COR

1 CROWN OFFICE ROW

ALCOHOL - THE ELEPHANT IN THE ROOM

ELIZABETH-ANNE GUMBEL QC

1 CROWN OFFICE ROW

APIL MEETING ON 11 FEBRUARY 2020

1. On Saturday the front page of the Financial Times Life & Arts section ran an article entitled: "HowMuch is Too Much?" It reported that "*Researchers have identified sharp declines in drinking by young people in Europe, North America and Australia. In the UK only 48% of males aged between 16 to 24 now drink at least once a week, down 16 percentage points since 2005 according to the office of National Statistics.*

2. However it also quoted an article from the Lancet in 2018 which had research from 195 countries and looked at drinking habits and outcomes between 1990 and 2016 and concluded: "*The level of alcohol consumption that minimised harm across health outcomes was zero*". The article also quoted from a book by David Nutt, Professor of neuropsychopharmacology at Imperial College London which had concluded that alcohol is associated worldwide with 2.8 million premature deaths a year. That is half a million more than are killed by: war, homicide and road traffic accidents combined.

3. The issue for this talk is however the way Courts treat alcohol consumption for the purposes of personal injury claims. That is regardless of the health hazards of alcohol consumption generally the issue is: what happens when alcohol has contributed to the cause of an injury to the claim for compensation. Does it wipe out the claim entirely or lead to a reduction for contributory negligence. There is also the further issue of whether a claim can be brought for the failure of doctors to treat alcohol abuse and thereby render a patient more likely to suffer injury or death…

4. The first point to take into account is that for the purposes of ascertaining whether a Claimant has capacity and requires damages to cover Court of Protection costs loss of capacity through alcohol consumption is excluded. Section 3 of the Mental Health Act 2007 amended section 1 of the Mental Health Act 1983 so as to maintain the exclusion by stating: "*(3) Dependence on alcohol or drugs is not considered to be a disorder or disability of the mind for the purposes of subsection (2) above.*"

5. The cases discussed below illustrate the view that various Judge's have taken in respect of responsibility for accidents and injuries suffered by Claimants who have consumed alcohol. The well known case of *Barrett v Ministry of Defence* [1995] 1 WLR 1217 decided by the Court of Appeal in 1995 illustrates the point well. In effect the Courts

will expect a Claimant to take responsibility for their own excessive drinking and any injury that befalls them as a result. However once rendered unconscious by an accident the Courts will expect others to take reasonable care for the safe treatment of the injured person. A Claimant can expect proper medical treatment and prompt treatment by the emergency services even if the accident they are involved in was caused by their own drinking.

6. In the *Barrett Case the headnote explains the position as follows:*

" The deceased, a 30-year-old naval airman, engaged in a bout of heavy drinking at a shore-based naval establishment in northern Norway. Having become unconscious, he was placed in his bunk in the recovery position. He was later found dead, having asphyxiated on his vomit. The senior naval officer at the base subsequently pleaded guilty to a breach of article 1810 of the Queen's Regulations for the Royal Navy 1967 , 1 which provided that it was the duty of officers to discourage drunkenness. The deceased's widow claimed damages against the Ministry of Defence for herself and their son under the Fatal Accidents Act 1976 and for the benefit of the deceased's estate under the Law Reform (Miscellaneous Provisions) Act 1934. The judge held that in the circumstances it was foreseeable that the deceased would succumb to heavy intoxication and that, because it failed to enforce its own standards with respect to discipline, the defendant was in breach of duty to the deceased to take positive steps to protect him from his own weakness. The judge awarded the plaintiff damages but reduced them by one-quarter because of the deceased's contributory negligence.

On appeal by the defendant: —

Held, allowing the appeal, that the purpose of Queen's Regulations and standing orders was to preserve good order and discipline in the service and to ensure that personnel remained fit for duty, obeyed commands and did not misbehave when off duty; but that they were not intended to lay down standards or to give advice in the exercise of reasonable care for the safety of the men when off duty; that the mere existence of regulatory or other public duties did not create a special relationship imposing a duty in private law; that it was fair, just and reasonable to leave a responsible adult to assume responsibility for his own actions in consuming alcoholic drink; that, until the

deceased collapsed, he alone was responsible for his condition but, thereafter, when the defendant assumed responsibility for him, the measures taken fell short of the standard reasonably to be expected; and that, accordingly, since it was the deceased's lack of self-control in his own interest that caused the defendant to have to assume responsibility for him, the damages recoverable by the plaintiff would be reduced by two-third"

7. In the Judgment of Lord Justice Beldam the position was explained as follows:

The plaintiff argued for the extension of a duty to take care for the safety of the deceased from analogous categories of relationship in which an obligation to use reasonable care already existed. For example, employer and employee, pupil and schoolmaster, and occupier and visitor. ***It was said that the defendant's control over the environment in which the deceased was serving and the provision of duty-free liquor, coupled with the failure to enforce disciplinary rules and orders, were sufficient factors to render it fair, just and reasonable to extend the duty to take reasonable care found in the analogous circumstances. The characteristic which distinguishes those relationships is reliance expressed or implied in the relationship which the party to whom the duty is owed is entitled to place on the other party to make provision for his safety. I can see no reason why it should not be fair, just and reasonable for the law to leave a responsible adult to assume responsibility for his own actions in consuming alcoholic drink. No one is better placed to judge the amount that he can safely consume or to exercise control in his own interest as well as in the interest of others. To dilute self-responsibility and to blame one adult for another's lack of self-control is neither just nor reasonable and in the development of the law of negligence an increment too far.***

