse meat as opposed to beef on the basis that horse meat is cheaper. Lane J pointed out that not only would this cause reputational damage to the company it would also breach food and trading standards legislation and that it was:

> "society's disapproval of acting in this manner that gives rise to the statutory duty and the breach of that duty is therefore indicative of societal disapproval of what the director had caused the company to do and the resulting reputational damage."

At [122] he went onto say:

> "Accordingly, as a general matter, the fact that the breach of contract has such a statutory element may point to there being a failure on the part of the director to comply with his or her duties to the company and, by extension, to the director's liability to a third party for inducing the breach of contract. Whether such a breach has these effects will, however, depend on the circumstances of the particular case."

He went onto find that neither Houghton nor Judge could honestly believe that they were paying the statutory minimum wage or overtime, or holiday pay and that they were entitled to withhold payments as they often did. They did all these things to maximise profits which they alone benefitted from. In short, they were not acting bona fide as was required in *Said v Butt*.

Lane J has obviously sought to achieve a fair and just result and has developed the law incrementally to that end. It also prompts an interesting debate but, from a personal injury perspective, I think it will be of limited application. In normal circumstances, company directors will be indemnified under an EL policy. For a company director to be personally liable in a personal injury claim they would have to act in an extremely egregious way to be deemed not to be acting *bona fide*. In such circumstances, I would anticipate that an EL insurer would seek to rely on the "deliberate act" exclusion of the policy.

[7] *Said v Butt* [1920] 3 K.B. 497.

Practice Points

- In employer's liability cases have regard to whether the directors may also be personally liable for breach of statute as well as the corporate entity.
- If the actions of the directors with regards to, for example, health and safety were such that they could not be said to be acting bona fide as directors, they may also be personally liable.
- While in many cases this may be a moot or even esoteric point, as it will be best to proceed against the company itself, there will be some instances where it is advantageous to consider the director's own liability. For instance, when a company has been wound up but the directors have assets in their own right and there are indemnity issues which inhibit a claim under Third Party (Rights Against Insurers) Act 2010.
- Also, explore whether the directors have any Directors and Officers insurance. Wordings of such policies are often a proverbial minefield!

David Fisher

XDE v Middlesex University Hospital Trust (2019)

[2019] EWHC 1482 (QB) QBD (Jay J, Master Haworth) 12 June 2019

Legal advice and funding—After the event insurance—Conditional fee agreements—Costs—Expert reports—Funding arrangements—Insurance premiums—Legal aid—Litigation friends—Reasonableness—Success fees

LT After the event insurance; Conditional fee agreements; Costs; Insurance premiums; Legal aid; Litigation friends; Success fees

The claimant appealed against a judge's refusal to allow her success fees and ATE premium.

The claim arose from the delayed diagnosis of tuberculosis meningitis. One of the alleged breaches of duty was admitted, but causation remained disputed.

The litigation friend instructed solicitors. In 2009 the solicitors were granted a legal aid certificate limiting costs up to stage 2 to £55,480 for the claim. In December 2011, the solicitors wrote to the Legal Services Commission ("LSC") seeking a £10,000 increase to the costs limit to deal with two further experts, making five in total. The LSC advised that its clinical negligence guidance limited a five-expert case to £45,000, and said a formal request for funding should be made accompanied by form CLSAPP8. The solicitors replied in May 2012 stating that their current costs were £57,000, costs at the point of issue would be £67,000, that they would not be able to progress the case with the current costs limit and requested that the certificate be discharged.

The solicitors advised the litigation friend of the recommendations they made to the LSC, advised her that the claimant would be in broadly the same position if the litigation friend proceeded under a CFA-lite, and that there was no need to complete a form that the LSC would send which requested that legal aid continue. The LSC issued a discharge certificate in May. The litigation friend entered into a CFA-lite with a 100% success fee and associated ATE insurance premiums.

