Journal of Personal Injury Law

Issue 4 2019

Table of Contents

Case and Comment: Quantum/Damages

Case and Comment: Procedure

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

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

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

ISSN 1352-7533

LEGAL TAXONOMY
FROM SWEET & MAXWELL

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

For orders and enquiries go to: *http://www.tr.com/uki-legal-contact*; Tel: 0345 600 9355.

Editorial

For the last instalment of 2019 I am pleased to introduce this bumper issue. Following on from Lauren Sutherland QC's article on *Montgomery* in the last issue, Dr Simon Fox QC considers the limitations of the *Bolam* test in additional spheres of medical negligence litigation. The tentacles of the *Bolam* test are also considered in board member Julian Fulbrook's detailed article on herbal medicine. A $100 billion global industry, has the law kept pace with the injuries being caused by the sometimes lethal use of alternative medicines?

We are also lucky to have three eminent academics from Loughborough University considering the impact of tiredness in road traffic and workplace accidents. Given the estimated likelihood of fatigue being a factor in 15–20% of road traffic crashes and the link between tiredness resulting from shift work, the article highlights how tiredness should form more of a focus in accident investigations and liability.

In the final liability case John Mackenzie considers the recent decision of *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd* in which the Court of Appeal identified how reinsurers in mesothelioma claims are identified as being on risk, a case that is so important it will be considered by the Supreme Court in early 2020.

Following the well-publicised case of "Thibault" this month, the Frenchman able to move all four of his paralysed limbs in a mind-controlled exoskeleton, Jon Graham and Matt White provide a comprehensive review of current exoskeleton technology, its rehabilitative uses, and limitations of the technology. No doubt, as with increasingly sophisticated technology in prosthetics, this will be a growth area in the future.

With claims of "Fundamental Dishonesty" now commonplace, unsurprising given the potential windfall for defendants, board member John McQuater provides an essential update and review of caselaw on the issue. David Miers then considers the recent changes to the Criminal Injuries Compensation Scheme and the impact of the abolition of the "one roof" rule (June 2019) on cases of historic child sexual offences.

We are fortunate to have Helen Vernon, Chief Executive of NHS Resolution, providing an insight into the caseload of NHS Resolution and their current strategy to manage the 900 clinical negligence cases it receives each month. This includes the importance of mediation, a new early notification scheme for obstetric brain injury cases, and the new clinical negligence indemnity scheme for GPs.

Early notification and mediation are both themes said to underpin the LASPO Part 2 changes in 2013. Investigating the empirical evidence surrounding LASPO, Paul Fenn, Neil Rickman, and David Marshall consider the data recorded by NHS Resolution and for wider personal injury claims to analyse the extent to which injury litigation outcomes, costs and damages, have been effected. Although unsurprisingly recoverable costs have been reduced, their findings, as presented to the government, of a reduction in recovered damages cannot be ignored.

We hope you enjoy the issue. The Board wish you all a relaxed and restful holiday season.

Jeremy Ford
General Editor

Bolam is Dead. Long Live Bolam!

Dr Simon Fox QC*

Bolam test; Breach of duty of care; Clinical negligence; Consent to treatment; Health; Ultrasound scans

Abstract

This article reviews the Bolam test for breach of duty in clinical negligence in the light of recent case law and asks: is it still the test for breach?

The Bolam test is the test for breach of duty on the part of doctors (and other professionals for that matter). According to the test, a doctor is not negligent if he/she acts in accordance with a practice accepted as proper by a reasonable and responsible body of doctors in that field.

Since I transferred from medicine to law 25 years ago, I have always thought that the Bolam test cannot logically apply to many scenarios of alleged clinical negligence. The scenario which has always struck me is the iatrogenic surgical bowel injury; a surgeon inadvertently and unknowingly perforates the bowel with a surgical instrument during a routine and otherwise uncomplicated laparoscopy. Can we logically apply Bolam as the test of negligence to that?

I have never thought so.

After a long wait, I find some judicial support for my concerns from Kerr J in *Muller v Kings College*.[1]

Before we go any further in a discussion about Bolam, it is important to be very clear exactly what we mean by the use of the term "the Bolam test".

McNair J actually described a number of tests for a doctor's negligence in *Bolam v Friern Hospital Management Committee*.[2]

The one which has become known as "the Bolam test" is this one:

> "He is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art,"

i.e. a body of doctors test.

However, McNair J also approved the Scottish case of *Hunter v Hanley*[3] which described the test as "such failure as no ordinary doctor of skill would be guilty of, if acting with ordinary care,"

i.e. a skill and care test.

The body of doctors Bolam test was subsequently lifted and adopted by the Court of Appeal and High Court in cases like *Maynard v West Midlands RHA*[4] and *Sidaway v Bethlem and Maudsley Hospitals*[5] to become "the Bolam test". In my experience, it is routinely applied to all types of clinical scenario.

It is interesting to note that the Bolam test originated in a judge's summing up of the law to a jury in a clinical negligence trial heard and decided by such a jury (as was then normal) in 1957. It was not the ratio of the case and was not part of a judgment in the modern sense—where a judge is giving a reasoned explanation to the parties of what the judge considers to be the test for breach and why.

* Medically qualified barrister at Serjeants' Inn Chambers, London and a specialist clinical negligence silk, assistant coroner and certified mediator. Contact at sfoxqc@serjeantsinn.com and on twitter @*clinnegsilk*.

[1] *Muller v Kings College Hospital NHS Trust* [2017] EWHC 128 (QB); [2017] Q.B. 987.

[2] *Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R. 582; [1957] 2 All E.R. 118.

[3] *Hunter v Hanley* 1955 S.C. 200; [1955] S.L.T. 213.

[4] *Maynard v West Midlands RHA* [1984] 1 W.L.R. 634; [1985] 1 All E.R. 635.

[5] *Sidaway v Bethlem and Maudsley Hospitals* [1985] A.C. 871; [1985] 2 W.L.R. 480.

The case of *Bolitho v City and Hackney HA*[6] added to the body of doctors test the requirement for that body to be reasonable, responsible and for their position to withstand a logical analysis of risks and benefits. This, in effect, means that a claim must fail unless the defence expert can be shown to fail this requirement and therefore fall into the so-called "Bolitho Exception"; a tough job for most claimants at trial.

The recent case of *Muller* concerned an allegation of negligence in interpretation of histology slide which was reported as normal when it in fact contained malignant melanoma. The parties disagreed over whether the Bolam test applied to breach. Kerr J adopted the test used in the earlier Court of Appeal cervical smear histology case of *Penney v East Kent*:[7]

- What as a matter of fact is present on the slide?
- In missing it, did the doctor exercise reasonable skill and care?

i.e. a skill and care test, *not* the Bolam test.

There is further support for Kerr J for his approach in that the same test was used in the two negligent interpretation of fetal ultrasound cases of *XXX v Kings*[8] and the earlier Court of Appeal case of *Lillywhite v UCL*.[9]

Two things are of note about this test.

First, it does in fact reflect the *Hunter v Hanley* skill and care test, the other test referred to by McNair J in *Bolam*—so it can at least be described as a test which is consistent with, or derives from, the *Bolam* decision.

This was expressly referred to in the cases of both *Penney* and *Lillywhite* and the House of Lords in *Maynard v West Midlands RHA* described the *Hunter v Hanley* skill and care test quoted in *Bolam* as one that could not be bettered as the test for clinical negligence.

Secondly, it is a less onerous test for a claimant because, from the judgments, there does not appear to be the same requirement to prove that the defence expert falls into the Bolitho Exception of being unreasonable, irresponsible or failing to withstand a logical analysis of risks and benefits. It does not play such a central role. It is either considered rather reluctantly at the end of the process, or not at all.

This might be because, logically, use of the Bolitho Exception only makes sense if you are applying it to a body of doctors test, which they were not.

Kerr J was obviously concerned about the latter because he adopted a belt and braces approach of finding that the defence expert did fall into the Bolitho Exception by adopting too low a standard, just in case.

A similar approach was taken by the first instance judge in *Penney* and the Court of Appeal didn't disagree with it.

The judgments in *XXX* and also *FB* (see below) do not refer to *Bolitho* at all.

Kerr J contrasted interpretation cases such as the one he was trying, which he called "pure diagnosis" cases, with "pure treatment" cases where the Bolam test does logically apply. He gave as an example the case of *C v North Cumbria*.[10]

There the allegation was of negligence in managing an induction of labour in a specific manner (timings and dosage of Prostin). In such a case, there is a choice of approach by the doctors and it is absolutely logical to assess negligence by reference to whether the approach adopted by the defendant would be accepted as proper by a reasonable and responsible body of obstetricians. The test is suited to the circumstances.

So there will still be cases where *Bolam* does apply.

[6] *Bolitho v City and Hackney HA* [1993] P.I.Q.R. P334; [1993] 4 Med. L.R. 381.
[7] *Penney v East Kent* [2000] Lloyd's Rep. Med. 41; (2000) 55 B.M.L.R. 63.
[8] *XXX v Kings College Hospital NHS Foundation* [2018] EWHC 646 (QB).
[9] *Lillywhite v UCL Hospitals NHS Trust* [2005] EWCA Civ 1466; [2006] Lloyd's Rep. Med. 268.
[10] *C v North Cumbria University Hospitals NHS Trust* [2014] EWHC 61 (QB); [2014] Med. L.R. 189.

In my view, the key feature for a scenario where the Bolam test does still correctly apply is one where the clinician is selecting one form of management from a number of different options, where there is a *choice*. It seems to me that this could apply to management in choosing how to investigate (and diagnose) as well as how to treat, so that *Bolam* can apply to some diagnosis as well as treatment cases.

I should add that, in *C v North Cumbria* at [20]–[25], Green J gives a fantastic guide (often quoted in subsequent judgments) on how to address the Bolam test and in particular whether the defence expert evidence falls into the Bolitho Exception when you do still have a Bolam case.

In my view, if the reasonable skill and care test applies to interpretation of histology and ultrasound, then logically it must also apply to interpretation of all radiology and other test interpretation such as ECG and, crucially, CTG for that matter.

So 60 years after the Bolam test was first described, there is now authority that it does not apply to interpretation cases. Where else does it not apply?

Well this is of course consistent with the decision in *Montgomery v Lanarkshire*[11] which made it clear that, while the Bolam test had been applied to consent for 60 years too, it was expressly described by the Supreme Court as not appropriate for consent.

They replaced it with what was helpfully set out by the subsequent Court of Appeal decision of *Duce v Worcestershire NHS Trust*[12] as a two-stage test:

- What risks associated with an operation were or should have been known to the medical profession; a matter falling within expertise of medical professionals.
- Whether the patient should have been told about such risks, were they material, not a matter to be determined by expert evidence alone.

Montgomery concerned an allegation of negligence in obtaining consent for an approach to management of pregnancy in an antenatal clinic (advising of the risk of shoulder dystocia and the option of elective Caesarean), not for surgery, as did the later case of *Webster v Burton Hospitals*.[13] So it is important to remember to apply *Montgomery* in similar "advice" type cases as well as surgical cases.

There is a good argument that the test to apply in an iatrogenic surgical injury case is that described by the House of Lords in *Whitehouse v Jordan*[14] (involving an allegation of negligence in forceps delivery); is the error one that would have been made by a reasonably competent surgeon with that skill, acting with ordinary care? (per Lord Fraser, in distinguishing negligent from non-negligent errors of judgment).

i.e. a skill and care test.

There is the further case of *Darnley v Croydon Health Services NHS Trust*.[15] In holding that the hospital did owe a duty of care on the part of its receptionists (and medical staff) not to provide misinformation to patients and was in breach, the Supreme Court described the duty simply as one to take reasonable care. There was no reference to the Bolam test or associated analysis of how the defence expert evidence fell into the Bolitho Exception.

More recently Jackson LJ in the Court of Appeal case of *FB v Princess Alexandra Hospital NHS Trust*,[16] in assessing the standard of history taking in the Emergency Department, referred to *Bolam* and described the test as "the defendant is required to exercise the skill and care of a reasonably competent member of his/her profession".

The recent case of *Flanaghan v University Hospitals Plymouth NHS Trust*[17] demonstrates the continued use of *Bolam*.

[11] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11; [2015] A.C. 1430.
[12] *Duce v Worcestershire Acute Hospitals NHS Trust* [2018] EWCA Civ 1307; [2018] P.I.Q.R. P18.
[13] *Webster v Burton Hospitals NHS Foundation Trust* [2017] EWCA Civ 62; [2017] Med. L.R. 113.
[14] *Whitehouse v Jordan* [1981] 1 W.L.R. 246; [1981] 1 All E.R. 267.
[15] *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50; [2018] 3 W.L.R. 1153.
[16] *FB v Princess Alexandra Hospital NHS Trust* [2017] EWCA Civ 334; [2017] Med. L.R. 279.
[17] *Flanaghan v University Hospitals Plymouth NHS Trust* [2019] EWHC 1898 (QB).

This was a spinal case heard by HH Judge McKenna at the RCJ. In 2008, the 59-year old claimant presented with some limited left sided spasticity due to degenerative changes in her cervical spine causing some cord distortion. She was seen by a consultant surgeon in the neurosurgical clinic who advised conservative management, no surgical intervention and she was discharged from further review. She was advised of the need to be re-referred if she developed further problems and was warned of the danger of future paralysis from a fall or accident.

In 2012, she tripped on a pot-hole and this resulted in cervical cord compression such that she lost power in her right leg and had reduced power in her hands. A cervical discectomy and fusion was performed. However, she suffered a further spinal injury during the course of the procedure. In broad terms she alleged negligence

- 2008 out-patient clinic: Failure to recommend immediate surgery or
- 2012 in-patient treatment: Various failures in the choice of surgical approach and also to appreciate a CSF leak.

The judge applied the Bolam test to all the allegations. Accordingly, the claimant could only win if she persuaded the judge not just to prefer her expert (which he did not), but in addition to find that the defence expert fell into the Bolitho Exception of not being reasonable, responsible or logical. The judge did not prefer the claimant's expert, let alone find that the defendant's expert fell into the Bolitho Exception and dismissed the claim.

It seems to me that there is now the potential for the *Montgomery* test to apply to an alleged failure in an out-patient clinic (or on the ward for that matter) to advise of the options and alternatives to conservative management. If that is right then there is the potential to apply *Montgomery* to a far greater range of cases as consent cases, but to which currently *Bolam* continues to be applied.

I set out a summary of my view of the different clinical scenarios and tests supported by the above cases:

- Advice and consent on treatment options (*Montgomery*).
- Misinformation—reasonable care (*Darnley*).
- Interpretation of investigations like histology, radiology (and ECG, CTG): reasonable skill and care (*Muller*).
- Selection of management where there is a choice: whether management means investigation, diagnosis or more commonly treatment: *Bolam* (*C v North Cumbria*).
- Consent to surgery (*Montgomery*).
- Surgical injury: reasonable skill and care (*Whitehouse*).

Finally, there has been some passing suggestion[18] that the Bolam test is still relevant to the first stage in the Duce test in applying the Montgomery test to consent.

This might arise from [115] of *Montgomery* where Lady Hale states "once the argument departs from purely medical considerations … the Bolam test becomes quite inapposite", i.e. Bolam does not apply to the second stage. This might be used to infer that it does however still apply to the first stage in *Duce*/*Montgomery*.

Is that correct?

It goes against the rest of the judgments—not just in the cases of *Montgomery*, *Duce* and *Webster* but other more recent cases like *Ollosson v Dr Lee*[19]—all of which describe *Montgomery* replacing *Bolam* without qualification. If *Bolam* did retain a specific role in the test for consent, you might expect these (often lengthy) judgments to say so.

[18] e.g. Yip J in *Kennedy v Frankel* [2019] EWHC 106 (QB); [2019] Med. L.R. 177.
[19] *Ollosson v Dr Lee* [2019] EWHC 784 (QB); [2019] Med. L.R. 287.

I note Lauren Sutherland QC's view that *Bolam* has no role in the new test for consent in her excellent article on *Montgomery* in the previous edition of JPIL.[20]

If the Bolam test is still relevant to consent (used as it is normally, to mean the body of doctors test), then Bolitho is still relevant and the judgments would contain an analysis of why the defence expert did or did not fail that test and fall into the Bolitho Exception. None of them do.

Is it logically appropriate to apply the Bolam test to *Duce* stage 1 in considering an alleged failure by a clinician to know of risks associated with a procedure? Would being ignorant of such a risk be a practice accepted as proper by a reasonable and responsible body of doctors? It seems illogical to ask the experts to address the test in that way as no body of doctors would describe being ignorant as being an acceptable practice but that doesn't mean it's negligent.

The test seems logically better described as whether, in being ignorant of the risk, they were still exercising reasonable skill and care—in keeping up to date by attending meetings and reading journals for example, i.e. the same reasonable skill and care test as that in *Muller*, *Penney*, *XXX* and *Lillywhite*—and also referred to in *Bolam* itself.

The Bolam test, as detailed by the House of Lords in *Bolitho*, is all about logic. There is a wonderful irony in trying to use it illogically in circumstances to which it is fundamentally not suited.

[20] L. Sutherland QC, "Montgomery: myths, misconceptions and misunderstanding" (2019) 3 J.P.I. Law 157–167.

Harmless, Healing or Lethal: Herbal Medicine on Trial

Julian Fulbrook

Bolam test; Breach of duty of care; Clinical negligence; Complementary medicine; Standard of care

Abstract

There are, as yet, very few tort claims on herbal medicine. Shakoor v Situ (t/a Eternal Life Company) *is the lone reported decision in the UK courts. Is this because the use of complementary and alternative medicine is essentially harmless? Reliant perhaps on a "placebo effect" and often an admixture of anodyne ingredients, the industry is hugely profitable. Can herbal medicine be simply written off as expensive for its customers but merely inoffensive? Unfortunately, this is not an appropriate assumption, and particularly not when conventional medicine is eschewed for unscientific "alternative medicine". It has also become increasingly clear that some dietary supplements in particular cause many hospital admissions and many herbal medicines have been banned in the US and Europe because of dangerous additives. Professor Fulbrook points out that "natural products" are not necessarily harmless, and analyses several criminal and civil cases which have led to fatalities and serious injury. While "natural products" have on occasion led to pharmacological breakthroughs—the humble aspirin is a classic example—rigorous testing is an essential prerequisite to safeguard the public. Since 2011, the UK Medicine and Healthcare Products Regulatory Agency ("MHRA") has banned hundreds of potentially dangerous products, but enforcement of safety standards, particularly in an age of internet purchases and local authority austerity cuts, is sporadic and often ineffective. Particular difficulties exist in gaining compensation for personal injury victims, particularly the narrow use of the Bolam test in the* Eternal Health *case. Professor Fulbrook suggests this precedent is overdue for review, as even overwhelming evidence of recklessness in the criminal cases on herbal medicine would not necessarily overcome the Bolam threshold in a related tort claim, although later medical cases show that Bolam could and should be widened to prevent harm to victims. There are also difficulties, as ever, in suing uninsured fraudsters, and also the possible use of an "assumption of risk" defence. It is clear that some tort claims on herbal medicine have been quietly settled on a confidential basis, and it is perhaps only a matter of time before the courts need to face up to the unjustifiable harm that can result from herbal medicine in contested litigation. Professor Fulbrook advocates a rigorous analysis of when the Bolam principle can strike down an inappropriate and unsafe practice, and also how the assumption of risk volenti defence should only be used when not only is the risk freely accepted by a patient but, more importantly, only when the victim did so with full knowledge of both the nature and the extent of that risk.*

Introduction

The global use of herbal treatments as complementary or alternative medicine is colossal, estimated at an annual world-wide cost of $100 billion, and in the UK of the order of £1.6 billion.[1] In the US, half of Americans report using dietary supplements, the most common form of alternative medicine there, with an estimated market of over $30 billion per annum; unfortunately, it is estimated that such supplements

[1] E. Ernst, *A Scientist in Wonderland* (Exeter: Imprint Academic, 2015), p.89.

also cause 23,000 emergency hospital visits each year, with over 2,000 serious enough for hospitalisation.[2] In the UK, it is estimated that herbal medicines are used by about a quarter of adults, although since 2011, such products have now to be registered with the Medicine and Healthcare Products Regulatory Agency ("MHRA") and indeed hundreds of potentially dangerous products have been banned.[3] Personal injury litigation is about providing compensation for harm suffered, but also with "lessons learned" in the courts and in the legal process it can keep people safe. Is there now a case for establishing a serious tortious "duty of care" in respect of herbal medicine or is this a relatively harmless fad?

Natural products?

A repeated sales claim for herbal products is that they are "natural". But natural does not necessarily mean safe. In the leading case of *Glasgow CC v Taylor*, a child of seven died after eating some tempting berries of the shrub *atropa belladonna*, freely accessible to the public near a children's playground in the Botanic Gardens, and with no adequate warning of its deadly nature. In formulating what has become known as a doctrine of "allurement" or "trap", Lord Atkinson indicated that "these berries, looking, as they do, to the uncritical eyes of young children, like cherries, or big blackcurrants" were an obvious hazard for them, adding that the botanical literature noted that they have "a sweet taste but are a deadly poison".[4] Indeed, commonly known as "deadly nightshade" belladonna has a long history as a poison for arrowheads, for murder in Roman times, but also in appropriate quantities it has been used as a cosmetic, an anaesthetic, and as a medicine. It is axiomatic that some of the best of "orthodox" medicine has been derived pharmacologically from the use of plants and plant extracts. But this transfer is accomplished in the modern era after rigorous testing regimes, and in particular, the vital safeguard of clinical trials. At that point, a herbal "alternative" medicine proves effective as a treatment against a range of diseases, and becomes "conventional" medicine. Even belladonna, in appropriate quantities and under supervision, is prescribed by mainstream doctors to stop bronchial spasms in asthma and whooping cough, and in dealing with Parkinson's disease, inflammatory bowel disease, and as a painkiller. It seems to be particularly effective in dealing with a slow heartbeat (brachycardia) although there are extensive warnings in the medical literature about this most toxic of plant substances; for example, the *British Medical Journal* in 2015 reported a case where a "trained herbalist" self-administered a dosage for insomnia and promptly ended up in intensive care, fortunately later making a full recovery.[5]

So-called "natural" remedies have a long history. Professor Edzard Ernst, a noted but sceptical authority in the field of complementary and alternative medicine, has drawn attention to "Ötzi, the 5,000-year-old mountain hiker whose frozen body was found in Austria in 1991"; it seems likely that this naturally mummified "Iceman" was receiving treatment at the time of his death, akin to acupuncture, but also herbal medicine, to deal with a parasitic whipworm.[6] Acupuncture has been generally associated with China, where piercing with needles is said to follow "meridians" in the body through which energy or "life force" or "Ch'I" is channelled, but clearly there was also European use of this technique. In one of their important contributions to the scientific assessment of "alternative medicine", Professor Ernst and his team used the ingenious device of a retracting telescopic needle for clinical trials on acupuncture. With a "sham acupuncture" control group Professor Ernst found that the predominant medical care given by acupuncture is the placebo effect, a well-known phenomenon in patient care but clearly a treatment of no therapeutic

[2] A. Geller, "Emergency Department visits for adverse events related to dietary supplements" (2015) 373 *New England Journal of Medicine* 1531–1540.

[3] "Do herbal medicines improve our health?", *Guardian*, 4 November 2015.

[4] *Glasgow CC v Taylor* [1922] 1 A.C. 44 HL; [1921] All E.R. Rep. 1.

[5] A. J. Chadwick, "Accidental overdose in the deep shade of night: a warning on the assumed safety of 'natural substances'" *BMJ Case Reports*.

[6] See generally E. Ernst, *A Scientist in Wonderland: A Memoir of Searching for Truth and Finding Trouble* (2015); and in particular, S. Singh and E. Ernst, *Trick or Treatment?* (Uxbridge: Corgi, 2008), pp.57–59 and 235–236.

value.[7] Some 3,000 clinical trials have confirmed this.[8] While it does not look possible to have the conduct of a "double blind" clinical trial—as the practitioner will know the use of the "theatrical dagger" needle—the conclusion seems to be that "as the trials become increasingly rigorous and more reliable, acupuncture increasingly looks as if it is nothing more than a placebo".[9] Meanwhile the commercial exploitation of acupuncture continues unabated, and indeed there are repeated calls for this "treatment" to be funded once again on the National Health Service.

In contrast, experimentation and then clinical trials with plant substances have sometimes proved their very important medicinal efficacy. Among Ötzi's possessions was a birch bark basket containing a birch fungus, seemingly used as an antibiotic and antiparasitic drug against the whipworm.[10] There are many other examples of effective medicines derives from botanical sources; for example, William Withering's research on digitalis for use on heart failure and arrhythmias, derived from foxgloves;[11] the isolation of quinine in 1820 from cinchona tree bark, long used by Peruvian Indians as a treatment for malaria; and then following investigation the widespread use of willow bark and leaves for the marketing from 1899 of aspirin, the most used drug in the world, and with clinical trials showing its use in relation to heart attack, strokes, and many forms of cancer. However, those trials have also shown a downside, as with many drugs; the limitations of aspirin in side effects such as stomach bleeding for some patients, a risk of asthma, and also problems leading to its non-use for children. It is also noteworthy that the vast majority of modern pain killers derive from either aspirin or opium, the latter another plant derivation not without its own problematic history. But the crucial divide here is that medicines derived from plants are treatments which are tested and, usually, regulated. By contrast, and as noted succinctly by UCL Professor of Pharmacology David Colquhoun, "Herbal medicine [is] giving patients an unknown dose of an ill-defined drug, of unknown effectiveness and unknown safety".[12] Not only is conventional medicine therefore evidence-based, but if something goes amiss there is a reporting mechanism for adverse effects, and often a possible litigation target for an evidence-based liability claim, with potentially a health service or insurance hinterland to support an award of damages. However, as we shall see, there are also some formidable litigation hurdles too in bringing any compensation claim in tort.

The Eternal Health Company case

There appears to be currently only one reported British tort claim on death through the use of herbal medicine. This is the first instance decision of *Shakoor v Situ (t/a Eternal Health Company)*.[13] Bernard Livesey QC, sitting as a Deputy Judge of the High Court, indicated that the deceased was "in very good general health, attended his general practitioner infrequently and was not known to have consulted alternative medical practitioners on any previous occasion". Abdul Shakoor, was aged 32, married and with four children, but was troubled by multiple benign lipomata. A lipoma is an overgrowth of fatty tissue just below the skin and is usually harmless, but is occasionally surgically removed for cosmetic reasons. Having been told by his GP that surgery was an option, Mr Shakoor then went for a 20–30 minute consultation with Kang Situ, a practitioner of Traditional Chinese Medicine, who had been trained in China for five years in herbal medicine and who had also obtained a further diploma in acupuncture. After practising as a "doctor" in Beijing for five years he had come to Britain, first to Birmingham and then to Nottingham, where he traded as "The Eternal Health Company". He was, of course, not medically qualified, and was not subject to regulation by either licensing or registration as a herbal practitioner. Mr Shakoor

[7] "The Truth about Acupuncture" in S. Singh and E. Ernst, *Trick or Treatment?* (Uxbridge: Corgi, 2008), p.105.
[8] See D. Colqhoun and S. Novella, "Acupuncture is Theatrical Placebo" (2013) *Anesthesia and Analgesia*.
[9] D. Colqhoun and S. Novella, "Acupuncture is Theatrical Placebo" (2013) *Anesthesia and Analgesia* 106.
[10] L. Capasso, "5300 years ago, the Ice Man used natural laxatives and antibiotics" (December 1998) *Lancet* 352.
[11] *An Account of the Foxglove and Some of its Medical Uses* (1785).
[12] D. Colquhoun, "Twitter-addicted scourge of scientific quackery",*Guardian*, 21 April 2013.
[13] *Shakoor v Situ (t/a Eternal Health Company)* [1990] 1 W.L.R. 1126; [1990] 2 All E.R. 1024.

was given a mixture of 12 different herbs separated into ten individual sachets, but after nine doses he became very ill, with loss of appetite, nausea, yellowing of the eyes and skin, and "heartburn". Transferred by his doctor to the Queen's Medical Centre he then suffered a "10 day history of vomiting, anorexia and abdominal pain". Tests disclosed acute liver failure. Despite liver transplant surgery, Mr Shakoor's life could not be saved. After seizure of the tenth herbal sachet by the Coroner an examination showed that it contained Bai Xian Pi or *dictamnus dasycarpus*, known also as "Burning Bush Root". Adverse liver reactions have now been widely reported,[14] but at the time of Mr Shakoor's death, these alerts were only in the medical literature. The judge declared that "There was some evidence, which was read, that this ingredient might be hepatotoxic but the evidence was unclear, contradicted by much other evidence and I do not accept it". Being wise after the event is generally termed hindsight, but as Denning LJ famously warned in *Roe v Minister of Health*, where contamination of a spinal anaesthetic was not foreseeable given the state of scientific knowledge: "We must not look at the 1947 incident with 1954 spectacles."[15] In that case, disinfectant had seeped in through "invisible" cracks causing paralysis. While one might perhaps question Bernard Livesey's scarcely authoritative determination of the medical evidence even at the time of *Shakoor*, the critical issue was the "state of knowledge" for Kang Situ, and under the *Bolam* test whether he had "acted in accordance with the practice accepted as proper by a responsible body of medical men *skilled in that particular art*" (emphasis added).[16] This classic exposition of the standard of care to be applied, a jury direction in a case on medical doctors, has of course been repeatedly affirmed at the highest level.[17] The learned judge in *Shakoor* was therefore clearly, at that time, correct in considering that the evidence of:

> "a number of letters and papers published in medical journals, particularly in *The Lancet*, which had suggested that there were certain known risks of liver damage and in one case, death—from the ingestion of a similar herbal medication failed the *Bolam* test, when applied to the 'art' of a Chinese herbal practitioner who was not reading *The Lancet*."

"Bolamisation", as it has been termed, has been widely applied, certainly in medical cases on qualified doctors, and one can see its attraction. Having looked at the medical literature available, but not read by the defendant, the conclusion was that the learned judge was:

> "satisfied that he acted in accordance with the standard of care appropriate to Traditional Chinese Herbal Medicine as properly practised in accordance with the standards required in this country. The fact that he died in consequence of the medication, as the doctors have on a balance of probability agreed, is a tragic accident but not the fault of the defendant."[18]

But has the time come to move beyond *Bolam* test in respect of herbal practitioners? In respect of "common standards" the British courts have always retained the right to strike down a common practice on the basis that the practice itself "gives rise to unreasonable risks".[19] In the key decision of *Bolitho v City and Hackney HA*, the House of Lords applied the *Bolam* test but accepted the need for a logical justification for a medical practice. That case was concerned partly with whether a hospital registrar should intubate a child suffering from severe breathing difficulties. There were two schools of thought; some doctors would, some would not. But Lord Browne-Wilkinson noted that the *Bolam* test required the court to be "satisfied that the exponents of the body of medical opinion relied upon can demonstrate that such

[14] See, e.g. the proposal to delete this substance from products sold to the public or to practitioners of Chinese medicine: S. Dharmananda, "Alert: Potential Idiosyncratic Liver Reaction to Dictamnus (Bai Xian Pi)" (December 2010) *Institute for Traditional Medicine*.
[15] *Roe v Minister of Health* [1954] 2 Q.B. 66 at 84; [1954] 2 W.L.R. 915.
[16] McNair J in *Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R. 582 at 587; [1957] 2 All E.R. 118.
[17] *Maynard v West Midland RHA* [1984] 1 W.L.R. 634; | [1985] 1 All E.R. 635.
[18] *Shakoor v Situ (t/a Eternal Health Company)* [1990] 1 W.L.R. 1126.
[19] *Clerk and Lindsell on Torts* (Sweet and Maxwell), 8-186.

opinion has a logical basis".[20] Medical cases that have not passed this "logical scrutiny" include *Marriott v West Midland AHA*,[21] *Taafe v East of England Ambulance Service NHS Trust*,[22] *C v North Cumbria University Hospitals NHS Trust*,[23] and *Lane v Worcestershire Acute Hospitals NHS Trust*.[24] With respect, and particularly in the modern era, British courts and the legislature should a fortiori examine carefully and with "logical scrutiny" any "art" purporting to provide effective medical care but based, as noted in *Shakoor,* on "an oral tradition extending back 4,000 years".

How harmful can a herbal substance be?

The advice from Hippocrates to doctors was that "As to diseases, make a habit of two things—to help, or at least do no harm".[25] There seems to be a widespread assumption that because a substance is "natural" it can rarely offend the Hippocratic "Do No Harm" principle. The reality is very different, as a cursory glance at criminal cases reveals. Securing a conviction can be a crucial springboard in a civil action, as under the Civil Evidence Act 1968 s.11 proof that a person has been convicted of a criminal offence "shall be taken as proof", which is usually decisive of a breach of an applicable tort standard of care. What then often occurs is a quiet, out of court settlement to dispose of the tortious action, so it is always difficult to see a trail in the settlement process, particularly if, as often happens, there is a non-disclosure clause. While it follows that a criminal conviction relating to a herbal substance which has been administered can be used as a trajectory for a grieving or bereaved family to bring a tort action, this will in turn be settled on a confidential basis to avoid reputational damage. Even where overwhelming proof is available in a criminal case there will be other legal hurdles which may cause evaporation of a civil claim, such as defendant disappearance, impecuniousity, or failure to insure.

An illustration of harm from herbal supplements is the case in 2010 of Patricia Booth, a 58-year-old civil servant who suffered from acne and, passing by a Chinese "Medical Centre" in Chelmsford, paused to pick up some pills which were represented to be "safe and natural" and equivalent to drinking Coca-Cola. They seemed to work for a time. However, after five years, this substance also wiped out her kidneys, requiring her to have dialysis, caused her to develop urinary tract cancer, and then having sustained a heart attack, she lost all quality of life, as well as her career. Ying Wu, the Traditional Chinese practitioner administering these pills and described by her counsel as a "receptionist and jack of all trades" was sentenced to two years conditional discharge by HH Judge Jeremy Roberts, on the basis of a clemency plea that she did not know the pills were harmful. The principal ingredient was aristolochic acid, made a prescription-only drug in 1997 and banned completely in 1999.[26] A study of liver tumour cases in South East Asia showed that 78% were linked to the use of aristolochia in Traditional Chinese Medicine.[27] There seems no trace of any tortious claim on behalf of Ms Booth.

With so many substances used in herbal practice, and with a largely unregulated industry, there is clearly a need for a centralised system for investigating harmful products. Then there is the issue of enforcement. It is illegal to sell poisonous or contaminated substances to the public, but tackling problems caused by herbal substances can be very sporadic. Since 2008, European laws make it explicitly illegal to make claims for any sort of treatment when there is no reason to believe the claims are true. With an estimated 2000 herbal practitioners in the UK surveillance is a monumental task, and cash-strapped local authorities in an era of austerity are simply unable to have an effective response. Unverifiable claims, for example

[20] *Bolitho v City and Hackney HA* [1998] A.C. 232 at 247; [1997] 3 W.L.R. 1151.
[21] *Marriott v West Midland AHA* [1999] Lloyd's Rep. Med. 23.
[22] *Taafe v East of England Ambulance Service NHS Trust* [2012] EHWC 1335 (QB).
[23] *C v North Cumbria University Hospitals NHS Trust* [2014] EWHC 61 (QB); [2014] Med. L.R. 189.
[24] *Lane v Worcestershire Acute Hospitals NHS Trust* [2017] EWHC 1900 (QB).
[25] Of the Epidemics, quoted in in S. Singh and E. Ernst, *Trick or Treatment?* (Uxbridge: Corgi, 2008), p.249.
[26] "Has the East lost its healing touch?",*The Times*, 20 March 2010; "Chinese herbalist escapes jail for supplying banned medicine",*Daily Telegraph*, 17 February 2010.
[27] "Traditional Chinese Medicine could cause liver cancer",*Daily Mail*, 18 October 2017.

that ginkgo biloba (the oldest known tree) can "cure" dementia, are legion on the Internet and Professor Colquhoun notes that "these laws are regularly and openly flouted on every hand".[28] Adverse reactions are hugely under-reported and the prosecutorial machinery often only grinds into action when there is a recognisable fatality. For example, in August 2007, a 25-year-old PhD student in Newcastle, Ling "Carrie" Wang, died after using a painkiller called jin bu huan to treat an upset stomach; she fell into a coma and died. This substance, taken as tea or in pills undoubtedly caused her death, but it was not known where she had obtained it, as she was no longer able to speak when she arrived at hospital. A verdict of misadventure was recorded by the Coroner,[29] and although serious enforcement on this and other dangerous substances was promised after the new European framework, little has changed.[30]

Slimming pills are another hazardous area. Eloise Parry took eight tablets of dinitrophenol ("DNP") imported from China and sold illegally online. This chemical raises metabolism, so can aid weight loss, but it also causes dehydration, nausea, vomiting, irregular heart beat, and organ failure. Ms Perry had bulimia, suffered cardiac arrest and died. Those she bought the pills from all denied manslaughter, but carried on a business selling steroids. As an illustration of the profit margins in this industry, DNP was imported in barrels bought for £340, but pills made from each barrel were then sold for £200,000. Another familiar theme, as well as the huge "mark up", was that the substances were retailed as "turmeric"; Dr Arthur Caplan, a bioethicist at New York University has indicated that "turmeric is being peddled for everything from joint pain to cancer".[31]

Ephedra, known as ma huang, was another herbal substance widely used in slimming products, but also for bodybuilding, and at one stage had over 12 million users in the US. Again, as a substance speeding up metabolism, it was linked to 155 deaths before being banned in April 2004. The Federal Food and Drugs Administration had been investigating its safety "for years" and the company itself had logged complaints by 13,000 customers over five years before this ban; the suggestion was that this figure was not a huge amount, given that they had sold 50 million bottles in that time, and "only 80 of the callers" mentioned seizure, heart attack, strokes and death.[32] Tort claims can have a prophylactic effect; in that same month, a jury in Houston awarded Rhea McAllister $2.4 million in compensatory damages plus $5 million in punitive damages when she suffered a stroke after taking this supplement. The jury found that the defendants, Metabolife International, had acted maliciously when it falsely claimed to state and national regulators that the company had "comprehensive safety monitoring procedures" and that their product was safe.[33] However, as Ms McAllister had not initially told doctors of her dietary supplement, the jury had deducted 30% for her own liability, which she found "disappointing".[34] Until the ban on Ephedra in 2004, Metabolife "had the reputation as one of the largest dietary supplement manufacturers in the US" but under the weight of lawsuits filed for Ch.11 bankruptcy in 2005.[35] One of the American deaths was of a promising baseball pitcher, Steve Bechler, aged 23, which brought national attention to these dangers, illustrating that tort claims and resultant publicity can have a useful effect in safeguarding the public. Additionally, in a false advertising claim, the makers of that supplement, Cytodyne, were ordered to return $12.5 million in profits on sales of the substance in California. This was said to be "the latest in a mounting tide of costly lawsuits against manufacturers of the supplement".[36] Following a European ban on ephedra

[28] "Regulate quack medicine?",*The Times*, 29 August 2008.
[29] "Student died 'after taking herbal remedy'",*Daily Telegraph*, 25 March 2008.
[30] "Alternative healers to face safety prosecutions",*Daily Telegraph*, 15 June 2008.
[31] "Online diet pills made of chemicals used in WWI",*Daily Mail*, 16 May 2018.
[32] "DoJ Eyes Ephedra Product", *CBS News*, 15 August 2002.
[33] "Jury awards $7.4 million in ephedra lawsuit", *Associated Press*, 24 June 2004; E. Ernst, "Alternative medicines can't escape the long arm of the law",*Guardian*, 22 May 2012.
[34] "Crosby woman wins Metabolife lawsuit",*Houston Chronicle*, 29 June 2004.
[35] "Ideasphere bids for bankrupt Metabolife's assets", *nutraingredients.com*, 6 July 2005.
[36] "Judge Orders Ephedra Maker To Pay Back $12.5 Million",*New York Times*, 31 May 2003.

herbal supplements the UK Medicine and Health Products Regulatory Agency ("MHRA") were involved in the prosecution of David Green, who failed to heed warnings and continued to sell from a website.[37]

The potential consequences of following an "alternative" therapy

One problem that can prove lethal is when a patient is persuaded to give up their "conventional medicine". In Australia, a 56-year-old woman with diabetes was counselled to give up her prescribed medication for "alternative therapy". Yun Sen Lou allegedly "showed no remorse" when his patient died and in 2018, was facing a prison term on a manslaughter charge.[38] This is a particular problem with homeopathy, a scientifically implausible practice based on diluting a substance with water—"potentiation"—down to the molecular level, so that not a single trace remains of the original substance. Generally regarded as harmless, and perhaps supporting a placebo effect based on the patient's belief, it can become catastrophic if conventional medicine is spurned for homeopathy. As pointed out by UCL Professor of Surgery Michael Baum, when homeopathy is promoted for curing HIV "then there is a serious problem".[39] Undercover investigation by a journalist in 2007 revealed that homeopathy clinics in the UK were prepared to provide pills for travellers to combat malaria, typhoid, dengue fever, and yellow fever.[40] When homeopathic "nosode" anti-malarial pills were analysed in that survey they were found to be concocted from African swamp water, rotting plants and mosquito larvae.[41] Founded in the 18th century by a German doctor Samuel Hahnemann, homeopathy still has its believers, even in royal quarters, but Professor Ernst after extensive research notes that "There is no scientific case for homeopathy: the debate is over".[42] Unfortunately, and principally because patients often neglect "conventional medicine" when they opt for homeopathy, there can be disastrous consequences.[43] For example, as a result of the now discredited "research" on MMR (measles, mumps and rubella vaccine) by Andrew Wakefield, alleging a link with autism and bowel cancer, a survey showed that few homeopaths would advise inoculation. Wakefield was struck off the medical register for unethical behaviour, misconduct and fraud—on the basis that he "repeatedly breached fundamental principles of research medicine".[44] It emerged that he had earlier been paid undisclosed amounts at the direction of a solicitor, Richard Barr, who hoped to raise a speculative class action lawsuit against the drug companies manufacturing the triple shot.[45] Wakefield's claims have led to a decline in vaccination rates in the US and the UK, the loss of "herd immunity" and a corresponding rise in measles and mumps, resulting in serious illness and deaths. Once such diseases were nearly eradicated, but there have been, for example, 80,000 cases of measles in Europe in the last year, there are ongoing epidemics in many parts of the US, and a serious health challenge across the world in promoting vaccination against a collapse in public confidence.[46] Depressingly, Wakefield continues his campaign, appearing back in London for the "UK premiere" of *Vaxxed*, a film alleging a "cover up" by the medical establishment,[47] and currently in a relationship with supermodel Elle Macpherson with her "premium luxury wellness business, WelleCo, which provides high-end alkaline powdered drinks and elixirs".[48]

[37] "Ephedra supplier jailed for six months", *nutraingredients.com*, 9 June 2010.
[38] "Chinese herbal medicine practitioner charged with manslaughter",*Daily Mail*, 17 August 2018.
[39] "Homeopathic treatment of AIDS attacked by medics",*Independent*, 16 November 2007. See also Professor Baum's criticism of the Prince of Wales for advocating "coffee enemas and carrot juice" for cancer patients, *BMJ*, 9 July 2004.
[40] See above.
[41] "BSc in gobbledegook",*Daily Mail*, 22 March 2007.
[42] "A scientist in wonderland",*Guardian*, 12 March 2015.
[43] See I. Freckelton, "Death by homeopathy: issues for civil, criminal and coronial law and for health service policy" (March 2012) 19(3) J. Law Med. 454–78.
[44] "Andrew Wakefield struck off register by General Medical Council",*Guardian*, 24 May 2010.
[45] B. Deer, "How the case against the MMR vaccine was fixed" (6 January 2011) *British Medical Journal* 342:c5347.
[46] "The measles virus was down and out. Now it's primed for a comeback",*Boston Globe*, 26 March 2019.
[47] "Disgraced MMR fraud doctor is back in Britain",*The Times*, 16 February 2017.
[48] "Elle Macpherson seen kissing Andrew Wakefield, who linked vaccines to autism in retracted study",*People Magazine*, 17 July 2018; "The Body and the Dodgy Doc",*The Sun*, 19 July 2018; *Daily Mail*, 14 December 2018.

A classic illustration of turning away from conventional medicine in favour of "natural" therapy was that of Russell Jenkins, a diabetic aged 52, who was a "spiritual healer". He suffered a minor injury when he stepped on an electric plug in his Portsmouth home in 2007. The wound turned septic and, eschewing standard medical treatment, he took advice from a homeopath who suggested alternative treatment with manuka honey, produced by bees foraging on a plant native to Australia and New Zealand. Mr Jenkins repeatedly refused conventional treatment and died of septicaemia and gangrene. His parents sued the partner of their son, Cherie Cameron, a former theatre nurse who had also turned to alternative medicine as a "flower essence adviser", in that she had failed in her duty of care. It was apparent that, even at the last, antibiotics could have saved Mr Jenkins. However, Pitchford J concluded that Mr Jenkins was exercising his own free will not to receive effective medical treatment, and that his partner had not "unlawfully killed" him when she failed to summon medical help in his final hours.[49]

Belief in herbalism can also disrupt not just medical intervention but also patient care in a more general sense. In the Irish case of *AC v Cork University Hospital*, Hogan J had to deal with a family appeal against a wardship order on a frail 93-year-old woman admitted to hospital on two occasions after falls had resulted in hip fractures. An assessment had to be made on the "attitude and behaviour" of her son and daughter, the latter who had visited their mother on the ward "and covered her in cayenne powder … a hot chilli powder used to flavour dishes … and also used as a herbal supplement" in a bizarre attempt to try to restore the mother's health by "natural" means. The appeal against the wardship order failed.[50] Commenting on a study in 2005 that 50% of homeopathic patients said the diluted substances made them feel better, Professor Colquhoun notes that many minor ailments are "self-limiting", but that when homeopaths believe they can prevent and treat malaria, AIDS, cholera, and even cancer then "homeopathy ceases to be a harmless joke".[51] In terms of diagnosis, the use of such alternative medicine, according to Professor Ernst, "runs the risk of missing an illness that might even kill the patient".[52]

Adulteration of "natural" substances

In 1998, the World Health Organisation set up a project to attempt "global standardisation for herbal medicines".[53] Commenting on this new system of collecting adverse reaction reports, Debbie Shaw, a toxicologist at Guy's Hospital, indicated that "For unregulated products, there is no guarantee that they contain what the label claims".[54] The adulteration of herbal substances is frequent. Research at Boston University Medical School showed that one-fifth of ayurvedic medicines available online contain dangerous metals such as lead, mercury and arsenic.[55] This has been a persistent pattern. In 1998, the Californian Department of Health found that of 260 Asian "medicines" investigated, 83 contained undeclared drugs or poisonous metals such as lead or arsenic. One nototorious and ongoing case is the class action against USPlabs, who were "engaged" in a conspiracy to import ingredients from China using false certificates of analysis and false labelling, and then lied about the source and nature of these ingredients; the case identified 97 people in 16 states who suffered liver damage. The tenacity of Linda Wong, a transplant surgeon in Hawaii, brought the dangers of this "muscle building" and "fat burning" supplement to the attention of the authorities.[56] Key directors have now pleaded guilty in Texas to fraudulently making $400 million in profits from these bogus weight loss supplements, which contained a chemical stimulant DMAA (Dimethlyamylamine) sourced in China. Banned in the US, the UK and many other countries, because

[49] "Parents fail to secure unlawful killing verdict",*Independent*, 12 December 2009. See also *Daily Telegraph*, 27 November 2009.
[50] *AC v Cork University Hospital* [2018] 1 E.C.A. 217.
[51] "Should the NHS fund homeopathy?", *The Times*, 26 February 2010.
[52] "Charles under attack for supporting homeopathy",*Daily Telegraph*, 18 January 2018.
[53] K. Morris, "Tackling thorny issues of herbal medicines worldwide", *The Lancet*, 18 April 1998.
[54] K. Morris, "Tackling thorny issues of herbal medicines worldwide", *The Lancet*, 18 April 1998.
[55] Dr R. Saper, JAMA; noted by P. Bee, "A toxic combination",*Guardian*, 28 August 2008.
[56] D. Thompson, "The Transplant Surgeon who went out on a limb", *Honolulu Magazine*, 25 June 2024; the class action was settled in Florida for $2 million; *Velasquez v USPlabs LLC* Case No.4:13-CV-00627 (US DC for the Northern District of Florida).

the ingredient has been linked to strokes, heart failure and sudden death, the stimulant was marketed as "geranium flower powder".[57]

There is clearly considerable profitability in supplying unlicensed medicines. In the UK, Martin Hickman pleaded guilty in March 2009 to five offences of supplying unlicensed medicines allied to money laundering. He was sentenced by HH Judge Taylor to two years' imprisonment and then in April 2012 a conviscation order was made after a proceeds of crime hearing, requiring Mr Hickman to pay £14 million (sic) within six months, with a default sentence of 10 years. Very little was paid of the £14 million, so the default sentence was imposed in March 2014. By then, Mr Hickman was living in Spain, so had to be apprehended under a European Arrest Warrant, but the sentence was upheld in the Court of Appeal in 2018. Mr Hickman had been trading without a licence, but had been selling fake viagra and potentially dangerous slimming products on the internet. Officers of the Medicines and Healthcare Products Regulatory Agency had assisted in bringing Mr Hickman to justice, in a very sizeable asset recovery.[58] For some time, it has been suggested that the MHRA has been engaged in a "crackdown" with a particular "concern about the growing number of drugs for cancer, heart conditions and depression that can be bought online".[59] But with the ease of access, the unscrupulous nature of the trade and, sadly, the gullibility of consumers, this is not an easy task.

Medical support for alternative treatment

Astonishingly, there is occasional support by doctors for alternative treatment. Two doctors, Paul Layman and Jason Schreiber, appeared before the General Medical Council in 2004 facing charges of serious professional conduct for misleading patients into believing that their breast cancer could be cured by alternative treatment. This consisted of a vegan diet, organic juices, and eating 60 apricot kernels every day. Professor Ernst as an expert witness pointed out that these kernels contained cyanide—"one of the most potent poisons known to mankind" and that this "treatment" was clearly "flying in the face of science".[60]

Homeopathy has also in the past been supported by doctors, sometimes with tragic results. In a classic case, *R. v Harris,* the parents of a child suffering from diabetes refused to permit an injection of insulin because of their Rastafarian faith. Their GP had immediately diagnosed diabetes and she booked an appointment for Dwight and Beverley Harris to take their nine-year-old daughter, Nahkira, to the Queen's Medical Centre in Nottingham for treatment. At this point, there was a clash of evidence in the case, the hospital and health visitor were under the impression that the parents were refusing treatment, with the parents claiming they simply wanted more information and were waiting for an appointment. Consulting a homeopath in Devon, the parents gave their daughter syzygium, which "served only to mask" symptoms. Belatedly, the parents then saw another GP who was also a homeopath, although by now the child had lost a third of her weight and was in a diabetic coma; he talked to the parents for an hour and a half "in an attempt to gain their confidence" but the child died on transfer to hospital. The parents were prosecuted for manslaughter, the father sent to prison for two and a half years and the mother given a suspended sentence of 18 months.[61] After the verdict, Bill Foxton, the secretary of the Faculty of Homeopathy, the professional body for doctors who also practise homeopathic medicine said "Where a patient is dependent on insulin, homeopathy is not relevant".[62]

[57] US Dept of Justice, 13 March 2019.

[58] *R. v Hickman* [2018] EWCA Crim 2717; "Conman who sold fake viagra jailed for failing to pay £14m confiscation order", *Manchester Evening News*, 2 October 2014.

