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PI FOCUS

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OPINION

'These falsehoods have been fuelled by the rise of populist anti-global nationalism, and the drift to polarised views on the internet'

In this, my last column as your president, I have reviewed my past efforts to see if there is a common theme. There is. The basis of what we believe in is constantly under threat. Time and again the rights of injury victims have been marginalised in the name of political expediency. At the heart of this is the appeal of simplistic deflecting narratives, including fraudulent claimants, 'activist' lawyers, and compensation culture.

In recent years these falsehoods have been fuelled by the rise of populist anti-global nationalism, and the drift to polarised views on the internet - in particular social media: in short, a them-and-us mindset. There are many biases to be confirmed and, in the political arena, it pays to be seen to tackle unfounded perceptions rather than apply principles. The Overseas Operations (Service Personnel & Veterans) Bill is a good example. The Bill actually restricts rights, but has been unashamedly advanced as a one that 'protects' service personnel. I am pleased to note that the House of Lords has recently voted for an amendment that would go some way to nullifying the proposed absolute limitation time-bar. This is why APIL's Rebuilding Shattered Lives campaign, as part of our strategic plan, is so vital. The dial needs to be reset.

Judicial review is now in the government's sights. In future, will APIL be able to apply to intervene and / or make representations in personal injury cases as we did earlier this year in Northern Ireland? That case helped to sting the NI Department of Justice into setting a realistic interim discount rate of -1.75% from 2.5%. Considerable academic work and careful responses have already been presented on JR reform. However, we can expect attempts to water down JR on the back of a commentary on 'out of touch' and 'neo-liberal / lefty' judges. APIL's aims and the work that we do for the needlessly injured is now more relevant and more important than at any time.

Sam Elsby
President

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APIL NEWS

Call for change on bereavement

Campaigning for change to the law on bereavement damages stepped up a notch with publication of APIL's new research report last month.

Bereaved people across the UK find themselves at the mercy of a postcode lottery, and *Bereavement Damages: A Dis-United Kingdom* explores the inequities in support available. Scotland has a law that has developed over time, and is now in tune with the 21st century, but the law in England, Wales and Northern Ireland remains woefully out of date.

Publication of the report follows a recent increase in support for reform, including from the UK Parliament's Joint Committee on Human Rights.

Ministers have consistently resisted reform of the law in England and Wales, but a YouGov survey commissioned by APIL shows the government is on the wrong side of popular opinion. The results of the survey, included in the report, reveal that 73% of British adults think the amount of compensation for grief and trauma should vary according to the circumstances of each case.

Overwhelming public support exists for fathers to receive compensation after the loss of a child, even if they were not married to the child's mother. The archaic law in England, Wales and Northern Ireland denies compensation to these fathers, but 85% of British adults believe this should change.

The survey results are accompanied in the report by the stories of bereaved people and their experiences of the law. It includes the story of Amelia, who was denied bereavement damages after her partner's death. Amelia and Jordan had been together for two-and-half-years, and Amelia was pregnant at the time of his death. But none of this mattered and, because they were not married, Amelia could not claim bereavement damages.

There is also Monica's story, a mother who was prevented from claiming bereavement damages in Northern Ireland because her son, Karl, was over the age of 18 when he was killed.

APIL's campaign calls for the law across the UK to mirror that in Scotland, which allows compensation for a wider category of relatives. To emphasise the difference between the different jurisdictions, the report shares the experience of the McGee family. After the death of Peter McGee, a court recognised the close relationships he had with a number of family members, and compensation was awarded to his wife, children, and grandchildren.

See APIL's CEO Mike Benner's *The Last Word* column on page 31 to learn more about how you can get involved with the campaign.

APIL NEWS

Rebuilding Shattered Lives: keeping up the momentum

APIL's flagship campaign *Rebuilding Shattered Lives* is now well underway and attracting an unprecedented level of support from individual members and their firms.

More firms are getting behind the campaign every week and discussions are ongoing with APIL staff about collaborative ways of working to extend its reach and influence. Activities range from ongoing social media engagement to sharing the campaign's centrepiece video on firms' websites and writing blogs. The social media toolkit is proving very popular as a made-to-measure way of promoting the work of *Rebuilding Shattered Lives*. Videos have been made and more are in the pipeline. Some firms are also briefing their staff about *Rebuilding Shattered Lives* in their own formal internal communications.

Individual members have shared compelling stories about ordinary people whose lives have been turned upside down by negligence.

'The APIL team is extremely grateful for the efforts being made to support this pivotal campaign, from both firms and individuals,' said APIL chief executive Mike Benner.

'We're continuing to receive many stories from members about the real people they have helped,' he added. "These stories are critical in demonstrating to everyone, from opinion-formers, to government ministers, to the person on the street, that compensation is never, ever, a windfall when someone has suffered needless harm.

'We rely entirely on members to share with us the devastation that needless injuries can inflict on the lives of ordinary people and their families, and to help us make this campaign a success, so thank you to everyone who is getting involved. With your ongoing support I'm confident that the campaign can make a lasting difference, stamping out misconceptions and replacing them with positive perceptions'.

Case examples include that of a young man who was hit by a car, suffering skull fractures and other broken bones. He still needs support to help him deal with permanent hearing problems, losing his sense of smell, and difficulties with concentration and mood swings that affect his working life. In another shocking story, a mother of young children has not walked since she was in a car crash. In yet another, a single mum's breast cancer diagnosis was delayed, resulting in the pain and trauma of chemotherapy and radiotherapy.

These examples, and others, will be shared on social media as *Rebuilding Shattered Lives* moves into its next phase.

More stories are needed to keep the momentum going. If you would like to get involved, contact jane.hartwell@apil.org.uk and ask for more information and a briefing pack.

LSB looks at quality

APIL has responded to a Legal Services Board (LSB) discussion paper about quality indicators in the legal services market. In the response, it was agreed that consumers need a way to recognise quality and be able to compare firms and services. But a broad-brush approach to quality indicators across the legal services market would be ineffective and misleading.

Quality can be defined in different ways depending on the area of law. Success rates, outcomes and objective data alone may be misleading when used to define quality. Applying success rates to historical abuse claims would be difficult, for example. While it is important that these cases are taken on, assessing the prospects of success at the outset and throughout is extremely challenging. Often these claimants receive a positive experience, regardless of the outcome, simply by being heard and receiving a good service.

Success is about obtaining the right result for the individual client on a case-by-case basis, in line with the client's own objectives. APIL has emphasised, therefore, that customer service is a crucial quality indicator and recommended public education about what success rates mean in different types of claim.

The association also argued that measurement of technical quality should include assessment of accreditation and the award of CPD hours. These demonstrate ongoing competency and up-to-date knowledge in specific areas of law. This is particularly important in personal injury and clinical negligence cases because of their complexity. They are good quality indicators because they give consumers a definable quality mark to look for.

Info sought on PPO responses

Members who have any cases where they encountered difficulties obtaining periodical payment orders (PPO) from insurers may be able to help with the next stage of APIL's research into PPOs.

Any information about such cases can be sent by email to john.mcglade@apil.org.uk.

John would be particularly interested in learning how the insurer responded to efforts to obtain a PPO, and why this behaviour made it difficult to obtain a PPO.

PULLING TEETH

Robert Mills explains negligent dentistry claims

Litigation concerning negligent dentistry is an area of clinical negligence claims that continues to expand.

Although perhaps often taken for granted, a person's dentition is undoubtedly one of their most sensitive physical features. The loss of a good smile is something that can cause significant embarrassment and a loss of confidence in personal and professional situations. This is one reason why dental claims will commonly have an associated psychological injury claim attached.

Coupled with this, dental pain can be one of the most invasive, prolonged and difficult forms of pain to treat. Where the damage is treatable with restorative work, it is often very expensive, with a single dental implant to replace one missing tooth costing anything from £2,500 to £3,500.

It is therefore unsurprising that when dentistry goes wrong, it is an area of medicine where people feel particularly affected, and so are minded to make a claim.

Identifying the defendant in dental negligence claims is not as straightforward for claimant solicitors as it once was. The conventional approach was to proceed against the individual negligent treating dentist, who would be indemnified by a defence organisation.

The progression of the law surrounding vicarious liability and non-delegable duties has opened the door for claims against the dental practice, partnership or practice principle, for the negligence of the associate dentists or staff. The vicarious liability approach is now commonly used when a treating dentist cannot be identified or is uninsured. Some firms now use the approach as a first port of call, given the advantages in multiple defendant cases, where the alternative would be to pursue each dentist individually with different defence organisations.

In such a scenario, the defendants may struggle to constructively engage and collaborate in settlement proposals, particularly if their assessment of liability or quantum is materially different. Care must be taken, as with all areas of clinical negligence, to stay up-to-date with the law surrounding vicarious liability, in order to ensure that the scenarios in an individual claim indicate that such an approach has merit.

Common claims

There is a wide range of different dental negligence claims. Data from one major dental defence organisation, the Dental Defence Union, indicated the following breakdown of the most common type of claims:

(i) Extractions (likely leading to nerve injury): 24%

(ii) Root canal treatment: 20%

(iii) Caries and fillings: 17%

(iv) Periodontal disease: 10%

(v) Implants: 9%

Periodontal disease is an area that commonly attracts high value claims due to the fact that multiple teeth are often lost, and complex restorative requirements ensue. Claimant solicitors are well advised to be on the look-out for periodontal claims, even when the initial complaint may be unrelated.

A close analysis of bitewing radiographs and Basic Periodontal Examination (BPE) scores in a patient's records are often the most reliable indicator of the presence of disease by either bone loss or pocketing of the gums. In the absence of such assessments in the records, liability is likely to be established if a patient went on to develop the disease without appropriate treatment.

Defendant solicitors will be on the look-out for causation defences in periodontal disease cases. In particular, consideration of the extent of the disease at the start of the treatment period, together with other restorative compromise of the tooth, can provide an effective defence to a causation of tooth

loss argument. If negligence has led to acceleration of loss only, the defendant may avoid a high-value implant claim.

Root canal treatments are another common area of negligence. Claimant solicitors should be on the lookout for root canal treatments where there has been no previous filling. There may be concerns about whether caries has been missed in its early stages, or whether the root filling was necessary at all.

Where a root filling has failed, practitioners should be alert to looking for the documented use of a rubber dam and appropriate irrigant to prevent bacterial contamination of the canals or the swallowing or inhalation of instruments.

A close examination of the radiographs of the filling itself can also form the basis of a claim if it can be seen that the canals are filled well short of the apex of the root, or indeed through the apex and into the soft tissues.

Crowns and veneers are a common area of restorative (and potentially) aesthetic dentistry that forms the subject of claims. When screening for claims, solicitors should look carefully at crowns which fail in a short space of time (1-2 years or less). In particular, an examination of radiographs can pay dividends in identifying caries that has been left in situ, or poor margins on the crown that have acted as a magnet for further development of decay.

Where multiple teeth are crowned to a poor standard, claimants can find themselves in very difficult situations, with complex treatment requirements. Complications such as temporomandibular joint (TMJ) pain, occlusal difficulties or simply a poor aesthetic can be invasive injuries.

Often a review of the records in such cases will reveal poor treatment planning, a lack of pre-operative photos and study models, or simply poor surgical technique in undertaking the dental work.

Consent claims

As with other areas of clinical negligence, the field of dentistry also sees its fair share of consent claims following the clarification of the law in *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 and subsequent litigation, which has been seen by many as raising the bar for medical professionals obtaining appropriate informed consent. Dentists have to be clear when undertaking any course of treatment that the patient is well appraised of the alternative treatments that may be suitable for them, and the risks and benefits of each option.