Disallowing the success fee and ATE insurance premiums, the costs judge held, among other things: that the information the solicitors provided in its first LSC letter was inadequate; the information in the second letter should have been contained in form CLSAPP8 and an accompanying report; the litigation

friend was advised not to complete any LSC forms he might receive without providing further advice on the appropriateness of the change to a CFA-lite; the solicitors attempt to obtain further LSC funding had been half-hearted and was really a pre-cursor to getting the certificate discharged; whilst it might have been too late in December 2011 to get the necessary funding to conduct the case, the solicitors should have ensured that the case was run within the contractual costs limit, but no evidence had been provided to demonstrate how that would be achieved; and changing funding arrangements because no effort had been made to run the case within the original funding agreement was not reasonable. A similar case had occurred in *Surrey (A Child) v Barnet and Chase Farm Hospitals NHS Trust*,[1] and one of the issues the instant court had to consider was the extent to which the principles in *Surrey* applied. In *Surrey* the litigation friends were not told that changing from legal aid to a CFA before 1 April 2013 would disentitle them to the 10% *Simmons v Castle* uplift. The position had been the same in the present case but here the funding change had occurred almost a year before 1 April 2013.

On appeal the claimant submitted that the costs judge had been wrong to equate the facts of this case with *Surrey* as there had been little to choose between legal aid and CFA funding. It was either that the decisive *Simmons v Castle* uplift in *Surrey* did not apply here or that a CFA-lite was so obviously advantageous that its qualities were bound to be dispositive in any decision-making process. In the alternative, the costs judge should not have held that the switch to a CFA was unreasonable; the claimant had no choice as she had exhausted her legal aid budget.

On the claimant's first argument the premise was incorrect as *Surrey* could not be read as already factoring in the *Simmons v Castle* uplift. The judges in *Surrey* had decided at an abstract level of assessment that the pros and cons of legal aid versus CFA-lites were finely balanced. The statement in *Surrey* that there was not much to choose from between legal aid and CFA funding was a general statement applying to all legal aid and CFA cases. It was not limited to CFAs which post-dated 1 April 2013 and therefore attracted the benefit of the uplift. The claimants recognised that the costs judges in *Surrey* had found that they were on a fairly level playing field, and that was an evaluative assessment which could not be shaken on appeal. The claimant's alternative submission that CFA-lites were preferable to legal aid and so the absence of subjective reasons in the solicitors' advice to the litigation friend was nothing to the point, lacked the necessary factual underpinning. The real reason for the change to funding was that in May 2012, the existing legal aid funding had run out. There was no escaping the principle in *Surrey* that the receiving party's reasons for switching from legal aid to a CFA required scrutiny; *Surrey* and *Sarwar v Alam*[2] followed. By the time the legal aid limit had been exceeded there was no prospect of extending the certificate; the claimant's solicitors had actively asked for it to be discharged. It could not be said that the solicitors had been in that letter seeking an extension of that certificate in some indeterminate amount on the basis of the information they had put forward. There was only one reason for the change in funding and the real question was whether the solicitors were culpable or otherwise in relation to the resulting state of affairs. The solicitors had stated that the claimant would be broadly in the same position under a CFA. The claimant did not seek to question or undermine that advice and it was not so plainly wrong that the court could look behind it. There was a difference in principle between a factor like the *Simmons v Castle* uplift which was an indisputable advantage, and the factors the claimant prayed in aid. Those factors were not so overwhelming that the failure to mention them might be overcome.

On the claimant's second argument, that switching to a CFA was reasonable, the solicitors had not provided any estimate of the costs to the end of stage 2, £57,000 already having been spent, but the costs judge had to have carried out some cursory calculations and the claimant accepted that approximately £90,000 was right. Therefore, a significant overspend would have occurred even without the two additional experts and the costs limit had probably been exceeded in March or April. The LSC's letter did not rule

[1] [2018] EWCA Civ 451.
[2] [2001] EWCA Civ 1401.

out an application for additional costs; it just had to be done in the proper form, but nothing was forthcoming. The costs judge's reasons for holding that the solicitors had behaved unreasonably were appropriate evaluative assessments. They should have kept the case within budget, demonstrated their adherence to the budget, and made a timeous and proper application for additional funding if needed. It had not been too late by December 2011 to make a properly constituted application for additional funding, the costs judge had only indicated that it "may be". Arguably the judge understated the difficulty, but it was not obviously wrong. The claimant had failed to discharge the burden of proof; it was for him to show that the lateness of the application made no difference.