[59] "Crackdown on illegal prescription drugs trade", *BBC News*, 29 September 2011.

[60] "Doctors 'misled their seriously ill patients'", *This is Wiltshire*, 10 November 2004.

[61] "The girl that nobody saved",*Independent*, 6 December 1993.

[62] "Father who let his diabetic daughter die gets jail term",*Independent*, 6 November 1993.

An even more extraordinary case was that of Dr Michelle Langdon, a GP at the Brunswick Medical Centre in London, who not only advocated "natural" remedies but purported to treat a baby's stomach infection by swinging a crystal pendant over a book of herbal remedies! The baby's mother, Bethan Jinkinson, was told by this GP that her home was "built on 'geopathic stress' lines that could cause ME, cancer and cot death". Fortunately, the baby was promptly taken by her unconvinced mother to the casualty department at University College Hospital where the infant was treated for gastroenteritis. Although in subsequent proceedings, Dr Langdon was found guilty of serious professional misconduct, she was only suspended for three months from the practice of medicine.[63]

The wholly bogus

Out of many possibilities, the current fad of "detoxification" perhaps can serve as a straightforward example of charlatanry. The pseudo-scientific rationale is that harmful waste products, "toxins", build up in the body, undermining the condition of organs, and these are removed by a specialist diet—often expensive. The NHS website notes that "The concept of detox diets is irrational and unscientific, and many of the claims are wild and exaggerated". One particularly dangerous trajectory here are the "Purification Rundown" and "Narconon" detox programmes developed by L. Ron Hubbard, the founder of Scientology. This involves megadoses of vitamins and minerals, leading to a clear medical warning by the US National Institutes of Health of "liver problems, gout, ulcers of the digestive tract, loss of vision, high blood sugar, irregular heartbeat", and with details of their investigation of fatalities. For example, the 2009 death of Kaysie Dianne Wernick, transferred belatedly from "Narconon Arrowhead" in Oklahoma to a hospital resulted in an out-of-court settlement for wrongful death.[64] Several other fatalities at that pseudo-medical establishment have resulted in over a dozen lawsuits and settlements, but despite a grand jury investigation this facility is still open.[65]

A cursory glance at websites shows a huge array of "cancer cures". Understandably perhaps, up to 80% of cancer patients are thought to resort, in desperation, to complementary and alternative medicine.[66] In the UK, the Cancer Act 1939 bans all practitioners from advertising any non-medical treatment as a "cure" for cancer.[67] But action can only be taken by Local Authority trading standards officers and the prosecutions are minuscule in number. Commenting on a "Spirit of Health Congress" in 2015, the Chair of the House of Commons Health Select Committee, Dr Sarah Wollaston MP, noted that the "Cancer Act was designed to protect people when they are at their most vulnerable from the snake-oil salesmen peddling false hope and fake cures". Film footage of this Congress showed elderly cancer patients being told that the products on offer would cure their diseases. These "alternative" treatments included "black salve, a highly caustic solution, as a cure for throat and skin cancers, a salt treatment for lung cancer, and the use of industrial-strength bleach to treat autism, Ebola and HIV".[68] Bleach seems a common theme; in 2012, the UK Food Standards Agency likened a "Miracle Mineral Solution" allegedly used by five million people worldwide as merely "industrial strength bleach". They warned of serious health risks including kidney failure and poisoning, and further investigation noted that this "health product" which claimed to be a cure for "AIDS, hepatitis A, B and C, malaria, herpes, TB, most cancers and many more of mankind's worst diseases" was being marketed by Jim Humble, a one-time gold prospector from Las Vegas who became an "archbishop" of his own Genesis II Church of Health and Healing, having broken away from

[63] See the Minutes of the GMC Professional Conduct Committee 13–16 January 2003 at *homewatch.org*; "GP 'swung a crystal ball to treat sick baby'",*The Times*, 14 January 2003 and the decision at *The Times*, 17 January 2003.

[64] "Scientology detox programmes: expensive and unproven",*Guardian*, 17 August 2012.

[65] "4 deaths in 3 years: Advocates wonder why drug rehab center's still open",*The Oklahoman*, 22 January 2017.

[66] J. J. Mao, "Complementary and alternative medicine use among cancer survivors" [2011] J. Cancer Surviv. 5:8–17. See also R. Schapiro, *Suckers: How alternative medicine makes fools of us all* (Harvill Secker, 2008).

[67] See in particular s.4(1)(a) which states that "No person shall take any part in the publication of any advertisement (a) containing an offer to treat any person for cancer, or to prescribe any remedy therefor, or to give any advice in connection with the treatment thereof".

[68] "MPs call for police inquiry into bogus cancer cures",*Daily Telegraph*, 25 May 2015.

Scientology. This "cure", touted on the internet, was responsible for the death of a Mexican woman travelling on a yacht in Vanuatu, who had taken the substance as a preventative for malaria, sparking medical alerts but not preventing further trading.[69] A serious problem here is of course the global nature of selling products on the internet and the difficulty of sharing information about fatalities and "near misses" caused by fraudulent quackery.

While prosecution under the Cancer Act can result in three months imprisonment, an analysis of the British cases, and those on related herbal supplements causing serious injury, show that there are very few prosecutions.[70] On conviction, the fines are usually trifling. For example, in 2017, Jerry Sargeant was fined £1,200 by Westminster Magistrates Court for a website advertisement touting "Energy Healing for Cancer Treatment", with the mitigation that he had not realised that he was unable to advertise his "self-taught" healing power using "star magic".[71] In 2014, Errol Denton, giving a distinguished medical postal address as Number One Harley Street, and describing himself as a "certified nutritional microscopist and qualified iridologist" (an alternative treatment claiming to examine eyes to determine a patient's health), was fined £9,000 for suggesting a cure for "toxic blood"—he had tweeted that "Cancer, diabetes, HIV etc etc all curable without the big pharmaceuticals".[72] In another case, Andrew Harris selling "Triamazon", advertised as a "miracle non-toxic natural rainforest discovery [which] wipes out deadly cancers" was first given a two year conditional discharge by Trafford magistrates in 2010.[73] He continued to market the product and was then the subject of a Crown Court case in Manchester, where in the course of the trial he suddenly changed his plea to guilty, and was sentenced to 12 months in prison, suspended for 18 months. HH Judge Adrian Smith stated that this was "not a deception case" and that the defendant, while on benefits and "undoubtedly" making a profit, had as his motive the provision of alternative treatment to fellow cancer sufferers.[74] This case resulted from a combined operation by police and the Medicines and Healthcare Products Regulatory Agency; Mr Harris continued to propagate the effectiveness of this "cure" and indeed the product is still being marketed. Demonstrating perhaps how obscure this legislation is in the public consciousness, when the supermarket chain Asda was charged under the Cancer Act for claiming that mangoes "could help beat cancer" the charge was dropped to an offence under the Food Labelling Regulations 1996.[75] They were fined £5,000 for what they argued was a "genuine mistake".[76] Asda is owned by the American company Walmart and a cursory glance at the Internet will reveal articles in the US such as "Eating Mangoes Will Clean Cancer Cells Out The Body".[77]

Not only judges but juries too can be merciful when a herbal case proceeds to the Crown Court. Sandra Stay, a 59-year-old catering manager in Brighton, had her kidneys removed in 2003 after taking a Chinese herbal medicine to cure a skin condition. According to the prosecution the 15 brown-coloured pills she took every morning contained Aristolochia, a poisonous plant extract banned by emergency regulations in July 1999.[78] She had been given herbals pills because allegedly her "hot and cold were out of balance".[79] However, the jury at Hove Crown Court failed to agree after retiring for five hours, and the herbalist Zie Zheng walked free on the basis that although she knew from a circular that she should remove all herbal

[69] "Death in Paradise", *Sydney Morning Herald*, 9 January 2010; "Calls for Bar on salesman promoting bleach to cure autism",*Daily Telegraph*, 14 April 2015.

[70] A House of Commons written answer on 12 June 2014 indicated there had been 25 convictions since 1984.

[71] "Man who says he cures people through crystals and star magic facing jail",*Metro*, 20 September 2017.

[72] "Duped by the 'blood analyst' who says that he can cure cancer",*Sunday Telegraph*, 30 March 2014.

[73] "Guilty over cancer 'cure'", *Manchester Evening News*, 19 April 2010.

[74] "Suspended sentence for 'miracle cure' cancer drug man",*Manchester Messenger*, 29 September 2010.

[75] Food Labelling Regulations 1996 (SI 1996/1499).

[76] "Asda fined for mango claim",*Guardian*, 26 October 2004.

[77] *alkalinevalley.com* (5 January 2019).

[78] "Chinese medicine contamination scare", *BBC News*, 28 July 1999. This was as a result of two British cases, although the Belgian slimming case when a product containing this substance led to 70 cases of renal failure was in 1993.

[79] "Herbal remedy woman had kidneys removed", *Brighton Argus*, 20 June 2003

supplements containing Aristolochia she had not known that these pills contained the poisonous substance.[80] The jury was informed that Ms Zheng would be retried.[81] However, it appears that the case has now slipped into abeyance.

Conclusion

With the huge numbers of people using "alternative medicine", and as we have seen, the cases of serious harm that can sometimes result, it is only a matter of time before the British courts will need to focus their attention once again on whether a tortious duty of care is owed. Research conducted by the Medicines and Healthcare Products Regulatory Agency in 2009 showed that 26% of UK adults had taken a herbal medicine in the previous two years. Current research shows that not only is there a risk from some products being marketed, but there is also the potential for "herb-drug interaction" causing harm, as well as the adulteration and even fraudulent admixtures being purveyed. Similarly unexplored is the potential for an allergic reaction when taking a herbal supplement; an instance was when Norman Ferris, an arthritis sufferer in Invergowrie took a herbal supplement of glucosamine and died within two months. When his sister campaigned to have strict testing of these pills, made from "natural" substances derived from crab and lobster shells, it was noted in the Perth Sheriff Court that the Department of Health had taken action on 56 complaints against glucosamine producers.[82]

It is perpetually astonishing that even intellectually sophisticated individuals can fall back on unknown "natural" treatments; one particularly poignant case in the US was that of a medical student whose family originated from India and who, on a family vacation there, was treated for low back pain with ayurvedic supplements. Returning to the University of Pennsylvania School of Medicine he suffered acute lead toxicity until medical staff could work out, just in time, what the problem was.[83] In the absence of strict pharmaceutical controls in manufacture, there is necessarily a serious risk in some of these products. Some ayurvedic medication has been found to contain lead and mercury at 100 to 100,000 times greater than acceptable limits.[84] Even more problematic is that four out of five supplements tested for the Adulterated Herbal Supplements lawsuit in New York did not contain the "medicinal herbs" they were supposed to; this ongoing case has been an attempt by the State Attorney-General to enforce a "cease and desist" letter requiring stoppage of sales containing herbs such as ginkgo, ginseng and echinacea. Testing showed that, even when advertising such substances, the actual products contained "cheap fillers" such as powdered rice, asparagus and houseplants.[85] With an industry of such magnitude in the US, and over half of all adults there indicating they use dietary supplements, recent research indicated that in 776 supplements there were 157 products containing more than one unapproved substances.[86]

While in the UK it became an indictable offence at Common Law in the 18th century to provide someone with food that it not fit for human consumption, regardless of whether this was done out of malice or profit-seeking,[87] and indeed a supplier can be charged with manslaughter if someone dies from eating contaminated food,[88] there are very few prosecutions under the current Food Safety Act 1990, and

[80] "Herbal remedy was poisonous court told", *This is Brighton and Hove*, 28 October 2003; "Clinic owner gets all clear", *Western Daily Press*, 7 November 2003.

[81] "Tablets 'caused kidney failure'", *BBC News*, 27 October 2003.

[82] "Arthritis remedy theory for death", *BBC News*, 6 December 2007; "Sister of natural remedy death man wants strict testing on tablets",*Daily Record*, 2 July 2008.

[83] A. Breyer and J. Green-McKenzie, "Case of acute lead toxicity associated with Ayurvedic supplements" (May 2016) *BMJ Case Report* (bcr 2016215041.

[84] K. Guntur et al., "Ayurvedic herbal medicine and lead poisoning" [2011] *Journal of Hemetology & Oncology* 4: 51.

[85] "New York Attorney General Targets Supplements at Major Retailers",*New York Times*, 3 February 2015.

[86] J. Tucker, "Unapproved Pharmaceutical Ingredients included in Dietary Supplements Associated With US Food and Drug Administration Warning" [2018] J*ournal of American Medical Assoc* 1(6).

[87] *R. v Treeve* (1796) 2 East P.C. 821.

[88] *R. v Kempson* (1893) 28 L. Jo. 477.

enforcement by local authorities necessarily is affected by "austerity budgets".[89] After 30 April 2011, all herbal medicines placed on the UK market must have a Traditional Herbal Registration or a marketing authorisation (previously known as a product licence) but there remain multiple challenges in keeping the public safe.

Although as indicated, the *Bolam* test remains the law on tortious liability in the event of harm from alternative medicine,[90] a closer scrutiny would suggest that there exists the judicial option for overturning the *Shakoor* precedent in an appropriate case.[91] While currently the practitioner of alternative medicine will be judged by reference to the standards of fellow practitioners, and not by the standards of conventional medicine, surely the time has come for a serious review of the standards applicable to what a reasonably competent practitioner needs to conform to in practising that "art" in the UK?

However, there then follows the need to overcome the doctrine of volenti non fit injuria, which would no doubt be thrown up as a defence.[92] Certainly anyone taking unconventional medication can be said to be "assuming a risk". But the better argument would be that a victim would only be consenting, and volens, to the risk of injury if they freely accepted the risk and, more importantly, did so with full knowledge of both the nature and the extent of that risk.[93]

[89] See C. MacMaoláin, *Food Law* (Oxford: Hart Publishing, 2015).
[90] See generally J. Laing and J. McHale, *Principles of Medical Law*, 4th edn (OUP, 2017).
[91] M. Fordham, "The Standard of Care Applicable to Practitioners of Alternative Medicine" [July 2001] *Singapore Journal of Legal Studies* 1–11.
[92] *ICI v Shatwell* [1965] A.C. 656; [1964] 3 W.L.R. 329.
[93] *Bowater v Rowley Regis* [1944] K.B. 476 at 479 CA; [1944] 1 All E.R. 465. See J. Goudcamp, *Tort Law Defences* (Oxford: Hart Publishing, 2013) p.55 onwards. See also *Clerk & Lindsell on Torts*, 22nd edn, (Sweet and Maxwell, 2018) 3-107.

Sleepiness, Shift Work, and Sleep Related Road Crashes

F. Pilkington-Cheney,*

A. J. Filtness**

C. Haslam***

Employees' liability; Employers' liability; Fatigue; Personal injury; Road traffic accidents; Shift workers

Abstract

Sleepiness is an important and often underestimated factor in the occurrence of motor vehicle and work-related incidents, contributing to approximately 15–20% of global road traffic crashes. Increased sleepiness has been shown to impair reaction time, vigilance, and cognitive decision making, skills which are vital to safety critical tasks such as driving. Sleep related crashes have been shown to be prevalent in shift workers due to a combination of work and home related factors, impacting sleep and resulting in increased sleepiness. Night workers especially are required to be alert and perform duties during times of decreased alertness, often then commuting home, increasing their risk of a sleep related crash. It is important that responsibility for sleep related crashes and workplace incidents is shared between the employer and employee. While individuals have a responsibility to ensure they are rested for work and adequately alert to drive, if shift schedules and patterns result in extended work periods and reduced opportunities to rest, individuals may experience excessive workplace or driver sleepiness despite their best attempts to manage their rest. Establishing an open culture environment within the workplace to encourage discussions relating to sleepiness as well as providing education relating to causes and consequences of sleepiness is an important initiative. Individuals may therefore be encouraged to report instances of sleepiness, reducing the risk of sleepiness related accidents, incidents and crashes.

Introduction

Sleep is an everyday behaviour to which many people do not give a second thought. However, sleep is vital for our health and well-being, and necessary for us to be alert and perform effectively. Sleep loss or reduced quality sleep can result in feelings of sleepiness, with excessive sleepiness potentially leading to severe consequences.

Driver sleepiness and sleep related crashes are a worldwide, current issue, and are often under-reported. Individuals who are experiencing high levels of sleepiness could be at risk of a sleep related crash, which tends to have more severe outcomes compared to accidents related to alcohol. Whereas a drunk driver may brake late, a sleepy driver may take no avoiding action, often being involved in a crash at the same speed as they were travelling. Therefore, sleep related crashes are associated with a higher risk of death and severe injury compared to other police reported crashes.[1] Sleep related crashes are likely to occur on high speed roads such as motorways and rural roads, resulting in serious injury, high speed, single vehicle,

* *Transport Safety Research Centre, Loughborough School of Design and Creative Arts, Loughborough University.*
** *Transport Safety Research Centre, Loughborough School of Design and Creative Arts, Loughborough University.*
*** *School of Sport, Exercise & Health Sciences, Loughborough University.*
[1] J.A. Horne and L.A. Reyner, "Sleep related vehicle accidents" (1995) 310(6979) Bmj 565–567.

run off the road accidents.[2], [3] However, sleepiness related incidents can also occur on lower speed roads, with research noting that 41% of all police reported sleep-related crashes occurred on low speed roads (50km/h, 31mph), and drivers commonly self-report sleep related incidents as occurring on low speed urban roads.[4]

It can be argued that sleepiness is a common occurrence within society. Modern lifestyle factors such as artificial light, 24h access to amenities, and increased late night use of screens have been shown to impact the quality and quantity of sleep.[5], [6], [7] However, the issue is not necessarily sleepiness itself, but the when, where and why sleepiness occurs. Everyone experiences sleepiness; it is natural to feel sleepy as an indicator to sleep. The problem arises if individuals experience sleepiness when doing something safety critical. Shift work, especially night work, is a well-known cause of sleepiness, often requiring individuals to be alert and potentially perform safety critical tasks at times when they usually would be asleep. In addition, many shift workers may also commute to work, therefore driving at times when the pressure to sleep is high, increasing the risk of sleep related crashes for themselves and other road users. Several safety critical occupations require extended work hours and night work which impacts sleep quality and duration. This leads to increased sleepiness, deficits in vigilance and reaction time, and increases in human error risk, leading to workplace accidents and incidents.

Despite research identifying causes and consequences of sleepiness and sleep loss, there have been problems defining and detecting sleepiness. In workplace or driver settings, sleepiness can be difficult to identify as a casual factor, particularly in relation to an accident or incident. Currently, there is a lack of an objective, reliable and validated technology to assess levels of sleepiness (e.g. equivalent to a breathalyser for alcohol), making it difficult to measure and quantify. This therefore has resulted in issues operationalising sleepiness in definite terms to incorporate into laws. Police officers typically receive very little training in terms of dealing with and recognising sleepy drivers.[8] In addition, sleepy driving is considered a risky behaviour, although not as risky as other driving behaviours, for example speeding.[9] Factors such as these therefore contribute to workplace and driver sleepiness being underestimated and underreported, highlighting the need for education and discussion surrounding the causes and consequences of sleepiness. In encouraging reporting and increasing awareness, the risk of sleep related accidents, incidents and crashes could be reduced, both in the workplace and on the road.

Sleepiness

Sleepiness can be caused by insufficient sleep and/or time of day, including circadian and homeostatic pressures which everyone experiences. Our circadian rhythms are biological processes which run on a near 24-hour cycle. These rhythms display peaks and troughs throughout the cycle, which is driven by an internal body clock. Homeostatic pressure increases over time, with pressure to sleep building the longer we have been awake. Despite there previously being a lack of consensus as to what constitutes sufficient sleep in adults, it was concluded recently that at least seven hours of sleep a night is needed on a regular

[2] J. Connor, et al., "Driver sleepiness and risk of serious injury to car occupants: population-based case control study" (2002) 324(7346) Bmi 1125.
[3] A.J. Filtness, K.A. Armstrong, A. Watson and S S. Smith, "Sleep-related vehicle crashes on low speed roads" (2017) 99 *Accident Analysis & Prevention* 279–286.
[4] K. Armstrong, et al., "Efficacy of proxy definitions for identification of fatigue/sleep-related crashes: An Australian evaluation" (2013) 21 *Transportation Research Part F: Traffic Psychology and Behaviour* 242–252.
[5] T. Åkerstedt and P.M. Nilsson, "Sleep as restitution: an introduction" (2003) 245(1) *Journal of Internal Medicine* 6–12.
[6] J.P. Chaput, "Sleep patterns, diet quality and energy balance" (2014) 134 *Physiology & Behaviour* 86–91.
[7] L. Matricciani, T. Olds and J. Petkov, "In search of lost sleep: secular trends in the sleep time of school-aged children and adolescents" (2012) 16(3) *Sleep Medicine Reviews* 203–211.
[8] I. Radun, et al., "Driver fatigue and the law from the perspective of police officers and prosecutors" (2013) 18 *Transportation Research Part F: Traffic Psychology and Behaviour* 159–167.
[9] C.N. Watling, K.A. Armstrong, S S. Smith and P.L. Obst, "Crash risk perception of sleepy driving and its comparisons with drink driving and speeding: Which behaviour is perceived as the riskiest?" (2016) 17(4) *Traffic Injury Prevention* 400–405.

basis.[10] However, studies indicate that individuals often obtain less than the recommended hours of sleep,[11], [12] with factors such as work hours, family and social lives and health impacting opportunities for sleep.[13]

Sleepiness is prevalent in shift workers. It is estimated that between 15%-20% of the working population in industrialised countries are involved with shift work.[14] Many aspects of shift work impact on an individual's sleep and result in increased sleepiness, both during work time, and following work—either during the commute home or during rest time. This is due to a combination of work and non-work related factors which often result in periods of extended wakefulness and circadian misalignment.[15] Rotating shift work patterns, 24 hour operations, extended commute times, instances of reduced rest, regular occurrence of time zone changes, as well as family and social commitments, all create instances of insufficient sleep.

Insufficient sleep can lead to workplace sleepiness and impaired performance for shift workers, resulting in increased risk of accidents and incidents. It has been reported that individuals who slept less than six hours had a 1.79–2.65 times greater risk of occupational injury compared to those individuals who slept between seven and eight hours a night.[16] This could have consequences for occupations which rely on shift workers to sustain operations 24 hours a day, seven days a week, such as industrial production, public safety, and the transportation industry,[17], [18] as well as safety critical professions such as the emergency services, health care and the army. There is also the concern of commuting or driving combined with shift work, with instances of sleep related crashes and incidents due to insufficient sleep.[19], [20], [21]

Reduced sleep has been associated with several health issues such as weight gain and obesity, diabetes, and cardiovascular disease.[22] Literature has also demonstrated the detrimental effects of lack of sleep on aspects of neurocognitive performance and attentional processing, such as accuracy and speed,[23] reaction time,[24] difficulty remaining focused, keeping up to date and grasping fast changing information,[25] and lapses in attention.[26] It is important to understand how sleepiness impairs cognition and performance, as many of these skills are required in safety critical occupations as well as during highly attentional tasks such as driving. For example, driving requires quick reactions and decision making, often in complex environments shared with other road users. As sleepiness is known to impair reaction time and decision making in cognitive tasks, sleepy drivers therefore would have impaired responses to safety critical events. In addition, it is known that periods of extended wakefulness result in similar neurobehavioral impairments

[10] Consensus Conference Panel, N.F. Watson, et al., "Joint consensus statement of the American Academy of *Sleep* Medicine and Sleep Research Society on the recommended amount of sleep for a healthy adult: methodology and discussion" (2015) 38(8) Sleep 1161–1183.

[11] M. Hirshkowitz, et al., "National Sleep Foundation's sleep time duration recommendations: methodology and results summary" (2015) 1(1) *Sleep Health* 40–43.

[12] C. Hublin, J. Kaprio, M. Partinen and M. Koskenvuo, "Insufficient sleep—a population-based study in adults" (2001) 24(4) *Sleep* 392–400.

[13] G. Costa, S. Sartori, and T. Åkerstedt, "Influence of flexibility and variability of working hours on health and well-being" (2006) 23(6) *Chronobiology International* 1125–1137.

[14] E. Haus and M. Smolensky, "Biological clocks and shift work: circadian dysregulation and potential long-term effects" (2006) 17(4) *Cancer Causes & Control* 489–500.

[15] S. Folkard, D.A. Lombardi and P.T. Tucker, "Shiftwork: safety, sleepiness and sleep" (2005) 43(1) *Industrial Health* 20–23.

[16] D.A. Lombardi, S. Folkard, L.J. Willetts and G.S. Smith, "Daily sleep, weekly working hours, and risk of work-related injury: US National Health Interview Survey (2004–2008)" (2010) 27(5) Chronobiology International 1013–1030.

[17] M. Sallinen and G. Kecklund, "Shift work, sleep, and sleepiness—differences between shift schedules and systems" [2010] Scandinavian Journal of Work, Environment & Health 121–133.

[18] M. Sallinen and C. Hublin, "Fatigue-inducing factors in transportation operators" (2015) 10(1) *Reviews of Human Factors and Ergonomics* 138–173.

[19] P. Philip, et al., "Fatigue, sleep restriction and driving performance" (2005) 37(3) *Accident Analysis & Prevention* 473–478.

[20] P. Philip and T. Åkerstedt, "Transport and industrial safety, how are they affected by sleepiness and sleep restriction?" (2006) 10(5) *Sleep Medicine Reviews* 347–356.

[21] J.F. Schwarz, et al., "The effect of partial sleep deprivation on computer-based measures of fitness to drive" (2016) 20(1) *Sleep and Breathing* 285–292.

[22] M.A. Grandner, "Sleep, health, and society" (2017) 12(1) *Sleep Medicine Clinics* 1–22.

[23] J. Dorrian and D.F. Dinges, "Sleep deprivation and its effects on cognitive performance" in T. Lee-Chiong (ed), *Encyclopedia of Sleep Medicine* (NJ: John Wiley & Sons, 2006), pp.139–143.

[24] C. Bougard, S. Moussay, S. Espié and D. Davenne, "The effects of sleep deprivation and time of day on cognitive performance" (2016) 47(3) *Biological Rhythm Research* 401–415.

[25] J. Horne, "Working throughout the night: Beyond 'sleepiness'—impairments to critical decision making" (2012) 36(10) *Neuroscience & Biobehavioural Reviews* 2226–2231.

[26] J.S. Durmer and D.F. Dinges, "Neurocognitive consequences of sleep deprivation" (2005) 25(1) *Seminars in Neurology* 117–129.

as to those found following alcohol consumption.[27] However, the performance impairment is not directly equivalent. Drunk drivers have slowed reactions, whereas sleep deprived individuals have been shown to have prolonged lapses with no reaction time at all.[28]

Driver sleepiness

Driving while sleepy can have serious consequences, with sleepiness being a significant risk factor to motor vehicle crashes. Driver sleepiness is associated with an increased crash risk[29], [30] and is thought to contribute to approximately 15–30% of global road traffic crashes.[31], [32], [33] It is a common issue, with research indicating that 27% of drivers experienced difficulty keeping their eyes open when driving within the past month of being asked, and 41% of drivers reporting falling asleep while driving at least once in their lifetime.[34] In terms of professional driving, these figures increase, with a study reporting that more than 40% of city bus drivers fought to stay awake while driving at least 2–4 times a month, and 19% at least 2–3 times a week.[35]

However, driver sleepiness is most likely under-reported in official crash statistics, due to difficulties associated with identifying sleepiness as a causal factor in a crash.[36] Investigating officers usually try to determine the cause of a crash with minimal information and often with little training in identifying sleep related crashes.[37] Individuals may not remember the events before an incident or be unwilling to report feelings of sleepiness before a crash. Also, if an individual has survived the incident, their alertness state will most likely have changed, with signs and symptoms of sleepiness diminishing as a result of the crash or close call. Further, official statistics only include crashes which are reported to the police. In a survey of the general public, 55% of those who had had a sleep related crash in the previous five years stated that the police were not involved.[38] Additionally, many people experience the effects of sleepiness while driving and are not involved in a crash. The issue with establishing the extent sleepiness as a problem in driving was recently highlighted as an important and current topic, as well as issues with crash investigating and reporting sleepiness related accidents.[39]

Research has shown that sleepiness can result in decrements in driving performance including simple and complex tasks, slower reaction times, impaired attention and loss of conscious awareness while behind the wheel.[40] Sleepy driving also results in a higher frequency of lane crossings,[41] reduced hazard perception,[42] and increased distractibility.[43] Findings have indicated that following 17 hours of wakefulness, driving

[27] C.N. Watling, K.A. Armstrong and S.S. Smith, "Sleepiness: How a biological drive can influence other risky road user behaviours" [2013] Proceedings of the 2013 Australasian College of Road Safety (ACRS) National Conference 1–12. Australasian College of Road Safety ("ACRS").

[28] J. Lim and D.F. Dinges, "Sleep deprivation and vigilant attention" (2008) 1129(1) *Annals of the New York Academy of Sciences* 305–322.

[29] S. Bioulac, et al., "Risk of motor vehicle accidents related to sleepiness at the wheel: a systematic review and meta-analysis" (2017) 40(1) *Sleep*.

[30] A. Hege, et al., "Surveying the impact of work hours and schedules on commercial motor vehicle driver sleep" (2015) 6(2) *Safety and Health at Work* 104–113.

[31] J. Connor, et al., "Driver sleepiness and risk of serious injury to car occupants: population-based case control study" (2002) 324(7346) Bmi 1125.

[32] J.A. Horne and L.A. Reyner, "Sleep related vehicle accidents" (1995) 310(6979) Bmj 565–567.

[33] P. Philip, et al., "Complaints of poor sleep and risk of traffic accidents: a population-based case-control study" (2014) 9(12) *PloS One* e114102.

[34] B.C. Tefft, *Asleep at the wheel: The prevalence and impact of drowsy driving* (Washington DC: AAA Foundation, 2010).

[35] A. Anund, et al., "Factors associated with self-reported driver sleepiness and incidents in city bus drivers" (2016) 54(4) *Industrial Health* 337–346.

[36] I. Radun, et al., "Driver fatigue and the law from the perspective of police officers and prosecutors" (2013) 18 *Transportation Research Part F: Traffic Psychology and Behaviour* 159–167.

[37] I. Radun, et al., "Driver fatigue and the law from the perspective of police officers and prosecutors" (2013) 18 *Transportation Research Part F: Traffic Psychology and Behaviour* 159–167.

[38] K. Armstrong, et al., "Efficacy of proxy definitions for identification of fatigue/sleep-related crashes: An Australian evaluation" (2013) 21 *Transportation Research Part F: Traffic Psychology and Behaviour* 242–252.

[39] J.S. Higgins, et al., "Asleep at the wheel—the road to addressing drowsy driving" (2017) 40(2) *Sleep*.

[40] A. Williamson, et al., "The link between fatigue and safety" (2011) 43(2) *Accident Analysis & Prevention* 498–515.

[41] D. Hallvig, et al., "Real driving at night-predicting lane departures from physiological and subjective sleepiness" (2014) 101 *Biological Psychology* 18–23.

[42] S.S. Smith, M.S. Horswill, B. Chambers and M. Wetton, "Hazard perception in novice and experienced drivers: The effects of sleepiness" (2009) 41(4) *Accident Analysis & Prevention* 729–733.

[43] C. Anderson and J.A. Horne, "Driving drowsy also worsens driver distraction" (2013) 14(5) *Sleep medicine* 466–468.

performance is equivalent to a BAC of 0.05%.[44] The legal driving limit is BAC 0.08% in the UK and 0.05% in Scotland and most EU countries.

Links between time of day and driving incidents have also been established. During periods when alertness is at its lowest due to our circadian rhythms, typically between 2.00am and 4.00am and with a smaller dip in between 1.00pm and 3.00pm, research has found there to be a higher number of driving accidents and incidents.[45], [46], [47] Prolonged nocturnal driving has also shown increased instances of lane weaving and lane crossings, similar to behaviours found in drivers whose BAC is increased.[48] Due to the nature of their work patterns, shift workers are most likely commuting to and from work during these critical times, increasing their risk of being involved in sleep related crashes.

Shift work and driver sleepiness

Shift workers are particularly at risk for crashes or near misses resulting from sleep loss. Aspects of shift work including irregular work hours, extended shift duration, and early morning shifts can be contributory factors to workplace and driver sleepiness. Many of these factors are also experienced by professional drivers, as well as additional aspects such as sedentary working and restricted seating, long hours of driving requiring constant vigilance and attention, irregular shift patterns, and a non-typical work environment, which are risk factors for fatigue and sleepiness.[49], [50], [51]

Night shift workers are especially vulnerable to increased sleepiness levels, notably in the early morning towards the end of their shift. This is due to homeostatic pressure to sleep, and the trough in alertness experienced during the natural night, creating instances of reduced alertness, slower reaction times and poor accuracy, evidenced by an increased accident risk during night work.[52] As well as being required to be alert and perform efficiently at times when they should be asleep, night shift workers are also required to sleep during the day, against their body clock, and during the peak of their circadian rhythms. This results in instances of shorter, and reduced quality sleep. Gaining adequate sleep has been reported as one of the main difficulties experienced by night shift workers.[53], [54]

Sleepiness is complex and is caused by a combination of work and home factors, often transitioning between the two. For example, if a shift worker experiences high levels of sleepiness during their shift or towards the end of their shift, the sleepiness would then be taken home with them, usually via their commute. Commuting impacts sleepiness by reducing the time provided for adequate recovery, sleep and rest. Long distance commuting is not uncommon and can be fatiguing in itself. If living away from home, commuters may want to group work duties together to maximise days off, thereby reducing the number of commutes within a period but also increasing consecutive shifts and reducing rest days, potentially increasing sleepiness. Research has highlighted the danger of driving following shift work, especially

[44] D. Dawson and K. Reid, "Fatigue, alcohol and performance impairment" (1997) 388(6639) *Nature* 235.

[45] T. Åkerstedt, J. Connor, A. Gray and G. Kecklund, "Predicting road crashes from a mathematical model of alertness regulation—The Sleep/Wake Predictor" (2008) 40(4) *Accident Analysis & Prevention* 1480–1485.

[46] J. Connor, et al., "Driver sleepiness and risk of serious injury to car occupants: population-based case control study" (2002) 324(7346) Bmi 1125.

[47] J.A. Horne and L.A. Reyner, "Sleep related vehicle accidents" (1995) 310(6979) Bmj 565–567.

[48] J.C. Verster, et al., "Prolonged nocturnal driving can be as dangerous as severe alcohol-impaired driving" (2011) 20(4) *Journal of Sleep Research* 585–588.

[49] T.L. Bunn, S. Slavova, T.W. Struttmann and S.R. Browning, "Sleepiness/fatigue and distraction/inattention as factors for fatal versus nonfatal commercial motor vehicle driver injuries" (2005) 37(5) *Accident Analysis & Prevention* 862–869.

[50] J. Chaiard, J. Deeluea, B. Suksatit and W. Songkham, "Factors associated with sleep quality of Thai intercity bus drivers" [2019] *Industrial Health* Advance online publication.

[51] B. Öz, T. Özkan and T. Lajunen, "Professional and non-professional drivers' stress reactions and risky driving" (2010) 13(1) *Transportation Research Part F: Traffic Psychology and Behaviour* 32–40.

[52] S. Folkard and P. Tucker, "Shift work, safety and productivity" (2003) 53(2) *Occupational Medicine* 95–101.

[53] T. Åkerstedt, "Shift work and sleep disorders" (2005) 28(1) *Sleep* 9.

[54] G. Costa, S. Sartori, and T. Åkerstedt, "Influence of flexibility and variability of working hours on health and well-being" (2006) 23(6) *Chronobiology International* 1125–1137.

following extended work shifts such as those experienced within the medical and healthcare industry.[55] Sleepiness related crashes involving shift workers often occur during the commute.[56], [57] Night shift work particularly results in impaired driving performance and increased driver sleepiness,[58], [59] as often the commute occurs during times when the pressure to sleep is high due to periods of extended wakefulness and homeostatic pressures, combined with low alertness due to circadian influences. Objective and self-report data also suggests that following extended duration shift work[60] and night work[61] individuals knowingly drive sleepy, putting themselves and other road users at risk of a sleep related crash.

Responsibility for falling asleep at the wheel

Research has shown that drivers have insight into their own increasing sleepiness,[62], [63] and are typically aware when they have reached a level of sleepiness that is too dangerous to continue driving.[64], [65], [66], [67], [68], [69] However, individuals continue to drive, with one study reporting that 69.8% of individuals continued to drive when sleepy in the preceding five years.[70] This may, in part, be because individuals are not able to predict the exact moment that they will fall asleep. It should also be noted that during studies focusing on awareness of driver sleepiness, participants are usually prompted to report their sleepiness, and often in laboratory settings. This therefore may help to alert individuals to their increasing sleepiness levels. This experience may be very different to real life situations, where the pressure to continue working or the urge to get home following shift work may override awareness or acknowledgement of increasing sleepiness.

In terms of responsibility for workplace and driver sleepiness, this needs to be shared between employers and employees at an operational level.[71] From a regulatory approach, there have traditionally been prescriptive hours of service aimed at reducing safety risk, limiting maximum hours and minimum rest breaks. Although this approach has several strengths in that it limits the duration of time on task and ensures opportunities for sleep and non-work activities, this can be considered a simplistic view of safety.[72]

[55] C. Anderson, et al., "Self-reported drowsiness and safety outcomes while driving after an extended duration work shift in trainee physicians" (2017) 41(2) *Sleep*.

[56] L.K. Barger, et al., "Extended work shifts and the risk of motor vehicle crashes among interns" (2005) 352(2) *New England Journal of Medicine* 125–134.

[57] F. Crummy, et al., "Prevalence of sleepiness in surviving drivers of motor vehicle collisions" (2008) 38(10) *Internal Medicine Journal* 769–775.

[58] S. Ftouni, et al., "Objective and subjective measures of sleepiness, and their associations with on-road driving events in shift workers" (2013) 22(1) *Journal of Sleep Research* 58–69.

[59] M.L. Lee, et al., "High risk of near-crash driving events following night-shift work" (2016) 113(1) *Proceedings of the National Academy of Sciences* 176–181.

[60] C. Anderson, et al., "Self-reported drowsiness and safety outcomes while driving after an extended duration work shift in trainee physicians" (2017) 41(2) *Sleep*.

[61] I. Radun, J. Ohisalo, K. Radun and G. Kecklund, "Night work, fatigued driving and traffic law: the case of police officers" (2011) 49(3) *Industrial Health* 389–392.

[62] J.A. Horne and S.D. Baulk, "Awareness of sleepiness when driving" (2004) 41(1) *Psychophysiology* 161–165.

[63] M. Ingre, et al., "Subjective sleepiness, simulated driving performance and blink duration: examining individual differences" (2006) 15(1) *Journal of Sleep Research* 47–53.

[64] T. Åkerstedt, et al., "Having to stop driving at night because of dangerous sleepiness-awareness, physiology and behaviour" (2013) 22(4) *Journal of Sleep Research* 380–388.

[65] S. Ftouni, et al., "Objective and subjective measures of sleepiness, and their associations with on-road driving events in shift workers" (2013) 22(1) *Journal of Sleep Research* 58–69.

[66] Lee (2016).

[67] I. Radun, et al., "Self-reported circumstances and consequences of driving while sleepy" (2015) 32 *Transportation Research Part F: Traffic Psychology and Behaviour* 91–100.

[68] C.N. Watling, K.A. Armstrong, S.S. Smith and A. Wilson, "The on-road experiences and awareness of sleepiness in a sample of Australian highway drivers: a roadside driver sleepiness study" (2016) 17(1) *Traffic Injury Prevention* 24–30.

[69] A. Williamson, R. Friswell, J. Olivier and R. Grzebieta, "Are drivers aware of sleepiness and increasing crash risk while driving?" (2014) 70 *Accident Analysis & Prevention* 225–234.

[70] C.N. Watling, K.A. Armstrong and I. Radun, "Examining signs of driver sleepiness, usage of sleepiness countermeasures and the associations with sleepy driving behaviours and individual factors" (2015) 85 *Accident Analysis & Prevention* 22–29.

[71] P. Gander, et al., "Fatigue risk management: Organizational factors at the regulatory and industry/company level" (2011) 43(2) *Accident Analysis & Prevention* 573–590.

[72] P.H. Gander, "Evolving regulatory approaches for managing fatigue risk in transport operations" (2015) 10(1) *Reviews of Human Factors and Ergonomics* 253–271.

Hours of service regulations usually do not take into account factors such as circadian rhythms, whereby performance impairments occur during the night and reductions in sleep quantity and quality are found if sleep is obtained during the day. Commuting times, family and social commitments and the issues of cumulative sleepiness and adequate recovery time are also often not factored in. Therefore, a multidimensional approach to managing sleepiness and fatigue has been developed as an alternative,[73] sharing duty of care for safety and health between employees and employers.

Individuals have a responsibility to ensure they are fit and safe to carry out the duties of their job role. For shift workers, especially night shift workers, this would also include making sure they are well rested and are in an alert state in order to perform safely and efficiently. Subsequently, individuals also have a responsibility to ensure that they are sufficiently alert to drive home following shift work. However, certain individual circumstances may impact sleepiness. For example, financial pressure may increase the need for overtime and the location of work and living arrangements can impact commute times, both reducing opportunities for rest and recovery. Family circumstances and prioritising social and personal commitments over sleep may also increase sleepiness levels, as well as individual variability in relation to sleep loss. There is also the issue of whether individuals know and understand the risks involved with excessive sleepiness, particularly in relation to driving and the workplace, and whether they have been provided with the knowledge of how to manage and counteract sleepiness. Certain countermeasures have been shown to be effective at reducing sleepiness, however they rely on an individual's subjective awareness of sleepiness and the willingness to act on those feelings.

There are also opportunities for industries and/or companies to minimise sleepiness risk. An individual can manage their own sleepiness and make use of countermeasure advice, however if their shift pattern entails extended work periods, or reduced opportunities for rest, then they may experience excessive workplace or driver sleepiness despite their self-management of rest attempts. For example, ensuring shift patterns are forward rotating (i.e. starting work later and later each day), limiting overtime, and avoiding too many consecutive higher risk shifts (night shifts or consecutive early mornings) will help in reducing sleepiness risk. By establishing an open culture and by providing education to employees relating to the causes and consequences of sleepiness, individuals may be encouraged to report instances of workplace and driver sleepiness, helping to reduce the risk of sleepiness related accidents and incidents.

Implications

Sleepiness is an important issue that should not be ignored. The implications of an individual experiencing excessive levels of sleepiness or falling asleep either at work or behind the wheel, are disastrous. Many occupations require the use of shift work patterns, especially within the transportation industry, and with previous instances of sleepiness and fatigue playing a role in high profile crashes (e.g. the 2016 tram crash in South London), workplace and driver sleepiness is becoming notable and gaining public interest. As a result of this, action is being taken within many transportation industries to implement strategies and systems to mitigate against sleepiness and fatigue. Public awareness campaigns for road safety have previously been popular, however their effectiveness at reducing driver sleepiness is unclear, possibly requiring a multi-dimensional approach. Educating drivers and shift workers about the causes and consequences of sleepiness and effective countermeasures is an important mitigation against workplace and driver sleepiness, however this may only be effective for those who are not aware of the risks of excessive sleepiness. There is also the issue of whether shift workers or drivers have the opportunities or facilities to implement any mitigation strategies. There may be many reasons as to why individuals decide to drive or to continue to drive while sleepy aside from work-related factors, such as a desire to reach their destination, and for professional drivers issues such as financial or business pressures, or time constraints.

[73] D. Dawson and K. McCulloch, "Managing fatigue: it's about sleep" (2005) 9(5) *Sleep Medicine Reviews* 365–380.

It may also be that individuals are unaware of their increasing sleepiness levels as previously mentioned. Therefore, to effectively mitigate against sleepiness, individuals firstly need to have the awareness of, and be able to recognise, their own sleepiness. They then need to have the knowledge and education of how to act to counteract sleepiness, as well as the opportunity, facilities and motivation to implement this knowledge. Increasing reporting related to sleepiness and fatigue is an important prevention strategy. It is imperative that discussions about workplace sleepiness and commuting are encouraged, however this needs to be done in a supportive and open safety culture, without fear of disciplinary consequences.

Conclusion

Sleepiness is a major risk factor for road crashes and incidents, which should not be underestimated. Insufficient sleep detrimentally impacts cognitive skills and degrades performance, which can result in severe consequences, especially when coupled with factors such as shift work or circadian pressures. Due to the timing of shift patterns and commutes, shift workers are at greater risk of workplace and driver sleepiness, with many safety critical occupations utilising shift work to sustain 24/7 operations. Employees and employers have a shared responsibility to ensure that individuals are educated in the dangers of increased sleepiness, and how to manage and counteract it. Discussions need to be encouraged in the workplace relating to sleepiness and risk, alongside suitable work hours and shift patterns, all contributing to minimise the risk of sleep related accidents and incidents.

"Spiking" of Asbestos Reinsurance Policies: An Attempt to Remedy the Anomaly

John Mackenzie

Tanveer Rakhim

Apportionment; Contributions; Insurers; Mesothelioma; Reinsurance; Tortious liability

Mesothelioma claims have never been simple but most of the issues have been long settled in the courts allowing parties to have the certainty required to deal with these complex claims. However, there is no doubt that the *Fairchild* decision and subsequently, the Compensation Act 2006 created substantial anomalies in the law. What started as an attempt to provide a secure remedy for innocent employees exposed to asbestos has resulted in unforeseen consequences in liability insurance and more recently into reinsurance.

It was previously held in *Zurich v IEG*[1] that an employer is entitled to recover 100% of its loss from (or "spike") an individual employers liability insurance policy which was on risk at any time during the period of asbestos exposure. The issue of reinsurance was not covered by that judgment.

The issue of "spiking" of reinsurance recoveries in asbestos claims had been one of the few unresolved issues within this field with no prior authority until *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd*.[2] The Court of Appeal held in this case, that claims to reinsurers must be presented using a time on risk (apportioned) basis, as opposed to allowing an insurer the choice of applying the full claim to a specific reinsurer policy year. However, the aim of correcting anomalies to return the law to the fundamental common law principles seems to have resulted in yet another anomaly in the way the decision has been reached.

Special treatment for mesothelioma claims

Mesothelioma cases have long been treated differently due to the unique issues involved in these claims. There are rules which apply exclusively to asbestos and mesothelioma within the Civil Procedure Rules ("CPR") PD 3D, a specific section in the Disease Protocol covering mesothelioma, specialist high court lists heard by Masters and an exemption from the Jackson reforms.

The current litigation has its roots in 2002 when the House of Lords made the ground-breaking decision in *Fairchild v Glenhaven Funeral Services*.[3] A new rule was created to compensate innocent victims of mesothelioma; the employee only had to show the employer exposed the victim to asbestos (be that in negligence or breach of a statutory duty) and then show the symptoms that developed as result *may* have been caused by this exposure. This meant the civil burden of proof of proving on the balance of probability did not apply to causation of the mesothelioma injury. This was later affirmed by the Compensation Act 2006, which gave statutory force to making an employer liable for the entirety of the damage caused by exposure resulting from their employment. This is despite the employee being exposed to asbestos elsewhere and it not being determined which exposure has actually caused the illness. The Act specified joint and several liability. The primary purpose of the courts and parliament deciding in this way was to prevent the injustice to victims of this fatal disease being left without recourse to compensation. Mesothelioma

[1] *Zurich v International Energy Group Ltd* [2015] UKSC 33; [2015] 2 W.L.R. 1471.
[2] *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd* [2019] EWCA Civ 718; [2019] Lloyd's Rep. I.R. 359.
[3] *Fairchild v Glenhaven Funeral Services* [2002] UKHL 22; [2003] 1 A.C. 32.

can theoretically be caused by a single fibre. However, medical science was not able to, (and remains unable to,) distinguish which of the individual asbestos fibres ultimately triggered the cancerous change many years after the employment.

"Spiking" of claims

Where joint and several liability applies, there is nothing to prevent employers or insurers who have settled the claim then seeking proportionate contributions from other insurers or uninsured solvent employers. *Equitas v MMI* had a similar issue at its heart; whether an insurer which had been on risk for the entire period could seek full reimbursement from a reinsurer who only covered part of the period.

The background to this case is Municipal Mutual Insurance ("MMI") provided employers liability ("EL") cover to include disease with individual annual policies and each policy was without limit and with no deductible. The appellant (Equitas) had liabilities transferred to them on policies where MMI had reinsured the liabilities with Lloyd's syndicates. These policies had various layers of reinsurance involving other reinsurers too. The employers insured by MMI had many asbestos claims and each annual policy was fully liable for each claim. Even where multiple years were involved, thus multiple policies affected, no apportionment was undertaken by MMI and they simply paid in full. Where there were other insurers, or the employer had not taken out insurance, then MMI would seek contributions using a time on risk basis to apportion.

The dispute in this case, arose when MMI started to seek recovery of the whole claim from one year of reinsurance on the basis that each policy was liable for the entire sum. Therefore 100% of the claim was presented to a specific reinsurance policy year and thus would only affect a single reinsurer. MMI would attempt a claim against the reinsurers in the first year of the policy where exposure took place and if this did not yield a full recovery then MMI would claim against the reinsurer of the year where they could get the fullest recovery. Equitas disputed this method and argued for the time on risk apportionment that used to take place.

Flaux LJ sitting as a Judge-Arbitrator held spiking to be allowed at reinsurers level. However, the Court of Appeal held that whilst insurers could spike a specific reinsurance year, the same did not apply to reinsurers where apportionment on a time-on-risk basis would be required. This was because a duty of good faith is to be implied into reinsurance contracts meaning the EL insurer is to spread any given claim across all relevant years exposed.

Conflicting approaches

The 2002 *Fairchild* decision involved the creation of a special rule to ensure victims were not without a remedy as the task of proving causation would have left innocent employees unable to prove the claim. The Compensation Act 2006 reflected the public policy of ensuring victims were protected. In between them was the decision in *Barker v Corus UK*,[4] where the House of Lords had attempted to mitigate the departure from common law, They did this by holding any liability held under the *Fairchild* rule is proportionate to the defendant's contribution to the risk of developing mesothelioma, this being measured by the duration and intensity of asbestos exposure involved in that employment. This was found using the principles of common law. The parliamentary intervention by use of the 2006 Act rejected this and again created an anomaly as employers and insurers were having to again meet claims where the claimants were unable to prove causation on the balance of probability.

In the *Equitas* case, the Court of Appeal aimed to remedy this anomaly; "it is desirable that the anomalies should be corrected and the law should return to the fundamental principles of common law". As a result

[4] *Barker v Corus UK Ltd* [2006] UKHL 20; [2006] 2 A.C. 572.

of the unique situation created by *Fairchild*, the court wished to revert to established common law principles. The case throws up interesting arguments. However, the court ended up using a contradictory method in getting there. In conventional court judgments, the judge will grapple with analysing the facts, the law, relevant evidence and submissions then applying the law to the facts to reach a conclusion. Most unusually, the Court of Appeal decided on the end goal before working backwards to meet this objective. They cited the reason for this being the unprecedented consequences created by the *Fairchild* exception. This is hardly in keeping with trying to preserve the common law principles desired but reflects the complex nature of asbestos claims.

Effects of decision

Nevertheless, what is the implication of this decision for EL insurers? The original employer is allowed to spike at the insurance level, meaning the employer could pick which insurance policy over the relevant exposure period would be triggered to meet the full mesothelioma claim. If there is a deductible on that policy, it would only fall to be met by the employer once.