Should the individual members of the senior rates' mess who bought rounds of drinks for a group of mess mates and the deceased each be held to have had a share in the responsibility for his death? Or should responsibility only devolve on two or three of them who bought the last rounds? In the course of argument Mr. Nice for the plaintiff experienced great difficulty in articulating the nature of the duty. Eventually he settled on two expositions. It was a duty owed by the defendant to any serviceman at this base in this environment to take into account group behaviour and arising from a duty to provide for the servicemen's accommodation and welfare there was a duty to take reasonable care to prevent drunkenness/drinking "(a) to a level which endangered his

safety or (b) such as to render him unconscious." The impracticality of the duty so defined is obvious. The level of drinking which endangers safety depends upon the behaviour of the person affected. The disinhibiting effects of even two or three drinks may on occasions cause normally sober and steady individuals to behave with nonchalant disregard for their own and others welfare and safety.

The plaintiff placed reliance on Crocker v. Sundance Northwest Resorts Ltd. (1988) 51 D.L.R. (4th) 321, a decision of the Supreme Court of Canada , and on another Canadian case, Jordan House Ltd. v. Menow (1973) 38 D.L.R. (3d) 105 . In the first case the defendant was held liable to an intoxicated plaintiff for permitting him to take part in a dangerous ski hill race which caused him to be injured. The defendant had taken the positive step of providing him with the equipment needed for the race knowing that he was in no fit state to take part. The plaintiff had consumed alcohol in the defendant's bars. Liability was based not on permitting him to drink in the bars but in permitting him to take part in the race. In the Jordan House case the plaintiff was a habitual customer of the defendant. He became intoxicated from drinking heavily. The defendant proprietor evicted him knowing he was unsteady and incapable in spite of the fact that he would have to cross a busy thoroughfare. The court held that these circumstances, including the fact that at the time he was evicted the plaintiff's relationship with the defendant was that of invitee/invitor, were sufficient to justify the imposition of a duty to take care for the safety of the customer. In each of these cases the court founded the imposition of a duty on factors additional to the mere provision of alcohol and the failure strictly to enforce provisions against drunkenness.

8. A similar position was reached in the more recent case of ***Geary v JD Wetherspoon Plc*** *[2011] EWHC 1506 (QB).* This was a decision of Mr Justice Coulson. In that case a claimant had attempted to slide down the banisters in a public house and had fallen thereby fracturing her spine. The Judge found the defendant owner of the premises could not be held liable for her injury as the claimant had voluntarily assumed the obvious risk inherent in sliding down the banisters. The Claimant visited the pub for a drink with colleagues and during the course of the evening talked about sliding down the banister. On the way out she attempted to slide down but fell backwards and landed

on the marble floor, approximately four metres below. She sustained a spinal fracture resulting in tetraplegia.

9. The Judge found the Claimant had accepted the obvious risk inherent in sliding down the banisters. The case was indistinguishable from *Poppleton v Trustees of the Portsmouth Youth Activities Committee [2008] EWCA Civ 646, [2009] P.I.Q.R. P1, [2008] 6 WLUK 277*; the Claimant had deliberately taken the risk that she might fall, she had not intended to fall but, due to a momentary misjudgement, she did, The Defendant had taken some steps to deal with the problem and could not reasonably have been expected to have done any more. Given the Claimant's evidence about the obvious risk that she ran, the principle of voluntary assumption of risk was fatal to her claim. The Defendant owed her no duty to protect her from such an obvious and inherent risk. She made a genuine and informed choice and the risk that she chose to run materialised. It was trite law that the mere fact that there was a foreseeable risk of injury did not of itself create a duty of care, *Fowles v Bedfordshire CC [1996] E.L.R. 51, [1995] 5 WLUK 255* considered. Even if the Claimant's voluntary assumption of an obvious and inherent risk was not a complete answer to the case there was no doubt that the absence of any obligation on the part of the Defendant to protect or prevent her from voluntarily assuming that risk provided the answer, *Barrett v Ministry of Defence [1995] 1 W.L.R. 1217, [1994] 12 WLUK 310* , *Ministry of Defence v Radclyffe [2009] EWCA Civ 635, [2009] 6 WLUK 809* and *Mitchell v Glasgow City Council [2009] UKHL 11, [2009] 1 A.C. 874, [2009] 2 WLUK 483*

10. In the context of a road traffic accident however, the fact that a driver has been drinking alcohol will not amount to ex turpi cause and will not prevent the Claimant from recovering damages at all, but is likely to lead to a reduction for contributory negligence.

11. In the case of ***Edwards v Jerman*** [2003] 10 WLUK 842 the Claimant [E] sought damages from the Defendant [J] who had been driving on the wrong side of the road.