In the dental sphere, it is relatively uncommon to see consent claims relating to restorative treatment such as root canals and fillings, for the simple reason that the alternative is usually to let decay progress untreated and lose the tooth.

The exception to this is to look carefully at decisions to extract teeth, to ensure that a claimant has been given all appropriate options for treatment or referral which may have saved or prolonged the life of a tooth.

The more common consent claims in dentistry relate to prolonged elective courses of treatment. Often these relate to aesthetic work such as crowns / veneers to multiple teeth, or orthodontic work where the patient ultimately had a realistic option as to whether to undergo the treatment.

Before such courses of treatment are embarked upon, professionals would be well advised to prepare thorough written consent documentation to illustrate that the *Montgomery* requirements are fulfilled. In the absence of this and with a claimant who can provide credible evidence as to why further information would have changed their decision, a successful consent claim may ensue.

Picking experts

Whether acting for claimants or defendants, solicitors are well advised to pick their experts carefully in dental negligence litigation.

Breach of duty evidence should come from a practitioner in the same field as that under scrutiny (*Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582). If a general dentist is at fault, this is the field in which the expert should practice. If a restorative dentist is criticised, the same field of practice should provide the expert analysis. Mixing the two is a dangerous strategy, and risks the other side arguing either that an excessively high standard is being applied by the expert, or that the expert simply does not have the level of expertise to comment on a specialist area. If the other side has a more appropriately qualified expert for the liability subject matter, they will be at a significant advantage at trial.

Similarly, in the field of condition and prognosis, practitioners should avoid the temptation to think that a dental negligence claim simply requires a dental expert to comment on both liability and condition and prognosis.

Often with complex restorative work such as implants following tooth loss from periodontal disease, a general dentist may have no experience

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of assessing the prognosis of remaining teeth or placing implants (and charging for these). Faced with an experienced periodontist, consultant restorative dentist or implantologist at trial, they would again be at a material disadvantage.

A specialist should always be sought depending on the nature of the injury. If the issue is the prognosis of root canals, an endodontist should be instructed. If there is a need to improve the position of teeth, an orthodontist should be instructed. If the issue is TMJ dysfunction, consider a consultant oral and maxillofacial surgeon. The list could go on.

The key is careful consideration of the appropriate field, as would take place in any other area of clinical negligence. A GP would not be instructed to opine on the condition and prognosis of an orthopaedic fracture, and the position is no different with dental negligence.

Quantum

When considering quantum, practitioners will adopt the usual approach of looking to the Judicial College Guidelines and comparable cases to assist their general damages valuation. The Guidelines are helpful in cases of tooth loss, but are of less assistance for dental claims of any other nature.

Practitioners might be assisted by considering damages for unnecessary root canal fillings or crowns to equate to the lower end of the Guidelines brackets concerning 'serious damage to teeth' which, arguably, these invasive treatments are when carried out without appropriate justification.

Beyond this, comparable caselaw is of most assistance, and there is a wide range available online.

Dental claims have at times been considered to be at the low end of the clinical negligence value spectrum, and by contrast with life-changing injuries associated with extensive care requirements and loss of earnings, this is true.

That said, even with the potential prospect of fixed costs looming, firms would be well advised to consider maintaining a dental negligence caseload. This author has been involved with several dental cases resulting in six figure settlements and court awards. Notably, the *A G-H v*

Zaman [2018] Lawtel AM0203454 case resulted in the highest reported award in the dental negligence field, with an uplifted general damages award at the Royal Courts of Justice of £69,400 and total damages at over £180,000.

When considering special damages, practitioners should look carefully at future risks of tooth loss or further restorative treatment requirements. Experts can commonly seek to answer legal questions concerning future prospects using the 'balance of probabilities' standard. This is the incorrect approach to future assessments, and any chance of loss / injury, whether 30%, 50% or 70%, should sound in damages to that level, with the appropriate percentage of associated special damages claimed.

Some experts can be reluctant to be drawn on specific percentages, which a minority view as 'crystal ball gazing'. In fact, helpful scientific analyses are now available in professional literature to give well supported assessments of, for example, the prognosis of teeth affected by periodontal disease, or the risk of a tooth being lost in the future following root canal treatment.

Contributory negligence

Finally, practitioners should be vigilant in their assessment of any risk of a finding of contributory negligence in dental claims.

The most common allegations stem from a patient smoking or not attending dental appointments. In the case of the former, there is clear scientific evidence that smoking damages the dentition, particularly in periodontal disease cases where the effect is to accelerate the disease.

If a claimant has been given smoking cessation advice but not complied, practitioners should consider the risk of a contributory negligence finding. Claimant practitioners will find support from the case of *Haughton v Patel* [2017] EWHC 2316 (QBD), where the finding was that no contribution would be found where a patient had not been specifically told that to continue to smoke risked future tooth loss.

In cases of non-attendance, the notes should be examined to determine if a patient was given specific recall intervals. Whether they in fact knew that they had a particular need for dental treatment is also relevant as to whether a court will make a finding of contributory negligence (for example, did they know that they had periodontal disease?).

The above has given a brief introduction to dental claims and an overview of some of the common types of case and issues that will be faced in progressing cases in this field of litigation.

Dental negligence is an interesting field of practice with views feeding in from a range of expert fields. Damages can be substantial, and the difference made to the lives of the individuals concerned significant. For that reason, these claims are likely to continue to make up a material part of the clinical negligence landscape going forward, and provide an ongoing source of case law and legal developments.

Robert Mills is a barrister at St John's Chambers

CRASHING OUT

David Withers and Cheryl Palmer-Hughes on Brexit and RTA claims against EU-based defendants

The transition period put in place by the UK/EU Withdrawal Agreement 2020 ended at 11pm on 31 December 2020. During the transition period, EU Regulations relating to jurisdiction, enforcement of judgments and governing law continued to have effect. Those Regulations no longer apply, as the EU / UK Trade and Co-operation Agreement took effect from 1 January 2021; and is silent on the issues of jurisdiction and enforcement of judgments.

Unfortunately, when it comes to jurisdiction and enforcement of judgments against EU-based defendants, for the most part, we are effectively in a 'no-deal' scenario. We are moving towards a new regime, but we are in essence still in a transition period while we adapt to a post-Brexit world. We are in a state of flux. Case law will develop, challenges will be raised and savvy defendants will no doubt seek to monopolise on the present uncertainty.

While this article will focus on how the position regarding EU-based defendants has changed since the transition period ended, it is worth bearing in mind that the rules that apply to EU-based defendants are now akin to those that have long applied to non-EU based defendants being pursued in the Courts of England and Wales.

Cases involving EU-based insurance companies

On a practical level, it is important to check that insurance provided by an EU-based company is regulated by the Financial Conduct Authority (FCA) and still enjoys the protection of the Financial Services Compensation Scheme (FSCS). Firstly, this is in case insurance companies seek to avoid their liabilities under any judgment or settlement agreement, and secondly, as this could affect the Court's ability to award or approve a Periodical Payment Order (PPO).

The FSCS only covers insurance companies authorised to provide insurance services in the UK by the FSA; and whether a company is authorised or not has changed now we are no longer part of Europe. There are now two separate regimes that provide for EU-based insurance companies seeking to provide insurance cover in the UK: the temporary permissions regime (TPR), and the financial services contracts regime (FSCR).

The TPR allows companies to operate within the jurisdiction for a temporary period beyond 1 January 2021 if they were covered by the FSCS previously. Those companies will need to seek full authorisation by the Prudential Regulation Authority or the FCA in the UK to continue to access the UK market.

The FSCR enables EEA (European Economic Area) firms that had previously passported into the UK and did not enter the TPR to wind down their UK business in an orderly fashion on the following conditions:

- For a limited period of time, the FSCR allows these EEA firms to service UK contracts entered into before the end of the transition period (or before they entered the FSCR) in order to conduct an orderly exit from the UK market now that the transition period has ended ('supervised run off');
- Firms cannot write new UK business during any such period of time, and they are limited to the regulated activities necessary for the performance of pre-existing contracts only, plus certain limited specified activities; and
- The time in which such companies can act in this way is limited for a maximum of 15 years for insurance contracts (although this can be extended by the Treasury).

In general, if an insurance company is in the TPR, or the supervised run-off part of the FSCR, and does not resolve your complaint, you should be able to complain to the ombudsman service, whether or not the firm has a branch in the UK. If an insurance company fails and is unable (or likely to be unable) to pay claims made against it, and is in the TPR or the supervised run off, a claim will usually be covered by the FSCS if the insurance company has a UK branch, or was covered by the FSCS before 31 December (for example, certain EEA funds managers).

If an insurance company does not have the protection of the FSCS, it may fall foul of the ability to satisfy the Court of its ability to make continued payments throughout the life of the PPO pursuant to section 2(4) of the Damages Act 1996. PPOs have always been subject to this scrutiny and there is no one prescribed way of providing the reassurance required – but the impact of Brexit might make satisfying this requirement more difficult. Ultimately, the FCA's guidance should be sought out of caution for any claims involving an EEA-based insurer.

Untraced / uninsured drivers

The usual recourse to the MIB if a person is injured by an uninsured driver for incidents occurring in Great Britain remains, including where the uninsured driver is an EU national. This also applies to cases involving untraced drivers, though obviously the claimant will not know whether or not there is an EU-based defendant in these circumstances.

The position has changed significantly for British residents injured in road traffic incidents in EU member states where the driver is uninsured or untraced, as the Motor Vehicles (Compulsory Insurance) (Amendment etc.) (EU Exit) Regulations 2019 removes the right of British residents injured by uninsured drivers in an EU Member State to bring an action in Great Britain and to claim compensation from the MIB. Those claims will now have to be made against the foreign equivalent body, and will have to be pursued in that foreign jurisdiction.

In preparation for Brexit, the MIB negotiated 'Bilateral Protection of Visitors Agreements' with a number of EU member states. Under these

agreements, the MIB and the foreign compensation body both commit to continuing compensation for victims of accidents involving uninsured drivers in their own country. The key difference compared to the pre-Brexit regime is that claims made on behalf of British citizens will need to be brought in the country where the incident occurred (as opposed to in the claimant's country of residence), although British claimants will benefit from the MIB's assistance in the overseas process.

The Guarantee Funds of 10 countries that have not signed reciprocal agreements have confirmed that they will continue to compensate UK-resident victims.

In either scenario, claimants may require foreign legal advice, and here they will likely face a number of practical difficulties, such as language barriers, procedural differences and time differences. Importantly, financial difficulties may arise where claimants must cover legal fees, win or lose, in countries where contingency type agreements are not valid or, if they are, after-the-event insurance is not available to supplement them. The level of compensation awarded will also be based on foreign law. The reality that there might not be any cover for legal fees could mean that even where reciprocal agreements are in place with EU Member States, access to justice is now a real issue for those who cannot afford to fund litigation on a private, and often up front, basis.

Where a reciprocal agreement is not in place, whether an EU member state's compensation body will compensate a UK-based claimant will depend on the law of that member state. There are concerns over certain states whose Guarantee Funds have not yet signed a bilateral agreement or confirmed ongoing compensation to UK based claimants; with France a notable example. French law only provides for residents of an EU member state to make a claim against the French Guarantee Fund, so UK residents involved in RTAs with uninsured or untraced drivers in France may not be entitled to compensation from the French Guarantee Fund - and the ability to seek compensation from the MIB in its place has been removed.

Service out of the jurisdiction

For claims against defendants based in EU member states (or further afield) arising from incidents that occurred in the UK, establishing the jurisdiction of the Courts of England and Wales is unlikely to be problematic. It is not controversial that the England and Wales Courts will most likely have jurisdiction over an incident that occurred in the jurisdiction; but establishing jurisdiction in the England and Wales Courts is intrinsically linked to where a defendant is based. The CPR provide a system whereby establishing jurisdiction against a foreign defendant is generally achieved by having, or seeking, permission to serve papers out of the jurisdiction.