However, spiking is not allowed at reinsurers level meaning affected EL insurers must then present separate claims to each relevant year of reinsurance. If the exposure is alleged over say 20 years, and each year was separately reinsured, then there is now a burdensome task of presenting potentially 20 claims to each of the reinsurers. The EL insurer is also to tolerate the deductible for each year, which could force EL insurers to consider the economics of attempting full recovery. An EL insurer must present separate claims to each applicable year of its reinsurance programme and bear a full deductible in each year, notwithstanding that at the insurance level, the employer is entitled to "spike" the whole of its claim to any single year of insurance of its choice.

It seems a strange outcome and arguably does not reflect the aim that had been set out in removing anomalies. The contradictory approach between insurers and reinsurers gave way to yet another anomaly. However, it is not without logic:

- It cannot be statistically correct for critical exposure being limited to a single policy year if an employer received many claims in that year.
- The risk undertaken by insurers/reinsurers would be made unpredictable if an insured were to be able to choose the period/policy to which a loss attaches.
- Even reinsurance markets require certainty and predictability in order to be able to operate.
- Reinsurers would struggle to obtain contributions where only the insurer (MMI in this case) would have exclusive knowledge on the insurance arrangements in each relevant year.
- Common law operates on the principle of fairness, which extends beyond innocent victims to insurers and reinsurers.

It is important to consider how the decision has been reached. The Court of Appeal refused to impose deemed allocation on MMI, whereby it would be deemed that MMI's settlement of claims must be deemed on a time on risk basis, (as this would have contradicted with spiking being allowed at the insurance level as held by the Supreme Court in *Zurich Plc v IEG*.) If deemed allocation was allowed then it would have introduced yet more distortions into insurance/reinsurance law. The eventual decision came from the novel principle of "good faith" being implied into the contract. This duty of "good faith" is implied into the reinsurance contracts and requires the insurer to spread each claim across all of the applicable years of its reinsurance programme by reference to each year's contribution to the risk, which will normally require the claims to be presented on a time on risk basis. The rational approach was deemed to be presenting on a time on risk basis, unless there was evidence of differing intensity of exposure. When entering a contract, a reinsurer would not reasonably expect spiking to occur. One may argue that even the reinsurers have to take into account of developing law but it was deemed this would be harsh to impose as the insurers would

not foresee the development in asbestos law over 30 years on from the contract. Hence spiking at reinsurance level was disallowed due to the unprecedented development of the *Fairchild* exception being created, reminding us of the special and unique way mesothelioma claims are dealt with by the courts.

The future

Permission has been granted for appeal to the Supreme Court. That judgment is expected early next year, thus paving the way to finalising one of the last uncertain issues involving asbestos claims. The case raises issues of wider importance as spiking is allowed for insurers but the current decision does not allow it for reinsurers. Additionally, the way the duty of good has been applied so generously to insurers and reinsurers is also fundamentally different to the position to date.

Issues of public policy are often relevant as it is often the reason for departing from conventional method and common law in mesothelioma claims. The introduction of the *Fairchild* exception and the Compensation Act had their origins in public policy: ensuring innocent victims are protected by ensuring they have access to compensation. The decision of *Zurich v IEG* had a similar aim where insurers only covering part of the exposure period were held to be liable for the entire claim. Hence, victims are assured are assured of a remedy as there would be a solvent employer, or a solvent insurer, or a statutory/industry compensation scheme. The *Equitas* case has no bearings on victims and there is no obvious public policy reason that comes into play that justifies departing from established legal principles. On the one hand, it is concluded that spiking is allowed under contractual rights, yet on the other hand the duty of good faith is extended much further than before resulting in spiking at reinsurance level being disallowed.

The constant departure from established authorities and procedure and using novel approaches reflects the complexity of asbestos claims. The fact that the matter going to the Supreme Court is not necessarily the end of the matter. Many previous asbestos cases have gone to the highest court. Arguably the decision in *Zurich v IEG* itself created this anomaly in allowing spiking to occur in EL claims without addressing reinsurance issues. There are billions of pounds at stake in the insurance industry on the outcome of these decisions. Despite all the best intentions, the unceasing battle in mesothelioma claims of having to weigh up many competing interests in a fair and principled way seems to have the effect of the Pandora's box being opened at some point and yet another problem emerging.

Exoskeleton Technology Review

Jon Graham BA BSc MSc[*]

Matt White MSc[**]

LT Artificial intelligence; Medical technology; Mobility aids; Personal injury; Rehabilitation; Wearable technology

Abstract

Jon Graham and Matt White are highly experienced Neurological Physiotherapists with a specialist interest in Exoskeleton technology. In this article, they provide a review of the different models of exoskeleton that are currently available on the market, and summarise their particular strengths and weaknesses. They provide a summary of the relevant literature addressing the potential benefits derived from the use of exoskeletons. Lastly, they briefly consider future developments. The technology has seen rapid development in the last 10 years. Current models can be found in daily use at rehabilitation units in the UK as therapy adjuncts. At the same time, a growing number of personal users are wearing these devices at home and in the community. The 2020 Edition of the Guinness Book of Records includes a citation for the "fastest man to cover a marathon distance in a robotic walking device", which was set at the London Marathon in April 2018.

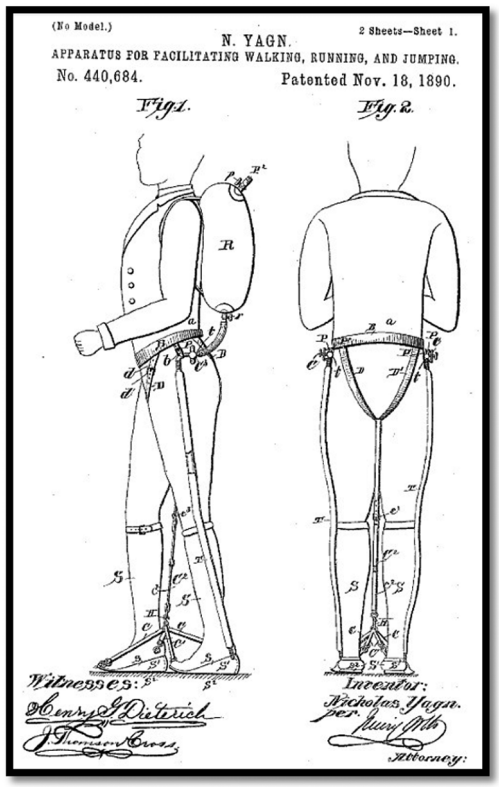
History

It is a surprise to most to learn that the first patent for an exoskeleton is attributed to Nicholas Yagn, an inventor from St Petersburg, Russia in the late 19th Century. His initial patent application was granted on 28 January 1890 for a mechanical *Apparatus For Facilitating Walking, Running, and Jumping*. A second patent (*Figure 2*) was granted in November of that year for a device using compressed gas. There is no record as to whether a successful prototype was ever built for either of these patents.[1]

[*] Clinical Director Physiofunction Ltd and Owner of Physiofunction Supplies Ltd.

[**] Senior Neurological Physiotherapist, *www.physiofunction.co.uk*.

[1] A. Dollar and H. Herr, "Lower Extremity Exoskeletons and Active Orthoses: Challenges and State-of-the-Art" (February 2008) 24(1) *IEEE Transactions on Robotics* 1–15.


(No Model.) 2 Sheets—Sheet 1.

N. YAGN.

APPARATUS FOR FACILITATING WALKING, RUNNING, AND JUMPING.

No. 440,684. Patented Nov. 18, 1890.

Fig. 1. Fig. 2.

Witnesses: Henry J. Dietrich, J. Thomson Brown

Inventor: Nicholas Yagn. per Munn & Co

Attorney:

Figure 1: Patent for the gas-powered Exoskeleton, invented by Nicholas Yagn in 1890

Research into powered exoskeletons began in relative earnest in the late 1960s with parallel activity between research groups in the US and in the former Yugoslavia. The focus in the US was primarily on developing technologies to augment the abilities of able-bodied wearers, often for military purposes. Whilst, researchers in the former Yugosalvia focused on developing technologies for assisting those with physical challenges.[2]

The evolution of microprocessor, actuator and lithium battery technologies has enabled manufacturers to bring devices to market for use in rehabilitation centres and in the community. The initial clinical focus was to provide ambulation aids for those suffering from paraplegia and tetraplegia secondary to spinal cord injury. However, this has widened to include rehabilitation of other neurological conditions, particularly stroke, acquired brain injury and multiple sclerosis.

The US Food and Drug Administration ("FDA") defines a powered exoskeleton as "a prescription device that is composed of an external, powered, motorized orthosis that is placed over a person's paralyzed or weakened lower extremity limb(s) for medical purposes".

The exoskeletons

There are currently five exoskeleton devices commercially available on the UK market: REX, Ekso, ReWalk, Indego and FREE Walk. A 6th device, Altas, is aimed at children. It is undergoing CE certification

[2] A. Dollar and H. Herr, "Lower Extremity Exoskeletons and Active Orthoses: Challenges and State-of-the-Art" (February 2008) 24(1) *IEEE Transactions on Robotics* 1–15.

at the time of writing, but is available for use for research purposes. Other lower limb exoskeletons appear in the literature, including HAL, Atalante and Phoenix but are currently unavailable in the UK and are not discussed in this article.

The devices use a variety of mechanisms to secure the shins, thighs, pelvis and lower abdomen of the user, and to accommodate the feet. All are powered by lithium batteries located within the frame. The wearer is supported within the exoskeleton and is not aware of the weight of the device, unless they "bunny hop" to make positional changes or make tight turns.

Ambulation is generally initiated by triggering tilt sensors, or in the case of the REX, by using the joystick.

The devices use actuators to move the limb segments and approximate human locomotion.

All the current devices, with the exception of the REX and the Atlas, require the user to operate elbow crutches or a wheeled walking frame to move from sitting to standing and to maintain their balance whilst walking.

Current exoskeleton walking devices can only accommodate users within relatively narrow height and weight limits. Table 1 displays these limits and also other comparable factors between the different exoskeletons.

Table 1: Comparison of the six exoskeletons currently or soon to be available in the UK

	REX	Ekso	ReWalk	Indego	FREE Walk	ATLAS
Min-Max user height (cm)	142–193	153–190	160–190	155–190	150–190	100–150
Max user weight (kg)	100	100	100	113	100	40
Upper limb aid required?	NO	YES	YES	YES	YES	NO
Indoor (level surface) use	YES	YES	YES	YES	YES	YES
Outdoor/ uneven surface use	NO	NO	YES	YES	YES	NO
Spotter Required?	YES	YES	NO	NO	YES	YES
Battery Life continuous use (hours)	2	4	4	4	4	2.5
Operation	Joystick	Therapist/user control	Wrist mounted controller	App or user operated	App or user operated	Therapist operated
Price (ex. VAT)	£110,000	£120,000	£88,000	£80,000	£65,000	Not yet available
Warranty (years)	5	4	5	2	5	N/A

ReWalk

The ReWalk (*figure 2*) was developed in Israel by Dr Amit Goffer after a vehicle accident in 1997 in which he sustained a serious spinal cord injury that rendered him tetraplegic. After several design iterations, ReWalk received FDA clearance in 2014 for use by individuals with a spinal cord injury in the clinic (Complete or incomplete SCI T4-T6) as well as at home and in the community (Complete or incomplete SCI T7-L5).

Figure 2: The ReWalk 6.0

Elbow crutches are required in order for the user to stand up and assist with ambulation.

The user's feet are accommodated using Ankle-Foot Orthoses ("AFOs") that are worn inside the footwear. The controller (Figure 3) for the device is worn either by the user, trainer or spotter on their wrist.

Figure 3: The Controller for the ReWalk 6.0

The ReWalk is currently the only device that can ascend and descend steps and stairs. The flexible footplates of the AFOs coupled with suitable footwear (of the users' choice) facilitate ambulation over uneven terrain.

Gait is triggered by the user exceeding a forward lean threshold that can be set by the clinician. The device will continue to swing alternate legs forward as long as the forward lean threshold is met, requiring the user to achieve a weight transfer towards the stance leg so that the toes on the swinging leg can clear the ground. Ambulation is terminated by the user allowing the toes of their swinging leg to strike the ground just before mid-swing. The device recognises this rapid deceleration as the signal to stop walking and re-align itself in a standing position. If the user experiences a strong lower limb spasm in their hamstrings, the device can misinterpret this and bring a premature end to the walk. Whilst, this does not pose a risk, it can be frustrating for users with an incomplete spinal cord who are subject to unexpected spasms.

It is intended for use as a personal mobility aid rather than a rehabilitation aid.

Ekso

Ekso Bionics was founded in 2005 and has pioneered the use of exoskeleton technology for mobility impaired individuals and for able-bodied individuals to assist with load-carrying in industrial settings such as manufacturing facilities and construction sites. The Ekso GT was the first exoskeleton to secure FDA clearance for use in the rehabilitation of stroke patients. The Ekso GT is the only device that can directly support the user's upper trunk. It has FDA clearance for use by individuals with higher lesions from T4 to C7.

Elbow crutches or an Ekso propriety wheeled walker are required in order for the user to stand up and assist with ambulation. With additional support of a therapist or trained spotter, the individual can mobilise with a unilateral walking aid such as a quadstick.

The user's feet are secured to broad footplates using a snow-board like binding system. This precludes its use on uneven surfaces and limits its ability to ascend and descend even slight slopes.

Gait is initiated either by the therapist using an external controller or by the user shifting their weight forward and laterally over their stance leg. Unlike the ReWalk, each step needs to be triggered in order to ambulate continuously.

Unlike the motor-assistance provided by the ReWalk, Ekso GT offers variable-assistance during swing that is responsive to the efforts of the user. The device monitors the forces generated by the user's limbs and reduces the assistance in *real-time*. When the device is being employed by individuals with a unilateral paralysis (stroke, ABI), the assistance can be curtailed on the unaffected side allowing the user to fully utilise the power of their unaffected limb.

The device can also assist the user with "pre-gait" exercises such as squats.

It can be coupled with an external Functional Electrical Stimulation (FES) unit.

This device is shortly to be superseded by the Ekso NR (Figure 4), which offers additional benefits such as variable-assistance during stance and falls mitigation.

Figure 4: Ekso NR

The Ekso is primarily designed for use within therapy in a clinic facility. It can be used in a domestic environment subject to the availability of a trained spotter, and suitable smooth and level flooring. It cannot be used outdoors.

Indego

Vanderbilt University developed a prototype exoskeleton and began field-testing the device in 2010 with individuals with paraplegia at the Shepherd Centre in Atlanta, Georgia. Parker Hannifin, a global leader in motion and control technologies for the Aerospace industry, signed an exclusive licensing agreement in 2012 to develop and manufacture a commercial version of the prototype, naming it as the Indego. They gained FDA clearance in 2016 to market and sell the Indego for personal and clinical use in paraplegia.

This was expanded in 2017 to include use by individuals with lesion up to C7, and again in 2018 for use in stroke rehabilitation.

Figure 5: Assembled Indego

Indego (Figure 5) is the lightest of all the exoskeleton and has a unique modular design. The user can either transfer into a fully-assembled device from their wheelchair or don the components as they are seated in their wheelchair. It comprises five components (Figure 6): pelvic band, left and right thigh sections, and left and right lower leg sections.

Figure 6: Indego Components

Like the ReWalk, the Indego uses AFOs to support the user's feet. Gait is initiated either by the therapist using the Indego app on an iPod, or by the user tilting their body forwards. Those with incomplete injuries can initiate swing using preserved or recovered active ipsilateral hip felxion as a trigger. The device can be programmed to initiate swing on active hip flexion. Like the Ekso, the user needs to trigger each step in order to engage in a continuous walk.

It has a less sophisticated variable-assistance mode than the Ekso. The therapist selects the percentage of power-assistance for swing rather than the device responding to the effort of the patient.

In the UK, users can be trained to use the device independently of a spotter. It has a falls mitigation feature that lowers the user's centre of gravity in the event of a fall. The Indego shares some of the rehabilitation features of the Ekso, including a provision for FES augmentation, and some of the practical features of the ReWalk for personal use. It is not as robust as the ReWalk, but it is significantly easier to transport. The components can be carried in a rucksack or holdall (Figure 7).

Figure 7: The Indego Components can be stored and transported in a rucksack or holdall

FREE Walk

This device began as an exoskeleton project in 2012 at the Taiwan based Industrial Technology Research Institute ("ITRI"), which is the one of the world's leading technology R&D institutions. Following successful clinical trials at the National Taiwan University Hospital and at SAGA University Hospital, Japan, the 3rd generation of ITRI EXO was renamed as FREE Walk. It was officially launched in 2016. FREE Bionics was established as a company in 2017 to further develop the device and introduce it to markets beyond Taiwan. It received CE approval in 2019 and is currently undergoing FDA accreditation.

Figure 8: FREE Walk

FREE Walk (Figure 8) employs two different footplate designs to support the user's feet. One supports the full length of the foot. The other, which can be seen in the Figure 8 supports the hind foot and mid foot. This enables the unsupported forefoot to adapt to the supporting surface. Individuals with an incomplete injury or other neurological condition with some residual muscle activity can balance in standing without the need for additional upper limb support, although close supervision is required as there is no "saving reaction" (i.e. a step) to stabilise in the event of a loss of balance. Elbow crutches are needed for ambulation purposes.

Gait is initiated either by the therapist using an external controller or by the user shifting their weight either forwards or laterally. The user can also control the device via switches in the handles of the elbow crutches.

The adjustable trunk support offers higher support than that offered by the ReWalk and Indego, but not as high as the Ekso.

It is the only exoskeleton that can initiate gait either with a left step as well as the "standard" right step (when used in "incomplete" mode). This choice of leading foot in combination with the initiation of gait through a lateral tilt are useful features for stroke survivors in rehabilitation and for personal use.

In operation, it is the most quiet of all the devices. It requires a trained spotter for personal use.

REX

REX was invented in 2003 by two ex-patriot Scottish engineers, working in New Zealand, with the aim of enabling wheelchair users to stand and walk independently with minimal effort. REX Bionics was

formed as a company in 2007. REX has been available in the UK since 2014. With regards to personal use, it has CE accreditation, but not FDA.

REX *(Figure 9) is* an intrinsically stable robotic exoskeleton that does not require the use of crutches or a walking frame. It can be used by wheelchair users with high levels of mobility impairment including paraplegics and quadriplegics up to C4/5.

Figure 9: REX

REX is controlled by a five-button keypad and joystick. The integral harness system supports the pelvic girdle and holds the user securely and safely while avoiding any skin irritation. The harness can significantly offset lower limb weight-bearing and be used by those individuals with compromised bone density.

REX can also be incorporated into a rehabilitation programme. Under a clinician's supervision, patients can perform REXercises: lunges, squats, and single-leg swinging. These lower limb REXercises can be combined with upper limb activities such as throwing and catching, or dynamic strengthening exercises using resistance bands.

Users with lower levels of mobility impairment are able to use their upper limbs for function whilst standing or walking, and participate in domestic, recreational and vocational activities. A trained spotter is required for personal use. The large footplates preclude its use on uneven surfaces and even slight slopes. It cannot be used outdoors.

Atlas

Figure 10: Atlas in use with a young child with Spinal Muscular Atrophy Type II, a progressive condition affecting young children and often leading to severe postural deformities

Atlas (Figure 10) will be potentially the first commercially available exoskeleton for paediatric use. It has been developed by Marsi Bionics, a company that originated from a joint venture between the Spanish National Research Council and the Technical University of Madrid. The company anticipate that the device will gain CE accreditation by the end of 2019 and be commercially available in early 2020.

The Atlas is contained within a supporting frame which enables the user to have functional use of their hands.

Safety of exoskeletons

In an early study evaluating the safety and tolerance of the ReWalk exoskeleton (previous version) in a small number (n=6) of mid-low thoracic level paraplegics, Zeilig reported that all participants were able to ambulate 100m (with varying levels of support) and over the course of 13–14 sessions no adverse events were encountered.[3] Since then various researchers have explored the safety of the use of overground lower limb exoskeletons. Miller produced a literature review with meta-analysis citing eight articles relating to ReWalk, three to Ekso, one to Indego and one to an "unspecified" exoskeleton. Evaluating a total of 111 participants completing training one-three times per week for 60–120 minutes over 1–24 weeks they reported no serious adverse events. Three falls were reported by one study. However, these occurred whilst the device was tethered to an overhead safety cable, and were a result of programming faults in an early generation Ekso. No injuries were sustained in the falls. Across all studies, one fracture was reported (hairline fracture to talus) in a participant with chronic SCI using the ReWalk who did not complete a

[3] G. Zeilig, H. Weingarden, M. Zwecker, I. Dudkiewicz, A. Bloch and A. Esquenazi, "Safety and tolerance of the ReWalk(™) exoskeleton suit for ambulation by people with complete spinal cord injury: a pilot study" (2012) 35(2) *Journal of Spinal Cord Medicine* 96–101.

bone density scan prior to use.[4] Miller proposed that these risks have since been mitigated by refinements in the design of exoskeletons and patient eligibility criteria.[5]

Relative strengths and weaknesses of the current models

Personal Use

The ReWalk offers the most functional benefits for those personal users for which it is suitable. It has a four hour battery life. It is the only device that allows users to ascend and descend steps and stairs. Users can traverse over relatively uneven ground as was demonstrated by the users who were able to complete the London marathon independently. However, despite its ability to manage more challenging terrain, the ReWalk is still limited by relatively low walking speeds. Louie reviewed 15 articles relating to gait speed and calculated an average walking speed of 0.26m/s (average of 84 patients).[6] This is considerably lower than the reported average walking speed in able bodied individuals, but is comparable with self-selected walking speeds of motor incomplete SCI patients.[7]

The Indego is not as robust as the ReWalk, but is able to be easily transported in its disassembled form. The user can transfer out of their vehicle into their wheelchair and assemble the device at their convenience. It is light enough at 26lbs to be supported on the user's lap whilst they self-propel to their destination.

The FREE Walk falls slightly behind the ReWalk and Indego in usability as a personal device. Unlike those devices, a spotter is required. The current model cannot be used for step and stair ascent or descent.

The REX provides benefits for personal use for those individuals who have functional use of their upper limbs and would like to engage in activities in standing such as cooking and woodwork. For individuals who would like to ambulate at home but do not have use of their upper limbs, the REX provides that opportunity. REX requires a spotter for home use.

Rehabilitation

Optimising rehabilitation following neurological illness or injury requires programmes that are high in dosage, intensity, and repetitions, contain task orientated activities and incorporate both "top down" and "bottom-up" approaches to integrate brain and body movement with task accomplishment.[8] Exoskeletons are able to provide consistent assisted gait practice and meet the demands of task-specificity. Often when assisting a mobility impaired individual to ambulate, the burden of fatigue falls on the therapists. An exoskeleton can provide motor-assistance for the duration of the therapy session so that the rate-limiting step is the fatigue of the patient thus maximising the dosage, intensity and repetitions of the therapy, when compared to conventional gait rehabilitation with stroke.[9]

The use of exoskeletons in rehabilitation has a positive benefit for skill mix. Less personnel overall are needed to assist even with severely impaired individuals. One trained therapist can mobilise a patient in an exoskeleton often without the support of even an assistant. Without an exoskeleton, hands-on gait

[4] I. Benson, K. Hart, D. Tussler and J.J. van Middendorp, "Lower-limb exoskeletons for individuals with chronic spinal cord injury: findings from a feasibility study" (2016) 30(1) Clin. Rehabil. 73–84.

[5] L.E. Miller, A.K. Zimmermann and W.G. Herbert, "Clinical effectiveness and safety of powered exoskeleton-assisted walking in patients with spinal cord injury: systematic review with meta-analysis" (2016) 9 *Medical devices (Auckland, NZ)* 455.

[6] D.R. Louie, J.J. Eng and T. Lam, "Gait speed using powered robotic exoskeletons after spinal cord injury: a systematic review and correlational study" (2015) 12(1) *Journal of neuroengineering and rehabilitation* 82.

[7] J. Kressler, C.K. Thomas, E.C. Field-Fote, J. Sanchez, E. Widerström-Noga, D.C. Cilien, K. Gant, K. Ginnety, H. Gonzalez, A. Martinez, K.D. Anderson and M.S. Nash, "Understanding therapeutic benefits of overground bionic ambulation: exploratory case series in persons with chronic, complete spinal cord injury" (2014) 95(1) *Archives of physical medicine and rehabilitation* 1878–1887.

[8] G. Morone, S. Paolucci, A. Cherubini, D. De Angelis, V. Venturiero, P. Coiro and M. Iosa, "Robot-assisted gait training for stroke patients: current state of the art and perspectives of robotics" (2017) 13 *Neuropsychiatric disease and treatment* 1303.

[9] D. Rand and J.J. Eng, "Disparity between functional recovery and daily use of the upper and lower extremities during subacute stroke rehabilitation" (2012) 26 *Neurorehabil Neural Repair* 76–84.

rehabilitation can be very taxing on therapists typically two trained therapists are required to assist with mobilising severely impaired individuals often with additional support from a therapy assistant.

All the current devices can provide assistance with rehabilitation. The Ekso and REX can be used with individuals with high lesions. The Indego with its relatively low trunk support is better suited to rehabilitation of those with lower lesions. FREE Walk falls between the levels that can be accommodated by Ekso and REX, and those by the Indego. The ReWalk is less suited than the other devices for therapy purposed due the absence of variable motor assistance. However, the physical demands of continuous walking with the ReWalk can provide cardiovascular benefits and strengthening for the upper limbs and trunk.

Health benefits

Exoskeletons appear to offer important long-term health benefits over and above those offered by standing alone. Common complications arising from SCI include neuropathic pain, pressure sores, spasticity and contractures, bladder and bowel dysfunction, impaired cardiorespiratory function, and reduced bone mineral density commonly leading to osteoporosis. In addition to these direct complications, following neurological illness or injury, the resultant reduction in loss of mobility places an individual at an increased risk of experiencing secondary health concerns such as diabetes.

Neuropathic pain

Neuropathic pain (pain occurring below the level of injury) is a common complication of SCI. No large-scale studies have directly explored the influence of exoskeleton walking on neuropathic pain. However, Cruciger produced a case series focusing on two patients who presented as subjects on their wider research trial who experienced chronic neuropathic pain.[10] They underwent an exoskeleton training programme using the HAL involving five, 90 minute sessions per week for 12 weeks. Pain was record on the Numerical Rating Scale (NRS-11). During the first week of training pain severity was rated at an average of 4.3 but by the 12th week severity had reduced to an average on 0.6. Furthermore, they reported that both patients reduced their medication to "as required", and had no recurrence of pain nor need for medication at one year follow up. Other studies citing pain reduction tend to illustrate reductions between pain perceptions prior to training (commonly the week preceding) and during training but there has been little longitudinal change observed.[11]

Pressure sores

Gorgey's review into the current pros and cons of robotic exoskeletons in rehabilitation highlights the need for care and vigilant monitoring of pressure zones when using exoskeletons due to the increased risk of tissue breakdown in patients following SCI.[12] However, it must be reinforced that Miller in their extensive literature review and meta-analysis cite no serious tissue breakdown.[13] Karelis investigated changes in body composition following 18 sessions (three sessions per week for six weeks) in a small number of SCI patients (n=5) and reported significant increases in leg and appendicular Lean Body Mass, reductions in

[10] O. Cruciger, T.A. Schildhauer, R.C. Meindl, M. Tegenthoff, P. Schwenkreis, M. Citak and M. Aach, "Impact of locomotion training with a neurologic controlled hybrid assistive limb (HAL) exoskeleton on neuropathic pain and health related quality of life (HRQoL) in chronic SCI: a case study" (2016) 11(6) *Disability and Rehabilitation: Assistive Technology* 529–534.

[11] C.B. Baunsgaard, U.V. Nissen, A.K. Brust, A. Frotzler, C. Ribeill, Y. Kalke and U. Holmström, "Exoskeleton gait training after spinal cord injury: An exploratory study on secondary health conditions" (2018) 50(9) *Journal of rehabilitation medicine* 806–813. G. Stampacchia, A. Rustici, S. Bigazzi, A. Gerini, T. Tombini and S. Mazzoleni, "Walking with a powered robotic exoskeleton: Subjective experience, spasticity and pain in spinal cord injured persons" (2016) 39(2) *NeuroRehabilitation* 277–283.

[12] A.S. Gorgey, "Robotic exoskeletons: The current pros and cons" (2018) 9(9) *World journal of orthopedics* 112.

[13] L.E. Miller, A.K. Zimmermann and W.G. Herbert, "Clinical effectiveness and safety of powered exoskeleton-assisted walking in patients with spinal cord injury: systematic review with meta-analysis" (2016) 9 *Medical devices (Auckland, NZ)* 455.

total leg and appendicular Fat Mass and increases in the cross-sectional area of the calf muscle.[14] These improvements in body composition following the use of exoskeletons may support the individual's long term resilience to pressure sores.

Spasticity and contractures

Miller cite five articles included in their meta-analysis which reported effects of exoskeletons on spasticity.[15] 38% of the 111 patients experienced improvements in their spasticity. Clinically observed improvements in spasticity are commonly experienced in the short term with carryover lasting in the region of eight hours before returning to baseline levels. This carryover period is often associated with improved sleep or improved function in the period with reduced spasticity. Whilst, the presence of contractures is a contraindication to most exoskeletons, improvements in range of movement have been observed in ankle dorsiflexion and hip extension following 1 week of intensive exoskeleton training.[16] It is highly likely that long-term exoskeleton use would prevent the development of lower limb contractures.

Bladder and bowel dysfunction

Few researchers have investigated the effects of exoskeleton ambulation on bladder and bowel function. Miller identified three studies reporting 61% of participants who experienced an improvement in bowel movements.[17] Subsequent evidence is provided by Baunsgaard who reported an increase in the awareness of the need to defaecate in 6 of their 25 recently injured participants, and Stampacchia who found improvements in neurogenic bowel function and reduced bladder leakage (overnight) in their 4 patients after 20 sessions and 3 month follow-up.[18]

Impaired cardiorespiratory function

Following SCI, patients will invariably experience progressive physical deconditioning due to restriction in their mobility and the lack of available modalities for physical activity.[19] In their US based study, Miller and Herbert estimated that initiation of physical activity within the first year post injury could produce lifetime savings of between $290,000.00 and $435,000.00.[20] Various researchers have explored the cardiorespiratory cost associated with exoskeleton use, and Miller calculated that exoskeleton walking results in 3.3 Metabolic Equivalents (METS) from four separate studies involving a total of 23 participants

[14] A.D. Karelis, L.P. Carvalho, M.J.E. Castillo, D.H. Gagnon and M. Aubertin-Leheudre, "Effect on body composition and bone mineral density of walking with a robotic exoskeleton in adults with chronic spinal cord injury" (2017) 49(1) *Journal of rehabilitation medicine* 84–87.

[15] L.E. Miller, A.K. Zimmermann and W.G. Herbert, "Clinical effectiveness and safety of powered exoskeleton-assisted walking in patients with spinal cord injury: systematic review with meta-analysis" (2016) 9 *Medical devices (Auckland, NZ)* 455.

[16] H. White, S. Hayes and M. White, "The effect of using a powered exoskeleton training programme on joint range of motion on spinal injured individuals: A pilot study" (2015) 1(1) Int. J. Phys. Ther. Rehabil. 102.

[17] L.E. Miller, A.K. Zimmermann and W.G. Herbert, "Clinical effectiveness and safety of powered exoskeleton-assisted walking in patients with spinal cord injury: systematic review with meta-analysis" (2016) 9 *Medical devices (Auckland, NZ)* 455.

[18] C.B. Baunsgaard, U.V. Nissen, A.K. Brust, A. Frotzler, C. Ribeill, Y. Kalke and U. Holmström, "Exoskeleton gait training after spinal cord injury: An exploratory study on secondary health conditions" (2018) 50(9) *Journal of rehabilitation medicine* 806–813. G. Stampacchia, A. Rustici, S. Bigazzi, A. Gerini, T. Tombini and S. Mazzoleni, "Walking with a powered robotic exoskeleton: Subjective experience, spasticity and pain in spinal cord injured persons" (2016) 39(2) *NeuroRehabilitation* 277–283.

[19] L.E. Miller, A.K. Zimmermann and W.G. Herbert, "Clinical effectiveness and safety of powered exoskeleton-assisted walking in patients with spinal cord injury: systematic review with meta-analysis" (2016) 9 *Medical devices (Auckland, NZ)* 455.

[20] L.E. Miller, A.K. Zimmermann and W.G. Herbert, "Clinical effectiveness and safety of powered exoskeleton-assisted walking in patients with spinal cord injury: systematic review with meta-analysis" (2016) 9 *Medical devices (Auckland, NZ)* 455.

using the Ekso,[21] Indego[22] and ReWalk.[23] This equates to the self-reported exertion of an able bodied individual walking at three miles per hour. Recent studies by Gorgey and Kressler also found positive cardiorespiratory effects in small scale studies with increased oxygen uptake and energy expenditure[24] and energy expenditure ranging from 1.39–7.17kcal/min.[25] These studies recruited both complete and incomplete SCI patients, with levels ranging from C5-T12. Faulkner used the Ekso to evaluate the effect of a five day exoskeleton training programme (90 minutes per day) with conventional physiotherapy (60 minutes per day) on cardiovascular health compared to conventional physiotherapy (60 minutes per day) with home exercise programme (60 minutes per day) with 12 chronic SCI patients.[26] Content of traditional physiotherapy sessions were reported as equivalent and delivered as per the individual requirements of the patients by the same Physiotherapist. Home exercise programme in the control group was 30 minutes standing followed by 30 minutes stretching. The first six participants were assigned on a first come first served basis to the experimental group, and the remaining six to the control group. Significant improvements were measured in the arterial wave reflection (Augmentation index) and mean arterial pressure in the experimental group. These changes were not observed in the control group. Due to the low power due to low participant numbers and lack of randomisation in the group allocation causation cannot be confirmed but the authors concluded that using an exoskeleton may be an effective tool in improving the cardiovascular health of SCI patients.

Reduced bone mineral density

Walking with a robotic exoskeleton, especially those requiring the use of crutches, results in the generation of ground reaction forces similar in magnitude and pattern to that of able-bodied walking.[27] This ground reaction causes loading through the long bones of the lower limbs and the spine which may be hypothesised to reduce bone demineralisation, which is commonly associated with SCI—60% of people with SCI have osteopenia or osteoporosis—and places the individuals at an elevated risk of fracture and even enhance bone mineral density.[28] This effect has been reported by Karelis who found a 14.5% increase in tibial bone mineral density although this did not reach significance due to a high variance within their five subjects.[29]

Exoskeletons are likely also to provide an improved sense of well-being and increased quality of life for mobility impaired individuals.[30] Users often report that they enjoy being at eye-level with others rather than at "waist level".

[21] A. Kozlowski, T. Bryce and M. Dijkers, "Time and effort required by persons with spinal cord injury to learn to use a powered exoskeleton for assisted walking" (2015) 21(2) *Topics in spinal cord injury rehabilitation* 110–121. J. Kressler, C.K. Thomas, E.C. Field-Fote, J. Sanchez, E. Widerström-Noga, D.C. Cilien, K. Gant, K. Ginnety, H. Gonzalez, A. Martinez, K.D. Anderson and M. S. Nash, "Understanding therapeutic benefits of overground bionic ambulation: exploratory case series in persons with chronic, complete spinal cord injury" (2014) 95(1) *Archives of physical medicine and rehabilitation* 1878–1887.

[22] N. Evans, C. Hartigan, C. Kandilakis, E. Pharo and I. Clesson, "Acute cardiorespiratory and metabolic responses during exoskeleton-assisted walking overground among persons with chronic spinal cord injury" (2015) 21(2) *Topics in spinal cord injury rehabilitation* 122–132.

[23] P. Asselin, S. Knezevic, S. Kornfeld, C. Cirnigliaro, I. Agranova-Breyter and W.A. Bauman, "Heart rate and oxygen demand of powered exoskeleton-assisted walking in persons with paraplegia" (2015) 52(2) *Journal of rehabilitation research and development* 147.

[24] A.S. Gorgey, R.Wade, R. Sumrell, L. Villadelgado, R.E. Khalil and T. Lavis, "Exoskeleton training may improve level of physical activity after spinal cord injury: a case series" (2017) 23(3) *Topics in spinal cord injury rehabilitation* 245–255.

[25] J. Kressler, T. Wymer and A. Domingo, "Respiratory, cardiovascular and metabolic responses during different modes of overground bionic ambulation in persons with motor-incomplete spinal cord injury: A case series" (2018) 50(2) *Journal of rehabilitation medicine* 173–180.

[26] J. Faulkner, L. Martinelli, K. Cook, L. Stoner, H. Ryan-Stewart, E. Paine, H. Hobbs and D. Lambrick, "Effects of robotic-assisted gait training on the central vascular health of individuals with spinal cord injury: A pilot study" [2019] *The journal of spinal cord medicine* 1–7.

[27] D.B. Fineberg, P. Asselin, N.Y. Harel, I. Agranova-Breyter, S.D. Kornfeld, W. A. Bauman and A. M. Spungen, "Vertical ground reaction force-based analysis of powered exoskeleton-assisted walking in persons with motor-complete paraplegia" (2013) 36(4) *The journal of spinal cord medicine* 313–321.

[28] A.S. Gorgey, "Robotic exoskeletons: The current pros and cons" (2018) 9(9) *World journal of orthopedics* 112.

[29] A.D. Karelis, L.P. Carvalho, M.J.E. Castillo, D.H. Gagnon and M. Aubertin-Leheudre, "Effect on body composition and bone mineral density of walking with a robotic exoskeleton in adults with chronic spinal cord injury" (2017) 49(1) *Journal of rehabilitation medicine* 84–87.

[30] D.H. Gagnon, M. Vermette, C. Duclos, M. Aubertin-Leheudre, S. Ahmed and D. Kairy, "Satisfaction and perceptions of long-term manual wheelchair users with a spinal cord injury upon completion of a locomotor training program with an overground robotic exoskeleton" (2019) 14(2) *Disability and Rehabilitation: Assistive Technology* 138–145.

The current models require between 10 and 40 training sessions for most users to gain competency in use. The most significant difference between naïve users and trained users of Ekso GT, ReWalk, Indego and FREE Walk is the amount of pressure exerted through the elbow crutches and the relative strain on their shoulders. Experienced users with lower lesions exert negligible pressures through the elbow crutches and apply minimal strain to their shoulders as they employ the crutches more for balance than weight-bearing when maintaining an upright posture during "quiet" standing and gait.

Future developments

This technology is continually advancing and future models are likely to accommodate a greater height and weight range of potential users. They are also likely to be faster, lighter, have longer battery life, and have an option for control via brain machine interface (controlled by the user's thoughts). The development costs may offset economies of manufacturing costs, and so future devices may not be less expensive than current models.[31]

[31] *Disclaimers:* Physiofunction Supplies sources and supplies rehabilitation technology. It does not have a distributorship or reselling agreement for exoskeleton devices. I have a consultancy agreement with REX Bionics PLC for which I receive payment for activities including clinical research, attending exhibitions and delivering clinical product demonstrations at hospitals and clinics, or to individuals interested in personal use.

Fundamental Dishonesty: Review and Update

John McQuater

Case management; Clinical negligence; Costs; Defences; Dishonesty; Personal injury

Introduction

Practitioners dealing with personal injury and clinical negligence claims have become familiar with issues relating to fundamental dishonesty.

The term "fundamental dishonesty" was first used in the CPR Pt 44.16(1), as amended in 2013, by way of exception to the qualified one-way costs shifting ("QOCS") introduced for personal injury claimants, provided for by Pt 44.13(1).

The same term has since been used in Criminal Justice and Courts Act 2015 ("the 2015 Act") s.57 to provide, in effect, a form of statutory defence to personal injury claims. Under the Act, if there is fundamental dishonesty on the part of the claimant that will be a complete defence to what may, apart from the dishonest element, be a valid claim (unless the court is "satisfied that the claimant would suffer substantial injustice if the claim were dismissed").

Since 2013, case law has developed and explained the proper approach to allegations of fundamental dishonesty whether in relation to costs, under CPR Pt 44, or on the substantive claim, under the 2015 Act.

This article aims to provide a review and update of where the law in this area has reached in October 2019 and, on the way, consider some practical issues.

Background

It is worth exploring the rationale for the introduction of fundamental dishonesty as a legal principle before going on to consider ways in which the concept has become important in personal injury litigation.

Rationale

Fundamental dishonesty was first introduced in 2013 on the premise that whilst personal injury claimants should generally benefit from QOCS (following the abolition of recoverable additional liabilities in turn introduced to safeguard the interests of claimants on the effective abolition of legal aid for personal injury claims) that would not be right where the claim was fundamentally dishonest.

The terms of the 2015 Act seek to replicate the long-established rule, in insurance law, of the "fraudulent device". This rule will defeat the claim of an insured against that insured's own insurer where the claim has a dishonest element. Section 57 of the 2015 Act effectively applies that rule to claims by a third party seeking damages for personal injury where "the claim has been fundamentally dishonest".

The policy which underpins the 2015 Act is to discourage what has been termed the "one-way bet", as explained in *Versloot Dredging BV v HDI Gerling Industrie Versicheung AG*.[1] That is achieved by negating the premise that if there is dishonesty the claimant has little to lose, because if the lie is discovered the claimant would still recover any damages proved to be due.

In *Zurich Insurance Plc v Romaine*,[2] the Court of Appeal recognised the wider implications, for the legal system and society generally, of dishonesty by quoting from evidence given on behalf of the insurer in that case that "the normalisation of fraudulent behaviour is socially corrosive and erodes trust".

[1] *Versloot Dredging BV v HDI Gerling Industrie Versicheung AG* [2016] UKSC 45; [2017] A.C. 1.
[2] *Zurich Insurance Plc v Romaine* [2019] EWCA Civ 851; [2019] 1 W.L.R. 5224.

Critique

Whilst there is logic in CPR Pt 44 referring just to fundamental dishonesty on the part of the claimant, as only the claimant has the benefit of QOCS, there seems less in the way of logic and fairness that the 2015 Act refers only to the effects of fundamental dishonesty by personal injury claimants. That is because there is an opposite, and perhaps equal, risk of the one-way bet from a dishonest defendant or dishonest defence.

A false allegation by a defendant, particularly a dishonest allegation by the defendant of dishonesty on the part of the part of the claimant (or even the threat to make such an allegation), should surely also be seen as a one-way bet and something no less pernicious, so far as the proper administration of justice or upholding of the rule of law is concerned, than dishonesty by a claimant.

It is quite correct to identify the normalisation of fraudulent behaviour as "socially corrosive" but it is surely morally dubious, and in any event irrational, to suggest only conduct on the part of a claimant has such an effect.

What is fundamental dishonesty?

The term "fundamental dishonesty" can be analysed by asking, first, what will amount to "dishonesty" and, secondly, when any such dishonesty will be "fundamental".

Dishonesty?

The test for dishonesty, generally, was explained by the Supreme Court in *Ivey v Genting Casinos UK Ltd*[3] where Lord Hughes said:

> "62. … Successive cases at the highest level have decided that the test of dishonesty is objective … The test now clearly established was explained thus in *Barlow Clowes* by Lord Hoffmann at 1479–1480 …:
>
> > 'Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards. The Court of Appeal held this to be a correct state of the law and their Lordships agree.'
>
> 63. … there can be no logical or principled basis for the meaning of dishonesty (as distinct from the standards of proof by which it must be established) to differ according to whether it arises in a civil action or a criminal prosecution. Dishonesty is a simple, if occasionally imprecise, English word …
>
> 75. … it is a fallacy to suggest that his finding that Mr Ivey was truthful when he said that he did not regard what he did as cheating amounted to a finding that his behaviour was honest. It was not. It was a finding that he was, in that respect, truthful. Truthfulness is indeed one characteristic of honesty, and untruthfulness is often a powerful indicator of dishonesty, but a dishonest person may sometimes be truthful about his dishonest opinions, as indeed was the defendant in Gilks. For the same reasons which show that Mr Ivey's conduct was, contrary to his own opinion, cheating, the better view would be, if the question arose, that his conduct was, contrary to his own opinion, also dishonest."

[3] *Ivey v Genting Casinos UK Ltd* [2017] UKSC 67; [2018] A.C. 391.

On this analysis, mere errors in formulating the claim should not routinely be characterised as dishonesty. In *Molodi v Cambridge Vibration Maintenance Service*,[4] Martin Spencer J quoted the trial judge, HH Judge Main QC, who had said:

> "I have hardly seen a Claim Notification Form in the last number of years where the detail of the accident as I found it on the evidence, often on objective evidence, is properly recorded in the Claims Notification Form. The process itself is often, because of its nature, littered with inaccuracy, partly because the forms are filled out by relatively lowly junior people in the office who are not qualified, partly because they do not take sufficient care over setting out the details and sometimes as they type it up they make mistakes. I see it in almost every case."

Whilst HH Judge Main QC declined to make a finding of fundamental dishonesty against the claimant Martin Spencer J, allowing an appeal by the defendant, regarded the first instance approach as "too benevolent" and, taking other background factors into account, substituted a finding of fundamental dishonesty by the claimant leading to the claim being dismissed.

Recognising that what would appear to be inconsistencies may, in reality, simply reflect errors, difficulties with the written word or even unfamiliarity with the English language it is important not to let eloquence sanitise conduct which is less than candid, as that will subvert the rule of law.

For example, the phrase of being "economical with the truth" gained parlance following the "Spycatcher" trial in the Supreme Court of New South Wales when Robert Armstrong, then Cabinet Secretary, was reported as having the following exchange with counsel:

> "Q: So that letter contains a lie, does it not?
> A: It contains a misleading impression in that respect.
> Q: Which you knew to be misleading at the time you made it?
> A: Of course.
> Q: So it contains a lie?
> A: It is a misleading impression, it does not contain a lie, I don't think.
> Q: What is the difference between a misleading impression and a lie?
> A: You are as good at English as I am.
> Q: I am just trying to understand.
> A: A lie is a straight untruth.
> Q: What is a misleading impression—a sort of bent untruth?
>
> **A: As one person said, it is perhaps being economical with the truth."**

Adding a further level of sophistication to such sophistry, during the course of evidence in the Matrix Church trial, Alan Clark spoke of being "economical with the *actualité*".

There is an irony that whilst a foreign language may be eloquently deployed as a convenient euphemism the use of English in a less articulate way, perhaps from someone not used to the written word or whose first language is not English, may be characterised as evidence of dishonesty.

Furthermore, if conduct is regarded as a mere peccadillo, because it can be eloquently and attractively explained by the educated and articulate, yet similar behaviour on the part of the less articulate is condemned as dishonest, the law is at risk of a form of intellectual discrimination.

Fundamental?

Any dishonesty must be fundamental.

[4] *Molodi v Cambridge Vibration Maintenance Service* [2018] EWHC 1288 (QB); [2018] R.T.R. 25.

In *Howlett v Davies*,[5] Newey LJ approved the analysis made by HH Judge Moloney QC in *Gosling v Hailo & Screwfix Direct*[6] who had said:

> "44. … It appears to me that when one looks at the matter in that way, one sees that what the rules are doing is distinguishing between two levels of dishonesty: dishonesty in relation to the claim which is not fundamental so as to expose such a claimant to costs liability, and dishonesty which is fundamental, so as to give rise to costs liability.
>
> 45 The corollary term to 'fundamental' would be a word with some such meaning as 'incidental' or 'collateral'. Thus, a claimant should not be exposed to costs liability merely because he is shown to have been dishonest as to some collateral matter or perhaps as to some minor, self-contained head of damage. If, on the other hand, the dishonesty went to the root of either the whole of his claim or a substantial part of his claim, then it appears to me that it would be a fundamentally dishonest claim: a claim which depended as to a substantial or important part of itself upon dishonesty."

In *London Organising Committee of the Olympic and Paralympic Games v Sinfield*,[7] Julian Knowles J, after quoting from *Howlett*, said:

> "57. There are a number of other decisions at the County Court level on CPR r.44.16(1). In *Meadows v La Tasca Restaurants* unreported, HH Judge Hodge QC at Manchester County Court, said at [18]:
>
> > '18. It may perhaps be appropriate to draw an analogy with the court's approach to lies told by a party to litigation. If a lie is told merely to bolster an honest claim or defence, then that will not necessarily tell against the liar. But if the lie goes to the whole root of the claim or defence, then it may well indicate that the claim or defence (as the case may be) is itself fundamentally dishonest.'
>
> 58. In *Rayner v Raymond Brown Group* unreported, HH Judge Harris QC at Oxford County Court, the judge said at [10] that he would direct himself:
>
> > '… that fundamental dishonesty within the meaning of CPR 44 means a substantial and material dishonesty going to the heart of the claim—either liability or quantum or both—rather than peripheral exaggerations or embroidery, and it will be a question of fact and degree in each case … Was there substantial material dishonesty which went to the heart of the quantum of this claim ?'
>
> 59. In *Menary v Darnton* unreported, HH Judge Hughes QC at Portsmouth County Court, the judge said at [9] to [11]:
>
> > '9. In terms of ordinary language, the word "fundamental" was given its classic definition for forensic purposes by Lord Upjohn in the well-known *Suisse Atlantique* case [*Suisse Atlantique Société D'Armement Maritime SA v nv Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361]. I quote so far as is necessary for present purposes (at 421–422):
> >
> > > "… there is no magic in the words 'fundamental breach', this expression is no more than a convenient shorthand expression for saying that a particular breach or breaches of contract by one party is or are such as to

[5] *Howlett v Davies* [2017] EWCA Civ 1696; [2018] 1 W.L.R. 948.
[6] *Gosling v Hailo & Screwfix Direct*, unreported, 29 April 2014, Cambridge County Court.
[7] *London Organising Committee of the Olympic and Paralympic Games v Sinfield* [2018] EWHC 51 (QB); [2018] P.I.Q.R. P8.

> go to the root of the contract which entitles the other party to treat such breach or breaches as a repudiation of the whole contract. Whether such breach or breaches do constitute a fundamental breach depends on the construction of the contract and on all the facts and circumstances of the case … A fundamental term of a contract is a stipulation which the parties have agreed either expressly or by necessary implication or which the general law regards as a condition which goes to the root of the contract so that *any* breach of that term may at once and without further reference to the facts and circumstances be regarded by the innocent party as a fundamental breach …"

10. Although in that case Lord Upjohn was contrasting the meaning of the phrase "fundamental breach" with that of "fundamental term", the sense in which the word "fundamental" is applied is broadly the same in each case, namely it is some characteristic that inevitably goes to the root of the matter. In the present appeal, that matter would not be fundamental in this sense. CPR 44.16(1) only requires the defendant to establish fundamental dishonesty on the balance of probabilities, the civil standard of proof. I think it unhelpful therefore to focus on the meaning of dishonesty as described in the criminal courts, such as in the case of *R. v Ghosh* … or as defined by criminal statute, such as the Theft Act 1968.
11. The use of the word "dishonesty" in the present context necessarily imports well understood and ordinary concepts of deceit, falsity and deception. In essence, it is the advancing of a claim without an honest and genuine belief in its truth. Although I would not presume to give a definition of a phrase that neither Lord Justice Jackson nor the Editorial Board of the Civil Procedure Rules thought appropriate to provide, for present purposes, fundamental dishonesty may be taken to be some deceit that goes to the root of the claim. The purpose of the phrase is twofold: first, to distinguish any dishonesty from the exaggerations, concealments and the like that accompany personal injury claims from time to time. Such exaggerations, concealment and so forth may be dishonest, but they cannot sensibly be said to be fundamentally dishonest; they do not go to the root of the claim. Second, the fundamental dishonesty is related to the claim not to the claimant. This must be deliberate on the part of those who drafted the Civil Procedure Rules. It is the claim the defendant has been obliged to meet, and if that claim has been tainted by fundamental dishonesty, then in fairness, and in justice and in accordance with the overriding objective, the defendant should be able to recover the costs incurred in meeting an action that was proved, on balance, to be fundamentally dishonest.'"