"E sought damages from J following a road traffic accident. E had been driving up a hill over which he could not see. He accelerated from 40 mph to 60 mph before cresting the hill at which point he saw J's car which was proceeding towards him on the wrong

side of the road. J's car was overtaking motor vehicles in J's correct lane. E braked and almost came to a halt but J was unable to return to her side of the road and a collision occurred. E was subsequently breathalysed and found to have 144mg in 100mg of blood. J argued that the maxim ex turpi causa non oritur actio applied and that E ought to be debarred from recovering any damages because at the time of the accident he had been involved in an illegal activity of drink driving. E had been contributorily negligent in travelling at 60 mph and the effect of the alcohol he had consumed would have been to slow down his reactions such that his chance of avoiding the accident was reduced. It was also suggested to, but denied by, E that he would have been travelling at a slower speed up to the crest of the hill had it not been for the alcohol he had consumed. E did accept that had he crested the hill at 40 mph the accident would not have happened because he would have been able to stop much earlier. J argued that there were three separate tests in deciding whether E's illegality ought to bar him from recovery, namely (1) whether it was impossible to determine the standard of care to be applied; (2) whether the claim was an affront to public conscience and should fail as a matter of public policy, and (3) whether E had to rely upon the illegality to properly put forward his claim. E argued that the defence of ex turpi could only apply if he had to either plead or rely upon his illegal act to found his cause of action and that in the instant case his cause of action was founded upon the negligence of J.

Held, giving judgment for E in part, that for the claim to be defeated under the ex turpi causa maxim, E had to be seeking to rely upon his act of illegality to found his cause of action, and that was not the case. E's speed was excessive, although within the speed limit for that particular road, and his decision to accelerate from 40 to 60 mph per hour as he proceeded up the hill, despite having no view beyond the crest of the hill was negligent. Although there was no evidence on the point, the judge could take judicial notice of the fact that the alcohol consumed by E was likely to have made his reactions less sharp than they otherwise would have been, and that the combination of speed and less acute reactions had caused him not to come to a halt before the collision. In the circumstances E was contributorily negligent and his damages were reduced by 25 per cent.

12. Another situation in which the fact that the Claimant had been drinking precluded him

recovering damages at all was the very recent case of: **Simon Thompson V Chief Constable Of Greater Manchester** (2020). In that case the Court of Appeal dismissed an appeal brought by a football supporter who whilst under the influence of alcohol had been assaulted by a police officer and suffered injury. The Judge dismissed the claim and the Court of Appeal dismissed the appeal. The facts were summarised as follows in the headnote:

"*The Claimant (T) had attended a football match and was arrested as a result of an incident with a steward at the football ground. The incident started when T was asked by the steward to stop smoking an e-cigarette. He had refused and became belligerent. The judge found that his conduct had been influenced by alcohol. T realised that he would not only be ejected from the grounds but faced a ban as that was not the first time he had flouted the prohibition on smoking. Two police officers who attended feared that T was going to attack the steward. One of the officers held T's right arm to immobilise him; the other officer (W) held his left arm intending to apply the "entangled arm lock", a police restraint technique. Initially, T's left arm was bent at the elbow in accordance with the proper application of the technique, but in the melee T's left arm had straightened when W decided to take him to the ground. The result was that W forced T to the ground when his left arm was straight and being rotated. That meant that considerable force was applied to T's arm in the hyper-extended position, resulting in a severe fracture to his left arm. T brought a claim for false imprisonment, negligence and assault. All three claims were dismissed. The judge's conclusions in respect of negligence were that W had intended to bring T to the ground using an entangled arm lock and that that was a reasonable decision, and in the heat of the moment, with a split second for decision-making, it was not negligent to continue bringing him to the ground.*

The Claimant argued that (1) the judge had not considered whether it was unreasonable for W to carry on with the manoeuvre to take him down or to do so in some other way, and that given the importance of that issue the judge should have dealt with it expressly, which meant that he had failed to apply his own self-direction or failed to give reasons; (2) it was irrational and wrong for the judge not to have found that W should have performed an alternative manoeuvre.

HELD: The first ground was not accepted. The judge's finding was that the matter had unfolded too quickly to expect W to take another course. He had embarked on a particular course, but T's arm had straightened as W was attempting to bring him to the ground. He had considered whether W should have stopped when T's arm was extended, and said that W had to make a split-second decision which justified not taking an alternative course. The judge's point was that in the melee that ensued it was not possible to make a measured assessment of the options. On the judge's finding W had embarked on a safe manoeuvre. There was nothing wrong or irrational in his conclusion that the force used was not excessive. The court sympathised with T, but he had created the circumstances in which he sustained the injuries.

