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TGC Personal Injury

The Newsletter of the TGC Personal Injury Team

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Editorial

By James Arney Q.C.
and Elizabeth Gallagher

Welcome to the inaugural edition of the TGC Personal Injury Newsletter. This is intended to be a twice-yearly publication containing articles covering recent developments in the field of personal injury, including a review of recent cases.

This publication is long overdue. Personal Injury work is the lifeblood of TGC, with over 30 active members of Chambers specialising in PI covering a very healthy balance between claimant and defendant instructions at junior, senior junior and silk level. Instructions on the defendant side include those from big insurers, and those arguing fraud and fundamental dishonesty. On the claimant side, they include the catastrophically injured with spinal, brain and amputation injuries, and those suffering from chronic pain conditions. TGC has great strength in depth, with a strong track record of recruiting from pupils as well as encouraging applications from established practitioners.

The TGC PI team have recently forged a partnership with LexisNexis to work on the 16th Edition of Binghams' Personal Injury and Motor Claims Cases. Binghams was first published over 75 years ago, and covers all aspects of liability, quantum, procedure costs and insurance-related issues arising with the road traffic collision arena. This is due for publication in mid-2023, with contributions from 28 members of the TGC PI team.

TGC is also intending to put on a series of in-person PI Seminars in the latter part of 2022, with venues both in London and the north of England, split between claimant and defendant-focussed events. These will be separately advertised once dates, venues, speakers and topics have been finalised. In the meantime, any firm of solicitors that would be interested in discussing in-house training opportunities should not hesitate to contact Keith Sharman or Nancy Rice of our clerking team.

Turning to the detail of this first issue of the TGC PI Newsletter.

To begin our contributors take a look at the recent additions to fundamental dishonesty case law, of which members have played an important part.

Lionel Stride kicks us off with a review of ***Palmer v Mantas*** **[2022] EWHC 90 (QB)**, in which Marcus Grant acted for the successful Claimant. This is followed by Marcus' review of one of the key aspects that the court had to grapple with in that case: understanding neurometabolic cascade and the delayed presentation of neurogenic symptoms following mTBI.

Anthony Johnson then provides a review of ***Long v Elegant Resorts Ltd*** **[2021] EWHC 1330 (QB)** in which Marcus, again, acted for the successful Claimant. Anthony considers what Defendants can take from the judgment to adapt their approach to pleading FD.

Turning to the procedural aspects of fundamental dishonesty litigation, Ben Casey looks at ***Stannard v Euro Garages Ltd*** **[2022] EW Misc 3 (CC)** regarding an application to strike out a case before the commencement of the trial.

Continuing the discussion on mTBI, James Henry looks at ***Stansfield v. BBC*** **[2021] EWHC 2638 (QB)**, in which the Court found that the Claimant had acquired an injury in the absence of any neuroradiological finding of brain injury, no clear evidence of post-traumatic amnesia (PTA), loss of consciousness or impaired GCS.

As part of our practitioner resources:

- James Henry considers proper notice and late amendments to plead fundamental dishonesty. The article surveys a range of important cases on the issues in what will be a useful and time-saving resource for those involved in FD litigation.
- James Laughland provides a salutary lesson in the adverse consequences of not tackling a received Part 36 offer head on, reviewing the leading Court of Appeal and Supreme Court decisions to provide readers with a comprehensive overview of the issues.
- Richard Wilkinson and James Yapp consider whether the doctrine of mistake can apply to Part 36 offers in their review of ***O'Grady (widow and executrix of the estate of Martin James O'Brien) v B15 Group Ltd (formerly Brighthouse Group Ltd)*** **[2022] EWHC 67 (QB)** a case in which they were both involved.

Turning to recent liability decisions, we take a look at some of the most interesting developments of which we think practitioners need to be aware.

- Michael Rapp unpacks the court's decision in ***(1) Martini (2) Zeqo v (1) RSA (2) AXA (3) Southern Rock*** **[2022] EWHC 33 (QB)**, in which he acted as Counsel for Ms Zeqo. The case considers causation and contribution in a multiple-vehicle collision, including an argument on novus actus interveniens.
- James Laughland examines the decision in ***Deller v King and McGarvey*** **[2021] EWHC 3396 (QB)**, in which the High Court made a finding of negligence against a driver whose vehicle experienced a sudden and serious malfunction.
- Emma-Jane Hobbs reviews the case of ***Parker (acting by her litigation friend) v McClaren*** **[2021] All ER (D) 83 (Oct)** which contains a helpful overview of appellate authorities in cases concerning accidents between cars and pedestrians, and an interesting point on safe speed.

The courts have seen a high number of cases concerning child claimants in recent months, and we have included a review of the contributory negligence cases:

- My co-editor Elizabeth Gallagher examines the appellate judgment in ***Gul v McDonagh*** **[2021] EWCA Civ 1503** in which the Court of Appeal upheld the decision to reduce a 13-year-old pedestrian's damages by 10% for contributory negligence, in a case where the Defendant driver was travelling at 42mph in a 20mph zone, but where the evidence suggested the Claimant did not properly judge this speed. The judgment contains an important discussion on the Court's discretion as to deductions for contributory negligence.
- Lionel Stride takes us through ***Alabady (a minor by her litigation friend) v Akram*** **[2021] All ER (D) 04 (Oct)**, considering the Court's typically claimant-friendly approach when a child claimant is under the supervision of adults.
- I then look at the case of ***Chan v Peters*** **[2021] All ER (D) 66 (Jul)** which concerned a 17-year-old Claimant, and compare the dismissal of that claim with others in which child claimants have been unsuccessful.

Looking more widely, our inaugural edition also contains three further articles on the scope of the duty of care:

- Ellen Robertson considers the latest from the Court of Appeal on non-delegable duties in ***Hughes v Rattan*** **[2022] EWCA Civ 107**.
- Rochelle Powell reviews the recent workplace vicarious liability case of ***Chell v Tarmac Cement and Lime Ltd*** **[2022] EWCA Civ**.

Aside from the in-depth reviews above, we have also put together some quick-fire case summaries on a wide range of issues.

We hope that you will find this first edition of our TGC PI Newsletter interesting and informative in equal measure.

Editor: James Arney Q.C.
Assistant Editor: Elizabeth Gallagher

Judgment for £1.6 Million in Favour of a Claimant with a Mild Traumatic Brain Injury Who Faced a Fundamental Dishonesty Defence

Lionel Stride with assistance from Philip Matthews

Lionel Stride examines the case of *Palmer v Mantas & Anor* [2022] EWHC 90 (QB), in which TGC's very own Marcus Grant appeared for the successful Claimant, securing damages in excess of £1.6 million and seeing-off an allegation of fundamental dishonesty in the context of a brain injury claim.

In a high-speed road traffic accident on 15 June 2014, the Claimant (a 26-year-old woman at the material time) was struck from the rear by the First Defendant, who was later convicted of driving under the influence of alcohol. The First Defendant was not insured and therefore the Second Defendant was liable to compensate the Claimant as the insurer of the vehicle pursuant to Section 151 of The Road Traffic Act 1998.

Liability was admitted so the case proceeded in relation to causation and quantum only, with the Claimant contending that she had sustained a mild to moderate Traumatic Brain Injury ('mTBI') and developed a somatic symptom disorder ('SSD'). The Second Defendant challenged the claim on several bases, foremost of which was the allegation of fundamental dishonesty. Clinical causation was also in dispute, and the updated Schedule of Loss was robustly challenged; by the start of the trial, the Claimant sought damages of £2.2 million whilst the Second Defendant conceded just £5,407. There was therefore insurmountable distance between the parties.

The Law on Fundamental Dishonesty

Section 57 of the Criminal Justice and Courts Act 2015 provides that even if a claimant is entitled to damages in respect of their primary claim, if they have been fundamentally dishonest in a related claim, the court must dismiss this claim unless it is satisfied that the claimant would suffer *"substantial injustice."* The burden of proof lies with the party alleging fundamental dishonesty (usually the defendant), and the standard of proof is the 'balance of probabilities'.

The test for 'dishonesty' is that set out in ***Ivey v Genting Casinos Ltd T/A Crockfords Club*** [2016] UKSC:

"although a dishonest state of mind is a subjective mental state, the standards by which the law determines whether it is dishonest is objective."[1]

Following the judgment of Julian Knowles J in ***London Organising Committee of the Olympic and Para Olympic Games (in liquidation) v Sinfield [2018]***, dishonesty will be 'fundamental' if it *"substantially affected the presentation of [the Claimant's] case, either in respect of liability or quantum, in a way which potentially adversely affected the Defendant in a significant way"*.

The Defendants' Position as to Fundamental Dishonesty

The Second Defendant's case, in essence, was that the Claimant had acted dishonestly in order to maximise the value of her claim. In the absence of decisive surveillance evidence, this allegation was supported with over 700 pages of social media posts showing the Claimant going on holidays and taking part in various physical activities which appeared to contradict her account of a restricted lifestyle. The Second Defendant's pain management expert also opined that the Claimant was exaggerating the extent of her accident-related injuries.

The Second Defendant cited two key factors to allege fundamental dishonesty:

1. The first matter – which was of particular relevance to the neurological aspect of the case – was that the Claimant had *"islands of memory"* [paragraph 5] post-accident. The Second Defendant noted that she recalled many small details of the accident, including that her airbags did not deploy and the other driver had smelt strongly of alcohol. However, she did not recall events after this moment.

2. The second matter related to how the Claimant presented during her medico-legal examinations, as compared with the picture distilled from the medical records. The central question was whether any exaggeration was conscious or unconscious. The Second Defendant asserted that the Claimant withheld evidence from the medical experts, in particular evidence relating to her travel and active lifestyle following the accident.

The Judge's Findings in Relation to Fundamental Dishonesty

Anthony Metzer Q.C. (sitting as a Deputy High Court Judge) found that the Claimant had not *volunteered* further information about the progression of her symptoms. However, he found that this did not amount to fundamental dishonesty, as she had answered the questions directly put to her by the experts and had done so truthfully:

*"**I reject the Second Defendant's assertion that the Claimant was actively withholding her level of functioning between 2014 and 2019 when the medical legal assessments were completed. As I have indicated above, I consider that the Claimant, although clearly articulate, intelligent and straightforward had chosen to respond by answering questions from the medical legal experts which I consider to be reasonable and not deceitful in any way. Indeed, acting otherwise by seeking to take charge of those interviews might have been perceived as controlling and tending to dictate the findings that the experts would subsequently make.** I accept the evidence from her family that she is reserved and tends to keep her emotions in check".* [paragraph 72]

Direct Criticism of Experts

Ancillary to his primary findings, the Judge also made some notable observations regarding the conduct of the Second Defendant's medical experts and their approach to assessing the Claimant. With regards to their neuropsychological expert (Dr Torrens), the Judge noted that her first report was *"littered with judgemental and rather scathing comments"* with reference to the Claimant being *"self-pitying"* and *"histrionic"* [paragraph 79]. Citing ***Mustard v Flower & Ors* [2021] EWHC 846 (QB)**, the Judge commented that, although an expert is entitled to express a lack of belief in the Claimant's case and criticise her actions accordingly, the level of language used *"went beyond language which is appropriate for an expert to employ and suggests a level of unconscious bias"*. Comparing Dr Torrens' evidence with that of her counterpart, the Judge noted the absence of balance in placing too great a reliance on small, negative details in the Claimant's medical records and what she volunteered in her statement, rather than other positive aspects of her work records and the views of colleagues. He found this to be *"concerning"*, such that he was unable *"to safely rely upon her expertise where it differed from [the other expert] because of what [he] perceived to be unconscious bias"* [paragraph 79].