On this basis Julian Knowles J concluded that:

> "62. In my judgment, a claimant should be found to be fundamentally dishonest within the meaning of s.57(1)(b) if the defendant proves on a balance of probabilities that the claimant has acted dishonestly in relation to the primary claim and/or a related claim (as defined in s.57(8)), and that he has thus substantially affected the presentation of his case, either in respects of liability or quantum, in a way which potentially adversely affected the defendant

in a significant way, judged in the context of the particular facts and circumstances of the litigation …

63. By using the formulation 'substantially affects' I am intending to convey the same idea as the expressions 'going to the root' or 'going to the heart' of the claim. By potentially affecting the defendant's liability in a significant way 'in the context of the particular facts and circumstances of the litigation' I mean (for example) that a dishonest claim for special damages of £9000 in a claim worth £10 000 in its entirety should be judged to significantly affect the defendant's interests, notwithstanding that the defendant may be a multi-billion pound insurer to whom £9000 is a trivial sum."

In *Hayden v Maidstone & Tunbridge Wells NHS Trust*,[8] Jay J commented on a claimant who complained of ongoing symptoms from an accident but had completed a health questionnaire, in connection a job application, which, whilst disclosing the injury, stated "no problems now" when he said:

"62. Clearly, the Claimant was caught on the horns of a dilemma. These answers were not consistent with the case she was now advancing. She accepted the obvious lack of congruence and told me that she knew that she would not be employed if she told the truth. Her mitigation was that she did feel that her injury was getting better, and she was receiving reassurance from her doctors to that effect.

63. In my judgment, it is impossible to assess this fragment of evidence in isolation, particularly if I were minded to hold that the employment questionnaire accurately recorded the true state of her functioning. In fact, I am completely satisfied that it did not. There is a plethora of evidence, certainly leading up to her operation (if not beyond), clearly indicating that the Claimant was not pain-free and that she was experiencing a functional deficit. She would not have submitted herself to major neck surgery if she knew that she did not need it. I find that the Claimant lied in order to put herself in a better position to secure a job that she really wanted.

64. Logically, therefore, the health questionnaire throws little light on the Claimant's level of functioning in April 2008. It throws some light on it because I do not believe that she would have applied for a job the responsibilities and demands of which she knew that she could not fulfil. It is also capable of throwing light on her propensity to dissemble should the need arise, although I place the obvious marker down that there is a significant difference between lying to secure a job and lying to secure substantial damages in the High Court."

The distinction between dishonesty and fundamental dishonesty was also, in a different context, identified by Mann J giving judgment in *Sir Cliff Richard v BBC*[9] when of the BBC reporter Dan Johnson he said:

"21. … I do not believe that he is a fundamentally dishonest man, but he was capable of letting his enthusiasm get the better of him in pursuit of what he thought was a good story so that he could twist matters in a way that could be described as dishonest in order to pursue his story."

What might be regarded as a damaging analysis does not, perhaps on the basis it was inappropriate to apply the epithet "fundamental", seem to have resulted in any action by the BBC against Mr Johnson who continues to work as a reporter.

[8] *Hayden v Maidstone & Tunbridge Wells NHS Trust* [2016] EWHC 3276 (QB).
[9] *Sir Cliff Richard v BBC* [2018] EWHC 1837 (Ch); [2019] Ch. 169.

Raising fundamental dishonesty

A distinction needs to be drawn between raising issues of fundamental dishonesty for costs purposes, relating to QOCS, and alleging fundamental dishonesty for the purposes of s.57.

Section 57

If the defendant alleges fundamental dishonesty for the purposes of s.57 that is a substantive defence and, for the purposes of Pt 16, either a reason for the defendant denying the claimant's entitlement to damages or, at least, a different version of events from that given by the claimant.

In these circumstances, case law dealing with the pleading of allegations relating to fraud (and for these purposes that terms seems synonymous with fundamental dishonesty) are likely to be relevant.

In *Three Rivers DC v Bank of England*,[10] Lord Hope at [55] of his judgment, said:

> "As the Earl of Halsbury LC said in *Bullivant v Attorney General for Victoria* [1901] A.C. 196 at 202, where it is intended that there be an allegation that a fraud has been committed, you must allege it and you must prove it. We are concerned at this stage with what must be alleged. A party is not entitled to a finding of fraud if the pleader does not allege fraud directly and the facts on which he relies are equivocal. So too with dishonesty. If there is no specific allegation of dishonesty, it is not open to the court to make a finding to that effect if the facts pleaded are consistent with conduct which is not dishonest such as negligence. As Millett LJ said in *Armitage v Nurse* [1998] Ch. 241 at 256G, it is not necessary to use the word 'fraud' or 'dishonesty' if the facts which make the conduct fraudulent are pleaded. But this will not do if language used is equivocal: *Belmont Finance Corp Ltd v Williams Furniture Ltd* [1979] Ch. 250 at 268 per Buckley LJ. In that case it was unclear from the pleadings whether dishonesty was being alleged. As the facts referred to might have inferred dishonesty but were consistent with innocence, it was not to be presumed that the defendant had been dishonest. Of course, the allegation of fraud, dishonesty or bad faith must be supported by particulars. The other party is entitled to notice of the particulars on which the allegation is based. If they are not capable of supporting the allegation, the allegation itself may be struck out. But it is not a proper ground for striking out the allegation that the particulars may be found, after trial, to amount not to fraud, dishonesty or bad faith but to negligence."

Despite this authority, and many other similar decisions, defendants can be reticent about alleging fraud and make only what might be regarded as insinuations against a claimant. This practice was expressly disapproved of by the Court of Appeal in *Hussain v Amin*.[11] In that case, where the defence expressed "a number of significant concerns in relation to the parties and the claim intimated".

Lord Dyson MR observed that:

> "Although the terms of the pleaded defence are not relevant to the issues that have been raised in this appeal, I am bound to register my concern with the way in which what in substance is an allegation of fraud was pleaded."

Similarly, Davis LJ held that:

> "In the event, as I see it, the claimant was faced with a hybrid, he in effect being required at trial to deal with an insinuation of fraud without any express allegation to that effect pleaded. Realistically, the trial judge dealt with the matter in the round, concluding that the claim was not fabricated or fraudulent and that the accident had not been staged. But this sort of pleading should not be sanctioned.

[10] *Three Rivers DC v Bank of England* [2001] UKHL 16; [2003] 2 A.C. 1.
[11] *Hussain v Amin* [2012] EWCA Civ 1456.

> It is in fact something of an irony that the second defendant seeks to criticise the conduct of the claimant's solicitors, when in part at least they were having to deal with an abusive defence. But ultimately it will be a matter for the costs judge to assess what is an amount reasonable to be paid by way of costs having regard to all the circumstances."

Reviewing a number of authorities in this area Birss J observed in *Property Alliance Group v Royal Bank of Scotland*[12] at [40] of his judgment that:

> "These cases and guidelines are all based on the same rationale. Assertions of fraud and dishonesty are easy to make but difficult to prove and can cause a major increase in the cost, complexity and temperature of an action. The court's approach is not intended to stop soundly based allegations of fraud or dishonesty from being made. It is intended to make sure that improper and unfounded assertions are not permitted and to make sure that the party against whom the allegation is made knows what case they have to meet."

QOCS

A more liberal approach is likely to be taken by the court if the issue of fundamental dishonesty is going to arise only in relation to costs, partly because parties have not traditionally been expected to plead costs issues in advance of a hearing.

Nevertheless, the claimant must be put on notice of the defendant's intention, although it will not be necessary to expressly allege "dishonesty" or "fraud".

In *Howlett v Davies*, the Court of Appeal considered the extent to which a defendant had to put the claimant on notice that fundamental dishonesty would be an issue in relation costs.

Newey LJ observed that:

> "Statements of case are, of course, crucial to the identification of the issues between the parties and what falls to be decided by the Court. However, the mere fact that the opposing party has not alleged dishonesty in his pleadings will not necessarily bar a judge from finding a witness to have been lying: in fact, judges must regularly characterise witnesses as having been deliberately untruthful even where there has been no plea of fraud. On top of that, it seems to me that where an insurer in a case such as the present one, following the guidance given in *Kearsley v Klarfeld*, has denied a claim without putting forward a substantive case of fraud but setting out 'the facts from which they would be inviting the judge to draw the inference that the plaintiff had not in fact suffered the injuries he asserted', it must be open to the trial judge, assuming that the relevant points have been adequately explored during the oral evidence, to state in his judgment not just that the claimant has not proved his case but that, having regard to matters pleaded in the defence, he has concluded (say) that the alleged accident did not happen or that the claimant was not present. The key question in such a case would be whether the claimant had been given adequate warning of, and a proper opportunity to deal with, the possibility of such a conclusion and the matters leading the judge to it rather than whether the insurer had positively alleged fraud in its defence."

Picking up this theme in *ATB Sales Ltd v Rich Energy Ltd*,[13] HH Judge Melissa Clarke (sitting as a Judge of the High Court) observed:

> "26. It is trite law that the assessment of the credibility and reliability of evidence is peculiarly a matter for the court. Of course I accept Mr Wyand's submission that the Claimant is entitled to test the Defendants' evidence by cross-examination at trial. Until it is so tested, and

[12] *Property Alliance Group v Royal Bank of Scotland* [2015] EWHC 3272 (Ch).
[13] *ATB Sales Ltd v Rich Energy Ltd* [2019] EWHC 1207 (IPEC).

considered in the light of other evidence before the court and the inherent probabilities, the court cannot know whether on the balance of probabilities it is true, mistaken, dishonest or concocted.

27 As long as the facts upon which an inference of dishonesty may be based are pleaded, if evidence emerges at trial which the Claimant considers sufficient that the court might properly find dishonesty, even though it was not able to plead it before trial, it must be put to the relevant witness so that he may answer it. It is only then that a court may properly be invited to, and may make, an evidential finding that such a witness was indeed dishonest. This is part of the court's ordinary adjudicative function. In this case, the facts from which dishonesty may be inferred are clearly set out in the pleadings and arise from the cause of action … It is for the court to sift and evaluate the evidence to determine the case. The court's hands will not be tied in the manner that the Defendants seek, by the fact that dishonesty has not been pleaded."

Consequences of alleging fundamental dishonesty

Where fundamental dishonesty is alleged, that may have a number of consequences.

Allocation and Case Management

Allegations of dishonesty will not automatically make a case suitable for the multi-track but the reality is that where such allegations are made the evidence necessary to deal with the issues, as defined, will probably mean any trial taking more than one day, given that this allows for a hearing time of no more than five hours.

Howlett is a prime example of the time such a hearing is likely to take, the trial in that case extending over four days.

That is all because of the potential significance of dishonesty allegations as recognised by Briggs LJ giving judgment in *Qader v Esure Services Ltd*[14] when he said:

> "… the consequences for a claimant of being found to have been party to the fraudulent contriving of a road traffic accident may well include the inability to obtain vehicle insurance in the future, criminal proceedings or punishment for contempt of court."

Briggs LJ also recognised that, in such circumstances, cases involving allegations of dishonesty, even if otherwise suitable for the fast track, would often need to be allocated to the multi-track.

Evidence

If the claimant's honesty is an issue that may have a bearing on the scope of the evidence required, particularly documentary and factual evidence.

It is important, however, claims are managed in a way that reflect the rule on similar fact evidence in civil proceedings. Guidance on what would be admissible as civil fact evidence was given by the House of Lords in *O'Brien v Chief Constable of South Wales Police*[15] the relevance of evidence under the similar fact rule will, in turn, determine the appropriate scope of disclosure, as explained by Moulder J in *PJSC Tatneft v Bogloyubov*.[16]

[14] *Qader v Esure Services Ltd* [2016] EWCA Civ 1109; [2017] 1 W.L.R. 1924.
[15] *O'Brien v Chief Constable of South Wales Police* [2005] UKHL 26; [2005] 2 A.C. 534.
[16] *PJSC Tatneft v Bogloyubov* [2018] EWHC 3249 (Comm).

Costs

An unsuccessful claimant will lose QOCS protection and be at risk of having to pay the defendant's costs, under the terms of the CPR.

A successful claimant is at risk of having the claim, nevertheless, dismissed, under Criminal Justice and Courts Act 2015 s.57.

The claimant is, whether successful or unsuccessful, also at risk of proceedings for contempt of court and, possibly, criminal proceedings.

With an unsuccessful claimant there may, at least notionally, be a liability for costs incurred by the claimant's representative, on the basis the claimant will have breached the terms of any conditional fee agreement. It is unlikely, however, recovery of costs from the claimant will be possible.

If a claim is dismissed, on the basis of fundamental dishonesty, it is likely, even though but for this provision the claimant would have been the successful party, the court will regard the defendant as the successful party and hence, under CPR Pt 44, decline to order payment of costs by the defendant to the claimant. Once again any recovery of costs from the claimant, by the claimant's representative, in these circumstances, despite breach of the terms of the conditional fee agreement, is most unlikely.

The defendant, at the very least, is likely to face adverse costs consequences if an allegation of fundamental dishonesty is not proved against a claimant who obtains judgment.

The claimant, as the successful party in these circumstances, is likely to obtain an order for costs applying the general discretion in Pt 44. Furthermore, should a claimant be vindicated at trial by the court rejecting allegations of dishonesty then, even if the claimant fails to beat a Pt 36 offer by the defendant, that is likely to be regarded as an outcome which is "more advantageous" on a broad analysis of the issues, see, for example the approach taken in *Smith v Trafford Housing Trust (Costs)*[17] and *MR v Commissioner of Police for the Metropolis*.[18]

On the basis of the way the defence was conducted, and the nature of the allegations made against the claimant, the defendant was ordered to pay costs on the indemnity basis in *Clarke v Maltby*.[19] Owen J held:

> "… the … counter-schedule called into question the genuineness of the symptoms described by the Claimant. The clear implication was that she was deliberately exaggerating her symptoms. Furthermore that was the basis upon which the prolonged cross-examination of the Claimant, and that of other witnesses was conducted. Whilst I accept that it was appropriate for the defendant to test the degree to which the Claimant was under a permanent disability as a consequence of the injuries sustained in the accident, the degree to which such disability adversely affected her capacity to function as a solicitor at partner level carrying out banking related work, and in particular to explore why she had reduced her working hours to three days a week, the manner in which the case was conducted went far beyond that. The allegation of deliberate exaggeration, an allegation that the claim was fraudulent, was not pleaded as it ought to have been if it was to be pursued."

In *PJSC Aeroflot—Russian Airlines v Leeds*,[20] Rose J adopted and approved the approach taken in *Clutterbuck v HSBC Plc*[21] when, at [50] of her judgment, she said:

> "David Richards J stated that the general proposition in relation to cases in which allegations of fraud are made is that if they proceed to trial and if the case fails then in the ordinary course of events the claimants will be ordered to pay costs on an indemnity basis. The court of course retains a complete

[17] *Smith v Trafford Housing Trust (Costs)* [2012] EWHC 3320 (Ch); (2012) 156(46) S.J.L.B. 31.
[18] *MR v Commissioner of Police for the Metropolis* [2019] EWHC 1970 (QB).
[19] *Clarke v Maltby* [2010] EWHC 1856 (QB).
[20] *PJSC Aeroflot—Russian Airlines v Leeds* [2018] EWHC 1735 (Ch); [2018] 4 Costs L.R. 775.
[21] *Clutterbuck v HSBC Plc* [2015] EWHC 3233 (Ch); [2016] 1 Costs L.R. 13.

> discretion in the matter and there may well be factors which indicate, notwithstanding the failure of the claim of fraud, that indemnity costs are not appropriate. The underlying rationale is that the seriousness of allegations of fraud are such that where they fail they should be marked with an order for indemnity costs because in effect the defendant has no choice but to come to court to defend his position. In circumstances where, instead of the matter proceeding to trial and failing, the claimant serves a notice of discontinuance, thereby abandoning the case in fraud, it is appropriate for the court to approach the question of costs in the same way."

In *Williams v Jervis*,[22] indemnity costs were ordered where the defendant's experts had not addressed their responsibilities or conducted themselves properly as expert witnesses, resulting in attacks on the claimant's integrity.

The forensic approach to allegations of fundamental dishonesty

Fundamental dishonesty only has to be proved on a balance of probability but, in practice, this may be no easier than the usual criminal standard of proof. That is because the court needs to bear in mind the inherent improbability of dishonesty, in most circumstances, as Lord Nicholls recognised in *re H (Minor)*[23] when he said:

> "When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability …"

In *Meadows v La Tasca Restaurants Ltd*,[24] the trial judge dismissed the claimant's claim on the basis that the claimant's evidence about the accident was not accepted. On this basis, the judge acceded to an application by the defendant that the claim should be found to have been fundamentally dishonest. On appeal HH Judge Hodge QC, after referring to both *Rizan* and *re H (Minor)*, noted:

> "District Judge Khan never expressly addressed the inherent probabilities in the claimant getting together with a long-standing friend, Mrs McGrath, to concoct a false account of an accident at a restaurant at the Trafford Centre in support of a claim for personal injuries limited to no more than £10,000. There was nothing to suggest that either the claimant or her witness were other than thoroughly honest individuals who had never engaged in this sort of behaviour before."

Accordingly, HH Judge Hodge QC held that:

> "In my judgment, for the reasons that have been advanced by Mr Rana, I am satisfied that District Judge Khan went too far, on the basis of the evidence before him, in concluding, not simply that the accident had not taken place as alleged by the claimant and her witness, but that no accident had taken place at all, and that the claim was a fabrication on the part of the claimant and her supporting witness. In my judgment, the district judge was perfectly entitled to say that the evidence adduced by the claimant and her supporting witness was too weak to prove the claimant's case to an appropriate standard, and that the claim should therefore fail. District Judge Khan gave reasons for regarding the evidence before him as unreliable, and I would certainly not be justified in interfering with his conclusion that the claimant had not made out her case. But, in my judgment, and recognising that this does involve a challenge to the district judge's findings of fact, with which an appeal court should interfere only with considerable reluctance, in my judgment, District Judge Khan's conclusion that

[22] *Williams v Jervis* [2009] EWHC 1837 (QB).
[23] *re H (Minor)* [1996] A.C. 563; [1996] 2 W.L.R. 8.
[24] *Meadows v La Tasca Restaurants Ltd* unreported 16 June 2016 Manchester County Court at Manchester.

the claim was fundamentally dishonest falls well outside the ambit of reasonable judicial decision-making. In my judgment, for the reasons that Mr Rana has advanced, it was not appropriate for the district judge to find that the accident had not happened in the circumstances described. He should have limited his decision, as he did in his first extemporary judgment, to a decision simply that the claimant had not made out her case on the evidence before him. In my judgment, the inconsistencies and curiosities highlighted by the judge did not entitle him to go further and to find that the claim had been fabricated, and thus was 'fundamentally dishonest'."

In *Rizan v Hayes*,[25] the trial judge, without being asked to do so by the defendant, made a finding of dishonesty. In the Court of Appeal, Tomlinson LJ observed:

"32. In my opinion the judge was unwise to express a view on the question whether the claim was fraudulent, and doubly unwise to do so without giving reasons for his conclusion over and above those which he had already given for his dismissal of the claim. The judge would have been better advised to cleave to his initial, correct, view that, as the Claimants had failed to satisfy the burden of proof on them concerning the occurrence of the alleged accident, it was unnecessary to address the question of fraud. It is apparent that the judge would not have expressed a view on the point had he not anticipated that that is precisely what Mr Clarke was about to ask him to do, but he would in my view have been better advised simply to point out, as of course he did, that resolution of that question was unnecessary, and to have left it at that."

In *Wright v Satellite Information Services Ltd*,[26] the trial judge had identified some inconsistencies in the claimant's case but concluded the claimant was not guilty of dishonesty, let alone fundamental dishonesty. The claimant had pleaded a claim for future care in excess of £73,000, whilst the judge allowed only £2,100 (to reflect the anticipated need for care following future surgery).

On appeal, Yip J recorded that when she pressed counsel for the defendant to identify the dishonesty in relation to the care claim, counsel said the claimant's dishonesty was in "brandishing" the care report, language Yip J regarded as emotive and perhaps reflective of the general approach taken by the defendant to the claim.

Yip J went on to say:

"The reason for the judge's rejection of this element of the claim was not that he found the Claimant's evidence to be untruthful, but rather that a proper interpretation of that evidence did not support the assessment of the care expert."

The difference between exaggeration, let alone dishonesty, and proper argument of the claim on quantum was also highlighted in *Jallow v Ministry of Defence*[27] when Master Rowley said:

"17. … The claimant was 'employed' by the defendant for a period of 14 months before he left. That is a very limited period on which to base a substantial loss of earnings claim. The situation in respect of being in the Army is further complicated by the various points (in this case 4 years, 7 years and 12 years) at which the claimant might have left the Army. As I indicated in respect of other decisions that I gave in this case, the claimant's claim in quantum was inevitably going to be based on a certain amount of conjecture. It is in fact for that reason that both sides relied upon employment expert's evidence. It seems to me that this is just the sort of case where a wide variety of potential sums might be achieved at an

[25] *Rizan v Hayes* [2016] EWCA Civ 481.
[26] *Wright v Satellite Information Services Ltd* [2018] EWHC 812 (QB); [2018] 3 Costs L.O. 323.
[27] *Jallow v Ministry of Defence*, unreported, 24 April 2018, SCCO.

assessment of damages hearing, depending upon how the evidence pans out. Consequently, it was likely to be settled somewhere in the middle given the risks involved to both sides of adverse findings by the judge. That is what happened in this case.

18. In my judgment, the claimant did not exaggerate his claim. He put forward alternative cases as to quantum which demonstrates that he was alive to the issues surrounding the potential level of damages to be recovered. Therefore, the ultimate settlement of this claim did not falsify in any way the premise of Master Leslie's setting of a budget in a case where the sums in issue were £300,000 …"

In *Knibbs v Heart of England NHS Foundation Trust*,[28] District Judge Truman held:

"79. The schedule is enthusiastic. It might well be categorised as overly enthusiastic, because I think it would undoubtedly not have succeeded in full at trial, but being over enthusiastic is not the same as behaving improperly. It was a schedule which had some basis in the medical and lay evidence. It was not a case where the claimant had deliberately exaggerated his injuries and thus the claims resulting."

In *Smith v Ashwell Maintenance Ltd*,[29] the defendant invited the court to dismiss the claimant's claim for fundamental dishonesty. Rejecting that argument HH Judge Hampton referred to an extract from the journal "Clinical Medicine" published in November/December 2002, cited by one of the claimant's experts, which stated:

"Outright faking of pain for financial gain is rare, but exaggeration is not, especially if the patient is involved in litigation. It is often difficult to determine whether this represents an attempt to convince or deceive the clinician."

HH Judge Hampton went on to observe:

"That observation succinctly sums up the court's own experience. I do not find in the present case that there has been outright faking of pain. I do however find that there is an element of exaggeration. It has been necessary to consider carefully whether the exaggeration represents an attempt to convince or deceive the medical witnesses and indeed the court. I note the Defendant's attitude until half way through the trial, as to liability in this case. The Claimant must have constantly felt, that from the earliest intimation of a claim, that the Defendant has shown a determination to avoid fully compensating him (see the letter to the Claimant's solicitors from a Claims Handler dated 27th September 2013, in which liability is denied). In the early stages the Defendant put as witnesses, individuals who were not even present at the time of the accident. Thus, I find, that the Claimant's exaggeration and overstatement of his difficulties, are the result of an attempt by him to convince, rather than to deceive. I find that to some extent, the Claimant genuinely believes himself to be more significantly disabled by his continuing pain than, objectively, is in fact the case."

HH Judge Hampton also observed that:

"Faking pain, as described by the learned authors referred to above, would almost undoubtedly amount to fundamental dishonesty. Exaggeration, with mixed motives of attempting to convince or deceive, is not."

PROCEDURE

[28] *Knibbs v Heart of England NHS Foundation Trust*, unreported, 23 June 2017, Birmingham District Registry.
[29] *Smith v Ashwell Maintenance Ltd*, unreported, 23 January 2019, Leicester County Court.

Accordingly, there was no "fundamental dishonesty" for the purposes of s.57 nor should the claim be dismissed in accordance with the principles in *Summers*, the claimant had not fabricated evidence to the extent of the claimant in *London Organising Committee of the Olympic and Paralympic Games v Sinfield*.[30]

In any event, HH Judge Hampton observed:

> "Given that this Claimant has suffered a painful injury, and that I have accepted what the Claimant's medical witnesses have told me about that, that he has been required to resist the Defendant's vigorous attempts to avoid responsibility for an accident which it was accepted at the very last moment was entirely the fault of the Claimant's employer, I find that the Claimant would suffer substantial injustice if the claim were dismissed. I do not find that the Claimant has forfeited his right to have his claim determined."

In *Friends Life Ltd v Miley*,[31] the Court of Appeal dismissed an appeal by an insurer against a judgment for the claimant that the defendant pay benefits under a group income protection insurance policy.

The defendant, amongst other matters, complained about the claimant's failure to disclose information including attendance at a beer festival. Turner J, the trial judge, had said:

> "27. … In so far as the notion of a beer festival might, to the uninitiated, conjure up images of the participants cavorting in lederhosen whilst brandishing overflowing beer steins in scenes of infectious Bavarian gaiety, they must be dispelled. In reality, this was a rather understated affair in which patrons of the local public house were given the leisurely opportunity to sample a range of craft beers."

In the Court of Appeal, having quoted this passage, McCombe LJ observed:

> "It is somewhat ironic that FL should have been complaining about exaggeration."

The courts also recognise that an honest witness may give evidence that is completely mistaken. As Leggatt J observed in *Gestmin SGPS SA v Credit Suisse (UK) Ltd*:[32]

> "While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate."

Leggatt J continued:

> "Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.)"

[30] *London Organising Committee of the Olympic and Paralympic Games v Sinfield* [2018] EWHC 51 (QB); [2018] P.I.Q.R. P8.
[31] *Friends Life Ltd v Miley* [2019] EWCA Civ 261.
[32] *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm).

The approach in *Gestmin* was applied by the court when dealing with allegations of fundamental dishonesty in *Keane v Tollafield*.[33]

Professional standards

If allegations of dishonesty should never have been made there is a risk of professional sanctions being applied against the representatives of the party making that allegation.

Guidance from the Bar Council provides:

> "In the case of *Medcalf v Mardell*, the House of Lords considered para.704(c) of the Code of Conduct and a barrister's duties in considering whether or not to draft a document including an allegation of fraud.
>
> Paragraph 704(c) states that a barrister should not draft a document containing any allegation of fraud 'unless he has clear instructions to make such an allegation and has before him reasonably credible material which as it stands establishes a prima facie case of fraud'. In this case, the Court of Appeal had taken the view that a barrister in making such an allegation should have before him 'evidence which can be put before the court to make good the allegation'.
>
> The House of Lords rejected this interpretation. Lord Bingham of Cornhill, with whom the other law lords agreed, said that:
>
> > '… the requirement is not that counsel should necessarily have before him evidence in admissible form but that he should have material of such a character as to lead responsible counsel to conclude that serious allegations should properly be based upon it.'
>
> The Professional Standards Committee (PSC) takes the view that there is no litmus test for determining whether it is proper to allege fraud. As Lord Bingham made clear: 'Counsel is bound to exercise an objective professional judgment whether it is in all circumstances proper to lend his name to the allegation'. That decision will depend on the individual facts of each case.
>
> It should be noted that although paragraph 704 refers specifically to fraud, the same principle would apply to any other allegation of serious misconduct."

If solicitors draft a pleading it might be expected the SRA would adopt a similar approach. In *ATB Sales Ltd v Rich Energy Ltd*,[34] HH Judge Melissa Clarke (sitting as a Judge of the High Court) said:

> "24. Both solicitors and counsel have particular professional responsibilities when considering whether to plead or allege fraud or dishonesty. Their responsibilities under the SRA Code of Conduct and the Bar Code of Conduct respectively are not identical, but broadly speaking, both provide that it is an act of professional misconduct to make such allegations without specific instructions and without having material which on the face of it justifies those allegations. There are many cases where dishonesty is suspected but there is insufficient material for a party to plead it …"

Representatives need to remember the overriding duty to the court and the interests of the administration of justice.

Committal

It is important all parties to litigation recognise that, above and beyond sanctions relating to the substantive claim and/or costs, false statements made in the course of proceedings may lead to committal proceedings.

[33] *Keane v Tollafield*, unreported, 8 August 2018, Birmingham County Court.
[34] *ATB Sales Ltd v Rich Energy Ltd* [2019] EWHC 1207 (IPEC).

The proper approach to applications for committal for contempt of court under CPR Pt 81 was reviewed by the Court of Appeal in *Zurich Insurance Plc v Romaine*.[35]

Conclusion

Since fundamental dishonesty was first introduced into the CPR, as part of the 2013 version of the rules, related law and practice have adapted as this subject has become part of the legal landscape for those practising in personal injury litigation.

It is important for practitioners to recognise when allegations of fundamental dishonesty should be properly deployed, in order to root out dishonest claims, but, equally, when it is inappropriate to do so.

[35] *Zurich Insurance Plc v Romaine* [2019] EWCA Civ 851; [2019] 1 W.L.R. 5224.

Historic Child Sexual Offences and the Criminal Injuries Compensation Scheme

David Miers*

Child sexual abuse; Criminal injuries compensation; Historical offences; Time limits; Victims

Abstract

This article comments on the abolition of the "same roof" rule, which was, until 13 June 2019, a controversial aspect of the Criminal Injuries Compensation Scheme 2012. This provided that no award would be made in respect of injuries sustained before 1 October 1979 where the applicant and the assailant "were living together at the time as members of the same family". This rule applied to all such applicants, but bore particularly harshly on victims of child sexual abuse. The article summarises the background to its abolition, and sets out the terms of the amendments to the 2012 Scheme, one of whose main purposes is to enable applicants who were previously refused compensation to reapply. The article concludes with some comments on the impact of the amendments, and on the Government's wider review of the Scheme.

Introduction

Practitioners familiar with historic child sexual offence and abuse claims made under the Criminal Injuries Compensation Scheme 2012 ("CICS 2012") will be aware of the provision colloquially known as the "same roof" rule. This provided that no award would be made in respect of injuries sustained before 1 October 1979 where the applicant and the assailant "were living together at the time as members of the same family". This rule ("the pre-1979 same roof rule") applied to all such applicants, but bore particularly harshly on those who as children had been (sexually) abused or injured prior to this date, and who had not applied until some years later when as adults the impacts of this history became known to, or began seriously to affect them. Following a decision of the Court of Appeal that was highly critical of the Government's decision to continue this rule in the otherwise substantially amended CICS 2012, the Ministry of Justice announced in September 2018 that it would abolish it.[1] Abolition took effect from 13 June 2019, meaning that "anyone previously denied compensation under the rule, or put off from coming forward because of it, will be able to make fresh applications".[2]

This article first summarises the background to this change. Secondly, it sets out the provisions of the Criminal Injuries Compensation Scheme 2012 (Amendment) Instrument 2019,[3] alongside which the Criminal Injuries Compensation Authority ("CICA") has published a new digital guide ("the 2019 Guide").[4] The abolition of the "same roof" rule is also one aspect of a wider government review of CICS 2012, on which a consultation paper is due to be published later in 2019, with a view to a revised CICS in 2020. The article concludes with some thoughts on the scope and the detail of this consultation.

* Emeritus Professor of Law, 3 Royal Chase, York YO24 1LN, *davidmiers2@gmail.com*.

I am grateful to Howard McNulty (*sthelenslaw.co.uk*) for his practitioner comments on a draft; he has no responsibility for its content.

[1] See *https://www.gov.uk/government/news/justice-secretary-announces-victim-compensation-scheme-review-scraps-unfair-rule* [accessed 20 October 2019].

[2] See *https://www.gov.uk/government/news/compensation-rule-abolished-allowing-victims-to-reapply* [accessed 20 October 2019].

[3] The draft was approved on 15 May 2019 and came into force 21 days later; House of Commons, Hansard, Vol.660, Delegated Legislation. See *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/808344/cics-instrument.pdf* [accessed 20 October 2019].

[4] See *https://www.gov.uk/guidance/criminal-injuries-compensation-a-guide* [accessed 20 October 2019]; "Same roof applications" (12 June 2019).

The pre- and post-1979 "same roof" rules

First introduced in the common law Scheme, the "same roof" rule applied to all claims arising from intra-family violence. The factors that were chiefly persuasive in its formulation were the perceived difficulty in establishing the facts, often many years after the incident(s), and of distributing blame, the possibility of fraud, and the administrative problem of ensuring that the assailant did not benefit.[5] The Scheme was amended with effect from 1 October 1979 so as to limit its exclusionary effect to adult family members ("the post-1979 same roof rule"), but left the pre-1979 "same roof" rule untouched.[6]

This differentiation continued in the first tariff Scheme made in 1996 under the Criminal Injuries Compensation Act 1995, in its successors in 2001 and 2008 and, with some further procedural and linguistic simplification, in the 2012 revision. CICS 2012 para.19 provided that:

> "an award will not be made in respect of a criminal injury sustained before 1 October 1979 if, at the time of the incident giving rise to that injury, the applicant and the assailant were living together as members of the same family."

In the case of a criminal injury sustained on or after 1 October 1979, para.20 provided that no award would be made:

> "if, at the time of the incident giving rise to the injury, the applicant and the assailant were adults living together as members of the same family, unless the applicant and the assailant no longer live together and are unlikely to do so again."

Because the 1979 amendment did not have retrospective effect,[7] victims of historic intra-family child and adult sexual or violent offences sustained before 1 October 1979 continued to be subject to the exclusionary rule. In the case of injuries sustained after that date, a child's application for compensation would be determined by the generally applicable provisions concerning their eligibility and proof of the injury. The limitations imposed by para.20 applied only to adult members of the same family. But for both child and adult victims, para.21, which continued the substance of earlier Schemes, meant that even where they met these provisions' requirements, an award would not be made if the CICA considered that "an assailant may benefit from the award".

The Court of Appeal's criticisms

The enduring impact of the absolute bar to pre-1979 injuries was strikingly illustrated by the facts of the Court of Appeal's decision in *JT v First-tier Tribunal*.[8] The 47 year old victim, JT, applied in 2012 in respect of the sexual abuse that began in 1968 when she was five years old, and continued until she was 17, offences of which her stepfather, with whom she then lived, had later been convicted. CICA made no award, relying on para.19, but the Court of Appeal held that the exclusionary rule constituted unlawful discrimination and breached her human rights. The remedy was that she was not prevented by para.19 from being made an award.

The defining issue was whether there was any "objective and reasonable justification" for the less favourable treatment of those victims excluded by the rule, compared with those whose situation was analogous to JT's but who were not caught by it. This issue was to be judged by whether the rule embodied a legitimate aim, and whether there was a "reasonable relationship of proportionality" between that aim

[5] Explanatory Memorandum to Criminal Injuries Compensation Scheme 2012 (Amendment) Instrument 2019 para.7.4.
[6] For a fuller analysis of the rule, and of CICS 2012 as a whole, see D. Miers, *Criminal Injuries Compensation* (Oxford University Press, 2018), paras 3.96–3.111.
[7] *R. v Criminal Injuries Compensation Board Ex p. P* [1993] P.I.Q.R. P314 DC; [1994] P.I.Q.R. P400 at 417 CA.
[8] *JT v First-tier Tribunal* [2018] EWCA Civ 1735; [2019] 1 W.L.R. 1313.

and the means employed to realise it. The Upper Tribunal had been persuaded that it was.[9] There was a legitimate aim in seeking to limit CICA's potential liability to compensate in such cases, which would otherwise impose on it a significant administrative burden to establish a causal link between the offence and the injuries. One of the aims of the CICS 2012 reforms was to reduce the burden on the taxpayer, and to make the Scheme sustainable in the long term, a consideration that had also conclusively weighed in a very similar claim heard by the Inner House of the Court of Session: the pre-1979 "same roof" rule was a "prudent policy decision concerning the allocation of finite resources".[10]

In a scathing criticism of the Government's position, Leggatt LJ said that the rule "appears flatly inconsistent" with its purposes for the 2012 Scheme, one of which is to compensate innocent victims of sexual offences. The rule was arbitrary and unfair, and its justifications no longer persuasive. Indeed:

> "it might be thought that a victim in JT's position would have a greater claim to be treated as eligible for an award than a person who was assaulted by someone who was not living as a member of their family when the incident occurred."[11]

This difference in treatment was "starkly illustrated" by the award which was made to the claimant's relative who had also been abused by her stepfather but did not live with them.[12] The government did not appeal this decision, instead indicating that it proposed to abolish the pre-1979 'same roof' rule. An appeal by the claimant to the Supreme Court in the case of *MA v CICB* was settled between the parties.[13]

The "same roof" rule: Substantive amendments

The substantive amendments to CICS 2012 are made by rr.8–11 of the 2019 Instrument. Paragraph 19 is omitted from CICS 2012 (r.9), and "to avoid setting up a potentially discriminatory position whereby adults are treated more favourably if the offence happened pre-1979", rr.10 and 11 amend para.20 so that the qualified version of the post-1979 "same roof" rule that applied only to adult family members now applies to any pre-1979 injury. "This will mean there is consistency in how the rule applies to all adult applicants".[14] The amended para.20 continues to apply to all current and future applications. New para.18A is inserted into CICS 2012. This permits the victim to make a renewed application in respect of pre-1 October 1979 injuries where the original application had been refused under the "same roof" rule, and caters for injuries that overlap the pre- and post-1979 rules. Their cumulative effect is as follows.

- A child or an adult victim who sustained a criminal injury during "the relevant period", that is, between 1 August 1964 and 30 September 1979, whose application, whether under the statutory scheme or the earlier common law Scheme, led to an award being withheld because he or she was at the time living with the assailant as members of the same family, may make a new application under the amended CICS 2012. This new application may be made whether or not this was the sole ground on which the award was withheld (para.18A(2)).
- A child or an adult victim who sustained a criminal injury on or after 1 October 1979 where the incident giving rise to that injury occurred over a period which began during, and ended after, "the relevant period" ("the injury period"), whose award was reduced because he or she was at the time living with the assailant as members of the same family, may make a new application under the amended CICS 2012. This new application may be made whether or not this was the sole ground on which the award was reduced (para.18A(3)).

[9] *JT v First-tier Tribunal and Criminal Injuries Compensation Authority* [2015] UKUT 47 (ACC).
[10] *MA v Criminal Injuries Compensation Board* [2017] CSIH 46; 2017 S.L.T. 984 at [25].
[11] *JT v First-tier Tribunal* [2018] EWCA Civ 1735 at [92], [96] and [99]–[117].
[12] *JT v First-tier Tribunal* [2018] EWCA Civ 1735 at [71]–[80] and [114].
[13] Explanatory Memorandum to Criminal Injuries Compensation Scheme 2012 (Amendment) Instrument 2019 para.7.7.
[14] Explanatory Memorandum to Criminal Injuries Compensation Scheme 2012 (Amendment) Instrument 2019 para.7.11.

- In either case, an award may only be made if the injury falls within both "the relevant period" and "the injury period", and only so far as the applicant and the assailant were living together as members of the same family (para.18A(4)). The effect is to confine any award to those circumstances in which an award was previously withheld or reduced.
- An adult victim who never made an application in respect of a criminal injury sustained in an incident of intra-family violence that occurred during "the relevant period" may now make an application, but an award will not be made "unless the applicant and the assailant no longer live together and are unlikely to do so again" (para.20).
- All of CICS 2012's other requirements and eligibility conditions will apply to these applications.
- In the case of both the renewed and the first time applications, rr.14–17 of the Instrument provide new time limits within which they must be made.

The new time limits for applications under para.18A

The pre-2019 amendment standard and extended time limits for applications are set out in CICS 2012 paras 87–89. Paragraph 87 provides that the application must be sent by the applicant so that CICA receives it as soon as is reasonably practicable after the incident, and in any event within two years of it. Paragraph 88 makes provision for cases in which the applicant was a child under the age of 18 at the time of the incident, and para.89 provides that CICA may in specified circumstances extend the time limits described in these two paragraphs. These paragraphs must now to be read subject to new para.88A, which specifies the time limits for these fresh applications.

Paragraph 88A(1)(a) applies to a person to whom para.18A applies, that is, a person who previously made an application that led to the award being withheld (para.18A(2)) or reduced ((para.18A(3)). This paragraph applies both to an adult applicant, and to one who was a child at the date of the incident, as for example in *JT v First-tier Tribunal*. Paragraph 88A(1))(b) applies to a person who had sustained a criminal injury between 1 August 1964 and 1 October 1979, who was at the time living with the assailant as members of the same family but who did not make an application in respect of that injury before the 2019 amendment date. This paragraph can also apply to both adult and child applicants, and in both cases, the new application under the amended Scheme must be received by CICA within two years beginning with the day after that date (para.88A(2)); that is, after 13 June 2019.

CICS 2012 para.88 gives an applicant who was a child under the age of 18 at the time of the incident greater latitude within which to make an application; in essence, where the incident was reported to the police before their 18th birthday, within the period ending on their 20th birthday, or, if reported after their 18th birthday, within two years of that report. Paragraph 88 is amended so that it does not apply to an applicant to whom para.88A applies (para.88(3)). Paragraph 88A(3) introduces a separate time limit for an applicant who was a child under the age of 18 on the date of the incident, and who did not make an application under the amended Scheme within the para.88(A)(2) time limit. There may be circumstances in which the delay in reporting the incident that was subject to the pre-1979 rule is such (say, not until December 2020) that CICA does not receive an application under the amended Scheme by 13 June 2021. If it is satisfied that the applicant could not have applied within the time limit, para.88(A)(3) provides that an application may be made within two years after the date on which the incident was first reported to the police; in this case, by December 2022.

The two year time limit in para.88A(2), and the variation in the case of child applicants in para.88A(3), may both be extended where the conditions in para.89 apply; that is, where CICA is satisfied that due to exceptional circumstances the applicant could not have applied earlier, and that the evidence presented in support of the application means that it can be determined without further extensive enquiries by a claims officer. CICA's 2019 Guide comments:

> "We have discretion to consider these applications [under para.88A] beyond the two-year period if you were a child at the time of the incident giving rise to the injury, or if you were exceptionally unable to meet this time limit."[15]

Consequential amendments

By r.21 the amending Instrument inserts paras 145 and 146 to CICS 2012, which provide that on and after the amendment date (13 June 2019), the 2008 Scheme is to be read as if the "same roof" rule (para.7(b)) were omitted, and that all determinations or decisions made on or after that date are to be made in accordance with CICS 2012 as amended.

Impact and the wider consultation

> "The rationale for intervention is to address the Court of Appeal's decision, and to meet the Secretary of State's commitment to remove the rule as soon as possible. Furthermore, there is an equity rationale to allow awards for pre-1979 SRR [same roof rule] applicants previously denied access to compensation."[16]

The Government's Impact Assessment estimates that abolishing the pre-1979 rule will have a ten-year net present cost of between £56.5m and £132.2m, depending in essence on the number of new applications, and their success rate. If all of the approximately 4,000 previous applicants refused under that rule reapply, CICA reckons 70% will be successful. The minimum number of "new" successful applications, that is, those victims who have not previously applied—a figure that by definition is unknown—may vary between 70 and 350 a year over 10 years. Average awards for successful applications are assumed to lie between £16,500 and £22,000, generating that 10-year net present cost. These cover the costs to CICA of compensation paid out to successful claimants, staff and medical evidence costs associated with investigating claims, as well as First-tier Tribunal costs from claimant appeals. A successful case was made to the Government to increase CICA's budget in 2019–2020 in response to these potential increases in its expenditure.[17]

Abolition of the same roof rule may be seen as being complementary with the Government's Victims Strategy, launched in September 2018.[18] Following this, the Ministry of Justice announced the terms of reference of its consultation on CICS 2012, which is to be published during 2019. They are wide ranging, dealing with both substantive and procedural matters.[19] The former include a consideration of the scope of the Scheme, with particular focus on the definition of a crime of violence, the range of injuries and their corresponding tariff levels, and the contested issue of consent in claims arising from sexual offences. In that connection, and following the abolition of the pre-1979 same roof rule, the consultation aims to address the Scheme's impact on victims of child sexual abuse,[20] and, reflecting such recent terrorist acts as those perpetrated in the Manchester Arena, and on London and Westminster Bridges, its impact on victims of terrorism.

[15] CICA 2019 Guide.

[16] Criminal Injuries Compensation Scheme 2012 (Amendment) Instrument 2019, Impact Assessment; *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/790958/impact-assessment_-cics-srr.pdf* [accessed 20 October 2019].

[17] Criminal Injuries Compensation Authority, *Annual Report & Accounts 2018–19* (25 July 2019; HC 2207), 81–82.

[18] HM Government, *Victims Strategy* (September 2018, Cm.9700).

[19] See *http://data.parliament.uk/DepositedPapers/Files/DEP2018-1283/terms_of_reference_CICS_Review.pdf* [accessed 20 October 2019].

[20] Interesting but unlikely to proceed is the Compensation Orders (Child Sexual Abuse) Bill 2017–19, a Private Member's Bill that would require the Lord Chancellor to report on the use by courts of compensation orders for child sexual abuse offences. Its promoter, Andrew Griffiths MP has also drawn attention to the pitifully small number of compensation orders made on conviction for child sexual abuse offences. Of 7,099 convictions and 6,861 sentences in 2017, there were 26 orders made against the offenders. With one significant exception (£15,000 for the rape of a female aged 13–15), 20 of these orders were for less than £400. Offences Against Children: Compensation: *Hansard*, House of Commons, Written Questions 220844 and 260612.

Victims' groups have particular concerns with the Scheme's time limits, which now include the additional limits in respect of new "same roof" claims and with the strict rules on the relevance of unspent convictions. They, and the practitioners who represent them, have for some time had concerns about CICA's decision-making, including such issues as the speed at which determinations are reached, the timeframes for accepting or rejecting awards, and the level of evidence required for compensation claims. A long-running concern relates to the possible disjunction between a GP's description of the victim's injury and what might be the appropriate tariff level. CICA has set up a dedicated team to provide extra support with the application process for the new applications made under the 2019 amendment, which includes a named contact to ensure applicants do not have to repeat their traumatic experiences to multiple people. Practitioners will no doubt welcome any new procedures that make their tasks and their clients' legitimate expectations easier to navigate and to conclude.

As has always been the case with those who press for greater recognition of crime victims' interests, the consultation will inevitably result in calls to widen the scope of the Scheme, reintroduce the discretionary decision-making available to claims officers under the earlier Schemes, and loosen some of the eligibility rules, in particular concerning an applicant's unspent convictions. All of these proposals imply an increase in expenditure, but which may founder on the final matter listed in the consultation's terms of reference, "the affordability and financial sustainability of the Scheme".

NHS Resolution—25 Years On

Helen Vernon*

Alternative dispute resolution; Clinical negligence; Damages; NHS Resolution

NHS Resolution (the NHS Litigation Authority as was) is soon to celebrate its 25th anniversary, having witnessed significant changes in the health and justice landscape we operate in. We are now far from being the back office function of our early years, having established our relevance to wider system efforts in areas such as patient safety.

A refresh of our strategy, confirms our commitment to keep NHS patients and staff out of formal court proceedings wherever possible and to build on the recent success seen with mediation to broaden and target a range of alternative dispute resolution ("ADR") initiatives. Whilst we recognise that some cases will need to be litigated, our aim is to move the resolution of cases of clinical negligence towards a more collaborative and less adversarial approach. However, this needs changes to be made across the market, for our own staff and lawyers but also for those who act for patients.

We currently receive around 900 new clinical negligence claims a month and last year we paid out just over £2.4 billion from the NHS for damages and legal costs. This "cash" cost is the tip of the iceberg. Our indemnity schemes operate on a "pay-as-you-go" basis which means that we collect in what we expect to pay out in any one given year. At current prices, the incurred cost of harm, ascribed to our indemnity schemes is £9 billion a year. Even that is an understatement as it excludes the direct costs to trusts of these incidents such as the costs of investigations and staff time or absence as well as incidents arising in areas which do not fall under our indemnity schemes. Our balance sheet provision is now £83 billion—almost treble what it was four years ago and up £6.4 billion in the last year alone.

Most who have experienced it would agree that the litigation process rarely works well for patients or NHS staff. Research that we conducted with the Behavioural Insights Team confirms that patients often bring claims in search of an explanation, an apology and to prevent the same thing happening again to someone else. Litigation delivers none of these things but perhaps a more collaborative approach between lawyers, which puts the formal process aside can.

This is where mediation can help and since we established our first mediation panel we have seen interest in mediation rise exponentially. Lawyers who act for patients and healthcare providers alike have started to see the benefits it can provide for their clients and to encourage their teams to develop experience in mediation as a mainstream area of their practice.

In 2018/2019, the number of mediations on clinical negligence claims increased by 119% to 380 from 173 in 2017/2018—exceeding the number of clinical negligence trials (62) more than six-fold.

We see the most success where a clinician from the healthcare provider is present, although not all harmed patients want this. The process provides an opportunity for the complexities and grey areas of a case to be explored in a way that the exchange of formal court proceedings often cannot. The focus can, as it should, be on what matters to that particular patient and their family and no two mediations are the same.

But mediation is not the only way to keep cases out of court and we are well aware that it is only one approach of many available us all to work together to resolve cases sooner. There is a shared objective here which has the backing and the commitment of many of specialist lawyers who work in the field who have worked with us in testing different approaches and who have supported our work to share learning from claims with the NHS. We welcome new ideas from those who are experienced in this field.

* Chief Executive of NHS Resolution

Our strategy refresh highlights two areas of particular interest to clinical negligence lawyers which will be gathering pace in the next year or two.

The first is our Early Notification scheme for obstetric brain injury which is entering its third year. This has been a flagship of our strategy giving us the opportunity to capture those incidents meeting clinical criterial defined by the Royal College of Obstetricians and Gynaecologists within 30 days. This is giving us the opportunity to disrupt what has become over the years quite a formulaic and lengthy path from the incident to a settlement. It is uncharted territory but for the first time we are making admissions and payments to families within months rather than several years of the birth. This means getting support to families when it matters and when it can make a difference. We have four clinical advisors supporting our Early Notification scheme—two obstetricians and two midwives working alongside our claims teams who are feeding back in real time to those organisations who are reporting incidents to us and sharing lessons more widely with the service. We recently published our first report on what we have learned from Early Notification, reviewing the experience of the scheme as well as making some clinical findings and recommendations for improvement.

Secondly, we are now also operating an indemnity scheme in primary care. On 1 April 2019, we launched the Clinical Negligence Scheme for General Practice ("CNSGP") which covers clinical negligence claims (with an incident date on or after 1 April 2019) against general practitioners, practices and their staff relating to care of patients within the NHS in England. One of the major benefits of the introduction of CNSGP is the opportunity for gathering and sharing learning about the causes of general practice claims. It also provides an opportunity for shared learning across primary, secondary and tertiary care across the whole of the NHS. Lawyers who work in this field have a tremendous amount of knowledge and insight as to what works well and where we can, collectively improve and there has never been a better time to work together to achieve this.[1]

[1] For more information, see *www.resolution.nhs.uk* [accessed 20 October 2019].