The appeal was dismissed

Comment

Introduction

The last two decades have seen not just major procedural reforms affecting the way such claims are brought and defended, but also significant changes in the way personal injury and clinical negligence claims are funded.

Whilst these funding reforms have obviously impacted on defendants when paying the costs of successful claimants, it is claimants' representatives who have had to face the challenge of helping claimants navigate the ever-changing funding options.

20 years ago a large number of personal injury and clinical negligence claims, and most of those involving claims for significant damages, were run on the basis of the claimant having the benefit of legal aid. There was a perception, at the time, that this system was in need of reform and hence, over the next couple of decades, a somewhat Byzantine system of funding has been created with a variety of funding methods, the complexity not being helped by heaping further reform upon earlier reform.

The duty of the claimant's lawyer has, throughout, remained constant: to help the claimant make an informed decision about what is, for that particular claimant, the best of available funding methods.

In a developing and ever changing environment where lawyers, and indeed the courts, have had to keep pace with the ramifications of each funding method it is, perhaps, a lot to expect that the individual claimant will fully appreciate the nuances associated with different ways of funding claims. There is, furthermore, surely a danger, with all the benefit hindsight brings, in judging too critically what the claimant decided, and what the claimant's lawyers advised, about the funding of a claim many years after the event.

The judgment in this case does not seem to fully recognise these very real difficulties.

Before considering the judgment it does, therefore, seem appropriate to consider the context in which the decisions, now being judged, were made.

Context

Following the introduction of funding by conditional fee agreement ("CFA") in 1995 further reforms in 2000 allowed the recovery, as part of the costs of the claim, of both a success fee and an after the event ("ATE") premium.

These reforms were made to offset the contemporaneous and considerable reduction in availability of legal aid, on the basis that this would preserve access to justice for parties previously entitled to legal aid. The reforms, however, were not confined to those who would previously have been entitled to legal aid.

This method of funding put the claimant, who opted for that method, into a strong position, hence references in earlier cases to such claimants as "super claimants".

Whilst, in 2000, legal aid was largely withdrawn for personal injury claims the earlier regime largely prevailed for clinical negligence claims for more than a decade, hence the claimant in this case was able to secure, in 2007, a legal aid certificate.

During this period, however, most claimant practitioners found that legal aid funding became increasing untenable, particularly for more substantial claims, as the Legal Services Commission ("LSC") applied an increasingly rigid approach to the operation of the scheme.

The recoverability of additional liabilities lasted until the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2013 ("LASPO"), in April 2013. Thereafter, whilst claims could still be funded by a CFA, claimants, at least in most cases, were no longer able to recover additional liabilities as part of the costs. At the same time legal aid was largely withdrawn for clinical negligence claims.

As information about these pending reforms emerged legal representatives, mindful of the duty to keep claimants up to date with relevant changes in the law, had to analyse, and advise upon, the forthcoming changes so that claimants could make decisions about the future funding of claims.

On the basis of information available in 2012 and 2013 it became apparent to practitioners that even where the claimant had the benefit of a legal aid certificate it was prudent to consider revising funding arrangements. That was because the failure to do so in a timely way, at that stage, might later leave the claimant disadvantaged and result in a complaint of failure to give appropriate advice.

More specifically whilst a claimant would have a number of potential advantages, or pros, for remaining on legal aid there were probably more potential disadvantages, or cons, in so doing and hence it was essential to carefully consider, in legal aid cases, moving to an alternative method of funding, most likely a CFA with supporting ATE insurance.

That, of course, required an analysis of the perceived pros and cons.

Pros and Cons

Whilst not intended to be a definitive analysis, or applicable in every case, it may be useful to analyse what might be regarded as the pros and cons of legal aid funding prior to LASPO (when it was still possible to enter a CFA which would allow for recoverable additional liabilities) given that the new post-LASPO regime would not be retrospective.