13. A further example of a recent case in which a Claimant has failed to recover at all as a result of her injury being caused whilst she was under the influence of alcohol is **Shelbourne v Cancer Research UK [2019] EWHC 842 (QB).** In that case **the facts were as follows:**

"*The appellant (S) appealed against the dismissal of her claim against her employer (CRUK) for damages for* ***personal injuries*** *sustained at her works Christmas party.*

The party, which was held at a Cambridge University research institute, had been organised by an employee (H) and run by staff members. It was a ticket-only event open to staff and their guests; there was a disco, and ***alcohol*** *was available. Before the party, H completed a risk assessment and as a result took steps to limit partygoers' access to nearby laboratories. One of the partygoers (B) was a visiting scientist who was not employed by CRUK but working in its laboratories under its supervision. Having drunk* ***alcohol*** *during the evening, he approached three women on the dance floor and lifted them off the ground. When he tried to do the same with S, he dropped her and she sustained a serious back* ***injury****. S alleged that CRUK was liable for her* ***injury****, either because of its own negligence or because it was vicariously liable for B's actions. She argued that, given the availability of* ***alcohol*** *at the party, CRUK should have conducted a risk assessment encompassing all eventualities stemming from inappropriate behaviour by partygoers, provided trained staff to look out for trouble at the party, and required each partygoer to make a written declaration that they would not behave*

inappropriately. The recorder dismissed her claim. Although he found that CRUK owed her a duty of care, he concluded that it had not breached it. He further held that CRUK was not vicariously liable because B's behaviour was outside the "field of activities" entrusted to him as a visiting scientist.

The Appeal was dismissed. - CRUK accepted that it owed S a duty of care. In Everett v Comojo (UK) Ltd (t/a Metropolitan) [2011] EWCA Civ 13, [2012] 1 W.L.R. 150, [2011] 1 WLUK 233, the court indicated that the scope of the duty was flexible: in a nightclub it might require that patrons be searched and security personnel provided, whereas in a respectable members-only club it might simply require that staff be trained to look out for trouble and alert security staff. In making those observations it was simply giving examples of what the duty might require; it was not laying down a rule of law that at any organised social gathering there had to be staff trained to look out for signs of trouble, Everett followed. Each case was fact-specific. In the instant case, a reasonable person would not regard the requirements postulated by S to be a socially appropriate set of requirements to impose on the organisers of a Christmas party or similar gathering. H had conducted a risk assessment which took into account the fact that ***alcohol*** *would be available, and there was no need for him to have gone on to address what might happen if an inebriated person did something untoward on the dance floor. Context was all-important. The party was an event for adults working in the scientific community in Cambridge, held at an institute of the university. It was the third that had been held there, and there had been no previous incidents of inappropriate behaviour caused or contributed to by* ***alcohol****. It was reasonable for the risk assessment and organisational arrangements to be informed by what had, or had not, happened in the past (see paras 88-103 of judgment). The recorder had drawn the correct inferences from the evidence as to the reasonableness of the steps taken during the party to deal with any problems. Nobody had complained about B's behaviour before the incident, and there was nothing to suggest that H or the staff members running the party had been unable to adequately monitor what was happening. The suggestion that such a social gathering could only be adequately monitored by detached observers set the standard of care unreasonably high. Finally, the recorder's findings were not undermined by the fact that, after the party, H recommended that the next risk assessment should cover a wider range risks arising from consumption of* ***alcohol****. Hindsight was not necessarily determinative of the legal question of what steps*

were necessary to discharge the duty of care. The recorder had been entitled to find that CRUK had taken reasonable steps in the planning and operation of the party and had not breached its duty of care to S (paras 104-117).

14. The Court quoted from the decision of the Court of Appeal in *Everett v Comojo (UK) Ltd* [2011] EWCA Civ 13, a guest in a members' club, a nightclub known as the Met Bar, attacked and injured another guest, stabbing him in the neck and abdomen. A waitress had earlier reported her concern about the attacker to her bar manager, rather than to one of the door supervisors.

15. The Court of Appeal held that the relationship between the management of the nightclub and its guests was one of sufficient proximity to justify the existence of a duty of care. At [32], Smith LJ held:

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

16. In the case of ***Bellman v Northampton Recruitment Limited [2018] EWCA Civ 2214*** the position was:

"Mr Major, the managing director of the defendant company, seriously assaulted the claimant, one of its employees, during a late-night drinking session in a hotel, which had followed the company's Christmas party for its employees. Mr Major committed

the assault after losing his temper when his authority had, in his view, been challenged by the claimant over a work matter.

At first instance, the judge had found in favour of the defendant, holding that there was "both a temporal and substantive difference between the drinks and the Christmas party [paid for by the defendant and which employees were expected to attend]. The drinks were not a seamless extension of the Christmas party... [and] there must be a limit to the effect of the discussion about work- related issues and proper account must be taken of the time and place at which the discussion takes place".

In the Court of Appeal, Asplin LJ held that, if the previous case law was examined:

"through the prism of Lord Toulson's analysis in Mohamud , which is essential ... the question of whether there is sufficient connection between the position in which the wrongdoer is employed and is in wrongful conduct so as to make the employer liable under the principle of social justice requires the court to conduct an evaluative judgment. It is a question of law based on the primary of facts as found". ([16])

26. Asplin LJ held that it was clear from the judge's findings that Mr Major's functions were widely drawn and that he was the directing mind and will of the defendant, being in overall charge in all aspects of its business. She held that it was necessary to ask whether Mr Major was "acting within the field of his activities assigned to him as Managing Director [..] when the assault took place or was he present in the lobby of the hotel merely as a fellow reveller?" ([19]). The question of the "field of activities entrusted to the employee" had to be assessed broadly by asking "what is the nature of the job" rather than focusing on actual authority.