The Impact of Legislation on the Outcomes of Civil Litigation: An Empirical Analysis of the Legal Aid, Sentencing and Punishment of Offenders Act 2012[1]

Paul Fenn[*]

David Marshall[**]

Neil Rickman[***]

Clinical negligence; Measure of damages; Personal injury claims; Success fees

Abstract

The Legal Aid Sentencing and Punishment of Offenders Act 2012 ("LASPO") came into force in England and Wales in 2013, Pt 2 of which brought a number of reforms to the costs and conduct of civil litigation. The purpose of the current paper is to summarise the empirical analysis of the effects of LASPO on the outcomes of civil claims,[2] to consider some possible explanations for these effects and to outline further research that might assist in evaluating these. After allowing for possible confounding effects due to changes in case value, duration, complexity and stage of settlement, we find statistically significant changes in litigation outcomes associated with the introduction of LASPO rule changes. For both types of claim where data were available, our results show significant reductions in recovered base costs (adjusted for inflation), agreed damages (adjusted for inflation), and the probability of proceedings (i.e. the proportion of claims settled post-issue). In our conclusion we put these results in context of the declared objectives of the reforms, speculate on what may have caused the behavioural shifts we observe, and comment on ways to develop the research.

Introduction

The Legal Aid, Punishment and Sentencing of Offenders Act 2012 ("LASPO") came into force in England and Wales in April 2013, Pt 2 of which brought a number of reforms to the costs and conduct of civil

[1] We would like to acknowledge the helpful provision of data and advice by Matthew Hoe (Taylor Rose TTKW), John Mead (NHSR) and Daryl Norvock (Acumension). We also acknowledge helpful feedback at an early stage of this work by those attending the seminar convened on 29 June 2019 by the Civil Justice Council for the Government's post-implementation review of the Legal Aid, Sentencing & Punishment of Offenders Act 2012 Pt 2. The paper also benefitted from comments received at the 2018 conference of the European Association of Law and Economics, Milan, Italy.

[*] Paul Fenn is Emeritus Professor at Nottingham University Business School. His background is in applied microeconomics, particularly in relation to the interaction between law, health, and insurance. He was one of the Assessors assisting Jackson LJ in his Review of Civil Litigation Costs, and has been closely involved in the implementation of the Jackson reforms, particularly those relating to fixed costs.

[**] David Marshall is a solicitor and managing partner at Anthony Gold Solicitors in London. He is a past president of APIL and immediate past chair of the Law Society's Civil Justice Committee. He was one of Jackson LJ's assessors for his supplemental report on fixed recoverable costs. He has written and lectured widely about conditional fee agreements since their inception.

[***] Neil Rickman is a Professor of Economics at the University of Surrey. He has published widely on economic aspects of legal services, including professional regulation, regulation of fees, the timing of settlement and clinical negligence reform. Neil served on the Clementi Review of the regulation of legal services, helped to design the Fixed Recoverable Costs Scheme for RTA claims in 2003, was an advisor to the review of GHRs in 2015 and is a member of the current Mayson Review of legal services regulation.

[2] P. Fenn and N. Rickman, "The Impact of Legislation on the Outcomes of Civil Litigation: An Empirical Analysis of the Legal Aid Sentencing and Punishment of Offenders Act 2012" (February 2019) at https://ssrn.com/abstract=3326665 [accessed 20 October 2019] or http://dx.doi.org/10.2139/ssrn.3326665 [accessed 20 October 2019].

claims. It represented the latest in a long line of reforms dating back to the approval of conditional fee agreements in 1995 and the later introduction of recoverable success fees and ATE premiums in the Access to Justice Act 1999 (brought into force April 2000). Fenn, Grembi and Rickman[3] argue that the AJA 1999 was responsible for litigation cost increases in the early 2000's due to the weakening of claimant-side incentives to contain costs.[4] Subsequent reforms to the CPR, introducing fixed recoverable costs and fixed success fees for some types of claim, arguably sought to address these perceived costs and inefficiencies in civil litigation. LASPO builds on this trend: amending the cost rules to allow for one-way cost-shifting (what Hylton,[5] calls the "pro-plaintiff rule"), reversing rules on recoverable success fees and ATE premiums, and removing controls over what constitutes a reasonable success fee to be recovered from the claimant's damages.

The purpose of the current paper is to summarise the empirical analysis of the effects of LASPO on the outcomes of civil claims,[6] to consider some possible explanations for these effects and to outline further research that might assist in evaluating these. The MoJ's Initial Assessment of LASPO Pt 2 (published 28 June 2018 and conducted to provide early detail for the review) listed the legislation's objectives as:

> "to reduce the costs of civil litigation and to rebalance the costs liabilities between claimants and defendants while ensuring that parties with a valid case can still bring or defend a claim. There was also an ambition to encourage early settlement; and to discourage unmeritorious claims."

Thus, while we are not able to cover all elements of the legislation, we have sought to consider the objectives listed above. In the remainder of this paper, where we refer to "LASPO" it should be taken to read as "LASPO Pt 2" and to include the various associated changes to secondary legislation brought in at the same time.[7]

Background to the Legal Aid Sentencing and Punishment of Offenders Act (LASPO 2012)

In 2010, Jackson LJ published a report on his root and branch review of the whole system of civil costs in England and Wales, following concerns by many over the increasing level of recoverable costs.[8] Jackson LJ's solution was to retain cost-shifting, but to improve claimant-side incentives to contain costs.[9] The most important first step was to unwind the principle of recoverable success fees and ATE premiums, which had arguably weakened incentives from the year 2000 onwards. But because this would result in claimants receiving lower net damages, Jackson LJ also felt he needed to soften the blow by enhancing general damages by 10%, by limiting the success fee to a maximum of 25% of damages, and by introducing one-way cost shifting. Perhaps the second most important step was Jackson LJ's recognition that the fundamental problem of weak cost control would still remain even with non-recoverable success fees, and therefore he argued strongly for the introduction of fixed costs throughout the fast track. These should reflect reasonable work needed to be done, and therefore should vary across claim types and be proportional to damages, with a reduction where there was an early admission of liability. LASPO Pt 2 incorporated most of the recommendations made in Jackson LJ's report and the post-LASPO litigation landscape looks

[3] P. Fenn, V. Grembi and N. Rickman, "'No win, no fee', cost-shifting and the costs of civil litigation: A natural experiment" (2017) 127(605) *Economic Journal* F142–F163.

[4] It should be noted that this study found no significant changes to damages as a consequence of AJA 1999.

[5] K. Hylton, "An asymmetric information model of litigation" (2002) 22(2) International Review of Law and Economics 153–175.

[6] P. Fenn and N. Rickman, "The Impact of Legislation on the Outcomes of Civil Litigation: An Empirical Analysis of the Legal Aid Sentencing and Punishment of Offenders Act 2012" (February 2019) at *https://ssrn.com/abstract=3326665* [accessed 20 October 2019] or *http://dx.doi.org/10.2139/ssrn.3326665* [accessed 20 October 2019].

[7] In particular, the changes to the CPR to implement Qualified One-way Cost Shifting ("QOCS"), a new process of court costs management (budgeting) and a new definition of proportionality for costs assessment and costs budgeting, all as recommended by Jackson LJ.

[8] Jackson LJ, *Review of Civil Litigation Costs: Preliminary Report Vol.1* (The Stationery Office, 2009).

[9] See P. Fenn, V. Grembi and N. Rickman, "'No win, no fee', cost-shifting and the costs of civil litigation: A natural experiment" (2017) 127(605) *Economic Journal* F142–F163.

a lot different to that which preceded it. The main changes—non-recoverable success fees and ATE premiums, success fees capped at 25% of damages, one way cost-shifting, banned referral fees, and fast track fixed costs—are all far-reaching and will arguably have impacts on business plans and strategies adopted in the personal injury sector, as well as on the behaviour of lawyers and their clients, on both sides of the industry.

Data

While the statutory components of LASPO took effect for CFAs agreed after 1 April 2013, there were also a number of changes made in 2013 to the Civil Procedure Rules ("CPR") in order to extend the existing fixed costs portal regime as applied to undisputed motor claims up to £10,000, both vertically (to claims worth up to £25,000) and horizontally (i.e. applied to other types of personal injury claim such as employer's liability and public liability) for accidents occurring after 30 July 2013. Moreover, from 31 July 2013, all motor, EL and PL claims up to £25k which exited the portal due to disputed liability were subject to a new Fixed Costs scheme as set out in the CPR. This means that virtually all personal injury claims made for less than £25k were subject to fixed costs from 2013 onwards. Clearly, any attempt to disentangle the effect of the statutory changes in LASPO from the effect of the new fixed recoverable costs in the CPR would be practically impossible for those claims. Consequently, for any such impact assessment to be made, it would be necessary to identify groups of claims which were not subject to fixed costs either before or after the implementation of LASPO. One possibility, of course, would be to focus on personal injury claims (e.g. motor, EL, PL) for more than £25k in value. Another possibility is to focus on an important category of claims—namely those involving clinical negligence—which have never, to date, been subject to fixed recoverable costs, irrespective of their value. In this paper, we therefore identify data sources providing information on the outcomes of settlements for these two categories of claim: clinical negligence (all values), and personal injury claims over £25k. For these claims, the only important changes to the process of litigation were those in the LASPO statute.

Data sources

Clinical negligence

NHS Resolution is the main defendant in clinical negligence claims in the UK, as the agency responsible for NHS Hospital Trusts' liabilities. NHS Resolution has a panel of solicitors' firms who specialise in the defence of clinical negligence claims, and in addition it arranges for the costs of some of these claims to be negotiated by the legal costs firm Acumension, who have established a database recording the outcomes of these negotiations. The data provided to us by NHS Resolution are drawn exclusively from that database—that is, claims where costs were negotiated by NHS Resolution defence panel solicitors or directly by NHS Resolution are excluded.[10] We have access to case-level data on claims settled by Acumension in the financial years 2012/2013 to 2017/2018. The combined dataset contains 14,248 claims settled with a value up to £250,000 and provides information on the agreed settlement amounts in terms of both damages and recovered costs, and also the stage of settlement (pre-issue or post-issue).[11]

[10] Without access to data on these excluded claims, it is not possible to be certain about how representative the Acumension dataset is of the overall population of clinical negligence claims against NHS Resolution. Nevertheless, it does represent around a third of all NHS Resolution clinical claims in any one year, and it is clearly an important source of information on that part of NHS Resolution's activity.

[11] Note that the number of Acumension claims settled at the end of the financial year 2016/2017 fell significantly before recovering sharply, and this had an impact on the mean outcomes for that period. We assume this was due to end of year NHSR budgetary concerns affecting the timing of settlement.

Personal injury claims over £25k

In relation to personal injury claims other than clinical negligence, we also received data from Taylor Rose TTKW, solicitors providing (among other things) costs and advocacy services predominantly to insurers and compensators. Their records are held in a bespoke case management system and its underlying database. The dataset extends over a number of years, including both pre- and post-LASPO settlements of a range of personal injury categories—mainly RTA (motor), employer's liability and public liability.[12] Again, the dataset provides information on the agreed settlement amounts in terms of both damages and recovered costs, and also the stage of settlement.

Matched samples

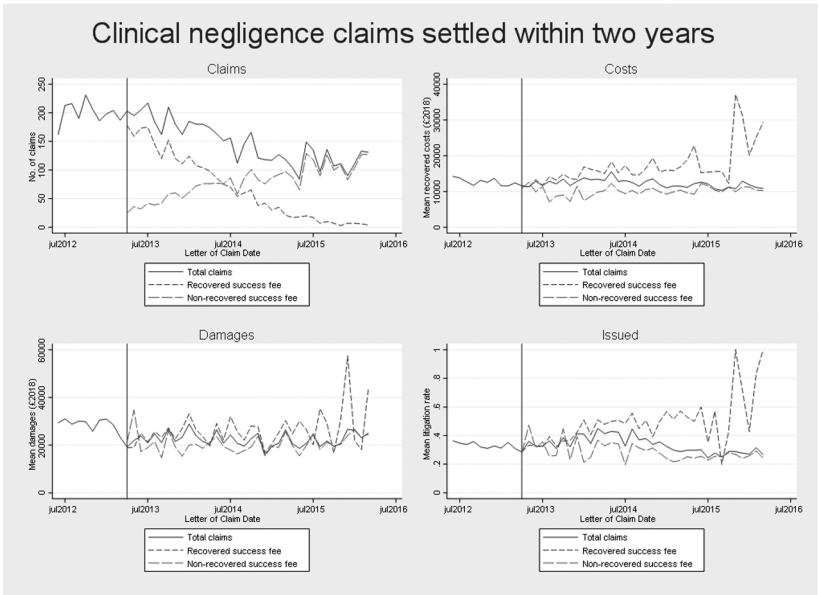
One obvious possibility open to us was to compare the mean outcomes of settled claims before and after LASPO. However, this approach cannot be used to infer the impact of the rule changes because of the delay between the funding agreement and the settlement of the claim. The monthly settlement samples after LASPO will consist of a mix of different funding types, including litigants in person, trade unions, legal expense insurers as well as CFAs, where the latter will include some which were agreed before LASPO and some after. Those agreed after LASPO will no longer have any recovered success fees at settlement, and these will be an increasing proportion of total funding types as time elapses after LASPO. Our datasets do have information on the recovery of success fees for each settled claim, so it may be possible to use this information to illustrate the phenomenon. However, it is not straightforward to simply equate the absence of a success fee recovery with the presence of a post-LASPO CFA, because there are other reasons for missing success fees. In particular, where claims are funded without a CFA being agreed (e.g. when the claim is funded by the litigant in person, or where it is funded by a third party such as a trade union or legal expenses insurer), no success fee will be recorded as being recovered, and, without further information on the funding mechanism, we are unable to distinguish these from post-LASPO CFAs.

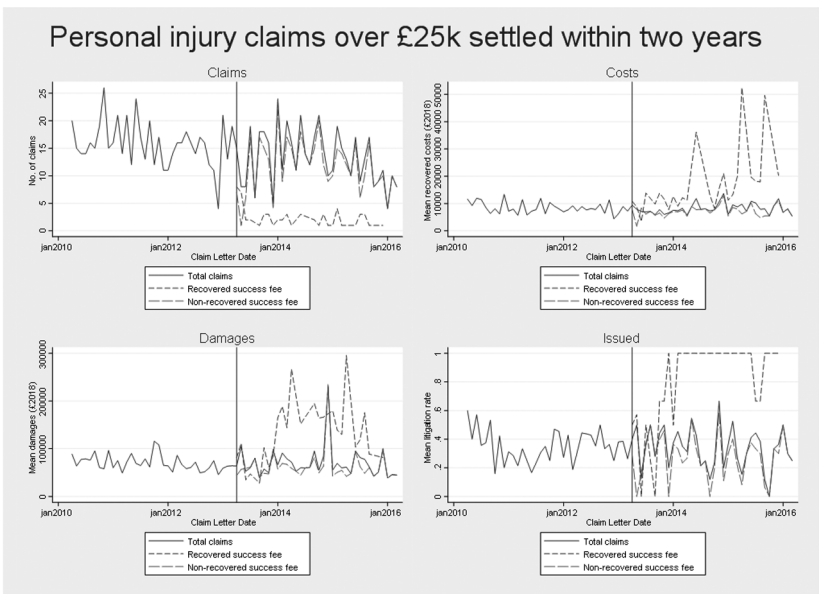
What is needed is some way of comparing claims of similar average complexity, with common prices, but run under different rules. The following charts show one way of visualising mean outcomes over time, using matched cohorts of new claims, where the mean outcomes are shown for all claims made in each month which subsequently settled within two years.[13] Consequently, these means are based on comparable samples of both pre-and post-LASPO claims, and, in the case of agreed damages and recovered costs, are measured in common prices.[14] Any trends revealed over time are therefore free of bias due to differing case lengths or prices. The charts show the total number of monthly claims (top left quadrant), the mean recovered real costs in 2018 prices (top right quadrant), the mean damages awarded in 2018 prices (bottom left quadrant) and the mean proportion of settled claims where proceedings had been issued—the litigation rate (bottom right quadrant). In all charts, the line before the LASPO implementation date shows the experience of total claims irrespective of funding type (old-style CFAs, self-funding, BTE insurance etc). After the LASPO implementation date, this total is also shown, together with separate lines indicating whether or not a success fee was recovered. If so (the short dash line), then the method of funding must have been an old style CFA, agreed before LASPO, but claimed after. If not (the long dash line), then the method of funding was either a new-style CFA, or another form of funding without a success fee.

[12] This dataset has been used to support statistical analysis in a number of previous policy reviews during which it has been cross-checked against claimant sources showing its basic representativeness and reliability.

[13] This truncated time horizon captures over 70% of all settled claims, and yet allows a fair comparison to be made up to April 2016.

[14] For damages, we use the Retail Price Index ("RPI") and measure all agreed damages at 2018 Q1 prices. For costs, we use the Services Producer Price Inflation index ("SPPI") for legal services at *https://www.ons.gov.uk/economy/inflationandpriceindices/timeseries/khw5* [accessed 20 October 2019] and measure all recovered costs at 2018 Q1 prices.





In relation to the total frequency of new claims, it seems clear that, for both clinical negligence and personal injury, there has been a reduction in claiming behaviour since LASPO, confirming trends from other sources such as the CRU. For PI claims over £25k, the switch from recoverable to non-recoverable success fees was immediately apparent in the months after LASPO, indicating that, within a short time after LASPO, the great majority of all CFA-funded claims were of the new type. For clinical negligence, by contrast, the majority of new CFA claims in the first year after LASPO remained those with recoverable success fees. Nevertheless, by the end of the observation window, claims of both types made in 2015/2016

which settled within two years were mostly funded by new-style CFAs or other forms of funding without recoverable success fees. Inspection of the graphs seems to indicate a reduction in real recovered costs, damages and the litigation rate for post-LASPO claims with non-recoverable success fees by comparison with all others. In the following section, we consider these differences more rigorously using appropriate statistical techniques. In particular, we need to ensure that any apparent association between post-LASPO rules and outcomes is not due to the confounding effects of changes to case value or claim strength. For this reason, in the following section we use a multiple regression approach which takes into account possible confounding factors such as case length, early admission of liability, and the stage of settlement.

Regression results

Tables 1 (clinical negligence) and 2 (personal injury over £25k) show the results from a multiple regression approach to estimating the impact of LASPO rules on litigation outcomes. Multiple regression analysis is a statistical method of testing the strength of relationships where several explanatory factors may be combining to influence the outcome variable. That is, it estimates the contribution of each factor to explaining variations in the outcomes, holding all of the other factors constant. So the rows in the tables below indicate the impact each explanatory factor has on the outcomes (costs, damages and the likelihood of proceedings),[15] together with an indicator of the statistical significance of the relationship (the "p-value", which shows the probability that the effect found may have been the result of chance).[16] So, for example, in Table 1 below, the results in the first column headed "Marginal Effects" show that for each £1,000 increase in damages, recovered costs on clinical negligence claims are £137 higher; for each extra day the case lasts, recovered costs increase by £9; for claims where liability was admitted within the protocol period costs were reduced by £1,313; claims which settled after proceedings were issued were on average £8,502 higher than those settled pre-issue; and finally, for claims settled post-LASPO with non-recoverable success fees, recovered costs were £1,420 lower. In each case, the results were statistically significant ($p<0.01$); there is a very small probability that they were due to chance. The other marginal effects can be similarly interpreted, with the second set showing the effects of the explanatory factors on damages (in £), and the final set showing the effects of the explanatory factors on the probability of litigation. Clearly, for the purposes of this paper, the results in the final row are the most important: holding all the other factors constant (at their mean values), we find that clinical negligence claims settled post-LASPO with non-recoverable success fees have lower recovered costs (by £1,420, or just under 10%), lower damages (by £8,411, around 22%) and a lower probability of litigation (by 0.088, or 8.8%).

Table 1: Regression results—clinical negligence claims up to £250k settled within two years

	Costs (£)[17]		**Damages (£)[18]**		**Probability of litigation[19]**	
	Marginal Effects	**p-value**	**Marginal Effects**	**p-value**	**Marginal Effects**	**p-value**
Damages (£000)	£137	0.01			0.0021	0.01
Caselength (days)	£9	0.01	£60	0.01	0.0009	0.01
Early admission	-£1,313	0.01	£3,104	0.01	-0.1840	0.01
Litigated	£8,502	0.01	£14,995	0.01		

[15] The first two regressions are estimated using ordinary least squares ("OLS") methods, whereas the final regression uses a probit model.

[16] As in the charts shown above, we continue to restrict the analysis to claims which settle within a fixed period of time (two years). This removes the possibility of a sample selection problem due to post-LASPO claims being shorter and therefore less costly on average.

[17] Real recovered base costs (2018 Q1 prices).

[18] Agreed damages (2018 Q1 prices).

[19] Probability of litigation (i.e. legal proceedings issued prior to settlement).

	Costs (£)[17]		Damages (£)[18]		Probability of litigation[19]	
	Marginal Effects	**p-value**	**Marginal Effects**	**p-value**	**Marginal Effects**	**p-value**
Post-LASPO non-recoverable	-£1,420	0.01	-£8,411	0.01	-0.0887	0.01
Obs.	8,693		8,881		8,881	

Moving to Table 2, this shows the regression results for personal injury claims over £25k, and can be interpreted in the same way as Table 1. Generally, the explanatory factors show a similar pattern of marginal effects: high value claims are associated with high costs, as are lengthier claims. Early admission leads as expected to reduced costs and damages, as well as reducing the likelihood of proceedings, and those claims that are litigated tend to be costlier. Once these factors are held constant at their mean values, the results in the final row again confirm our main findings: personal injury claims over £25k settled post-LASPO with non-recoverable success fees have lower recovered costs (by £688, or just under 8%), lower damages (by £12,889, around 17%) and a lower probability of litigation (by 0.088, or 8.8%).

Table 2: Regression results—personal injury claims over £25k settled within two years

	Costs (£)		Damages (£)		Probability of litigation	
Marginal Effects	**p-value**	**Marginal Effects**	**p-value**	**Marginal Effects**	**p-value**	
Damages (£000)	£37	0.01			0.00002	n.s.
Caselength (days)	£8	0.01	£3	n.s.	0.0004	0.01
Early admission	-£1,255	0.01	-£12,106	0.05	-0.0970	0.01
Litigated	£3,687	0.01	£735	n.s.		
Post-LASPO non-recoverable	-£688	0.1	-£12,889	0.05	-0.0878	0.01
Obs.	1,034		1,034		1,034	

In summary, having allowed for possible confounding effects due to changes in case value, duration, complexity and stage of settlement, we find statistically significant changes in litigation outcomes associated with the introduction of LASPO rule changes. For both types of claim where data were available, our results show significant reductions in recovered base costs (adjusted for inflation), agreed damages (adjusted for inflation),[20] and the probability of proceedings (i.e. the proportion of claims settled post-issue). The following table (Table 3) summarises these results. They do show a clear pattern that is similar across each type of claim, despite some fundamental differences in the types of issue involved in settling these claims, and the sources from which the data originated. This consistency in the regression results across claim types, as well as the visual evidence from the charts presented above, indicates a good degree of confidence in our estimates of the impact of LASPO.

[17] Real recovered base costs (2018 Q1 prices).
[18] Agreed damages (2018 Q1 prices).
[19] Probability of litigation (i.e. legal proceedings issued prior to settlement).
[20] Note that these reductions have occurred in spite of the 10% uplift in general damages implemented by Court of Appeal guidance in the case of *Simmons v Castle* [2012] EWCA Civ 1288; [2013] 1 W.L.R. 1239. In addition, for cases concluded after 20 March 2017, the reduction of the discount rate underpinning future loss multipliers from +2.5% to -0.75% would have had a significant upward impact on damages on claims with a future loss award.

Table 3: Regression results—summary

Percentage reductions due to LASPO			
	Costs	*Damages*	*Probability of Litigation*
Clinical negligence <£250k	10%	22%	8.8%
Personal Injury ><25k	8%	17%	8.8%

Discussion

In the light of the findings reported above, we can speculate on what may have been the drivers behind the impacts shown in the data. Given that our statistical approach focussed on those types of claim unaffected by fixed costs, the relevant LASPO rule changes informing our search for explanations are:

- Removal of recoverability of success fees.
- Removal of recoverability of (some) ATE premiums.
- QOCS.
- Proportionality.
- Budgeting.

LASPO also removed legal aid for clinical negligence except for a tiny number of the most serious child brain injury claims. The relative similarity between the results from the Acumension clinical negligence dataset and the Taylor Rose personal injury dataset would suggest that the changes to legal aid were not a significant factor behind the findings we have reported above.

Non-recoverability of success fees

The success fee under a CFA is intended to compensate for the risk of the claimant's solicitor losing the case and being paid nothing. It must be expressed as an uplift on the base costs with a maximum of 100% (i.e. double the fees). Under the pre-LASPO rules and caselaw, recoverable success fees were usually much lower than 100%, unless the case was very risky or went to trial. Success fees for many common categories of claim were fixed by court rules. For example, success fees for road traffic claims under old CPR 45.15 (now repealed) were 12.5% (or 100% if the case went to trial). There was a discretion for the court on costs assessment to allow a higher (or lower) success fee for claims where the damages exceeded £500,000 (old CPR 45.15(6), now repealed), but the success fee was rarely significantly increased[21]). Where the success fee was not fixed (e.g. for clinical negligence) the losing opponent could argue for reduction on the percentage claimed on costs assessment. However, unless a solicitor voluntarily included this (and there is no evidence this was done by solicitors between 1999 and 2013) there was no cap on the amount of the success fee which related to the level of damages. The success fee was also not subject to a proportionality test on assessment (under the old Costs Practice Direction para.11.9, now repealed).

Under the Jackson reforms implemented by LASPO the success fee is no longer recoverable from the opponent. In addition, there is an additional statutory cap on the amount of the success fee that can be taken from the client's damages. Except for appeals, this is 25% of sums recovered for general damages for pain, suffering and loss of amenity and past financial loss. In those lower value damages cases where base costs are high in proportion, it is unlikely that the full success fee set out in the CFA will be recoverable from the client because of the cap:

[21] *NJL v PTE* [2018] EWHC 3570 (QB); [2018] 6 Costs L.R. 1389.

General Damages	Past Loss	Future Loss	Total Damages	Base Costs	Contractual Success fee	Capped Success Fee
A	B	C	D	E	F	G
£1,500	£500	£0	£2,000	£3,000	£1,500 (50% 'E')	£500 (25% A+B)

Similarly because future losses are excluded from the calculation of the cap, success fees will be restricted to below what would have been charged pre-LASPO even in higher value damages claims:

General Damages	Past Loss	Future Loss	Total Damages	Base Costs	Contractual Success fee	Capped Success Fee
A	B	C	D	E	F	G
£80,000	£100,000	£2,000,000	£2,180,000	£200,000	£100,000 (50% 'E')	£45,000 (25% A+B)
(50% 'E')	(25% A+B)					

On the other hand, there is evidence that some solicitors abandoned the pre-LASPO fixed success fee percentages and risk-based calculation of success fees and claimed a 100% uplift on base costs in every case, subject to the statutory 25% cap on damages. This methodology was deprecated (absent a clear explanation to and informed consent from the consumer) and overturned by the Court of Appeal in *Herbert v HH Law*[22] where a 15% success fee was substituted for 100% in a low value road traffic claim, but many such cases will undoubtedly be in the Taylor Rose dataset. However, it is believed that elsewhere (e.g. Trade Union and other similar referral arrangements) solicitors are contractually obliged to charge a 0% success fee and generally bear losses themselves in exchange for a guaranteed volume of work. Also, especially for higher value claims, beauty parades should operate as a factor to push down success fees sought. All these cases are also likely to be in the Taylor Rose dataset. It is not known what the average effective rate of success fees charged to clients out of their compensation has been as there has been no published research on this post-LASPO.

If the effect of the abolition of recoverability combined with the 25% damages cap has been to reduce actual or anticipated success fees, one hypothesis might be that the reduced reward for risk is an economic incentive for solicitors to advise acceptance of lower, earlier offers, which behaviour would result in the outcomes shown by the data, namely shorter case lengths, lower likelihood of proceedings, lower costs and lower damages. The longer the claim goes on the solicitor will still be required to increase inputs which are likely to achieve higher base costs, so there is still an economic incentive for the solicitor to push on, but it is a reduced incentive as there may be no or only a limited success fee uplift. It may be that these incentives need to be reviewed if they are inadequate to enable recovered damages to return to pre-LASPO levels.

Non-recoverability of ATE premiums

Recoverability of ATE premiums was also removed, except to a limited degree for clinical negligence cases where recoverability of the part of the premium for liability experts' reports was retained. Removing ATE recoverability could have made the claimant more risk averse (thereby affecting behaviour in the case—for example, possibly making claimants more inclined to accept lower settlements) but QOCS (see below) may have neutralised that somewhat insofar as it reduced the need for ATE insurance.

[22] *Herbert v HH Law* [2019] EWCA Civ 527; [2019] 1 W.L.R. 4253.

Qualified one-way cost shifting

Qualified One-way Cost Shifting ("QOCS") was introduced for personal injury cases, including clinical negligence. QOCS modifies the "English rule" of cost shifting so that while the claimant will be paid their base costs (but not any success fee) by their opponent if they win, the claimant will not, except in exceptional circumstances, have to pay their opponent's costs if they lose. Pre-LASPO, winning defendants, after issue of court proceedings, could recover their costs from the claimant who would usually have taken out ATE insurance against this risk. It is not, however, known how often such costs were recovered—most personal injury cases succeed and only a small number actually go to trial. It might be thought that the economic incentive for a defendant would be to settle more cases early as the costs of defending the case will not be recovered and this could, therefore, drive defendants to settle cases at their early stages and lead to lower costs. It is less obvious how this might affect settlement damages, however: whilst disposal at an early stage might lower these, defendants weakened by cost pressure might be inclined to offer higher (not lower) settlements in order to encourage a conclusion. Of course, reputational considerations might counter this. Overall, however, it seems that QOCS could, but need not, have influenced our findings and we believe that more research is required here, specifically on the extent to which the offer/acceptance behaviour of the parties is affected by changes to cost rules. This would also require data on the level and frequency of Pt 36 offers pre-settlement.

Proportionality

A new, stricter definition of "proportionality" is to be applied on the assessment of the claimant's base costs by the court.[23] These costs can now be reduced if disproportionate, even if reasonably and necessarily incurred (CPR 44.3(2)(a)). One effect of the change is to increase uncertainty for claimants and their solicitors as to what proportion of the base costs will be recovered.[24] That risk obviously increases as the amount of base costs increases. A fear that the required additional inputs to reject an offer and push on with the claim may fail the new test of proportionality may be an economic disincentive to do so for the claimant (if solicitor and own client costs are to be charged) or for the claimant's solicitor (if they are not).

Budgeting

One of several Jackson reforms implemented by LASPO introduced a new process of advance costs management or "budgeting" where the court at the first costs and case management conference ("CCMC") after issue of court proceedings sets a budget which, unless varied or there is "good reason" to depart from it, limits the amount of future costs that can be recovered from the losing party. Costs incurred prior to the CCMC, which for claimants amount to about 32% of the total budget[25] remain subject to retrospective costs assessment only. It is possible that if the claimant solicitor believes that additional inputs will be required to beat an offer and these are higher than the budget allows for, then this may be an economic disincentive to reject an offer and push on with the claim for the claimant (if solicitor and own client costs are to be charged) or for the claimant's solicitor (if they are not). Although budgeting only applies to cases which have been issued, fear of what might happen at the CCMC (e.g. that sufficient costs may not be allowed to properly pursue the claim) could drive earlier behaviours in the directions of our results.

[23] Including the costs of substantive claims settled pre-issue where, if costs cannot be agreed, the court can assess pre-issue costs via costs-only proceedings under CPR Pt 8.

[24] See, e.g. *Barts Health NHS Trust v Salmon* [2019] 1 WLUK 529, HH Judge Dight (with Master Brown sitting as assessor) at Central London CC, where the reduction of budgeted costs from £52,133 to £40,000 on assessment on the grounds of proportionality was upheld on appeal in the context of a low value clinical negligence claim.

[25] Jackson Supplemental Report 2017 Ch.6 para.3.2.

Context

The research strategy underlying our results has been to identify a subset of claims that clearly operated under pre-LASPO and post-LASPO regulations and see if these different samples can be linked to different claim outcomes. We have then noted (above) that some of the changes in LASPO could be consistent with the observed reduction in costs, damages and issue of proceedings that we found, with more research being required to help understand these findings. It is important, however, also to bear in mind that other developments have also been taking place in the realm of personal injury claims and that, while these may not have generated our results (given their timing), they may provide important context for understanding the effects of LASPO. As such, we briefly consider several developments:

- Guideline Hourly Rates.
- Court Fee increases.
- Financial pressures on law firms.
- Deskilling.

There has been no increase in Guideline Hourly Rates ("GHRs") since 2010. GHRs are guidelines for summary assessment of costs but which are widely applied, at least as a starting point, in detailed assessment of costs. A working group of the Civil Justice Council recommended changes but their recommendations were not accepted by the then Master of the Rolls in July 2014 and there has been no further review since then. Although many solicitors are, on a solicitor and client basis, increasingly ignoring the out of date GHRs and applying higher rates in their CFAs, they will face the inevitable challenge on costs assessment that the court should apply the GHRs. This may be an economic disincentive to reject an offer and push on with the claim for the claimant (if solicitor and own client costs are to be charged) or for the claimant's solicitor (if they are not).

Solicitors acting under CFAs generally fund disbursements on behalf of the claimant. On 9 March 2015, court fees increased very significantly. For example, the issue fee for claims over £200,000 increased from £1,115 to £10,000 (there is some provision for remission on the client's financial circumstances). The increased court fees are a disincentive to issue court proceedings and might be a factor in acceptance of offers. Defendant behaviour especially following the decrease in the discount rate and increase in damages and the anticipated legalisation to change this (now implemented in July 2019) may also be a factor. There is evidence of cashflow pressures in the claimant solicitor sector.[26] The number of law firm failures in the sector appears to have led to a reduction in the availability of bank lending. Claimant law firms are paid nothing until the case concludes, so increased case lengths and disbursements, combined with possible reduction in availability of funding, are inevitably going to increase economic pressure on law firms.

Finally, given the high proportion of personal injury cases that are low value[27] and the widespread implementation of flat fixed fees, with a heavy involvement of unqualified paralegals, it is possible that there has been a degree of deskilling with a "portal mentality" spreading to cases of a higher value. There is some evidence of this "portfolio approach" from the US. Thus, Kritzer[28] documents contingency fee lawyers taking on a portfolio of claims and trying to settle them quickly to produce a stream of small but reliable fees. Further, Engstrom[29] documents how high volume auto claims in the US are sometimes dealt with in a fashion that resembles "no fault" compensation, with law firms, defendants and claimants agreeing low settlements in return for the speed and predictability of the outcome. Engstrom refers to this behaviour "on the ground" as "settlement mills".[30]

[26] See, e.g. R. Rothwell, "Counting the Cash: Running a Personal Injury Practice in Treacherous Times" [February 2019] *Solicitors Journal*.
[27] Of 43,182 personal injury claims settled since April 2013 in the Taylor Rose dataset, 75% were settled for less than £10,000.
[28] H. Kritzer, *Risks, Reputations and Rewards: Contingency Fee Legal Practice in the United States* (Stanford University Press, 2004).
[29] N. F. Engstrom, "Sunlight and settlement mills" (2011) 86(4) *New York University Law Review* 805–887.
[30] A simple Google search reveals this to be a well-recognised concept in the US.

Conclusion

It is possible that a combination of some or all of the LASPO reforms and/or other factors discussed above have contributed the observed reduction on recovered damages. The reduction might be a result of:

- **Claimant behaviour:**

  The impact of delay and of success fees and other deductions coming out of damages which may increase as the case goes on which may make claimants more averse to pursuing claims beyond an early offer.

- **Claimant solicitor behaviour:**

  The balance of incentives and risk may deter solicitors from recommending that claimants reject offers and push on to trial or to achieve a better offer.

- **Defendant/insurer behaviour:**

  Insurers may be adapting to QOCS by making earlier low Pt 36 offers which, combined with the changed incentives, may be more attractive to claimants and/or their lawyers than pushing on for a better offer or to trial.

The reforms generally had the intention of reducing costs so the evidence that they have succeeded in doing so is not a surprise. However, it was not intended that claimant's recoverable damages should be reduced. Where a success fee is charged the recovered damages will be subject to further reductions to pay the success fee (subject to the 25% statutory cap), unrecovered solicitor and client costs and the cost of any ATE premium. These further deductions may lead to the damages received by the claimant being perhaps as low as 60% of the damages received pre-LASPO (damages recovered from the opponent reduced by 20% as per these findings, further reduced by say 25% by solicitor and client deductions including capped success fee). This potentially affects the propensity to claim by injured parties thus reducing the accountability of tortfeasors for their actions. It is also a very significant reduction of the amount of compensatory damages for injured people which might undermine confidence in the justice system as being able to deliver fair compensation for personal injury. It may also lead to increased reliance on state support if the amount actually received from the tortfeasor is inadequate to meet needs.

The MoJ's response to the LASPO consultation drew a somewhat more sanguine conclusion from some of the results presented in this paper. In particular, in relation to our finding of reduced damages, they state that:

> "the reasons for this are not immediately obvious and it should be noted that there are some limitations with the analysis that was feasible, meaning it is not possible to generalise the findings fully. Various potential explanations can be theorised (such as changes in solicitor behaviour) but are not supported or contradicted by quantitative evidence."

We too have some reservations about our statistical findings but, at the very least, they reinforce our view that more research is essential in order to understand the behavioural effects of recent and developing policy in this area, including LASPO. Thus, it is also important to understand the new incentives and disincentives created by any change to the costs regime. This is so that the impact of past reform can be understood and reviewed if necessary, but also to inform future policy development (e.g. the widespread extension of fixed costs and the possible liberalisation of Damages Based Agreements[31]).

More work is required to further understand the relevance of the various factors discussed above to the observed changes. In particular, analysis of claimant data is important to understand what fees are being

[31] Under the Courts and Legal Services Act 1990 s.58AA (as amended by LASPO).

charged to the client and to try to understand any behavioural changes of solicitors or their clients. It is often harder to obtain claimant solicitor data because there is no central entity collecting the data independently. However, it is to be hoped that individual law firms or professional bodies representing claimants or their solicitors may be able to assist in developing this research to help enable evidence-based policy to be developed, and evaluated.

Case and Comment: Liability

Chisholm v D&R Hankins (Manea) Ltd

(High Court of Justice (QBD); Jeremy Johnson QC, Sitting as a Deputy Judge of the High Court; 10 December 2018; [2018] EWHC 3407 (QB))

Contributory negligence—employers liability—electricity at work—Enterprise Act—risk assessment—inadvertence

LT Accidents at work; Contributory negligence; Electrical safety; Electricity lines; Employers' liability; Risk assessment; Wires and cables

On 11 February 2016, the claimant was cleaning out the trailer of his tipper truck in Block Fen Drove, Cambridgeshire. Electrical current was transferred from overhead power lines ("OHPLs") to the trailer, which had been tipped to allow the previous load to run out, causing him to suffer an electric shock. As a consequence, he suffered serious injuries including a below knee surgical amputation of his right leg, extensive burning to a large proportion of his body resulting in severe scarring, a spinal process fracture to L2 and psychological injury. Damages were sought in excess of £4 million.

The trial that took place was in relation to liability and contributory negligence which was heard as a preliminary issue. The claimant was an experienced tipper driver and had worked for the defendant for approximately 13 years. His usual work involved collections of aggregates from the Bardon Aggregates quarry on Block Fen Drove. He would carry out a number of runs in any one day without returning to the depot. If the load differed then he was required to clean out the trailer to avoid contamination. This would typically be done in a layby or other convenient place.

On the day of the accident, the claimant was unable to use his usual spot on Block Fen Drove for cleaning out his trailer due to roadworks. He had observed that the OHPLs crossed to the left side of the road just before the layby he chose on the right. It would not have been visible from his cab that the OHPLs in fact ran above where he stopped. He started to raise the trailer whilst in the cab and was focused on releasing the tailgate on the trailer. He returned to the cab to put the lever for the tipper mechanism in neutral. Once he left the cab he received the electric shock.[1] The moment was witnessed by a colleague Mr Fox:

> "80 Seconds before the accident, Mr Fox, who was a colleague of Mr Chisholm, drove past Mr Chisholm's parked lorry. He first saw it from a distance of a quarter to half a mile away. He could see that the trailer was raised, or was being raised. As he got closer he could see that the tailgate was open and Mr Fox concluded that Mr Chisholm was cleaning out the trailer before going to the quarry. He says that it was common to come across lorry drivers cleaning out their trailers near to the quarries. He does not express any surprise at seeing the trailer raised. This adds further support for the conclusion that, in practice, drivers did often clean their trailers by tipping and were aware that each other did so.
>
> 81 As Mr Fox passed he saw Mr Chisholm in the cab operating the PTO. He could see that the trailer was touching, or was very close to, the power lines. He sounded his horn to warn Mr

[1] In his words he was "zapped".

Chisholm. Aware of the danger of an electric arc, he sped up to get away from the immediate vicinity. Seconds later he saw Mr Chisholm, in his wing mirror, go up in flames.

82 Mr Fox says:

> 'If Mr Chishom had looked up he may have seen the power line but it is unlikely that he would have realised how close it was to his lorry as it was closest to the opposite side of the trailer to where Mr Chisholm was standing and to him the overhead lines would have appeared to be at least a trailer's length away.
>
> …
>
> I didn't actually realise the power lines cross the road at the point where Gary's accident occurred as they remain on the same side of the road prior to the accident spot and the angle of overhead power lines is deceiving to the eye.'"

The control for the tipper trailer on his vehicle was unusual[2] in that it permitted the driver to put the control in a detent and for the trailer to continue to rise without positive pressure being applied by the user.

OHPLs were a known risk, that should be checked for before tipping. The danger from OHPLs, and the precautions that must be taken before working in the vicinity of OHPLs, is explained in detail and in clear and straightforward terms in three documents published by the HSE:

- A guide to workplace transport safety;
- Guidance Note GS6 "Avoiding danger from overhead power lines"; and
- Agriculture Information Sheet No.8.

It was accepted from that guidance that there was a risk of electricity arcing from OHPLs to a trailer was it came within close proximity of the power line. The GS6 guidance note required a risk assessment to be carried out if work near OHPLs could not be avoided and that a horizontal exclusion zone of 10m should be established. GS6 also referred to a publication of the Energy Networks' Association on behalf of electricity companies entitled "LOOK OUT—LOOK UP! A Guide to the Safe Use of Mechanical Plant in the Vicinity of Electricity Overhead Lines". This was said to be written in very clear and straightforward terms:

"The body of the document runs to just 5 pages, including large diagrams. It says:

'2 **Exclusion Zones**

- … any contact can result in serious or fatal injuries.
- Electricity at high voltages can also jump gaps with no warning whatsoever, so it is also dangerous to let your plant approach too close to a line.
- The distance that electricity can jump depends on the voltage of the line. The higher the voltage, the further you must stay away from the line … This distance is called the EXCLUSION ZONE …'

The guidance then sets out diagrams showing the exclusion zones for different lines, the zone for 11kV lines being 3 metres. It then says: (Emphasis in original)

> 'Please note that these are absolute minimum distances that should under no circumstances be infringed. *If you do—it could prove fatal*.'"

[2] Other cabs had a standard control that required continued pressure from the user.

The risk assessment completed by the defendant identified a risk of contact with overhead cables from unsafe tipping, with a control measure of briefing drivers on the tipping code of practice with annual retraining.

On the facts, there was a difference established from the pleaded system of work in respect of cleaning, which made tipping the trailer a potential disciplinary offence, and that adopted in practice by workers. The latter saw the trailer being tipped to let remnant of the previous load fall out and then the trailer would be swept out. The evidence was that the drivers were aware of the need to be aware of OHPLs before tipping and that tipping was a regular occurrence on Block Fen Drove.

The evidence heard in respect of training led the judge to the conclusion that the claimant was not prohibited from tipping his trailer for the purpose of cleaning,[3] he was not instructed as to the minimum exclusion zone from OHPLs and that an electric shock could be caused without actual contact. In addition, whilst he was instructed that he should check for obstructions before tipping, he was not given any instruction as to how he should do that.

The defendant had told the HSE that there had been no previous incidents of this nature that had been reportable under RIDDOR.[4] However, there had been two that should have been reported and one that was very similar to the claimant's accident.

Primary liability

The claimant argued that the control mechanism for the tipping of the trailer was not reasonably safe as it operated whilst in the detent, which was contrary to HSE guidance[5] and the Supply of Machinery (Safety) Regulations 2008.[6] Schedule 2 Ch.3:

> "3.3.1 **Control devices**
>
> The driver must be able to actuate all control devices required to operate the machinery from the driving position, except for functions which can be safely actuated only by using control devices located elsewhere. These functions include, in particular, those for which operators other than the driver are responsible or for which the driver has to leave the driving position in order to control them safely.
>
> …
>
> Where their operation can lead to hazards, notably dangerous movements, the control devices, except for those with preset positions, must return to the neutral position as soon as they are released by the operator."

It was accepted by the court that it was a control device that could lead to dangerous movements.

It was accepted that a reasonably prudent employer would carry out an adequate risk assessment in connection with its operations.[7] There was no specific risk assessment in relation to the cleaning of the vehicles on the highway when it was foreseeable that the drivers would tip their trailers. This was a breach of duty, as was the failure to carry out a sufficient assessment:

> "In order to undertake a reliable risk assessment Hankins was obliged to 'seek out knowledge of risks which are not themselves obvious'. That is so as a matter of general common law obligation.

[3] *Chisholm v D&R Hankins (Manea) Ltd* [2018] EWHC 3407 (QB) at [63].
[4] Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 (SI 2013/1471).
[5] *Guide to Workplace Transport Safety* para.168:
"Drivers should:
…
• Not leave the control position when raising or lowering the body and not apply straps to hold the controls in position."
[6] Supply of Machinery (Safety) Regulations 2008 (SI 2008/1597).
[7] *Kennedy v Cordia (Services) LLP* [2016] UKSC 6; [2016] 1 W.L.R. 597 applied.

> It ought, at the very least, to have consulted readily available guidance, particularly the guide to workplace transport safety and the section in that guidance on 'tipping'. That section identifies the risks not just of contact with OHPLs, but of coming into close proximity with OHPLs. It cross-refers to the other specific guidance in relation to OHPLs …"

The general risk assessment in relation to tipping only referred to the risk of contact not proximity to OHPLs and made no reference to the clear HSE guidance available. There was no good reason for not doing so.

The employer was also found not to have provided a safe system of work in the sense that the requirement not to tip the trailers when cleaning should have been enforced. That was not done and the alternative of not requiring a 10m exclusion zone from OHPLs was not done either.

The claimant relied upon Electricity at Work Regulations 1989 reg.4(3).[8] That states:

> "Every work activity, including operation, use and maintenance of a system and work near a system, shall be carried out in such a manner as not to give rise, so far as is reasonably practicable, to danger."

Whilst it was accepted that this did not give rise to a right of action in damages[9] it was said that the obligations in the Regulations were entirely consistent with the statutory obligations and if the Defendant had given thought to those it would have complied with its common law duty of care.

Causation

This hinged on the requirement to risk assess, as the claimant would have tipped the trailer even if the detent had not been available on the control. This was correctly made out as if a sufficient risk assessment had been carried out then a control measure would have been introduced to prevent tipping of trailers in this situation, or to limit it. If a sufficient assessment had been carried out it would also have identified the risk from OHPLs which would have led to a control measure based upon the need to establish an exclusion zone where tipping could not take place in proximity to OHPLs.

The breaches in relation to risk assessment were a material cause of the accident.

Contributory negligence

Reliance on cases where similar accidents had occurred[10] was not preferable to applying the well-established principles.[11]

The claimant's failure to check the area was free from obstructions before tipping was both a failure to take reasonable care for his own safety and an immediate and substantial cause of the accident. The defendant's breaches were numerous but less immediate. It was therefore not possible to identify a difference in their causative potency.

The employer was significantly more blameworthy than the claimant. Workers will suffer from momentary lapses and it is for that reason that employers must risk assess and enforce systems of work. The employer had clear guidance from the HSE which was easy to implement. They did not do so over a period of years. This was an ongoing failure.

The argument that post Enterprise Act the failures were from common law breaches not statutory breaches was mistaken:

[8] Electricity at Work Regulations 1989 (SI 1989/635).
[9] Enterprise and Regulatory Reform Act 2013 s.69.
[10] *Milroy v British Telecommunications Plc* [2015] EWHC 532 (QB) considered.
[11] *Jackson v Murray* [2015] UKSC 5; [2015] 2 All E.R. 805 followed.

> "As it happens Hankins were also in breach of statutory duties, it is just that those breaches do not directly give rise to a liability in damages. More importantly, however, the duties that were here breached were duties which were designed to prevent the very thing that occurred, namely momentary inattention on the part of a normally hard working and attentive employee."

Contributory negligence was assessed at 25%.

Comment

The Enterprise and Regulatory Reform Act 2013 ("the Act") heralded a change in approach to how employers liability cases were pursued and defended. The changes made to the Health and Safety at Work Act 1974 were intended to require a claimant in a personal injury case to prove that the duty holder had been negligent.[12] Surrounding that very clear steer from the Government of the time were concerns about the status of the health and safety regulations going forward and the effect of the removal of a statutory breach on contributory negligence.

Since the introduction of the Act there has been a significant drop in the number of cases brought against employers for personal injury which is just now beginning to rebound:[13]

Year	Employer
2018/19	89,461
2017/18	69,230
2016/17	73,355
2015/16	86,495
2014/15	103,401
2013/14	105,291
2012/13	91,115
2011/12	87,350
2010/11	81,470

It is possible that the uncertainties surrounding the changes have meant that claimant representatives have been more cautious in taking on such cases. We are now though beginning to see several cases reaching trial where a judge has to deal with the effect of the Act. This judgment is one of those and it

[12] On 24 April 2013, Viscount Younger said in the House of Lords on behalf of the Government:
"The codified framework of requirements, responsibilities and duties placed on employers to protect their employees from harm are unchanged, and will remain relevant as evidence of the standards expected of employers in future civil claims for negligence."
In the same debate, Lord Faulks QC, said:
"A breach of regulation will be regarded as strong prima facie evidence of negligence. Judges will need some persuasion that the departure from a specific and well-targeted regulation does not give rise to a claim in negligence."

[13] See *https://www.gov.uk/government/publications/compensation-recovery-unit-performance-data/compensation-recovery-unit-performance-data* [accessed 20 October 2019].

confirms that the regulations do matter and are directly relevant to how an employer is held to account in the tort of negligence for the safety of their employee.

The confirmation that the regulations do matter is unsurprising.

Regulations matter

The decision of the trial judge was that the question of whether an employer has complied with their common law duties owed to their employee to keep them safe whilst at work rests upon the duties imposed upon them in the regulations. In particular, that where there is a regulation that is relevant to the issue of foreseeability of harm and to the standard that the employer must reach in complying with their duty of care. That is clearly the case and it would be an odd position if an employer in breach of the criminal law in failing to comply with the requirements of the regulations could at the same time claim that they were not in breach of duty in negligence.

The approach taken in this case mirrors the approach taken in *Dehenes v T Bourne & Son*,[14] which is well worth reading if you defend or pursue personal injury cases based upon an employer's duties.

Contributory negligence

At the time the Act was passing through Parliament, the effect on arguments of contributory negligence was also something that caused many practitioners concern. Prior to the Act such issues, where properly argued before the courts took in to account the importance of a statutory duty in balancing relative blameworthiness and causative potency.[15] The concern was that if reliance upon the statutory duty directly was not possible that such an argument would either be difficult or at least problematic.