Pros

- A claimant who remained on legal aid, having not entered a CFA which provided for recoverable additional liabilities, would become entitled, from April 2013, to the 10% uplift on damages. That, however, was only something which became clearer following the initial ruling of the Court of Appeal in *Simmons v Castle*[3] on 26 July 2012 though that ruling had to be clarified by the judgment in *Simmons v Castle*[4] given on 10 October 2012.
- A claimant remaining on legal aid, again not entering a CFA with recoverable additional liabilities, would have the benefit of Qualified One-Way Costs Shifting ("QOCS"). This point might not reasonably have been apparent until the Court of Appeal ruling in *Wagenaar v Weekend Travel Ltd*.[5]

[3] [2012] EWCA Civ 1039.
[4] [2012] EWCA Civ 1288.
[5] [2014] EWCA Civ 1105

Cons

- The ever-present risk, recognised and known of by practitioners at the relevant time, that a legal aid certificate might be discharged on the basis of:
  - — a change in financial circumstances; or
  - — a change in merits; or
  - — a change in risk/benefit.
- Costs limitations on legal aid certificates at a level, even when allowing for lower hourly rates payable, it would not be viable to complete the work necessary on a claim, particularly if that claim was higher value or otherwise complex.
- Limitations on experts' fees, restricting the choice of expert.
- Bureaucracy, a point tacitly accepted in *LXM v Mid Essex Hospital Services NHS Trust*.[6]
- The potential operation of the statutory charge, particularly in the event of a Part 36 offer by the defendant which the claimant subsequently failed to beat.
- The expectation by the LSC that, whatever the individual circumstances of the case, the claimant would seek a split trial where liability was in issue.

It is important to recognise that whilst the cons, as these had been experienced in practice, were known, and recognised by, those dealing with clinical negligence claims at the relevant time, the pros were more speculative pending appropriate rulings from the courts.

Furthermore, some pros/cons were not entirely straightforward and may not, perhaps, have been fully appreciated when, with the benefit of hindsight and elapse of time, the reasonableness of decisions have been reviewed many years later. For example, whilst a legally aided claimant had little protection against a defendant's Part 36 offer the position is likely, depending on the precise funding arrangements made, to be very different if the funding method chosen is a CFA supported by ATE. Should the CFA have been in the modified version of the Law Society Model, providing for the solicitors to receive neither base costs nor a success fee where the claimant was advised not to accept but subsequently failed to beat an offer, most ATE would, in these circumstances, meet the defendant's costs which, in a legal aid case, would have ended up being deducted from damages, by application of the statutory charge.

Accordingly, a number of the cons associated with legal aid could be mitigated, or eliminated, by the entry of an appropriate pre-LASPO CFA, providing for recoverable additional liabilities, with supporting ATE.

The circumstances prevailing in the lead up to April 2013 meant, however, that decisions on future funding had to be made within a limited timescale, and based on information then available, as after April 2013 the window for a claimant who might lose legal aid, to have entered a CFA providing for recoverable additional liabilities, would have closed.

From this brief analysis it is apparent that the issues were complex, for lawyers and the courts, let alone the claimant.

So it was, with all these potential pros and cons (some of which were not even apparent at the time), in 2012 the claimant in this case had the legal aid certificate discharged and made new funding arrangements under a CFA with supporting ATE insurance and that, following successful resolution of the substantive claim, an issue arose as to the recoverability of the additional costs which resulted.

The funding issues arising in this case were, of course, a question faced by many claimants and it is not, therefore, surprising the issue has already been considered by the courts, up to the level of the Court of Appeal by way of second appeal, in *Surrey v Barnet & Chase Farm Hospitals NHS Trust*[7] ("*Surrey*").

[6] [2010] EWHC 90185 (Costs).
[7] [2018] EWCA Civ 451.