The Judge made similar criticisms of the Second Defendant's chronic pain expert (Dr Miller), who admitted that he had been *"over-zealous in his use of language from the outset ... and when [he] re-read [his] reports in preparation, [he] winced and thought [he] could have been a little bit more reflective and kinder and provided a little bit more range of opinion"*. At issue was his approach of only considering the Claimant's clinical records after the assessment, which left her no opportunity to comment on their contents (and allowed him to insinuate dishonesty based on any discrepancies). The Judge then made the following findings: *"Overall, for the reasons set out above, I was troubled by the extent of departure of Dr Miller from his Part 35 duty, and I considered that it lacked the appropriate necessary balance, probably as a result of his initial views of the Claimant's credibility. In the circumstances, on matters of variance where his opinion departed from Dr Munglani's, I preferred the latter expert's evidence."*

Judgment Summary

Having found in favour of the Claimant on the issue of honesty, the Judge also found in her favour on causation and prognosis, although he accepted that there would be improvement in her condition. On this basis, it is notable that he preferred the multiplier/multiplicand approach to calculating the Claimant's loss of earning capacity (i.e., making an Ogden 8 rather than a Smith v Manchester award), applying the 'mid-point' Reduction Factor (between an 'able' and disabled female) when calculating the future earnings differential due to her acquired disability. Critically, this was not on the basis of her current condition but to allow for some projected improvement. Taking into account future promotions, the Judge awarded £1,206,053 for future loss of earning capacity alone. The total award for all heads of loss was £1,679,406 (over 75% of the sum claimed).

Conclusion

Whilst ***Palmer***, like all fundamental dishonesty cases, was decided on its own facts, there are nevertheless a number of important lessons that practitioners can draw from the case: -

i. A failure to *volunteer* information is different from deliberately withholding information in the face of direct questioning.

ii. It is important to distinguish between conscious and unconscious exaggeration – the former will likely result in a finding of fundamental dishonesty, the latter will not.

iii. The claimant's credibility is, as ever, key. However, inevitable differences in recollection when asked repeatedly to recite history and symptoms are unlikely to be persuasive evidence of dishonesty. Complete consistency would itself tend to be suspicious.

iv. Experts should always be reminded of their duties under CPR 35, so that their opinions remain objective and unbiased. They are likely to be criticised if their opinions focus exclusively on the negative counterfactual, without acknowledging the positive; and a claimant should be given a fair opportunity to respond to any inconsistent medical records.

If dishonesty is alleged unsuccessfully, a generous assessment of loss is more likely.

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1. Lord Hughes at paragraph 62

High Court Finds for Brain-Injured Claimant in the Face of Allegations of Fundamental Dishonesty

Anthony Johnson

Anthony Johnson considers *Long v. Elegant Resorts Limited* [2021] EWHC 1330, a case that should be of interest to all PI practitioners, with a particular focus upon two key aspects: (i) its treatment of the medicine relating to mild traumatic brain injuries; and (ii) its treatment of the Defendant's allegation of fundamental dishonesty.

The Claimant was a 47-year-old male who struck his head when passing beneath a low door lintel in the course of his employment. Primary liability was admitted, but causation was denied; the medical evidence in the case was extremely complex. The Claimant alleged that he had developed a mild traumatic brain injury as a consequence of his initial head injury, whereas the Defendant denied any brain injury whatsoever, instead alleging that the Claimant's presentation reflected a pre-existing Somatic Symptom Disorder.

The Claimant's diagnosis of mild traumatic brain injury was made with reference to a period of post traumatic amnesia of at least a few minutes by reference to the Mayo classification of brain injuries, together with post traumatic migraine. It was said that his brain injury was responsible for causing periodic flare-ups in his cluster of physical, cognitive, behavioural and psychological symptoms upon physical and mental exertion. It was alleged that the persistence of his brain injury symptoms then led to the onset of a Severe Depressive Episode, which then became his primary clinical condition and persisted at a severe level for at least two years before remitting partially. He had been left with a residuum of his brain injury symptoms, which by that stage were better explained by reference to a Functional Neurological Disorder and a co-existing Somatic Symptom Disorder.

By the date of the trial, he had recovered a part-time earning capacity in a less well remunerated and less pressurised role. He conceded a reduction in the top line of his loss of earnings claim to acknowledge a prior vulnerability to chronic pain, having suffered Fibromyalgia for several years that had left him with low-grade chronic pain which he treated with medication and graded exercise.

The Defendant's case was that the Claimant's presentation reflected a pre-existing Somatic Symptom Disorder unrelated to the 'mild bump on the head' that he had suffered when striking his head on the lintel, which was said to be 'of a kind which people suffer regularly and which has led to no long-term consequences at all' and was, therefore, incapable of causing a 'Symptomatic Possible Train Brain Injury' per the Mayo classification, let alone a mild traumatic brain injury. It was alleged that the deterioration in the Claimant's alleged pre-existing symptoms had progressed into a genuine Depressive Disorder two months post-accident in the face of stress caused by the knowledge that he was about to be made redundant.

HHJ Pearce, sitting as a High Court Judge, preferred the Claimant's case over the Defendant's wherever there was any material disagreement, chiefly due to accepting the Claimant's expert medical evidence over the Defendant's. It was specifically found that post-traumatic amnesia of a few minutes was sufficient to give rise to a mild traumatic brain injury, and that it was possible to suffer post-traumatic amnesia without showing any obvious signs of confusion. It was noted that the Defendant's neurologist gave evidence that he had experienced patients with 'pretty innocuous head injuries … sustained in sport who had had enduring symptoms going on for many years'. The Court could see no basis to distinguish sporting injuries from the facts of the index case. It was also found that 'the evidence of the severity of the impact is a relatively poor indicator of the likelihood of a person suffering mild traumatic brain injury'. The Claimant was awarded £509.957 damages, along with an additional sum reflecting that he had beaten a Part 36 offer.

The Defendant pursued a case that the Claimant had lied in the presentation of his claim. It was alleged that he had exaggerated various material aspects of his claim, particularly in relation to his loss of earnings claim, and said that he had failed embedded validity and stand-alone effort tests conducted by both parties' neuropsychological experts. The Defendant sought to have the claim dismissed pursuant to Section 57 of the Criminal Justice and Courts Act 2015.

The Court found that the Claimant had not been fundamentally dishonest, noting that judges must be careful in drawing conclusions adverse to the honesty of a claimant from evidence about peripheral issues, especially where the defendant had not given advance warning of its intention to raise such issues. Although it was accepted that there were some aspects of the Claimant's claim that the Defendant had given adequate notice of its intention to explore at trial, the Claimant's tendency to exaggerate those aspects of the claim was found to be attributable to the consequences of a Somatic Symptom Disorder rather than conscious exaggeration.

Whilst it is suspected that the significance of this decision will not be lost on any readers who are Claimant practitioners, it is respectfully suggested that a proper appraisal and understanding of the judgment would be even more important and beneficial for Defendant practitioners. This is suggested due to two key respects:

1. In cases involving brain injuries, particularly mild traumatic brain injuries, the findings of fact in ***Long*** will allow defendants to reality test assumptions that have been adopted by their experts in relation to matters such as the Mayo classification, post-traumatic amnesia and the relationship between the forces involved in the collision and the likelihood of mild traumatic brain injury being sustained. Whilst cases of this nature are inherently fact specific, it is anticipated that the medical dispute that arose on the facts of this case will be repeated in other cases involving similar injuries; and
2. HHJ Pearce was clearly of the view that natural justice demanded that the Claimant should have notice of the allegations that were being levelled against him in order that he had a proper opportunity to respond. Notwithstanding that the Court of Appeal's ***Howlett v. Davies*** **[2017] EWCA Civ 1696** allows fundamental dishonesty to be raised for the first time at trial in certain circumstances with no absolute requirement that it must be formally pleaded, it is suggested that this is only likely to apply in situations where new information that could not have been anticipated is revealed for the first time at trial. It will always represent best practice to plead allegations that are anticipated in advance. In addition to avoiding claimants and judges criticising defendants for not giving notice of the allegations, it is also likely to enhance a defendant's case if it can be submitted at trial that allegations had been put to the claimant in advance and were not adequately responded to, e.g. there is an immediate shift in the benefit of the doubt in relation to any failures to have contemplated points and/or produced documents.

Stannard v Euro Garages Limited [2022] EW Misc 3 (CC) (HHJ Walden-Smith)

Ben Casey

The Defendant applied to strike out the Claimant's personal injury claim on the basis that he had been fundamentally dishonest.

In 2017, in the course of his work, the Claimant had made a delivery to a petrol station owned by the Defendant. He tripped on a defect in the forecourt and sustained an ankle injury. The Defendant admitted liability for the accident.

The claim started life in the portal for low value public liability personal injury claims. However, by the time it was issued, the statement of value on the claim form had increased to £100,000 with the schedule of loss detailing claims for loss of earnings, travel expenses and care and assistance. An updated schedule of loss was subsequently served which set out a claim for special damages in the sum of £67,611.83. The defence reserved the Defendant's position pending further investigation in various respects and raised a number of issues relating to special damages. The court subsequently entered judgment on behalf of the Claimant and provided case management directions.

The Defendant then served surveillance evidence together with a significantly altered Amended Defence in which it alleged that the Claimant had consciously and dishonestly exaggerated his claim. In essence, the Defendant alleged that the Claimant had exaggerated the level of his symptoms and disability, that he was making a claim for his own care and loss of earnings whilst receiving carer's allowance for the care of his own mother and that he knew his loss of employment was unconnected to the accident. In taking that stance the Defendant relied heavily on the surveillance evidence which it had served and on the comments of its orthopaedic expert on the content of that evidence.

In furtherance of this stance, the Defendant made an application to strike out the Claimant's claim pursuant to the provisions of section 57(1)(b) of the Criminal Justice and Courts Act 2015. Unusually, however, the Defendant made this application before the trial had begun and, therefore, before the court had heard any evidence at all.

