THE CASELAW UPDATE

APIL

SARAH PRAGER
1 CHANCERY LANE
LONDON WC2A 1LF
sprager@1chancerylane.com

JUNE 2009

Is it a package?: the issue that won't die…

Judgment in Pauline Mary Oczerklewicz v Latesearch UK Ltd, 8th May 2008
Wigan County Court, HHJ McMillan

A preliminary issue has arisen for me to determine. The facts are not in dispute. On dates between late September and 2nd October 2003, the Claimant booked a holiday for herself and her family through the Defendants, a firm of travel agents with an office here in Wigan. The arrangements included return flights between Manchester and Tenerife, and accommodation at the Altamar. She flew to Tenerife, booked into her apartment, but unhappily she almost immediately had a nasty accident. She fell down stairs and was injured. There is an issue as to whether the cause of the fall was any fault of the Defendant, but at this stage I am not resolving that issue because the preliminary point is crucial. Did the Defendant sell a package under the Package Travel Package Tours and Package Holidays Regulations 1992?

A Package is defined as "a prearranged combination of at least two of the following components when sold or offered for sale at an inclusive price", and two of the elements mentioned are transport and accommodation. There is no doubt that the Claimant purchased transport, and accommodation in the apartments.

I have been referred to the case of *ABTA v CAA*, a decision of the Court of Appeal in 2006. In that case, Chadwick LJ said that this question is not easy to resolve, but is a question of fact to be decided on a case by case basis. The Court of Appeal, in rejecting the appeal, approved the judgment of Goldring J below, who had likened the sale of a non-package to putting items in a trolley at the supermarket, and then going to the checkout. Did

the Defendant sell a package to the Claimant, or several components sold at the same time?

It is true there is no precise documentation created at the moment the booking was made. Instead there is a conflict of evidence between Mrs Oczerklewicz, and the evidence of the Defendant's witness Angela Lucas, and also the hearsay statement of Lisa Fisher. Mrs Oczerklewicz agreed the contents of the statement of Lisa Fisher when it was put to her. There were a number of telephone conversations between the Claimant and Miss Lucas, at the end of which the Claimant went into the Defendant's office to make the booking. Where there is a conflict of evidence, I say that in each case I prefer the evidence of Miss Lucas. This booking was made some time ago. A person looking forward to a holiday does not pay precise attention to the mechanisms of the booking, but is only concerned with the outcome. I find that Mrs Oczerklewicz was vague in her evidence, and on occasions changed her mind, for example as to whether the transfer was mentioned before or after the booking was made. She was also uncertain as to whether she had received various invoices, which clearly she did. By contrast Miss Lucas struck me as a competent, forthright and sensible witness. I am satisfied that Miss Lucas made it very clear that the flight and accommodation were being booked through different suppliers and that Mrs Oczerklewicz had a choice whether to take them or not.

Looking at the documents, there is nothing signed by both parties. But the first document is at page 236 of the bundle, the paperwork completed by Miss Lucas. The first item she could have made an entry against was "Package" where she has made no entry. But against flights, accommodation, transfer and so on, she has completed the form. It is quite clear that she wrote down that separate items were being sold at the same time. The first document sent to the Claimant is the letter at page 251. it enclosed a receipt, and says " your confirmation account is normally received by ourselves within 3 weeks, when we will forward it on to you. In the meantime we would like to draw your attention to the fact that your

reservation has been made in accordance to your Tour Operator and airlines current booking conditions", and so on. It clearly shows that the Defendant was acting merely as agent. The phrase used, in respect of "all transactions" is repeated several times in the documents for example at page 250 in the letter from the Defendant of the 15th October. This supports what Miss Lucas says: that there were several separate transactions.

In those circumstances, I am quite satisfied that this was not a package, but as Goldring J said, this was a case of separate items being put in the basket to be paid for together. I regret therefore that this claim must be dismissed.

Another old chestnut: local standards...

Karen Lilley v First Choice Holidays & Flights Limited, 18th July 2008 Central London County Court

The Claimant was on a package holiday to Alcudia, Majorca. The Claimant stayed with her family at the Jupiter Hotel, Club Mac resort, and this is where the accident occurred. The Defendant was the tour operator for the holiday. The Claimant was on holiday with her husband and two children. The holiday commenced on 26 April 2005 for a period of 7 nights. Accommodation at the hotel was provided on an all-inclusive basis.

The Claimant's pleaded account of the accident was as follows: "On or about 2nd May 2005 the Claimant was walking along a corridor, having exited a lift in the said hotel, when she slipped and fell due to the fact that the floor had been recently cleaned and was still wet and/or detergent or other cleaning materials were still present." The accident was reported to the Defendant's local representative and an Accident/Illness Report Form was completed, dated 2nd May 2005. Among other things this read, "Mrs Lilley has reported the maid was mopping the floor and that a wet floor sign was in place at the opposite side of corridor but not where she was mopping."

The Claimant disclosed a sketch plan of the accident location which depicted the point where she slipped and the point where the warning sign was placed.

The Claimant's Particulars of Claim relied on conventional causes of action in contract pursuant to an implied term that reasonable care and skill should be exercised in the performance of the agreement. In essence, she alleged that: (a) there was a failure to dry the floor after wet mopping; and, (b) there was a failure to erect warning signs/notices to alert the Claimant to what was alleged to have been a dangerous floor. The Defence put liability, causation and quantum in issue and a contributory negligence defence was raised. It was admitted that the Claimant suffered injury while in the corridor of the Hotel and, further, that the same had recently been cleaned. In its Defence, the Defendant averred that there was temporary warning signage in place at the time of the accident. There was an averment that the Defendant's system was safe.

The Judge at first instance made the following findings of fact (in a reserved judgment):

(a) the Claimant returned to her room at the hotel with her husband and children;

(b) the Claimant and her husband took the lift to the 5th floor and the Claimant's children climbed the stairs;

(c) when the Claimant's lift reached the 5th floor it was necessary for her, on leaving the lift, to turn left and left again to reach the corridor where her room was located;

(d) the Claimant turned left and left again, but slipped on the floor and injured herself;

(e) the floor was wet and slippery underfoot and this caused the accident;

(f) there was a sign warning that the floor was wet at the beginning of (or just in front of) the opposite corridor – the Claimant's evidence was that this sign was not obvious and the judgment implied that the Claimant did not see it before she slipped;

(g) there was a maid in the vicinity when the Claimant left the lift and the maid "may" have indicated to the Claimant that the floor was wet before the accident;

(h) one warning sign was not sufficient to alert the Claimant to the fact that the floor was wet and slippery. The Claimant indicated in cross-examination that the "maid did wave with her hand, but too late". The Claimant's husband indicated in cross-examination that the "Warning sign was there on leaving lift. Metre or two away – ish. Maid mopping the floor."

The Judge concluded that:

(a) there was one warning sign – but it was in the wrong place;

(b) there was a cleaner in the vicinity and she may have indicated to the Claimant with her hand that the floor was wet (the necessary implication is that this was also insufficient to alert the Claimant to the hazard created by the floor).

In essence, the Judge found for the Claimant because such efforts as the hotelier's staff made to alert the Claimant to the hazard created by the wet floor were insufficient to enable her to be reasonably safe (this was described by the Defendant, in submissions at trial, as an argument, "that there was not enough warning signage.") The Judge regarded this as a breach of the contractual duty to exercise reasonable care and skill. On appeal it was submitted that the District Judge fell into error in approaching the case in this way on the following grounds:

(a) the Claimant bore the burden of proving what the local safety standard was and that there had been a breach of the same (this was a corollary of the proposition that she has to prove her case: see, Codd v Thomson Holidays Limited);

(b) there was not a scrap of evidence at trial – whether expert or otherwise – to establish (i) what, if anything, the local safety standard required the Defendant to do by way of warning (the Court could not assume that the Spanish standard was identical to the English standard); or, (ii) that what

the Defendant did (one visible warning sign and the presence of a maid) was insufficient to alert the Claimant to the risk of slipping;

(c) it was not appropriate for the Claimant to rely on the safety systems of the index hotel or tour operator as a substitute for what the general safety standard required (see *First Choice Holidays & Flights Limited v Holden* where this point was made clear);

(d) the Judge seemed to have regarded the warning sign that was in place as creating "a false sense of security" because it was in the wrong place – but this finding sat uncomfortably alongside the Claimant's evidence that she did not see the warning sign until after she had fallen – by contrast the Claimant's husband did see the warning sign and did not slip).

(e) in summary, the Judge failed to direct himself correctly as to the law and failed to apply authorities which were binding on him: *Wilson v Best Travel Limited [1993] 1 All ER 353* (QBD) and *Codd v Thomson Holidays Limited [2000]* (CA) and *First Choice Holidays & Flights Limited v Holden [2006]* (QBD).

The Defendant's arguments were accepted on appeal and the appeal was allowed. The Claimant's claim was dismissed.

Bunce v Travelworld Vacations Limited, 6th May 2008
Chester County Court, HHJ Woodward QC

On 1st July 2005 the Claimant booked a package holiday with the Defendant on behalf of herself and her husband. The couple were to fly from Manchester to Larnaca on 25th September 2005, to stay for seven nights at the Kouzalis Beach hotel, Protaras, Cyprus, and to return to the UK on 2nd October 2005. The holiday cost a total of £2,422.42. On 28th September 2005 the Claimant slipped and fell in the restaurant area of the hotel. She said, and there was no reason to disbelieve her, that she slipped as a result of the presence of a spillage on the restaurant floor. On the Claimant's own

case, and that of her family, the hotel was generally clean, and none of them had noticed any other spillages prior to the accident. An independent witness had provided a witness statement to the effect that she saw two other spillages, as well as the spillage in question; but she did not attend the trial and her evidence could not be tested in cross-examination. The Defendant's witnesses provided witness statements giving evidence of the hotel's cleaning system.

Mrs Bunce claimed for breach of the holiday contract under Regulation 15 of the Package Travel Regulations and under s.13 of the Supply of Goods and Services Act 1982. She said that the hotel ought to have identified and dealt with the spillage prior to the accident, and that had it done so, the accident would not have occurred.

The trial took a highly unusual course, unique in the experience of the trial judge and Counsel. The Claimant's four witnesses each gave evidence in chief by way of their witness statements, with no supplementary questions. They were not cross-examined. The Defendant's Counsel then made a submission of no case to answer, having elected not to call any evidence.

The submission was successful. The Circuit Judge found that the Claimant had not adduced a shred of evidence as to the local standard, by which the hotel should be judged, and so, following the decision in *Holden v First Choice Holidays & Flights Limited*, the claim must fail. On a submission of no case to answer he could not take any account of the Defendant's evidence as to the local standard, since the Defendant had not, indeed could not, put that evidence before the court. In any event, Goldring J had been quite clear in Holden that evidence of what the hotel chose to do did not constitute evidence of the standard by which it should be judged.

It is noteworthy that the Claimant's Counsel accepted in *Bunce* that it was for him to prove the local standard, and breach of it. There was no evidence as to the standard, and precious little as to the alleged breach.

<u>All fall down: when will they ever learn?..</u>

Hammond v Mark Warner Limited, 15th December 2008
Lewes County Court, HHJ Coltart

The Claimant and her family went to Greece on a package holiday supplied by the Defendant. The package holiday included their hotel (The Lemnos Summer Beach Resort).

The Claimant alleged in her Particulars of Claim that she slipped on a terracotta tiled slope that was wet as a result of having been hosed down, leaving standing water. The Defendant's rep arrived at the scene of the incident shortly afterwards and tested the tiles with her hand – they were dry.

The Defendant defended the claim on the basis that the slope was not wet, and that even if it was, there was no evidence of local standards to suggest that this was unacceptable in Greece.

The judge concluded that the evidence from the single joint expert in Greek standards enabled the Claimant to succeed. The expert had stated in terms that under the Greek Civil Code an occupier had to act prudently with regard to the safety of hotel guests and (in a later clarifying email) that taking reasonable care for guests in the cleaning routine of a hotel was "customary" in Greek Hotels.

Therefore, that legal standard was the applicable standard of care and in the light of that general standard it was for the judge to determine whether such reasonable care had in fact been exercised. In his view it had not.

There was every reason why on this recommended route to the kids club users of the slope should have been warned whilst it remained wet – had there been a warning the Claimant would not have used the slope, but gone round the long way. Failure to erect a warning was a failure to be prudent, and that breached the local standard of care as verified by the single joint expert.

Thompson v First Choice Holidays & Flights Limited, 17th June 2008
Bristol County Court, DJ Rowe

In March 2005 Mrs Thompson and a number of her friends took a package holiday with the Defendant. Throughout the holiday they stayed at the Paphian Bay hotel in Paphos. On 1st April the weather was appalling; it rained all day, only stopping in the evening. It was then that Mrs Thompson decided to go out of the reception area and onto a large tiled balcony, from which the hotel swimming pool could be seen. It remains a mystery why she wanted to view the pool, but in any event, she never got that far. She slipped on a pool of rainwater, and fell, sustaining a nasty injury to her left wrist.

Mrs Thompson claimed for breach of the holiday contract under Regulation 15 of the Package Travel Regulations. She said that the hotel ought to have mopped up the rainwater, or at least have positioned signs around the balcony warning guests of the danger of slipping.

At trial the Claimant adduced evidence from a Cypriot lawyer to the effect that the law in Cyprus is very similar to that of England and Wales, at least in this context. There were no regulatory standards governing the use of warning signs or the cleaning systems required under local law, although the equivalent of the Occupiers' Liability Act 1957 did require hotels to take reasonable care of their guests. The expert did not comment on the extent of that duty as applied to this factual matrix.

The District Judge found against the Claimant on the basis that, after *Holden v First Choice Holidays & Flights Limited*, in order to succeed in establishing liability as against the Defendant she had to adduce evidence of the local standard, be it regulatory or customary. She had not done so, and the evidence of the hotel as to its cleaning systems could not amount to evidence of the obligatory standard. In the circumstances, the claim had to fail.

It is suggested that this case was rightly decided on the facts and the law as it now stands. Furthermore, even on a 'common sense' approach the claim was doomed to failure. How, it is asked rhetorically, can a hotel be found liable for an entirely natural phenomenon such as rainfall? Does an occupier owe a duty to mop up every puddle as soon as the rain stops? Is it really necessary to warn guests that there may be puddles when it has been raining all day? It is tentatively suggested that even the most Claimant-friendly court would have difficulty in finding that a hotel owed such a duty, whatever the evidence of local standards.

Hopper v First Choice Holidays & Flights Limited, 20th November 2008 Birmingham County Court, HHJ Adelman QC

Whilst on a package holiday in the Algarve provided by the Defendant, the Claimant and her family attended a Welcome meeting hosted by the Defendant's rep. She booked a number of excursions, including a Typical Portuguese Evening scheduled for 7th April 2004. The Claimant contended that the Defendant contracted to provide this excursion; the Defendant contended that the rep sold the excursion only as agent for a local provider, Megatur. At trial this issue fell away because the Claimant denied that she had been provided with a copy of Megatur's brochure, which featured its logo, and the rep was not called to give evidence. It was therefore conceded that the Defendant acted as agent for an undisclosed principle in respect of the excursion.

The Claimant duly went on the excursion. On the party's return from the event, they were taken by coach to a car park, where they were to transfer to a minibus for onward transportation to the hotel. As she crossed the car park, the Claimant tripped and fell over a large yellow concrete kerbstone just under a metre long, and about a third of a metre high.

Mrs Hopper claimed for breach of the excursion contract under s.13 of the Supply of Goods and Services Act 1982. Essentially, she said that the Defendant ought to have selected a better lit location for the transfer, and had it done so, the accident would not have occurred. She also contended that the local guide ought to have assisted her in crossing the car park.