Surrey

Jay J reviewed the decision in *Surrey*, starting with the observation that:

> "25. The Court of Appeal in *Surrey* was seized of three cases in which the facts differed slightly. In all three cases the CFA-lites were concluded shortly before the change in the regime for such arrangements which came into effect on 1st April 2013 in respect of agreements concluded after that date. The change restricted the recoverability of success fees and ATE insurance premia: the precise details matter not for the purposes of this appeal. On the other hand, the general rule for all civil cases decided after 1st April 2013 was that general damages – typically for pain, suffering and loss of amenity - benefitted from a 10% uplift ('the *Simmons v Castle* uplift') which was introduced with a view to covering, at least in part, the irrecoverable ATE premium. The effect of s.44(6) of LASPO 2012 was that this uplift would not apply to cases where the relevant CFA was concluded before 1st April 2013. In other words, the *Simmons v Castle* uplift would apply to (a) post-April 2013 CFAs, and (b) legally aided cases regardless of the date of the certificate."

Jay J went on to explain:

> "27. The issue in the Court of Appeal was whether the Costs Judges had erred in concluding in all three cases that the decision to enter into a CFA, with its accompanying ATE insurance policy, gave rise to costs which were unreasonably incurred. This required an objective analysis of the reasonableness of the individual claimant's decision, on advice, to change the basis of funding, taking all relevant circumstances into account. The obligation to act reasonably did not preclude a claimant from choosing a more expensive option."

Jay J identified the core principle in *Surrey* when he said:

> "30. Lewison LJ rejected the contention that the issue either fell to be resolved at a generic high-level assessment (para 29) or on the basis that if there were little or nothing to choose between the two funding methods, it would follow that the selection of either would lead to costs which were reasonably incurred (para 30). In short:
>
> > 'The court is required to take into account all the circumstances of the case. That means the particular case under consideration: not some generalised description of similar cases, as Solutia makes clear. Moreover, the burden of proof, in the case of an assessment on the standard basis, lies on the receiving party. Accepting for the sake of argument that there is a "level playing field" and that there was not much to choose between funding by legal aid and funding by CFA, the fact is that in each of the three cases the claimant already had chosen legal aid. If there is not much to choose between the two methods of funding, and the claimant decides to switch to a funding method that is far more disadvantageous to a paying party, I consider that the paying party is at least entitled to ask the question: why did you switch? In those circumstances I consider that it is up to the receiving party to justify his choice; and that entails examining the reasons why the choice was made.'"

Jay J then explained how the Court of Appeal had applied that principle to the facts of the individual conjoined appeals when he said:

> "32. …

(1) In *Surrey*, the solicitor asserted that there was no guarantee that the LSC would increase the limitation on costs, but on analysis there were no details of the costs that had been incurred, what the authorised costs limit was, and what further costs needed to be incurred. The solicitor also gave misleading advice to her client in suggesting that any shortfall might be 'topped up' by him personally. The strongest arguments in support of the change in funding related to the shortfall, the risk of failing to beat a Part 36 offer, and the operation of the statutory charge (paras 34-36).

(2) In AH, the evidence was very similar, including the suggestion that any shortfall might be made up by the client (paras 37-38). On the facts of AH, breach of duty had been conceded but causation of catastrophic injury was not accepted.

(3) In *Yesil*, the solicitor stated that she took into account the risk of failing to beat any CPR Part 36 offer as well as the potential for a 10% uplift, although it was accepted that this was not mentioned to her client. Unfortunately for her, the solicitor's calculation as to the costs incurred to date was seriously overstated, as well as her estimate of likely future costs (paras 39-43)."

Jay J summarised the application of principle to the facts in those appeals when he said:

"33. A common thread in all three cases was that the claimant's litigation friend was not told that the change from legal aid to a CFA (before 1st April 2013) would disentitle him or her to the uplift. This was a critical factor in the cases of Surrey and AH because on their particular facts the adverse risks were no more than possibilities whereas the foregoing of the uplift was a certainty (para 53). Given that the Costs Judges held that it was impossible to say what the decision would have been had that information been given, the inevitable doubt had to be resolved in favour of the paying party (para 47)."

Decision

Having identified the principle in *Surrey*, Jay J applied that to the primary and secondary arguments advanced by the claimant in this appeal.