The Fourth Motor Insurance Directive requires each motor insurer in the EU to have a claims-handling representative in each Member State. Where a claim was being brought against a foreign motor insurer, proceedings could be served on the nominated UK claims-handling agent, which negated the need to serve abroad. The process has now changed, and service of proceedings abroad will be necessary, as there is no longer a requirement for EU-based motor insurers to have a claims-handling agent in the UK; and even if they do, it will not be possible to serve on the UK agent.

The present position for RTA claims is now that, where an EU-based defendant is named on the Claim Form, permission must be sought to serve the Claim Form (and Particulars of Claim etc.) in an EU member state. This is an important procedural and practical change post-Brexit for RTA claims in particular.

RTA claims issued before 31 December 2020

Article 67(1)(a) of the Withdrawal Agreement applies to claims 'instituted' before 11pm on 31 December 2020. It is relevant to the issue of seeking permission to serving out of the jurisdiction, in that it effectively provides that the pre-Brexit regime (explored below) applies to claims instituted before the transition period ended.

The view is that whether a claim has been 'instituted' should be interpreted in line with national law of the member state concerned (case 129/83). CPR Part 7.2 states that 'Proceedings are started when the court issues a claim form at the request of the claimant'; that is when the claim form has been issued, provided it is then served correctly.

It is important to note here that the determining factor is when the claim was instituted, not when the incident occurred. If an incident occurred pre-Brexit, but proceedings have not yet been instituted, then a claimant cannot take advantage of the pre-Brexit regime.

Where the pre-Brexit regime applies, while a claimant will no longer be able to serve on a UK claims handler for a foreign insurer, permission will not be required in order to serve out of the jurisdiction, as the provisions of the Brussels (recast) (Regulation (EU) 1215/2012) regime continue to

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apply. However, the practical steps of having to serve on a defendant abroad will have to be followed. This will undoubtedly cause some delay, and increase the costs of the action. The steps involved (outlined below) need careful and specialist attention given the inherent risks around defective service; particularly if the limitation deadline is looming.

RTA claims issued after 31 December 2020

For new, post-Brexit claims (ie. those not issued before the end of the transition period), there is no automatic right to serve out of the jurisdiction, and an application must be made for the Court's permission to do so, before the practical and time-consuming steps of serving out of the jurisdiction are embarked upon.

Various factors will affect the prospects of an application to serve out of the jurisdiction being successful, contained within CPR Part 6 and Practice Direction 6B (para 3.1); but it is overwhelmingly likely that the Courts of England and Wales will have no difficulty in confirming jurisdiction over a claim arising from an incident that occurred in the jurisdiction, and so granting permission to serve out of the jurisdiction. The most relevant CPR provisions are: CPR 6.37 (relating to the application to serve out – domicile of the defendant is the key consideration); CPR 6.40 - 6.42 (methods of service); and CPR 6.45 (translations).

Once permission has been granted, the procedure for serving out of the jurisdiction is now covered by the Hague Service Convention, which effectively means service should be effected via the Foreign Process Section (FPS) at the Royal Courts of Justice – whose work was temporarily suspended because of the COVID-19 pandemic. This adds to an already existing backlog of cases, where, in the writers' experience, it was taking at least three or four months for documents to be processed by the FPS pre-covid – taking up a significant proportion of the six-month time limit within which papers must be served.

For claimants applying for permission to serve out of the jurisdiction, prevailing COVID-19 circumstances are such that an application for an extension in time to serve the Claim Form and Particulars of Claim may also be necessary. Coupling making an application for permission to serve out of the jurisdiction with the need to now have all documents translated and served abroad (as opposed to serving English documents on a UK claims handler) will serve to increase the lifespan of litigation, as well as the associated costs.

Enforcement

And finally, turning our thoughts to perhaps the biggest area of concern post-Brexit: enforcement. Cross border practitioners have a certain degree of confidence that whatever the situation, claimants will be able establish jurisdiction in England and Wales for a variety of types of claim. But where a claim is brought against a foreign defendant, will a claimant be able to enforce any judgment obtained against it?

Article 67(2)(a) of the Withdrawal Agreement covers the recognition and enforcement of judgments. This provides that '(i)in the United Kingdom, as well as in the Member States in situations involving the United Kingdom', Brussels I (Recast) will continue to apply to judgments 'given in legal proceedings instituted before the end of the transition period.' For ongoing proceedings, any subsequent judgment obtained should therefore be enforceable in the defendant's country of domicile, as per the pre-Brexit Brussels (recast) regime.

For claims instituted after 31 December 2020, recognition and enforcement of UK judgments will now depend on the national law of the country where the defendant is domiciled. There is currently a flurry of commentary from EU-based lawyers on the topic of enforcement, and the position will vary from country to country. Some commentators seem to suggest that damages ordered by the English Courts arising out of contractual disputes could well be readily enforced in a foreign country, while claims relating to tortious acts might be more controversial.

What seems clear is that whatever the recipient country of the judgment, the foreign Court will need to be reassured that the Courts of England and Wales were the proper courts to deal with the claim in the first place. This may effectively create a proactive and reactive need to convince the Courts about jurisdiction: first at the point of seeking permission to serve out of the jurisdiction, and second, to allow enforcement proceedings, if and when appropriate, in an EU member state. It is also clear that claimants will need to instruct foreign lawyers to commence enforcement proceedings in the relevant foreign country, no doubt at extra cost to the claimant. As seems to be a common theme with the post-Brexit regime, this will increase time and costs.

Lugano Convention

The Lugano Convention is very similar to the Brussels (recast) regime and could be an apt replacement for the pre-Brexit rules that enabled UK-based claimants to serve upon defendants based in EU member states without having to first seek the Court's permission and, crucially, provided a framework for mutual recognition and enforcement of judgments, albeit in a slightly different manner than that provided for under the Brussels (recast) regime.

The UK's accession to Lugano would not, unfortunately, overcome the issues identified in relation to FSCS protection for EU-based insurance companies, or re-instate UK-based claims handlers for EU-based insurers, or the rights of UK residents to bring claims against the MIB in place of foreign guarantee funds.

However, given the time and costs involved in seeking permission to serve abroad, serving abroad and potentially enforcing judgments in a foreign country, there are clear benefits in a road traffic accident context to the UK being a party to the Lugano Convention.

A unanimous agreement on the part of the EU27 is required before the UK can accede to the Lugano Convention. The UK government indicated its desire to be a contracting party to Lugano on 8 April 2020. While the text of the convention itself provides for a decision to be given within 12 months of such a request, that is not a firm deadline and no response has yet been received. There will no doubt be more to say on this topic in the future, hopefully in the context of a positive decision on Lugano. Watch this space.

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ZOOMING IN

Carol Hopwood looks at what aspects of pandemic working will be worth keeping

On 23 March 2020, with a mix of bewilderment and an attitude that belied the gravity of the situation that we were about to face, I locked the door on our office fully expecting to be back within the month. I suspect I was not alone with that thought process. I had not heard of Zoom, video calls were the exception not the norm, remote appointments were rare, and as for working from home – I was not a fan.

Yet, here we are, over a year later. How things have changed for all of us involved in the litigation process. Judges presiding over remote hearings with electronic bundles. Experts assessing clients and our own client meetings and conferences via video conferencing. When Professor Robert Kelly or 'BBC Dad' was interrupted by his children during a live video interview in 2017, it went viral and was broadcast around the world. Many will now have experienced something similar, and any embarrassment has largely gone. It has almost become a welcome relief to have long video conferences interrupted by the unpredictability of pets and children.

Necessity is said to be the mother of invention, and we have learnt that there is nothing like a pandemic to put that to the test. Our IT team were incredible and, unless you are in IT, I do not actually think we have a true understanding of the logistics of switching an entire workforce of nearly 1,000 people to working from home at short notice.

Managing the frustrations and expectations of the workforce would no doubt have required the patience of multiple saints, but they did it with a smile on their faces and despite a few bumps in the road, we were soon operating as business as usual, just from our bedroom, study or kitchen with a big sprinkling of flexible working. We achieved in a few short weeks what would likely have taken many months but for Covid.

My children are at University, so I am thankful that the particular challenge of home schooling passed me by. I have absolute respect and admiration for my colleagues who have somehow managed to continue to perform as if in non-pandemic times, maintaining outstanding five star client reviews at the same time as home schooling. I think that brings a completely new meaning to the definition of multi-tasking.

So, one year on, it is a good time to reflect on those enforced changes and how our 'new normal' may look at Carpenters Group.

Flexible / agile working

Our ability to maintain 'business as usual' required us to re-visit our attitude to flexible working. While our workforce has formal 'flexi- time', this was elevated to a completely new level and once schools closed, we were proactive in supporting our colleagues to work hours that allowed them to meet home and work commitments rather than the traditional office hours. Our clients, many of whom were in the same predicament, welcomed being able to talk to their lawyers outside of normal hours.

The feedback from the team is that being able to work flexibly helped ensure that work and family life remained balanced. But we are very mindful of the importance of on-the-job learning, that is more difficult to achieve working remotely.

Like many other organisations, we are now in the process of a full review of agile working for the future. We are currently surveying our entire work force on this area, but general feedback during the pandemic has been that a hybrid system of part office, part home based working would be the ideal; and overwhelmingly that the work / life balance is much improved with agile working. I do not ever see us going back to the 'old normal'.

Employee wellbeing

These have been difficult and testing times for all of us and we have been acutely aware of the difficulties our people have faced. Thankfully, only a limited number have been ill with Covid, but our people have lost loved ones. The firm has tried to proactively support colleagues and their families through a number of measures: appointing wellbeing ambassadors across the firm; organising online monthly wellbeing sessions; holding open discussions about mental health; installing an ethos of 'it's okay not to be okay'; offering the ability to work non-conventional hours; planning social activities and online events such as quizzes and awards; and delivering 'thank you' parcels to every team member.

These initiatives are underpinned by the day-to-day support and wellbeing checks that our managers across the business provide.

On a personal level, I have met children (and pets) that I almost certainly would never have met, and feel like I know more about my team and their daily lives than I would have otherwise. I feel

it has made us stronger as a unit, and I hope that this feeling is widespread. I am very proud of what our teams have delivered in the last year - professionalism, teamwork, resilience and compassion, all in testing times.

Remote meetings

If you had asked me a year ago, I would probably have said that Zoom was an airline. I had no clue. However, like many others, I quickly got up to speed (thank you IT, again) and along with Teams, this forms the bedrock of all communication with clients, experts, counsel, the Courts and of course until recently, social interaction with friends and family. I am a convert.

While there is no substitute in serious injury litigation for meeting your clients in person, moving forward I will try to use video conferencing in place of telephone calls with my clients and their families. I think it is more personable, you can get a better feel for how they are doing, and client feedback is that they feel more as if they are having a proper social interaction rather than a faceless call. That is particularly important for our clients who are socially isolated or have few friends and family.

One of my brain-injured clients put it quite succinctly when he pointed out that the pandemic was nothing new for him. Social isolation was his normal and seeing us on a Zoom call really cheered him up. In some cases, we have arranged for tablets to be provided to our clients so that they can stay in touch with us.

Medical appointments

These too have moved, where possible, to remote assessment. Protection of our clients' health has been critical and for many who are extremely clinically vulnerable and have been shielding, in-person assessments were simply not possible. Zoom, WhatsApp or FaceTime have become the norm for many.

Our clients have appreciated the steps we have taken to protect them. Calls are scheduled to avoid times of maximum fatigue, travel to and from appointments is no longer necessary, clients can be supported by family members who may otherwise not have been available to travel with the restrictions, and calls are arranged at our clients' convenience and, above all, our clients are in the comfort of their own home.