27. Turning to the question whether there was a sufficient connection, the judge had concluded that there was insufficient connection between Mr Major's field of activities and the assault. Asplin LJ held that that was wrong and "despite the time ****P298*** *and place, Mr Major was purporting to act as Managing Director [...] he was exercising the very wide remit which had been granted to him [...] his managerial decision making having been challenged, he took it upon himself to seek to exercise authority over his sub-ordinate employees". He had chosen "to wear his metaphorical managing director's hat to deliver a lecture to his subordinates [...] and drove home his managerial authority, with which he had been entrusted, with the use of blows". He*

was, accordingly, "not merely one of a group of drunken revellers, his conversation had turned to work". ([25])

28. Asplin LJ concluded that "although the party and the drinking session was not a single seamless event and attendance was voluntary, it seems to me that Mr Major was not merely a fellow reveller. He was present as managing director of NR, a relatively small company, and misused that position...". In that regard, Asplin LJ concluded that the case was "a very long way from the example being given by a judge of a social round of golf between colleagues during which conversation turns to work... the judge's example is based on different premise". There:-

"... all participants are equal and attend as casual friends and golfers. One can readily see that in such circumstances, even if discussions turn to work and a golfer who happens to be a more senior employee assaults another golfer who is a junior colleague, looked at objectively, they have all attended qua social golfers. The participants in the drinking session, on the other hand, had attended the Christmas party qua staff and managing director. As I have already mentioned, just because the drinking session was unscheduled and voluntary, I do not consider that their roles changed or if they did, that on the facts of this case, the role of managing director was not re-engaged." (paragraph 28)

17. In the case of **Christopher Robinson v North Yorkshire County Council,** the claimant fell from Castle Terrace in Richmond in Yorkshire onto Millgate, some two and a half metres below. As a result of the fall the claimant suffered catastrophic spinal injuries and his mobility is now severely restricted. The Judge found:

"I do not consider that it was negligent to fail to foresee that an accident might occur in the circumstances that arose in this case. It is always possible for somebody to slip over or to fall over an edge. However, in my judgment, the first defendant was entitled to look at the position as a whole and to take into account that pedestrians or visitors here (strictly they are not visitors they are pedestrians) using Castle Terrace have a duty to take reasonable care for their own safety and, in my judgment only somebody who was quite as affected by alcohol as the claimant, would have failed to notice the drop and failed to notice the end of the barrier.

18. In two cases however, a Claimant has succeeded in showing injury as a result of the Defendant either causing an alcohol problem, or failing to treat an alcohol problem.

19. In the Scottish case of ***Carling v WP Bruce Ltd [2007] 7 WLUK 248*** the case was as follows:

"A man born on March 25, 1954 raised an action of damages against the employers of a tractor driver for injuries sustained on September 25, 2002 following a collision between the car he was driving and the tractor. The pursuer had been driving along a single carriageway at approximately 19.15 when the tractor, towing a trailer, emerged from a farm road into the pursuer's path. The pursuer's car collided with the side of the tractor and the steering column and steering wheel were pushed into the pursuer's chest. The pursuer was formerly the chief executive and managing director of a company, he had not worked since the accident, and while his physical injuries were undisputed, he sought £900,000 in respect of associated psychological problems including post-traumatic stress disorder (PTSD), which he associated with his excessive consumption of alcohol since the accident. The defenders admitted liability but submitted that the pursuer suffered from PTSD which was moderately severe to severe in nature and if he moderated his consumption of alcohol, the disorder would be treatable and he would be able to return to some form of work.

Held

(1) The pursuer did suffer from PTSD and it was proved on a balance of probabilities that the degree to which he suffered was between moderately severe and severe. (2) While it might have appeared prima facie that in resorting to drink, the pursuer had made a free, deliberate and informed decision which was of such substantial importance that it negated a causal connection between the accident and the gravity of his present condition, such an appreciation of the situation would be incorrect where, having regard to all the medical evidence, alcohol abuse or alcohol dependence was

not an abnormal accompaniment of PTSD, and the pursuer resorting to heavy drinking should be regarded as still reacting to the accident and not being in control of his situation and free to act otherwise. Thus his failure to reduce or discontinue his drinking should not count against him in the assessment of damages. (3) In view of the absence of supporting evidence from the brain scans, a brain injury sustained by the pursuer was not proved on a balance of probabilities. (4) There was no prospect of the pursuer returning to work unless in the future some new treatment was tried and tested and was successful. (5) A total sum of £726,390 would be awarded: accepting the agreed sums of £207,087 and £14,776 as representing the pursuer's loss of earnings to date, and interest thereon; £437,000 in respect of future loss of earnings, taking into account that some new treatment might be discovered to enable the pursuer to return to some form of employment; £42,527 in respect of solatium, inclusive of interest, with one third attributable to the past; and agreed services at £25,000.