Jay J summarised the claimant's primary argument when he said:

"57. Mr Williams' principal argument requires a close examination of paras 29-30 in particular of Lewison LJ's judgment in *Surrey*. Are those passages predicated on the *Simmons v Castle* uplift already having been factored into the balance sheet assessment? If that were the correct interpretation, it would follow that it is the inclusion of this factor which has enabled the Court of Appeal to conclude that there was not much to choose between the two methods of funding. By way of corollary, the absence of the *Simmons v Castle* uplift in the instant case would lead inevitably to the contrary conclusion that CFA-lites are significantly and objectively preferable to legal aid, and it is not incumbent on the receiving party to justify his choice."

Jay J, however, concluded that this submission on behalf of the claimant had an incorrect premise, explaining:

"58. … I cannot read paras 29-30 of Lewison LJ's judgment as already factoring in the *Simmons v Castle* uplift. The Costs Judges in *Surrey* had concluded at an 'abstract', 'generic high-level' or 'macro' level of assessment that the pros and cons of legal aid versus CFA-lites were finely balanced … On my reading of his judgment, the *Simmons v Castle* factor was taken

into account at a later stage of the Court's decision-making as being decisive in two out of the three cases of which it was seized."

Jay J then turned to a secondary argument advanced on behalf of the claimant when he said:

"60. Mr Williams advanced the alternative submission that even if he was wrong on his principal argument as to the inclusion of the *Simmons v Castle* uplift in paras 29-30 of *Surrey*, an objective examination of the merits of CFA-lites over legal aid leads to the clear conclusion that the former is far preferable to the latter, in which circumstances the absence of subjective reasons in BBK's advice to the Litigation Friend is nothing to the point."

This argument was also rejected, on the basis that this was not the advice given by the claimant's solicitors nor a case run before the Master, hence Jay J went on to say:

"62. Accordingly, it seems to me that there is no escape in the circumstances of this case from the application of the principle laid down in *Surrey* that the receiving party's particular reasons for the switching from legal aid to a CFA fall under scrutiny. The paragraphs in *Surrey* to which I have already referred … strongly support this approach."

Jay J concluded the real reason for the advice to switch to a CFA was that the legal aid limit had been exceeded and the real issue was whether the claimant's solicitors were culpable or otherwise in relation to that issue. Jay J rejected the challenges made to the reasons given by the Master for finding a degree of culpability that made, ultimately the claimant's decision unreasonable, namely that inadequate effort was made to keep within the original funding agreement and so far as a request for an increase to that limit was concerned this had not been properly formulated and it may not have been too late to secure the additional funding.

Analysis

The decision does seem to focus on some very specific aspects of the chronology, specifically whether the claimant's solicitors had appropriately used available legal aid resources to run the case and/or made an appropriate application for the cost limit to be extended, rather than the bigger picture of recognising the times and context in which the claimant needed to make a decision on future funding, a decision that would later have to be judged as reasonable or unreasonable.

Whilst recognising the decision in *Surrey* required the court to look at the circumstances of the individual case, rather than just a generic high-level assessment of the pros and cons, those broad advantages and disadvantages surely form an important part of the context for judging the reasonableness of any decision to switch funding in a particular case. That is illustrated by a comparison between the facts of *Surrey* and the facts of this case.

In the three cases before the Court of Appeal in *Surrey* it was possible to identify errors in the advice given and, accordingly, how these would inevitably have a bearing on the reasonableness of the decision by the claimant to change the way in which each claim was funded. Bearing in mind the burden of proof was on the receiving party to prove the reasonableness of the costs incurred, the forensic problem for the claimant in each case, in these circumstances, is that it could not be said the claimant would probably have taken the decision to move to a CFA had the correct advice been given.

This case is very different. The advice given, and hence the reasonableness of the claimant's decision, related solely to the available costs under the legal aid certificate and the prospect of the extant cost limit being increased had application been made in a different way.

A simple comparison of the figures suggests that however the LSC had been approached the claimant's legal aid certificate would not have been amended to reflect the costs likely to be incurred.