This does not suit all types of assessment, and there will be cases where domestic circumstances are such that our clients want to be seen outside of the home, but I do feel that the last 12 months has proven that for the right cases, this approach works well.

Rehabilitation during pandemic

The way that rehabilitation is delivered, both privately and on the NHS, will differ from Trust to Trust, but much rehabilitation has been delivered remotely by telephone or video call during the various lockdowns.

Working in partnership with insurers to get a proactive case manager and private rehabilitation has been critical. Securing places in private neuro-rehabilitation units that are Covid-free or arranging packages of rehabilitation that have been remotely delivered such as psychology, physiotherapy, occupational therapy and case management has been logistically challenging.

In addition, clients' family networks are suffering greater stress due to the reports of alcohol misuse, suicide attempts, breakdown of relationships and homelessness. Having a good working relationship with the defendant insurer has been critical, and makes all the difference. My experience is that in many situations the insurers have been very proactive in working with us to find solutions to difficult situations.

The Court system

I think this is one of the biggest positives to come from the pandemic, in the sense that the use of technology has been accelerated significantly and has demonstrated how the systems can be improved.

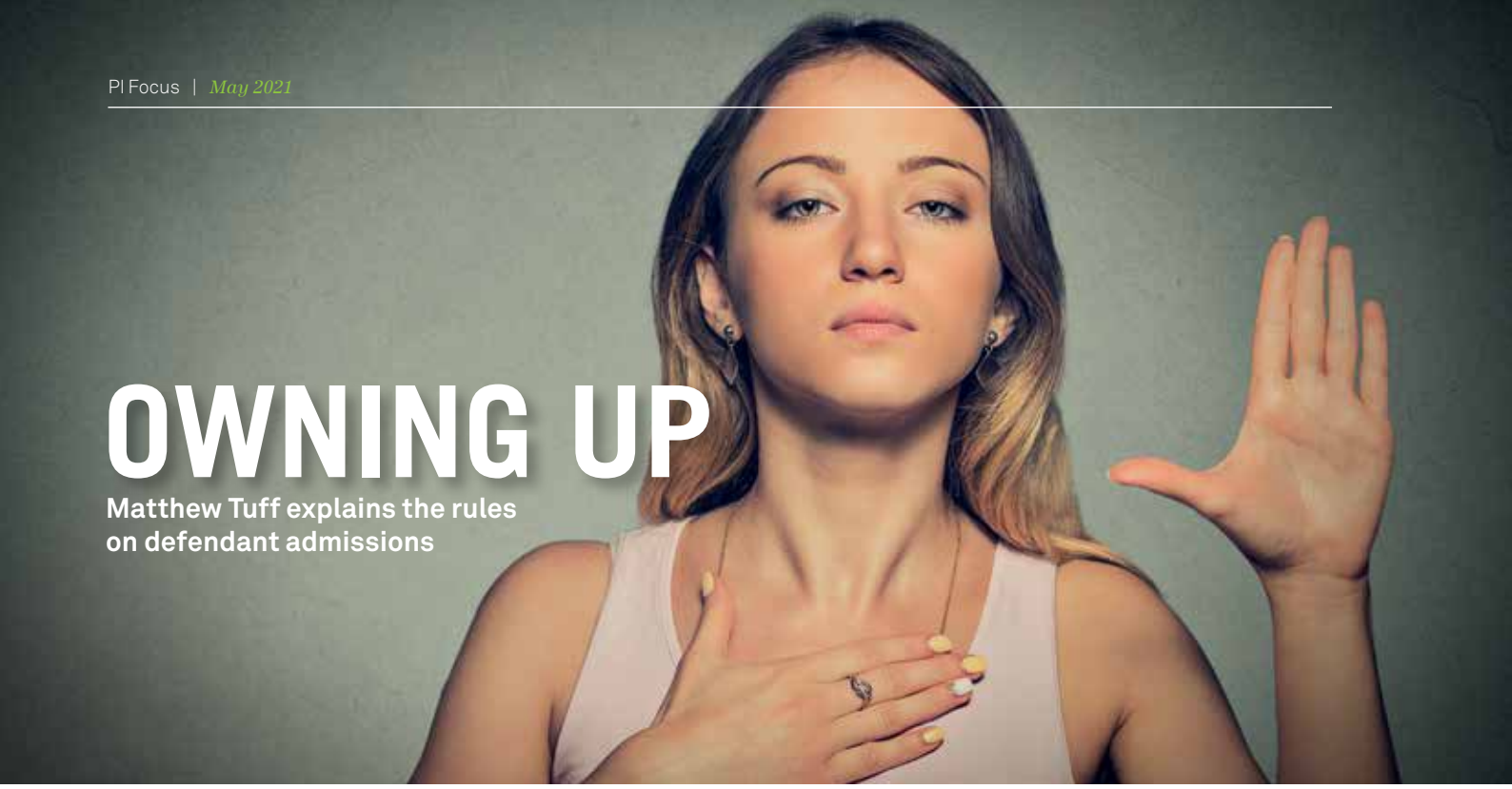
Electronic filing, video hearings, e-bundles and the local pilot of online issuing are just some examples. Court colleagues have been fantastic in working with us to ensure minimum disruption to our cases. I hope that the pandemic has been the catalyst for a more permanent change rather than a temporary fix.

Some final thoughts

The coronavirus pandemic certainly presented new challenges to the way serious injury cases are managed, but by working consensually with our opponents where possible, adopting new procedures and using the available technology, we have continued to deliver our business as usual, just a different usual.

Many of the changes that were forced on us have resulted in improved systems and processes, improved methods of communication and better work life balance at home. However, I for one will still be glad to get back to the office and to see my clients and teams in person.

Carol Hopwood is head of serious and catastrophic injury, Carpenters Group



OWNING UP

Matthew Tuff explains the rules on defendant admissions

The issue of 'admissions' has given rise to its fair share of litigation. Here, I consider what is a valid, binding admission, and when a defendant can withdraw their admission. Admissions can be made by a party before or after the commencement of proceedings and, once proceedings have been started, a party may enter judgment upon a pre-action admission made by another party.

A valid admission?

The first question to consider is whether the defendant has actually made a valid, binding admission. The wording of the admission is very important.

The Personal Injury Pre-Action Protocol provides useful guidance about how an admission should be worded. It states that (no later than three months after acknowledging the letter of claim), the defendant should state if liability is admitted by confirming that the accident occurred, that it was caused by their breach of duty, that the claimant suffered loss and that there is no defence under the Limitation Act 1980.

If the defendant states that liability is admitted or primary liability is admitted, that is a binding admission of liability. If they say they 'will deal with your claim', it is not. If they say breach of duty is admitted, this is not a full admission of liability (although it is still quite useful). If they say causation is not admitted, this is arguably not a full admission of liability (although see *Cavell v Transport for London* [2015] EWHC 2283 (QB), below). While one would not reasonably expect a defendant to concede that all of the losses claimed were due to their breach of duty, they are required at least to concede that it caused some loss (the extent of which remains to be proved). If any admission is made in a without prejudice letter, it is of little use as it cannot be shown to the court.

Greater Manchester Fire & Rescue Service v Veevers [2020] EWHC 2550 is a useful example of the above points. This was a fatal accident case relating to the death of a firefighter. On the eve of the inquest, solicitors for the fire service wrote to Mrs Veevers' solicitors, saying:

'Our clients are not in a position to consider an admission of liability and we have not undertaken a detailed forensic analysis of the potential for liability in any civil claim on their behalf. The purpose and objective in making the comments which we make directly below is to attempt to remove any additional stress from the family during and immediately after the inquest…We write in open correspondence in order to advise that our clients are willing to compensate the estate and dependents of Stephen Hunt pursuant to the Fatal Accidents Act 1976… for any loss which they may prove to be attributable to the incident on 13 July 2013 together with payment of their reasonable costs'.

At detailed assessment at the end of the case, the fire service argued that the costs of the claimant's lawyers attending the inquest were not recoverable, in view of the above assurance that the fire service had provided. But the court held that the costs were recoverable, as the defendant had not given a formal admission of liability. The court stated obiter that, had liability not been in issue, the costs of attending the inquest would not have been recoverable.

Resiling from an admission

Of course, even if a defendant gives a valid, full admission of liability, they may still be entitled to resile from that admission at a later stage. CPR 14.1A provides that where a defendant makes an admission before the commencement of proceedings, they may withdraw that admission (before proceedings have been issued) if the party to whom they made the admission agrees. After the issue of proceedings, they can only withdraw that admission with the consent of all the other parties, or the court's permission.

CPR 14 .1 provides that, where a defendant makes an admission after the commencement of proceedings, the permission of the court is required to withdraw or amend a decision. The court's power to allow a party to retract an admission is discretionary, but Practice Direction to Part 14 (paragraph 7.2) states:

'In deciding whether to give permission for an admission to be withdrawn, the court will have regard to all the circumstances of the case, including: (a) the grounds upon which the applicant seeks to withdraw the admission, including whether or not new evidence has come to light which

was not available at the time the admission was made; (b) the conduct of the parties, including any conduct which led the party making the admission to do so; (c) the prejudice that may be caused to any person if the admission is withdrawn; (d) the prejudice that may be caused to any person if the application is refused; (e) the stage in the proceedings at which the application to withdraw is made, in particular in relation to the date or period fixed for trial; (f) the prospects of success (if the admission is withdrawn) of the claim or part of the claim in relation to which the admission was made; and (g) the interests of the administration of justice.'

None of these factors has more importance than the other (although, depending on the facts of the case, some may be more relevant than others; *Woodland v Stopford* 2011 EWCA Civ 266).

As a general rule, the later in the proceedings an application to resile is made, the lower its prospects of success. The court will want to know why the applicant has left it so late. As for the 'conduct of the parties', this would be relevant where, for example, the claimant held back important evidence until after the admission was made. Below are some cases that show the court's approach when considering applications to withdraw admissions.

In *Foster v United Lincolnshire Trust* [2016], the defendant applied to withdraw only three weeks before trial, and more than three months after the new evidence relied on had come to light. The court denied its application.

Sometimes, a genuine error by the defendant can be sufficient grounds for allowing an application to resile (provided that the defendant makes its application promptly). In *Moore v Worcestershire Acute Hospitals NHS Trust* [2015] EWHC 1209 (QB), the defendant made an admission following 'a careless and cursory' reading of a medical report. The court said the fact that this was a 'pure mistake' was significant, because it distinguished it from being a 'tactical change'. The defendant had a reasonable prospect of defending the claim if allowed to withdraw from its admission. The application was made very early in the proceedings, and the court granted the defendant's application.

By contrast, see *Cavell*. The claimant injured his back when he fell off his bike due to a pothole in a bicycle lane. The defendant's claims handlers admitted liability and proceedings were issued. Shortly after filing its defence, the defendant applied to withdraw the admission, arguing that it had been made in error, and that it had a strong case on liability. The wording of the defendant's admission had been 'Please note liability will not be an issue, subject to causation' and the court concluded that 'The only sensible meaning of those words is that primary liability for the accident is admitted but no admission is made as to whether the injury suffered (or some part of it) was caused by the accident. It clearly was an admission of liability'.

The court noted that the defendant had offered no explanation as to how an error had been made when admitting liability. Its claims handlers were hugely experienced and all the available evidence showed they had carried out a careful consideration of the liability issue. No new evidence had come to light supporting the defendant's case. It was not in the interests of justice to allow withdrawal of an admission after mature reflection by highly competent professional advisers.