20. In the case of: ***Pauline Elizabeth Hutchinson v Epsom & St Helier NHS Trust [2002] EWHC 2363*** the claimant, Pauline Elizabeth Hutchinson, was the widow of Gerald Hutchinson who died on 19th December 1998 aged 51. This claim was brought by her under the Fatal Accidents Act 1976 and also as executrix of the deceased's estate, under the Law Reform (Miscellaneous Provisions) Act 1934 .
It was alleged that the death resulted from the negligent failure by the defendants to provide the deceased with adequate treatment resulting from his admission to Epsom Hospital on 27th September 1997. The reason for his admission was that he was suffering from a painful, swollen, left leg, headache and fever. He was admitted under the care of Dr Rom. He was seen by a house physician, it was noted that he had vomited that afternoon. A note was taken of his social circumstances. It is evident that he was asked how much used to drink. Three-quarters of a bottle of wine a day is noted. It was also noted that he was obese. He was about 6'2" and weighed 20 stone. Cellulitis was diagnosed and he was treated with antibiotics and inpatient rest. He was discharged home on 8th October. Blood tests had been ordered on his admission; the results were very abnormal but not notified to his general practitioner. The Defendant admitted:

"(1) that liver function tests should have been carried out in the light of the abnormal blood test results; (2) that liver function tests would probably have shown that the deceased was suffering from liver disease; (3) that as a result the deceased would have been advised to stop drinking and lose weight in or around October 1997."

21. The main dispute in the case was one of causation. The defendants maintained firstly his cirrhosis of the liver was caused by his obesity, not alcohol, and secondly if his death was alcohol related, he would probably not have stopped drinking even had he been told to.

22. The issues were summarised as:

(1) What was the cause of the deceased's cirrhosis of the liver and consequential death? Was it (a) alcohol or (b) obesity or (c) a combination of the two. (2) If it was a combination of the two, was the alcohol a material contributory cause, i.e., was it more than de minimus? (3) If it is proved that the alcohol was at least a contributory cause, would the deceased have given up drinking had he been appropriately warned in 1997? These matters have to be proved on the balance of probabilities; the burden is on the claimant.

23. The Judge found:

"I have come to the clear conclusion that: (1) the level of intake in excess of 56 units was such as to exclude by definition and on the evidence of both Dr Murray Lyon and Professor Summerfield the diagnosis of NASH [Non-alcoholic Stiato Hepatiti]; (2) the strong probability is that both obesity and alcohol were causative factors in this case."

24. On the issue of whether the deceased would have given up drinking if advised to do so the Judge approached the issue as follows:

"Would the deceased have given up drink had he been properly warned? This is not an easy question to decide. It is clear on the evidence, as I have found, that he was a considerable drinker. He was very fond of his wine in particular, he needed it for a host of reasons. Clearly, the family had nagged him to control his drinking in the past. What would he have been told? The evidence is that he would have been told, "If you don't stop drinking you will be dead in 12 months or perhaps two years". That is a stark

warning. Mrs Hutchinson gave evidence on this issue. She said, "I believe he would have given up had he been told this." She pointed to the fact, first of all, that he had given up smoking in 1995. He had been smoking since the age of 14 and they got him to give up eventually because of the health risks. Secondly, she pointed to the fact that they have a very difficult son. She said Ricky was very, very supportive. He would not have wanted me to have had to look after him alone. Thirdly, she pointed to the fact that "we had many good things in our lives. He adored and cherished the children and there is no way that he would have jeopardised that". Lastly, she pointed out, "He had me, and I would have killed him if he hadn't have done it".

29. Having listened to Mrs Hutchinson in the witness box and seen her during this trial, it is clear to me that there is considerable force in what she says. Undoubtedly he would have had the motivation. In my judgment, she is probably right. Had he been given that stark warning when he should have been, he would, on the balance of probabilities, have stopped drinking".

25. The Judge concluded:

" 30. I have been referred to three authorities, Bonnington Castings Ltd v. Wardlow [1956] AC 613 , secondly Wiltshire v. Essex Area Health Authority [1988] AC 1074 , and thirdly Tahir v. Haringey Health Authority [1998] Ll LR 104 . The principles to be distilled from these authorities are straightforward and uncontroversial: (1) the burden of proving causation is on the claimant; (2) causation is a question of past fact to be decided on the balance of probabilities; (3) if it is proved that negligence was the sole cause or substantial cause or that it materially contributed to damage, the claim succeeds in full. Material contribution means a contribution which is more than de minimus.

31. For the reasons set out earlier in this judgment, it follows that the claimant has proved that negligence in this case was at least a material contribution to the damage that was suffered, that damage was the cause of the deceased's death, and in consequence this claim must succeed in full".

26. The role of alcohol in personal injury cases can therefore be significant for a number of reasons:

(a) If an accident occurs because the Claimant has taken a risk or done something dangerous whilst under the influence of alcohol the Claimant may well fail to recover damages at all.

(b) If a road traffic accident is the fault of another driver but the Claimant had been drinking, there may be a reduction for contributory negligence as the Claimant has slower reactions or has added to the consequences of the accident by driving too fast.

(c) Once a Claimant has been injured there is the same responsibility for calling medical treatment and treating the Claimant responsibly regardless of why the accident or injury occurred.