The approach of the judge here is correct. It is the fact of the breach of the statutory duty that is relevant to the question of contributory negligence not whether the case is pursued as a direct statutory duty case as opposed to a case in negligence relying on the statutory duty as relevant factors in the court deciding the intertwined issues of duty of care and breach of duty. That sits properly standing back from the issue of contributory negligence which rests on the judge's assessment on the culpability of the behaviour of a party or failures in the circumstances of the case.

Viewed from that perspective it is unsurprising that the judges conclusion on contributory negligence relied heavily on the purpose of the regulations (to protect employees from moments of inadvertence) and the fact that those regulations are intended to put an employer in a position where they have many more opportunities to keep the employee safe than the employee. That is the thrust of the regulations and the system put in place to keep employees safe from harm at work under the Health and Safety at Work Act 1974 and the associated regulations.

Risk Assessment

Since *Kennedy v Cordia Services LLP*[16] it has been well established that an employer must in complying with their common law duties to keep an employee safe carry out a sufficient assessment of risk and implement control measures in furtherance of that duty. The judge here correctly applies that approach to the facts. Key to establishing the failure on the risk assessment duty was the availability of clear Health and Safety Executive ("HSE") and other guidance that both established the risks that the employer should have been aware of in relation to overhead power lines and the control measure of establishing an exclusion zone around them that would have probably prevented the incident.

[14] *Dehenes v T Bourne & Son* 2019 S.L.T. (Sh Ct) 219.

[15] See, e.g. the judgment of Lord Hoffmann in *Reeves v Metropolitan Police Commissioner* [2000] 1 A.C. 360 at 371; [1999] 3 W.L.R. 363 approving of the judgment of Lord Tucker in *Staveley Iron & Chemical Co Ltd v Jones* [1956] A.C. 627; [1956] 2 W.L.R. 479.

[16] *Kennedy v Cordia Services LLP* [2016] UKSC 6; [2016] 1 W.L.R. 597.

Practice points

- Post Enterprise Act regulations do matter. Employers must comply with them or be in breach of criminal law. It would be an odd result if the requirements of them did not form part of the consideration of their duties at common law. Practitioners should not be deterred from relying upon allegations founded in the employer's duties under those regulations.
- An employer's duty towards their employee as a matter of common law requires a consideration of those duties and that has an impact, too, on the consideration of contributory negligence.
- Post Enterprise Act cases against employers should rely on the employer's duty to assess risk. To succeed though, the breach if established in relation to risk assessment must also be causative[17] and practitioners, whether defending or pursuing, should address that in any case.
- Practitioners would be well advised to access for, and if appropriate rely upon any HSE guidance available. This is freely available from the HSE website and there is a wealth of general, sector and activity specific guidance available. This will assist in arguments as to foreseeability of harm (the risk that the assessment should have identified) and what steps the employer should have taken that could have prevented the harm eventuating (the control measure in a risk assessment).

Brett Dixon

Al-Najar v Cumberland Hotel (London) Ltd

(High Court of Justice (QBD); Dingemans J; 21 June 2019; [2019] EWHC 1593 (QB))

Assumption of responsibility—hotels—assault—negligence—duty of care

Assumption of responsibility; Causation; Contributory negligence; Duty of care; Foreseeability; Hotels; Intervening events; Third parties

The claimants[1] in this action were visiting the UK from the United Arab Emirates and were staying at the Cumberland Hotel near Marble Arch in London at the end of April 2014. They were asleep[2] in rooms 7007 and 7008, which had an interconnecting door. At 1.13am on Sunday 6 April 2014, Philip Spence entered the hotel and passed a security guard on his way to the lift. He exited the lift on the fifth floor and then climbed the stairs to the seventh floor.

On the seventh floor he saw the door to room 7008 was open, with the deadlock used to prevent it closing and locking. This had been done to facilitate the return of a hairdryer by another family member without waking the children. In the room Ohoud, Khaloud, Fatima and Khaloud's three children aged 12, 10 and 7 years were asleep. Whilst Spence was stealing money and items he was disturbed by Khaloud.

Khaloud, Fatima and Ohoud all suffered very serious injuries when Spence attacked them hitting them on their heads with a hammer. Ohoud suffered catastrophic brain damage as a consequence. Spence

[17] See *Uren v Corporate Leisure* [2011] EWCA Civ 66 at [39]:
"Such a failure can only give rise to liability if a suitable and sufficient assessment would probably have resulted in a precaution being taken which would probably have avoided the injury."

[1] Ohoud Al-Najar ("Ohoud"), Khaloud Al-Najar ("Khaloud") and Fatima Al-Najar ("Fatima").

[2] Three children belonging to Khaloud were in the rooms as well.

abandoned the hammer and left the hotel. Thomas Efremi, who had supplied the hammer, then used the credit cards stolen to withdraw £5,000 in cash. Spence and Efremi were convicted of conspiracy to commit aggravated burglary and Spence was convicted of three counts of attempted murder.

The claimant's case was that the hotel had:

> "breached a duty 'to take such care as in all the circumstances of the case was reasonable to see that their person and property were kept reasonably safe, whilst they were staying at the hotel', and that breach created the circumstances in which Mr Spence could attack them and cause the injuries which they had suffered."

The hotel admitted that a duty was owed to its guests but argued that did not extend to protecting them from criminal acts such as been committed. They denied that the actions of Spence were reasonably foreseeable and that they had acted in breach of duty or that the injuries were caused by any breach.

The court had to determine the following issues:

- whether the duty owed by the Cumberland hotel extended to a duty to take reasonable steps to prevent the attack by Mr Spence; and if there was any such duty;
- whether the attack by Mr Spence was a new intervening act which broke any chain of causation;
- whether the attack by Mr Spence was reasonably foreseeable;
- whether the hotel acted in breach of any duty owed to Ohoud, Khaloud and Fatima by failing to act as a reasonable, prudent and competent operator of a London hotel of this standard;
- whether any breach of duty on the part of the Cumberland hotel caused the injuries suffered by Ohoud, Khaloud and Fatima; and
- whether there was any contributory negligence on the part of Ohoud.

Did the duty extend to taking reasonable steps to prevent an attack of this nature?

The question was whether the duty was limited to not causing harm to the claimants or whether it extended to a duty to protect against the criminal acts of third parties. The law in relation to such duties had been comprehensively reviewed by the Supreme Court in *Robinson v Chief Constable of West Yorkshire*.[3] Lord Reed had explained that *Anns v Merton LBC*[4] had caused some difficulties by adopting an approach of laying down one test to be applied in all circumstances to identify if a duty of care was owed. There had also been some misunderstanding of the effect of the judgment in *Caparo Industries v Dickman*.[5] The approach explained by Lord Reed was that ordinary principles should be followed and following *Caparo* in novel situations the law should be developed incrementally and by analogy with established authorities.

Lord Reed had also confirmed that liability is not ordinarily imposed for pure omissions, save in four identified situations. One of those was where "A has assumed a responsibility to protect B from that danger" and it was confirmed that absent those situations private bodies and public authorities will not generally owe a duty of care to prevent the occurrence of harm.[6] Historically, the law imposed stricter duties for the protection of the goods of a guest than for the guests themselves. In *Calye's Case*,[7] at 33b it was said that "if the guest be beaten in the inn, the innkeeper shall not answer for it". By 1917, that had evolved to include in the context of a fire a duty "to take reasonable care to prevent damage to the guest from unusual danger which the occupier knows or ought to know of".[8]

[3] *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4; [2018] A.C. 736.
[4] *Anns v Merton LBC* [1978] A.C. 728; [1977] 2 W.L.R. 1024.
[5] *Caparo Industries v Dickman* [1990] 2 A.C. 605; [1990] 2 W.L.R. 358.
[6] *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4 at [35].
[7] *Calye's Case* 77 E.R. 520; (1604) 8 Co. Rep. 32a.
[8] *MacLenan v Segar* [1917] 2 K.B. 325.

In *Everett v Comojo*,[9] the Court of Appeal in the context of a nightclub assault applied the three-stage test in *Caparo* and concluded at [34] "… there is a duty on the management of a nightclub in respect of the actions of third parties on the premises, but I stress the standard of care imposed or the scope of the duty must also be fair, just and reasonable" and at [36] that "the common duty of care is an extremely flexible concept, adaptable to the very wide range of circumstances to which it has to be applied".

Applied to the facts in this case the hotel owed a duty to the claimants to protect them against injury caused by third parties. The duty was one that fit within the exceptions identified at [35] of *Robinson* as a "responsibility" type of case based upon an omission to take steps to prevent the attack or a duty to make things better by preventing the attack. This arose because "the hotel invited guests to come and stay at the hotel and thereby assumed a duty to take reasonable care to protect guests". In relation to foreseeability, *Hughes v Lord Advocate*[10] it is enough to establish that a particular risk was reasonably foreseeable in this case that meant it was sufficient that the risk of an attack on guests in their bedroom would be enough, and it was not necessary to show that a hammer was likely to be used.

Was the attack by Spence an intervening event?

In *Smith v Littlewoods Ltd*,[11] the court considered the judgment of Lord Sumner in *Weld-Blundell v Stephens*[12] that:

> "In general … even though A is in fault, he is not responsible for injury to C which B, a stranger to him, deliberately chooses to do."

Which was said not to be an indication that the voluntary act of another had broken the chain of causation as where a duty had been imposed to guard against deliberate wrongdoing by others it would be wrong to say the harmful effects were not caused by any breach of such a duty:

> "It follows from the wording of the duty of care that I have found to exist the fact that the attack by Mr Spence was a criminal act would not amount to a new intervening act and break the chain of causation. This is because the duty is to take reasonable care to protect guests against injury caused by the criminal acts of others."

Was the attack by Spence reasonably foreseeable?

Where a duty has been breached *The Wagon Mound (No.2)*[13] required the loss to be reasonably foreseeable, here, to the reasonable hotel proprietor. It was important to recognise the distinction, though, between "bare foreseeability" and "reasonable foreseeability" illustrated in *Dorset Yacht v Home Office*[14] by Lord Reid as:

> "If I buy a ticket in a lottery … it is foreseeable that I may win a very large prize—some competitor must win it … but no one could say that winning was a natural and probable result of entering such a competition."

The defendant sought to characterise the events as a case of possibility upon possibility:

> "… that an attacker might enter the lobby, that he would not look suspicious and would walk confidently to the lifts, that he might get to the guest floors, that he might come across an unlocked

[9] *Everett v Comojo* [2011] EWCA Civ 13; [2012] 1 W.L.R. 150.
[10] *Hughes v Lord Advocate* [1963] A.C. 837; [1963] 2 W.L.R. 779.
[11] *Smith v Littlewoods Ltd* [1987] 1 A.C. 241; [1987] 2 W.L.R. 480.
[12] *Weld-Blundell v Stephens* [1920] A.C. 956.
[13] *The Wagon Mound (No.2)* [1967] 1 A.C. 617; [1966] 3 W.L.R. 498.
[14] *Dorset Yacht v Home Office* [1970] A.C. 1004; [1970] 2 W.L.R. 1140.

> door, that he might start to steal, that he might inadvertently wake the occupants, and that he would be carrying a weapon to attack them with, and that he might use it."

The claimants relied on evidence of past events to show that there had been thefts, that non-guests wandered around the hotel and that the hotel's own training identified the possibility of non-guests coming in to attack guests.

The evidence did show:

> "… that an attacker might enter the lobby, that he would not look suspicious and would walk confidently to the lifts, that he might get to the guest floors, that he might come across an unlocked door, that he might start to steal, that he might inadvertently wake the occupants, and that he would be carrying a weapon to attack them with, and that he might use it."

In that circumstance, it was reasonably foreseeable to the hotel that a third party might gain entry and injure guests. This had been identified in the hotel training. The evidence showed that the likelihood was extremely low, which was relevant to the reasonable steps to be taken to address that risk.

Was the hotel in breach of duty?

The relevant standard was agreed to be that of similar four-star hotels in London. Evidence of practice from similar hotels was relevant, but it did not mean that if every other hotel did not adopt a measure it was not reasonably required to provide reasonable protection. The following allegations of breach were considered:

- **Security governance.**

  There was no single overarching security policy or plan, but the evidence showed that there were Brand Statements, job descriptions and training materials which showed that risks had been identified and relevant training provided.

- **Risk assessments.**

  There was no single risk assessment for the hotel, but the training did identify the risks and there were some external and internal risk assessments that referred to the risk. It could not be said that any further risk would have been identified or a preventative measure identified if all the documents had been collated into one formal risk assessment.

- The evidence showed the hotel had a detailed system for recording and investigating incidents and had reasonable security operating procedures with procedures to control access to the hotel.
- The hotel's systems for reviewing and keeping abreast of criminal trends were reasonable, that training of security staff was continuous with performance kept under review.
- There were 135 CCTV cameras in the hotel, that were subject to a maintenance contract. Not all recorded when they should have done, but Spence had been recorded. The CCTV though was not continuously monitored.
- Whilst there was no notice on the back of doors advising guests to close them, there were systems to ensure staff who became aware of open doors shut them. Patrols of the premises were taken seriously.
- Only operating the single entrance after 11.00pm, the lobby officer together with the other staff in the lobby, the CCTV, the possibility of finding housekeeping and the DSO on the guest corridors, and the self-locking door showed that the hotel had taken reasonable care to protect against this attack.

The evidence as a whole showed that the hotel took security seriously and that they took reasonable care to protect the claimants against the injuries caused by Spence. Continuous monitoring of the CCTV was not necessary nor were further CCTV cameras in the lift or fire escape or security alarms for open doors. No other hotel did so given the low likelihood of an attack occurring. Requiring key cards to use the lifts was a system implemented post incident, but that did not point to it being reasonably required.

Causation

The problem here was that whilst some of the measures suggested might have prevented the attack it was not possible to say that it was more likely than not that they would have prevented it:

> "I accept that if there had been a duty to provide: continuous monitoring of CCTV; there had been CCTV on the fire escape staircase and lifts; a notice or leaflet telling guests to shut the doors; another lobby officer; more patrols; or a key card providing lift lobby access; these measures might have prevented the attack, but I am unable to say that it was more likely than not that they would have prevented the attack. This is because it is unlikely that Mr Spence would have been identified as a non-guest on CCTV or by another lobby officer, or that he would have come across a patrol. The notice on the door about shutting the door or a leaflet would have added nothing to Shaikha's understanding that the door should be closed."

In most cases, it was possible to identify something that would have probably prevented an attack, for example security arches would have identified the hammer or door open alarms would have meant the door would have been shut, the hotel had not acted in breach of duty.

Contributory negligence

No negligence had been found on the part of the hotel, so it was not possible to balance relative blameworthiness and causative relevance fairly. No view was therefore expressed.

Conclusion

> "(1) in my judgment the Cumberland hotel owed the Claimants a duty to take reasonable care to protect guests at the hotel against injury caused by the criminal acts of third parties; (2) the attack by Mr Spence was a criminal act but did not amount to a new intervening act and break the chain of causation; (3) the attack by Mr Spence was reasonably foreseeable to the hotel but the likelihood of such an attack occurring was extremely low; (4) the hotel did not act in breach of any duty of care to the Claimants; (5) I have made findings on whether any actions might have prevented the attack; and (6) in circumstances where I have not found any breach of duty on the part of the hotel I have not made any findings on the issue of contributory negligence. I therefore determine that there was no liability on the part of the Cumberland hotel to Ohoud, Khaloud and Fatima for the attack carried out by Mr Spence."

Case comment

The liability of hoteliers and package tour operators is very topical at present and this decision will be of interest to the whole industry. The outcome is very disappointing for the claimants of course, particularly given the existence of weaknesses in the defendant's security arrangements that the judge identified, but his finding as to the nature and extent of the duty of care owed is a helpful application of traditional negligence principles which had become somewhat confused in recent times prior to the *Robinson* decision in the Supreme Court. Lord Reed more than anyone else has helped to ensure our appreciation that the

imposition of duties of care arise incrementally and by analogy with previous authorities on the issue. The three-stage test of *Caparo* requiring consideration of whether it would be fair, just and reasonable to impose a duty should be confined to genuinely novel duty situations—which this case was not. The law surrounding the intentional acts of third parties has also been confused in the past by courts sometimes treating it as a question of remoteness rather than addressing the scope of the defendant's duty of care. The trial judge appears to have taken the right approach in this case.

The hospitality industry want to know how far they need to go to protect guests from the deliberate acts of others. The judge's pragmatic approach on breach will give some comfort to the industry, although this case is a good illustration of the risks that need to be guarded against, and not all hoteliers may appreciate the extent of the duty of care that they owe guests or the types of harm from third parties that they may be liable for. This is in part because the statutory duty of hoteliers dates back to the Innkeeper's Liability Act 1863, repealed and replaced by the Hotel Proprietors Act 1956, each of which emphasised protection of guest's chattels over protection of the guests themselves. The law has moved a long way since *Cayle's Case* referred to above.

On the issue of whether there was a new intervening event breaking the chain of causation, the judge dealt with this shortly and decisively. As Lord Goff had said in *Smith v Littlewoods Ltd* at 272C "if a duty of care is imposed to guard against deliberate wrongdoing by others, it can hardly be said that the harmful effects of such wrongdoing are not caused by such breach of duty". This seems to be the correct approach on the facts of this case, but as *Clerk & Lindsell* point out:[15]

> "No precise or consistent test can be offered to define when the intervening conduct of a third party will constitute a novus actus interveniens sufficient to relieve the defendant of liability for his original wrongdoing. The question of the effect of a novus actus 'can only be answered on a consideration of all the circumstances and, in particular, the quality of that later act or event'."[16]

Where the law presently stands on the question of novus actus deserves its own article as there it is often difficult to discern clear judicial consistency as to how it should be applied. A case in point is *Clay v TUI Ltd*,[17] where the claim by a man who fell from a hotel balcony in Tenerife failed because of the application of novus actus interveniens. Clearly decisions on this issue will continue to be acutely fact sensitive.

Practice points:

- The imposition of a duty of care is to be considered by analogy with other decided cases with similar issues, and will develop incrementally. Resort to the three-stage test in *Caparo* is only for genuinely novel situations in which a duty is being imposed.
- Breach of duty will be very fact specific in any case, and in this particular case expert evidence was important, as was analysis of what other similar hotels provide by way of security, albeit the latter evidence is in no way determinative.
- The facts of this case are quite disturbing for those, like most in the legal profession, who stay in large 4-star hotels from time to time, and the lesson to learn is that you should always lock (and deadlock) the door of your hotel room.

Nathan Tavares QC

[15] *Clerk & Lindsell* (Sweet and Maxwell), para.2-111.
[16] Citing *Hogan v Bentinck West Hartley Collieries (Owners) Ltd* [1949] 1 All E.R. 588 at 593 per Lord Simonds.
[17] *Clay v TUI (UK) Ltd* [2018] EWCA Civ 1177; [2018] 4 All E.R. 672.

Carmelo Labbadia v Alitalia (Societa Aerea Italiana SPA)

(High Court of Justice (QBD); Margaret Obi (Sitting as a Deputy High Court Judge); 31 July 2019; [2019] EWHC 2103 (Admin))

Montreal Convention—accident—aircraft—disembarkation

Accidents; Aircraft; Disembarkation; International carriage by air; Passengers; Personal injury

At 7.35am on 5 February 2015, the claimant fell head first from uncovered aircraft stairs whilst disembarking flight AZ229 from London Heathrow to Milan Linate airport. The weather was poor and there was snow on the stairway. He suffered significant injuries to his right dominant shoulder and right pelvis. He was 72 years old at the time of the accident.

Liability was governed by the Montreal Convention 1999 art.17(1).[1] "Accident" within that provision was said to be an autonomous concept. Lord Scott in *re Deep Vein Thrombosis Group Litigation*[2] stated that the balance between passengers and airlines "… ought not to be distorted by a judicial approach to interpretation in a particular case designed to reflect the merits of the case". Scalia J in *Hussain v Olympic Airways*[3] made the following comments in relation to the use of the word accident in the provision:

> "A legal construction is not fallacious merely because it has harsh results. The Convention denies a remedy, even when outrageous conduct and grievous injury have occurred, unless there has been an 'accident'. Whatever that term means, it certainly does not equate to 'outrageous conduct that causes grievous injury'. It is a mistake to assume that the Convention must provide relief whenever traditional tort law would do so. To the contrary, a principal object of the Convention was to promote the growth of the fledgling airline industry by limiting the circumstances under which passengers could sue … Unless there has been an accident there is no liability, whether the claim is trivial … or cries out for redress."

The evidence of the claimant was clear and consistent as to the fall and the mechanism. That, along with meteorological evidence, led to the court finding that there had been a combination of rain and snow, that the stairs were covered in snow and/or compacted snow, it was snowing on exit from the plane, there was no canopy on the stairs and the stairs were very slippery. The claimant slipped on the aircraft stairs due to the presence of the snow and/or compacted snow.

Was it an "accident" for the purposes of the Montreal Convention?

The natural meaning of the word "accident" had to be applied in the context of art.17:

> "The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition that the accident which caused the death or injury took place on board the aircraft or in the course of the operations of embarking or disembarking."

Which leads to three requirements:

- the passenger has suffered a bodily injury;

[1] Which succeeded the Warsaw Convention 1929.
[2] *re Deep Vein Thrombosis Group Litigation* [2005] UKHL 72; [2006] 1 A.C. 495.
[3] *Hussain v Olympic Airways* 540 U.S. 644 (2004).

- which was caused by an accident; and
- the accident took place on board the aircraft or during the process of embarking or disembarking.

Article 20[4] provides for "partial exoneration" or contributory negligence if the injury was caused by or contributed to by the passenger.

The Montreal Convention as an international instrument has been interpreted in other jurisdictions. The US Supreme Court in *Air France v Saks*[5] interpreted "accident" in the Warsaw Convention leading to the conclusion that:

> "… (i) it was not the same as 'occurrence' (now 'event'; under the Montreal Convention) in Article 18 (relating to liability for destruction or loss of baggage) and (ii) Article 17 refers to an accident which caused the injury to the passenger, not the injury itself."

Liability could only arise under the Convention if the injury is caused by an unusual or unexpected event or happening that was external to the passenger. Whilst that had to be interpreted flexibly, an event will not be caught where "… the injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft". The passenger need only show some link in the chain of causes leading to the accident was an unusual or unexpected event.

The view expressed in *Saks* was considered in the *DVT* case with Lord Scott stating:

> "It is evident that it was never, or should never have been, enough for there to have been an occurrence that caused the damage. For article 17 liability the occurrence had to have the characteristics of an 'accident'."

and:

> "First, for Convention purposes the 'loss or hurt' cannot itself be the 'accident'. Article 17 distinguishes between the bodily injury on the one hand and the 'accident' which was the cause of the bodily injury on the other. It is the cause of the injury that must constitute the 'accident'. Second, it is important to bear in mind that the 'unintended and unexpected' quality of the happening in question must mean 'unintended and unexpected' from the viewpoint of the victim of the accident. It cannot be to the point that the happening was not unintended or unexpected by the perpetrator of it or by the person sought to be made responsible for its consequences. It is the injured passenger who must suffer the 'accident' and it is from his perspective that the quality of the happening must be considered."

The position was considered then by the Court of Appeal in *Barclay v British Airways Plc*[6] where Laws LJ:

> "I conclude that article 17(1) contemplates, by the term 'accident', a distinct event, not being any part of the usual, normal and expected operation of the aircraft, which happens independently of anything done or omitted by the passenger. This gives the term a reasonable scope which sits easily in the balance the Convention strikes."

Which led to the conclusion that to determine if an "accident" has taken place within the meaning of the Convention required a consideration of whether an injury was caused by an event, that was external to the claimant, and which was unusual, unexpected or untoward as opposed to resulting from the normal operation of the aircraft.

[4] "If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage."

[5] *Air France v Saks* [1985] 470 U.S. 392.

[6] *Barclay v British Airways Plc* [2008] EWCA Civ 1419; [2010] Q.B. 187.

The poor weather conditions in Milan in winter were not unusual. The decision to use stairs without a canopy required a positive decision. The decision to provide the steps and give the passengers permission to disembark was an "event". The airports own manual provided that where steps were used, they should be free from snow and ice before authorising disembarkation. They had not been and that therefore was not the "normal operation of the aircraft".

From the perspective of the claimant, it was unusual as he had no reason to expect that they would be slippery due to compacted snow. There was no contributory negligence, either as he did nothing other than disembark as instructed. His injuries were directly caused by the acts or omissions of the airport personnel which was an unusual or unexpected event external to him.

Judgment for the claimant in the sum of £106,344 excluding interest.

Comment

Personal Injury lawyers without a background in aviation related accidents will be scratching their heads at what seemed to be something of a sledgehammer to crack a nut. Many will feel that not only was this obviously an accident, but it clearly arose out of the negligent actions of the defendant for which compensation should naturally follow. Unfortunately, it really is not as simple as that.

In theory at least the Montreal Convention as successor to the Warsaw Convention is a damages limited non-fault regime but as with the Consumer Protection Act in real terms this description is illusory.

The faux strict liability regime arose from a determination by nations' governments to protect a fledging aviation industry and apparently to offer a trade-off between receiving some compensation from the inevitable accidents that would follow against awards that could have crippled that industry

The Warsaw Convention in 1929 followed 15 years after the beginning of the First World War when aircraft were used in combat for the first time. The first scheduled daily international commercial service between London and Paris took place in 1919. Despite this it was still an immature form of transport particularly for carrying large numbers of passengers. The convention provided for the airline to be obliged to accept liability unless it could show it took "all reasonable measures" to avoid the accident. Originally the damages were limited to around £15,000. The Warsaw Convention as incorporated had six particularly important features:

- it applied to all international air travel involving signatory countries;
- it applied a strict two-year time bar in which to bring claims;
- it capped the compensation available;
- it defined the circumstances in which a claim may be brought;
- it defined the limits of the injury for which compensation may be awarded; and
- it imposed a limited strict liability upon the carrier whereby unless the carrier can show that it took all reasonable measures to avoid the accident, it must accept liability.

The concerns, arguably more illusory than real, was that air safety was precarious whilst any accident almost inevitably fatal. It was thought in some countries at least that the level of damages that would have to be paid out in relation to these accidents could stifle the progress of passenger aircraft travel. Thus it was that the Warsaw Convention came into force providing strict liability but to a capped level of damages. In doing that, the definition of an accident and the relevant jurisprudence was carried through into its successor convention the Montreal Convention 1999.[7] By the time that that Convention was being circulated for signature, there were many who had been involved representing victims or air travel who actually actively campaigned to persuade their governments not to enter into the Convention as drafted. It was already clear by 1999 that the definition of accident was in fact less straightforward than might at first

[7] Convention for the Unification of Certain Rules for International Carriage by Air.

glance have been presumed, and that it was in fact, causing more problems than it was thought the Convention was designed to solve. In the end, the Convention was ratified by 133 signatories, the EU and 132 Member States of the International Civil Aviation Organisation.

It is difficult to find many, if any, serious air accidents in which it would not be possible for a passenger to recover damages in some way. Whether that be in negligence against the airline for the actions of its flight crew or maintenance team, or even in product liability against the manufacturer of the aircraft.

In many jurisdictions, the current cap on damages at SDR[8] 113,100, around £124,000 is only a small proportion of the value of a fatal claim in any event and so the claimant is left to litigate fault in any event. The limits are reviewed every five years or if the inflation factor exceeds 10%, the limits are also revised. However, there have been many more modest and non-fatal accidents involving aircraft where the claimants have struggled to recover compensation in situations which had they been reproduced in any other form of passenger transport or workplace environment they would have been compensated promptly. Perhaps an example of the aviation industry having its cake and eat it.

Article 17 defined liability as:

> "The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition that the *accident* which caused the death or injury took place on board the aircraft or in the course of the operations of embarking or disembarking." (emphasis added)

The *Air France v Saks*[9] case set the definition in the US Supreme Court:

> "An unusual or unexpected event; the said event must be external to the passenger; and cannot arise from the usual, normal or expected operation of the aircraft."

Mrs Saks was a passenger on the aircraft as it descended to land in Los Angeles on a trip from Paris, when she felt severe pressure and pain in her left ear, and the pain continued after landing. She consulted a doctor who concluded that she had become permanently deaf in her left ear. She then filed suit in a California state court, alleging that her hearing loss was caused by negligent maintenance and operation of the jetliner's pressurisation system; the defendant had her case struck out on the basis this was not an accident.

In the English and Welsh courts, this interpretation failed the claimants in the high profile litigation brought by passengers alleging they had contracted deep vein thromboses as a result of long distance air travel.[10] Scott LJ giving the lead judgment that the claimants could not succeed said "… does not cover incidents from a personal … or particular reaction to the normal operation of the aircraft". In this litigation, it was determined that the claimants failed to overcome this criteria where the contraction of the illness fell foul of the criteria of being a personal, particular reaction to the normal operation of the aircraft.

This same emphasis on the language has led to the other aberration within the convention that has impacted upon the victims of air accidents, and that is the reference to "bodily injury" such that psychiatric injuries absent a cause from a physical injury are not compensable by the courts.[11]

Against this legislative background, the court in *Labbadia* determined the following issues for trial:

- the mechanism of injury (namely whether the claimant slipped on snow and/or ice on the disembarkation steps as he existed the aircraft);
- whether this fall amounted to an "accident" within the definition of the convention;
- the extent of the claimant's injuries and whether he will require surgery; and

[8] Special Drawing Rights: an international type of monetary reserve currency created by the International Monetary Fund ("IMF") in 1969 that operates as a supplement to the existing money reserves of member countries.

[9] *Air France v Saks* 470 U.S. 392 (1985).

[10] *Deep Vein Thrombosis and Air Travel Group Litigation* [2005] UKHL 72.

[11] *King (AP) v Bristow Helicopters Ltd* [2002] UKHL 7; [2002] 2 A.C. 628.

- Quantum.[12]

When one reads the judge's recitation of the facts then absent an understanding of the Convention an observer would find it difficult to understand why the claimant struggled to succeed in this case:

> "He recalled noticing white flecks on his black coat. He stated that the rear aircraft stairs did not have a canopy, which in his experience was unusual. However, the front aircraft stairs did have a canopy. He stated that the rear stairs were metal and were covered in snow. He accepted that he did not see ice but suspected there was ice '… because of the way [his] foot went'. The Claimant described holding his trolley case and a plastic bag in his right hand and moving to the left to reach for the handrail. He stated that as he took one more step lost his balance and he 'went down'. He stated that he did not have the chance to grab hold of the handrail."[13]

The judgment contains a useful discussion of the various cases dealing with slipping and tripping cases under the Convention as well as the Court of Appeal view in *Barclay*. The cases where the claimant succeeded were:

- *Singhal v British Airways Plc*.[14] The claimant lost her footing when disembarking from an aircraft onto a staircase that was put against the door but six inches below it. The judge held that the step down was unexpected and unforeseen from the claimant's viewpoint and was an external factor. Thus the fall constituted an accident within the meaning of the convention.
- An American case of *Gezzi v British Airways Plc*[15] where the Court of Appeals upheld a decision deciding that the proximate cause of the claimant's fall was the presence of water on stairs boarding his flight and this was "unexpected and unusual" and "external" to the passenger.
- The less clear cut decision in *Chendrimada v Air India*.[16] The plaintiffs were delayed by fog for 11.5 hours and alleged that they were not allowed to leave the plane to go into the terminal, nor were they given anything to eat. The court was sympathetic to the idea that being kept on board a plane without food was an unexpected and unusual event and for 11 hours although the questions of fact were left for trial.

The two losing cases were:

- *Cannon v My Travel*[17] the claimant's slip on a wet aircraft ramp was not an "accident". Unlike this case, the ramp was fixed in place and was always exposed to the elements.
- Another American case, *Vanderwall v United Airlines*,[18] where a passenger tripped on a piece of litter in the aisle of an aircraft but this not an "accident". Here the claimant admitted that the presence of litter in the aisle was not unusual or unexpected.

In *Barclay*, Laws LJ set out three circumstances:

- A passenger injury from a hot coffee spillage by a crew member; an accident.
- A heart attack unprovoked by any factor within the aircraft; "plainly" not an accident.
- The facts in *Barclay*: *A* passenger fall caused by tripping over an embedded plastic strip, inert and forming part of the aircraft.

[12] *Carmelo Labbadia v Alitalia (Societa Aerea Italiana SPA)* [2019] EWHC 2103 (Admin) at [4].
[13] *Carmelo Labbadia v Alitalia (Societa Aerea Italiana SPA)* [2019] EWHC 2103 (Admin) at [6].
[14] *Singhal v British Airways Plc*, unreported, 20 October 2007, Wandsworth County Court.
[15] *Gezzi v British Airways Plc* 991 F.2d 603.
[16] *Chendrimada v Air India* (No.89 Civ. 4070 (LBS) US District Court, SD New York).
[17] *Cannon v My Travel* [2005] 7 WLUK 216 per Caulfield J.
[18] *Vanderwall v United Airlines* 80 F.Supp 3d 1324.

In finding that Mrs Barclay's event did not constitute an accident, the Court of Appeal (Laws LJ) said:

> "I conclude that article 17(1) contemplates, by the term 'accident', a distinct event, not being any part of the usual, normal and expected operation of the aircraft, which happens independently of anything done or omitted by the passenger. This gives the term a reasonable scope which sits easily in the balance the Convention strikes … There was no accident here that was external to the claimant, no event which happened independently of anything done or omitted by her. All that happened was that the claimant's foot came into contact with the inert strip and she fell."[19]

The judge here found nine findings of fact the main ones which were:

- it was snowing at the time of the fall;
- there was no canopy on these steps;
- the surface was slippery because of the snow;
- the steps used by the claimant were covered with snow and/or compacted snow; and
- the slipperiness and the claimant's slip were due to the presence of the snow and compacted snow.

She then worked her way through the *Saks* test to find in favour of the claimant:

> "The essential components of an 'accident' can be determined by considering the following questions: (i) Was there an event? (ii) If so, was the event unusual, unexpected or untoward from the Claimant's perspective? (iii) Was the event external to the Claimant?"[20]

> "The Claimant's fall was directly caused by acts and omissions by airport personnel which was an unusual or unexpected event and external to him. It was not a reaction to the normal operation of the aircraft or an immutable state of affairs. I am satisfied that the Claimant sustained his injuries as a result of an accident within the meaning of Article 17 of the Convention."[21]

> "The event was unusual from the point of view of the Claimant. He was a frequent flyer and had never experienced having to descend aircraft stairs at the airport without a canopy and reasonably anticipated that the stairs would be free from compacted snow. Of course, there are inherent risks in disembarking from aircraft stairs with luggage. The Claimant may have anticipated that aircraft stairs exposed to the elements would be wet from precipitation, but he had no reason to expect that the stairs would be slippery due to compacted snow. Therefore, the event was unexpected and unforeseen from his perspective. The event was also external to the Claimant."[22]

A cursory examination of the six cases considered by the judge in this case along with her own decision will show how fact specific coming within the definition of an "accident" is. Even then, why is slipperiness from snow more acceptable as an "accident" than rain?

Whilst this may be chalked up as a rare victory for the claimant in circumstances that would have instantly led to compensation in any other location, it is unlikely to make life very much easier for injured claimants from aircraft accidents. Any lawyer considering a case will have to take the *Saks* list and offer up the facts of their case against it. They will still proceed with their fingers crossed.

[19] *Barclay v British Airways Plc* [2008] EWCA Civ 1419 at [27].
[20] *Barclay v British Airways Plc* [2008] EWCA Civ 1419 at [39].
[21] *Barclay v British Airways Plc* [2008] EWCA Civ 1419 at [45].
[22] *Barclay v British Airways Plc* [2008] EWCA Civ 1419 at [42].

Practice points

- Accidents on or around aircraft for passengers must always involve consideration of the Montreal Convention as incorporated.
- The *Saks* matrix must be carefully applied to the facts of the case.

Mark Harvey

Poole BC v GN (Through His Litigation Friend "The Official Solicitor")

(Supreme Court; Lady Hale, President Lord Reed, Deputy President Lord Wilson, Lord Hodge, Lady Black; 6 June 2019; [2019] UKSC 25)

Local authority duties—children—assumption of responsibility—negligence—duty of care

Anti-social behaviour; Assumption of responsibility; Children; Local authorities' powers and duties; Personal injury; Vicarious liability

The claimants sought damages for personal injuries suffered while they were children living in the area of the defendant council. The basis for the claim was that the abuse they received from a neighbour caused them physical and psychological harm and that the council owed them a duty of care at common law when exercising its powers under the Children Act 1989 s.17,[1] Sch.2[2] and s.47.[3]

In May 2006, the council had housed the children and their mother next door to a family that were known by the council to be persistently engaged in anti-social behaviour. One of the children was disabled mentally and physically, with constant care needs.

Over a period of years, the children and their mother were subjected to abuse from their neighbours. This included verbal abuse, attacks on their home and car, threats of violence and physical assaults on one of the children and the mother.

The incidents were reported to the council and they took a number of measures against the neighbours including eviction, injunctions, contempt of court proceedings, anti-social behaviour orders and the imposition of sentences of imprisonment but the harassment was not stopped or prevented.

One of the children became suicidal in 2008 and ran away from home in 2009, aged 10. In June 2011, the Council undertook an investigation under the Children Act 1989 s.47 and the child was made subject to a child protection plan. At the same time, a decision was made to rehouse the family away from the estate and after adaptations were made, they moved into the new home in December 2011.

[1] Children Act 1989 s.17(1) provides a general duty to (a) to safeguard and promote the welfare of children within their area who are in need; and (b) so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children's needs. Section 17(6) includes provision of accommodation in those services.

[2] In considering the general duty under s.17(1) there are specific duties and powers set out in Sch.2. These include a duty to take reasonable steps to identify the extent to which there are children in need within their area, a duty to assess the needs of any child who appears to be in need, and a duty to take reasonable steps, through the provision of services under Pt III of the Act, to prevent children suffering ill-treatment or neglect.

[3] Children Act 1989 s.47(1) imposes a duty where there is "reasonable cause to suspect that a child … in their area is suffering, or is likely to suffer, significant harm", to make such enquiries as they consider necessary to enable them to decide whether they should take any action to safeguard or promote the child's welfare.

Duty of care: General principles

Public authorities are subject to the same principles of the law of tort, at common law, as private individuals and bodies.[4] In *Dorset Yacht Co Ltd v Home Office*,[5] it was made clear that whilst a statute could exclude liability for conduct that would otherwise be tortious at common law a person exercising that statutory duty could still be liable if he performed the act carelessly and caused needless damage. Lord Reid[6] explained:

> "Parliament deems it to be in the public interest that things otherwise unjustifiable should be done, and that those who do such things with due care should be immune from liability to persons who may suffer thereby. But Parliament cannot reasonably be supposed to have licensed those who do such things to act negligently in disregard of the interests of others so as to cause them needless damage."

However, if Parliament had conferred a discretion and that was exercised lawfully it would be an act authorised by Parliament.

A public body could come under a common law duty to protect from harm in circumstances where the principles applicable to private individuals or bodies would impose such a duty, for example where the authority had created the source of danger or had assumed a responsibility to protect the claimant from harm, unless the imposition of such a duty would be inconsistent with the relevant legislation.[7]

For some time after the *Caparo* decision, that position had been misunderstood until the House of Lords in *Stovin* and *Gorringe* reasserted the importance of the distinction in the law of negligence between harming the claimant and failing to confer a benefit on him or her, typically by protecting him or her from harm

In *Stovin*, Lord Hoffmann at 947 said "[in] the case of positive acts, therefore, the liability of a public authority in tort is in principle the same as that of a private person but may be restricted by its statutory powers and duties" and in relation to a failure to perform a statutory duty at 952 said:

> "[i]f such a duty does not give rise to a private right to sue for breach, it would be unusual if it nevertheless gave rise to a duty of care at common law which made the public authority liable to pay compensation for foreseeable loss caused by the duty not being performed."

In *Gorringe*, Lord Hoffmann reiterated at [17] the distinction between causing harm and failing to protect from harm, in the context of the provision of warning signs on the highway:

> "It is not sufficient that it might reasonably have foreseen that in the absence of such warnings, some road users might injure themselves or others. Reasonable foreseeability of physical injury is the standard criterion for determining the duty of care owed by people who undertake an activity which carries a risk of injury to others. But it is insufficient to justify the imposition of liability upon someone who simply does nothing: who neither creates the risk nor undertakes to do anything to avert it."

He observed at [32] that it was:

> "… difficult to imagine a case in which a common law duty can be founded simply upon the failure (however irrational) to provide some benefit which a public authority has power (or a public law duty) to provide."

[4] *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4; [2018] A.C. 736.
[5] *Dorset Yacht Co Ltd v Home Office* [1970] A.C. 1004; [1970] 2 W.L.R. 1140.
[6] *Dorset Yacht Co Ltd v Home Office* [1970] A.C. 1004 at 1030.
[7] *Stovin v Wise* [1996] A.C. 923; [1996] 3 All E.R. 801, *Gorringe v Calderdale MBC* [2004] UKHL 15; [2004] 1 W.L.R. 1057,*Mitchell v Glasgow CC* [2009] UKHL 11; [2009] 1 A.C. 874,*Michael v Chief Constable of South Wales* [2015] UKSC 2; [2015] A.C. 1732 and *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4; [2018] A.C. 736 followed.

That period led to a number of decisions concerned with a public bodies duties to children affected by the discharge of their statutory functions that the court felt it appropriate to comment upon. In *X (Minors) v Bedfordshire CC*,[8] claims against a local authority relating to their functions under child care legislation had been struck out as disclosing no cause of action. That decision was wrong insofar as it ruled out on grounds of public policy the possibility that a duty of care might be owed by local authorities or their staff towards children with whom they came into contact in the performance of their functions under the 1989 Act, or in so far as liability for inflicting harm on a child was considered to depend upon an assumption of responsibility.

Robinson drew the strands in the earlier case law together and clarified three issues in particular:

- *Caparo* did not establish a universal test for the existence of a duty of care but instead had recommended an incremental approach in novel situations using established categories of duty as a guide. Whether it was fair, just and reasonable to impose a duty was relevant to that approach and was not relevant to established categories. In the ordinary run of cases, courts should follow established principles of law rather than relying on considerations of public policy.
- It reaffirmed the importance of the distinction between harming the claimant and failing to protect the claimant from harm (including harm caused by third parties).
- That public authorities are generally subject to the same general principles of the law of negligence as private individuals and bodies, except to the extent that legislation requires a departure from those principles.

Consequently, whether a local authority or its employees owed a duty of care to a child was dependent upon the applications of the general principles of negligence:

- public authorities may owe a duty of care in circumstances where the principles applicable to private individuals would impose such a duty, unless such a duty would be inconsistent with, and is therefore excluded by, the legislation from which their powers or duties are derived;
- public authorities do not owe a duty of care at common law merely because they have statutory powers or duties, even if, by exercising their statutory functions, they could prevent a person from suffering harm; and
- public authorities can come under a common law duty to protect from harm in circumstances where the principles applicable to private individuals or bodies would impose such a duty, as for example where the authority has created the source of danger or has assumed a responsibility to protect the claimant from harm, unless the imposition of such a duty would be inconsistent with the relevant legislation.

Assumption of responsibility

In the context of this case, the nature of an assumption of responsibility was important as it was clear that the circumstances fell into the category where it was alleged the defendant had failed to provide a benefit to the claimants by protecting them from harm.

The Court of Appeal had not followed the approach set out in *Robinson*, understandably as it had not been decided at the time the Court of Appeal made its decision. The claim was though brought was on the basis of an assumption of responsibility, with the particulars of claim stating:

[8] *X (Minors) v Bedfordshire CC* [1995] 2 A.C. 633; [1995] 3 W.L.R. 152.

> "In purporting to investigate the risk that the claimants' neighbours posed to the claimants and subsequently in attempting to monitor the claimants' plight as set out in the sequence of events above, the defendant had accepted a responsibility for the claimants' particular difficulties and/or there was a special nexus or special relationship between the claimants and the defendant. The defendant purported to protect the claimants by such investigation and in as far as such investigation is shown to have been carried out negligently and/or negligently acted on the defendant is liable for breach of duty."

In the present case, the defendant's monitoring and investigation of the situation did not involve the provision of a service upon which the claimants or their mother could be expected to rely. The mother may well have been anxious that the defendant act so as to protect the family from the neighbours, but that was not the same as reliance. Lord Reed went on to say:

> "Nor could it be said that the claimants and their mother had entrusted their safety to the council, or that the council had accepted that responsibility. Nor had the council taken the claimants into its care, and thereby assumed responsibility for their welfare. In short, the nature of the statutory functions relied on in the particulars of claim did not in itself entail that the council assumed or undertook a responsibility towards the claimants to perform those functions with reasonable care."

It also could not be said on the basis of the particulars of claim, and the evidence available, that such an assumption of responsibility could be inferred from the manner in which the defendant behaved towards the claimants.

That led to the conclusion that the particulars of claim did not set out an arguable claim, but for different reasons than the Court of Appeal:

> "Although *X (Minors) v Bedfordshire* cannot now be understood as laying down a rule that local authorities do not under any circumstances owe a duty of care to children in relation to the performance of their social services functions, as the Court of Appeal rightly held in *D v East Berkshire*, the particulars of claim, in this case, do not lay a foundation for establishing circumstances in which such a duty might exist."

Vicarious liability

Social workers carried out an assessment of the claimants' needs on the basis of instructions from the defendant and then advised the defendant for the purpose of enabling it to perform its statutory functions. That gave rise to a contractual duty on the social workers to exercise professional skill and care, but the question was whether they owed a similar duty to the claimants in tort.

It could not be said that in this case such a duty was owed. The position could be contrasted with the position of the educational psychologists and the advisory teacher in *X (Minors) v Bedfordshire*, and the educational psychologists in *Phelps v Hillingdon* where it was accepted that it was reasonably foreseeable that the parents of the children would rely on advice given. In the present case, there was no suggestion that the social workers provided advice on which the claimants' mother would foreseeably rely.[9]

It could not be said either that the social workers had assumed responsibility on the basis that the mother had entrusted the conduct of the family's affairs to them as there was no evidence to suggest that there had been an express or implied undertaking to take reasonable care.[10]

[9] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C.465; [1963] 3 W.L.R. 101 followed.
[10] *Spring v Guardian Assurance Plc* [1995] 2 A.C. 296; [1994] 3 W.L.R. 354 followed.

Decision

> "The particulars of claim in these proceedings do not disclose any recognisable basis for a cause of action. The complaint is that the council or its employees failed to fulfil a common law duty to protect the claimants from harm inflicted by their neighbours by exercising certain statutory powers. The relevant provisions do not themselves create a cause of action. Reliance is placed on an assumption of responsibility arising from the relationship between the claimants and the council or its employees, but there is nothing to suggest that those relationships possessed the necessary characteristics for an assumption of responsibility to arise. Furthermore, it is clear that the alleged breach of duty, namely a failure to remove the claimants from the care of their mother, has no possible basis."

Whilst, the appeal related to the decision to strike out the court did not believe that those fundamental problems with the basis for the legal claim could be overcome.

Comment

This is the latest in a whole series of local government cases on the vexed border of tortious liability, often involving children who in some way have suffered a detriment. But the harm here was overwhelmingly caused by the implacable anti-social behaviour of the "delinquent" family next door on a Council estate. Sadly such a "neighbour dispute" is not an uncommon problem, but here the one-sided harassment was at such an extreme level that, according to their counsel Elizabeth-Anne Gumbel QC, the lives of the two principal claimants "have been wrecked by their nightmare childhood".[11]

As the perpetrators of this appalling behaviour against a family with a mentally and physically impaired child were clearly persons of straw the legal focus inevitably shifts to a local authority, so often the "longer pocket" target and backed by insurance and, to some extent, financial resources and statutory powers to effect a remedy. Unfortunately, this case of acute neighbour victimisation also illustrates the relative powerlessness of a local authority in dealing with maximal anti-social behaviour ("ASB"); Lord Reed in giving the unanimous judgment of the Supreme Court indicates that the authorities had already resorted to various measures:

> "against the neighbouring family, including eviction, the obtaining of injunctions, proceedings for contempt of court, anti-social behaviour orders, and the imposition of sentences of imprisonment, but the harassment nevertheless continued."[12]

Indeed, the case not only displays that powerlessness in the face of seriously lawbreaking and unmanageable ASB but also the failure of "joined up thinking" by the authorities; only when the mother of these two boys turned in desperation to her councillors and a Member of Parliament did this result in the Home Office commissioning an independent report, which was critical of the police and the various agencies involved.

This was essentially a housing case at the outset, but with reduced council housing caused by the haemorrhage of Right to Buy sales and the nature of an "arm's length" management company, it took an inordinate length of time for the obvious solution of moving this family to a safe environment. In the meantime, the agony of this innocent family continued. Inevitably with a child with special needs and a sibling in such extremity as to run away from home aged ten penning a suicide note, the focus turned towards social services. Indeed, the claimant "Graham" was in no doubt that the Supreme Court judgment

[11] "Boys brought up on tough Council estate win right to sue local Council over harassment that ruined their lives", *Daily Telegraph*, 16 July 2016 commenting on the judgment at first instance by Slade J.

[12] *Poole BC v GN* [2019] UKSC 25 at [4].

"glossed over the long-term failures of Poole Social Care to protect [them] from years of abuse, torment and terror".[13]

Although in a strike out decision the courts never had a trial of the facts, the background information averred in the pleadings showed that this was clearly an appalling situation for a blameless mother and her two boys. But could liability for the resultant mental and physical harm be affixed to Poole BC?

In the light of the authorities it is understandable that Master Eastman struck out most of the initial claims against the housing association as an "arm's length management organisation", the local authority and the police, on the basis that the defendants owed no duty of care to protect individuals from harm caused by third parties. There then followed a brave judgment by Slade J, very much child-centred, in allowing the claim to proceed against the local authority social service department.[14] While the Children Act 1989 s.17 promotes a general duty on local authorities to "safeguard" children, how could that have been effected in this case? Irwin LJ in the Court of Appeal notes that conceptually "What is alleged here derives from a housing placement, not from a decision under the Children Act".[15] He understandably regarded the proposition that continued residence with their mother exposed the boys to harassment, and therefore social services should have unilaterally removed them from their mother's care, as "startling".[16] King LJ is similarly alarmed at such a "draconian order" and Davis LJ points out that "It was never said that the mother was an unfit mother. She loved and cared for her (vulnerable) children. They loved and needed her".[17] The Court of Appeal is therefore emphatic that a trajectory as "looked after children" was entirely inappropriate. While their analysis of the law was "pre-*Robinson*", and therefore superceded by that Supreme Court formulation, it seems eminently sensible that in these circumstances the boys should not have been taken into local authority care. Ultimately, what should have happened did happen, and the housing transfer was the end of tragic suffering for the family at the hands of their neighbours, although inevitably with a lingering aftermath.