In the Chancery Division case of *SL Claimants v Tesco* [2019] EWHC 3312 (Ch), the defendant had made a 'carefully considered' admission of liability in their pleadings. No new evidence had come to light – the defendant had simply reappraised the evidence and decided that in fact it did not support the admission previously made. This reappraisal had occurred almost three years after the pleadings were originally filed. The court denied the defendant's application.

Wood v Days Healthcare UK Limited [2017] EWCA Civ 2097 shows that 'new evidence' is not limited to liability issues. The claimant's solicitors initially indicated that they considered the claim to be a fast track case. The first defendant's claim handlers admitted liability in full. The claimant's solicitors later advised the first defendant that it was becoming clear that the value of the claim was much higher than initially anticipated and, when court proceedings were issued, the statement of value in the particulars referred to the claim being 'in excess of £300,000'. Shortly after the commencement of proceedings, the first defendant applied to resile from its admission of liability.

At first instance, the first defendant was denied permission to withdraw the admission. At the same hearing, judgment was entered against a second defendant. The first defendant appealed the decision to deny its application to withdraw. The Court of Appeal said that the increase in value of the claim more than ten-fold amounted to highly material 'new evidence' (CPR 14PD 7.2(a)). An increase in value of a few thousand might not amount to 'new evidence', but such a significant increase did. This in itself would have been enough to allow the defendant's application; but the fact that judgment had been entered against a second defendant also meant that there was little prejudice to the claimant in allowing the first defendant to retract its admission.

By contrast, see *Royal Automobile Club Ltd v Catherine Wright* [2019] EWHC913 (QB), in which the claimant fell down stairs while at work. On receiving the letter of claim, the defendant alleged that it should have been brought through the Claims Portal, but the claimant's solicitors replied that the claim was certainly in excess of £25,000. The defendant admitted liability. The claimant later served a schedule valuing the case at over £1m. Shortly after the commencement of proceedings, the defendant applied to withdraw its admission. The defendant's application was refused. The court said it was clear from the outset that this was a complex case, and there was no reasonable basis for the defendant to decide that it was a low value claim.

These cases show that the circumstances in which a party may be permitted to withdraw an admission are not limited to those where new liability evidence has come to light. At the same time, a defendant has a relatively high evidential bar to overcome in order to persuade a court to grant its application; and if there has been delay on its part or the matter is close to trial, this can be fatal to its application.

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FACT OR FICTION?

Theo Huckle on the courts' approach to the reliability of oral witness evidence

On 6 April this year, a new practice direction (PD57A) concerning certification of trial witness statements and extended statements of truth came into force, based in large part on *Gestmin v Credit Suisse* [2013] EWCA 3560 (Comm). This is so far (and rather confusingly) for the Business & Property Courts only – and it will perhaps not concern many of us that the Admiralty court is likely to accede to these new provisions in October – though as Stephen Gold recently wrote in *New Law Journal*, 'How much of the PD spills out into other jurisdictions is anyone's guess'.

New requirements are imposed upon the witness in cases with significant disputed issues of fact, to indicate in the statement how well they remember things; whether their memory was refreshed by any particular documents; and, if so, which ones; and how good their memory was before they saw those documents. More controversially, solicitors must attach an appendix to a witness statement, listing every document that the witness was shown. Witness statements must stick to the facts (rather than the annoyingly common protracted *argument* or *explanation* of documents) and go through a minimum number of drafts; and witnesses must certify that they have 'not been encouraged by anyone to include in this statement anything that is not my own account'.

The court will visit condign punishment upon a witness or lawyer shown to have breached these rules, including exclusion of all or part of the trial statement or its redrafting, and severe costs sanctions. Underlying all of this, it appears, is concern as to whether the use of documents to confirm or refresh memory has the capacity to 'corrupt' recollection. It seems to imply that judges have concerns about the reliability of witness evidence generally, as opposed to documentary record, and perhaps for good reason.

Much, of course, depends on the nature of documents consulted by the witness. It must be true that a witness's accuracy could only be improved by consulting documents of his/hers which may properly constitute *aide memoire*, rather than relying on normally faulty recollection after the passage of considerable time periods. In this context, that memory *is* faulty is surely uncontroversial; the real question is *how* inaccurate is later memory?

Judges know this, of course. Yet it is a fiction deeply imbedded in our justice system that judges – and magistrates and juries in the criminal context - can tell from witnesses' demeanour and presentation whether they are telling the truth, and having decided which of conflicting witnesses is the truth-teller and which not, accept the evidence of the truth-teller and reach the just result. Apart from common sense, there is a lot of research data

which indicates that this is a simplistic and often simply false approach. Witnesses may appear 'shifty' because they are lying, or because they are terrified of appearing in court, or for myriad other reasons. Confident witnesses may be accomplished and persuasive liars and confidence-tricksters capable of taking in even the most sophisticated and intelligent observer. Judges know this too. They do not often say it, because that could call into question any full acceptance of a witness's factual account they need to make to resolve a case, which is after all their duty.

It may, then, be witnesses' reliance on contemporaneous documents which indeed show their accounts to be accurate, at least so far as the documentary support goes, and that this is more likely to make an account credible and (properly) acceptable than a judge's reliance on the witness's appearance and demeanour.

Fundamentally dishonest, only a little bit, or just mistaken?

It was reassuring that in the recent High Court clinical negligence case of *Brint v Barking etc. UHNHST* [2021] EWHC 290 (QB), HHJ Platts declined to apply the fundamental dishonesty dismissal provided for by s57 of the Criminal Justice and Courts Act 2015 on the basis that the account was wrong / mistaken, but not fundamentally dishonest. The case concerned an extravasation injury following a CT scan with contrast carried out by the defendant when the claimant was aged 69; she claimed for significant disabling injury, but the judge found only short-term relatively minor effects and no relevant breach of duty, so the claim failed. Very late, on the eve of trial, the defendant notified the claimant that it intended to allege that she had been fundamentally dishonest. The judge reviewed the recent redefinition of dishonesty by the Supreme Court in *Ivey v Genting Casinos Limited* [2017] UKSC 67. He found the claimant's evidence about the events at the time of the scan and her prior health condition was unreliable, but on this application he was against the defendant, stating that he was satisfied the claimant 'genuinely' believed her case to be true, and that 'applying the standards of ordinary decent people I find as a fact that although her evidence was wholly unreliable in the sense that I do not accept it, she has not been dishonest'.

The judge was influenced in reaching this view by a number of factors, including notably that the claimant was not motivated by financial gain, the consistency of her complaints from early stages, her pre-existing psychological profile and issues of inaccurate self-perception of her prior state of health, and the reality of her 'genuine and significant disability which she firmly believes has been caused by the [index] events'.

This followed a similar analysis by HHJ Williams in the Birmingham County Court case of *Keane v Tollafield* in August 2018. The judge applied *Gestmin* (see below) in holding that although the claimant's oral evidence had been confused, the defendant had not established on the balance of probabilities that she did not have a genuine belief in what she said in her statement at the time she made it, 15 months before the trial. She had not deliberately exaggerated her symptoms and would not be deprived of the protection of qualified one-way costs shifting for fundamental dishonesty under CPR r.44.16(1).

> *In our ordinary lives, we surely well understand that people 'misremember' events*

It is perhaps also fair to comment that in our ordinary lives, we surely well understand that people 'misremember' events, because the minds of persons remembering back over time will sometimes cause them genuinely to remember what did not happen, and that perhaps this is most likely to happen if it suits their belief about the rights and wrongs of their position in a dispute. The apocryphal 'collision between two stationary vehicles' is not always caused by somebody lying, but sometimes by stress / shock / fear and the mind's desire to remember that one did the right thing, driving carefully and drawing to a halt successfully.

There is thus an important distinction between 'rejecting' a witness's account and concluding that the witness has been 'lying' to the court. Judges have been increasingly reluctant to phrase their judgments as to dishonesty, perhaps partly because they accept that the judicial process is far from perfect, and their job is to do their best to identify where the truth lies rather than claim god-like omniscience in that regard. We are all very familiar with miscarriages of justice based on evidence accepted by tribunals of fact but later demonstrated to have been false (Roy Meadows, Jeffrey Archer etc.).

All of this makes it all the more important that a judge is slow simply to accept the witness on one side and reject the witness on the other, which fits with the liar v truth-teller analysis, but rather considers the evidence in a more granular way, accepting and rejecting aspects of the accounts of witnesses as required by the evidence as a whole.

However, as we will discover, there have recently been highly significant developments in the judicial approach to assessment of oral witness evidence.

The judicial method – the traditional view

As highlighted by Gordon Exall's excellent *Civil Litigation Brief* - from which some of my references below have been gleaned – there have been numerous ongoing developments in relation to witness credibility.

When considering the judicial process of assessing the credibility of an oral witness, a good place to start is the (dissenting) speech of Lord Pearce - subsequently cited with approval by many - in *Onassis v Vergottis* [1968] 2 Lloyds Rep 403, 431. Lord Pearce said that whereas 'demeanour' was mostly concerned with whether witnesses seemed to be telling the truth as they now believed it, 'credibility' involved four wider problems:

'First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person, telling something less than the truth on this issue, or though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so, has his memory correctly retained

them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking, or by over much discussion of it with others?

'Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance.

'And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part.'

Lord Pearce identified the following 'main tests' to determine whether a witness is lying, noting that their relative importance will vary from case to case: 'The consistency of the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred; the internal consistency of the witness's evidence; consistency with what the witness has said or deposed on other occasions; the credit of the witness in relation to matters not germane to the litigation; the demeanour of the witness.'

He added that the evidence may only be unreliable, and not dishonest, 'but the nature of the case may effectively rule out that possibility'.

In similar vein, in *Grace Shipping v Sharp* [1987] 1 Lloyd's Law Rep. 207, 215 Lord Robert Goff cited (apparently with the House's unanimous approval) his own judgment in the Court of Appeal in *Armagas Ltd v Mundogas S.A. (The Ocean Frost)* (1984) WL 281667. He said:

'Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities.'

Finally, some words from Lady Arden (recently retired and sadly missed from the Supreme Court) sitting in the Court of Appeal in *Wetton v Ahmed* [2011] EWCA Civ. 610, an appeal from HHJ Simon Brown QC: '[I]t is clear that what has impressed the judge most in his task of fact-finding was the absence, rather than the presence, of contemporary documentation or other independent oral evidence to confirm the oral evidence of the respondents to the proceedings.' The judge had not accepted the respondents' evidence, and the Court of Appeal was unmoved.

Lady Arden said a court's weighing up of witness evidence was not 'solely a matter of body language or tone of voice' in the witness box, but that a judge should also consider what 'other independent evidence', generally documentary, was available to support the witness. She added that documentary records, texts or emails 'may be particularly important in cases where the witness is from a culture or way of life with which the judge may not be familiar. These situations can present particular dangers and difficulties to a judge.'

Lady Arden added that an appeal court would generally treat a trial judge as having had a special advantage in seeing the witnesses give their evidence; though this would be lessened where the evidence is largely documentary. She added that contemporaneous written documentation may be conspicuous in its absence, if it were likely to have existed but has not been produced.

Having reviewed these and other judicial offerings on the subject, in the argument about a replica Porsche 917 in *Piper v Hales* [2013] EWHC B1 (QB) [37], HHJ Simon Browne QC added his own pithy summary, linking the issue of witness assessment and credibility with the value of statements:

'Contemporaneity, consistency, probability and motive are key criteria and more important than demeanour which can be distorted through the prism of prejudice: how witnesses present themselves in a cramped witness box surrounded for the first time with multiple files can be distorted, particularly elderly ones being asked to remember minute details of what happened and what was said, and unrecorded, nearly four years later as here. Lengthy witness statements prepared by the parties' lawyers long after the events also distort the accurate picture even though they are meant to assist the court.'