In doing so, the Defendant relied on the case of ***Patel v Arriva Midlands Ltd*** [2019] EWHC in which HHJ Melissa Clarke, sitting as a deputy judge of the High Court, determined that it was appropriate, on the facts of that case, to dismiss the Claimant's claim on the grounds of fundamental dishonesty after the conclusion of a preliminary trial on liability but before the commencement of the trial on quantum. Counsel in ***Stannard*** were invited by the judge hearing the Defendant's application to identify any reported case other than ***Patel*** in which a judge had struck out the Claimant's claim on the grounds of fundamental dishonesty before the conclusion of the trial. They were not able to do so.

The judge in ***Stannard*** observed that the Defendant was seeking to obtain a finding of fundamental dishonesty before the evidence had been heard and tested in court. She went on to find that the application could only succeed if there was evidence on the papers alone which could not be challenged in a hearing which establishes, on the balance of probabilities, that the Claimant is fundamentally dishonest. It was said to be a 'high hurdle to overcome.'

The court noted that ***Patel*** was an unusual case on its facts. In that case, the Claimant maintained he was significantly disabled and was diagnosed with a severe conversion disorder by his own psychiatrist. However, surveillance evidence obtained by the Defendant suggested that he was able to walk, speak and engage with those around him in a normal manner in contrast to how he presented to the medics. The Defendant's expert concluded that the diagnosis of conversion disorder was no longer tenable and that the disability was feigned. The Claimant did not provide any further medical evidence after the surveillance was disclosed. On those stark facts, the court concluded that the claim was fundamentally dishonest on the documentary evidence. In reaching that conclusion, HHJ Clarke

stated that in considering such an application on the papers it is necessary 'to think carefully whether there are real grounds for believing that a fuller investigation will add to or alter the evidence relevant to the issues that it must determine'.

Conclusion

Whilst the court accepted that ***Patel*** established that in a suitable case an application could successfully be made to strike out the proceedings and/or for a finding of fundamental dishonesty before the quantum hearing, this will only be in rare and highly unusual situations. In order for a court to be satisfied that a Defendant has established fundamental dishonesty on the balance of probabilities, it is necessary for the court to have all the evidence before it and for that evidence to be subjected to the rigours of cross-examination.

In ***Stannard***, the orthopaedic surgeons did not share the same interpretation of the surveillance evidence. Furthermore, the Claimant did not accept the allegations made by the Defendant. He provided explanations as to why he believed that his job loss had been caused by the accident and in relation to the claim for care. The court considered that he was entitled to put those explanations before the court. As an allegation of fundamental dishonesty could have a severely negative impact on an individual the court would not lightly shut someone out from being able to put their case forward fully.

The court considered that the decision in ***Patel*** was based on its particular facts and that it is not a case that is easy to apply to other scenarios. It said that, where there are disputes on the factual conclusions a court should arrive at, it is not appropriate to reach what is, in effect, a summary judgment conclusion.

Understanding the Neurometabolic Cascade and the Delayed Presentation of Neurogenic Symptoms following mTBI

Marcus Grant

Marcus Grant analyses the facts of *Palmer v Mantas and Another* [2022] EWHC 90 (QB) which throw up a question that is often debated between experts in mTBI cases: does the presence of apparently continuous memory for up to 30 minutes post trauma contraindicate TBI, even if clear and continuous memory is not maintained thereafter?

Briefly, the Claimant was involved in a high energy rear-end shunt on the M25 in which a drunk driver drove into the rear of her stationary Renault Clio at a speed of up to 50 mph. She brought a substantial claim for damages premised on an assertion that she sustained a mild TBI ["mTBI"], aggravation of a latent pre-existing audiovestibular condition, post-traumatic migraine, soft tissue injury to her cervical, thoracic and lumbar spine that segued into a chronic pain condition, post-traumatic stress disorder and delayed onset of a major depressive disorder. The question as to whether there was a neurological substrate to her enduring subjective report of mental fatigue, cognitive and behavioural symptoms was an important issue in the case, because it impacted on the optimal treatment pathway, prognosis and value of future heads of damage.

The Claimant retained what were described by the Second Defendant's neuro experts as a continuum of *"fine-grained detailed memories"* of events over the first 30 minutes after the accident before presenting with denser amnesia, interspersed with snapshots of recollection over the ensuing c. 23 hours.

The Second Defendant's experts contended that such fine-grained and detailed memories of events over that 30-minute period was inconsistent with post traumatic amnesia ["PTA"] (defined as the failure to lay down clear and continuous memory following head injury), which is an important marker to confirm / exclude the likely presence of brain injury. On the Second Defendant's analysis, it followed that if there was no PTA, then as there was no documented loss of consciousness or neuroradiological evidence of brain injury, there was no TBI.

It was common ground that the Claimant failed to lay down clear and continuous memory of events between the 30 minute and 24 hour period after the accident; memorable events such as her journey from the accident scene on a vehicle transporter, how she spent the night at her friend's house, her journey to her parents' home the following morning, her attendance on her wrecked car at the police salvage yard with her mother and her attendance upon two casualty departments over that first 24 hour period were all events that could not be cued in her memory, save for a few consistent vivid snapshots of recollection that she retained. It was common ground that such events ought to have been capable of being cued in her memory, absent a medical explanation (or bad faith).

The competing explanations for this pattern of memories were as follows: the Second Defendant's experts advanced a hypothesis that it was explicable by psychogenic amnesia; the shock of the accident, manifesting as part of her PTSD in which dissociation played a prominent role, was the reason that she did not lay down memory over that period.

The Claimant's experts' explanation, led by her neurologist, was that the failure to lay down clear and continuous memory was a specific signature delayed onset PTA, consistent with the specific mechanism of injury; namely, acceleration-deceleration-rotation injury (sometimes referred to as a 'contrecoup injury'), in which the brain is shaken violently around three planes in 1/20th second during the whiplash cycle following a high energy rear-end shunt.

The Claimant's neurological expert argued that such injuries applied maximal deformation strain from the tortional (stretching/twisting) forces to the long axonal tract deep within the midline structures of (1) the mid brain, (2) the fornix, and (3) the corpus callosum. He referred to these three midline structures as the 'cone of vulnerability'.

Following such a strain on these midline structures a pathophysiological process starts, known as the 'neurometabolic cascade'; this involves ionic shifts brought about by damage to supporting protein structures of the damaged axons. It takes some time, say up to 30 minutes, for this process to reach a tipping point that manifests in the presentation of neurogenic symptoms associated with concussive head injury.

Such symptoms typically involve nausea, vomiting, headaches, blurred vision and scintillating scotoma (flashing stars when closing the eyes). The first four were recorded contemporaneously by A&E clinicians and the fifth reported subsequently in the Claimant's s case over that first 24-hour period.

This delayed onset of symptoms is often seen following sporting concussions; until recent concussion protocols were instituted in sport, it was typical for players to continue playing following a head injury, only to suffer a delayed onset of the effects of their concussive head injury.

The natural process of the neurometabolic cascade is between a few hours and a few days, depending on the severity of the head injury. In most cases where this process is short, certainly less than 24 hours, there is an expectation that the patient will make a full recovery from the effects of the injury.

In ***Palmer***, the neurological experts agreed that there is *"a small proportion of patients who suffer mild traumatic brain injury who have a poor outcome for various reasons and that is a significant concern in the medical profession and that this patient cohort invariably have overlapping injuries outside the field of neurology and that mild Traumatic Brain Injury is the most challenging area of brain injury for the medical profession"* (see paragraph 99 of the judgment).

The Claimant's experts rejected the Second Defendant's psychogenic amnesia explanation of the delayed onset of a failure to lay down clear and continuous memory on the grounds that (1) it is extremely rare, (2) there is no academic literature that documents a delayed onset of psychogenic amnesia following a shocking event; and (3) psychogenic amnesia is not characterised by snapshots of vivid recollection in a sea of amnesia; psychogenic amnesia equates to total amnesia.

The neurometabolic cascade explanation for the delayed onset of denser amnesia following contrecoup head trauma was developed further in evidence in ***Palmer*** in that it was agreed that the 'cone of vulnerability' (the midbrain, fornix and corpus callosum) are the structures of the brain responsible for the consolidation of episodic memory. Damage to those structures would raise an expectation of subjective reporting of memory impairment (as was the case).

The Court also had the benefit of the fact that in 2020, the Claimant's neurological expert co-authored with the world renown US neurologist Dr Erin Bigler an academic paper entitled *"Improved neuropathological identification of TBI through quantitative neuroimaging and neural network analyses"* in the Journal of Neurorehabilitation, which addressed this issue of the delayed presentation of impaired memory following contrecoup trauma, by reason of the operation of the neurometabolic cascade on the 'cone of vulnerability'.

The Court preferred the 'neurometabolic cascade' explanation and found that the Claimant had probably suffered a mTBI. The Court in ***Stansfield v. BBC [2021] EWHC 2638***, acknowledged the concept of the 'neurometabolic cascade' at paragraphs 140 and 151, but did not find it necessary to descend into that level of scientific detail to find that there was a mTBI.

The fact that the Court in ***Palmer*** elected to grapple with the science should help draw some of the heat from this area of jurisprudence. Who knew the law could be so interesting?

Will mTBI cases ever be considered 'exceptional' again?

James Henry

Background

In the case of ***Stansfield v. BBC*** **[2021] EWHC 2638 (QB)**, heard by Mrs Justice Yip, both parties were represented by members of TGC. The Claimant was injured while acting as a 'crash test dummy' during filming for the BBC science programme, 'Bang Goes the Theory'. He took part in two forward-facing and two rear-facing simulated crashes into a metal pole at speeds between 8 and 11mph. It was agreed by the expert engineers that the force of the impact in these 'barrier collisions' was equivalent to a vehicle-to-vehicle collision at up to twice the speed. As Yip J remarked at the outset of her judgement, it was astonishing that anyone thought the exercise was a sensible idea. The parties agreed that the Claimant would accept a reduction of 1/3 of the full value of his claim.

The parties' cases

On the Claimant's case the crash tests caused him chronic neck pain, a mild Traumatic Brain Injury (mTBI), Audiovestibular (AV) injury and neuropsychiatric consequences. The complex interplay of injuries resulted in a cluster of physical, cognitive, vestibular, behavioural and psychological symptoms that compromised his ability to function effectively in his home and recreational lives, and, importantly for the value of the claim, compromised him in the workplace to the extent that he lost the chance to earn significantly more money than he would otherwise have done in the later years of his career (adopting a loss of chance model).