With the Supreme Court endorsing the view of the Court of Appeal to support a strike out, albeit on different "post-*Robinson*" grounds, does this mean that "This important decision appears to turn the clock back in the law of negligence in the context of child protection claims" as has been suggested?[18] With respect, the case must be considered as highly "fact sensitive", and it may also be that it was indeed "clearly a poor case on which to mount a claim" in respect of children's rights as opposed to housing issues.[19]

However, what we now have is a very clear and detailed exposition from Lord Reed in the Supreme Court on the tangle of local authority cases over recent years. While necessarily this judgment confirms the limitations on claims against public bodies after the excursion with the *Anns* doctrine, Lord Reed in a very lengthy list of the leading cases explores "Recent Developments in the Law of Negligence".[20]

Clearly there is a continuum across these cases. The courts will adopt an "interventionist" approach when necessary, particularly when the lives of children are shattered within a family or in the direct care of a local authority; the recent leading decision of *Armes v Nottinghamshire CC* demonstrates that in respect of vicarious liability for foster parents.[21] Another graphic illustration, not mentioned in the current case but germane, is the duplicity of social services in wrecking a family by placement of a known sexual abuser foster child, who then raped the family's own young children, following a false representation assurance by the social worker; the claim in *W v Essex CC* was for psychiatric damage suffered by the parents, but it was abundantly clear that the harm to the family was caused by the local authority.[22]

[13] "Poole Siblings lose 'neighbour torment' damages claim", *BBC News*, 6 June 2019.
[14] *CN v Poole BC* [2016] EWHC 569 (QB); [2016] H.L.R. 26.
[15] *CN v Poole BC* [2017] EWCA Civ 2185 at [41].
[16] *CN v Poole BC* [2017] EWCA Civ 2185.
[17] *CN v Poole BC* [2017] EWCA Civ 2185 at [109] and [117].
[18] G. Douglas, *Family Law* (2018), 275.
[19] G. Douglas, *Family Law* (2018), 275.
[20] *CN v Poole BC* [2019] UKSC 25 at [25] onwards in the Supreme Court.
[21] *Armes v Nottinghamshire CC* [2017] UKSC 60; [2018] A.C. 355.
[22] *W v Essex CC* [2001] 2 A.C. 592; [2000] 2 W.L.R. 601.

The analysis leads to a reiteration by the Supreme Court of a very important distinction in the plethora of cases discussed. Lord Reed endorses the distinction made by Lord Hoffmann in both *Stovin* and *Gorringe* between:

- causing harm (making things worse); and
- failing to confer a benefit (not making things better).

Lord Reed states that the present case is firmly in the latter category, and this is clearly a rather more useful delineation than the traditional dichotomy between "acts and omissions" in negligence liability.[23] He also deals with an argument that a duty of care might have arisen here on the basis that the defendant council had created the source of danger; they clearly had not "created" this disaster, as sadly the savagery of the neighbours only became apparent after the housing placement.[24]

At the other end of the continuum for negligence liability, is the issue of immunity, statutory or otherwise, and at one time an all-encompassing defence for many public bodies, but in the modern era subjected to close judicial scrutiny. In between these extremes of relatively straightforward liability on the one hand and immunity on the other there remains a huge conglomeration of difficult cases on particular points, which Lord Reed helpfully analyses. In particular, he confirms that *X (Minors) v Bedfordshire CC* can no longer be regarded as good law:

> "… in so far as it ruled out on grounds of public policy the possibility that a duty of care might be owed by local authorities or their staff towards children with whom they came into contact in the performance of their functions under the 1989 Act, or in so far as liability for inflicting harm on a child was considered, in the *Newham* case, to depend upon an assumption of responsibility."[25]

The parameters of when there is an "assumption of responsibility" will no doubt nevertheless remain a fertile field for potential litigation. Noting that since that phrase came to the fore in *Hedley Byrne v Heller* the concept has been applied in many situations, Lord Reed nevertheless points to *X v Hounslow BC* where it was held by the Court of Appeal that the local authority's social services and housing departments had not assumed responsibility to protect vulnerable Council tenants and their children from harm inflicted by third parties, a case with "similarities".[26]

Where should the line be drawn? Lord Reed is sceptical of the point emphasised by Irwin LJ that liability in negligence in this area "would complicate decision-making in a difficult and sensitive field". This notion derives in a line from the case involving the parent of a victim of the "Yorkshire Ripper", *Hill v Chief Constable of West Yorkshire*, but clearly with the most recent case of an elderly pedestrian caught up in police action, *Robinson*, British courts are now on a different trajectory. Lord Reed suggests that they have:

> "reverted to an earlier approach … based on the premise that public authorities are *prima facie* subject to the same general principles of the common law of negligence as private individuals and organisations."[27]

However, in respect of this particular case in Poole the Supreme Court are unanimous that there was no arguable case that the local authority owed a duty of care to the claimants for the undoubted outrages perpetrated by third party neighbours.[28]

[23] *CN v Poole BC* [2019] UKSC 25 at [74] and see also the points made by Irwin LJ in the CA at [28].
[24] See the analysis noted by Lord Reed of four categories suggested by Tofaris and Steel, (2016) 75 C.L.J. 128.
[25] *X (Minors) v Bedfordshire CC* [1995] 2 A.C. 633 at [74]; [1995] 3 W.L.R. 152.
[26] *X v Hounslow BC* [2009] EWCA Civ 286, Lord Reed noting at [71] SC that this was a case with "similarities" but also referencing other cases which did not wholly exclude the assumption of responsibility doctrine in other circumstances, such as banking.
[27] *CN v Poole BC* [2019] UKSC 25 at [75].
[28] *CN v Poole BC* [2019] UKSC 25 at [83].

Practice points

- This very important decision not only reviews a very extensive line of cases, but reaffirms limits on claims against public bodies when damage has been caused by third parties and there has been no "assumption of responsibility".
- While the case started out with a focus of considering the housing function of a local authority, and indeed was eventually dealt with on a practical level by a housing transfer, that aspect was struck out at the first stage and not continued, and subsequently it was the focus on a potential duty of care under the Children Act 1989 that foundered.
- The suggestion that the local authority should have dealt with acute harassment by neighbours through the "draconian" mechanism of taking children into care, and away from their loving mother, was considered to be wholly inappropriate.
- Lord Reed in particular reinforces the distinction between "causing harm" and "failing to confer a benefit" for negligence liability, in preference to the traditional analysis of attempting a division between "acts" and "omissions".

Julian Fulbrook

Barlow v Wigan Council

(QBD (Manchester); Waksman J; 19 June 2019; [2019] EWHC 1546 (QB))

Defects—highway maintenance—local authorities' powers and duties—personal injury—public paths—road traffic

LT Defects; Highway maintenance; Intention; Local authorities' powers and duties; Personal injury claims; Public expenditure; Public paths

The claimant appealed against a decision that a public path in a park was not a highway "maintainable at the public expense", within the meaning of the Highways Act 1980 s.36(2)(a), and that she therefore had no cause of action against the defendant.

The defendant cross-appealed against a finding that s.36(2)(a) could apply to highways constructed before the Act came into force.

The claimant had tripped on a public path in a park owned by the defendant. The judge found that the path was in a dangerous or defective condition, but concluded that it did not come within the meaning of s.36(2)(a). The land had been purchased by the district council predecessor to the defendant. The park was constructed in the 1930s. It was not disputed that the defendant was a highway authority or that the path was a highway. The duty under s.41 of the Act on a relevant highway authority to maintain a highway was owed only in respect of a highway "maintainable at the public expense". The judge held that the path had become a highway through at least 20 years' usage, pursuant to s.31(1), but that, in order for s.36(2)(a) to apply, the highway had to have been constructed as such at the time of its construction. That required an intention to dedicate it as a highway on the part of the highway authority, and there was no evidence regarding the district council's intention when it had created the path.

The claimant contended that s.36(2)(a) did not require proof of intent to create a highway at the time of construction, and that it was enough that (i) the path was constructed; (ii) at the time of the accident it had become a highway; and (iii) it had been constructed by a highway authority.

The judge dealt with the proper construction of Highways Act 1980 s.36(2)(a) and also the defendant's argument on retrospectivity.

Section 36.2(a)

The judge's construction meant that the only compliant dedication of the path would be an express dedication at the time when it was created. If a highway authority created a relevant public way but did not dedicate it as a highway for, say, six months, it would fall outside s.36(2)(a). The effect would be that there was no duty to maintain under s.41. The claimant's interpretation was preferred. The fact that the path only became a highway subsequently did not mean that it was not constructed by the relevant highway authority. There was no reason in statutory language, principle or case law why the instant path could not fall under s.36(2)(a) because it only became a highway after long usage and had not been constructed as such at the outset, see *Young v Merthyr Tydfil CBC*.[1]

The defendant argued that even if the district council was a highway authority when constructing the path, it was not acting as such but as a local authority. However, if it was necessary to ensure that the local authority which constructed the relevant highway had been acting as highway authority at the time, that might not be an easy task. Moreover, there would not always be a distinction between the local authority acting in two different particular capacities, for example housing and highway, but rather one between a particular capacity and the local authority's general capacity as creating amenities on land it owned. Any investigation into the particular "hat" which the local authority was wearing at the time was susceptible to uncertainty and arbitrariness insofar as the result could depend on which particular department was handling that particular matter. The relevant legal entity should be identified and no attempt made to look behind it, see *Gulliksen v Pembrokeshire CC*.[2] Provided that the relevant local authority at the time was, among other things, a highway authority, that was sufficient for its construction of the highway to attract the operation of s.36(2)(a).

Retrospectivity

The defendant argued on its cross-appeal that s.36(2)(a) could only apply to highways constructed after the Act came into force. However, the circumstances here were not an example of true retrospectivity where, for example, an event which had already taken place, lawful at the time, was now deemed to be unlawful. There would be no liability until and unless there had been a failure to maintain the highway which caused loss at some point subsequent to the commencement of the Act. The fact that the highway might have been constructed at an earlier stage did not amount to imposition of a retrospective liability. Also, in contrast to the Highways Act 1959 s.38(2)(b), there was no express limitation within s.36(2)(a) of the 1980 Act to highways created after commencement of the Act. Nor was there any basis for implying such a limitation, see *Wilson v First County Trust Ltd*.[3]

The appeal was allowed and the cross-appeal dismissed.

Comment

What is or is not a highway in principle sounds like a matter for common sense rather than a detailed legal judgment. Perhaps the key is understanding that this case did not concern whether the path was or was not a highway but instead whether it was a highway "maintainable by public expense". This was key to the question as to whether or not the Highway Authority had a duty to maintain it pursuant to s.41 of the

[1] *Young v Merthyr Tydfil CBC* [2009] P.I.Q.R. P23.
[2] *Gulliksen v Pembrokeshire CC* [2002] EWCA Civ 968; [2003] Q.B. 123.
[3] *Wilson v First County Trust Ltd* [2003] UKHL 40; [2004] 1 A.C. 816.

Act. This appeal concerned precisely that question, all framed around the question of *intention* of the highway authority at the time of construction of a path or route. At first instance, HH Judge Platts concluded that *intention* was all important—without the *intention* to construct a highway maintainable at the public expense then the path could not be defined as such, even if subsequent to its construction it was used as a highway thereafter.

As the Court of Appeal quite rightly pointed out, this interpretation of what is required for a highway maintainable at the public expense would lead to what many would seem to be illogical and impractical consequences—so the example given is one of a path dedicated six months after construction to be a highway falling outside the Highways Act 1980 (s.36(2)(a)). This could not be the intention of those who drafted the Act. The decision is therefore the most logical and sensible one that could be reached in the circumstances by the Court of Appeal to avoid these unintended consequences of the lacuna which had been created by the first instance judgment. If members of the public are using a path as a highway then it seems only right and fair that the highways authority should ensure that that path is properly maintained and not hazardous so they are not injured during the course of using it.

The case is a useful consolidation and clarification of relevant law for practitioners in this area. Furthermore, the Court of Appeal were not impressed by the defendant's arguments on retrospectivity which had no logical base—true retrospectivity is when "an event which has already taken place, lawful at the time, is now deemed to be unlawful".[4] The whole point in this case was that liability would only attach to the highways authority at the point at which there was a failure to maintain the highway causing loss. The court also stressed that within s.36(2)(a) there was no express limitation to highways created after the commencement of the act. The key was that the defendant was not being made liable for an event which had already occurred.

Practice points

- When considering what is and what is not a highway, the key is to look at what the path is being used for now "if there is dedication and acceptance, a highway is created".[5]
- When considering if the highway is one that should be maintainable by public expense, the key is not to look at the intention when built but what the road is actually used for once built—if it is being used as a highway then it is maintainable by public expense and the duties under the Highways Act are triggered from that point.
- In every case of a claimant being injured due to a defect in the highway the importance of getting contemporaneous photographic evidence of the defect cannot be overstated and the inspection records from the relevant highways authority showing what they have/haven't done in the relevant period are always key to establishing breach.

Kim Harrison

[4] *Barlow v Wigan Council* [2019] EWHC 1546 (QB) at [41]; [2019] P.I.Q.R. P18.
[5] *Young v Merthyr Tydfil* [2009] P.I.Q.R. 23.

Case and Comment: Quantum/Damages

Carol Dodds (A Protected Party by Her Sister and Litigation Friend Janice Dodds) v Mohammad Arif, Aviva Insurance Ltd

(High Court Of Justice (QBD); Master Davison; 18 June 2019; [2019] EWHC 1512 (QB))

Life expectancy—evidence—bespoke—atypical—expert—permission

Expert evidence; Life expectancy; Ogden tables; Personal injury claims

The claimant was struck by a car being driven by the first defendant on 6 February 2017 whilst crossing a road in south west London. She was 73 years old at the time of the accident and suffered a traumatic brain injury. At a case management conference on 4 June 2019 permission for "bespoke" life expectancy evidence for the defendant was refused.

The claimant's neurological expert indicated that in the absence of epilepsy developing that her life expectancy was "unlikely to be reduced". The defendants had disclosed and sought to rely upon a report from Professor Bowen Jones, an expert on life expectancy. His report indicated a reduction in life expectancy of approximately five years.

The claimant had argued that the normal position was that clinical experts would comment on life expectancy[1] unless the claimant was "atypical". This, in turn, meant that in the majority of personal injury cases the Ogden tables were used as opposed to a bespoke approach.

The defendants argued that the claimant was "atypical" as she had a head injury that reduced her life expectancy. There was no rule that required that opinion to come from a clinician as some would not be in a position to give an opinion.

Permission had been refused for different reasons. Life expectancy was held to be an important issue in personal injury litigation, but the Ogden tables are ordinarily used. The Explanatory Notes to the tables stated:

> "4. The tables are based on a reasonable estimate of the future mortality likely to be experienced by average members of the population alive today and are based on projected mortality rates for the United Kingdom as a whole …
>
> 5. The tables do not assume that the claimant dies after a period equating to the expectation of life, but take account of the possibilities that the claimant will live for different periods, e.g. die soon or live to be very old. The mortality assumptions relate to the general population of the United Kingdom. However, unless there is clear evidence in an individual case to support the view that the individual is atypical and will enjoy longer or shorter expectation of life, no further increase or reduction is required for mortality alone."

The tables are based upon a general cohort of the population and are designed to achieve broad justice and bespoke evidence is not permitted unless the claimant is atypical. In *Edwards v Martin*,[2] the claimant had a head injury which the neurologists in the case agreed did not affect life expectancy. Smoking and

[1] Relying on *Arden v Malcom* [2007] EWCA Civ 404; [2007] 1 W.L.R. 2897 and *The Royal Victoria Infirmary v B (A Child)* [2002] EWCA Civ 348; [2002] P.I.Q.R. Q10.

[2] *Edwards v Martin* [2010] EWHC 570 (QB).

a history of depressive illness were not enough, in that case, to make the claimant "atypical and will enjoy a longer or shorter expectation of life".

Here, there was some difference in the medical position as the claimant's expert did not rule out any reduction at all and in the event of epilepsy, she would have a significantly reduced life expectancy. That opinion should be expanded and clarified via a supplemental report and Pt 35 questions.

The defendant chose not to do that and obtain their own evidence. There was no discussion with the claimant. CPR 35.1 requires that expert evidence for which permission is sought to rely upon "is reasonably required to resolve the proceedings", which must be considered in light of the overriding objective.

Whilst evidence on life expectancy is needed it was clear that "bespoke" evidence was not as the claimant was not in the atypical category. Life expectancy is a clinical issue and statistical evidence, such as the defendant's expert relies upon is only a starting point to an "inter-disciplinary approach".[3] In *Sarwar*, Lloyd-Jones J said that statistics were:

> "… no more than a starting point. The court is not engaged in a mechanical exercise and what matters is the clinical judgment of the experts on the facts of this particular case."

Tugendhat J in *Arden* said:

> "In my judgment it is in the spirit of the decision of the Court of Appeal in the Royal Victoria Infirmary case that the clinician experts should be the normal and primary route through which such statistical evidence should be put before the court. It is only if there is disagreement between them on a statistical matter that the evidence of a statistician, such as Professor Strauss, ought normally to be required."

In practical terms, it is cost-effective to ask clinical experts to deal with life expectancy. Use of bespoke life expectancy experts should be limited to cases where the relevant clinical experts cannot offer an opinion at all or state that they require specific input from a life expectancy expert or where they deploy, or wish to deploy statistical material, but disagree on the correct approach to it.

That was not the case here and it would be wrong to characterise the defendant's expert report as a clinical report from a clinical expert as that was not the tenor of the report or the expert's approach to it. Permission refused.

The following propositions were indicated by the judge:

> "(i) Where the claimant's injury has not itself impacted upon life expectancy, permission for this category of evidence will not be given unless the condition in paragraph 5 of the Explanatory Notes is satisfied, namely that there is 'clear evidence … to support the view that the individual is atypical and will enjoy longer or shorter expectation of life'.
>
> (ii) Where the injury has impacted on life expectancy, or where the condition in paragraph 5 of the Explanatory Notes is satisfied, the 'normal or primary route' for life expectancy evidence is the clinical experts.
>
> (iii) The methodology which the experts adopt to assess the claimant's life expectancy is a matter for them.
>
> (iv) Permission for 'bespoke' life expectancy evidence from an expert in that field will not ordinarily be given unless the clinical experts cannot offer an opinion at all, or for reason state that they require specific input from a life expectancy expert, or where they deploy, or wish to deploy statistical material, but disagree on the correct approach to it."

[3] *Edwards v Martin* [2010] EWHC 570 (QB), *Lewis v Royal Shrewsbury Hospital NHS Trust* [2007] 1 WLUK 628 and *Sarwar v Ali* [2007] EWHC 274 (QB) applied.

Case Comment

Personal injury cases frequently involve consideration of the claimant's life expectancy. This may, for example, be to quantify an award for a loss expected to continue for life. It may be to assess the extent of any "lost years". In a fatal accident claim, it may be to consider how long the deceased could otherwise have expected to have lived. Where such issues arise one or both of the parties will often wish to adduce evidence concerning life expectancy. The current case is the second this year where the High Court has had to consider when and how such evidence may be adduced.

Background

The starting point for any consideration of a claimant's life expectancy should usually be a presumption of normal life expectancy. The life multipliers set out in the Ogden Tables are based on projected mortality rates for the UK collated by the Office for National Statistics. As the Explanatory Notes to the Ogden Tables make clear, the mortality assumptions relate to the general population of the UK. There must be a clear reason to find that a claimant is "atypical"—that they are a statistical outlier—if the tables are to be departed from and a different life expectancy applied. The statistical data that underlies the Ogden Tables is drawn from a cohort that includes individuals affected by a variety of medical conditions and leading very different lifestyles. Some will smoke and drink whilst others will may exercise regularly and adopt healthy lifestyles. All are included in the figures.

So when might the presumption of normal life expectancy be rebutted? Clearly, some serious injuries can affect an individual's life expectancy. For example, spinal cord injuries and traumatic brain injuries are well recognised for shortening life expectancy. A claimant may also have a pre-existing medical condition—perhaps cancer or heart disorder—which could affect his or her life expectancy. In such situations, the parties may wish to adduce evidence to show that the claimant has a shorter or longer life expectancy than normal.

Back in 2002, the Court of Appeal confirmed in *Royal Victoria Infirmary v B (A Child)*[4] that both clinical and statistical evidence could potentially be relied upon when asking a court to assess a different life expectancy. Tuckey LJ confirmed that there will be occasions when statistical evidence relating to life expectancy will be admissible:

> "… in an appropriate case it may well provide a useful starting point for the judge … Such evidence, together with medical evidence, should provide a satisfactory inter-disciplinary approach to the resolution of issues of the kind which arose in this case."[5]

Sir Anthony Evans held that statistical evidence could be "both relevant and admissible and the judge must take account of all the evidence, including this, when deciding what assumption he should make as to the future lifespan of the Claimant".[6] He went on to suggest that the courts should primarily be guided by clinicians, but that statistical evidence could play a part.[7]

There have been several subsequent cases in the last two decades where the High Court has considered the approach to life expectancy, and permitted clinical, actuarial and statistical evidence on the issue.[8] So where have we got to now with the courts? When will such evidence be permitted and what is the appropriate evidence to adduce?

[4] *Royal Victoria Infirmary v B (A Child)* [2002] EWCA Civ 348 CA; [2002] P.I.Q.R. Q10.
[5] *Royal Victoria Infirmary v B (A Child)* [2002] EWCA Civ 348 CA at [21].
[6] *Royal Victoria Infirmary v B (A Child)* [2002] EWCA Civ 348 CA at [36].
[7] *Royal Victoria Infirmary v B (A Child)* [2002] EWCA Civ 348 CA at [38].
[8] See, e.g. *Sarwar v Ali* [2007] EWHC 274 (QB), *Burton v Kingsbury* [2007] EWHC 2091 (QB) and *Lewis v Royal Shrewsbury Hospital NHS Trust* [2007] 1 WLUK 628.

Mays v Drive Force (UK) Ltd[9]

In this recent High Court case, Deputy Master Hill QC was required to consider if the defendants should be granted permission to rely upon life expectancy evidence. The case involved a claimant who had suffered a traumatic brain injury but who was also a smoker and suffering from co-morbid conditions that could affect life expectancy. The neurologist instructed by the defendants had indicated that he would defer to expert life expectancy evidence to assess the impact upon life expectancy of those other lifestyle and health factors. The defendants wished to rely upon statistical evidence from Professor Bowen-Jones as a life expectancy expert. He had prepared a report assessing the impact of the claimant's smoking, obesity, hypertension and colitis on his life expectancy. The report concluded that the claimant's life expectancy was reduced by 11 years from the "normal" figure.

The claimant objected to such life expectancy evidence being introduced. They argued that life expectancy evidence is generally treated as a clinical matter, and that separate statistical evidence is normally reserved for cases in which the clinical experts interpret the data in a fundamentally different way. Matters such as smoking and mild hypertension, it was pointed out, are common conditions. The claimant argued that to permit such evidence was effectively opening the door to a bespoke life expectancy assessment in nearly every case.

Deputy Master Hill QC was satisfied that the case law made clear that, in an appropriate case, the court should consider whether factors other than the index event have impacted on the claimant's life expectancy. Further, he also felt that the court is likely to be assisted by expert evidence in that regard. He noted several previous instances where the courts had considered that statistical evidence on such issues would be useful. He decided that, given the number of potential co-morbid factors in issue, and given that the neurologists had felt unable to address them all, it appropriate to allow Professor Bowen-Jones' statistical evidence alongside the evidence given by the clinicians.

Dodds v Arif[10]

A few months after the *Mays* decision, a similar issue came before Master Davison in *Dodds*. Interestingly, this also involved a defendant seeking permission to rely upon statistical life expectancy evidence from Professor Bowen-Jones. It also involved a claimant who had suffered a brain injury where co-morbid medical issues (high blood pressure and raised cholesterol) were potentially relevant to life expectancy. A neurologist had provided a report giving a clinical view on the impact of the brain injury on life expectancy. But the defendants wanted to adduce this further life expectancy evidence to assess the combined effect on life expectancy of both the co-morbidities and the injury from the material accident. On this occasion their request was refused.

In *Dodds*, Master Cook has helpfully pulled together various strands from the caselaw to provide a coherent framework to determine when evidence can be adduced on life expectancy and by whom:

- Evidence can be adduced to deal with the impact of a claimant's injury on their life expectancy, but such evidence should be given by a clinical expert in that field.
- Evidence can also be given to consider life expectancy where the claimant is "atypical" due to some co-morbid or pre-existing health issue or other lifestyle factor, but again such evidence should generally be given by a relevant clinical expert. So if, for example, the claimant was suffering from kidney failure prior to an accident then one would want a nephrologist to consider how such a condition may have affected their life expectancy.
- The methodology that the experts adopt to assess life expectancy is a matter for them.

[9] *Mays v Drive Force (UK) Ltd* [2019] EWHC 5 (QB).
[10] *Dodds v Arif* [2019] EWHC 1512 (QB).

- It should only be where the clinical experts cannot offer an opinion, or feel that they need specific input from a life expectancy expert, or where there is disagreement between clinical experts over the correct approach to statistical material, that "bespoke" life expectancy evidence will be permitted.

It is likely that this approach will now restrict the frequency with which bespoke life expectancy reports will be permitted, although no doubt lawyers representing defendants will be pressing the clinical experts to confirm whether they consider that additional expert life expectancy evidence is indicated.

What next?

If evidence can be adduced to consider life expectancy where a claimant is "atypical", much focus will now shift to the scope of this term. Take for example diabetes. It has been estimated that 6% of the UK population suffer from this condition. Does diabetes make you "atypical" even though some four million people suffer from the condition? And what about obesity? Over 60% of adults in the UK are considered to be overweight or obese. How overweight must a claimant be before they could be considered "atypical"?

Many people drink, or smoke, or suffer from common health conditions such a high blood pressure. Each in themselves would not be sufficient to make you a statistical outlier, but what if you have a number of these health and lifestyle issues. How many co-morbidities do you need to make you atypical?

It must also be acknowledged that being "atypical" is not always a matter of reduced life expectancy. At the other end of the spectrum there must be those who, for reasons of lifestyle, genetics or good fortune, can expect to live a much longer life than normal. Examples of life expectancy being extended for a claimant are few and far between in the caselaw (and in practice), but if the issue is being dealt with even-handedly then there should be as many instances of atypical claimants being recognised as having an unusually long life expectancy as there are where it is appropriate to reduce it. This poses the question as to what factors are sufficient to characterise a claimant as someone with an atypically lengthy expectation of life?

It is likely that at some stage in the future the courts will be required to consider some or all of these issues.

Practice points

- In any case where life expectancy is relevant, the starting point should be a presumption of a normal life expectancy. It is only where the injury reduces life expectancy or the individual is otherwise "atypical" that evidence to assess the individual's life expectancy is required.
- Where such evidence is required, this should as a general rule be obtained from a clinical expert in the field relevant to the condition that is affecting life expectancy.
- Bespoke life expectancy evidence relying upon actuarial or statistical data should only be permitted in limited circumstances where the clinical experts consider it necessary or are in dispute over the data.
- Life expectancy should not be one-way traffic as it can go up as well as down. There should in theory be as many instances of life expectancy being increased for atypical individuals as there are of it being reduced.

Richard Geraghty

Wright v (1) Troy Lucas & Co (2) Rusz

(QBD; Judge Eady QC; 15 March 2019; [2019] EWHC 1098 (QB))

Duty of care—legal advice and funding—legal advisers—loss of chance—McKenzie Friends—professional negligence—unqualified persons—loss of a chance damages

LT Duty of care; Legal advice and funding; Loss of chance; McKenzie friends; Personal injury; Professional negligence; Unqualified persons

The claimant made, what might be termed a quasi-professional negligence claim, against an unqualified legal adviser, Mr George Rusz, who was trading as Troy Lucas & Co.

The claimant had been left with foreign bodies inside his stomach following an operation that had been negligently performed by a hospital. Consequently, the claimant engaged the defendant to help him with the conduct of a clinical negligence claim.

The defendant sent a letter to the claimant offering to provide legal services for £150 an hour, rising to £250 an hour if any compensation received exceeded £250,000. The defendant had used headed paper stating that the firm was regulated by the Ministry of Justice and the Solicitors Regulation Authority, giving the impression that it was a law firm with several members of staff, which the defendant later contended had been a printing error.

The defendant subsequently provided legal advice to the claimant including litigation strategy, drafting court documents, instructing an expert witness, conducting settlement negotiations with the trust, and ghost writing letters on behalf on his behalf.

The defendant drafted particulars of claim seeking £1.1 million, which he later amended to £3 million, but did not provide any evidence to support the sums. The defendant suggested to the claimant that the hospital would be more likely if he were to draft menacing witness statements.

Based on a lack of evidence to support large parts of the claim, the trust successfully applied for the majority of the clinical negligence claim to be struck out but did admit liability on a limited basis and agreed to settle that claim for damages of £20,000.

Due to the way the claimant's claim had been conducted, the court ordered the claimant to pay £75,000 towards the costs of the trust.

The claimant then brought a claim against the defendant.

The defendant was an unreliable witness who had given contradictory evidence to the court.

The headed note paper gave the misleading impression that the firm was regulated and comprised several people, when that was not so.

The defendant had entered into a contract that went beyond being a McKenzie Friend, rather the defendant had agreed to provide the claimant with legal services in the conduct of litigation which he was not authorised to provide. The defendant had not advised the claimant of any problems that could arise from their terms of engagement, given him proper advice about insurance and funding arrangements or advised him of his own limited ability to act.

There was no dispute that the claimant had an arguable case against the trust, arising from inappropriate treatment that left him with foreign bodies inside his body. The defendant took on the role of legal adviser to the claimant in the conduct of his case against the trust which included drafting particulars of claim seeking sums unsupported by evidence and making misconceived applications.

The defendant accepted that he had held himself out as having the skills and expertise of a competent legal professional and he owed the claimant a duty of care to provide the services to the appropriate standard. That duty of care obliged him to ensure the claimant was advised properly, but there was little evidence that he had done so. Some of the defendant's advice had been positively harmful to the claimant.

The defendant had been negligent and acted in breach of his duty of care, at the very least he had been out of his depth.

As a result of the defendant's negligence, the claimant had lost the chance of settling his claim against the trust on more favourable terms. Had the claimant been given competent legal advice he would have had evidence to support his wider claim against the trust. In that situation, it was likely the claimant would have recovered damages of around £300,000.

The claimant did bear some responsibility for the conduct of the case, so damages payable by the defendant were reduced by 35% and the defendant, accordingly, ordered to pay the claimant £263,759 in damages.

Judgment was entered accordingly for the claimant.

Comment

Introduction

The judgment in this professional negligence claim usefully reviews a number of issues likely to arise when dealing with such claims including: setting the relevant standard of care; how limitation should be approached when there is scope for argument about when the cause of action accrued; the role of causation in professional negligence claims; the assessment of quantum; and duties in relation to ADR.

The judgment also, perhaps more importantly, provides a salutary warning about the risks of deregulating the provision of legal services and the reasons why good quality representation is essential for claimants in clinical negligence claims, both to ensure access to justice and to help uphold the rule of law.

These key issues can be considered in turn before drawing some themes together and identifying relevant practice points.

Duty

The well-established test on the standard of duty in the context of professional services is, of course, that found in *Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R. 582.

The broad test can be refined to reflect a particular specialism of the professional concerned and, for these purposes, much will depend on the expertise that person professes to have.

Furthermore, the duty will generally reflect an objective standard, for the reasons explained by Jackson LJ in *FB v Princess Alexandra Hospital NHS Trust* [2017] EWCA Civ 334 when he said:

> "The issue arising in this case is part of a wider problem with which the courts have wrestled for over a century, namely to what extent are the personal attributes and experience of the defendant relevant in determining whether he/she was negligent? The general rule is that the courts disregard them."

Whilst the nature of the duty owed by someone who only acts within the scope of the usual role adopted by a McKenzie Friend will be influenced by the nature of that role anyone purporting to act, in the usual way, as a professional legal representative can expect to have the appropriate, objective, duty of care applied by the court and consequent findings of breach made where applicable.

Limitation

In professional negligence claims the breach of duty may sometimes have occurred on a specific date but will often have occurred over a period of time, in particular there may be an interval between the breach of duty which later leads to loss and the time at which that loss can properly be said to have occurred.

Here the judge explained:

> "In my judgement, the first time it might be said that the claimant would have been put on notice that the defendants' conduct in his case was negligent was when the Trust made its application to strike-out parts of his claim in February 2011. If the cause of action is seen to have accrued only when the claimant's loss crystallised (adopting the approach laid down in Hopkins v MacKenzie [1995] PIQR 43 CA), then that would then have been with Master Yoxall's order of 17 June 2011. If, however, the cause of action is seen to have accrued at the time when the claim became significantly vulnerable to being struck-out (following, instead, the approach in Khan v Falvey [2002] EWCA Civ 400), then the limitation period could be said to run from the Trust's application of 8 February 2011. On either approach, however, the claim is not statute-barred."

Quantum

Whilst the approach taken to valuing and quantifying the initial claim by the defendants was particularly egregious it is important for advisors to understand what claims can properly be made whilst, at the same time, advancing all claims that are properly arguable. This can be a difficult balance to strike.

The defendants formulated a claim on behalf of the claimant including items for which the judge found there was simply no evidential foundation. The explanation for this was summarised by the judge when she said:

> "45. … I find the truth is, as the second defendant volunteered in evidence, that he and the claimant used the book the second defendant referred to as something like a catalogue from which potential heads of claim could be derived."

This approach to quantum was also reflected in the advice given by the defendants to the claimant regarding negotiations again recorded by the judge when she said:

> "47. …when an offer was made for payment of £5,000 in June 2009 the defendants' response was to suggest the Trust solicitors, "add quite a few zeros at the end of the sum"."

ADR

More generally the approach taken by the defendants towards ADR simply failed to accord with the standard to be expected in modern legal practice.

Parties should be advised about ADR, both in general terms and in relation to the specific consequences of Part 36 offers. Only then can an informed decision be made about when, how and in what terms a party wishes to engage in ADR. In this case the relevant advice given by the defendants to the claimant seems to be just that referred to by the judge when she said:

> "48. To the extent that it is possible to see any advice to the claimant on the question of settlement, there is a copy of a letter faxed to him on 9 April 2010 in which the second defendant refers to the need to finalise witness statements for later that month, observing, 'if our statements are menacing enough they have no other options but to try and settle the claim. If they don't attempt a settlement the trial judge will criticise them and probably make them pay extra damages'. Otherwise, there seems to have been no consideration of potential settlement terms until May 2011 when the defendants

made what was said to have been a Part 36 offer to settle the claimant's claim for £1½ million plus costs."

Advisors should, subsequently, seek specific instructions on any offers which are to be made as, again, the judge recognised when she said:

"52. What is clear, however, is that before making this offer the defendants had not fully discussed this with the claimant. The second defendant has said that the claimant had himself identified this as the lowest sum for which he would settle. If that is right - and I accept that claimants can have over-inflated ideas as to the real value of their claims - then it can only have represented an ill-advised view of the case. In any event, whatever figures the claimant may have mentioned, the second defendant has not suggested that he advised the claimant of the implications of making such an offer to the Trust."

It is also good practice to record in writing any offers exchanged, in the event an issue later arises as to the terms of any offers made as well as, of course, taking proper instructions upon such offers after giving appropriate advice. Yet again the judge recorded the failings in this respect when she observed:

"53. Before turning to the Trust's strike-out application, I should deal with one further part of the evidence relating to a possible settlement of the underlying claim. It is the defendants' case that in mid-May 2010 the Trust's solicitor telephoned the second defendant and said she had been instructed to settle the claim but could not go beyond £570,000. The second defendant says he responded, 'can we call it £570,000?' and, when this was confirmed, he said he would put it to his client. It is the defendants' case that this offer was made by the experienced solicitor for the Trust without any additional terms, for example, as to how costs would be dealt with, or as to the time period for acceptance. The second defendant says he then put this to the claimant who, 'was furious. He said I am not taking less than £1½ million'. On that basis, the second defendant says he never went back to the Trust's solicitor on this offer, not even to see whether it might still be open when it became apparent that questions were being raised as to the bona fides of the claimant's claim.

54. I am satisfied that the defendants' account in this regard is simply untrue. It is inconceivable that an experienced solicitor would have made an offer in the terms suggested. First, in relation to the amount suggested, there would have been no basis for an offer in that sum at that stage of the litigation. Even if I am wrong about that, however, and the Trust had considered that such a sum should be offered, it is entirely inconsistent with the way in which its solicitor conducted the litigation to suggest she would simply make that offer over the telephone with no subsequent confirmation in correspondence. The previous offer made by the Trust in June 2009 had, in contrast, been carefully set out in writing, clearly breaking down how it had been calculated and making plain that it was time-limited. I have no hesitation in finding that no offer to settle at £570,000 was ever made. The second defendant's testimony to me in this respect was simply false."

Recording all such advice, and any instructions received, in writing is, once again, prudent.

Loss of Chance

Once the judge had found a causative breach of duty, and hence that liability had been established, it was necessary for the court to assess quantum by trying to reflect the value of what the claimant had lost.

The proper approach to assessing damages in these circumstances has recently been considered by the Supreme Court in *Perry v Raleys Solicitors* [2019] UKSC 5.

The judge accepted that the claimant's chance of securing a more favourable outcome in the original claim, but for the defendant's breach of duty, was real, not speculative, and that he had lost something of value.

The judge applied the approach of Lord Briggs in Perry who had explained:

> "For present purposes the courts have developed a clear and common-sense dividing line between those matters which the client must prove, and those which may better be assessed upon the basis of the evaluation of a lost chance. To the extent (if at all) that the question of the client would have been better off depends on what the client would have done upon receipt of competent advice, this must be proved by the claimant upon the balance of probabilities. To the extent that the supposed beneficial outcome depends upon what others would have done, this depends upon a loss of chance evaluation."

In Perry the claim ultimately failed on the basis that the breach of duty only caused the claimant in that case to lose the opportunity of brining a claim which would have been dishonest. The judgment in this case illustrates that where the position is not so clear cut the claimant's own conduct is simply a factor to take into account when evaluating the value of the lost chance, the judge explaining:

> "93. … ultimately, I find that (i) he would have been prone to exaggeration but would not have been fundamentally dishonest in his claim; (ii) he would have provided information relevant to his claims; and (iii) following competent legal advice, he would not have advanced/would have withdrawn claims for which there was no proper evidential foundation. Thus, although I consider it more likely than not, that a court would have found the claimant was not an entirely reliable witness in respect of his impairments, in my judgement, that would not have been fatal to his case. Specifically, I consider that a reasonably competent advisor would have ensured that the heads of loss and the claim for special damages were supported by documentary and/or expert evidence."

On this basis the judge applied a 35% deduction to reflect chances.

Professional Standards

This case illustrates how important it is that litigation is conducted by those who not only have the requisite skill and experience but also adhere to proper professional standards.

It is, moreover, important that all litigants, particularly those who may not be familiar with the legal system, have proper access to quality representation and have ways of identifying where that can be obtained.

A central tenet of the rule of law is that the law applies equally to all. That is reflected by the terms of the overriding objective which, amongst other matters, aims to put the parties on an equal footing. In many types of litigation, particularly personal injury and clinical negligence claims, there is an almost inevitable risk of disparity between the parties. Defendants, as multiple users of the legal system, will know how to secure effective legal representation, whilst claimants, often individuals and one-time users, may, without adequate safeguards, experience the very problems faced by the claimant in this case.

This inevitably comes at a cost, here to an unsuccessful party in litigation, but it is surely a proper price to pay in a society which puts so much value on the rule of law, at least if that is to mean something more than empty rhetoric.

Part of this process is proper regulation of those conducting litigation and also fair, transparent and visible recognition of those with relevant experience. The danger, otherwise, is that the inexperienced may be persuaded by no more than hubris, exemplified by the observations made by the trial judge of the defendants when she said:

> "18. …I am satisfied that the headed paper was intended to mislead recipients into thinking that the defendants had some professional legal qualification (they did not) and were more than one man (they were not). That, in turn, assists me in deciding who to believe in terms of the impression given to the claimant when he first met the second defendant. Although I would accept that the second defendant was careful not to state that he actually was a solicitor, I also accept the claimant's evidence that he was given the impression that the second defendant was an experienced legal professional who said he had extensive experience of 'these types of claims' and was 'as good as, if not better, than any solicitor or barrister' and suggested there were other lawyers connected to the first defendant who were similarly very experienced."

It is, of course, also important that those providing legal services, as well as being regulated, have adequate insurance cover in place, should things go wrong, but in the absence of appropriate regulations such cover may not have been taken out.

Practice points

A number of practice points can, therefore, be drawn from this judgment.

- The standard of any duty of care will generally reflect an objective test and, in part, be influenced by any skill or expertise the defendant professes to have (even if not having such skill or expertise).
- Care is required when identifying the commencement of the limitation period in professional negligence claims.
- When formulating the case on quantum it is appropriate to include claims that are properly arguable but not those without any evidential foundation.
- The claimant should be advised carefully and comprehensively in relation to ADR.
- When assessing issues in the "counter-factual" world the court will adopt a loss of chance rather than balance of probability approach. John McQuater

John McQuater

Case and Comment: Procedure

JLE v Warrington and Halton Hospitals NHS Foundation Trust

(QBD; Stewart J; 24 June 2019; [2019] EWHC 1582 (QB))

Part 36—interest—unjust—additional amount—CPR 36.17(4)

LT Costs orders; Part 36 offers; Personal injury; Proportionality

The claimant brought a clinical negligence claim against the defendant.

The defendant was ordered to pay the claimant's costs and an issue arose, in detailed assessment proceedings, about the consequences of a Pt 36 offer made by the claimant.

Following the order that the defendant pay the claimant's costs, the claimant had served a bill claiming costs which totalled £615,751.51.

On 21 June 2018, the claimant made a Pt 36 offer, on costs, of £425,000. The relevant period in that offer expired on 13 July 2018.

The detailed assessment commenced on 16 July 2018. The claimant's costs were assessed at £421,089.16 which with interest of £10,723.89, gave a total of £431,813.05.

The claimant, accordingly, beat the claimant's own Pt 36 offer, allowing for interest, by about £7,000.

The claimant sought the consequences provided for under Part 36.17(4) sub-paras (a), (b) and (c).

Subsequently, but before an agreed order was sealed by the court, the claimant invited the court to award the 10% additional amount provided for by Pt 36.17(4)(d). This issue was determined by the court at a further hearing.

The claimant contended that the court did not have the power to order some, but not all, of the consequences set out in Pt 36.17(4). This was on the basis that if the court did not find the consequences to be "unjust" that was a gateway which triggered all of the consequences provided for under Pt 36.17(4).

The defendant contended that the court should consider whether it was "unjust" to make an order on an individual basis for each of the consequences provided for in the sub-paras to Pt 36.17(4).

Master McCloud noted some of the decisions cited were from courts of co-ordinate jurisdiction whilst other decisions were made by the Court of Appeal observing of the former they:

> "… were first instance decisions of judges of coordinate jurisdiction to me and would be treated as binding on the basis of comity rather than precedent, unless I am satisfied they are wrong (see the well-established principles in cases such as *Coral Reef Ltd v Silverbond Enterprises Ltd* [2016] EWHC 874 (Ch) and various others as to the difference between precedent and comity to the effect that as between judges of coordinate jurisdiction (HCJ sitting as first instance judge, and Master, for example, or Circuit Judge and District Judge when both sit at first instance, the doctrine of strict precedent does not apply)."

Master McCloud stated that:

> "In my judgment it is only where the cost penalty created by the 10% rule would be clearly disproportionate that one would incline to exercise the discretion to waive it."

Master McCloud turned to the factors identified in Pt 36.17(5) before concluding:

> "Taken together in my mind the most significant factors are (1) the very small margin by which the offer was beaten relative to the much greater size of the bill (2) the fact that where a bill is reduced (and seems to have been expected to be reduced) significantly, it will on the whole generally be very difficult for a party to know precisely or even approximately to within a few percent, where to pitch an offer such that even a competent costs lawyer would operate close to chance level as to whether an offer is likely to be 'over' or 'under' at the end of the hearing, and (3) the large size of the 10% 'bonus' award relative to the margin by which the offer was beaten."

On this basis, Master McCloud held that:

> "In all the circumstances in my judgment the 'bonus' of 10% in this case would be a clearly disproportionate sum and it would be unjust to award it. That is also the case when one looks at the overall effect in the round of what would be the cumulative penalties in sub-rules (a)-(c) added to (d)."

Master McCloud concluded by stating:

> "To summarise my judgment: consistent with examples cited to me from both appeal courts and courts of coordinate jurisdiction with myself, I hold that the court should apply the test of 'injustice' separately for each part of rule 36.17(4) as well as in the round, as was the approach in *Ayton*, and that where one is considering the 10% 'bonus' under sub-rule (4)(d) it is appropriate to disallow that sum if in all the circumstances the level of bonus is clearly disproportionate relative to the margin by which the offer was beaten, especially where a bill has been significantly reduced on assessment and where the margin by which the offer is beaten is small. There may well of course be other circumstances where one would disapply the sub rule but on the facts of this case I have concluded that this is a case where the award of the 10% figure would be disproportionate."

The claimant appealed.

The claimant's first ground of appeal was that there was a single test of injustice so that all or none of the normal consequences in Pt 36.17(4) would apply.

Stewart J indicated that in the absence of authority when the rule did not make clear the exception of injustice had to be applied in every case across the board, there was a jurisdiction to rule that it was unjust to award some, but not necessarily all, of the consequences set out in Pt 36.17(4), though Stewart J went on to observe:

> "23. …(iv) That said, it would perhaps be an unusual case where the circumstances of the case, including those particularised in sub paragraph (5), yield a different result for only some of the orders envisaged in sub paragraph (4)."

After reviewing the authorities Stewart J concluded there was nothing which caused him to depart from his preliminary view that the test of what is "unjust" should be applied separately for each of the sub-paragraphs in Pt 36.17(4).

The claimant's second of appeal was that the Master was wrong to conclude it would be unjust for the claimant to receive an additional amount under Pt 36.17(4)(d), as a correct approach to the test of injustice would yield the same result for each sub-paragraph save for the most exceptional of cases (which this case was not).

In *Smith v Trafford Housing Trust*,[1] Briggs J considered what would be "unjust" for the purposes of Pt 36 and concluded that showing injustice was a "formidable obstacle", that approach being approved by the Court of Appeal in *Webb v Liverpool Women's NHS Foundation Trust*.[2]

[1] *Smith v Trafford Housing Trust* [2012] EWHC 3320 (Ch); (2012) 156(46) S.J.L.B. 31.
[2] *Webb v Liverpool Women's NHS Foundation Trust* [2016] EWCA Civ 365; [2016] 1 W.L.R. 3899.

A factor taken into account by the Master was that the claimant's offer was only beaten by a small margin relative to the size of the bill. Stewart J considered this reflected an error of principle by the Master.

The Master also took into account the significant reduction of the claimant's bill on assessment, but that failed to reflect the judgment of Slade J in *Cashman v Mid Essex Hospital Services NHS Trust*.[3]

In these circumstances, the Master erred in principle and, even if there had been no such error, exceeded the very generous ambit of discretion an appeal court should afford.

The Master was also wrong to have regard to the large size of the 10% "bonus" relative to the margin by which the offer was beaten.

Comment

It may be felt that Pt 36 has become an unnecessarily complicated rule. In this journal alone, it has produced 11 articles on its complications and judicial interpretation. Many practitioners, when asked to name a relevant authority on the rule, will readily recall *Huck v Robson*[4] and its mantra of always applying the costs sanctions under the rule "unjust to do so". This is a phrase now embedded in the rule. And, as here, that has become the battleground for so many cases, presumably because the penalty can be very high and often an unpleasant surprise for the paying party. In this case, the claimant had beaten the defendant's offer by £7000 on a bill of £615,000 leading to an additional award of nearly £45,000.

It is CPR 47.20(4) that allows parties to make Pt 36 offers in a detailed assessment and not just on the substantive part of the case. CPR 36.17(4) provides that where a Pt 36 offer is beaten:

> "… the court must, unless it considers it unjust to do so, order that the claimant is entitled to—
>
> (a) interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;
>
> (b) costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;
>
> (c) interest on those costs at a rate not exceeding 10% above base rate; and
>
> (d) provided that the case has been decided and there has not been a previous order under this sub-paragraph, an additional amount, which shall not exceed £75,000, calculated by applying the prescribed percentage set out below to an amount which is—
>
> (i) the sum awarded to the claimant by the court; or
>
> (ii) where there is no monetary award, the sum awarded to the claimant by the court in respect of costs—

Amount awarded by the court	Prescribed percentage
Up to £500,000	10% of the amount awarded
Above £500,000	10% of the first £500,000 and (subject to the limit of £75,000) 5% of any amount above that figure."

The Civil Procedure Rules gives guidance on when it may be unjust to apply the sanction:

> "(5) In considering whether it would be unjust to make the orders referred to in paragraphs (3) and (4), the court must take into account all the circumstances of the case including—
>
> (a) the terms of any Part 36 offer;

[3] *Cashman v Mid Essex Hospital Services NHS Trust* [2015] EWHC 1312 (QB); [2015] 3 Costs L.O. 411.
[4] *Huck v Robson* [2002] EWCA Civ 398; [2003] 1 W.L.R. 1340.

(b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;
(c) the information available to the parties at the time when the Part 36 offer was made;
(d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and
(e) whether the offer was a genuine attempt to settle the proceedings.

(6) Where the court awards interest under this rule and also awards interest on the same sum and for the same period under any other power, the total rate of interest must not exceed 10% above base rate …"

The Master at the costs hearing had interpreted this rule in this case to mean she should not apply the penalty:

"40. Taken together in my mind the most significant factors are (1) the very small margin by which the offer was beaten relative to the much greater size of the bill (2) the fact that where a bill is reduced (and seems to have been expected to be reduced) significantly, it will on the whole generally be very difficult for a party to know precisely or even approximately to within a few percent, where to pitch an offer such that even a competent costs lawyer would operate close to chance level as to whether an offer is likely to be 'over' or 'under' at the end of the hearing, and (3) the large size of the 10% 'bonus' award relative to the margin by which the offer was beaten.

41. In all the circumstances in my judgment the 'bonus' of 10% in this case would be a clearly disproportionate sum and it would be unjust to award it. That is also the case when one looks at the overall effect in the round of what would be the cumulative penalties in sub-rules (a)-(c) added to (d)."

Perhaps the other case on Pt 36 that practitioners remember is *Carver v BAA*.[5] In a personal injury case, the claimant beat the payment into court by only £51 after adjustments for interest. The judge declined to award the Pt 36 penalties based on the rule then in force. In the Court of Appeal, it was held that the words "more advantageous" then permitted "a more wide ranging review of all the facts and circumstances of the case" as in non-money claims. However, as the judge here remarked, Jackson LJ's "Review of Civil Litigation Costs: Final Report" criticised this judgment:

"2.9 **Conclusion**

I confirm my provisional view expressed in the Preliminary Report that *Carver [v BAA]* introduces an unwelcome degree of uncertainty into the Part 36 regime and also that it tends to depress the level of settlements. I recommend that the effect of *Carver* should be reversed either judicially … or by rule change. It should be made clear that in any purely monetary case 'more advantageous' in rule 36.14(1)(a) means better in financial terms by any amount, however small."[6]

Thus it was that this judge decided it was not open to judges to exercise discretion where a Pt 36 offer has been beaten as this would be to bring back the *Carver* era and the unfair effect which the current rule had removed.

Although it was a ground of appeal that the Master had regard to the small margin by which the offer was beaten relative to the greater size of the bill the court acknowledged:

[5] *Carver v BAA* [2008] EWCA Civ 412; [2009] 1 W.L.R. 113.
[6] Jackson LJ, "Review of Civil Litigation Costs: Final Report", para.42.