Perhaps the correct conclusion to reach here is that judges approach significant disputes of factual or expert witnesses on the basis that they look for documentary or other reliable objectively established record of what happened or the data underlying an opinion to support an account in oral evidence, and where they would expect such confirmatory objective evidence, may be wary of the oral account. Nevertheless, in the end a judge may be driven to 'accept the word of one party or the other', and, although it simplifies the process of judging to a result, this is where the real danger for truth discovery lies.

Remote hearings and witness assessment – a new approach?

Concerns have recently been raised in the pandemic context, including by the senior judiciary (especially by Sir Andrew McFarlane P on appeal from the Family Division: *Re A (Children) (Remote Hearing: Care and Placement Orders)* [2020] EWCA Civ 583), about the effect of hearings by 'vidcon platform' on a judge's assessment of evidence in certain types of case. It is widely thought inappropriate for serious disputes of fact to be tried 'remotely' by these methods, rather than 'in person' with the judge able to observe the witness in the traditional way.

However, in *A Local Authority v A Mother* [2020] EWHC 1086 (Fam), Lieven J said she did not think it was possible to say 'as a generality that a

remote hearing is less good at getting to the truth than one in a courtroom.' She added: 'Some people are much better at lying than others, and that will be no different whether they do so remotely or in court.':

In reaching this view, Lieven J relied on *ex p SS (Sri Lanka)* [2018] EWCA Civ 1391 [34ff.], where the Court of Appeal rejected an asylum appeal put partly (though in a late change) on the basis that the tribunal had failed to record observations on witness demeanour. Lord Leggatt gave the court's judgment, which was a *tour de force*. He noted that these days, an appeal court's reluctance to interfere with findings of fact was justified on different grounds, such as the efficient use of judicial resources.

He added: 'Generally speaking, it is no longer considered that inability to assess the demeanour of witnesses puts appellate judges "in a permanent position of disadvantage as against the trial judge". That is because it has increasingly been recognised that it is usually unreliable and often dangerous to draw a conclusion from a witness's demeanour as to the likelihood that the witness is telling the truth.

'The reasons for this were explained by MacKenna J in words which Lord Devlin later adopted in their entirety and Lord Bingham quoted with approval: "I question whether the respect given to our findings of fact based on the demeanour of the witnesses is always deserved. I doubt my own ability, and sometimes that of other judges, to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is that the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help." *Discretion (1973) 9 Irish Jurist (New Series) 1, 10'*

Lord Leggatt continued: ' The reasons for distrusting reliance on demeanour are magnified where the witness is of a different nationality from the judge and is either speaking English as a foreign language or is giving evidence through an interpreter. Scrutton LJ once said that he had "never yet seen a witness giving evidence through an interpreter as to whom I could decide whether he was telling the truth or not" [*Compania Naviera Martiartu* (1922) 13 Ll L Rep 83, 97]...

'It would hubristic for any judge to suppose that because he or she has, for example, seen a number of individuals of Tamil origin giving oral evidence this gives him or her a privileged insight into whether a particular witness of that ethnicity is telling the truth. That would be to assume that there are typical characteristics shared by members of an ethnic group (or by human beings generally) which can be relied on to differentiate a person who is lying from someone who is telling what they believe to be the truth. I know of no evidence to suggest that any such characteristics exist or that demeanour provides any reliable indication of how likely it is that a witness is giving honest testimony.

'To the contrary, empirical studies confirm that the distinguished judges from whom I have quoted were right to distrust inferences based on demeanour.'

Lord Leggart quoted from Wellborn's piece in the Cornell Law Review summarising 'consistent findings of psychological research' into the issue. The journal noted that the 'empirical evidence' found that ordinary people could not make 'effective use' of demeanour in deciding whether to believe a witness; and in fact there was some evidence that 'the observation of demeanour diminishes rather than enhances the accuracy of credibility judgments'. Leggatt added that 'While the studies mentioned involved ordinary people, there is no reason to suppose that judges have any extraordinary power of perception which other people lack in this respect.'

The judge continued: 'This is not to say that judges (or jurors) lack the ability to tell whether witnesses are lying. Still less does it follow that there is no value in oral evidence. But research confirms that people do not in fact generally rely on demeanour to detect deception, but on the fact that liars are more likely to tell stories that are illogical, implausible, internally inconsistent and contain fewer details than persons telling the truth: see Minzner, "Detecting Lies Using Demeanor, Bias and Context" (2008) 29 Cardozo LR 2557. One of the main potential benefits of cross-examination is that skilful questioning can expose inconsistencies in false stories.

'No doubt it is impossible, and perhaps undesirable, to ignore altogether the impression created by the demeanour of a witness giving evidence. But to attach any significant weight to such impressions in assessing credibility risks making judgments which at best have no rational basis, and at worst reflect conscious or unconscious biases and prejudices.

Underlying all of this is concern as to whether the use of documents to confirm or refresh memory can 'corrupt' recollection

'One of the most important qualities expected of a judge is that they will strive to avoid being influenced by personal biases and prejudices in their decision-making. That requires eschewing judgments based on the appearance of a witness or on their tone, manner or other aspects of their behaviour in answering questions. Rather than attempting to assess whether testimony is truthful from the manner in which it is given, the only objective and reliable approach is to focus on the content of the testimony and to consider whether it is consistent with other evidence (including evidence of what the witness has said on other occasions) and with known or probable facts.'

In the introduction I referred to *Gestmin*. That was the case where Leggatt J set to on his quest to challenge some orthodoxies. Sitting in the Commercial Court, the judge was considering his proper approach to evidential discrepancies between recent and sworn witness statements prepared with the help of

lawyers in the context of electronic disclosure. As part of a rapid ascent to the highest court in the land, he lit a slow fuse for what may be something of a forensic explosion to come, and which all litigators need to have carefully in mind.

He said: 'An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory. 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.

'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.)

'External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all, or which happened to someone else…'

The judge added that memory is especially unreliable when it comes to 'past beliefs'. He said: 'Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

Witnesses may appear 'shifty' because they are lying, or because they are terrified of appearing in court

'The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.'

He added that the process of preparing for a civil trial also interfered with memory: 'A witness is asked to make a statement, often when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall.

'The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read the statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.'

The judge noted that it was 'not uncommon' for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction, or whether their evidence is a genuine recollection or a reconstruction of events. But he said such questions were 'misguided', as they assume that there is a 'clear distinction' between recollection and reconstruction, and ignore the fact that such processes are largely unconscious.

He asserted that the best approach for judges in commercial cases was 'to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts.'

He added: 'This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely… in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events.'

And in conclusion: 'Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.'

This approach has been adopted by a number of Lord Leggatt's Commercial Court brethren (see *Watson Farley & Williams v Itzhak Ostrovizky* [2014] EWHC 160 QB Silber J; *Virulite LLC v Virulite Distribution Ltd* [2014] EWHC 366 (QB) Stuart-Smith J; *UBS v Kommunale Wasserwerke* [2014] EWHC 3615 Males J).

Although one sees occasional references to some of the above material and judicial consideration of these issues, in other contexts there was at least initially less detailed review of the matters exercising Lord Leggatt in particular, though extremely detailed review of the evidence itself. See, for examples, *Laporte & Christian v MPC* [2014] EWHC 3574 (QB) Turner J; *Gorgeous Beauty* [2014] EWHC 2952 (Ch) Arnold J; *Freemont (Denbigh) v Knight Frank* [2014] EWHC 3347 (Ch) Smith QC.

In *Lavis v NMC* [2014] EWHC 4083 (Admin), a midwife disciplinary case, *Gestmin* was cited, but Cobb J took the view that Lord Leggatt's comments 'were probably aimed at commercial cases' and that 'such an exclusive approach could not be taken in other jurisdictions...', so it is apparent that there was judicial resistance at play here. I confess to struggle to understand the distinction being drawn between commercial and non-commercial cases (save, I suppose, that there may tend always to be lots of documents in a commercial case), but this is perhaps unsurprising.

Confident witnesses may be accomplished and persuasive liars and confidence-tricksters

A moment's consideration shows that this approach, underlying the new rules and the requirements to explain what documents have been used to compile a witness statement, may be directly in conflict with the approach offered by Robert Goff LJ in *Armagas* as above. If a witness relies on documents, does this support their account, or undermine it? Perhaps both may be true, though probably not at the same time.

In 2017 Lord Neuberger, then Supreme Court President, gave his Neill Lecture at the Oxford Law Faculty, in which he joined the Leggatt theme. He declared himself 'very sceptical about judges relying on their impression of a witness, or even on how the witness deals with questions... Sometimes it might appear that factual disputes are being resolved by reference to who calls the best-performing witness, not who calls the more honest witnesses'.

In the clinical negligence case of *CXB v North West Anglia NHS Foundation Trust* [2019] EWHC 2053 (QB), HHJ Gore also said that the comment in *Gestmin* (that the best approach was to place little if any reliance on witnesses' recollections, and to base factual findings on inferences drawn from documentary evidence) should be treated with caution, since all the decided cases reminded judges that care had to be taken in making their assessment, and that full and proper reasons had to be given; but otherwise the judge is free to rely on witness recollection if satisfied by it.

This approach was approved by the Court of Appeal in *Kogan v Martin* [2019] EWCA Civ 1645, the case about the disputed rights to the screenplay of the sublime *Florence Foster Jenkins*. The court explained that *Gestmin* was not to be taken as laying down a general principle for the assessment of evidence, but rather emphasising the fallibility of human memory. Nevertheless, a proper awareness of that fallibility did not relieve judges of the essential judicial function of making findings of fact based upon *all* the evidence. It was correct that (some of?) the *Gestmin* observations were expressly addressed to commercial cases, and here, Meade J had wrongly applied them selectively and inconsistently to a situation involving private individuals.

However, this 'explanation' has not prevented judges looking to the authoritative *Gestmin* analysis in non-commercial cases generally, and in the injury claims context in particular.

In *Kimathi v Foreign and Commonwealth Office* [2018] EWHC 2066 (QB) Stewart J declined to apply s33 of the Limitation Act to save one of the Kenyan torture group claims after a 56-year delay. He summarised his judicial treatment of witness memory. He expressed caution at applying 'the full rigour' of *Gestmin* and subsequent authorities to a claimant's disadvantage where documentary support was lacking, but noted clear problems with relying on the claimant's largely uncorroborated evidence. The prejudice to the Foreign Office was too great to allow the claim to proceed.

2020 was a particularly good year. In *BXB v Watch Tower and Bible Tract Society* [2020] EWHC 156 (QB) the claimant succeeded in proving the Society was vicariously liable for her rape by one of its elders.

On the limitation issue, Chamberlain J noted that her evidence was the only evidence on some of the disputed points. Applying *Gestmin*, the judge bore in mind the fallibility of memory and the tendency of the human mind to construct a narrative after the event, but considered that any discrepancies in her evidence did not provide any basis for doubting it. He said her answers in cross-examination made him more confident of the reliability of her evidence.

In *Bannister v Freemans* [2020] EWHC 1256 (QB), Geoffrey Tattersall QC expressly applied *Gestmin* in an asbestosis case where he found that the claimant widow's factual evidence contained in witness statements contained inconsistencies, and there was no documentary evidence to either support or undermine the account relied on by the claimant. The claim failed.

Conversely, the claimant's claim for asbestosis succeeded in *Smith v SS Transport* [2020] EWHC 1954 (QB). Thornton J also expressly applied *Gestmin*, as explained in *Kogan*, saying that in approaching the claimant's evidence it had to be borne in mind that the fluidity and unreliability of human memory meant that little reliance could be placed on witnesses' recollections of what was said in meetings and conversations, and that factual findings had to be based on known or probable facts, or inferences drawn from the documentary evidence. But the court had to make findings of fact based on all the evidence, and where it disbelieved a party's sworn evidence, it had to say why.