(d) A Claimant who is not given competent advice about the need to stop drinking may have a claim against his doctors.

(e) A Claimant who develops alcohol problems as a result of an injury may recover damages for this development as with any other medical condition resulting from an injury.

1 Crown Office Row

London EC4Y 7HH

E.A.Gumbel QC

February 2020

Elizabeth-Anne Gumbel QC

Year of call: 1974
Year of silk: 1999

lizanne.gumbel@1cor.com

Lizanne Gumbel is a leading practitioner in Clinical Negligence and Personal Injury claims. Lizanne has a distinguished reputation for representing Claimants with highly complex claims for catastrophic injury. Frequently her work involves multi-party actions.

She has developed particular expertise for her work on sensitive child abuse cases and cases that attempts redress for Claimants of abuse in institutions.

Lizanne's work also involves multi-party actions and she recently acted for over 700 Claimants in the litigation against Mr Ian Paterson, Spire Healthcare and HEFT. Lizanne has also been instructed in a number of multi-party actions arising out of sexual abuse and physical abuse of children and adults in institutions including the Jimmy Savile litigation and the Winterbourne View claims. Lizanne is now acting for woman abused by Mr Harvey Weinstein. Claims against private hospitals, the Catholic Church and local authorities have involved a number of cases which have resulted in the development of the law in respect of vicarious liability.

Selected Recent Cases

- Al-Zahra (PVT) Hospital & 7 ors v DDM (2019):
- CN & GN v Poole BC [2019] UKSC 25
- Barclays Bank PLC v Various Claimants (2018)
- XXX v King's College Hospital NHS Foundation Trust (2018)
- TW v Royal Bolton Hospital NHS Foundation Trust [2017] EWHC

- FB v Princess Alexandra Hospital NHS Trust [2017] EWCA Civ 334.

- ABC v (1) St George's Healthcare NHS Trust (2) South West London and St George's Mental Health NHS Trust (3) Sussex Partnership NHS Foundation Trust [2015] EWHC1396, [2017] EWCA.Multi-Party Actions

Qualifications:
Lady Margaret Hall, Oxford
Wycombe Abbey School

Publications:
Joint author of "Clinical Negligence – A Practitioner's Handbook", published by OUP
Joint author of "Child Abuse Compensation Claims", published by the Law Society and *"Guide to Child Abuse Compensation Claims"* published by Jordans
Contributor to *"Risk Management and Litigation in Obstetrics and Gynecology"* edited by Roger Clements, published by RSM Press

Memberships:
APIL
AVMA
PIBA
PNBA

Directories:
Lizanne Gumbel is recommended as a leading and a star silk for both the clinical negligence and personal injury fields by Chambers & Partners Directory UK and in the Legal 500. Since 2016 she has been frequently awarded 'Personal Injury and Clinical Negligence Silk of the Year' by both Legal 500 and Chambers & Partners.

In 2020, Lizanne was awarded 'Personal Injury and Clinical Negligence Silk of the Year' by Legal 500.

"She combines substantial expertise and technical legal knowledge with a highly supportive and caring approach. She's passionate about going above and beyond to secure the best outcome for her clients."

'She is tough and yet tender with vulnerable clients and gets truly life-changing results.'

"A top barrister who is able to provide exceptional service and advice." "She is extremely hard-working and thinks outside the box to achieve good results in difficult situations."

'She has unparalleled work ethic and able to get to the heart of a case with ease.'

"She is just phenomenal, she's got a brain the size of the Shard and works extremely hard on behalf of her clients."

"She is a powerhouse with a phenomenal work ethic and a huge heart."

"She's just quality from start to finish."

C O R

1 CROWN OFFICE ROW

1COR HEALTH LAW

We currently have a formidable bench of silks and impressive number of experienced senior juniors in the team, with many of our younger juniors showing great promise in this important area of law.

Our breadth and depth of experience in this increasingly specialised field enables us to provide objective, careful advice, and expert advocacy in Court.

We have established ourselves in this field by acting for a wide range of clients. We act for privately and publicly funded Claimants, with diverse interests across the whole medical, dental, and alternative treatment spectrum. Our Defendant clients include hospitals and organisations within the NHS, private hospitals, medical defence organizations and other insurance bodies.

We also believe that our strength in other areas of medical law, such as personal injury, disciplinary, medical crime, inquests, Court of Protection and public law, gives us a real advantage. We can take a wider view, and provide our clients with advice and representation tailored to the circumstances of the particular case. Members also run the popular Quarterly Medical Law Review (QMLR) newsletter.

Recent cases:

- ABC v St George's Healthcare
- CN & GN v Poole Borough Council
- Pomfrey v Secretary of State
- Darnley v Croydon Health Services
- ARB v IVF Hammersmith
- Various Claimant v Barclays Bank
- Infected Blood Inquiry
- Paterson Litigation

For many years, we have been ranked as the top tier set by both Chambers & Partners and Legal 500, who describe us as *'"Undoubtedly one of the top sets for clinical negligence work in the country." Instructing solicitors praise the set's "breadth of experience," adding that the barristers are all "amazingly intellectual but also very approachable and down to earth."'*

In 2020 we were named 'Personal Injury / Clinical Negligence Set of the Year' by Legal 500.