The claim failed. The judge held that the kerbstone was there to be seen. Notwithstanding evidence from the Claimant and her husband to the effect that the lighting conditions were such that you 'could not see your hand in front of your face' and that 'it was pitch dark', photographs of the area taken 3½ years after the accident showed adequate street lighting and other lighting, and the Defendant's evidence that these lights were there at the time of the accident was accepted. Furthermore, the Defendant's expert, Tom Magner, had measured the lighting in the area some four years after the accident and found it to be sufficient to comply with local standards. The kerbstone therefore formed an obvious risk against which it was unnecessary to warn the Claimant.

This case may be of interest in the context of other lighting cases in which it has been held that there is no better evidence than that of the Claimant as regards the lighting conditions at the time of the accident. In this case the evidence of the expert was preferred, notwithstanding the passage of quite some considerable time between the date of the accident and the date of inspection. It is suggested that the trial judge bore in mind the fact that the area in question was a municipal car park, and that it was therefore unlikely that it did not comply with local standards (although whether this is a correct inference is perhaps debatable).

Robson v Newmarket Promotions Limited, 23rd May 2008

Exeter County Court, HHJ Leeming QC

On 17th September 2003 Mrs Robson booked a package holiday with the Defendant for the period 12th to 19th October 2003. She was to join a coach party trip from Plymouth to Lake Garda via Nancy, with hotel accommodation provided throughout.

There was no complaint regarding the holiday until the morning of 19th October 2003. The party had stayed overnight at hotel Campanile, Nancy, Vandoeuvre, France, and they were getting ready to return to the coach and resume their return journey to England. Mrs Robson returned her key to the hotel reception, by walking from her room across a courtyard and into the reception area. She then returned to her room. At this time it was about 7.15am. Mrs Robson gave evidence to the effect that as she walked back to her room, the lights in the courtyard were switched off, and the courtyard was plunged into darkness. She walked along an area of hard standing, but it gave way to soft ground, which she assumed was part of the garden area. She felt for the kerb of the footpath with her foot, but as she did so she missed her footing, and slipped.

There were no witnesses to the accident, but a fellow guest came to her aid. She gave evidence that the coach driver called out for some-one to switch the lights on, and put the lights on in his room, so that Mrs Robson could be seen by her rescuers.

Mrs Robson claimed for breach of express and implied terms of the holiday contract under Regulation 15 of the Package Travel Regulations. Essentially, she contended that the hotel was at fault in that it failed to ensure that the courtyard was properly lit. The Defendant defended the claim on the basis that if it had been dark, the lights would have been on; if the lights had been switched off, it must have been light.

It was agreed at trial that local standards obliged the hotel to ensure that the courtyard was lit to a standard of 5 lux at all times. The parties both adduced expert evidence that the effect of this was that if the accident had occurred prior to about 7.40am, the lights in the courtyard ought to have been illuminated; if, however, it had taken place thereafter, the lights

need not have been switched on. The Claimant's evidence was that the accident must have occurred before 7.30am, since she was aware that the coach was due to depart at that time and would not have been walking back to her room any later.

The Defendant relied on the evidence of the operations director of the group of hotels to which the hotel in question belonged. He said that the lights at the hotel operated on a timer basis; they were automatically switched off at 7.30am on the day of the accident. If, therefore, the accident occurred before 7.30am, he said, the lights would have been on.

The trial judge was unimpressed by the Defendant's circular argument that because the lights ought to have been on at 7.30am, the accident must have taken place after that time. He found that since the Claimant was a truthful witness, the accident must have taken place prior to 7.30am, and the lights must have been off. The Defendant's own expert had conceded that if the lights had switched off prior to 7.30am it was more likely than not that either the clock or the timer had been wrongly set, both indicative of fault on the part of the hotel. In the absence of any other theory as to why the system had not worked, the Claimant succeeded in her claim.

The judge declined to make a finding on whether the burden of proof rested on the Claimant or on the Defendant in respect of the adequacy of the lighting system; he found that in any event the Claimant had proven on the balance of probabilities that the hotel had been at fault, and since there was no evidence to the contrary, he need not go on to consider whether the Defendant bore any burden in respect of the system.

Tales of the unexpected…

Johnstone v Travelworld Vacations Limited, 2nd June 2008
Newcastle County Court, DDJ Silver

On 14th May 2004 Mrs Johnstone's friend Mr Chivers booked a holiday with the Defendant for the fortnight between 19th May and 2nd June 2004. He and Mrs Johnstone were to stay for 14 nights in self-catering studios in Paphos. At 4.30am on 1st June Mrs Johnstone got out of bed to get a drink of water. She said that she went into the kitchen, but as she shut the fridge door and turned to return to bed, she slipped, and fell. According to Mrs Johnstone, she slipped because of the presence on the floor of a dirty, greasy substance.

The Defendant's rep said that he went to the Claimant's apartment on the day of the accident, and that the kitchen floor was not dirty or slippery at that time. He took a photo of the kitchen, which showed that the floor was not dirty.

Mrs Johnstone claimed for breach of the holiday contract under Regulation 15 of the Package Travel Regulations. She said that the hotel ought to have cleaned the floor of the kitchen before allocating the apartment, and that it ought to have been cleaned regularly during her stay.

The Defendant defended the claim on the basis that since Mrs Johnstone had not contracted for cleaning services, it could not be liable for any failure to clean the apartment during her stay. However, it was accepted that the hotel ought to have cleaned the apartment prior to allocation to her. The only issue at trial, therefore, was whether or not the kitchen floor was greasy at the time of the accident (by reference to local standards of cleanliness).

As is so often the way, the evidence at trial took an unexpected turn. When Counsel for the Defendant brandished the photo of the kitchen taken by the Defendant's rep, and asked Mrs Johnstone whether it showed a clean kitchen, she accepted that it did. She then went on to say that although the kitchen was clean, it was not the kitchen of her apartment. At this stage the Defendant's case appeared to have sunk without trace. Further cross-examination merely served to harden her view that the photo was of an

entirely different kitchen; the door and shelves shown in it were different to those in the kitchen in which the Claimant said she had fallen.

But all was not lost for the Defendant. When its rep came to give evidence, he said that he was sure that the photo was of the Claimant's apartment. He was adamant that it was. When asked how he could be so sure, he said that he knew that that was the right apartment because Mr Chivers had let him in to it and was standing next to him when he took the photo.

Mr Chivers was in no position to assist on this or any other point, having died between the date of accident and trial.

The Defendant submitted that in the absence of any suggestion that the rep was falsifying his evidence, it had to be accepted that the photo portrayed the kitchen in question. If this was so, the Claimant's recollection of where she fell was so poor that her evidence should be discarded in its entirety as being unreliable – and she could not establish liability as against the Defendant.

The judge accepted this submission and dismissed the claim.

This case is yet another demonstration of the golden rule that the simpler a case appears at first sight, the more likely it is that something unexpected will happen. Certainly the Claimant's legal representatives, who were on conditional fee agreements, had not anticipated this turn of events…

Dearman v MyTravel Group Plc, 18th December 2008
Southend County Court

Whilst on a package holiday with his family Sam Dearman (then aged 14) joined in a game of hockey organized by Tony Cain (an entertainer at the Alcudia Pins hotel, Majorca employed by the Defendant). The game took place on the hotel's cork-surfaced five-a-side pitch. In the course of the game the Claimant was hit over the left eye by Mr Cain's hockey stick, sustaining a nasty injury. The two relevant players were on opposing sides.

Mr Cain was in possession of the ball (like a tennis ball) running towards the opponents' goal, past the half way line. He is left handed. He gave evidence that he was about to make a shot/pass when he became aware of the Claimant out of the corner of his eye. As a result of the Claimant making contact with Mr Cain he started to overbalance reaching out his right arm to break his inevitable fall. As he fell, the hockey stick (in his left hand) was out of control and rising to the left as Cain fell over (to his right), and the stick struck the Claimant in the face. The Claimant on the other hand had the impression that he was hit in the eye when Mr Cain took a swing at the ball "like a golf swing". Mr Cain was himself responsible for instilling the rules of the game into the participants.

It would have been surprising if the Claimant's case did not involve reliance on the case of *Leatherland v Edwards* (Newman J. QBD 1998), where a deliberate golf swing with a hockey stick which took out someone's eye was regarded as negligent. But since then the law relating to the duty owed in sporting contests had developed in the form of the *Compensation Act 2006* and was re-stated by Holland J as approved by the CA in *Caldwell v Maguire* [2001] EWCA Civ 1054. At paragraph 11 – Tuckey LJ (5 propositions):

(a) Contestants in a sporting contest owe each other a duty of care.

(b) The duty is to exercise objectively reasonable care in the prevailing circumstances to avoid inflicting injury.

(c) The prevailing circumstances depend on the contest – but will include its objectives, rules and the standard of the players.

(d) The threshold for liability *is in practice inevitably high* – proof of breach of duty will not flow from proof of error of judgment or momentary lapse in skill (or one might add concentration or a moment's over-enthusiasm).

(e) In practice it may be difficult to prove such a breach of duty absent proof of conduct that amounts to a reckless disregard for a contestant's safety.

The Defendant contended that in the heat and rough and tumble of a fast game, errors of judgment will occur; mistakes will be made; rules of the

game breached and even injuries sustained (one might add particularly when the participants are all young people) – but these factors *in themselves* did not constitute an actionable breach of duty. Accordingly, even if Cain's hockey stick was raised higher than the rules suggest it should have been – and even if in the heat of the game Cain's back swing proved far too high – the result could be described as a terrible accident, no more.

The trial judge was unimpressed with the Defendant's contentions. *Leatherland* he considered to be on all fours with the present case, and given that all such cases turn decidedly on their own facts and circumstances he felt that the swing of the hockey stick was the wrong side of the line from the Defendant's point of view – judgment for the Claimant.

When is not *very* negligent negligent enough?

Judgment in Newton v Hotelplan v Viajes Regina v Viajes Regitours, 8th December 2008

Leeds County Court, HHJ Cockroft

The Claimants booked a winter ski holiday in Andorra with the Defendant tour operator. The package included flights, hotel accommodation and coach transfers. On the 11th February 2007 the Claimants were passengers on a coach returning them to Toulouse, at the end of their holiday. They reached a point about half way between the frontier and the first French village at 7:30am, when it was still dark, called the Llatte bend. The driver lost control of the coach, slewed down sideways on black ice, and the coach toppled over onto its side. The Claimants sought damages from the Defendant. So did other passengers on the coach, who were awaiting the outcome of this trial.

The Claimants relied upon the alleged negligence of the driver. The Defendant defended the claim on the basis that the driver was not negligent, that this was an inevitable accident in effect, and that

irrespective of this, there was a missing link in the chain of causation. Alternatively, the Defendants sought an indemnity from Regina, a Spanish company with whom they had a signed contract, or Regitours, an Andorran company for whom Regina claim to act as agent. Neither had filed a defence or taken any step in the action.

The evidential burden was on the Defendant to prove that the skid was not the result of negligence – *Richley -v- Fall 1965*.

The driver was Mr Madureira, a Portuguese citizen who had lived in Andorra since 1969. He had long experience of driving lorries and coaches and had driven that stretch of road at all times of day and in all conditions. He said that he had driven past the scene thousands of times. At the relevant period he was driving lorries during the week and coaches at the weekend. He had a license for driving dangerous loads.

The French police examined the coach. It was 6 to 7 years old, and had 55 seats of which 41 were occupied. All was in working order. There were no seat belts but that was not a requirement under local law. In the circumstances, no criticism can be made of the coach.

As to the weather, there was snow about but not on the road at that time, so chains were not needed on the tyres. The temperature was about freezing point, the road was glistening and there was a danger of ice.

Passengers were collected from 6am, and were facing a journey of about 4 hours. They were not late or behind schedule. In any event flights could be held back (as indeed happened after this accident), so there was no need for a rush. The altitude at the accident scene was 1,750 metres, higher than anywhere in the UK. The road had sharp bends and steep drops to the side from time to time. Before the frontier was a long tunnel where the speed limit is reduced from 90 to 50kph. The sign warns of snow. There was no evidence that the reduced speed limit was raised again after that point. There was a further sign warning of ice. The driver was familiar with the signs, and also that French clearing and salting were allegedly haphazard.

After the accident the driver was tested for alcohol and the test proved negative. It was said that he had been in high spirits, joking with one family and pipping his horn as he went through villages.

One witness said that the driver had his side lights on, and overtook on the left of a vehicle signaling left. Another said the ground was slippy even when he got on the coach. He said the driver was on a mission to get quickly to the airport and that he had remarked to his wife that the driver was in a rush; his concerns grew when the coach overtook another coach and a working gritter in the face of an oncoming car which moved in a strange way and flashed its lights, but no notice was taken by the coach driver.

Two other passengers gave evidence. One became very agitated and felt the driver was rushing, she changed seats several times and ended up putting bags next to the window to try to protect her safety. She said she was holding on for dear life. Her companion thought she was overreacting, but after the overtaking he began to think her concerns were valid.

The passengers exited the overturned coach through the sky lights, and found it was impossible to keep upright because of the black ice, which was invisible but not, I find, unforeseeable.

I make allowance for the possibility of exaggeration coloured by the trauma of the accident. In any event we know the actual speed of the coach. The tachograph found that the speed limit had not been exceeded. Just before the accident the coach was travelling at between 45 and 50kph (that is 28-31mph), reducing to 20kph after the first impact. These figures are not challenged by the Claimants. It means that he was travelling at close to the maximum speed despite it being dark, the road being untreated, and the warning from the oncoming vehicle. It is relevant to see the conclusion of the tachograph expert Mr Koch: "there are no specific observations to make concerning the speed of the vehicle, which does not appear excessive in the light of the road configurations. It is however possible that the speed of the vehicle was not appropriate given the weather conditions and the state of

the road (black ice, slippery road etc)." The French police concluded based on the 90kph supposed speed limit, not the 50kph special limit that "there were no particular observations, that he was not travelling too fast, and that the coach driver had not committed any rash action or any breach of his obligations". It is not surprising therefore that there was no prosecution of the driver, and the Defendant is entitled to rely on that fact.

The speed limit appears to be 50 not 90, and is an open question whether the police would have reached the same conclusion if they had known it was 50.

An oncoming driver in his statement to the police, which is very important, said "I passed a bus that was going down and I had the impression, knowing the state of the road below, that it was going too quickly. I said to myself that he wouldn't get through Llatte bend, but I did not know whether or not it was iced……… I was reading the papers on 12th February 2007 in which I state that in my opinion the bus was travelling too fast. This is not in fact what I meant. What I meant to say was that knowing the state of the road further down, I thought it was travelling too fast for the environment, namely one of black ice. It is true that had the road not been iced, a fact of which the driver was certainly unaware or have no knowledge, his speed would have been suitable. I flashed him and made hand signals when I passed him to warn him of the danger, but I'm not sure whether he saw or understood my gestures".

It may be that had there been no ice the driver could have got round the bend, but the fact is there was ice and the driver knew there was a high risk of ice.

Mr Madureira gave evidence through his witness statement and by oral evidence via a Spanish interpreter. He said the road from frontier was not salted, so he was travelling at 45kph, which was super safe. He was aware of the risk. He said in his statement he could not remember overtaking a gritter but if so did it safely as the gritter was going very slowly. In evidence he denied overtaking a gritter, saying that he had only passed a coach

which was less well equipped than his. He recalled the oncoming car flashing its lights, and thought this had been a greeting not a warning. He blamed the panic of passengers for the toppling over of the bus. I found he has that the wrong way round; it was the toppling that caused the movement and panic of the passengers.