Then in *Dutta v GMC* [2020] EWHC 1974 (Admin), Warby J applied Lord

Leggatt's documents-focussed approach in criticising the Medical Practitioners Tribunal's findings against a cosmetic surgeon for starting with the complainant's oral account and asking 'do we believe her' before considering the available documents, as well as relying on her 'confident demeanour', which he described as 'a discredited method of judicial decision-making.'

Finally for this review of developments so far, it is worth noting the family case of *Re A (A Child)* [2020] EWCA Civ 1230, in which the *Gestmin / Kogan* combination was considered again by the Court of Appeal. Following an analysis of the two cases, Lady Justice King said that while oral evidence was of 'great importance' in 'assessing the reliability of a witness', the court must be 'mindful of the fallibility of memory and the pressures of giving evidence'. She added: 'The relative significance of oral and contemporaneous evidence will vary from case to case. What is important, as was highlighted in *Kogan*, is that the court assesses all the evidence in a manner suited to the case before it and does not inappropriately elevate one kind of evidence over another.'

I suppose it is rather obvious that the judge's approach to assessment of the case depends on the particular case, and the evidence available upon which to determine the case. But aside from this, and an implied judicial determination to be permitted to rely upon witness evidence when that is all there is, Lord Leggatt's warnings about 'the fallibility of memory' appear to have obtained general agreement.

Moreover, it is difficult not to think that the decision in *ex p SS (Sri Lanka)* was something of a riposte to the attempt in *Kogan* and elsewhere to water down or restrict the reach of *Gestmin*. We do not – yet – see *ex p SS (Sri Lanka)* reviewed alongside *Gestmin*, but it surely ought to be?

A view from abroad (1)

Judges in other jurisdictions have traditionally been more sceptical of witness recollection and judicial confidence in it. Some readers may already have been amused by the forthright judgments of Justice Quinn in Ontario. In perhaps the best example in point, in *The Hearing Clinic (Niagara Falls) Inc v Ontario Ltd, Lewis & Lewis 2014 ONAC 5831 (CanLii)* he began a 1500-paragraph judgment:

'The story concerns the 2006 purchase and sale of a business – specifically, a hearing clinic. How difficult could that be? Two experienced multiple-clinic owners, each represented by a lawyer and with the almost-daily (sometimes hourly) assistance of chartered accountants, put together a transaction with more loose ends than a badly knit sweater.

'I have found it impossible to articulate a helpful overview of this trial. Sitting atop the evidence here is like scaling a very, very high mountain only to find that, when one reaches the summit, one is too far from everything to see anything. The best that I can do is say that the core of the case is the allegation that the individual defendants and their accountant knowingly made fraudulent misrepresentations and withheld information, such that the plaintiff overpaid for the hearing clinic...

'E-mails, hundreds of them, along with letters and other documents, proved to be the most reliable evidence. Without them, the truth would have been unattainable, leaving me at the mercy of witnesses and desperately self-interested litigants attempting to recall events today that took place in 2006. There are inherent evidentiary problems in asking witnesses to tell of such events. Sincerely believed memories that are innocently incorrect become more problematic for the court than do intentional lies.'

Indeed. The judge conceded the limits of judicial perspicacity, but in the case of Mr Fridriksson, it was easy in the end:

'Determining credibility can be a challenge for a trial judge. We have no special powers in that realm and, wherever possible, avoid reliance upon darts, dice and Ouija boards. However, rarely, has a witness generously offered up so many reasons to be disbelieved. Fridriksson was an evidentiary gift who kept on giving.'

The case showed how documentary evidence can undermine a witness's account. The judge said: 'A unique evidentiary feature of this case is the presence of numerous handwritten notes made by Fridriksson (selfie notes?), allegedly memorializing telephone conversations that he had with Dee Lewis and Terry Lewis and with the two accountants. My initial impression was: "Goodness, gracious, this is an organized man whose fastidious attention to detail will make my task easier." However, that impression faded as cross-examination revealed the self-serving fiction of the notes.'

The reader will know what happened. Costs of CAD$1m+ were awarded against the defeated claimant.

Appeals

Very much linked to questions about how good judges are at testing and assessing the truthfulness and accuracy of evidence given orally before them, and by what methodology, is the issue of attempts to appeal them when we think they just got it wrong. My own view is that our tenacity in upholding erroneous findings of initial tribunals has helped to harden the myth that judges are especially good at telling the liar from the truth-teller.

The criminal experience is instructive. In England & Wales the magistrate or juror is the arbiter of fact, and open to little challenge upon it. Cases often turn on 'pure' evidence of fact, unencumbered by documentary support or gainsay, where the court 'just has to decide who it believes', an exercise heavily dependant on demeanour. Of course, many issues of fact in civil cases can be similar, with the road traffic accident perhaps the archetypal example in the personal injury context.

The Court of Appeal *Criminal Division* has from time to time allowed appeals because it harboured a 'lurking doubt' about the correctness of a jury's conviction, a basis established by Lord Widgery CJ's court in *R v Cooper [1969] 53 Cr.App.R.82*. Lord Widgery recognised the court's reluctance to intervene, but noted that its powers were 'somewhat different' since the Criminal Appeal Act 1966. He said the Court should ask itself the 'subjective' question of 'whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done'. This might be based on the 'general feel of the case as the Court experiences it,' rather than based 'strictly on the evidence as such', he added.

This basis was approved by the House of Lords in *Stafford v DPP* [1974] AC 878 (subject to the caveat that evidence to be considered by the appellate court still had to be admissible) and used a number of times by the Court of Appeal (eg. *Pattinson & Laws* (1974) 58 Cr.App.R.417); but also mentioned without being applied on other occasions. However, the permissive test was significantly hardened by the CA in *R v Pope* [2012] EWCA Crim 2241.

In *Pope*, Lord Judge CJ stressed that where there is trial by jury, the 'constitutional primacy and public responsibility for the verdict' rests with that jury; and if the jury has convicted after proper directions, it is not open to the appeal court to set that conviction aside 'on the basis of some collective, subjective judicial hunch that the conviction is or may be unsafe'. Setting the bar high, he said any application of the 'lurking doubt concept' would need 'reasoned analysis of the evidence or the trial process, or both, which leads to the inexorable conclusion that the conviction is unsafe'; and so only in the 'most exceptional circumstances' would a conviction be quashed on this ground alone.

This remains the CA's position, reasserted the following year in *R v Stewart* [2013] EWCA Crim 1421, where the Court said: 'As for the "lurking doubt" submission, this case does not come close to the kind of exceptional case Lord Judge CJ had in mind in *Pope*, where a tribunal which has not heard the evidence should usurp the proper function of a jury because of a "judicial hunch". In any event, we have no such "hunch".'

It is a fiction deeply imbedded in our justice system that judges can tell from witnesses' demeanour and presentation whether they are telling the truth

There has been considerable recent controversy about this in light of the poor record of the Criminal Cases Review Commission (CCRC) in referring dubious convictions back to the CA for reconsideration, the Commission having often declined to refer back in cases where the original evidence is challenged, because there is no 'real possibility' of overturning the conviction.

Thirty years ago when the Birmingham Six were cleared, then Home Secretary Kenneth Baker set up a Royal Commission on Criminal Justice, which in 1993 recommended what became the CCRC. The Royal Commission said it should be 'made clear that the Court of Appeal should quash a conviction, notwithstanding that the jury reached their verdict having heard all the relevant evidence and without any error of law or material irregularity having occurred, if after reviewing the case, the Court concludes that the verdict is or maybe unsafe'.

Then, in March 2015, the House of Commons Justice Select Committee (JSC) concluded that the CCRC was not meeting its original intended role, and said the Law Commission should review the Court of Appeal's grounds for allowing appeals, with a possible statutory change to 'allow and encourage the Court of Appeal to quash a conviction where it has a serious doubt about the verdict, even without fresh evidence or fresh legal argument'. The JSC said this change should be accompanied by a review of its effects on the CCRC, and of the continuing appropriateness of the 'real possibility' test.

In September 2015, however, the Minister of Justice, Michael Gove, wrote to the JSC Chair dismissing this proposal as unnecessary, as he saw no reason why the CCRC could not already refer a case to the Court of Appeal on the basis of a 'real possibility' that a jury's verdict went against the weight of the evidence.

On that basis, Lord Widgery's 'lurking doubt' can justify a CCRC referral on the basis of a 'real possibility' that the conviction will be quashed, so that the JSC recommendation is unnecessary. However, many are entirely unconvinced by this in light of the *Pope* formulation.

A view from abroad (2)

A very different attitude to the issue of witness recollection and preparedness of the appellate court to interfere was memorably taken in the High Court of Australia (their equivalent Supreme Court) in the notorious criminal case of *Pell v Queen [2020] HCA 12*. On 7 April 2020, it allowed the appeal

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of Cardinal Pell, clearing him of allegations of historic sexual assault on two choristers.

The court considered in detail the evidence put before the jury, and concluded that the other evidence in the case was *not* consistent with the complainants' account so that, despite that account clearly having been accepted by the jury, there was 'a significant possibility that an innocent person has been convicted'.

The High Court was very clear as to its proper role: 'The function of the court of criminal appeal in determining a ground that contends that the verdict of the jury is unreasonable or cannot be supported having regard to the evidence, in a case such as the present, proceeds upon the assumption that the evidence of the complainant was assessed by the jury to be credible and reliable. The court examines the record to see whether, notwithstanding that assessment - either by reason of inconsistencies, discrepancies, or other inadequacy; or in light of other evidence - the court is satisfied that the jury, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt.'

Unlike the approach in Australia, *R v SJ & MM* [2019] EWCA Crim 1570 was also a case that concerned historic child sexual offences (by foster parents upon their wards). Evidence from a prosecution witness of fact included adverse subjective opinion which should have been ruled inadmissible, but our CA held that the wrongful evidence did not undermine the safety of the conviction, as 'the critical issue was whether or not the jury were sure that [the complainants] were telling the truth'.

Although the standard of proof is different, the approach to judicial assessment of oral evidence of factual and expert witnesses is very similar in the Court of Appeal Civil Division. The Court of Appeal in all divisions has traditionally been very resistant to attempts to challenge the lower courts' assessment of witness evidence both factual and expert, tending to interfere only where the judge has very clearly misunderstood the evidence, or where fresh evidence is permitted to challenge or undermine the original evidence base, in accordance with *Ladd v Marshall* [1954] 1 W.L.R. 1489.

Given the clarity of Lord Leggatt's debunking of myths about oral evidence and its assessment in *Gestmin* and *ex p SS (Sri Lanka)*, I do wonder how long the traditional approach of our Court of Appeal can be maintained, at least in cases where documents and / or undisputed evidence are readily available to show what probably happened, and that the court below just got it wrong.

There are some modest signs of relaxation perhaps. In *Staechelin v ACLBDD Holdings* [2019] EWCA Civ 817, the Court of Appeal was led by Lewison LJ, who had also chaired the *ex p SS (Sri Lanka)* court. Here the case concerned a dispute over agent's commission on the sale of a painting. The judge had found $10 million commission payable. The appeal court held that there was clearly evidence on which the judge had based his findings. Rather, it was a question of whether the findings were rationally insupportable, *McGraddie v McGraddie* [2013] UKSC 58.