In contrast, the Defendant accepted that the Claimant suffered only a minor whiplash injury and depressive symptoms, but denied that he sustained any mTBI or AV injury. The Defendant did not advance a positive case of dishonesty, or offer an alternative explanation for the injuries (it was expressly not part of the Defendant 's case that the Claimant had any pre-existing condition or vulnerability which meant that he was likely to develop symptoms in any event). Instead, it required the Claimant to prove the causation of his injuries, contending that this was the type of exceptional case referred to by Lord Hope in ***Pickford v. ICI*** **[1998] 1 WLR 1189**, where the burden of proof would be the determining factor. Such cases would *"depend on the assessment of complex and disputed medical evidence, where the court finds itself in difficulty in reaching a decision as to which side of the argument is the more acceptable"*.

mTBI

Notwithstanding the absence of any neuroradiological finding of brain injury and no clear evidence of post-traumatic amnesia (PTA), loss of consciousness or impaired GCS, the Court found that the Claimant had sustained a mTBI. Crucial to that finding was the very detailed contemporaneous evidence. Not only was the court able to analyse the precise moments of the crashes, which had been captured for the documentary on a high-speed digital camera, but the Claimant was filmed at 40 minutes and two hours after the crashes, conducting an interview and delivering a piece to camera. The court found that while the video clips neither established nor ruled out the presence of PTA, the later clips demonstrated clear evidence of the Claimant being dazed and confused. There followed rigorous analysis of the acute phase of the injury by reference to medical records and lay witness evidence (both of the Claimant and those around him). The court found that the Claimant was agitated and confused when he got home, and that he was reporting symptoms including loss of smell, dizziness and loss of balance in the first few days after the crash tests, all of which pointed to the conclusion that he sustained a mTBI.

However, the court went on to conclude that, taken by itself, the mTBI could not explain the Claimant's ongoing impairment. It was, to quote the judge, *"another piece in the jigsaw"*.

AV Injury

The court found that the Claimant suffered from migraine, and sustained subtle damage to his left utricle and semi-circular canal (of the inner ear) as a result of the crash tests, which was the cause of his early complaints of dizziness and balance problems (both evident by the evening of the crash tests). The organic damage to his AV system was objectively verified following detailed neurotological assessment. The Claimant's tinnitus that presented several weeks after the crash tests was also attributable to them.

Again, the court concluded that the relatively modest AV damage could not explain the Claimant's ongoing significant impairment on its own, but was *"another piece in the jigsaw which contributes to the overall symptomology and the Claimant's complex presentation".*

Psychiatric Condition

The court found that the Claimant suffered a significant psychological reaction, characterised by depression and post-traumatic symptoms, later combined with Somatic Symptom Disorder, which were superimposed upon organic injury to the neck, brain and audio-vestibular system.

The Combination of Injuries

The court found that, individually, none of the neck, mTBI and AV injuries were particularly serious, and in respect of each it would reasonably have been anticipated that the Claimant would have made a full functional recovery. However, *"research and clinical practice demonstrates that each of these injuries can be associated with unexpectedly poor outcomes. I find that the Claimant is one of the unfortunate minority of people to suffer disproportionately severe symptoms following relatively minor injury".*

Something for Everyone?

Defendant insurers will doubtless take solace in the fact that Mr Stansfield's case was extremely unusual, having arisen from four successive impacts over a short period, at speeds which, if replicated in vehicle-upon-vehicle collisions, would have equated to impact speeds of between 16 and 22mph. ***Stansfield*** is certainly not authority for the proposition that the importance of reliable findings of PTA is diminished. It will be a rare case where the precise moment of the collision, together with the Claimant's presentation in the hours that follow, is filmed for the experts and court to analyse in detail. However, the case does make clear that a finding of PTA is not a precondition to a finding that a claimant sustained mTBI. The court recognised the importance of standing back and looking at all the evidence holistically when making clinical findings.

In ***Hibberd-Little v. Carlton*** [2018] EWHC 1787 (another leading mTBI case with TGC on both sides of the argument) one of the reasons that the Claimant failed to prove her case was that the court could not reconcile her self-report of symptoms consistent with mTBI with the absence of any corroboration in her clinical records over a 24–month period post-accident. ***Stansfield*** reiterates the importance in mTBI cases of contemporaneous evidence to support causation.

For claimants, the judgment represents an important acknowledgment from the High Court that these cases are very complex and require an assessment of the interplay between the different strands of medicine combining to form the overall picture, which may explain a claimant's seemingly disproportionate impairment. On the facts of this case, the Claimant relied on medicolegal evidence from a neurologist, neuropsychologist, psychiatrist, AV physician and orthopaedic surgeon. Evidence from each of them was required to put together the 'pieces of the jigsaw'.

There will always be cases where the burden of proof is determinative of issues of factual causation (***Hibberd-Little v. Carlton*** is an excellent example). Perhaps a more pressing issue is whether mTBI cases can still fall into the category of 'exceptional' cases referred to by Lord Hope in ***Pickford***, in which the burden of proof is determinative of the issue of medical causation. The findings in ***Stansfield***, that the Claimant's presentation was capable of scientific explanation, suggest that the analysis has moved beyond simply being unable to determine causation on a balance of probabilities, and into the more nuanced realm of determination following detailed consideration of the totality of the evidence, including complex and disputed medical evidence, which makes up the overall picture.

Proper Notice And Late Amendments To Plead Fundamental Dishonesty

James Henry

James Henry reviews the authorities on this subject, including the recent case of *Covey v. Harris* [2021] EWHC 211 (QB), and makes the case for substance over form.

It is in the interests of basic fairness that a claimant should be given adequate warning of, and a proper opportunity to deal with, the possibility of a finding of fundamental dishonesty. When should notice be given of an intention to raise fundamental dishonesty and in what form?

In ***Covey v. Harris***, John Bowers QC (sitting as a Deputy Judge of the High Court) gave permission to the Defendant to a serious personal injury claim (pleaded at £8.8M) to amend his defence to advance a positive pleading of fundamental dishonesty. The hearing took place 11 days before the trial. The judge considered the relevant competing factors and found that it was *"very sensible to plead [fundamental dishonesty] and, indeed, to do so with the level of detail that has been pleaded here"*.

That statement of principle offers a good opportunity to reflect on the need to properly address allegations of dishonesty in pleadings, and the need to focus on substance rather than form:

1. The starting point is that justice ordinarily requires that issues which either party properly wishes to raise should be heard: ***Cobbold v. London Borough of Greenwich*** [1999] EWCA Civ 2074.
2. That approach was endorsed in ***Hussain v. Sarkar*** [2010] EWCA Civ 301 in the context of an application to amend a defence to plead fraud one week before the trial (the case being decided before the introduction of the concept of 'fundamental dishonesty'): *"Justice requires that each party should have a reasonable opportunity to present any case which it may properly wish to advance"* (para. 23).
3. In ***Howlett & Howlett v. Davies (1) Ageas (2)*** [2017] EWCA Civ 1696 the Court of Appeal held that there was no requirement to plead that a claim is fundamentally dishonest in order to have QOCS displaced on that ground, so long as the Claimant had fair notice of the challenge to their honesty, and an opportunity to deal with it: *"The key question in such a case would be whether the Claimant had been given adequate warning of, and a proper opportunity to deal with, the possibility of such a conclusion and the matters leading the judge to it rather than whether the insurer had positively alleged fraud in its defence"* (para. 31).
4. In ***Mustard v. Flower*** [2021] EWHC 846 (QB), the Defendant was not permitted to amend its defence to include a contingent plea that, if the court determined at trial that the Claimant had consciously exaggerated her symptoms, it reserved the right to seek a finding of fundamental dishonesty and apply to have the claim dismissed pursuant to s.57 of the Criminal Justice and Courts Act 2015. Some commentators argued that the decision in ***Mustard*** actually discouraged defendants from laying their cards on the table, and it was said that the decision was inconsistent with the guidance in ***Howlett*** to the effect that the Claimant should have fair notice of the challenge to their honesty. The reality is that it had become commonplace (post-***Howlett***) for defendants to plead the caveat that they 'reserved the right' to allege fundamental dishonesty, in the event that the trial judge found the Claimant to be fundamentally dishonest. In fact, that tautological position rarely clarified the issues.
5. In ***Matthewson v. Crump & Anor*** [2020] EWHC 3167 (QB) although the defence did no more than 'reserve the right to plead' that the claim was 'fraudulently untrue' the issue of fundamental dishonesty was properly before the court and the Claimant had a fair opportunity to deal with it because it was raised in the Defendant's skeleton argument and it was put to the Claimant during the hearing that parts of his evidence were untrue.

6. ***Cojanu v. Essex Partnership University NHS Trust*** **[2022] EWHC 197 (QB)** was a widely publicised decision of Ritchie J, overturning a finding that the Claimant was fundamentally dishonest about the way in which he had sustained his injury (the Claimant had cut his fingers in the process of the attempted murder of his wife) on the basis his dishonesty related to the way in which he sustained the injury, and was not directly relevant to the issues in the civil injury claim. The decision made headlines in the press for obvious reasons, but is noteworthy for present purposes because the judge stated that *"there are 5 steps to be taken by a trial judge when faced with a defence under S.57 before a finding can be made of fundamental dishonesty"*. The first of those was *"(i) the S.57 defence should be pleaded"*. That principle appears to have been distilled from the case law without any direct reference to an authority on the point, and would, on its face, seem contrary to the decision of the Court of Appeal in Howlett. However, 'should' is not expressed in mandatory terms, and Howlett dealt with the need (or not) to plead fundamental dishonesty in relation to CPR 44.16, rather than s.57. Notwithstanding those observations, the decision is likely to cause some confusion and uncertainty.
7. In ***Jenkinson v. Robertson [2022]*** **EWHC 756 (Admin)**, the Claimant successfully appealed against a finding that he had been fundamentally dishonest, in part because the Defendant had not given proper notice to the Claimant (a litigant in person) of the allegations. The defence put the Claimant to proof of his alleged injuries but did not plead a positive case of dishonesty or exaggeration. The Defendant contended he had given proper notice, and relied on correspondence, in which he asserted that the claim was 'exaggerated and unreasonable'. However, the Defendant did not provide particulars of its allegations, even after receiving a request to do so. Choudhury J held that in the circumstances, *"If a defendant wishes to establish that an exaggerated or unreasonable claim is fundamentally dishonest, then the basis on which that dishonesty arises or is alleged to arise ought to be made clear"*. The judge went on to comment (obiter) that routinely flagging up the possibility of a s.57 application in advance of trial and then seeking to rely upon the fruits of a successful cross-examination to support such an application without giving any further notice, would not be fair or procedurally sound.

Recent decisions reflect a judicial trend to allow amendments to plead fundamental dishonesty, so long as it is fairly and squarely put, with proper detail, even if it is late in the day and some time and has passed since a claimant has nailed his colours to the mast. It was noted in ***Covey*** that the defence in ***Brint v. Barking, Havering and Redbridge University Hospitals NHS Trust*** **[2021] EWHC 290 (QB)** was pleaded on the eve of trial. However, the Court will not allow claimants to be ambushed with such serious allegations, particularly in routine correspondence that merely alludes to dishonesty.