He is a likeable and straight forward man, and I recognise his experience and the fact that the French police took no action. But that does not mean an absence of negligence, falling below a reasonable standard however uncharacteristic that may have been and however extenuating the circumstances.

The Claimants were not neurotic witnesses. All say they were concerned about the speed. The fact that the tachograph does not show the bus exceeding the speed limit is not the end of the matter, because of the surrounding circumstances. The fact that no one warned the driver does not exonerate him; it only means that his actions are not aggravated by ignoring warnings. I find the speed limit was 50kph and that there were warnings of ice. I find that the driver was aware of the conditions and that gritting was haphazard in France. He had been around sharper bends. He overtook a coach, but it cannot be said that a prudent driver should have stayed behind. There is overwhelming evidence that he overtook a gritter but I find that was not negligent per se. Staying behind a gritter travelling at 30kph would not be the preferred choice of many, but once ahead of it he knew that the road was not gritted. He made no adjustment despite the oncoming driver flashing his lights, still travelling at 28-31mph. If he meant that his speed was reasonable absent black ice, I agree; but there was black ice and the driver knew the risk.

I conclude that he was negligent, and was driving too fast to avoid an accident when he hit the black ice.

I accept that an overtaking manoeuvre many minutes before the accident was not causative of the accident but was relevant because the driver then knew that the road ahead was not salted but he did not adjust his

behaviour. The Defendant said that there is no evidence that had the bus travelled more slowly, the skid would not have occurred. They say it is incumbent on the Claimant to prove by expert evidence that a slower speed would have avoided the accident. I do not accept that. It was not necessary to prove with precision the speed at which a skid would have been avoided. The facts show that other coaches made it safely through, including the coach he overtook and which was less adapted to the conditions, but which stopped safely at the scene. But there is an evidential burden on the Defendant to show the skid was not due to his fault, so if anyone needed expert evidence it was the Defendant; but such evidence would be disproportionate in the present case in any event, and easily invalidated anyway by reference to different circumstances.
It follows that on balance negligence, although not to a high degree, has been proved, and that this caused the accident.

Can you have *too much* adventure on an adventure holiday?

Gert Shaffer v Scantours Limited, 23rd April 2008
Bristol County Court, DJ Daniel

On 22nd February 2004 the Claimant suffered an accident during a short break which he had taken with his companion Mrs Webb to an area known as Kiruna in the Swedish part of Lapland. The holiday was a "package" and involved staying at the Ice Hotel in Kiruna. The hotel were responsible for organising a number of activities, including, on the first evening, a visit by Snowmobile to some relatively isolated cabins. It was intended that the guests should have dinner and look at the Northern Lights, as well as enjoy and experience the atmosphere of a wilderness setting. The guests parked their Snowmobiles on a flat area which, in fact, was a frozen riverbed a few hundred metres from the cabins. The cabins were located at a point somewhat elevated from the river bed. The guests were lead by a guide

across the snow to the cabins ascending the slope in a horseshoe direction to avoid clambering up the steep ridge of snow and ice separating the river bed from the area where the cabins were located. The accident happened while the Claimant was returning from the huts to the Snowmobile. As the guests left the area of the cabins to return to the Snowmobiles, they were not led by a guide and walked back in small groups towards the snowmobiles in the general direction that they had come. No one attempted to clamber down the steep slope and those leading the group attempted to follow the line in which they had been led on arrival. The Claimant's case was that there was no guidance at all about how they should return to the snowmobile and that he and Mrs Webb simply followed others who had started before they had. His evidence was that there were eight or 10 ahead of him and Miss Webb was by his side. The nearest members of the party in front of him were about 10 to 1 2 feet ahead. The Claimant said that after he had been walking for about 15 yards or so, he lost his footing and slid down the steep snow and ice bank. At the bottom of this was hard ice. He fell on his shoulder and was injured.

The Claimant alleged a failure on the part of the guides accompanying the trip to direct him back to the snowmobiles by means of a safe route. He also complained about the lighting in the area of the accident and the alleged inadequacy of the footwear with which he had been provided. The Judge held as follows:

"I consider it important to examine the context of this excursion and indeed the holiday as a whole. The purpose of this holiday was to experience life in a wilderness location. In a location such as this there are bound to be potentially hazardous physical features. The ice itself is slippery, topography was known not to be entirely flat and there were trees, obstacles and other hazards around. This is not, to my mind, an excursion where a guest would expect to be heavily supervised, and to be led at every step by a tour guide. The party had, on arrival, been shown a way to access the location of the cabins. It was a relatively short distance and in my

judgment any reasonable guide would be justified in leaving it to the guests to find their way back over this quite short distance. Even if a guide had been at the head of the returning party, there is no reason to believe that the Claimant would not still have lost his footing. The other guests had apparently had no mishap in finding their way back and there is no evidence of any problems on other trips of the same nature organised by the hotel. It is clear that members of this party knew in general terms the way back to the Snowmobiles and other members of the party were following the route back. To my mind it is a counsel of perfection and expecting too much for the guides to warn guests of all possible hazards, particularly when there seemed to have been no problems previously of this nature…This is a holiday in a wilderness, and something of an adventure. Guests would, in my judgment, expect to be left to their own devices to an extent and not be subject of heavy supervision or warnings about potential safety hazards."
With respect to the lighting complaint, it was held,
"Again I would turn to the nature of this holiday and this particular outing. The area was gloomy, the lighting was fairly minimal and I accept the claimant's account that there was no obvious moon in the sky'. To my mind it would clearly have retracted from the general nature of this outing to have had brightly-lit parts. Part of the adventure it seems to me was that the party was passing through a natural area, partly in order to see the northern lights and that excessive lighting would have detracted from this experience. Again I do not find that the Ice Hotel were negligent in failing to provide more substantial lighting."
The claim was dismissed; the Judge found the absence of previous accidents (despite very large numbers of guests participating in the excursion) to be persuasive of its generally safe character.

Quality matters

Judgment in Sax v Balfour France, August 2008

Poole County Court

The Claimant David Sax entered into a contract with the Defendant to rent a holiday home in France for 3 weeks from 11th August 2007. The Defendant did not own the property but rented it on behalf of the owner, who took no part in any negotiations or action. The rent was £9,553 plus a security deposit (which had been returned). The villa was advertised as sleeping 6 in 3 double rooms. The Claimant represented that he wanted it for himself, his wife and 8 month old son. It was advertised on the Defendant's website and in their brochure as maintained to a high standard, well appointed and expensively furnished. Specifically it was not listed as "a property of especially high standard", for which there is a separate category listed. Mr Balfour told me in evidence that it was at the bottom of their mid-range properties which range, for a 3 bedroom house or villa, from £2,600 to as much as £20,000 per week.

The Claimant and family arrived at about 4.00 pm on Saturday 11th August. Mrs Sax says she was instantly disappointed, thinking the property was not what she expected. She said so to her husband, and he told her that maybe the inside was more pleasant. I have seen the photographs of the property which so far as one can tell appears to be perfectly reasonable. The grounds and the property itself look attractive from the pictures and there is an extensive patio and swimming pool area about which no complaint is made. My overall impression of the evidence of the Claimant and his wife was that for some reason they did not want the property before they even entered it, and had looked for reasons to justify that.

Mrs Sax went into the property with Katia Bernady, the Defendant's representative, who came from France to give evidence, and Mr Sax stayed outside, on the telephone. Mrs Sax indicated her disappointment to Ms Brandy and told her that it compared unfavourably with their luxurious home. She looked round in what she described as increasing disappointment. Her husband joined her and was similarly disappointed. Ms

Bernady did what she could to help by trying to find a hotel for them to stay in overnight but was unsuccessful.

Mr Donnell, one of the Defendant's employees, was then contacted at 7.00pm-8.00pm and had a long telephone conversation with Mr Sax. He eventually persuaded the family to stay for the night to see if they felt differently in the morning. He told me that he suggested to Mr Sax that he should relax, take a swim, open a bottle of the local rose wine, have a sleep and they would talk in the morning. Mr Sax gave evidence that Mr Donnell told him to go and get drunk. But when I pressed him as to what was actually said, after initially confirming his original statement he backed off and said that sharing a bottle of wine would make him drunk but that Mr Donnell had not used the words originally complained of. A far cry from his initial evidence and an indication of his ability to exaggerate.

Mr Donnell hoped that all would be resolved in the morning either by them staying or by making other arrangements. He was criticised for not making alternative arrangements then and there. It must be remembered that it was 8.00pm on Saturday evening, the property was in France and he was in England. He was further criticised for not ringing back on the Sunday. This is hardly surprising bearing in mind that he received a phone call from Mr Sax's solicitor to say that they had left and were on their way home. This call was at *10.00am on Sunday*. Having referred to his legal position in the phone call on Saturday evening, Mr Sax wasted no time in taking advice and by 10.00am on Sunday had achieved the almost impossible feat of getting his solicitor involved.

In any event Mr and Mrs Sax packed up and left at 2.00am on the Sunday, telling me that the overpowering stench in the bed and in the sofa meant that they felt physically ill and could not stay. The sofa, which was leather, smelt of nicotine and the bed was described as being rancid, smelling of sour milk, which got worse with their body heat when they lay on it.

Mr and Mrs Sax say that they complained of the smell on the Saturday but Ms Bernady denies this. She tells me that she had visited in the morning

when the cleaners were in and the house had been locked up from 12-4pm. She herself opened the doors and the windows when she arrived in anticipation of the arrival of the family and there was no smell. Mr Sax says in paragraph 8 of his statement that the smell was so pronounced that it could not be got rid of by opening the windows but in evidence his wife said that it was not apparent with the doors and windows open - it had been ventilated out, yet she at the same time insists that she complained about it.

The list of complaints was long and grew by the minute as Mr Sax gave his evidence. I will deal with the various matters below, not necessarily in order of importance.

I have mentioned the smell. This was said to be apparent everywhere, particularly when the windows were closed. It was in the sofa, the bed was described as rancid, the bedding, which was only used for tenants once a year and had been washed the previous day, and in the whole house.

The third bedroom was small and had a sofa bed for two. This was going to be a problem as I am told that 2 girls were going to arrive later to act as babysitters and could not share it. The fact that it was a double rather than a twin, was apparent from the first time anybody looked at the website. In any event the presence of those additional guests would be a breach of the booking conditions as they had not been mentioned before. Mr Balfour told me that if they had been mentioned at the time of booking, he would have said that the property was not suitable.

There were no curtains in this room but there are in the photograph supplied in the bundle. It was not maintained at the hearing that curtains were present at the time, but there are shutters in the window. In any event this must be a minor point.

The cover for the bed was said to be stained and Mrs Sax pointed out in the photograph what she meant. It is unclear and may well be a shadow. It is not a point mentioned in any statement. The description of this bed was

"rancid" but Mrs Sax told me that she would not even touch the cover so how did she know?
The second bedroom was to be occupied by Freddie aged 8 months and apart from describing, as everywhere else, that the furnishings were "tired" the complaint here is that the central light fitting was loose in the ceiling. In the particulars of claim paragraph 6.1 it is described as an exposed light fitting. It is quite clear that one is to assume that it was dangerous but Mrs Sax said that there were no exposed connections. Anybody that has stayed in France or Spain will know the standard of electrical fittings can be quite different from those in this country. In any event it is difficult to see how an 8 month old baby could in any way be endangered by a central light fitting.
In his deprecatory tour of the building in evidence Mr Sax described the main bathroom as tasteless, which of course is a matter of opinion. The photo shows a large, nicely tiled room with two basins and fitted cupboards under a huge mirror and a very large round bath. I believe there is also a separate shower, although that may be in the other shower room.
In any event, in that other room the wash basin is cracked. It is described by the Claimant as having been tiled and the filler being dirty. The Claimant said in evidence that the basin shown in the photograph had been changed and he was quite emphatic about this. His wife disagreed and said it was the same. She was able to identify the hairline crack that can just be made out in the photograph. It is difficult to see how this could have had any visible filler in it, of whatever colour.
Complaint is made that the cooking pans were unusable and dirty. Mr Sax explained how those in the photograph had been substituted to mislead the court. Mrs Sax however identified certain pains in the photos both on the cooker and in the drawer as those that she found. She also did not recognise those on display.
The house was said to be dirty, but no specific complaints were made. Cleaners had been in that day and Ms Bernady had seen them in the morning

when she went in to check. Mr Sax said that there had been some cleaning because when they arrived the tiled floors were wet. I think he was trying to suggest that somebody had just had a quick mop round. The cleaners had been there in the morning, the floors were tiled and the temperature was in the mid 80s. The floor would have dried in minutes, not hours. There is no evidence at all that the house was dirty and no specific allegations.

Mrs Sax said that all the kitchen utensils and cutlery were dirty with food stuck on to them. Whilst it is always possible that something may not have been washed properly to suggest that *everything* was dirty suggests exaggeration.

When going through the photographs Mr Sax seized on the picture of the tennis court. There is no doubt that it has seen better days but he said that that was indicative of the whole property, when the photographs show this not to be the case. When asked about how the lack of a pristine tennis court would affect his holiday he said that he could not have used it, that he might otherwise have practised his serving etc or perhaps even met somebody who wanted a game. This is not pleaded, despite the long list that is, and does not appear in his statement. There is no doubt in my mind that he was making this up as he went along.

This property is only let to one tenant a year while the owner himself goes on holiday. The previous years tenant was Mark Newbery and family. He is a solicitor and a partner in the very prestigious London firm of Herbert Smith. As one would expect his evidence was impressive and straightforward. He was quite satisfied with the property and did not feel that the brochure had misled him in any way. There was no smell, the property was clean and the facilities satisfactory. Although this was a year, before his evidence was most helpful.

The Claimant's evidence was unimpressive. He was prone to exaggeration and in some respects deliberately untruthful. Mrs Sax followed her husband in exaggeration. It may be that the property was not what they expected and had they stayed and not managed to sort out their complaints with the

Defendant, it may be that they would have been able to establish a claim in some small way but their suspect evidence and deliberate "over-egging" of the facts has destroyed their credibility to the point where I believe little of what they have said.

I do not accept that they had good reason to leave when they did and the reference to the Claimant's legal position in the first conversation and the involvement of his solicitor by 10.00am on Sunday speaks volumes about his attitude.

Mr and Mrs Sax took an instant dislike to what appears to be a very reasonable property, comparing it unfavourably with their own home, and acted precipitately in leaving, no doubt assuming that somebody else would bear the cost. Their action was unreasonable and the claim fails.

The Regulation 15(2)(c) defence

Wilkinson & 4 others v First Choice Flights & Holidays Limited, 16th September 2008
Liverpool County Court, DJ Knifton

Following the announcement of the disputed presidential elections, widespread civil unrest broke out in Kenya (armed gangs went on the rampage in Nairobi and other major towns and cities). This case involved four consolidated claims arising out of a package holiday to the Plaza Hotel in Bamburi. The Claimants were flown out on 30th December 2007, just as the first results of the election were announced, and the violence erupted. They alleged that the Defendant, in breach of Regulations 12, 13 and 15 of the Package Travel Regulations 1992, had flown them into a 'war zone'. They were escorted by coach, flanked by armed guards, to their hotel, where they spent the first week as 'prisoners', too scared to venture out of grounds of the complex and confined to following the progress of the situation on television. By the second week events had calmed down

sufficiently to allow them to go on a limited number of excursions, although they complained that some of the major ones, for example overnight safaris, had been cancelled.