Importantly, however, the court said that a trial judge's findings were *not* inviolable (*Yaqoob v Royal Insurance (UK)* [2006] EWCA Civ 885), but it was of critical importance that in *Yaqoob* the trial judge had erred in basing his evaluation on the *demeanour* of the claimant in the witness box, which is not a solid foundation: *ex p SS (Sri Lanka)*. A judge's reasons for his findings had be given in sufficient detail to show the parties and the Court of Appeal the principles upon which he had acted, and the reasons that had led him to the decision. Here the judge's findings were rationally supportable and the appeal failed. He was presented with two contradictory accounts and did not find either wholly reliable, but it was for the judge to do his best with the material available.

Conclusions

The unanimous decision led by Lord Leggatt in *ex p SS (Sri Lanka)* marks a clear new modern appreciation of the weaknesses of judicial assessment of credibility of oral evidence. This is especially stark in relation to evidence of fact, but questions of the value of assessment of demeanour equally apply to expert evidence. The inexperienced expert witness's opinion may well be right, and the court must be careful not to reject it in favour of the bluster of the 'old hand' opponent.

It seems to imply that judges have concerns about the reliability of witness evidence generally

The accepted truth of this weakness has been used recently to justify remote hearings including for resolution of stark issues of fact: *A Local Authority*.

That the demeanour of witnesses giving oral evidence is not determinative, and that its importance is being regularly downplayed by senior judges, with notable impetus from Lord Leggatt in *Gestmin*, will increasingly call into question the reluctance of appellate tribunals to interfere with the evidential assessment below despite having the full transcripts and full trial bundles. The High Court of Australia appears to feel no such inhibition, at least as guardian of criminal justice: *Pell*.

There will now undoubtedly be greater scope to contend that an appellate court should review the evidence in more detail, and take its own view as to what is beyond doubt, or even just probable. Those with conduct of cases should seek to apply the requirements in the new PD57A (even if not strictly applicable), but be careful about the use of documents, which may either support or undermine the account given by a witness based upon them. Perhaps even both.

Theo Huckle QC *is senior Leading Counsel now in sole practice and associate member of Doughty Street, Apex (Cardiff), Cornwall St Chambers Birmingham/Oxford/ Shrewsbury) and No.18 Chambers (Southampton); theohuckleqc.com*

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Katherine Allen heads the travel litigation team at Hugh James, and has vast experience of acting for tourists who have become ill or been injured on package holidays, in road accidents abroad, on cruise liners and on aeroplanes. She also has experience in dealing with claims arising from aviation disasters. She is an APIL senior litigator and is one of the first APIL accredited accidents and illnesses abroad specialists. She is a member of the Travel and Tourism Lawyers Association, the Pan-European Organisation of Personal Injury Lawyers (PEOPIL), and the American Association for Justice. She is also the Chair of the PEOPIL RTA European Exchange Group.

Daniel Clarke is also a barrister at Outer Temple Chambers and practises in personal injury. He has a particular specialism in cases with an international element. These include claims arising from accidents abroad involving conflicts of law and jurisdictional issues, package travel claims, claims under the Athens and Montreal Conventions. Dan specialises in cases cross-border claims (including claims raising conflicts of law and jurisdictional issues) and has experience of acting in claims in other jurisdictions including in the Privy Council and in Jersey. He is experienced in costs issues and is an accredited mediator.

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CASE NOTES

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PB v Imperial College Healthcare NHS Trust

Clinical negligence: delay in treating a cerebral venous sinus thrombosis; *Quantum:* Severe sight impairment; debilitating headaches; psychological impact; cost of care, case management and accommodation, periodical payments.

Mediated settlement held virtually over Microsoft Teams in May 2020. Mediator: Neil Goodrum, of CEDR

A claim was brought regarding a delay in treating a cerebral venous sinus thrombosis. The case settled at a pre-issue virtual mediation for £1.9m plus annual periodical payments of £40,000 for life.

Background

In June 2015, the 26-year old claimant had an episode of severe headaches, sensitivity to light and vomiting. In July 2015, his optician noted that he had swollen discs and referred him to an ophthalmologist. In September 2015, the claimant saw an ophthalmologist who noted that he had bilateral swollen nerve heads and made an urgent referral to a neuro-ophthalmologist at Charing Cross Hospital.

In October 2015, the claimant saw a neuro-ophthalmologist at Charing Cross Hospital who indicated that he had bilateral papilloedema (optic disc swelling caused by raised intracranial pressure). The claimant was sent to the emergency department for a CT head scan, which showed no abnormalities. He was then seen by the acute medical team, but no further investigations were carried out. A follow-up appointment was arranged to take place with the neuro-ophthalmologist in four weeks.

In November 2015, the claimant experienced headaches, dizziness and some blurred vision. He attended the follow-up appointment with his neuro-ophthalmologist who reassured him and made a non-urgent neurology referral. A neurology appointment was subsequently arranged for February 2016.

In December 2015, the claimant suffered a catastrophic deterioration in his condition. He awoke one morning and was unable to see properly. On admission to Charing Cross Hospital, a lumbar puncture and CT venogram revealed raised intracranial pressure caused by a cerebral venous sinus thrombosis. The claimant was treated with anticoagulation medication. In January 2016, a ventricular peritoneal shunt was inserted.

Injuries

The claimant was registered as 'severely sight impaired (blind)'. He could not see objects unless they were held very close to his face, and even then they were very blurred. He required a guide dog and white cane. He suffered from debilitating headaches. Losing his sight at such a young age had a devastating psychological impact on the claimant. He had been training to be an electrician, but that was no longer possible. He had to move back in with his parents. He suffered from severe anxiety and depression, developed a fear of leaving the house and had suicidal ideation.

Investigations

Investigations commenced in June 2017. Supportive expert evidence was initially obtained from a neuro-ophthalmologist. A letter of notification was sent to Imperial College Healthcare NHS Trust (the Trust), and then supportive reports were obtained from an emergency medicine consultant, a physician and a neurologist.

A letter of claim was sent alleging that in both October and November 2015 it was mandatory to perform urgent investigations to establish the cause of the claimant's symptoms. The experts agreed that a CT or MRI venogram and lumbar puncture should have been performed. This would have shown raised intracranial pressure caused by a cerebral venous sinus thrombosis, which would have been successfully treated with anticoagulation medication prior to any loss of sight.

In the letter of response, the defendant denied liability on the basis that the claimant was mostly asymptomatic and that there was no need to arrange urgent investigations given the normal findings on the CT head scan in October 2015. However, the defendant invited the claimant to engage in a mediation prior to issuing court proceedings. Following a conference with leading and junior counsel, it was agreed with the defendant that the parties would obtain quantum expert evidence and prepare schedules of loss in advance of a mediation. Limitation was initially extended by 12 months to enable these steps to take place.

The claimant obtained quantum expert evidence from a neuro-ophthalmologist, a neurosurgery shunt expert, a care and occupational therapy expert, a psychologist and an accommodation expert. The defendant obtained quantum expert evidence from a neuro-ophthalmologist and a care and occupational therapy expert only.

Prior to the mediation, a conference was held to finalise the quantum expert evidence and schedule of loss. The claimant served a without prejudice schedule of loss and offered to simultaneously exchange quantum reports on a like-for-like basis. The defendant was only willing to exchange the care / occupational therapy reports. A counter schedule was served. Subsequently, the claimant decided to unilaterally disclose the psychology report as it was felt this demonstrated the devastating impact the injuries had had on the claimant.

Virtual mediation

The mediation took place virtually in May 2020. At the beginning of the mediation, a representative of

the trust made a sincere apology to the claimant, and this set the tone. Despite this, the defendant's counsel reiterated that the trust formally denied liability. Although liability was disputed, the key battleground was quantum. The most contentious heads of loss were future care and case management, and accommodation. While the defendant accepted the claimant's lifelong need for care, there was a dispute over the number of hours and the level of case management required. There was also a dispute about whether the claimant would use an agency carer or would directly employ his own carer.

After six hours of negotiation, a capitalised settlement of £4.3m was reached which was broken down into a lump sum of £1.9m and annual periodical payments of £40,000 for the rest of the claimant's life to meet his care and case management needs. This reflected a directly employed carer at 4.5 hours per day and approximately 50 hours a year of case management. In advance of the mediation, counsel had prepared a valuation of the likely recovery for each head of loss on a full liability basis, and this valuation almost exactly matched the settlement obtained. The settlement breakdown is estimated as follows: PSLA £252,180; Past losses: loss of earnings £50,000; gratuitous care £65,000; therapy £260; travel £1,000; equipment £980; accommodation £30,000; miscellaneous expenses £4,000; Future losses: loss of earnings £750,000; care and case management £40,000 annual periodic payments; treatment £50,000; travel £101,000; aids and equipment £104,000; holidays £150,000; accommodation £250,000; miscellaneous £37,000.

Following the settlement, the parties agreed the terms of the PPO and the claimant issued Part 8 proceedings to have it sealed by the court and provide authority to seek a detailed assessment hearing as costs remained in dispute.

William Audland QC and Isaac Hogarth of 12 King's Bench Walk, instructed by Stewart Young of Stewarts acted for the claimant; Capsticks acted for the defendant.

ASSISTANCE

Mesothelioma - asbestos exposure

I act for the family of a man who sadly passed away from mesothelioma. He could not recall where his exposure to asbestos had occurred, having had several periods of employment where he may have come into contact with asbestos. I seek information about any previous asbestos disease cases involving the following:

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- Henderson's Department Store (S Henderson & Sons Limited 1963-65)
- Plesseys (1965-1968)
- Lockheed Precision Products Limited (Lockheed Aircraft Centre 1968-71)
- Ford Motor Company (1971-2000)

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THE LAST WORD

The postcode lottery facing British citizens on bereavement damages is another example of how the UK government is failing to put the needs of injured people at the heart of policy making. APIL's *Bereavement Damages: A Dis-United Kingdom* report launched last month shines a spotlight on the unfair and inconsistent approach to compensating people seriously affected by the death of a loved one caused by the negligence of someone else. The stories it contains are heart-breaking.

It is unacceptable that rigid, out-dated and discriminatory restrictions in England, Wales and Northern Ireland rub salt into the wounds of those suffering from the loss of a family member or close friend compared to bereaved people north of the border, where there is fairness for families, and compensation is considered on a case-by-case basis. Such a discrepancy has no place in our society, yet the government has refused to act, despite calls from APIL. We are not alone in these calls either. In 2019, the Joint Committee on Human Rights called for a review, but this was ignored.

Crucially, the restrictions are also unpopular with voters, and surveys

'Crucially, the restrictions are also unpopular with voters and surveys suggest there is overwhelming public support for reform'

suggest there is overwhelming public support for reform. APIL's research, detailed in our report, reveals, for example, that 69% of adults think the paltry 'token payment' of £15,120 is too low, and 73% believe compensation for the bereaved should be judged on a case-by-case basis, suggesting that most people support APIL's point of view and would like to see reform.

With strong support from many parliamentarians and the public, APIL's campaign for positive reform has solid foundations, but we need you as a member to help force a government review. Through many years of campaigning experience, I have often seen the power of constituent letters to MPs when they are backed by a well-argued campaign and are timed well. Please write to your MP with a link to our report and ask them to back APIL's call for reform in England, Wales and Northern Ireland. Our public affairs officer, Sam Ellis, will help you do this in as little time as possible. You can reach him at sam.ellis@apil.org.uk.

The current restrictions are immoral and look to be politically focused on the non-existent 'compensation culture' that has blocked fair treatment for injured people for too long. The UK government even failed to rise to the opportunity for wide reform when forced by the Court of Appeal ruling to stop excluding cohabitees from the list of eligibility. For many bereaved people to be faced with a view that they do not deserve compensation for the grief they have suffered is simply wrong. Even for those who are compensated, a fixed 'token payment' is insulting. The people of the United Kingdom deserve better, and as the champion of the needlessly injured person, and bereaved families, APIL will continue for push hard for change.

Mike Benner
Chief executive

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