1 COR

1 CROWN OFFICE ROW

The 1COR Bundle

The 1COR Bundle is the annual newsletter of 1 Crown Office Row which features case analysis from all of 1COR's cases across the year in each of our practice areas. The 1COR Bundle 2017 – 2018 is currently available, please email us to receive your copy.

1COR Quarterly Medical Law Review (QMLR)

This new quarterly publication aims to provide summaries and comment on recent cases in medical law, including clinical negligence, regulatory, and inquests. Spring 2019 Issue 1 has been released, please email us at medlaw@1cor.com to receive a free copy or to subscribe.

The UK Human Rights Blog

Up to date analysis and discussion on Human Rights Law in the UK from the specialists at One Crown Office Row.

Since its launch in March 2010, The UK Human Rights Blog has evolved into one of the most widely read online resources for people wanting to keep abreast of Human Rights Law.

Each week sees new posts and updates on the most high profile cases with comments and features written by our Human Rights and Public Law specialists. Please subscribe for regular updates.

"1 Crown Office Row's Human Rights Update is one of the most significant free legal resources to appear on the web." Delia Venables, Internet Newsletter for Lawyers

Law Pod UK

1 Crown Office Row run a regular podcast, Law Pod UK, with presenters Rosalind English and Emma-Louise Fenelon, to discuss developments across all aspects of Civil and Public Law in the UK.

It is produced by the barristers at 1 Crown Office Row and Whistledown Productions with interviews and panel discussions featuring judges, barristers and experts.

Please visit iTunes, Audioboom, Spotify or your favourite podcast platform to listen or find us on the UK Human Rights Blog.

Twitter & LinkedIn

Please connect with our Twitter account at @1CrownOfficeRow for regular updates from our barristers and 1COR news. Please connect with our 1 Crown Office Row Linkedin Page for articles and updates.

C O R

1 CROWN OFFICE ROW

MEMBERS OF CHAMBERS

QCs

Richard Booth QC	1993	QC 2013	**David Evans QC**	1988	QC 2012
Robert Seabrook QC	1964	QC 1983	**Marina Wheeler QC**	1987	QC 2016
Stephen Miller QC	1971	QC 1990	**Henry Witcomb QC**	1989	QC 2016
Philip Havers QC	1974	QC 1995	**Owain Thomas QC**	1995	QC 2016
Elizabeth-Anne Gumbel QC	1974	QC 1999	**Jeremy Hyam QC**	1995	QC 2016
Paul Rees QC	1980	QC 2000	**Clodagh Bradley QC**	1996	QC 2016
Margaret Bowron QC	1978	QC 2001	**Peter Skelton QC**	1997	QC 2016
David Balcombe QC	1980	QC 2002	**Oliver Sanders QC**	1995	QC 2017
David Hart QC	1982	QC 2003	**Shaheen Rahman QC**	1996	QC 2017
Martin Forde QC	1984	QC 2006	**Sarah Lambert QC**	1994	QC 2018
William Edis QC	1985	QC 2008	**Sarabijt Singh QC**	2001	QC 2018
Angus McCullough QC	1990	QC 2010	**Neil Sheldon QC**	1998	QC 2019
John Whitting QC	1991	QC 2011	**Robert Kellar QC**	1999	QC 2019

Juniors

John Gimlette	1986	**Isabel McArdle**	2008
Andrew Kennedy	1989	**Matthew Hill**	2009
Martin Downs	1990	**Alasdair Henderson**	2009
Giles Colin	1994	**Claire McGregor**	2009
Sydney Chawatama	1994	**Matthew Flinn**	2010
Justin Levinson	1994	**Natasha Barnes**	2010
Richard Smith	1999	**Paul Reynolds**	2010
Christopher Mellor	1999	**Lois Williams**	2012
Matthew Barnes	2000	**Jim Duffy**	2012
Iain O'Donnell	2000	**Dominic Ruck Keene**	2012
Cara Guthrie	2000	**Jessica Elliott**	2013
David Manknell	2001	**Hannah Noyce**	2013
Suzanne Lambert	2002	**Michael Deacon**	2014
Judith Rogerson	2003	**Rhoderick Chalmers**	2014
Amy Mannion	2003	**Emma-Louise Fenelon**	2015
Richard Mumford	2004	**Gideon Barth**	2015
Rachel Marcus	2005	**Jo Moore**	2015
Leanne Woods	2005	**Jonathan Metzer**	2016
Pritesh Rathod	2006	**Charlotte Gilmartin**	2015
Caroline Cross	2006	**Rajkiran Barhey**	2017
Matthew Donmall	2006	**Michael Spencer**	2017
Michael Paulin	2007	**Darragh Coffey**	2018
Amelia Walker	2007	**Thomas Beamont**	2019

Chambers of Richard Booth QC

Chambers Director	**Senior Clerk**	**Clerks**		
Andrew Meyler	Matthew Phipps	Andrew Tull	Jack May	Louis Candy
		John Mclaren	Connor Curtin	Emma Buckland
		Chloe Turvill	Alex Fletcher	Kelly Shaer