The Defendant denied any liability to the Claimants, and alleged that it had followed Foreign and Commonwealth Office (FCO) travel advice which, on the date of departure, did not advise against travel to Kenya. The court found for the Defendant and dismissed the claims. First of all, it concluded, following earlier County Court decisions in *Lambert v Travel Sphere (2004)* and *Clark v Travel Sphere (2004)* that the Defendant had not been 'constrained' (within the meaning of Regulations 12 and 13) on 30th December 2007 to cancel the holiday. There was still a 'flicker' of hope and it was not 'absolutely inevitable and unavoidable' that the holiday could not be provided. With regard to Regulation 15, the court found that the political upheaval and violence was outside the Defendant's control and therefore the statutory defences under 15(2)(c) were engaged.

Flying fumbles

Wallentin-Hermann v Alitalia, 23rd December 2008

European Court of Justice

In a test case, the European Court of Justice ruled that airline passengers are entitled to compensation when a plane is cancelled because of a technical fault, unless that fault was due to exceptional circumstances such as sabotage or terrorism. The case was brought against Alitalia by an Austrian family after the airline refused to pay compensation for a cancelled flight, blaming the cancellation on extraordinary circumstances. Article 5(3) of Regulation No 261/2004 must be interpreted as meaning that a technical problem in an aircraft which leads to the cancellation of a flight

is not covered by the concept of 'extraordinary circumstances' within the meaning of that provision, unless that problem stems from events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control. The Montreal Convention is not decisive for the interpretation of the grounds of exemption under Article 5(3) of Regulation No 261/2004.

Morley v TUI UK Ltd, 30th June 2008
Central London County Court, DJ Taylor

The Claimant sued for damages allegedly arising out of a delayed flight. He had purchased a flight from London to Holguin, Cuba, from Thomsonfly, a subsidiary of the Defendant. The flight was to be operated under charter by Thomas Cook Airways Ltd. The flight was due to depart Gatwick at around 9 o'clock in the morning on 19th August 2007. Upon arrival at the airport he was handed a piece of paper by a Thomas Cook Airways representative explaining that due to the disruption caused by Hurricane Dean, which was building in the Caribbean at the material time, his flight would not be departing on time. He was advised to return to the airport the following day. His flight later departed some 32 hours late. He intimated claims both in breach of contract and under the Denied Boarding Regulations 2005. He alleged that as Cuba was not in fact affected by the hurricane, and as other operators had continued to fly into Cuban airports on the day in question, his flight should have operated on time. The first point taken by the Defendant was that no liability could be fixed on it under the Denied Boarding Regulations as it was not the "operating air carrier" for the purposes of those regulations. The judge put it to the Claimant that he had "sued the wrong geezer", a proposition which proved unanswerable, and the judge duly dismissed that portion of the claim.

In relation to the general claim for breach of contract, the Defendant argued that it had never represented to the Claimant that the reason it could not operate his flight was due to any immediate meteorological threat to Cuba. He submitted that it (or its subcontractors) had made it clear, both at the time and in subsequent correspondence, that the reason for the delay was that it had used all its available aircraft to operate rescue flights to evacuate its customers from Jamaica and Mexico, both of which lay in the predicted track of the hurricane. The relevant term of the Defendant's booking conditions read "The Carrier shall [use] its/their best efforts to carry you and your baggage with reasonable dispatch. Times shown in the timetable and elsewhere are not guaranteed and form no part of this contract".

The Defendant submitted that this obligation had to take into account the causes of any delay, whether such cause was foreseeable and the resources available to the Defendant at any one time. When so construed, the obligation was effectively to take all reasonable steps to operate the Claimant's flight on time. The Defendant submitted that it was clearly reasonable to direct its resources to evacuating customers who were in mortal danger rather than operating other flights to strict schedule.

The judge agreed, and the claim was dismissed.

The claim also threw up an interesting issue of quantum. When the Claimant arrived in Cuba he was unable to pick up his intended connection due to the delay. He therefore took a taxi, but when he arrived at his destination, a dispute arose over the price. When he had extricated himself from the confrontation to his accommodation, he realised that his wallet had been stolen. He claimed from the Defendant the value of the currency in the wallet (some £800) and the fees for a language school which he was due to attend whilst in Cuba. The Defendant submitted that these losses were too remote and relied on the case of *Wiseman v Virgin Airways [2008].* In that case, a passenger had been prevented from boarding his flight from Nigeria to England due to the admitted breach of contract of the

Defendant. Whilst waiting in Nigeria and attempting to find an alternative flight, he was robbed. Eady J held that the effects of the robbery were irrecoverable: whilst it was true that had the Claimant left Nigeria as scheduled the robbery would not have happened, this did not make the effects of the robbery compensable by the Defendant. The robbery was a supervening event and as such was simply not [legally] caused by the breach at all, or to put it another way, the delayed flight was a *causa sine qua non* of the robbery but it was not *causa causans*. The judge in the instant case agreed that the principle in *Wiseman* applied equally here and held that, had he found for the Claimant on liability, he would have disallowed the claim for the lost money and the course fees.

Judgment in O'Carroll v Ryanair, 11th September 2008
Aberdeen Sheriff's Court, Sheriff Principal Sir Stephen St Young Bt QC

The sheriff principal having resumed consideration of the cause, answers both questions of law in the stated case in the affirmative, refuses the appeal accordingly and adheres to the decree granted by the sheriff on 31st March 2008: finds no expenses due to or by either of the parties in respect of the appeal.

In this small claim the pursuers and respondents are husband and wife. On 3rd August 2007 they were passengers on a flight operated by the defenders and appellants from Aberdeen to Dublin. Two pieces of baggage which should have accompanied them on the flight were delayed, so that they were only able to collect them at the airport in Dublin some 48 hours after they had themselves arrived there. As a consequence of this delay they raised the present action for damages against the defenders. The total sum sued for was £750 and was made up of two elements which were set out in two letters dated 12th August and 4th September 2007 which the pursuers sent to the defenders. Firstly, there were out-of-pocket expenses incurred

by the pursuers as a result of the delay including the cost of an extra night's hotel accommodation in Dublin, the cost of travelling to and from the airport to collect their baggage and the cost of purchasing essential items such as toiletries. And secondly, each of the pursuers sought a sum as compensation for the stress, inconvenience, frustration and disruption to their holiday which they had experienced as a result of the delay.

The defenders lodged a written statement of defence in which they intimated their intention to defend the proceedings upon two bases. The first was that this court had no jurisdiction in light of the provisions of the Montreal Convention 1999 ("the Convention") which, it is accepted, governed the contract between the parties in this case. And in the second place it was said that, *esto* this court did have jurisdiction (which was denied), the sum sued for was not due in light of articles 19 and 29 of the Convention. Article 19 provides, *inter alia,: "*The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo…" Article 29 provides: "In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable". After referring to these provisions (and also article 22(2) of the Convention which it is agreed has no application in this case) the defenders averred: "The defenders do not therefore have liability for the various heads of claim detailed by the pursuers in their letters of 12th August and 4th September 2007 which are "punitive, exemplary or any other non-compensatory damages" in terms of article 29 of the Montreal Convention 1999".

At the first hearing Sheriff McLernan in accordance with rule 9.2(3) of the Small Claims Rules 2002 noted that there was no factual dispute at all

between the parties and that (1) the sole issue was whether this court had jurisdiction, and (2) if jurisdiction was established, whether the defenders were protected from a payment obligation under the Convention.

On 31st March 2008 the case was called before Sheriff Tierney for proof. The first-named pursuer appeared on behalf of his wife and himself. The defenders were represented by a solicitor who intimated at the outset that they were not insisting on their defence based on jurisdiction (but were not conceding the point). In the event, and in light no doubt of Sheriff McLernan's earlier note to the effect that the facts were not in dispute, no evidence was led. Instead the sheriff heard argument on the question whether the pursuers were entitled to damages. The upshot was that he found them so entitled and granted decree for payment to them of the sum sued for, namely £750, with expenses of £75. This award was made up of £269 (or approximately £215) in respect of their out-of-pocket expenses with the balance (namely £275 each) to compensate them for the stress, inconvenience, frustration and disruption to their holiday caused by the delay in the arrival of their baggage.

The defenders lodged a note of appeal against the sheriff's decision in which they stated that the points of law upon which the appeal was to proceed were:

Was the sheriff entitled in the circumstances to hold that the pursuers' claim for compensation for stress and inconvenience was allowable?

Esto such claim was allowable, was the sheriff entitled to find that the pursuers' claim for stress and inconvenience was not excessive or punitive?

In response to the note of appeal the sheriff prepared an admirably comprehensive and lucid stated case. It is unnecessary to set this out in full here, and I simply refer to it for its terms. It concluded with two questions of law as follows:

Was I entitled in the circumstances to hold that the pursuers claim for compensation for stress and inconvenience was allowable in Scotland having regard to the terms of articles 19 and 29 of the Montreal Convention?

Esto such claim was allowable, was I entitled to decline to hear argument that the pursuers' claim for stress and inconvenience was excessive?

At the hearing of the appeal on 15th August 2008 the first-named pursuer again represented his wife and himself (with, if I may say so, commendable skill), and the defenders were represented by counsel.

Opening the appeal counsel began by addressing the first question of law in the stated case which he submitted should be answered in the negative. He accepted that in Scotland there was an abundance of authority for the proposition that at common law, and in cases both of breach of contract and (as I understood him) delict, a pursuer could recover damages for stress and inconvenience brought about by the action of another party. But he submitted that in the present case the pursuers' rights at common law were constrained by the terms of article 29 of the Convention with the result that they were entitled to recover only the out-of-pocket expenses that they had incurred as a result in the delay in the arrival in Dublin of their baggage. Their claim for damages in respect of the stress and inconvenience which they had experienced as a result of this delay was, said counsel, excluded by the last sentence of article 29 since these damages fell to be categorised as exemplary or non-compensatory. In support of these submissions counsel referred to four county court decisions in England, namely *Brunton -v- Cosmosair (*Keighley County Court, 25th November 2002). *Wood -v- Ryanair* (Redditch County Court, 18th October 2007), *Lucas -v- Avro plc* (Sheffield County Court, 15th March 1994) and *Parker -v- TUI UK Travel* (Central London County Court, 30th October 2006).

In response the first-named pursuer referred to *Abnett -v- British Airways plc* 1997 (HL) 26, *Mack -v- Glasgow City Council* 2006 SC 543*, Jarvis -v- Swans Tours Ltd* 1973 1 QB 233, *Jackson -v- Horizon Holidays* 1975 1 WLR 1468, *Reid -v- Ski Independence* 1999 SLT (Sh Ct) 62 and Shawcross and Beaumont: Air Law, part VII at paragraphs [219] and [603]. In short he submitted that the sheriff had been correct to allow his and his wife's claims for damages to compensate them for the stress and inconvenience

which they had experienced as a result of the delay in the arrival of their baggage.

In my opinion the submission for the pursuers is to be preferred. I did not understand counsel for the defenders to argue that the word "damage" where it appears in article 19 of the Convention was not of itself apt to include, where appropriate, damages for stress and inconvenience occasioned by delay in the carriage by air of passengers, baggage and cargo. Rather his point was, as indicated, that such damages were excluded by the terms of the final sentence of article 29. This begs the question whether the damages which the sheriff awarded to the pursuers in respect of stress, inconvenience, frustration and disruption to their holiday were "punitive, exemplary or non-compensatory". In my opinion, it is perfectly clear that they were none of these. They were certainly not punitive or exemplary in as much as they were not intended by the sheriff either to punish the defenders or to make an example of them. Nor were they non-compensatory. On the contrary, they were plainly compensatory since they were awarded to the pursuers by the sheriff to compensate them for the stress, inconvenience, frustration and disruption to their holiday occasioned to them by the delay in the arrival of their baggage in Dublin. There was no dispute that, aside from the terms of the Convention, the pursuers were entitled to recover such damages under the law of Scotland, and it follows in my opinion that the first question of law in the stated case should be answered in the affirmative.

I should add here that I did not find anything in any of the four county court decisions to which counsel referred me to dissuade me from this conclusion. The reports of the decisions in these four cases which were produced at the hearing of the appeal are not exactly helpful and consist in each case only of what is described as the "Case Note on Judgment" of the district judge who made the decision. In *Brunton -v- Cosmosair the claimant booked a holiday for himself and his family to Mallorca. They arrived in the resort as scheduled but two out of their four items of baggage had not been*

loaded onto the aircraft and were still in the United Kingdom. These bags contained clothing and personal effects and were not delivered to the claimant for over 24 hours. He brought an action against the defendant claiming general damages for loss of amenity of holiday, distress and discomfort as a result of the delay to the luggage. According to the report the district judge, giving judgment for the defendant, held that "damage" under the Warsaw Convention 1929 did not cover distress, discomfort and the loss of enjoyment of holiday, only actual damage or pecuniary loss. No indication is given of the district judge's reasoning, and I would merely observe that the claim in the present case has been brought under the Montreal Convention 1999 rather than the Warsaw Convention 1929. Counsel for the defenders conceded that the later Convention was more orientated towards consumers than the earlier Convention had been and that, in interpreting the later Convention, care should be exercised in relying upon the jurisprudence under the Warsaw Convention. The report in Brunton ends with a comment "The Montreal Convention 1999 now supersedes by the Warsaw Convention and article 29 enshrines this principle" (sic). It is not said who was the author of this comment (whether it means), or upon what basis he or she felt able to make it.

In *Wood -v- Ryanair* the claimant entered into a contract of carriage by air with the defendant to travel from East Midlands Airport to Girona in Spain on 8th May 2007. One item of the claimant's baggage was delayed and not restored to him until the event of 12th May 2007. He issued proceedings for £1,003.44 made up of "£599 for holiday, £29.44 insurance, £84 taxi fares, £50 car park fees, £171 passports and £70 clothes we had to buy". It appears from the report that the defendant accepted liability for damage occasioned by the delay in the carriage of this item of baggage, such liability being limited in accordance with its General Conditions of Carriage for Passengers and Baggage and under the terms of the Montreal Convention 1999. On an *ex gratia* basis the defendant sent the claimant a cheque for £70 in respect of the amount claimed for the "clothes we had to buy" but

submitted that the other heads of damage claimed did not arise as a matter of English law in cases governed by the Convention as they were not damage occasioned by the delay in restoring checked baggage to a passenger which could be compensated by reimbursement of the local purchase of necessaries. Reference was made to article 29 of the Convention to the effect that "non-compensatory damages shall not be recoverable". The report concludes that judgment "was given in favour of the claimant for the equivalent of €80 (£55) (at the local airport. Noting that a cheque for £70 "for clothes we had to buy" had already been issued in favour of the claimant, no other heads of damage were allowed. No order was made as to costs". Once again no indication is given in the report of the reasoning of the district judge in reaching this decision, and accordingly I derive no assistance from it.

In *Lucas -v- Avro plc* the claimant purchased chartered flight seats from Avro. Because of a mistake on the tickets, the return flight in fact took place almost 24 hours later than the claimant had expected. Avro admitted a breach of contract, and their liability to pay the claimant £165 in respect of hotel, taxi and telephone expenses, and loss of earnings. However, the claimant also claimed damages for mental distress and suffering. According to the report, it was held that a contract which supplied flight seats only was not a contract to provide peace of mind or freedom from stress and that therefore damages for mental distress were not recoverable. Once again no indication is given of the reasoning of the district judge except that it is said that *Haynes -v- James Charles Dodd (A Firm)* 1990 CLY 1524 was followed. I was not referred to this last case, and in any event the citation given for its suggests that the report of it is unlikely to be illuminating. The report of *Lucas* ends with the comment: "Warsaw Convention applied (superseded by Montreal Convention 1999) (Article 29 applicable). EU Reg. 261/2004 not in issue". It is not said who was the author of this comment and I cannot see that it assists in the least towards a resolution of the issue in this case.