> "40. This was described by the Master at [30] as not 'a very material factor'. Nevertheless, she considered that the proportionality of the costs penalty must be applied separately for each of the sub rules in 36.17(4).
>
> 41. The Master referred [30] to the definition of 'more advantageous' in Rule 36.17(2). In fact the provision which governed this case was 36.17(1)(b). In any event, it is important to recall that that sub rule emphasises that better in money terms means 'better in money terms by any amount, however small, and "at least advantageous" shall be construed accordingly'. By 36.17(1)(b) if, in accordance with this definition, judgment against the paying party is at least as advantageous to the receiving party as the proposals contained in the Claimant's Part 36 Offer, then the consequences set out in 36.17(4) must be applied unless the Court 'considers it unjust to do so'.
>
> 44. In describing at [40] the very small margin by which the offer was beaten relative to the much greater size of the bill as a significant factor, the Master erred in principle. Given the points I have mentioned above, it is not open to judges to take into account in the exercise of the discretion the amount by which a Part 36 Offer has been beaten. To do so risks re-introducing *Carver* and the adverse consequences which it brought in its wake, and which the Rule Committee reversed on the recommendation of Jackson LJ."

Further, it was determined that the Master had erred in principle by finding that there was some difficulty in assessing the bill of costs due to the level of reduction applied to the bill at assessment. Rightly the judge reminded the parties of the other venue for Pt 36 offers, namely damages. He acknowledged that frequently one made Pt 36 offers by taking a view of the available circumstances absent full disclosure of the other party's case.

It was argued by the defendant that there was a lack of proportionality between the large size of the 10% "bonus" and the margin by which the offer was beaten. The judge, however, held that the additional award should not be treated as a "bonus" and it was in fact meant to be compensatory. There should be some penalty to the paying party when the claimant has made an adequate offer. Again, the judge cited the Jackson report in this regard.

So does this decision mean the court is bound to apply the full 10% in every case where the receiving party beats the paying party's Pt 36 offer? No, but then it never did:

> "…There may possibly be circumstances where a high bill much reduced on assessment is a valid reason for refusing to make an additional award. Slade J gave an example. Nevertheless, it must always be remembered from *Smith* that the burden on the claimant to show injustice is a formidable obstacle to the obtaining of a different order."[7]

In Slade J's judgment in *Cashman*,[8] he had dealt with a gross bill of £262,000 assessed down to £173,693 but against a receiving party's offer of £152,500 which should have triggered an additional amount of £17,000. In his deliberations the judge had acknowledged that inflated costs may, depending on their impact, lead to a situation in which it was indeed unjust to award the additional amount:

> "In circumstances in which the inflated level of costs claimed leads the Defendant to incur expense in investigating the claim before the Part 36 offer was made it may be unjust to make such an award. There was no finding of that nature by the Master in the present case." [18]

Nevertheless what this judgment, like *Cashman* tells us is that the burden for proving the award would be unjust will switch to the paying party but they are going to need clear and cogent evidence of unfairness to persuade a court not to apply the more usual additional amount.

[7] Jackson LJ, "Review of Civil Litigation Costs: Final Report", para.50.
[8] Jackson LJ, "Review of Civil Litigation Costs: Final Report".

It may be, of course, that this may encourage a paying party into taking an alternative path, that of arguing for a lesser sum to be awarded than the 10%. In an obiter passage, the judge considered several other decisions around this point along again with the Jackson report. He concluded:

> "In short, if I had to, I would find that the 10% in subparagraph (d) is all or nothing. It must be awarded in full unless it is unjust to do so. However, for the reasons given, it does not arise on this appeal."

One strong ground for this attitude was to discourage the inevitable satellite litigation that would arise from the extent of an award each case. Part 36 in costs as well as damages has tried to move towards much greater certainty for the parties in its various applications. This must be welcomed.

Practice points

- The receiving party before signing any bill should carefully consider not only its accuracy but also its defensibility, including but not limited to proportionality.
- Both parties should give consideration as early as possible to suitable Pt 36 offers.
- Faced with not beating a receiving party's Pt 36 offer the paying party will need to be able to demonstrate detailed reasons supported by evidence to persuade a court why it was unjust to award the additional amount.
- The hurdle for a successful challenge is a high one.

Mark Harvey

Cape Intermediate Holdings Ltd v Dring

(SC; Lady Hale PSC, Lord Briggs JSC, Lady Arden JSC, Lord Kitchin JSC, Lord Sales JSC; 29 July 2019; [2019] UKSC 38)

Administration of justice—civil procedure—CPR—access—court records—non-parties—open justice—trial bundles

Access; Court records; Non-parties; Open justice

The appellant appealed against the Court of Appeal's decision that the respondent should have access under Pt 5.4C to records of the court in relation to proceedings in which the appellant had been a party and the respondent had been a non-party.

The respondent cross-appealed on the basis that the court had wrongly limited the scope of Pt 5.4C.

Those proceedings had concerned the appellant's alleged negligence in its manufacture of asbestos. They were settled between the trial and the delivery of judgment.

The respondent represented an association supporting people suffering from asbestos-related diseases. It applied under Pt 5.4C for copies of all documents used at or disclosed for the trial, including the trial bundles and the trial transcripts, believing that the documents would contain information about the asbestos industry's knowledge of the dangers of asbestos.

Master McCloud held that there was jurisdiction to make an order under either Pt 5.4C(2) or the common law to grant access to all the material sought.

The Court of Appeal set aside that order, holding that the jurisdiction under r.5.4C was more limited, but that the court had an inherent jurisdiction under which further documents could be obtained.

Consequently, the Court of appeal ordered the appellant to provide the respondent with all statements of case, witness statements, expert reports and written submissions, and that the application be listed before a High Court judge to decide whether any other document sought should be provided.

The Supreme Court dealt with the terms of Pt 5.4C, and open justice before applying those principles to the facts of the case.

Part 5.4C

There were certain documents to which a non-party had a right of access under Pt 5.4C.

The copy was to be obtained "from the records of the court", but the CPR did not define those records or set out what they were to contain.

The "records of the court" had to refer to those documents and records which the court kept for its own purposes. However, current practice as to what was kept in the records of the court could not determine the scope of the court's power to order access to case materials in particular cases. The purposes for which records were kept were completely different from the purposes for which non-parties could be given access.

Open justice

Unless inconsistent with statute or rules of court, all courts and tribunals had an inherent jurisdiction to determine what the principle of open justice required in terms of access to documents or information placed before the court. The default position was that the public should be allowed access, not only to the parties' written submissions and arguments, but also to the documents which had been placed before the court and referred to during the hearing, see *R. (on the application of Guardian News and Media Ltd) v City of Westminster Magistrates' Court*.[1]

However, although the court had the power to allow access, an applicant had no right to be granted it, save to the extent that the rules granted such a right. It was for the applicant to explain why they sought access and how granting access would advance the open justice principle. The court had to carry out a fact-specific balancing exercise. On one hand would be the purpose of the open justice principle and the potential value of the information in advancing that purpose, and on the other, would be any risk of harm disclosure would cause to an effective judicial process or the legitimate interests of others, see *Kennedy v Information Commissioner*[2] and *BBC, Re*.[3]

Also relevant would be the practicalities and the proportionality of granting the request. It was highly desirable that the application was made during the trial. The applicant would be expected to pay the reasonable costs of access. Trial bundles, as compilations of copies of the relevant materials, were not the evidence or the documents in the case. Disclosure of a bundle marked up by someone involved in the case could not be ordered without the consent of the person holding it.

Application

The Court of Appeal did have the jurisdiction to make the order that it had, and to make a wider order if it had been right to do so. However, the basis of making any wider order was the inherent jurisdiction in support of open justice, not Pt.5.4C.

[1] *R. (on the application of Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420; [2013] Q.B. 618.
[2] *Kennedy v Information Commissioner* [2014] UKSC 20; [2015] A.C. 455.
[3] *BBC, Re* [2014] UKSC 25; [2015] A.C. 588.

The Court of Appeal had taken a narrower view, both of the jurisdiction and the applicable principles. However, the appellant had argued its case on a narrow view of the court's jurisdiction. There was no realistic possibility of the judge making a more limited order than the Court of Appeal had.

The order that the court should provide the respondent with documents pursuant to the Pt.5.4C(1) right of access, and that the appellant should provide the respondent with copies of witness statements, expert reports and submissions, would stand.

The order that the matter be listed before a judge to determine whether any other document sought should be provided would be replaced by an order that the court determine whether the appellant should be required to provide a copy of any other document placed before the judge and referred to in the course of trial.

The appeal was dismissed and the cross-appeal allowed.

Comment

Although this will never be regarded as Lady Hale's most famous judgment, her unanimous judgment in *Cape* cements "open justice" as the overarching principle that applies to all tribunals exercising the judicial power of the state in the UK. This is so whether family, civil, or criminal and despite the court rules being different in Scotland and Northern Ireland, the principle being vital to the policing of the rule of law.

This is not the first time personal injury litigation has caused the appellate courts to consider the principle of open justice and the competing interests of parties, including journalists. Practitioners will be familiar with *JXMX v Dartford & Gravesham NHS Trust*[4] when the Court of Appeal reaffirmed the principle but recognised that there are occasions when derogation from open justice is necessary to achieve justice in a particular case. Justifying the derogation "strictly on the grounds of necessity", we know that justice normally permits a minor derogation for approval hearings for protected parties, Moore-Bick LJ highlighting that the court:

> "should normally make an anonymity order in favour of the claimant without the need for any formal application, unless for some other reason it is satisfied that it is unnecessary or inappropriate to do so."

The particular facts of *Cape* consider how the principle of open justice should apply the growing landscape of written and often digitised evidence/litigation. Previously this ancient principle had been satisfied by holding hearing/trials in open court thus ensuring not only that justice was done but that justice was seen to be done. Then, civil proceedings were dominated by the spoken word, oral argument, any written documents being read out, and judgment being given orally. Now, civil litigation is dominated by the presentation of written evidence and written argument, followed by written judgment. Many oral arguments in court merely flesh out written arguments not available to those observing proceedings. In such circumstances, how could the public fully understand and scrutinise the judicial system?

The Civil Procedure Rules (r.5.4C) do permit non-parties to obtain from the court records a copy of a statement of case and a judgement or order given or made in public. Additionally, it provides a further discretion for the court to permit copies of any other documentation filed by a party, necessarily contained in the records of the court. Despite argument to the contrary, the Supreme Court found that "records of the court" would not include all the evidence put before the court for the trial, "records of the court" is limited to those records a court keeps for its own purposes. However, rightly, it was found that the purposes for which a court keeps records, which may change over time depending on the will of administrators, is completely distinct from the principle of open justice. As such, court rules are not exhaustive of the circumstances in which a non-party may be given access to court documents. Thus, unless inconsistent

[4] *JXMX v Dartford & Gravesham NHS Trust* [2015] EWCA Civ 96; [2015] 1 W.L.R. 3647.

with statute or rules of court, courts retain an inherent jurisdiction to consider requests for access in light of the principle of open justice.

The Supreme Court did recognise however, that those drafting the Civil Procedure Rules were cognisant of the use of written evidence at trial adversely impacting the ability of those observing proceedings to hear and understand the evidence. Rule 32.13(1) permits the inspection of a witness statement at trial, which is no longer read out but stands as evidence in chief, "unless the court otherwise directs during the course of the trial". Further, it was noted that Lord Woolf's report into access to justice in 1996, the precursor to the CPR, specifically highlighted that its suggested changes that made litigation more efficient, such as written witness statements, should not erode the principle of open justice. However, given the postscript to Hale LJ's judgment, those drafting the rules for courts throughout the UK are now on notice of the need to reconsider their rules relating to access of documentation to non-parties, both before and after proceedings are concluded, to ensure that the universality of the principle of open justice is ensured.

Following Lady Hale's judgment, at a minimum the purpose of the principle of open justice is two-fold. It must: (i) enable public scrutiny of the way a court decides cases, thereby holding judges to account for the decisions they make and thus to enable to public to have confidence that judges are doing their job properly; and (ii) enable to public to understand how the justice system works and why decisions are taken. For the latter, the public has to be in a position to understand the issues and the evidence adduced in support of a parties' case, including all the documents placed before the court and referred to in the hearing. However, simply because a court has power to award this access, the non-party seeking access has the burden of explaining why that access will advance the open justice principle. Not only will the request have to be proportionate but the court will necessarily have to engage in a fact based balancing exercise, an exercise the media may be best, although not exclusively, placed to advance. As part of this exercise will necessarily include consideration of any risk of harm disclosure may cause to the maintenance of an effective judicial process or the legitimate interests of others, good reason specifically being noted as including the protection of the interests of protected parties, *Cape* will not impact on the practice established by *JXMX*.

Given the peculiarities of the arguments adopted by the parties in the appeal, we know from the Supreme Court judgment Hale LJ considered that the principle of open justice meant that the Asbestos Victims Support Groups Forum UK had satisfied the court that it was entitled to copies of all statements of case; witness statements; expert reports; and written submissions. We also know that the "default position" is that there is a power for access to be granted for copies of all documents placed before the court and referred to at the hearing. However, whether access to these additional documents, read or not by the Judge, will satisfy the test of advancing the open justice principle was not pronounced upon and will be decided after a further High Court hearing, preferably before Picken J who heard the original trial. Given *Cape* compromised the original cases after trial but before judgment, it is to be hoped that further guidance regarding the extent of access by non-parties for these additional documents will be judicially considered and reported. Only will this further judgment complete judicial guidance on the application the principle of open justice for our digital age.

Jeremy Ford

AB v Mid Cheshire

(QBD; Dingemans J; 16 July 2019; [2019] EWHC 1889 (QB))

Clinical negligence—conditional fee agreements—costs—legal aid—success fees

LT Civil legal aid; Clinical negligence; Conditional fee agreements; Funding arrangements; Personal injury; Reasonableness; Success fees

The claimant brought a clinical negligence claim against the defendant. The defendant appealed the decision of a costs judge that additional liabilities were recoverable by the claimant on assessment of costs.

The claimant, a protected party, suffered from tetraplegia. It was alleged that the claimant's condition had resulted from negligent treatment given to him by the defendant following a road traffic accident in 2000.

The claimant was granted legal aid in December 2010. In February 2013, the claimant's solicitors applied to have his legal aid certificate discharged and a conditional fee agreement ("CFA") was entered into. The claimant's mother was not advised at the time that that meant that she would not get the benefit of 10% uplift on damages nor advised of her potential additional liability for a higher hourly rate and success fee.

The defendant admitted liability in 2014. Quantum was agreed and a settlement approved in 2017.

In detailed assessment proceedings, the decision to change from legal aid to a CFA was challenged. The claimant's solicitors asserted that the change was reasonable because numerous experts would be required in circumstances where the Legal Services Commission was limiting the field of available witnesses through the imposition of unattractive hourly rates.

The costs judge held that:

> "I am just about persuaded that the evidence produced to me by way of witness statements, correspondence, skeleton argument, submission and extracts from the LSC evidence list meets the required criteria … In all the circumstances I am satisfied that it was reasonable to enter the CFA and abandon Legal Aid … Each case is fact specific."

Accordingly, the costs judge held the claimant was entitled to recover the success fee and ATE insurance premium.

The defendant appealed.

Although the reasoning of the costs judge was very summarily expressed, there was no failure to take into account relevant considerations, nor had irrelevant considerations been taken into account. The decision of the costs judge was within the ambit of reasonable decisions open to him on the facts of the case, because he rightly noted that each case was fact specific and had referred to the witness statements, correspondence and extracts from the Legal Services Commission correspondence. The decision to have "the freedom of the CFA" and to be "free of the shackles of the LSC" was reasonable because of the need to instruct another expert in substitution for the expert already instructed as a result of the dispute between the experts on the issue of causation. As to the issue of what had changed between December 2010 when legal aid was granted and February 2013, when the decision was made to change funding, a serious dispute had arisen between the respondent's experts on the issue of causation, which issue was critical to the success of the claim. In circumstances where experts had already been instructed and hourly rates had

already been an issue for one of them, and given the problems with other experts being caused by the approach of the Legal Services Commission to hourly rates, a new funding arrangement was reasonably considered necessary.

A failure to give sound advice on the loss of a 10% uplift on damages could affect the reasonableness of a decision to change funding arrangements. However, in this case such an uplift was not in any sense secure because the prospects of success had been assessed 51%, and unless the issue of causation was resolved there would not be any recovery, still less a 10% uplift on general damages. In those circumstances, the costs judge had been entitled to find that the reasonableness of the decision to change funding was not affected by the failure to advise on that point.

The costs judge had been right to reject a submission that the failure to advise on the potential additional liability for a higher hourly rate and a success fee did not undermine the reasonableness of the change. That was because there was a very real risk that there would be no recovery because of the issue on causation, meaning that the requirement to have the freedom of a CFA to attempt to ensure that there was some recovery for the respondent became the decisive feature.

The appeal was, accordingly, dismissed.

Comment

Changes in funding arrangements can lead to friction between the parties. The position of the paying party is often quite simple to understand—they wish to pay as little as possible. The position of the receiving party is often more complicated as the underlying issue—the reason for the change—can be muddied by the passage of time and the desire of the paying party to argue that any change was unreasonable to reach the end goal of reducing the payment they have to make. This often manifest itself as technical arguments over the advice provided to the receiving party by their advisors.

The starting point is to identify the primary purpose of the main proceedings and this is quite simply to succeed in those proceedings. If they do not, the claimant will receive no damages and their solicitor would not receive payment for the work done. Decisions taken flow from that primary purpose and should be measured in that way.

After that it is correct to say that each case turns on its own facts. Here the decision to "have the freedom of the CFA" and to be "free from the shackles of the LSC" mirrors the experience of many practitioners and perhaps, most importantly, reflects a desire to be in a position to obtain the evidence and undertake the work necessary to succeed in the case. On the facts here, this was even more relevant given the problems with an existing expert and a clear dispute on causation.

One aspect that is often raised in cases of this nature (where the decision to change from legal aid funding to a CFA was made) it is common for issues to be raised by the paying party in relation to the advice given to the claimant in relation to the availability of the 10% uplift on damages. The importance of giving that advice is obvious, but what is also important is that the court undertakes a consideration of the effect of that advice being either absent or deficient in some way. Here, the low prospects of success and the potential for the case to fail entirely unless the causation issue was resolved meant that the backdrop for assessing the impact of any deficient advice on the 10% uplift was a failure to recover any damages.

The very real risk of no recovery was crucial to the decision that a reasonable decision was made to change to a CFA where there was clear evidence that it was grounded in the primary purpose of achieving success in the case.

The outcome, in this case, must be contrasted with the decision of Jay J in *XDE v North Middlesex University Hospital NHS Trust*.[1] The claimant's solicitors, in that case, changed funding arrangements from legal aid to a CFA. The reason for the change was very similar to the position here—a desire to win

[1] *XDE v North Middlesex University Hospital NHS Trust* [2019] EWHC 1482 (QB); [2019] Costs L.R. 725 and reported in the last issue of JPIL.

the case. Underpinning both decisions is a consideration of *Surrey v Barnet & Chase Farm Hospitals NHS Trust*.[2] The important distinguishing point is that in that case liability had been admitted. In AB and XDE liability was still in issue and consequently the question of the availability of the 10% uplift had to consider the issue of success.

Put simply, if the client had been asked what was most important to them: the 10% extra if they succeeded or succeeding then the answer would have been the latter. That leads to the inevitable conclusion that XDE is flawed in its approach and that AB, in contrast, is rational in approach and outcome. The case of XDE is understood to have received permission for a second appeal to the Court of Appeal.

Practice points

- The advice given to a client in relation to changing funding requires a consideration of the reasonableness of that advice.
- That should be undertaken on the basis of what was known at the time and with the decision place in its context. That approach is no different from the approach that the court traditionally has taken to assessing the reasonableness of other funding decisions such as the setting of a success fee in a conditional fee agreement.
- The context here inevitably must take in to account the nature of both the funding arrangement in place at the time of the decision and the one moved to. Legal Aid in the eyes of practitioners had at that time significant disadvantages.
- It must also include consideration of the client's needs and desires which is very important where what is put in the balance is increasing the likelihood of success as against the potential of a 10% increase in damages in the event of success.

Brett Dixon

Royal Automobile Club Ltd v Catherine Wright

(QBD; William Davis J; 26 March 2019; [2019] EWHC 913 (QB))

Civil procedure—civil evidence—personal injury—admissions of liability—withdrawal of admission—negligence

LT Admissions; Fresh evidence; Negligence; Personal injury; Withdrawal

The claimant was employed by the defendant at the defendant's premises in Pall Mall, London.

On 30 June 2015, the claimant was injured when she fell down a flight of stairs during the course of her employment at the defendant's premises.

The claimant instructed solicitors who sent a letter of claim to the defendant in accordance with the Pre-Action Protocol for Personal Injury Claims which William Davis J explained "set out in very considerable detail the various alleged breaches of statutory duty and particulars of negligence".

That letter of claim also gave details of the claimant's injuries stating:

> "Fibula and tibia break to right leg, development of complex regional pain syndrome. We propose instructing experts in the following fields: orthopaedic, pain, psychiatry. This list is not exhaustive

[2] *Surrey v Barnet & Chase Farm Hospitals NHS Trust* [2018] EWCA Civ 451; [2018] 1 W.L.R. 5831.

> and further medical evidence may be required. In the light of the severity of the claimant's injuries, we invite you to appoint an agreed case manager to undertake an initial needs assessment, as per the provisions of the Rehabilitation Code of Practice."

The defendant, when responding to the letter of claim, suggested that, as the value did not appear to exceed £25,000, that claim should be submitted via the "Claims Portal", which the claimant's solicitors declined to do given the likely value of the claim.

On 8 September 2016, the claims handler acting on behalf of the defendant wrote to the claimant's solicitors stating:

> "… we have completed our investigations. Liability is admitted and we shall await to receive medical evidence in due course."

The claimant's solicitors gathered evidence on quantum, including a number of medical reports, interim payments were made by the defendant and, on 4 August 2017, a very detailed schedule of loss was provided by the claimant to the defendant, the claim now being valued at just in excess of £1 million.

On 18 September 2017, a letter was sent to the claimant's solicitors by a lawyer who had now been instructed for the defendant stating:

> "The defendant is also engaged in the process of further refining its case. My client appreciates the fact that it had admitted primary liability and it does not propose to reopen that issue. However, it hereby puts the claimant on notice that your client's contributory negligence shall form part of the defendant's case."

A subsequent letter sent on behalf of the defendant on 9 April 2018 stated:

> "Your letter of claim conveyed the impression that it was a relatively simple and straightforward orthopaedics matter, and that damages would be modest, and accordingly a commercial decision was made to admit liability and maintain the good working relationship which existed between the parties. However, your client decided to increase her claim massively. Given the high value of the proposed claim, the defendant reopened its investigation into the facts and has, upon advice, formed a view that its early admission as to liability may have been unwarranted."

The defendant now invited the claimant to agree to the withdrawal of the admission of liability. The claimant did not agree and hence proceedings were issued.

The defendant's defence indicated an intention to withdraw the admission of liability and the defendant subsequently made an application on that basis.

The Master considered the various factors referred to in Practice Direction 14 para.7.2, concluding there was no proper basis on which the defendant should be permitted to withdraw the pre-action admission. The defendant appealed.

On appeal, the Master was held not to have been engaged in a trial of the proceedings but in case management. The Master was obliged to, and had, considered all the circumstances of the case by reference to the matters set out in PD 14 namely: (a) the grounds on which the admission was sought to be withdrawn; (b) the parties' conduct; (c) the prejudice that the parties would suffer if the admission was, or was not, withdrawn; (d) the stage the proceedings had reached; (e) the interests of justice; (f) the claim's prospects of success.

It was clear that the claimant's claim, involving expert evidence from a number of medical specialists, was anything but straightforward and it had been unreasonable for the defendant to expect that a modest amount of damages would be claimed. The claimant would be prejudiced if the admission was withdrawn. Whilst the application to withdraw the admission had been made shortly after the claim had been issued, that was a long time after the admission had been made. Seeking to withdraw an admission of liability at

a late stage after interim payments had been made and when an investigation into the accident would be more difficult demonstrated a cavalier attitude to the administration of justice, see *Cavell v Transport for London*.[1]

It was doubtful whether the Master had needed to conclude that the claimant was bound to succeed, but he had had to consider the parties' prospects of success, and those were not such as to inevitably lead to a conclusion that leave to withdraw the admission should have been given. The Master had been right to conclude that it was not appropriate to permit the admission's withdrawal.

The appeal was dismissed.

Comment

It is a misconception often held that a substantial increase in the value of the claim will be sufficient to permit a party to resile from an admission. This case is a good example of that misconception.

The claimant's solicitors were careful to set out the description of the claimant's injuries in their letter of claim, along with details of the experts they intended to instruct. From the outset the claimant's solicitors were clear that the claim was not suitable for the low value pre-action protocol: that it would be valued in excess of £25,000 despite pressure from the defendant's claims handler for the claim to start within the protocol.

Liability was admitted by the defendant and over the next six months the claimant gathered expert evidence and just over a year following the defendant's admission, the claimant solicitors served a detailed schedule of loss. The claim was valued at around £1 million.

The defendant claimed to be surprised by the value of the claim, alleging contributory negligence in the most general of terms, inviting the claimant to consent to the withdrawal of the admission of liability. The claimant, unsurprisingly, refused to consent.

Had there been new evidence which could justify the defendant's application to withdraw its admission? An increase in value per se was not enough. The court found that the defendant had unreasonably assumed prior to receipt of the schedule of loss that the claim would be modest: but the clues were there from the start. In the letter of claim the injuries, the experts, the indication of "severity" along with the claimant solicitors' insistence that the claim was not suitable for the low value pre-action protocol all should have alerted the claims handler to the possibility that this was a high value claim.

The prejudice to the claimant of investigating the claim at a distance of three years was considerable, exacerbated by the defendant's lackadaisical approach to raising the issue of both the admission and contributory negligence: "even when the supposedly unexpected nature of the claim became known, it was many months before an indication was given that the admission would be withdrawn."

As for the prospects of success: the judge was not drawn into conducting a mini-trial, but exercised his case management powers, considering all the factors contained in PD 14 para.7.2, and did not permit the defendant to resile from its admission. The appeal confirmed that this was the correct approach and was "well within the range of reasonable decisions that could be made".

This decision adds to recent similar decisions, illustrating some the issues which both sides should consider when either making or opposing an application to withdraw an admission.

The claimant's counsel in this particular case successfully steered the claimant's opposition to the defendant's application. Crucial to this success was the care of the claimant's solicitors when setting out the claim at the outset and counsel's successful argument that the increase in value was not new evidence. The rate of success on such arguments on behalf of the opposing party is low and it pays to look at some other decisions to examine what it is that parties should consider in cases with similar scenarios.

[1] *Cavell v Transport for London* [2015] EWHC 2283 (QB).

Cues in the letter of claim, and "new evidence"

As in *Royal Automobile Club*, the claimant's representatives should take care at the outset of any claim when setting out the nature of the injuries and likely value of the claim. The cues in those initial steps can affect the defendant's judgment as to how the claim should be treated and, if new evidence comes to light, the admissions made early on will inevitably be revisited and potentially withdrawn.

In the recent judgment in *Newham LBC v Arboleda-Quiceno*,[2] Lambert J, (Lawtel summary) the clamant solicitors had set out the injuries in detail and also made it clear that this was not a claim suitable for the low value pre-action protocol: its value would be more than £50,000. The schedule of loss served three years later valued the claim at nearly £3 million. The defendant local authority appealed against a master's refusal of permission to withdraw a pre-action admission made by its insurer. Lambert J found that the Master had been right to conclude that the claimant's claim was not of a different size or character: the letter of claim provided the cues that suggested the claim could prove to be substantial on which the defendant should have picked up. Ultimately, the defendants were permitted to withdraw their admission, but not because the claim was now worth more than they had expected.

In *Blake v Croasdale*,[3] a RTA claim, the claim was started within the low value pre-action protocol for road traffic claims ("the RTA Protocol"). An admission of liability was made while the claim remained within the RTA Protocol, although the defendant raised the issue of contributory negligence at the time. The claim became unsuitable for the RTA protocol and left the electronic portal. Once medical evidence had been served it became apparent that the claim was valued at between £3 million and £5 million. The claimant had, in effect, given the wrong cue to the defendants: starting the claim within the RTA Protocol had sent a signal that this was a low value claim. "There was nothing in the material it [the defendant] received to indicate a claim running into millions and therefore proportionality persuaded Esure to adopt a pragmatic approach …" and admit liability at an early stage ([28]).

In *Wood v Days Health Care UK Ltd*,[4] the claimant's solicitors wrote a follow-up to the letter of claim stating "currently we consider this case will fall into the fast track". The defendant's admission was made after that letter and following an inspection of a faulty wheelchair at the heart of the claim. The value of the claim then increased substantially: what had been presented as a fast-track claim in 2010 had become a claim valued at £300,000 two years on. It also later transpired that the wrong wheelchair had been inspected. The appeal judge found that the discovery that the wrong wheelchair had been examined was new evidence, although the increase in value was not. It was not just an increase in value: as the claimant stated in correspondence, both the character and amount of the claim had changed.

Mini trials and PD14 para.17.2(f)

Beware of encouraging the judge who hears the application to indulge in a mini-trial on the prospects of success. In *Royal Automobile Club*, the Master in the lower court did not conduct a mini-trial of the action (see [18] of the appeal judgment), although on appeal the defendants alleged that he had gone further than he should. Davis J, hearing the appeal was not convinced:

> "The Master was not considering a full trial. He was exercising his case management powers. He did not concentrate on a single factor. He had to consider all the factors to which I have referred by reference to the Practice Direction."

All items listed in PD14 para.17.2 being considered equally,[5] the insertion of a "mini-trial" inevitably damages the decision, whichever way it goes.

[2] *Newham LBC v Arboleda-Quiceno*, unreported, 31 July 2019, QBD.
[3] *Blake v Croasdale* [2017] EWHC 1336 (QB).
[4] *Wood v Days Health Care UK Ltd* [2017] EWCA Civ 2097.
[5] *Woodland v Stopford* [2011] EWCA Civ 266 at [26]; [2011] Med. L.R. 237.

In *Newham*, the Master who had first considered the application to withdraw the admission had gone beyond merely considering the prospects of success of the local authority's defence, conducting a mini-trial, without the benefit of all the evidence and witnesses. The Lawtel summary indicates:

> "Having disavowed the concept of a mini-trial, she had engaged in one, without considering all of the evidence and without being able to hear from witnesses. Having found a realistic prospect of success for the defence, she should have left it there. The merits had been one of the three factors she had relied on in her decision, but she had treated them all equally, so it could not be said that she would have reached the same conclusion without the error. It obviated her decision …"

The admission was permitted to be withdrawn.

In *Blake*, the defendants sought to argue ex turpi causa, should their application to withdraw their admission succeed. In his opposition to the application to withdraw, the claimant argued that the allegations made against him (he had been a passenger in a car being chased by the police: cannabis and other paraphernalia suggestive of drug dealing were found in the car along with a knife and a large quantity of cash) did not make out a case of engaging in criminal activity. The judge refused to conduct a mini-trial on the evidence before him on this point. He said:

> "I am concerned only with ascertaining whether there is a real issue to be tried—in other words, a realistic prospect of success. That does not require, at this stage, the satisfaction, even provisionally, of any burden of proof. It merely requires that there be a case worthy for trial."

He allowed the defendants to withdraw their admission. In fact, a later case report indicates that it was more than worthy for trial: the plea of ex turpi causa succeeded and the claimant's claim failed.[6]

Proportionality

The introduction of the low value pre-action protocols into the litigation mix has added an additional element for consideration in these types of applications.

In *Blake*, the judge held that the defendant insurer Esure could not be criticised for making an early admission in a claim which was being run in the RTA Protocol:

> "Esure should be entitled to withdraw its admission and that to refuse to do so would discourage defendants, especially insurers, from acting proportionately, which would make the giving of admissions in like cases where it is appropriate, in the interests of reasonableness and proportionality, to give them, more difficult to secure."

Similarly, in *Wood*, the issue of proportionality was raised:

> "Changes in litigation procedures and in the applicable costs regime provided, in 2010 as now, every incentive on grounds of proportionality for parties—and particularly, perhaps, defendants and their insurers—speedily to settle such claims. The Personal Injury Protocol was designed to facilitate that …"

If a dramatic change in the nature of the claim (increasing value and new evidence) was insufficient to allow a defendant to withdraw an admission made within the protocol period, then such a decision would "tend to discourage speedy admission of liability in (then) small claims; admissions made having regard to considerations of saving costs and of proportionality".

[6] See *Blake v Croasdale* [2018] EWHC 1919 (QB).

Practice points

- **Value the claim with care**

  The claimant's solicitors, in this case, had done nothing to give the impression that this claim was of modest size. In fact they had expressly avoided any reference to the Claims Portal as the appropriate means by which to process the claim. If the value of the claim is unclear at the outset, say so in terms and set out the steps you will take to ascertain its worth. Do not "surprise" your defendant with a significantly increased valuation later down the line.

- **A substantial increase in valuation is not necessarily "new evidence"**

  This is particularly true if the nature of the claim remains unchanged as in *Royal Automobile Club*. By contrast in *Wood v Days Healthcare UK Ltd*, the claimant solicitors admitted that "our client's claim has changed entirely in character and amount".

- **Do not encourage the judge to conduct a mini trial on prospects of success**

  Although it is tempting, it will ultimately undermine the judge's decision and almost inevitably lead to an appeal as in *Newham*.

- **Proportionality**

  The introduction of the low value pre-action protocols for various personal injury claims will inevitably lead to some defendants adopting a pragmatic approach to early admissions which they later seek to withdraw if the claim leaves the protocol procedures and is dealt with by way of the CPR. This will inevitably form part of the court's considerations, particularly with reference to PD14 para.7.2 (a) as in *Wood*. It is, though, the quid pro quo for the many claimants for which an early admission facilitates a speedier settlement of their claim.

Helen Blundell

Cable v Liverpool Victoria Insurance Co Ltd

(In the County Court at Liverpool; HH Judge Wood QC; 5 July 2019)

Personal injury—appeal—protocols—strike out

LT Abuse of process; Low value personal injury claims; Part 8 claims; Personal injury; Personal injury claims; Pre-action protocols; Road traffic accidents; Striking out

The claimant suffered injuries as a result of a road traffic accident on 1 September 2014, when the claimant's vehicle was struck behind by the defendant's vehicle.

The claimant consulted solicitors and a claim notification form ("CNF") was submitted to the defendant's insurers describing the claimant's injuries as being soft tissue injuries to the neck, back and shoulder.

In April 2015, a neurologist reported that the claimant had continuing symptoms and had been unable to return to work though the prognosis was that the claimant would recover in 15 to 18 months.

Despite what was described later as "radio silence" on the part of the claimant, a further report was commissioned from the neurologist which, in January 2017, suggested ongoing and probably permanent problems attributable to the accident.

With the expiry of the limitation period approaching a Pt 8 Claim Form was issued on 25 July 2017. An order was made in Birkenhead County Court on 31 July 2017 granting a stay and stipulating that the Claim Form should be sent to the defendant by 20 August 2017.

It was not until February 2018 that the Claim Form was sent to the defendant, but no application was made so far as non-compliance with the order dated 31 July 2017 was concerned.

On 18 August 2018, an application was made by the claimant to lift the stay and for the matter to proceed as a Pt 7 claim with consequential directions.

An order was made, without a hearing, on 21 August 2018 that the matter proceed as a Pt 7 claim.

That was followed by an application on behalf of the defendant, which was made on 6 September 2018, seeking an order setting aside the order made on 21 August 2018, hence keeping the stay in place, and that the claim be struck out.

Both applications were heard by a district judge on 17 October 2018, when the order made on 21 August 2018 was set aside and the claim struck out.

On appeal, the court held the district judge had applied the correct test to determine whether or not the claimant should be entitled to proceed with the claim and the appeal was dismissed.

Comment

I make no apologies for quoting at length from the original judgement given by Campbell DJ:

> "64. Does the conduct get to be as serious as mischievous, deliberate, deliberate [sic] concealment? It is difficult for the court to say one way or another whether it is sheer incompetence or deliberate concealment. But what the court is extremely unhappy with is the suggestion that August 2018 is the first time anyone in this international personal injury law firm bothered to value this case. That is wholly out with all the obligations that the Claimant's solicitors have to conduct litigation efficiently, at proportionate cost, to have parity between the parties under the overriding objective and to comply with rules, practice directions and orders, and to properly prosecute the client's claim. I have not even mentioned to try and get Mr Barry Cable into a position where his life is beginning to improve because that does not seem to have been thought about at any stage by the Claimant's solicitors at all."

This is at the nub of this case. As a defendant insurer, what is euphemistically called "Portal incubation" is the bane of our lives. All too often, I see substantial personal injury commenced in the Portal. On occasions, when I come across such a claim, after trying to speak to the claimant fee earner (sometimes unnamed) by telephone, I will write, sometimes to the senior partner, and say:

> "Your client appears to have sustained significant injuries. However, as you have commenced the claim in the Portal and it is limited to (say) £25,000, on an entirely without prejudice basis as investigations are ongoing, please advise who you would like a cheque made payable to and I will send a cheque for £25,000 in full and final settlement of your client's claim."

Such a letter normally prompts some sort of semi sensible response. More worryingly, some claimant fee earners (including qualified ones) believe that ALL claims must be commenced in the Portal. One assumes that they have never heard of the Personal Injury Pre-Action Protocol.

I live in hope that *Cable v Liverpool Victoria Insurance Co* and the fact that HH Judge Wood upheld the appeal of striking out a claim with a potential value in excess of £2m will send a bit of message around the claimant community. No insurer will hesitate and challenging the abuse of "Portal incubation".

Although the chronology of this case may be extreme, the basic thrust of the matter is all too common. The claim arose out of a straightforward road traffic accident in September 2014. In the Claim Notification Form, injuries were described as soft tissue injuries to neck, back and shoulders, with no time taken off work. In short, the type of matter that the Portal was designed for. Liability was not in dispute and was admitted on 2 October 2014. On 28 November 2014, the claimant's solicitors received their first medical report. This indicated that the claimant was off work and that a report from a neurologist was required. In other words, there were signs, within three months of the accident, that the claim was not entirely straightforward. Arguably, the matter should have dropped out of the Portal at this stage.

In January 2015, service of an interim settlement pack led to a modest interim payment followed by the defendant asking if the claimant remained off work and if there were a loss of earning claim. The claimant was a high earner with net earnings said to be £130,000. So, by this time, the loss of earnings claim alone potentially exceeded the Portal limit.

Things go from the redeemable to worse. In December 2015, the claimant lost his job, though this was not communicated to the defendant insurer. In an attempt to prompt some reaction, as emails and phone calls were not working, a Part 36 offer of £10,000 was made on 19 April 2016. One would have thought that this would have prompted some reaction and communication, perhaps to advise that the claimant had lost his job and that this might be quite a large claim, but no.

In September 2016, there was dialogue and the defendants were advised that a neurological report had been received. This was not disclosed and despite further chasing emails, and what the district judge described as "radio silence" from the claimant's solicitors, there was little overt progress. However, the claimant's solicitors did obtain a second neurological report in January 2017, with a revised report being available in June 2017. Part 8 proceedings were commenced on 25 July 2017. Clearly, this was not a low value claim and as opposed to seeking Pt 8 resolution, the claimant solicitors sought a stay of the proceedings in order to "comply with the RTA protocol".

The Pt 8 claim form was considered ex parte and a stay of a year was granted with the proviso that the claim form should be served to the defendant by 20 August 2017. This did not happen.

On 16 August 2018, the claimant's solicitors emailed the defendant saying that the claimant was still suffering significant neurological problems and sough consent to transfer to Pt 7. The following day the neurological reports were served and the defendant's responded expressing concerns regarding conduct and stating that they found themselves in a "very difficult position".

An application was made to lift the stay and for the matter to proceed by way of Pt 7. Again, an ex parte order was made requiring and amended claim and particulars to be served by 4 September 2018, but these were not served until three weeks later. The defendants issued an application in opposition.

The matter was eventually heard by Campbell DJ who struck out the claimant's claim. On appeal, Wood HH Judge upheld that decision saying:

> "73. As far as the question of prejudice is concerned, I find myself unable to accept the general submission advanced on behalf of the claimant that the judge found prejudice where there was none. Prejudice in this context involved, as I have indicated, a consideration of the effect of the manner in which the court's process has been abused. It is important that a balancing exercise is undertaken in this regard. In his submissions Mr James provides an analysis of the several factors identified by Judge Campbell and seeks to break them down on an individual basis, suggesting that none would be capable of supporting a finding of abuse of process. However, this fails to acknowledge that in exercising a discretion the learned judge was entitled to consider the cumulative effect of the various factors, which included the overall delay, the loss of any opportunity for input on rehabilitation, the inability of the defendant's solicitors to participate in the case management process, including the identification of their own experts, depriving the insurer of an opportunity to set a reserve,

deliberately (if not contumeliously) misusing the portal process to secure a stay and thus obtain a limitation extension, and the wholesale failure to address the value of the claim at any stage before the early part of 2018, or to inform the Defendant until later in 2018 that this was a high value claim."

He went onto say:

"75. In summary, I am satisfied that the learned judge not only applied the correct test to determine whether or not the Claimant should be entitled to proceed with his claim notwithstanding the abuse of process attributable to his solicitors, but also came to a conclusion which was within the reasonable and generous ambit of her discretion. In fact, it is difficult to contemplate any other outcome in the circumstances with which she was faced."

This case comes on the back of *Lyle v Allianz Insurance Plc*.[1] In that case, HH Judge Pearce refused to lift a stay where the claim had been issued under Pt 8 three years earlier. While the abuse in *Cable* was considered to be more serious than that in *Lyle*, both cases illustrate the risks of leaving cases in the Portal inappropriately and of issuing proceedings and doing nothing for extended periods.

In the introduction to his judgement Wood HH Judge clearly explains the inter-relationship between the MOJ Portal and PI Protocol and is worth quoting in full:

- The vast majority of road traffic accidents which give rise to claims for personal injury and other losses are of relatively low value and dealt with through the RTA protocol, and the MOJ portal associated with that, and if necessary, the streamlined Pt 8 procedure. The rationale behind such a tried and tested process is that costs are predictive and kept within a reasonable proportion to the value of the claim, disputes are resolved relatively quickly, and there is no need for any significant court involvement.
- Claims which lead to substantial injury, and thus likely to result in awards of more than £25,000, are the subject of a separate protocol, the PI protocol, which involves a far different approach at the pre-action stage, requiring extensive cooperation with "cards on the table", so to speak, and encouragement to rehabilitation, early schedules of estimated loss and damage, and a degree of mutuality in the choice of medical experts. Ultimately, these claims will be resolved by the court, if not settled by alternative dispute resolution, through the Pt 7 procedure, and usually as multitrack actions.

Practice points

- "Parking" or "incubating" cases within the Portal for an extended period is an extremely dangerous practice and is utterly unnecessary. It does not help the claimant, undermines the integrity of the profession and could cause immeasurable damage to the claimant law firm.
- Insurers educate their claims handlers to try and identify claims of value; if insurers can do that, why can't claimant solicitors? From very early on in the life of this case it was clear that it was likely to exceed the Portal limit.
- Accordingly, ensure that there is a process of early, and ongoing, assessment as to the potential value of a claim and use the correct procedure as explained by Wood HH Judge in [1] and [2] of his judgment.
- Finally, remember that the overriding objective requires that litigation is conducted efficiently, at proportionate cost and that there is parity between the parties. Doing little and saying

[1] *Lyle v Allianz Insurance Plc*, unreported, 21 December 2017.

nothing for extended periods, so that your opponent is left in the dark, hardly fulfills the objectives of the Civil Procedure Rules.

David Fisher

Smith v (1) Berrymans Lace Mawer Service Co (2) Berrymans Lace Mawer LLP

(QBD; Master McCloud; 18 July 2019; [2019] EWHC 1904 (QB))

Civil procedure—default judgments—extensions of time—relief from sanctions—setting aside

Default judgments; Personal injury claims; Relief from sanctions; Setting aside

The defendant applied to set aside a judgment in default of defence.

The claimant had brought a personal injury claim worth over £3 million. On 30 September 2018, the defendant applied for an extension of time to file its defence. The original time for filing expired on 4 October. On 17 October, the claimant applied for judgment in default of defence. On 26 November, after requesting and receiving the defendant's Private Room Appointment form, court staff issued the defendant's application for an extension of time and listed a hearing on 15 February 2019. On 28 December 2018, the defendant submitted its defence. The PRA form and defence were not placed on the court file or entered into the court computer. On 2 January 2019, a master directed judgment in default; it was entered on 15 January. On 15 February, the fact that a defence had been filed was entered into the court computer system. The defendant then issued the application to set judgment aside.

The issues were whether it was open to the court to enter a default judgment under Pt 12.3, where a defence had in fact been filed prior to the judgment, and whether an application to set aside judgment under the court's discretionary powers, under Pt 13.3, should be treated as an application for relief from sanctions, engaging the criteria set out in Pt 3.9 and *Denton v TH White Ltd*.[1]

Default judgment

The extensive case law on the issue had been considered at length in an obiter decision, *Cunico Resources NV v Daskalakis*.[2] The analysis in that case was agreed with. However, unlike *Cunico* here the application for an extension had been made before the request for judgment in default was filed, and the late defence was filed before judgment was actioned by the court.

Cunico had set out two alternative interpretations of Pt 12.3 regarding the court's powers to enter a default judgment. One was that the court could only grant default judgment where, at the time of its judgment, there was no acknowledgement of service (or defence) and the time for filing it had expired. The second was that the court could grant default judgment so long as at the time of the application for default judgment, there had not been an acknowledgement of service (or defence) and the time for filing it had expired. Part 12.3 stated that a claimant could obtain judgment "only if the defendant has not filed" the defence and the time for doing so had expired.

[1] *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926.
[2] *Cunico Resources NV v Daskalakis* [2018] EWHC 3382 (Comm); [2019] 1 W.L.R. 2881.

The judgment in *Cunico* had not had to decide between these two interpretations. However, the language of Pt 12.3(1) conveyed the first meaning: that the court could not enter judgment if filing had taken place prior to entry of judgment. It was not relevant when the time for filing expired, if the court found that a defence had been filed. A late-filed defence was not, by reason of its lateness alone, to be treated as if not validly filed. A defence under Pt 12.3 did not have to be a timely defence. Default judgment could be a useful device where claims were not disputed, but an overly strict reading which shut out genuinely defended cases simply for lateness of defence would be disproportionate. If a defence was filed prior to the point at which the court came to apply Pt 12.3, the court did not have jurisdiction to enter default judgment.

Disclosure of application

It would not have made any difference if the claimant, as the defendant contended, failed to disclose facts such as the existence of an application to extend time or the fact that a defence had been filed, unless there had been some positive deception.

The court had been unaware of the fact that a defence had been filed but there was, however, no duty on a claimant to constantly monitor the court's files to ensure that these were up to date. The court system ought to be taken as knowing the state of its own files.

Denton

Under Pt 3.10 an error in procedure did not invalidate a procedural step, including filing a defence, unless the court so ordered. If a step was taken late, and a rule did not impose a sanction, it was open to the court to impose such a sanction and then to consider relief, but relief was not required if the rule provided no sanction.

There was no basis for requiring a relief from sanctions application under r.3.9 where there was no provision or order providing for a sanction. The decision in *Regione Piemonte v Dexia Crediop SpA*,[3] which had considered the applicability of *Denton* under Pt 13.3, meant only that the Denton principles should be considered when exercising the discretion under Pt 13.3 and having regard to "all the circumstances"; it did not require a separate application for relief from sanctions under Pt 3.9.

The application was granted.

Comment

This procedural decision is of significance as it has raised issues in relation to the interpretation of CPR 12,13 and 3 and to the application of the *Denton* case on relief from sanctions. It confirms that where a claimant applies, under CPR 12.3, for judgment in default of defence but where the defendant has filed its defence before the court entered judgment in default, the court no longer has jurisdiction to enter judgment. In doing so, the court confirmed that a late-filed defence was not, for lateness alone, to be considered as not validly filed.

The court also indicated that provided there was no deliberate deception, the claimant was under no obligation to inform the court of the existence of such a defence (or for the application to extend the deadline to submit the defence). Instead, the court made it clear that it was their responsibility to ensure they had their files in order.

Referring to the issue of the applicability of Denton in such circumstances, the court indicated its view that a relief from sanctions application under CPR 3.9 was not required where there was no provision or court order providing for a sanction.

[3] *Regione Piemonte v Dexia Crediop SpA* [2014] EWCA Civ 1298.

Whilst the judgment could be appealed, there are some practical points worth considering:

- The decision agreed with *Cunico* in its interpretation of CPR 12.3 that if a defence was filed prior to the point at which the court came to apply default judgment, the court did not have jurisdiction to enter default judgment. Whilst certainly not definitive and with other earlier cases offering different interpretations, it does provide a clear steer as to likely outcomes in similar cases. Until the matter is resolved in a higher court or the rules are changed to show their clear intentions, ambiguity will remain.
- What it does highlight is that both parties must act in haste. This is particularly pertinent to defendants who need to ensure they file their defence as soon as practicable and not wait to hear the outcome of an application to extend the deadline or for an application to set aside a default judgment.
- It is not clear from the judgment as to whether discussions took place between the parties in relation to the request for an extension, but defendants should consider, when appropriate, to negotiate with the claimants to attempt agree to an extension as this could have the potential to avoid unnecessary time and cost.
- Never assume that the court has a record of all the papers filed. Be prepared when attending any applications hearings to provide evidence to support it, along with the knowledge that the other party was, or should have been, aware of such papers.
- Also, never assume that an error in procedure will result in invalidating a step in the proceedings if that particular step provides no such sanction. To invalidate such a step would require a court order. Indeed, this case exemplifies the impact court errors and delays have on the ability of parties to navigate case management and clearly indicates the importance of the need for court modernisation.

Whilst this case seemingly provides an equitable outcome, in that a defendable case is allowed to be defended despite procedural errors, it does beg the question as to how this outcome is potentially in conflict with the aims of the latest round of reforms (Jackson). Such reforms were borne out of a desire to reduce costs (and indirectly time), however, this outcome is somewhat at odds with such aims.

This case confirms that even a late filled defence, which will naturally increase both cost and time, is clearly in the interest of justice. This, therefore, raises complex questions as to the extent to which aims of reducing costs and the interests of justice are in conflict. It does seem that during the "Woolf era", the priority was very much in the interests of justice (which did on occasion result in disproportionate costs) but in the current "Jackson era" the interests of justice is caveated with "at proportionate costs" and this inevitably has resulted in, on occasion, being at the expense of justice. Perhaps the outcome of this case has in some small way reigned in the extent to which proportionality and strict adherence to the rules hinders justice.

Clare Johnston

Journal of Personal Injury Law

Journal of Personal Injury Law

2019

SWEET & MAXWELL

THOMSON REUTERS

This volume should be cited as [2019] J.P.I.L. 00

Published in 2019 by Thomson Reuters, trading as Sweet & Maxwell. Thomson Reuters is registered in England & Wales, Company No.1679046. Registered Office and address for service: 5 Canada Square, Canary Wharf, London, E14 5AQ.

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

Computerset by Sweet & Maxwell.
No natural forests were destroyed to make this product: only farmed timber was used and replanted.
A CIP catalogue record for this book is available from the British Library.

ISBN 978-0-414-07383-8

LEGAL TAXONOMY
FROM SWEET & MAXWELL

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

For orders and enquiries go to: http://www.tr.com/uki-legal-contact; Tel: 0345 600 9355.

Table of Contents

Articles

Case and Comment Sections

Table of Cases

Table of Statutes

Table of Statutory Instruments

Table of EU and International Legislation

Treaties and Conventions

Regulations

Directives

Table of Civil Procedure Rules

Cumulative Index

This index has been prepared using Sweet & Maxwell's Legal Taxonomy.