Defendants considering seeking findings of fundamental dishonesty (whether pursuant to CPR 44.16 or s.57) would be well advised to concentrate their pleadings on making the Claimant aware of facts that lay the evidential foundation for such findings, with proper notice and in sufficient detail to put the Claimant on notice of the challenge to their honesty, as opposed to simply 'reserving the right' to make submissions about fundamental dishonesty. Wherever possible, if a positive case of dishonesty is to be put to the Claimant, it is best practice to plead that case, but if the focus is on the substance of the issues rather than the form of the pleading from the outset, it is more likely that a late amendment will be permitted to formalise the positive case, even if made very close to the commencement of trial.

Don't Leave It Too Late To Grasp the Nettle

James Laughland

James Laughland considers the judgment of Master McCloud in *MRA v The Education Fellowship Limited ('Rushden Academy')* [2022] EWHC 1069 (QB). How often is a Part 36 offer made that the recipient, usually the Claimant, considers it too difficult to assess? How tempting is it to wait-and-see, in the hope that something better, or something anything, comes along later that will make the decision-making process easier? This case is a salutary lesson in the adverse consequences of not grasping the nettle.

The Claimant's claim was for damages to compensate him for the consequences of sexual abuse that occurred when he was around 14–15. Liability was admitted, but causation and quantum were difficult to determine in part due to his pre-existing autistic spectrum disorder and ADHD, as well as the uncertainties associated with pharmacological treatment and psychological intervention. The Claimant's case was that the abuse caused a Moderate Depressive Episode and PTSD.

At the time of issue, the Schedule contained mainly *"TBCs"* expressed to depend on the prognosis which was stated as *"not yet known"*. The Claim Form's Statement of Value was for a claim not exceeding £100,000 *"on current evidence"*.

Four months after service of the proceedings the Defendant's insurers made a Part 36 offer of £80,000. Coincidentally, the Claimant's psychiatrist produced an addendum report within the initial "relevant period" of the offer indicating that the symptoms of PTSD had worsened and expressed a pessimistic view. There was mention of suicidal thoughts and the statement that *"...prognosis, at this time, is poor. This is based on the fact that his symptoms are deteriorating and he has not been able to access adequate treatment."* The expert also indicated that a specialist in autism and learning disability would be needed to input into the Claimant's care.

Not untypically, the Claimant's solicitors responded to the offer asking for a general extension of the *"relevant period"* on the grounds that the prognosis was *"so uncertain that the value of the claim cannot yet be ascertained"*. Reference was also made to how there would need to be approval of any proposed settlement, and a claim made that such approval would not be forthcoming *"in circumstances where the judge could not reach a conclusion on whether or not the offer was a reasonable one without a prognosis"*. The offer was expressly *"neither accepted nor rejected"*. The Claimant's request for an extension did not get a response.

Here is where things started to go wrong. The costs order in favour of a Defendant where there is late acceptance of a Part 36 offer *"must"* be made *"unless ... it is unjust to do so"*. That is a different test to asking whether the Claimant was reasonable in not accepting the offer at the time the offer was made.

Moreover, just because the prognosis is uncertain this does not mean that the sufficiency, or otherwise, of an offer cannot be evaluated. At the very least an evaluation of quantum can be made on the basis that the then existing condition continues without improvement.

In the event the offer was accepted over 2 years after it had been made, following receipt of a more optimistic but still rather poor prognosis. Then the battle was who should pay the intervening costs. The Claimant prayed in aid the decision in ***SG v Hewitt*** **[2012] EWCA Civ 1053** whilst the Defendant relied on ***Briggs v CEF Holdings*** **[2017] EWCA Civ 2363.**

Reference to ***Hewitt*** is often made by those seeking to justify late acceptance, but the precise facts relevant to that decision are often overlooked. Crucially in that brain injury case, all experts agreed that no diagnosis could be made before the child reached 18, let alone any prognosis given. When the issue had been revisited by the Court of Appeal in ***Briggs***, the Court (per Gross

LJ) observed that *"it is very important not to undermine the salutary purpose of Part 36 offers"* and that *"a heavy burden"* fell on the Claimant to provide injustice. In Briggs the decision was that the uncertain prognosis did not make it unjust to reverse or vary the usual consequences of late acceptance.

Returning to MRA, Master McCloud was persuaded by the Defendant's analysis of the expert evidence available at the time the offer was made, and how it developed subsequently, that diagnosis had been possible, as had been assessment of quantum. Whilst the uncertainties of prognosis meant that there were inevitable variables, the Defendant's offer had been deliberately made at a high level (£80,000, against a claim pleaded at up to £100,000) assuming a poor prognosis and could and should have been appreciated as such. That being so, there were no grounds for concluding it would be unjust not to make the usual order.

Of further interest is the fact that it remained a live issue in the case whether the Defendant could enforce that costs order against the damages recovered upon late acceptance. Where, as here, approval was always going to be required, late acceptance to some degree was always inevitable. One interpretation of ***Cartwright v Venduct Engineering Limited*** **[2018] EWCA Civ 1654** is that the damages recovered by way of a Part 36 payment are immune from costs enforcement, but this was treated as a still debatable proposition.

We shall never know what Master McCloud would have decided as she "parked" the issue and the costs claim has since been compromised, but it may be that that those involved saw which way the wind was blowing. In May 2022 the MOJ issued a consultation on proposed changes to the QOCS regime in personal injury cases. The draft revised rules would make it explicit that costs orders favourable to defendants could be enforced and/or offset against damages, interest and costs, thereby reversing both ***Cartwright*** and the more recent Supreme Court decision in ***Ho v Adelekun*** **[2021] UKSC 43**. As is often the way, proposals mooted in consultation have a likelihood of being implemented.

Don't Leave It Too Late To Grasp The Nettle – Part 2

Another temptation to put off the evil day comes with the awkward subject of costs budgets. How often does a solicitor incur costs more than those budgeted for in a phase, and hope that such will later be condoned as done with good reason? Complacency may also take hold due to the belief that if not recovered from the opponent, the shortfall can be recovered from the client.

Not so, well certainly not so easily so, says Senior Costs Judge Gordon-Saker in ST v ZY (SC-2021-BTP-000929). Costs as between client and solicitor will generally be presumed to have been reasonably incurred, but that is not so if they are *"of an unusual nature or amount"* and *"the solicitor did not tell the client that as a result the costs might not be recovered from the other party"* (CPR 46.9(3)(c)).

Whilst the client in ***ST v ZY*** had been warned of a likely shortfall between incurred and recovered costs, with a reasonably reliable estimation of what that sum might be, there had been a failure by the solicitors to advise the client that there had been a significant overspend in certain phases. The Senior Costs Judge held that such costs *"must be unusual in amount"* when they so considerably exceeded what the costs managing judge had deemed it would be reasonable and proportionate to spend. This is significant, as where there has been a failure to advise the client that as a result of costs being unusual in amount they might not be recovered from the other party, those costs are then *"presumed"* to have been *"unreasonably incurred"*. How long before CheckMyLegalFees.com start asking questions about how much warning a client was given of unrecoverable excess costs?

Don't Leave It Too Late To Grasp The Nettle – Part 3

This is a warning for those who have no nettle they need grasp. Instead, it applies to those who have a rose they should treasure but squander the opportunity.

Imagine the scene: hard fought trial; judgment reserved; draft judgment circulated; date set for hand-down of judgment; one side happy with outcome and wants it costs. The mistake is to think that you can just rock up on the day and ask for costs. Not so says Richard Farnhill, sitting as a Deputy Judge of the Chancery Division, in ***Preston v Beaumont and The Official Receiver*** **[2022] EWHC 440 (Ch)**. He, unlike me, has paid more attention to the wording of paragraph 4.4 of Practice Direction 40E "Reserved Judgments":

> Para 4.4: Where a party wishes to apply for an order consequential on the judgment the application must be made by filing written submissions with the clerk to the judge or Presiding Judge by 12 noon on the working day before handing down.

Note the "must". The successful party was refused the opportunity to ask for costs at the hand-down hearing due to its non-compliance with this mandatory provision and the absence of any evidence for that failure that could support an application for relief from sanctions. Absent the evidence, no consideration could be given to relief, and none was. Just to drive the point home, the judge said *"even had such application been made it would have faced significant obstacles. This was an obvious failure to apply with a clear rule in circumstances where compliance would have been straightforward"*. Ouch.

You're Just Too Good To Be True – Mistake and Part 36 Offers

Richard Wilkinson and James Yapp[1]

Richard Wilkinson and James Yapp analyse the judgment in *Gibbon v Manchester City Council* [2010] 1 WLR 2081, in which the Court of Appeal firmly endorsed the notion that Part 36 embodies a "self-contained code", a concept which was subsequently incorporated explicitly into the wording of CPR 36.1(1).

Giving judgment in that case, Lord Justice Moore-Bick acknowledged that basic concepts of offer and acceptance underpin Part 36, but held:–

"It does not follow, however, that Part 36 should be understood as incorporating all the rules of law governing the formation of contracts, some of which are quite technical in nature. Indeed, it is not desirable that it should do so. Certainty is as much to be commended in procedural as in substantive law, especially perhaps in a procedural code which must be understood and followed by ordinary citizens who wish to conduct their own litigation. In my view Part 36 was drafted with those considerations in mind and is to be read and understood according to its terms without importing other rules derived from the general law, save where that was clearly intended."[2]

So does that mean Part 36 exists in its own hermetically sealed bubble, to the exclusion of ordinary contractual principles, unless the rules themselves state otherwise? That was the issue confronting Master Thornett in the recent case of ***O'Grady v B15 Group Ltd*** **[2022] EWHC 67 (QB)**, concerning the purported acceptance of an inadvertent and erroneous Part 36 offer. In a decision which should come as a relief to fair-minded litigators on both sides of the litigation divide, Master Thornett held he was nonetheless entitled to consider the application of wider common law concepts such as the doctrine of mistake, as well as the Overriding Objective, in determining whether the offeror was bound by the terms of her unintended offer.

The decision is worth studying, both to understand the limitations on the extent to which a party may avoid the consequences of its own errors and for the valuable insight into the tactical issues that may arise when dealing with such applications.

Procedural background

As ever, it is first necessary to understand the factual background to the case. It is as straightforward as it is unfortunate.

The proceedings arose from a fatal road traffic accident in February 2018. The Claimant's husband – a motorcyclist – had collided with a lorry performing a u-turn in a 'no u-turn' area. The claim was brought on behalf of the estate and dependents of the deceased. The Defendant was subsequently convicted of causing death by careless driving at a trial in December 2019.

Following this conviction, but without any admission of liability, in April 2020 the Defendant made a Part 36 offer on the issue of liability 60/40 in favour of the Claimant. That offer was never withdrawn. In February 2021, the Defendant accepted primary liability (subject to an allegation of contributory negligence).