Finally in *Parker -v- TUI UK Ltd* the claimant in July 2005 booked a return flight from London to Sydney. The flight itself was provided by the defendant, trading as ThomsonFly. The claimant alleged that she had been informed, when she spoke to a representative of the defendant on the telephone, that she had booked a scheduled flight with Qantas. When she discovered that the flight was a charter flight she asked to be upgraded to a premium economy seat and duly paid an additional £325. The outbound flight departed from London on 26th December 2005. On 18th January 2006, the date of the return flight, the claimant arrived at Sydney Airport to be told that her flight had been delayed by at least 24 hours. In accordance with its obligations under Article 9 of EC Regulation 261/2004 (the "Denied Boarding Regulations"), the defendant offered all passengers overnight accommodation (including free transport to and from the airport), free meals and free telephone calls. The claimant refused the offer and stated that she would prefer to stay at a friend's house in Sydney. The flight was in fact delayed by 49 hours. After approximately 24 hours, and having tried to contact the defendant without success, she decided to pay for an alternative flight home to London with Qantas. She subsequently raised proceedings against the defendant which included various heads of claim including £500 as damages for "loss of enjoyment". The particulars of claim pleaded reliance upon the Denied Boarding Regulations and section 13 of the Supply of Goods and Services Act 1984. According to the report, the district judge accepted that the level of service provided to the claimant had been abysmal, and that the whole experience had been very upsetting and disappointing for her. After referring to some of the other heads of claim, the report continues:

As to the claim for loss of enjoyment, the defendant had no reason to know that the claimant had come to Australia on holiday. She could have come on business or for a number of other reasons. This was a contract of carriage only, not a contract for a holiday. *Lucas -v- Acro* (sic) 1994 CLY

1444 was authority for the proposition that general damages for loss of enjoyment are not recoverable for a breach of a contract for carriage only.

Contracts for carriage by air were governed by the Montreal Convention 1999. In the well-known case of *Sidhu -v- British Airways* 1997 1 AC 430, the House of Lords held that where the Convention applies, no alternative remedy was available at common law or otherwise. Therefore even if the claimant was claiming for some other breach of contract (other than her claim for loss of enjoyment) she could not succeed.

Furthermore, the defendant referred to other cases - *Patel -v- India Air* 1999 CLY 4904, *Nanuwa -v- Lufthansa* 1999 CLY 4885 and *Brunton -v- Cosmosair* 2002 CLY 232 - which lay down guidance for the proposition that even if the claim had been made under the Montreal Convention 1999 damages for loss of enjoyment would not be recoverable.

Counsel for the defenders suggested that this was an important decision, but I am afraid that I am at a loss to understand how it can be said to assist the defenders in the present case. Apart from anything else, the pursuers in this case did not seek damages for loss of enjoyment and the district judge's comments about the applicability of the Convention are plainly *obiter*.

The sheriff dealt with the issue raised in the second question of law at paragraph (17) of the stated case where he wrote:

As the sheriff presiding at the first hearing had not noted as a defence any question relating to quantum of damages, and as that was not raised as an issue in the written note of defence I declined to hear argument on this point, beyond determining that the level of claim was not so great that it could not properly be called compensation at all. I did however consider that the level of damages claim by the pursuer was compensatory and could not be characterised as punitive or exemplary.

Counsel for the defenders submitted that this question of law should also be answered in the negative. He submitted that the sheriff had erred in not hearing argument on the quantum of the pursuers' claim for damages for

inconvenience and stress, that his approach to this aspect of the case had been unduly harsh and that no reasonable sheriff would have declined to allow parties to address him on the matter.

In my opinion the sheriff was quite correct to refuse to hear any argument on the quantum of the pursuers' claim. As already indicated, the only point taken by the defenders in their written note of defence in relation to the merits of the pursuers' claim was that the defenders had no liability for the various heads of claim detailed by the pursuers in their letters of 12th August and 4th September 2007 which were "punitive, exemplary or any other non-compensatory damages" in terms of article 29 of the Convention. There was no suggestion that, on the assumption that the defenders are liable in principle to the pursuers, the damages sought by them were in any event excessive. Nor was this identified by Sheriff McLernan at the first hearing as an issue of either fact or law in dispute. In these circumstances the pursuers were in my opinion entitled to assume that when it came to the proof the only issue, apart from the issue of jurisdiction would be whether the obligation of the defenders to pay damages to them was excluded by the terms of article 29 of the Convention and that the quantification of their claim, if allowed in principle, would not be an issue. It follows that the second question of law should also be answered in the affirmative.

For the sake of completeness I should add that counsel for the defenders also addressed me on the quantification of the pursuers' claim on the assumption that the sheriff had been wrong to decline to hear argument on the point. He referred in particular to the issue of proportionality, suggesting that the damages awarded by the sheriff to the pursuers had been out of proportion to the amount of the airfares which they had paid to the defenders. For present purposes, I do not need to express any opinion on this point beyond saying that, like the sheriff, I am not in the least persuaded that the damages awarded to the pursuers in respect of the inconvenience and stress occasioned to them by the delay in the arrival of

their baggage were so high that they could not properly be described as compensatory at all and must have fallen into one or other of the categories of punitive, exemplary or non-compensatory damages referred to in article 29 of the Convention.

Cruising for a bruising…

Judgment in Wainwright v TUI UK Limited, 24th March 2009
Swansea County Court, Deputy District Judge Jenkins

This is the hearing of an application dated 18th February 2009 made by the Defendant to strike out the Claim on the grounds that "the County Court has no jurisdiction as per the Civil Court's (Amendment) (No2) Order SI1999/1011. This is a claim that should have been brought in the Admiralty Court pursuant to CPR 61.1(2)(a) and sections 10(1)(a) and (2)(f) of the Supreme Court Act 1981…As the Claimant has been professionally advised throughout…his (sic) is something which the claimant knew or ought to have known for the purpose of sec 42 County Court's Act 1984, and as such the claim should be struck out…"

A relevant chronology of events is as follows: An Amended Claim form (amended only as to the name of the Defendant) was filed on 10th April 2008, alleging damages for personal injury whilst a passenger on a cruise ship "The Celebration" on or around 24th April 2006. A fully pleaded Particulars of Claim is dated 25th July 2008 alleging at para 4 a breach of an implied term of the contract, at para 5 negligence by way of breach of duty and at para 6 (i) negligence by way of Reg 15 of the Package Travel, Package Holiday and Package Tour Regulations 1992.

The Defendant's fully pleaded Defence is dated 19th September 2009 (an extension of time for filing having been agreed in writing). In it at para 3 the Defendants plead that the Athens Convention Relating to the Carriage

of Passengers and their Luggage by Sea 2002 "the Athens Convention" applies, and accordingly a claim for personal injury can only be brought under the provisions of the Athens Convention, relying specifically on *Norfolk v My Travel [2004] 1 Lloyds Reps 106* and *Sidhu v British Airways [1997] 2 WLR 26.*

The Claimant's Allocation questionnaire is dated 7.10.08 and sought a Fast Track allocation, and was accompanied by proposed Directions, and the Defendant's Allocation Questionnaire is dated 6.10.08 also proposing the Fast track with 'standard fast track directions' ((question G). The Defendant's Allocation questionnaire is accompanied by a notice of change of solicitor.

At an Allocation hearing on 6th January 2009 (Order typed 12th January 2009) the Swansea County Court allocated the case to the Multi Track and gave directions up to and including a CMC set for 21st April 2009. This hearing was attended by solicitors for both parties by way of Telephone conference.

By application dated 18th February 2009 the Defendants seek to strike out the claim for the reasons at paragraph 1 hereof. I have bee provided with Skeleton arguments from both the Claimant and the Defence in respect of the application, the Claimant's dated 9.3.09 by Ms Sarah Prager, Counsel, who attended before me (the document is actually entitled 'Written Submissions') and the Defendant's Skeleton dated 12th march 2009 by Mr Jack Harding, Counsel, who also attended. In addition Mr Harding provided me with a bundle of authorities containing CPR 61.2, SCA81 sec 20, CCA 84 sec 42, The Athens Convention, as contained within the Merchant Shipping Act 1995 Schedule 6, *re NP Engineering v Pafundo [1998]BCLC 208, Norfolk v My Travel [2004] 1 Lloyds Reps 106* and *Sidhu v British Airways [1997] 2 WLR 26.* I have now read all these authorities and have studied both Skeletons.

The claim is based on an allegation that whilst on the cruise holiday supplied by the Defendant tour operator the Claimant became ill, and that,

in summary, this illness was caused by the crew of the ship failing to maintain standards of hygiene aboard ship. The allegation against the Defendant is that they failed to enforce or to institute proper systems of cleaning or hygiene aboard the vessel.

High Court or County Court?

The Defendant in his Skeleton at paragraphs 6-11 sets out his reasons for alleging that this is a claim that should have been started in the Admiralty division of the High Court. For the purpose of this Judgement I do no need to consider in detail whether the Defendant is right in this assertion, because the Claimant admits that this is an action which should have been started in the Admiralty Division of the High Court – see para 3 of the Claimant's Skeleton argument. Accordingly I turn now to the County Courts Act 1984 sec 42 which sets out the County Court's jurisdiction to transfer a claim which should have been started in the High Court to the High Court. This section is the basis for the Defendant's application to strike out the claim, and the Claimant's de facto application to transfer the claim to the High Court.

Transfer or strike out – discretion?

Sec 42 CCA 1984 reads as follows:

"Where a County Court is satisfied that any proceedings before it are required by any provision of a kind mentioned in subsection (7) to be in the High Court, it shall

Order the transfer of the proceedings to the High Court; or

If the court is satisfied that the person bringing the proceedings knew or ought to have known, of that requirement, order that they be struck out."

On first reading of this section I was of the view that the word "shall" informed both a) and b), thus making it mandatory to strike out the claim if I was of the view that the person bringing the proceedings knew or ought to have known that the proceedings should have been issued in the High Court.

This interpretation was certainly urged upon me by Mr Harding (for the Defendant) when I canvassed submissions from both Counsel. He expresses this at para 27 of his Skeleton.

Ms Prager argued that the word “shall” only qualified the part (a), and suggested therefore that the court retained a general discretion under part (b). I was not referred to authority on this particular point, though both Counsel relied upon *Pafundo* (above) at page 10 (my pagination) where Lord Justice Morrit quotes from *Restick v Crickmore [1994] 1 WLR 420.*

I have found it helpful to read the whole judgement of *Restick v Crickmore [1994] 1 WLR 420,* which in my judgement is an authority absolutely on point, although it deals with sec 40 (1) of the County Courts Act 1984 which is the mirror provision in respect of transfers from the High Court to the County Court. In all other respects, the wording is identical, and accordingly this authority is a proper authority for the interpretation of sec 42 also.

In *Restick*, at page 424G, Lord Justice Staurt – Smith paraphrases “…the argument which prevailed with the Judges in the Courts below was that the word “shall” is mandatory and governs paragraph (b); accordingly if the condition set out in that paragraph is satisfied as it usually will be where a solicitor is issuing a writ…the court has no option but to strike out the action.” However he then goes on at page 425 para H “…These considerations cannot affect what, in my judgement, is the plain meaning of the section. With all respect to them, the Judges’ construction ignores the word “or” in combination with the word “shall” when applied at the end of the introductory words of the subsection. Once the conditions set out in the opening words of section 40 (1) are fulfilled, the court is required to do one of two things: to transfer the proceedings to the county court or strike them out. It plainly has a choice between the two courses of action…IN my judgement, the meaning of the section is plain and not ambiguous. The court is required to make a choice between two

alternatives, but it can only strike out if the additional condition is satisfied, namely, that the person bringing the proceedings knew or ought to have known of the requirement. But otherwise the choice or discretion is unfettered. …To construe the section in the sense contended by the Defendants would in my view require different language." Stuart Smith LJ then considers the actual debate in Parliament and finds support for his interpretation there.

It is thus only after an exhaustive analysis of the construction of the section that Stuart Smith LJ then says at page 427 E "The construction I prefer accords with the well established policy of the courts: provided proceedings are started within the time permitted by Statute of Limitations, are not frivolous, vexatious or abuse of the process of the court and disclose a course of action, they will not as a rule be struck out because of some mistake of procedure on the part of the Plaintiff or his advisers. Save where there has been a contumelious disobedience of the court's order, the draconian sanction of striking out an otherwise properly constituted action simply to punish the party who has failed to comply with the rules of court, is not part of the court's function. No injustice is involved to the defendant in transferring an action which should have been started in the wrong court (sic) to the correct court." This is the paragraph quoted in *Pafundo.*

Accordingly, *Restick v Crickmore* is clear – the word "shall" does not make it mandatory to strike out the claim if the court is satisfied that the claimant did or should have known that the proceedings should have been issued in the High Court. However the court can only exercise its discretion to strike out if the condition is satisfied. Even if the condition is satisfied, the Court's power to strike out is still discretionary.

Knew or ought to have known

I turn therefore to the question whether or not he Claimant either knew or ought to have known that the proceedings should have been issued in the High Court. Quite clearly, it seems to me, the Claimant or his solicitors did

not know of the requirement. In this particular case there can be no advantage to issuing in the County court despite knowing of a requirement to issue in the High Court.

Equally, because the Claimant was represented by solicitors at the time of issue, I am really only concerned with whether the Solicitors ought to have known of the requirement to issue in the High Court.

Ms Prager at paras 4-7 inclusive argues that:

(1) Issuing in the County Court in respect of Cruise injuries is a common mistake (para 4);

(2) Neither the issuing Court (Basingstoke County Court) nor the receiving court (Swansea) alerted the Claimant, thus illustrating the novelty of the point;

(3) The Defendant did not raise it in the Defence, upon Allocation nor at a telephone conference.

Dealing briefly with (2) above, it is not part of the function of the court administrative staff to pick up on points of jurisdiction. There may be occasions when such a point is picked up administratively and thus brought to the attention of the parties, but the absence of such action cannot, in my judgement, avail the Claimant in this case.

In respect of (3), whereas it could have been argued earlier, the fact remains that the Defendant has brought the issue of jurisdiction to the attention of the court. I am prepared to consider the argument that the timing of the Defendant's awareness of the error in issue is a matter to be taken into account when considering the exercise of my discretion whether to strike out or not, but it is not a relevant factor in considering whether the Claimant ought to have known of the requirement to issue in the High Court.

In respect of (1) above, CPR 61 is readily available to all practitioners, as is sec 20 RSC 81. This was an accident at sea in or around the Canary Islands.

This should have been sufficient for a solicitor to consider whether this is an Admiralty claim. In my judgement, the passage quoted above from *Restick* at 424 above provides guidance on this matter. "…the argument which prevailed with the Judges in the Courts below was that the word "shall" is mandatory and governs paragraph (b); accordingly if the condition set out in that paragraph is satisfied as it usually will be where a solicitor is issuing a writ…". This aspect of the lower court's decision making process was not criticised. For my part I cannot readily accept that because many solicitors make the same mistake, then I should not find that the Claimant's solicitors *ought* to have known of the requirement. It does not follow. No good reason has been advanced. Neither do I take judicial notice of the assertion that many such claims are routinely issued in the County Court, though I cannot speak for other judges.