Whilst recognising, following *Surrey*, the need to focus on what would be a reasonable decision for the individual claimant, rather than assessing pros and cons on a purely macro level, surely the reality is that had the claimant, in this contested case, remained on legal aid it may have been difficult to get the case to the point at which an agreement on liability was reached, remembering defendants do not appear to be under any such corresponding restraint (despite each side being publically funded). Moreover, in whatever way the request for further support was formulated, and whenever such request had been made, it seems inevitable, from the very tenor of the correspondence sent by the LSC, there would be no, or little, departure from the iron matrix of relevant guidance on costs authorised under the certificate.

The reason why the absence of information about the 10% uplift was not critical in this case is that when the relevant decision was made the guidance from the Court of Appeal in *Simmons* was not available.

In any event *Surrey* does, perhaps, overstate the "possibilities" of perceived cons of remaining on legal aid against the "certainty" of the perceived pros. For example, despite the guidance in *Simmons* it is notable that in *Summers v Bundy*[8] the claimant had to appeal a decision not to award a legally aided claimant the 10% uplift on damages. Whilst it might be said that error was put right on appeal a claimant faced with the need to go to the Court of Appeal on such a point could hardly be regarded as having a "certainty".

This case, perhaps, has more in common with *Hyde v Milton Keynes Hospital NHS Foundation Trust*[9] than *Surrey*. In *Hyde* the focus of the argument, again in a case where the claimant moved from legal aid to a CFA prior to April 2013, was whether the absence of a formal discharge of the legal aid certificate rendered the CFA unenforceable. It did not, because funds available under the certificate had been exhausted, but it is worth noting that, in passing, the costs judge, High Court judge and Court of Appeal accepted the claimant had acted reasonably, in any event, in transferring to a CFA in these circumstances, the costs judge observing:

> "43 … It seems to me that there is no reason why a broader view cannot be taken about the work done and needed to be done when compared with the costs limitation. There have been many cases where a solicitor has decided against the use of BTE funding in a serious case on the basis that its limit of indemnity could not possibly be sufficient to cover the entire case. There has never been any suggestion that the solicitor would have to exhaust that BTE cover before being able reasonably to take that view. It seems to me that the position is the same here. From the passage in the Replies set out above, the solicitor considered that the work still required to be done could not realistically be completed within the figures allowed for by the LSC in July 2012 and increased modestly in November 2012. I agree …
>
> 44. The parties addressed me on the merits and demerits of entering into a CFA rather than using legal aid in accordance with the case law up to and including *LXM v Mid Essex Hospital Services NHS Trust* [2010] EWHC 90185 (Costs). I do not propose to set out those submissions in any detail because it was clear that the overriding consideration of the claimant and her lawyers in this case was the perceived exhaustion of the legal aid funding and the claimant's only alternative option being a CFA and ATE. The claimant's replies seek to suggest that the impending arrival of the Legal Aid Sentencing and Punishment of Offenders Act 2012 supported the decision but I do not accept that the coming into force of LASPO was relevant in this case."

Hyde might be distinguished on the basis that the available costs had already been utilised but that does seem a somewhat fine distinction from the circumstances of this case and requires particular focus on whether the solicitors control costs adequately and/or presented a properly formulated request rather than setting this factor in the broader context of what was known at the time these decisions were being made.

[8] [2016] EWCA Civ 126.
[9] [2017] EWCA Civ 399.

In any event so far as the judgment focused on the advice given by the claimant's solicitors (which in turn informed the reasonableness of the claimant's decision to change funding) that was all viewed through the prism of the perceived failure to control costs adequately and/or present a properly formulated request to the LSC for an increase in the costs limit. Both these factors, however, just point to the difficulties, well-recognised at the time, that legal aid had become a very problematic way of funding complex clinical negligence claims due to both fiscal and administrative issues.

In all these circumstances, remembering the context in which advice had to be given and a decision made, did the claimant really fail to show that a reasonable decision was made when, ultimately, that decision was probably inevitable.

Practice Points

It is difficult to draw any useful practice points from this case as the only lesson is that it is easy to be wise after the event, with the benefit of hindsight.

The judgment does, however, serve as a reminder that practitioners never know which letters, file notes, or other documentation may end up being reviewed by a court.

John McQuater

Cumulative Index

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