The Claimant issued proceedings shortly thereafter. She then made a Part 36 offer on 23rd February. The literal terms of the offer were as follows:–

"The Claimant offers to resolve the issue of liability of on 80/20 basis. For the avoidance of doubt if the Defendant accepts this offer it will only be required to pay 20& of the Claimant's damages." (sic)[3]

The Defendant's solicitor received the offer at 15.51 on 23rd February. He accepted it at 10.02 the following day. The Claimant's solicitor replied immediately to make it clear that the offer was intended to be an 80/20 offer in the Claimant's favour. With the Defendant standing by its view that the issue of liability had been compromised on a 20/80 basis in its favour, the Claimant applied on 2nd March 2021 for permission to withdraw her offer or change its terms under CPR 36.10(2)(b).

Statements were duly exchanged. It was the Claimant's case that the mistake must have been obvious. She said it was implausible she would make an offer to accept 20% of her claim when there was a 60/40 offer from the Defendant still on the table. In a carefully worded statement in reply, the Defendant's solicitor side-stepped the issue of whether he or his client realised on receipt of the offer that it must have been a mistake.

Proving what the Defendant knew

In order for the Claimant to be able to rely on the common law doctrine of mistake it was essential for her to establish that the Defendant and/or his legal advisers knew, or ought reasonably to have known, that the offer contained a mistake: see O.T. ***Africa Line Ltd v Vickers PLC*** **[1996]** 1 Lloyd's Rep 700. Mance J (as he then was) there held that such knowledge could even be imputed in situations where the recipient fails to make enquiries which would have revealed the mistake. *"But there would have, at least, to be some real reason to suppose the existence of a mistake before it could be incumbent on one party or solicitor in the course of negotiations to question whether another party or solicitor meant what he or she said".*

To avoid the risk of the Defendant wriggling off the hook by persuading the Court that the evidence was unclear, the Claimant applied to cross-examine the Defendant's solicitor on the content of his witness statement. Faced with this no doubt uncomfortable prospect, on the return date for the hearing of that application, the Defendant conceded that the offer was of a kind that would render any agreement void if the court were to accept that the common law doctrine of mistake was relevant when considering Part 36 offers. This crucial concession left the Court needing only to focus on the issue of whether or not such doctrines were relevant in the specific context of Part 36 offers.

The authorities

Despite the plethora of cases considering the effect of "Part 36" offers, there were no reported cases directly on the point. However, having reviewed several authorities concerning Part 36 offers, the Master concluded that whilst Part 36 did not incorporate all the rules governing formation of contracts, it was *"nonetheless compatible with them in the absence either of express exclusion, express inclusion or direct contradiction"* and that to accept the Defendant's invitation to disregard any contractual doctrine not directly expressed within the wording of Part 36 would be inconsistent with those authorities.

The decision

The Master ultimately decided that:

"...the doctrine of common law mistake can apply to a Part 36 offer in circumstances where a clear and obvious mistake has been made and this is appreciated by the Part 36 offeree at the point of acceptance... On the particular facts of this case, it is entirely compatible with a procedural code that is intended to have clear and binding effect but not at the expense of obvious injustice and the Overriding Objective still has application.

...it is difficult to think how the Overriding Objective would support the Defendant's position at all. Plainly, "saving expense" [r.1.1(2)(b)] does not have as its primary aim the substantial reduction of a party's liability for damages owing to the mistake of another "of a kind which in law would render the agreement void." (emphasis added)[4]

Practice Points

1. Anyone can make an honest mistake. This is therefore a decision which is as useful to Defendants / insurers as it is to Claimants. Indeed, as more offers are made by Defendants in personal injury claims, with greater scope for serious errors to creep in, it is probably of even greater significance to Defendants.
2. Not all mistakes are the same and not all mistakes are obvious. What was crucial here was that the mistake was, or should have been, appreciated by the offeree. But suppose the Claimant had made a similar offer *prior* to the Defendant having made its own offer and/or prior to conceding primary liability. Even though an opening offer pitched at 20/80 would have been unusual, the Claimant would likely have had an extremely uphill battle persuading the Court the Defendant should have realised her error. So too if instead of offering 80/20 as intended the Claimant had offered (say) 65/35 in her favour.
3. Is the written evidence regarding mistake sufficiently clear? The burden lies on the offeror to prove that the offeree knew or should have realised the mistake. If the point is not conceded expressly, serious consideration will need to be given to applying to cross examine the offeree. That application in the present case was crucial to the overall outcome of the case.
4. Get the application right. In this case what the Claimant actually sought was a declaration that there was no binding agreement. The Claimant was

unlikely to be able to satisfy the requirements of CPR 36.10(2)(b) so as to be able to withdraw or change the terms of her offer given that it was accepted within the 21 day period for acceptance. The Claimant would have needed to satisfy the Court that there had been a change of circumstance since the making of the original offer.

5. Don't forget the Overriding Objective. Often cited, but in this case critical. Dealing with cases justly is hardly consistent with the Court closing its eyes to obvious errors to the detriment of one party.

6. Would any settlement require Court approval and if so, could the offer be revoked prior to Court approval? See e.g. ***Drinkall v Whitwood*** **[2004] 1 WLR 462.** Here, one of the dependants was a child (a grandchild of the deceased) and although her financial claim was modest, the Master indicated that it was unlikely a court would have been prepared to approve an agreement based on an apparent mistake and which did not appear to reflect the underlying merits of the claim.

7. Portal cases may give rise to different considerations which may still produce different outcomes. Master Thornett was referred to, but found no assistance from, various County Court cases in which judges had grappled with the issue of mistakes made within the context of low value Portal claims.[5] It is clear that Judges in those cases, in deciding that the doctrine of mistake did not apply, had been heavily influenced by the fact that Portal claims are lower value claims in which the costs associated with any such satellite litigation are best avoided. But as ever more claims, of ever increasing value fall within the scope of fixed cost regimes, these cases (and the relevance of the Overriding Objective) may merit closer inspection.

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1. Richard was instructed on behalf of the Claimant to deal with the "Part 36" applications on behalf of the Claimant. James is instructed on the Claimant's behalf in the underlying proceedings.

2. Paragraph 6

3. It was not suggested the typographical errors in the Claimant's offer letter – including "20&" instead of "20%" were of any real significance.

4. See judgment para 25.

5. In particular ***Draper v Newport*** (decision in 2014 of District Judge Baker in Birkenhead CC); ***Fitton v Ageas*** (decision of HHJ Parker in Liverpool CC on 8/11/18) and Harris v Browne (decision of HHJ Davey QC in Bradford CC on 18/6/19). In the latter case, the Defendant was aware that the Portal offer had been made in error before acceptance. HHJ Davey QC held on appeal that the overriding objective 'saved' the claimant in the particular circumstances of that case. The defendant applied for permission to bring a second appeal. McCombe LJ refused permission on the papers, commenting *"I reach this conclusion with no regret whatsoever, so avoiding what would obviously be a monstrous injustice"*.

Causation and Contribution in a Multiple-Vehicle Collision

Michael Rapp

Michael Rapp unpacks the court's decision in *(1) Martini (2) Zeqo v (1) RSA (2) AXA (3) Southern Rock* [2022] EWHC 33 (QB), in which he acted as Counsel for Ms Zeqo.

On 15 October 2015, a Mr. Wylecial (insured by RSA), fell asleep at the wheel of his Fiat van southbound in lane 1 of the M20 motorway. His Fiat van then remained stranded and unlit in the middle lane of the dark carriageway. Shortly afterwards, a Scania HGV travelling in lane 1 approached the scene. It travelled all the way across into lane 3 to avoid a collision, slowing down as it went. Mr. Martini and Ms Zeqo were in a black Audi TT (insured by Southern Rock) , proceeding in lane 3 behind the Scania, and driving at around 65–70 mph. When the Scania entered his lane, Mr. Martini braked and swerved left, to try to avoid hitting it. However, as a result of swerving left, he collided with the Fiat in lane 2, which he had not seen, and his car then ricocheted across to hit the rear of the Scania in lane 3. Mr. Martini's Audi came to a stop in the carriageway a short distance ahead of the Fiat van. He and his passenger got out and made it on foot to the grass verge beyond the hard shoulder. Finally, a Vauxhall Vivaro (insured by AXA) driven by Mr Jason Mason approached the scene. It crashed into the Fiat van in lane 2, and then spun across the highway, striking Mr. Martini and Ms Zeqo where they were standing on the grass verge.

The Claims

Claims were brought for personal injury against RSA, by Mr. Martini, Ms Zeqo and Mr Mason. Days before trial Mr Mason settled his personal injury claim and therefore only his insurer, Southern Rock, was represented at trial.

The Issues

The trial is particularly worthy of note as RSA admitted that their driver had been negligent and secondly Mr Wyliecal had been found guilty by a jury in the criminal courts for dangerous driving causing the collision. However, despite these factors RSA sought to argue that:

1. Despite his negligence their insured's driving was not an operative legal cause of any of the subsequent collisions, nor of the resulting damage and injuries sustained by the Claimants. In other words both Mr Martini and Mr Mason's actions represented *novus actus interveniens.*
2. Alternatively, Mr. Wylecial's negligence was not the sole legal cause of the subsequent collisions and the resulting damage and injuries; in other words, both other drivers should contribute to the Claimant's damages.

As a result of RSA's stance, the issue of previous conviction, agony of the moment and contribution were all explored in some detail.

Novus Actus

RSA alleged that both Mr. Martini in the Audi and Mr Mason's actions in the Fiat broke the chain of causation such that Mr. Wylecial's negligence was no longer actively relevant. With regard to Mr Martin it was argued that

i. He did not keep a proper lookout, and he failed to exercise reasonable care by slowing down in lane 3 to avoid the Scania lorry that was moving in front of him, despite having sufficient time and space in which to do so

ii. No injuries were suffered by any of the Claimants until the subsequent collision by Mr. Mason's Vauxhall van with the Fiat;

With regard to Mr Mason they argued that:

a. He negligently failed to slow down before the collision with the stricken Fiat even though he had warnings of there being hazards ahead by reason of various vehicle hazard warning lights flashing (on the Audi, Mercedes, Scania, and Fiat).
b. If Mr. Mason had exercised reasonable care, he would have avoided the collision with the Fiat, and there would have been no consequent injuries suffered by Mr. Martini and Ms Zeqo from their position standing on the grass verge.

The other parties argued at trial that since RSA had put forward no material new evidence in support of that case beyond what had been available to the jury at the criminal trial the point was an attack on the outcome of the criminal trial. Reliance was placed on s.11(2) of the Civil Evidence Act 1968, which states:

"In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in the United Kingdom … (a) he shall be taken to have committed that offence unless the contrary is proved"

RSA sought to argue that the jury at the criminal trial had not had the benefit of all the evidence on the issue of causation (including that of four separate experts) which was to be led at the civil trial, and that it was open to them to prove that the chain of causation had been broken.