Further, the Claimant does not plead the Athens Convention, yet today accepts through Miss Prager that the Athens Convention applies, and indeed that it necessarily follows that the Package Travel, Package Holiday and Package Tour Regulations 1992 therefore do not apply, nor would breach of contract or common law negligence causes of actions apply if the Athens Convention applied. Under the circumstances, by pleading the breach of contract, negligence and the package Travel Regulations as causes of action which apply, it is clear that in addition to missing the jurisdiction point, the Claimant's solicitor also was unaware of the Athens Convention point.

In my judgement, it is clear that the Claimant's solicitor simply misread the action. A proper reading of the cause of action and recognition that this was an injury at sea should, in my judgement, have alerted the Claimant through his solicitors to consider whether this was an Admiralty action, and indeed whether any jurisdictional issue arise from the fact that the injury was caused whilst cruising around the Canary islands. Accordingly I am satisfied that the Claimant's solicitor, and therefore the Claimant ought to have known that the claim should have been issue in the High Court.

Having decided therefore that the Claimant ought to have known that the claim should have been issued in the High Court, I turn to the exercise of my discretion whether to Transfer to the High Court or whether to Strike the claim out.

Exercise of the discretion

The Defendant in his para 12 of his Skeleton argues that *Pafundo* is authority for the following proposition:

The two discretions under CCA 84 sec 42 (1) (a and b) '*have to be considered together'* and

(1) provided proceedings are started within time, are not frivolous, vexatious or

(2) abuse of the process of the court *and disclose a course of action*, they will not as a rule be struck out but instead should be transferred to the High Court.

I am not in full agreement with this as a statement of the law for the following reasons.

The two discretions referred to in *Pafundo* are the discretion whether to join a new party to an action under RSC Ord 15, and the discretion whether to transfer to the High Court or strike out under CCA 84 sec 42(1) (a or b). The reference to RSC Ord 15 is peculiar to the facts in *Pafundo* and has no relevance to this case ... "It was accepted by Counsel before us that the two discretions really have to be considered together. There is no point in substituting parties if the proceedings are not to be transferred, and vice versa." (my page 10 of the judgement)

Although *Pafundo* quotes from *Restick*, *Restick* itself has to be considered in order to put into context how Staurt Smith LJ came to deliver this part of the judgement, and why.

In *Restick*, the Court of Appeal was faced with two interpretations of the word "shall" in sec 40 CCA 1984 (our sec 42). See this judgement paragraphs13-15. After analysing the competing arguments Staurt Smith LJ prefers the construction which allows the Court a discretion to transfer or strike out if the condition (knew or ought to have known) was met.

When Stuart Smith LJ says " the construction I prefer accords with the well established policy of the courts: provided..." he is saying that his construction of sec 40 is consistent with the well established policy of the courts in respect of applications to strike out claims. He is summarising that 'well established policy' as a means of further lending support to his interpretation of the word "shall" in the construction of sec 42. He is not, in my judgement stating that as a rule of law, in every application to transfer to the High Court the Court should undertake an analysis of whether defects in the Claim are sufficient to justify striking out for want of a cause of action. To undertake this task as a mandatory element would lead to inconsistencies in the application of this section.

For example, if I were to find that I was *not* satisfied that the Claimant knew or ought to have known of the requirement (sec 42 (1) (b) then I must transfer to the High Court, irrespective of whether there is an issue of want of Cause of Action. In such a case the application to strike out for want of cause of action would then be made in the High court post transfer.

I my judgement given that I am satisfied that the Claimant knew or ought to have known of the requirement, the existence of an argument to strike out not only because the claim was wrongly issued in the County Court, but also because the Defendant claims there is no cause of action is one of the factors in this case which I must consider before exercising my discretion to transfer or not. It is not, however a pre-requisite to transfer, as this would run contrary to the dicta of Stuart Smith LJ in *Restick* "The court is required to make a choice between two alternatives, but it can only strike out if the additional condition is satisfied, namely, that the person bringing the

proceedings knew or ought to have known of the requirement. But otherwise the choice or discretion is unfettered."

When considering the submissions of Mr Harding for the Defendant I bear in mind that the application notice dated 18th February 2009 states only that the Claim should be struck out because the claim was wrongly issued.

I also am concerned that the Skeleton argument of Ms Prager deals only with the issue of "knew or ought to have known of the requirement". She does not address at all the question of striking out because the Claim allegedly does not disclose a cause of action. This does not unduly surprise me because a) the notice does not raise the issue, and b) the Skeleton argument from Ms Prager is dated 9th March 2009, whereas the first mention of Striking out for disclosing no cause of action is found in the Skeleton argument of the Defendant which is dated 12th March 2009.

Mr Harding argued before me that the Notice need not indicate an application to strike out for disclosing no cause of action, because, as he argued, it is inherent in the task before the court in an application for transfer, relying on his assertion of the *ratio* in *Pafundo* above. As I have indicated, I am not in full agreement with that assertion.

For my part, when I am asked to exercise a discretion, I remind myself immediately of the Overriding objective CCR 1:

(1) Ensuring parties are on an equal footing;

(2) Saving expense;

(3) Dealing with the case proportionately:

To the amount of money involved;

The importance of the case;

The complexity of the issues;

To the financial position of each party;

(4) Ensuring that it is dealt with expeditiously and fairly;

(5) Allotting an appropriate share of the court's time.

If the Defendant is right, and there is no cause of action pleaded, then of course it would save unnecessary expense and court time to deal with the case now rather than to transfer to the High Court. In my judgement this consideration is also part and parcel of my duty to deal with a case expeditiously. I also have regard to the fact that the claim is for a modest sum of money. These are factors which support the argument that I should deal with the want of cause of action arguments at this stage.

On the other hand for the Claimant, and potentially for the Defendant the issues raised are of some importance. Further I have regards to the fact that the arguments are not straight forward and have some complex elements. I also have regard to the fact that the Defendant has not overtly put the Claimant on notice that such an argument is to be raised in the context of an application to strike out, although I acknowledge that it has been raised in the Defence to which no reply or application to amend has been forthcoming. This latter factor touches upon my duty to ensure the parties are on an equal footing, which in this particular case I interpret as having notice of arguments which would have such a significant affect, and also on my duty to ensure the fairness of the proceedings.

On the question of complexity, the Defendant argues that as the Athens Convention is not pleaded, and as it constitutes a self contained and exclusive cause of action, then failure to plead the same is fatal to the claim (para 14, 25 Skeleton) On the face of it the Defendant raises a powerful argument.

The Claimant, orally in answer to me when I raised the lack of Notice of this element of the application, indicated her consent to dealing with it at the hearing. Ms Prager argued that there is no requirement post CCR to plead Law, that clause 5 of the Particulars of Claim was wide enough to cover

liability under the Athens Convention, and in any event the defect could be cured simply by an amendment to state that the claim was brought under the Athens Convention.

Is Ms Prager correct in her assertion that clause 5 of the Particulars of Claim is wide enough to cover the Athens Convention, or is Mr Harding right when he says it should be specifically pleaded. This particular point is not difficult to adjudicate upon, as *Wilding v Commissioner for the Metropolis [2004] EWHC 3042* springs to mind "…it was a matter of elementary pleading to specify independently each and every cause of action." If I were adjudicating on this issue I would have little difficulty in finding in favour of the Defendant on this matter. But such a finding would raise the question of whether a defect could be cured by amendment.

However, for the reasons explained above, no authorities were relied upon by the Claimant to support her arguments. A little research on my part revealed that the Limitation period under the Athens Convention is 2 years from the date of disembarkation. Whereas the Claim was issued within that 2 year period, any amendment made now would be outside the 2 year limitation period. The immediate question which arises is whether therefore CCR 17.4 should apply (discretion to amend statement of case after the end of a relevant limitation period). More specifically, does the Athens Convention come under the description in 17.4 (1) (b) (iii) "any other enactment which allows such amendment…"? Also, *Higham v Stena SealinkLtd CA unreported (Civ div) (Hirst LJ Pill LJ) 16/2/1996_* states that the sec 33 Limitation Act 1980 (disapplying limitation period) does not apply to actions brought under the Athens Convention. Does CCR 17.4.(2) apply, or is that also excluded?

These questions were not argued by either party, and more specifically were not addressed by the Claimant at all prior to the hearing. I raise them as questions, but provide no conclusions in the absence of argument,

because identifying potential issues forms part of my analysis of the application of the overriding objective.

Conclusion

I have found the following:

(1) That the claim should have been issued in the High Court, upon the Claimant's admission through Ms Prager.

(2) That the claimant's solicitor did not know but ought to have known that the claim should have been issued in the High Court.

(3) That having so found, I have an unfettered discretion whether to transfer to the High Court or whether to strike out the Claim. (para 13-15 above *Restick v Crickmore [1994] 1 WLR 420.* applied).

(4) That the Correct cause of action is under the Athens Convention, again as Ms Prager accepted orally.

In *Restick*, I apply the following dicta of Stuart Smith LJ, at page 427 E "The construction I prefer accords with the well established policy of the courts: …Save where there has been a contumelious disobedience of the court's order, the draconian sanction of striking out an otherwise properly constituted action simply to punish the party who has failed to comply with the rules of court, is not part of the court's function. No injustice is involved to the defendant in transferring an action which should have been started in the wrong court (sic) to the correct court."

The question whether this is a properly constituted cause of action however is a live issue. When I balance the factors of the Overriding Objective, I conclude that this is a matter which is complex, and that I cannot do justice to the Claimant if I were to decide on such a matter in the absence of the Defendant having given Notice of his intention to rely upon an argument that the particulars of Claim discloses no cause of action. I do not accept the Defendant's assertion that such an argument is inherent in the application to strike out for lack of jurisdiction. In my judgement the

application should have included this part expressly so as to have put the Claimant on notice. This would have given the Claimant a clear opportunity to answer the argument and to produce authority if the Claimant so desired.

I have regard to that part of *Restick* in which the strike out sanction is described as draconian and not intended to be used as a weapon of punishment. Specifically, there is no injustice to the Defendant in having this matter transferred to the High Court. That is where it should have been, and had it been issued there in the first place, no doubt the Defendants would have made an application on notice to strike out the claim for failure to disclose a cause of action. Accordingly I exercise my discretion to transfer this matter into the High Court.

The arguments raised by The Defendant in respect of failure to disclose a cause of action can be brought in the High Court on Notice, which may or may not be accompanied by an application to amend the Particulars of Claim. It should not be interpreted that I have concluded one way or another the question of striking out for failure to disclose a cause of action.

The only prejudice to the Defendant is in costs. I am aware that the Claimant did not trigger this hearing by applying to transfer himself. I recognise that this hearing is brought by the Defendant who has not succeeded. However in my judgement, given that the Claimant had not applied for transfer himself, I consider that the Defendant had acted reasonably in applying to the Court.

The Order that I make for costs is that each party must bear his own costs. The Defendant has not succeeded, but the application was triggered by the Claimant's inaction.

The Order therefore is as follows:

(1) The matter is transferred to the High Court.

(2) No Order as to costs on the application.

Discrimination

Judgment in Walker v Thomson Customer Support, 5th November 2008 Sheriffdom of Tayside, Central and Fife at Kirkcaldy

In this case, Mr Walker seeks reparation for breach of a statutory duty. The particular duty is one imposed on a provider of services under the Disability Discrimination Act 1995. Section 19(1) of the Act makes it unlawful for a provider of services to discriminate against a disabled person by failing to comply with any duty imposed on him by Section 21 in circumstances in which the effect of that failure is to make it impossible or unreasonably difficult for the disabled person to make use of any such service.

Section 21 of the Act is in the following terms:

Where a provider of services has a practice, policy or procedure which makes it impossible or unreasonably difficult for disabled persons to make use of the service which he provides, or is prepared to provide, to other members of the public, it is his duty to take such steps as is reasonable, in all the circumstances of the case, for him to have to take in order to change that practice, policy or procedure so that it no longer has that effect.

Sub-section 4 provides that:

That where an auxiliary aid or service, for example, the provision of information on audio tape or of a sign language interpreter would - (a) enable disabled persons to make use of a service which a provider of services provides, or is prepared to provide, to members of the public, or (b) facilitate the use by disabled persons of such a service, it is the duty of the provider of that service to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to provide that auxiliary aid or service.

In the present case, the evidence established that on 12 September 2007, Mr Walker visited the Leven office of Thomson Travel Agents to enquire

about flights to Australia. At no stage during that first visit or a number of subsequent visits, did Mr Walker ever actually enquire about holidays to Australia. Rather, what Mr Walker did was by means of a written note, request the services of a British sign language interpreter. Staff in the office indicated that they would be happy to deal with any holiday enquiry in writing. There were a number of further visits by Mr Walker to the Leven office and during the course of these visits he was again informed that staff would be happy to deal with his enquiry in writing. He was also told that he could book his holiday or make further enquiry by use of the internet. He was also in due course offered the services of a member of staff from the Alloa office who was able to read sign language. However, to take up this offer, Mr Walker would have been required to travel to either Alloa or Dundee.

In his evidence, Mr Walker explained that British sign language was his first language and that he, in common with many deaf people, especially those who had been deaf from birth, had difficult understanding English. He explained that he was able to communicate by way of written note but that there were limits to his understanding of English or his willingness to use the means of communication, especially for anything complicated or significant. It was clear from Mr Walker's evidence that his strong preference was to be able to communicate using British sign language which he found more relaxing than the use of English.

In addition to offering to deal with his enquiry by written note or on the internet, the defenders also made it clear to Mr Walker that he could use the Type Talk service in which the customer could type their request and receive a reply in English. Mr Walker explained that using such a service would cause him difficulty because of the need to type his request in English.

I accepted Mr Walker's evidence that British sign language was his first language and that he did have difficulty with the use of English. I was unable to judge the extent of that difficulty. It was certainly clear from

the exchange of written notes and from correspondence between Mr Walker and Thomson's that he was able to communicate in English. While I accept that such communication presents Mr Walker with some difficulty as there will be words that he does not understand, the evidence before me was simply insufficient to allow me to assess the extent of his difficulties.

Standing the statutory duty, I require to address two issues:

Is it impossible or unreasonably difficult for Mr Walker to access the services offered by Thomson's by using written notes, the internet or Type Talk?

If it is, would it have been reasonable for them to provide the service of an interpreter to enable Mr Walker to use their services.

My difficulty with Mr Walker's claim is that he did not at any stage attempt to use the means of communication provided by the travel agent. It was quite clear that his preference was to use a British sign language interpreter but the Defenders would not be in breach of their statutory duty simply because they were not willing to meet his preference. There would be a breach only if the absence of a British sign language interpreter made it impossible or unreasonably difficult for Mr Walker to make use of their services. I am satisfied that it would have been possible for Mr Walker to make use of Thomson's services by way of the internet or the use of written notes, at least to the extent of making some preliminary enquiry. With regard to the position should Mr Walker then have decided to book a holiday, I cannot determine whether, at that stage, it would have been impossible or unreasonably difficult for Mr Walker to have booked a holiday using the internet or written notes.

The problem with Mr Walker's approach is he not only refused to try to use alternative methods of communication but that he was not even willing to try such alternative methods to make some preliminary enquiry. It is not inconceivable, for example, that if the Defenders had arranged for a British sign language interpreter to be present, the enquiry made by Mr Walker about holidays to Australia might have involved nothing more than his

asking about the likely cost and deciding that that cost made it inappropriate for him to continue with his enquiry.

During the course of the proof, both parties referred me to the Disability Rights Commission Code of Practice which givers some useful examples of good practice of the sort required to avoid discrimination. At page 69, there is an example involving a hospital physiotherapist with a new patient who used BSL as his main means of communication. The example is given of the hospital arranging for a qualified BSL interpreter to be present at the initial assessment, which requires a good level of communication on both sides. At this initial assessment the physiotherapist and the disabled patient can discuss what other forms of communication and services or aids would be suitable. They may agree that for major assessments, that a BSL interpreter would be used, but that at routine treatment appointments, they will communicate with a notepad and pen. The code suggests that this would be appropriate because routine appointments will not require the same level of intensity of communication.

Another example is given of pupils at a primary school with deaf parents, whose preferred means of communication is BSL. The code suggests that parents could communicate with their children's class teachers individually through note taking and lip-reading on a day to day basis. However, the code suggests that at a special event arranged for parents, the school should arrange for a BSL interpreter to attend so that the required level of detail can be communicated between the parents and their children's teachers. Another example in the code (at page 69) which may have a particular relevance to the present case, is that of the hearing-impaired person who lip-reads as her main form of communication and wants a secured loan from a bank. The code suggests that in the initial stages, it might be reasonable for the bank to communicate with her by providing printed literature or information displayed on a computer screen. However, before a secured loan agreement is signed, this particular bank usually gives the borrower an oral explanation of its contents. At that stage, the code

suggests that it is likely to be reasonable, with the customer's consent, for the bank to arrange for a qualified lip-speaker to be present so that any complex aspects of the agreement can be fully explained and communicated.

In the present case, I am satisfied that it would not have been reasonable in all the circumstances, for Mr Walker to expect Thomson's to provide a BSL interpreter to enable him to make some preliminary enquiry about holidays in Australia. Whether it would have been appropriate or necessary for Thomson's to provide an interpreter at the stage when Mr Walker was booking a holiday to Australia, so that he could fully understand the terms and conditions of the booking, is not something I can determine. I cannot be satisfied that it would have been impossible or unreasonably difficult for Mr Walker to access Thomson's services using the auxiliary aids or services provided by them, namely the use of a computer or written notes. I am satisfied that he could have made preliminary enquiry about holidays in Australia and that it would not have been reasonable, in all the circumstances of this case, for Thomson's to have provided an auxiliary aid in the form of a qualified BSL interpreter to enable him to make such preliminary enquiry, especially as Mr Walker did not attempt to explain to the staff at the Leven office that he had a difficulty with English.

In all the circumstances, I am satisfied that Mr Walker's claim for compensation should be dismissed. If I had held that there had been a breach of their statutory duty, I would have found that an appropriate award by way of damages would have been $750. Mr Walker explained that his claim for £1,500 was based simply on the fact that that was the maximum amount that he could claim using the small claims procedure. He explained that he sought compensation because of the upset caused to him. He said that this case had caused him stress and had led to arguments at home over the failure to book a holiday yet.

I was referred to the cases of *Purves v Joydisc Ltd* 2003 SLT (Sh Ct) 64 and *Appleby v Department for Work and Pensions*, 24 July 2002 unreported

(CLYB 2003). Both of those involved cases where either an apology had never been offered or the claimant had been treated disrespectfully. There was no dispute that in the present case the staff at the Leven shop had been polite and helpful and that the Defenders had repeatedly expressed their regret for any inconvenience. I am satisfied that Mr Walker's refusal to even attempt to us\e the internet or a written note, together with his failure to, at any stage, explain his difficulty with English, is relevant to the question of *quantum*.

In all the circumstances, I shall grant decree of absolvitor to the defenders together with £150 the expenses of the action.

Applicable law: or, whose law is it anyway?

B v B, 29th July 2008

Liverpool District Registry

The claim arose out of a road traffic accident in Spain. The Claimants were a mother and her two children. The Second Claimant, a child, sustained very serious spinal injuries. The Claimants were passengers in a Spanish hire vehicle driven by the Defendant who was the husband of the First Claimant and the father of the Second and Third Claimants. The Claimants and Defendant were British nationals and were domiciled in England. At the time of the accident they were commencing a 7 night holiday to Spain (travelling to stay in private rental accommodation). The Defendant had a Spanish insurance policy. The Defendant drove negligently into the path of another vehicle driven by a Spanish driver. The Defendant was on the wrong side of the road at the time and there was a suggestion (albeit unsupported by any evidence) that he had believed that he had the right of way on the left hand side of the road (as he would in the United Kingdom). The Defendant conceded that he was negligent and judgment was entered against him (on a 100% basis). The Claimants argued that English law

applied. The Defendant's insurers contended that Spanish law applied. At the case management stage of the proceedings it was determined that the question of applicable law should be tried as a preliminary issue.

Applicable law was (potentially) a matter of considerable importance. The Second Claimant, who was nearly 4 years of age at the time of the accident, sustained a fractured pelvis and damage to his spinal cord. He had suffered extensive neurological injury and was likely to have a very significant future loss of earnings claim. Spanish law experts were instructed by the parties and there was a difference of opinion as to the recoverability, in Spanish law, of the child Claimant's future losses. In the light of this the Defendant's insurer's stance was:

(a) that Spanish law should be applied; and, thereafter,

(b) that its own expert's opinion as to the (ir)recoverability of future loss of earnings should be preferred; and,

(c) that the Second Claimant should not, therefore, be entitled to the award of future loss of earnings to which he would be entitled if English law were applied.

It was against this background that the preliminary issue was fought.

The following facts and matters were relevant and might have been regarded as tipping the balance decisively in favour of the Claimants' argument that section 12 should be applied to displace the section 11 presumption:

(a) the Claimants and Defendant lived together in a settled relationship;

(b) the Claimants and Defendant were British nationals;

(c) the Claimants and Defendant were domiciled in England;

(d) the Claimants and Defendant were on a family holiday to Spain at the time of the accident – their residence in Spain was, strictly, temporary;

(e) at the time of the accident, the Claimants and Defendant were making their way from the airport to the apartment where they were to stay for a week's holiday (the apartment was owned by the First Claimant's English employer and the Claimants and Defendant were to stay there rent-free);

(f) all of the Claimants received medical treatment for their injuries in England. The Second Defendant was likely to have very significant physical and psychological needs which required ongoing medical treatment, care and assistance throughout his life and this would be provided in England;

(g) the Defendant hired the index car and arranged insurance for the sum of £85 through Economy Car Hire (an English registered company) and this was done in England prior to departure on holiday.

However, there was, according to the Defendant's insurers, a wrinkle in this analysis. It was the insurer's case that the car hire company was incorporated in Spain and that the insurers were also incorporated in Spain. The Defendant's case was that these factors – taken together with the place of the accident and the section 11 presumption – meant that Spanish law should be applied. At trial of the preliminary issue, the Defendant emphasised that the burden was on the Claimants to establish that the presumptive rule should be displaced and that section 12 should only be applied where it was "*substantially*" more appropriate to apply English law.

The Judge was satisfied that most, if not all, of the factors relevant to the tort connected it more strongly to England than Spain. However, this left the twin facts that: (a) the hire car was Spanish; and (b) the insurance company was also Spanish. Observing that section 12 did not identify as a

relevant factor (and in terms) the domicile of the insurer(s), he dealt with these matters in the following way:

" The other point which is advanced is that the other vehicle involved in the accident was a Spanish vehicle. That is true and perhaps that is a consequence of the first and main point, that the accident took place in Spain. I do not think that that is a particular consequence in so far as the issues in this case are concerned, although I do take it into account in the general scheme of things. The other factors go beyond the actual happening of the accident. They relate to the vehicle and the insurance. It is pointed out rightly that the vehicle involved was a Spanish vehicle. The contract of hire in respect of that vehicle was with a Spanish company and governed by Spanish law. That, clearly, is a relevant factor which links the whole matter to Spain but, as I think [the Defendant] *accepted in argument, it is connected to the tort only by way of background to the tort. It is not immediately connected to tort; it is not a cause of the injury. It is merely a background circumstance to it, so it is of some but, in my judgment, of lesser importance. The next issue is that the insurers are Spanish. The defendant argues that this is an extremely important point and makes the point validly that it is important to the parties to that contract of insurance that they should know the basis of any claim that might be made against them under it, and which law should be applicable to it.*

Therefore, they should be able to anticipate confidently that were a claim made under that policy, it would be governed by Spanish law. The immediate consequence of the tort was the injury to the parties and any damage that resulted to vehicles. That is the immediate consequence. Who is liable to pay for that damage through a contract of insurance is, in my judgment, one step removed. Whilst it is of some significance, for that very reason it seems to me that it is not something which is of

overwhelming importance. Therefore, I do agree with the comments of Mr Justice Garland in the Edmunds case that the question of insurance, whilst a factor, is not of overwhelming weight. It seems to me, that is an accurate description of the weight which should be attached to it."

The Judge went on to observe that it was also a relevant consideration that, although the contracts of hire and insurance were Spanish, the arrangements for the same were made from England and they were paid for in English currency by the (English domiciled) Defendant.

The Judge concluded that the general presumption should be displaced. The consequence of this was that English law was to be applied; the preliminary issue was determined in the Claimants' favour. The Defendant's case at the preliminary issue trial was that *Edmunds v Simmonds* should, in the light of *Harding v Wealands* (and, in particular, *obiter* comments by Waller LJ in his judgment in the Court of Appeal), be treated with caution where it dealt with the significance to be attached to a foreign policy of insurance in the balancing exercise under sections 11 and 12 of the 1995 Act. This argument was rejected by the Judge. *B v B* may chart the way forward for cases of this kind while we await the arrival of Article 4(2) of the Rome II Regulation (EC Regulation 864/2007). In the meantime, the Defendant's insurers in *B v B* have indicated an intention to appeal.

Judgment in Baines v Baines, 29th July 2008
Liverpool District Registry, HHJ Platts

These proceedings arose out of a road traffic accident in Spain in which the Claimants (a mother and her two children) were injured. The Second Claimant, a child, sustained very serious spinal injuries. The Defendant driver of the vehicle in which the Claimants were passengers was the

husband of the First Claimant and the father of the Second and Third Claimants. The Claimants and Defendant were British nationals and were domiciled in England. At the time of the accident they were commencing a 7 night holiday to Spain (travelling to stay in private rental accommodation). The Defendant drove negligently into the path of another vehicle driven by a Spanish driver. The Defendant conceded that he was negligent and judgment was entered against him (on a 100% basis).

The Claimants argued that English law applied. The Defendant's insurers contended that Spanish law applied (the Second Claimant's provisional schedule indicated a significant claim for future care and for future loss of earnings; there was an issue between the parties whether such heads of loss were recoverable according to Spanish law).

Among other matters, the Defendant's insurers relied on the fact that, at the time of the accident, the parties were travelling in a Spanish registered hire vehicle which was insured by a Spanish insurance company (albeit that hire and insurance had been arranged through an English broker). The Defendant's insurers argued that the general rule contained in section 11 of the Private International Law (Miscellaneous Provisions) Act 1995 should be applied and so Spanish law should be the proper law of the tort.

The Claimants contended that section 12 of the 1995 Act should be applied so that English law was the applicable law. HHJ Platts, sitting as a Judge of the High Court, held that section 12 of the 1995 Act should displace the general rule and English law should apply.

While it was a consideration that the hire car and insurers were Spanish this did not outweigh the factors which linked the tort to England. These factors made it substantially more appropriate to apply English law within the meaning of the section 12 test (*Edmunds v Simmonds [2001] 1 WLR 1003* and obiter comments of Waller LJ in *Roerig v Valiant Trawlers Ltd [2002] 1 WLR 2304* and *Harding v Wealands [2005] 1 WLR 1539* applied).

Ronald Charles Hornsby v (1) James Fisher Rumic Ltd (2) Five Oceans Services GmbH [2008] EWHC 1944 (QB)

This case has about as international a flavour as one could hope for in a conflict of law case: a Welshman working on a Dutch barge owned by a German company laying power cables off the coast of the United Arab Emirates. The judge found that English law applied. How he reached that conclusion is another useful example of how the "substantially more appropriate" test is applied at first instance.

Mr Hornsby was working aboard a vessel called the *Coastal Spider.* His job was to operate a miniature remote-controlled submarine called the *Gator*, which was being used to lay cables. The *Gator* was connected to the *Coastal Spider* by a power and control cable known as an "umbilical". On 18th July 2005, the Coastal Spider was involved in a collision with another vessel a tug called the *Al Meezan*, causing the umbilical to become entangled. The Claimant attended a meeting aboard a fourth vessel, the *Raven*, where it was decided to haul in the umbilical using a powered winch. As he was feeding the umbilical into the winch, the *Al Meezan* again collided with the *Coastal Spider*, causing the Claimant to stumble and sustain injury.

Analysing the facts, the judge noted that other than the fact the locus was the UAE, the links between the parties – and the tort – and the UAE were tenuous: Mr Hudson was ordinarily resident in Wales, he was providing services to a German company and the manager of the project was Dutch. They were in the UAE on a temporary basis and were "to a large extent socially insulated" from the local environment. Mr Hudson was employed by a UK company and his relationship with the German company arose out of contracts governed by English law. No party to the claim lived in the UAE.

Having analysed the facts in this manner it is perhaps unsurprising that the judge came to the conclusion that it was substantially more appropriate

that English law should be the applicable law for the purposes of determining heads of liability, heads of damage and limitation. The Defendant's argument, based on the applicability of the UAE limitation period, was therefore dead in the water.

NOTE: The legislative framework provided by sections 11 and 12 of the 1995 Act will be affected by the Rome II Regulation (EC Regulation 864/2007) when it comes into force (in January next year). Article 4(2) of this provides, "However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply."

Rome II: this time it's serious

The implementation of EU Regulation 864/2007 has important implications for personal injury lawyers embroiled in or likely to become embroiled in European (EU) cross-border accident litigation.
The Rome Convention on the law applicable to contractual obligations ("*Rome I*") was agreed by European Member States in 1980. It lays down uniform rules to determine the law applicable to *contractual* obligations. *Rome I* was implemented in the United Kingdom by the Contracts (Applicable Law) Act 1990. The material scope of the *Rome II* is that it applies to non-contractual obligations in "*civil and commercial matters*", a term which is to be understood in the same sense as in the Brussels I Regulation (jurisdiction). The Regulation would therefore not apply to revenue, customs or administrative matters. Article 1(2) specifically excludes non-contractual obligations arising out of family relationships,

matrimonial property regimes and succession, obligations under negotiable instruments, the personal liability of officers and members for the debts of a corporate and incorporated body, the personal liability of persons carrying out a statutory audit, the liability of settlors, trustees and beneficiaries of a trust, and, finally, non-contractual obligations arising out of nuclear damage. The approach taken by the Commission in the Regulation is to divide non-contractual obligations into two major categories, those that arise out of a tort or delict and those that do not.

Whilst it is important to bear in mind that *Rome II* extends to all torts, the focus of this article is the single major change it introduces into English law with regard to the *assessment of personal injury damages* arising out of accidents in other jurisdictions of the EU.

It is worth revising what the current position is in actions litigated in England involving *European* (EU) accidents. Briefly, the applicable law for the issues arising out of an accident will invariably be the law of the place where the accident occurs (section 11 – Private International [Miscellaneous Provisions] Act 1995) subject to exceptions (section 12). So far as is relevant these sections provide as follows:

Section 11: Choice of applicable law: the general rule

The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur.

Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being–

for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual was when he sustained the injury;

Section 12:

If it appears, in all the circumstances, from a comparison of–

the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and

the significance of any factors connecting the tort or delict with another country,

that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.

(2) The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events.

And section 14 (so far as relevant) importantly provides as follows:
(3) Without prejudice to the generality of subsection (2) above, nothing in this Part–

……

affects any rules of evidence, pleading or practice or authorises questions of procedure in any proceedings to be determined otherwise than in accordance with the law of the forum.