Comment

The court accepted this line of argument and permitted RSA to run the point. This is a useful finding in that it establishes that:

1. The burden of proof remains with the party alleging it to establish novus actus;
2. The court will recognise the disparity between a civil court and a criminal court if a differing approach has been taken. This is noticeable as 2 collision investigators had been called at the criminal trial and RSA's accident recon expert was in fact the same at both trials.

However, the judge did not in fact need to consider this issue as on the facts of this case (as in reality in most others where a criminal conviction has been established) RSA abandoned the *novus actus* argument by the time of the closing submissions and accepted that Mr. Wylecial's negligence caused, in part, all the relevant collisions and the resulting injuries.

Contribution

Alongside the *novus actus* argument RSA sought to argue that all 3 drivers were all negligent to the same or a similar degree, and that all should bear an equal share of the blame for the resultant impacts and damage. The judge flagged comments of Master Davison in ***Stark v. Lyddon*** **[2019] EWHC 2076 (QB)** that apportionment was *"an exercise which is exquisitely fact-sensitive and previous decisions are of limited assistance."*

Agony of the Moment

Both co-Defendants relied heavily on the principle of the agony of the moment given that they were confronted with abandoned vehicles on the highway. A number of sources of authority for the *"agony of the moment"* principle were cited. HHJ Turner flagged 2 being:

i. Clerk & Lindsell on Torts (23rd edition, 2021, consolidated with text from the Supplement), at para 7–165:

"Acting in an emergency: Where the defendant's conduct has occurred in the course of responding to an emergency this will be regarded as relevant to the objective standard of care required. All that is necessary in such a circumstance is that the conduct should not have been unreasonable, taking the exigencies of the particular situation into account."

ii. The second was the decision of HHJ Saffman sitting as a Judge of the High Court in YYY, ***Aviva Insurance Ltd. V. ZZZ*** **[2021] EWHC 632 (QB)**, at [56], in which the Court had to consider the actions of a party who had to exercise judgment in the agony of the moment:

"… it is clear that the conduct of the defendant cannot be judged with the benefit of hindsight or, in my view, having regard to nice calculations done by experts with the benefit of computer models and calculators. What matters is whether, having identified a potential hazard, the claimant has established that the steps taken by the defendant to mitigate it were not reasonable steps or a reasonable response even in the agony of the moment."

Common Sense

The second principle relied upon by both co-Defendants was that assessing what was a relevant cause for the purposes of attributing tortious liability was an exercise that required the application of common sense. In Wright v. Lodge [1993] RTR 123 (CA), Staughton LJ stated as follows at p.132:

> *"...Causation depends on common sense and not on theoretical analysis by a philosopher or metaphysician ... Not every cause 'without which not' or 'but for' is regarded as a relevant cause in law. The judge or jury must choose, by the application of common sense, the cause (or causes) to be regarded as relevant."*

Contribution from Mr Martini

As a result of the expert accident reconstruction evidence it became clear that RSA's allegations against Mr Martini turned on matters of seconds. In this context, moreover, Mr. Martini reacted to the unexpected movement of the Scania in front of him by taking an "agony of the moment" decision to steer from lane 3 into lane 2 as well as braking. The court found that it was not appropriate:

> *"to engage in a fine-grained mathematical calculus, on the basis of imperfect information, doubtful assumptions, and with the benefit of hindsight, in order to assess the liability in negligence of the motorist in the present context."*

Comment

On this basis Mr Martini was absolved of any liability. This is a useful reminder that despite no less than 4 accident recon experts and detailed cross examination of each moment of the chain of events the court should not allow itself to be sucked into calculating what were always very fine margins and applying hindsight. (Although it would be fair to say that during the course of the trial itself the judge did seem highly interested in these points!)

Contribution from Mr Mason

Mr. Mason did not give oral evidence at the trial. He filed a brief witness statement, the contents of which were agreed. It was suggested that the final collision involving Mr. Mason's Vauxhall occurred roughly 6 minutes after the first collision. It was established that as Mr. Mason approached the scene in the Vauxhall Vivaro, there would have been certain lights flashing on vehicles that had already been involved in the first to third collisions. It was suggested by RSA that:

i. Mr Mason had a very early view of the potential hazard ahead of him and more than enough time to take steps to appreciate fully what was happening ahead and respond.

ii. There was sufficient time and distance for Mr Mason to have taken steps which would have avoided a collision including:

a. using his main beam for a moment to identify what was ahead of him;
b. slowing down;
c. moving into lane 2 and then into lane 3; or
d. remaining in lane 1, at a lower speed if necessary.

iii. There was sufficient room in lane 1 to have enabled Mr Mason to pass through the locus without a collision (as at least one large lorry had managed to do). That was particularly so had he been travelling at a lower speed (which should have been the case).

The judge rejected all of these contentions; in particular he rejected the idea that Mr. Mason could have switched on his main beams, in order to survey the road ahead, particularly as if there were oncoming vehicles at the time, then he may not have been in a position to illuminate his main beams.

Equally, there were no good grounds for finding that Mr. Mason ought reasonably to have moved from lane 1 into lane 2 and although it was theoretically possible for a vehicle to have navigated along lane 1 through the obstacles presented, Mr. Mason's decision to move into lane 2 when he did so – most likely in order to give a wide berth to perceived objects in the hard shoulder or lane 1 – could not be classified as negligent.

Comment

Again the court's views are useful in highlighting how hindsight and the benefit of accident reconstruction should not be used to override both the agony of the moment and common sense. What Mr Mason might have been able to theoretically have achieved was not the test.

Don't Make a Bad Situation Worse!

James Laughland

James Laughland examines the decision in *Deller v King and McGarvey* [2021] EWHC 3396 (QB), in which the High Court made a finding of negligence against a driver whose vehicle experienced a sudden and serious malfunction.

It's every parent's worst nightmare. Causing a road traffic accident that results in significant injury to their child. It's every driver's worst nightmare. Causing a road traffic accident that results in significant injury to a child. In this case, both nightmares came true.

Hugh Mercer QC, sitting as a Deputy Judge of the High Court, had to unpick the events that led to a collision between the two vehicles driven by the Defendants. In this task he was assisted by a total of four experts who gave evidence on issues concerning both accident reconstruction and the performance, alternatively failures, of vehicle tyres.

It could be said that the criticisms made of each driver amounted to a counsel of perfection, as neither initiated the unfortunate chain of events through any negligence and each had to react to an unexpected and unwelcome situation on a fast-moving motorway. Neither wanted to make a bad situation worse, but in the event the judge held that each had done so.

The Claimant, aged only 4 at the time, was the rear passenger in a car driven by his mother, Ms King. Mr McGarvey was the driver of the other car with which she eventually collided. The judge found Ms King to be an experienced and careful driver. Whilst moving from lane 2 towards lane 1 of the motorway Ms King's car suddenly started vibrating and a warning light, the ABS light, lit up on the dashboard. Understandably, she decided she needed to pull over to the hard shoulder to check what was wrong. Here is when she began to make a bad situation worse.

Had she made a sharp turn into the hard shoulder or was it a gradual left turn? Interestingly, it was the evidence of her husband, the front seat passenger, that underpinned the judge's conclusion and the finding of negligence against her. He recalled seeing her right hand go up to the 12 o'clock position on the steering wheel, something that would lead to a 60˚ turn. He said this was "too sharp for me".

What had necessitated the move into the hard shoulder was the sudden vibration and warning light. That vibration, the judge found, was a consequence of a puncture of the rear offside tyre and a circumferential split in the tyre's sidewalls as they separated from the tread. So, an emergency situation necessitating prompt and decisive action. But did the Claimant's mother misjudge her reaction?

Once she began to steer towards the hard shoulder, thereby necessarily deviating from a straight-line path, she was at risk of the consequences of oversteer and the greater the degree of turn the greater the risk. Oversteer occurs because of the impact of a punctured rear offside tyre on vehicle handling when effecting a turn to the left (turns to the right are not affected). The risk is that a distinct steering input to the left may give rise to a greater turn than intended due to the effects of the rear offside puncture, in particular if accompanied by a braking input. As the judge noted, whilst it might be preferable if more drivers knew of the risks of oversteer with a rear tyre puncture, Ms King's ignorance of this was not itself negligent.

Once on the hard shoulder Ms King's Audi began fishtailing. This is something very difficult to control after it starts. The usual course is that the swings to left and right become sharper and sharper until the vehicle goes into a spin. Only a professionally trained– or lucky – driver can be expected to regain control. Unfortunately for her and the Claimant, Ms King was not lucky and lost control of her car from the moment it began to fishtail. The car eventually ended up straddling lanes 2 and 3, facing the central reservation. The inevitable then happened with Mr McGarvey's car that had been in lane 2.

Mr McGarvey had seen Ms King's Audi begin to wobble, as if driving on an uneven surface. He saw that the offside rear tyre was deflated and recognised the wobbling as likely related to that puncture; an event he had himself experienced to his own car on the motorway some years before. Having been driving between 60–70mph when he first saw what was happening to the Audi, he then reduced his speed to about 50mph.

He could see that the Audi, once in the hard shoulder, was out of control with its rear swinging to the left and right. He felt that all that needed to happen was for the Audi's driver to regain control by slowing down gradually, which would then allow him to pass by without incident. In his own experience of a motorway puncture, he had not lost control and thought the same would occur. However, he accepted in cross-examination, perhaps because of an astute question, that things don't always go according to plan.

The judge found that there would have been a point, a point he determined by reference to the expert evidence, at least 4.5 seconds prior to eventual impact when it would have become apparent to an observer that the Audi was going to leave the hard shoulder.

Turning to consider where there had been negligence by either driver that led to the final collision, the judge started with consideration of Ms King's driving. Turning the wheel at 60˚ whilst driving at about 40–50mph, moments after experiencing a serious malfunction (serious vibration and the sensation of driving on a rough road surface) gave rise to a risk of harm and the possibility of danger. If nothing else, the angle of the wheels would soon need to be altered to avoid crossing the hard shoulder and ending up on the verge. Whilst sympathetic to these unusual and unforeseen circumstances, the judge nonetheless held it was incumbent on Ms King to exercising caution in executing any manoeuvre. Whilst keen to reach the hard shoulder, doing so by means of a sharp turn was not justified. This set in train the unfortunate sequence of events.

Was Mr McGarvey also at fault? Yes. His belief that the Audi was in a safe place (the hard shoulder) where it would be able to stop safely was influenced by his own prior experience of dealing with a similar crisis. However, the Audi was out of control, he could see it was out of control and thus there remained a significant risk it would re-enter the carriageway and there could be no expectation that it would then remain in lane 1. He ought to have braked to a stop, not assumed he could continue forwards and pass the Audi. There was, it turned out, sufficient time for him to do so safely without colliding with the Audi.