Thus, the applicable (foreign) law – the law of the place where the accident occurs - determines what types or *heads* of damage are recoverable (because this is what the tortfeasor is liable *for* which is always a substantive matter) but the English court applies its own rules on *assessment* or quantification to work out what the amount awarded should be. Assessment is regarded as a *procedural* matter, hence, for our purposes, the application of English law to the issue of quantification.

That the assessment of damages was to be determined by the *lex fori* was most recently clarified by the House of Lords in *Harding v Wealands* [2006] UKHL 32. This concerned a road traffic accident that happened on 3 February 2002 on a dirt track near Huskisson in New South Wales, when the respondent Ms Wealand lost control of the vehicle she was driving and it turned over. Negligence is admitted. The appellant Mr Harding, who was a passenger, was severely injured and is now tetraplegic. Mr Harding is English and Ms Wealand Australian. They had formed a relationship when Mr Harding visited Australia in March 2001 and in consequence Ms Wealand had come to England in June 2001 to live with Mr Harding. At the time of the accident they had gone together to Australia for a holiday and a visit to Ms Wealand's parents. The vehicle belonged to Ms Wealand and she was insured with an Australian insurance company. After the accident, Mr Harding and Ms Wealand returned to England. The action was tried by Elias J, who applied English law to the assessment of damages for two reasons. First, because the assessment of damages was a matter of *procedure* governed by the *lex fori* and secondly, because even if it was a matter of substantive law, it was in this case "substantially more appropriate" to apply English law.

Had the law of NSW been applied to the quantification of personal injury damages then by virtue of section 123 of the Motor Accidents Compensation Act 1999, very strict limits would have been placed on the amount recoverable by the inured Claimant. 4 of the most accessible examples of such limits would have been:

The maximum recoverable for non-economic loss (pain and suffering, loss of amenities of life, loss of expectation of life, disfigurement) is A$309,000;

In assessing loss of earnings, an excess of net weekly earnings over A$2500 must be disregarded;

There is no award for the loss of the first 5 days of earning capacity;

No award may be made for gratuitous care which does not exceed 6 hours a week and is for less than 6 months ...

Lord Hoffman said this in confirming the important difference between substantive law and procedure (the latter including assessment of damages):

The conclusion that the amount of damages for an injury actionable by the lex causae must be determined according to the lex fori was to be left untouched is confirmed by the Report of the Law Commission and the Scottish Law Commission (*Private International Law: Choice of Law in Tort and Delict* (Law Com No 193, Scot Law Com No 129), published in 1990, on which Part III was based. Paragraph 3.38 dealt with damages:

"The Consultation Paper [Law Commission Working Paper No 87 and Scottish Law Commission Consultative Memorandum No 62, which had been published in 1984] provisionally recommended that there should be no change in the present law on the question of damages, which we confirm. Accordingly, the applicable law in tort or delict determines the question of the availability of particular remedy.

In principle, therefore, I think that the relevant provisions of MACA should be characterised as *procedural* and therefore *inapplicable by an English court.*

This is all changing with effect from 11 January 2009.
As with all European Regulations the legislators start with a long preamble stating the objectives of the legislation about to be introduced. The relevant extracts of the preamble for overseas personal injury accidents are as follows:

The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.

The *law applicable* should be determined on the basis of *where the damage occurs*, regardless of the country or countries in which the indirect consequences could occur. Accordingly, *in cases of personal injury* or damage to property, the country in which *the damage occurs should be the country where the* *<u>injury</u>* *was sustained* or the property was damaged respectively.

Regulation 864 (already known for some years through the drafting process in more user-friendly terms as "Rome II") covers as already emphasised all non-contractual liabilities to pay damages, but is of particular interest to international litigators so far as it touches on *personal injury* accidents.

Article 4:

Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

Thus far we are directed that the applicable law of a tort shall be the law of the country where the damage occurs (*Article 4*) which in personal injury cases means the country where the *injury* is sustained (*Preamble 17*). Note that this relates to all personal injury accidents not just those arising out of road traffic accidents. The Regulations goes further.

By Article 15 the *scope* of the applicable law is specified. We are directed that the applicable law determined in accordance with earlier provisions covers (for example):

(a) The basis and extent of liability (e.g. *who may be liable*);

(b) Defences (grounds of exemption) or limitation (contributory negligence);

(c) The existence, nature and *assessment* of damages;

(d) Vicarious liability;

(e) Entitlement to compensation (e.g. *who gets damages*);

(f) Limitation periods.

There is only one element of Regulation 864 that reflects any major change for cases litigated in England. It is that the *assessment of damages* in personal injury cases should be in accordance with the law of the place where the damage occurs, namely the country *where the injury is sustained*. This is a victory for the lobbyists in the insurance industry. From time immemorial it has been the position that the heads of loss in an English court would be determined in accordance with the law of the place where the accident occurred, but hitherto the quantification or assessment of the amount payable was undertaken in accordance with English principles of assessment. An *earlier draft* of the Regulation amended by the European Parliament called for the assessment of damages to be in accordance with the rules of the place where the victim habitually resided. This would have ensured that an English victim injured in Poland (for example) would have had recoverable heads of loss assessed at a level suitable for the place of that victim's residence whilst a Polish victim injured in England would not get a handsome windfall.

There are certain limited exceptions to these general principles. First, if both parties habitually reside in one state but have an accident in another it is the law of their own state that should be applied in all material respects. However, it is difficult to see the logic in this. An English resident is injured in a RTA in Malta by a Maltese driver has damages assessed in accordance with Maltese calculations (and probably loses out as a result) whereas an English pedestrian run over in Malta by an English resident using a hire car on holiday gets damages assessed according to English principles (albeit limited to Maltese heads of loss). The resulting difference seems rather arbitrary. Secondly, if another system of law is clearly more closely connected to the issues than that of the place where the injury occurred,

by way of exception, that other system law can be adopted. The preamble to Regulation 864 makes it very plain that the deployment of this exception should be truly *exceptional* and recognized as a departure from the default position in the rare situations where it likely to apply.

Rome II *applies* from 11th January 2009 but it *came into force* on 19th August 2007 and the Regulation says, it "shall apply to events giving rise to damage which occur after its entry into force". *Coming into force* is achieved 20 days after publication of the Regulation in the Official Journal of the EU. It follows that the Regulation will apply to events occurring on or after 19th August 2007, but cannot be used until 11th January 2009. It appears, therefore, that actions commenced prior to 11th January 2009 but in respect of events occurring on or after 19th August 2007 will still be subject to the old conflicts rules – *until 11th January 2009 when the applicable law as to quantification of damages changes*. Can this be right? Why this convoluted implementation procedure and transitional period was considered necessary remains opaque.

Matters of pure procedure remain for the *lex fori* – that is the court of the member state seised of the action.

Article 3 of the Regulation provides that the law thereby created should apply whatever the domestic law of individual member states may be on the conflict of laws. That being the case it is (albeit tentatively) suggested that the change made to English law by the Regulation as to the scope of the applicable law of the tort in personal injury cases, namely that *assessment* of damages is for the law of the place where the injury was sustained, is likely to be of universal application. That is, the new rule will supplant the traditional rules on assessment *wherever* the accident occurs overseas – even outside the EU.

It is tempting to conclude that the change brought about by the new common rule that damages should be *assessed* in accordance with the law of the place where the accident occurs would be easy enough to implement even if it does not suit everyone's taste. A close look at recital 33 in the

preamble to the Regulation, however, sows the seeds of future confusion. It applies to road traffic accidents only and says:

According to the current national rules on compensation awarded to victims of road traffic accidents, when quantifying damages for personal injury in cases in which the accident takes place in a State other than that of the habitual residence of the victim, the court seised should take into account all the relevant actual circumstances of the specific victim, including in particular the actual losses and costs of after-care and medical attention.

What does this mean? Assistance from the European Court of Justice cannot be expected anytime soon. It is tentatively suggested that the regulators have been alert to the fact that due to the varying economic conditions in different Member States the amount of money required by road accident victims to properly compensate them for special damage and future loss will vary. The cost of living and the cost of care and medical treatment in the UK, for example, is radically higher than similar costs in, say, Slovakia or Poland. So it seems that the regulators by clause 33 are urging courts to award damages that actually compensate injured parties according to the cost of living where they reside so far as is consistent with assessment principles in the court seised of the action. Perhaps after all the regulations, the actual outcome will not be that much different in the event.

FBTO v Odenbreit: the fun never stops…

The recent decision of the European Court of Justice in *FBTO v Odenbreit (ECJ C-463/06)* renders it beyond doubt that an injured Claimant may bring proceedings directly against a road traffic insurer in the courts of his own domicile. However, in a number of cases currently proceeding in the High Court the applicable law in such cases is in dispute. In the first of these in which judgment has been given, *Maher v Groupama Grand Est [2009]*

EWHC 38 (QB), Mr Justice Blair decided two issues: the law governing (1) the assessment of damages, and (2) pre-judgment interest on those damages. As he observed, there is a body of well-known authorities on the answers to these questions as they arise in proceedings by an injured party against a tortfeasor, but there appears to be none as regards proceedings based on an injured party's direct claim against the insurer of the tortfeasor.

The facts in *Maher* were not in dispute. On 29th July 2005, Mr Maher was driving his Range Rover on the RN5 road in the area of Mont Sous Vaudrey, France. His wife was a passenger. M. Marc Kress was driving a van in the opposite direction. He lost control of the van, and it collided with the Mahers' Range Rover. M. Kress was killed in the collision, and Mr and Mrs Maher suffered injuries for which they brought a claim for damages in the English court.

The Defendant was the French insurance company which insured M. Kress against third party claims arising out of the use of his vehicle under a contract of insurance, the applicable law of which was French law. Neither liability nor the jurisdiction of the English court was in dispute, and judgment on the issue of liability was entered on 24th September 2008. The Master ordered the following questions to be decided as preliminary issues:

(a) Are damages to be assessed by reference to English Law or French Law?

(b) Should the question of the award of pre-judgment interest on those damages be determined in accordance with English law or French law? (it was agreed that post-judgment interest should be determined in accordance with English law.)

There was, originally, a third question for preliminary determination, it being argued by the Defendant that the question of the recoverability of

costs inter partes should also be determined according to French law, but that argument was abandoned.

The Claimants submitted that since the liability of the Defendant flowed from that of its insured, the assessment of damages should be treated as an issue in tort. Because under English conflicts rules it is well established that the assessment of damages in tort is a procedural matter, the issue would be governed by English law. So far as the second question was concerned, interest was claimed under section 35A of the Supreme Court Act 1981. This was a procedural provision, and English law therefore applied.

The Defendant submitted that the Claimants' direct claim against the insurer should be characterised as a contractual claim, because the insurer becomes involved only on the basis that it is contractually obliged to indemnify the policy holder against the claim which the injured parties have against him. For the same reason, the availability of interest was a substantive rather than a procedural matter, and therefore governed by French law as the law applicable to the contract of insurance, and not English law as the law of the forum. The question for the court was the extent of the indemnity to which the tortfeasor was entitled under his policy. Only a French court had jurisdiction over any claim as between the tortfeasor and the insurer, and it was therefore the amount that the Claimants would be awarded by a French court that the English court had to value for the purposes of the direct claim against the insurer.

The Claimants disputed the proposition that an English court would have no jurisdiction in respect of a claim against the tortfeasor himself (or his estate), pointing to Article 11(3) of the Judgments Regulation. Article 11(3) says that if the law governing the direct action provides that the insured may be joined as a party to the action, the same court shall have jurisdiction over him. The Defendant countered that this provision only permits the courts of one Member State to exercise jurisdiction over an

insured domiciled in another Member State when he is joined as a third party to a claim which has been brought against his insurer. It does not provide a basis on which to join him as an additional Defendant.

It is well established under English conflicts of law rules that the assessment of damages in tort is a procedural matter, and so governed by the law of the forum (cf the decision of the House of Lords in *Harding v Wealands [2007] 2 A.C. 1*). This position has altered as from 11th January 2009, in relation to events which give rise to damage which occur after 20th August 2007, as a result of Council Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations ('Rome II'). Since the accident happened on 29th July 2005, however, Rome II was not applicable.

If the claim had been brought against the tortfeasor or his estate, therefore, there was no doubt that damages would have been assessed by reference to English law. The question for the court was whether it made a difference that the claim was a direct one against the tortfeasor's insurer.

The Claimants submitted that to establish a direct action against an insurer, the Claimant would ordinarily have to prove (i) that the injury was caused by a breach of duty (usually in tort) on the part of a wrongdoer, and (ii) that the wrongdoer was entitled to be indemnified by the insurer against liability for such breach of duty. Ordinarily, the Claimants submitted, it would be appropriate to consider stage (i) issues as arising in tort, and stage (ii) issues as arising in contract. At stage (i), the insurer is in reality no more than a surrogate for the tortfeasor, and it would be artificial for such questions as the law governing the tortfeasor's liability to turn on the question of the law governing the contract of liability insurance which he took out. The question of the assessment of the damages in respect of which the indemnity is given arises at stage (i), and should be viewed as a matter arising in tort.

The judge found that whether a claim can be brought by an injured party directly against the wrongdoer's insurers is a contractual question, governed by the law applicable to the insurance contract, namely French law. Subject to that, he agreed with and adopted the Claimants' approach. In this case, liability had been admitted, and judgment had been entered by consent. As a result, the insurer had to meet directly the wrongdoer's liability, which in *Maher* was a tortious one. For the purposes of the assessment of damages, therefore, the insurer's liability should equally be seen as a liability arising in tort.

The judge went on to give a tentative 'preliminary view' that the Defendant might be right to suggest Article 11(3) of the Judgments Regulation envisaged the bringing of third party proceedings by the insurer against the insured, rather than providing an independent route by which the injured party can bring the wrongdoer before his own courts in circumstances not within the special jurisdiction provisions in the previous articles. However, this view was *obiter* and did not affect his conclusion that the assessment of the Claimants' damages resulting from the road accident is a matter of procedure to be determined by reference to English law, as the law of the forum, as arising in tort in accordance with *Harding v Wealands* and earlier authority.

Blair J found that the claim for interest on damages should be characterised as an issue in tort, and any question as to whether there was a right to claim interest by way of damages would therefore depend upon the provisions of the applicable law under s. 11 of the Private International Law (Miscellaneous Provisions) Act 1995. In this case, the applicable law was that of France.

If interest is recoverable under the applicable law, the rate falls to be determined under English law as the *lex fori*; but this would not necessarily mean that the rate allowed would be the domestic English rate. The

principles governing the court's discretion to award interest under s. 35A of the Supreme Court Act 1981 are sufficiently flexible to enable the court to arrive at an appropriate rate, whether English or French or some other rate entirely.

For now, and pending any appeal, the position in respect of direct claims against insurers appears to be as follows:

(a) Damages fall to be assessed by reference to the law of England and Wales;

(b) Whether or not the Claimant is entitled to claim for pre-judgment interest falls to be assessed by reference to the applicable law;

(3) If the Claimant is entitled to claim for pre-judgment interest, that claim falls to be assessed by reference to the law of England and Wales, but the court might well exercise its discretion to use the interest rate prevailing in the jurisdiction of the applicable law.

These conclusions, set out in a full and persuasive judgment, are of assistance to practitioners advising clients on the issues determined; however, it is likely that either the decision in *Maher* or in other similar claims passing through the High Court at present will be appealed, so it is necessary to exercise some caution in relying upon them. Only time will tell if the judgment of Blair J will remain good law for long.

sprager@1chancerylane.com