Having found both drivers at fault, the judge then held that Ms King's actions had had the greater causative potency, but that Mr McGarvey had the greater share of blameworthiness. The judge apportioned 60% of the liability to Mr McGarvey, with 40% to Ms King.

Reviewing the Authorities on Apportioning Liability between Cars and Pedestrians

Emma-Jane Hobbs

Emma-Jane Hobbs examines the decision in *Parker (a child by her litigation friend) v McClaren* [2021] EWHC 2828 (QB), in which the High Court reviewed the appellate authorities dealing with the apportionment of liability in cases involving accidents between cars and pedestrians.

At first blush, it might seem somewhat surprising for a driver to be deemed negligent based solely on their speed, when that speed was 20mph (at the point of impact) and they were driving in a 30mph zone. That is what happened in this case. However, closer examination reveals the reasoning; and the Defendant driver accepted in cross-examination that it would not have been safe to travel at more than 15mph in the particular circumstances. What were those circumstances?

At about 11.20pm on a Saturday in May 2017, there was a road traffic accident in the centre of York. The Defendant, a licensed private hire driver, was driving a Skoda Octavia car to a destination in the city centre. The Claimant, then aged 23, was on a night out with friends. The accident occurred when the Claimant attempted to cross the road along which the Defendant's car was travelling. The car hit the Claimant, resulting in her being thrown to the ground and striking her head. She sustained catastrophic injuries, including a traumatic brain injury.

The Claimant, acting by her father as Litigation Friend, brought a claim against the Defendant. The essence of her allegations of negligence was that he was travelling too fast in the circumstances and that he failed to keep an adequate lookout.

The Defendant alleged that the accident was caused or contributed to by the negligence of the Claimant. The essence of the Defendant's case was that the Claimant failed to notice the Defendant's approaching car and entered the road when it was unsafe to do so.

The matter was listed for a four-day trial on liability only. Permission was given to the parties to rely upon expert accident reconstruction evidence. Both parties' experts attended trial and gave evidence orally. The only witness of fact relied upon by either party was the Defendant himself. The Claimant was not able to give an account of the accident because of the serious nature of her injuries.

The Law

The judge adopted the observations of Mr Richard Hermer QC, (sitting as a Deputy High Court Judge), in ***Barrow & Others v Merrett & Another*** **[2021] EWHC 792 (QB)**, as to the task of the Court in a case such as this:

"There are many claims arising out of accidents, be they on the road, in the home or in the workplace, in which it is simply not possible to conclude with absolute precision what occurred. The law does not require the Court to do so. The task for the Court is not to reach a conclusion based on 'certainty' as to what occurred but rather to come to a reasoned view as to the most probable explanation. In many accidents there will be a range of confounding factors which render the task of precise reconstruction of events impossible.....

A Court attempts to reconstruct the most probable answers to the core questions by applying established forensic tools to such evidence as is available. It looks at the evidence in its totality, it seeks to understand the relevant layout of the scene, identify any objective facts that might act as lodestars by which more subjective opinion and recollection can be tested, scrutinises carefully the account of witnesses of fact and experts, both in the witness box and in earlier written statements – and it applies to all of this a fair dose of common sense."

The judge referred also to the observations of ***Coulson J in Stewart v Glaze*** **[2009] EWHC 704 (QB)**, in particular what he said at [10] of his judgment, that it is *"the primary factual evidence which is of the greatest importance in a case of this kind"* and that it is important not to elevate the expert evidence into a framework against which the defendant's actions are to be judged with mathematical precision.

Findings of Fact

The judge (Matthew Gullick QC sitting as a Deputy High Court Judge) made the following findings of fact:

1. The Defendant was travelling at a speed of 20mph at the point of impact, and slightly more than that before impact (the speed limit was 30mph).
2. The Claimant ran into the road from a standing start on the edge of the kerb at the southern side of the road (i.e., from the right-hand side of the Defendant's approaching vehicle). The judge emphasised that was *"not in and of itself a finding of any fault on the part of the Claimant"*.
3. The Claimant was in the carriageway, after leaving the southern kerb, for a period of approximately three seconds prior to the collision occurring.
4. The Defendant was keeping a lookout for pedestrians who might, (as he put it), jump out in front of his car. However, he did not see the Claimant leave the southern pavement.
5. The Claimant would not have presented herself as a potential hazard until she had travelled about half a metre or so from the edge of the kerb into the carriageway.
6. The Defendant saw the Claimant in the road just prior to the collision occurring and depressed his brake pedal prior to impact to try and avoid hitting her.
7. There was a distance over which the Defendant did not see the Claimant after she had left the southern kerb, and after her motion had become recognisable as a potential hazard. To travel that distance at running speed would have taken the Claimant approximately between one to two seconds.

Liability

Liability was established based on the speed at which the Defendant was travelling before the accident occurred. The Defendant's car was travelling at a speed of 20 mph at impact. In the circumstances, which included the location of the accident, the large numbers of people around, and the history, known to the Defendant, of pedestrians jumping out into the road, a safe speed was no more than 15 mph. Had the Defendant been travelling at no more than 15 mph, the accident would not have happened.

However, the Defendant's failure to have seen the Claimant attempting to cross the road until just before the moment of impact did not fall below the standard to be expected of a reasonable driver in these circumstances.

Contributory Negligence

The Claimant made a serious error in attempting to run across the road without looking first. If she had looked, and waited for the Defendant's car to pass, the accident would not have occurred.

In view of the causative potency and blameworthiness of the parties, the judge held that liability for the accident should be apportioned equally between them. Accordingly, there was judgment for the Claimant for damages to be assessed, subject to a deduction of 50% for contributory negligence.

Comment

This case illustrates some of the evidential difficulties which revolve around the reconstruction of fast moving and traumatic events which last no more than a few seconds from beginning to end. The court is faced with a particular difficulty in making findings of fact when the severity of a claimant's injuries makes it impossible for them to give evidence about the circumstances of the accident.

The judgment contains a useful review of appellate authorities dealing with the apportionment of liability in cases involving accidents between cars and pedestrians, which is likely to be of assistance to personal injury practitioners dealing with such cases.

A Surprising Finding of Contributory Negligence?

Elizabeth Gallagher

Elizabeth Gallagher examines the judgment in *Gul v (1) McDonagh and (2) Motor Insurers' Bureau* [2021] EWCA Civ 1503, in which the Court of Appeal upheld the trial judge's decision to reduce a 13-year-old pedestrian's damages by 10% for contributory negligence.

The Claimant was crossing a residential street when he was struck by a Ford Focus being driven by the First Defendant, who was uninsured and travelling at 40 mph. The Claimant unfortunately sustained very serious injuries and the First Defendant was subsequently charged with, and pleaded guilty to, a count of causing serious injury by dangerous driving.

The MIB (the Second Defendant) admitted primary liability and judgment was entered against the First Defendant for damages to be assessed. The question of contributory negligence was tried as a preliminary issue before His Honour Judge Gargan sitting as a Judge of the High Court.

There was no live evidence called before the judge. There were a number of factual witnesses but none of them saw the accident itself, and they were not required to attend for cross-examination. There were accident reconstruction experts instructed by the Claimant and the MIB, but they had prepared a joint statement in which they concluded there were no significant areas of disagreement between them, and they were not required either.

The judge made a number of findings of fact, which were not challenged on appeal:

1. Although the speed limit was 20mph, the reasonably safe speed to drive along the street would have been 15mph.
2. The First Defendant was travelling at 40mph at the point of impact, but his approach speed was 45mph. This meant that the Focus must have been about 42 metres from the Claimant when he started crossing.
3. On balance (although there was no direct evidence), the Claimant would have looked to his right to check for traffic before setting off. At that point, he would have had a clear view of the Focus.
4. The headphones found at the scene belonged to the Claimant and it was likely that he was wearing them at the time of the collision.
5. The Claimant would only have needed to travel another 30cm to have successfully cleared the path of the Focus, If he had increased his speed whilst crossing he would, on the balance of probability, have avoided the impact.

The judge found that there had been fault on the part of the Claimant. He accepted that many children cannot judge how fast vehicles are going or how far away they are. However, he found that it was likely that the Claimant would have experience of crossing roads on his own, even road where traffic might be going at 40mph. Whilst it would be wholly wrong to expect that Claimant to have been able to estimate the precise speed of the Focus, a reasonable 13 year old, making a careful assessment, would have realised that the Focus was being driven much faster than usual. The judge further concluded that, although the Claimant did not have far to go, a reasonable 13 year old would have considered that the Focus represented a source of potential danger and would have waited for it to pass. Further, even if a reasonable 13 year old had set off, they would have kept the Focus under observation so that, if necessary, they could hurry across. The judge concluded that the Claimant should have waited for the Focus to pass. If he elected to cross, he should have kept his eye on the vehicle as he did so.

The judge found that the Claimant's conduct was causative – and this was not challenged on appeal. He then considered what, if any, reduction should be made.

The judge observed that it is generally expected that the court will impose a high burden on drivers of cars to reflect the fact that a car is potentially a dangerous weapon. He noted that the First Defendant's conduct was particularly egregious: excessive speed, obvious

risk of injury and desire to avoid arrest after the accident. Insofar as the Claimant could see the Focus, so too the First Defendant could see the Claimant; he could and should have slowed down. It would not have taken much adjustment to allow the Claimant to complete the final 30cm across the road. The causative potency of these factors was extremely high and must weigh heavily against the First Defendant. However, the judge held that, whilst deeply sympathetic to the Claimant, his culpable misjudgement could not be wholly ignored. When balanced against the First Defendant conduct, the just and equitable reduction in all the circumstances was 10%.

The Claimant appealed on three bases: (1) The judge's reasoning that the Claimant ought to have appreciated the speed of the Focus was flawed because he equated the Claimant's perception with that of a number of witnesses who saw and heard the car in very different circumstances. (2) The judge was wrong to conclude that the Claimant was partly responsible for the damage he sustained, having regard to the questions of blameworthy conduct and causative potency. (3) The judge was wrong to find, in the event that the Claimant bore any such responsibility, that it was just and equitable to make a reduction of 10% from the Appellant's claim.

The first ground of appeal was rejected by the Court of Appeal on the basis that it was clear from the judgment and the judge's comments in relation to the oral application for permission to appeal that he had not done this.

In relation to the second ground of appeal, the Court of Appeal reiterated that the correct approach under the Law Reform (Contributory Negligence) Act 1945 ('the Act') is to consider: (i) Was the claimant at fault? (ii) If so, did the claimant suffer damage (partly) as a result of his fault? Or in other words, was the claimant's fault a cause of his damage? (iii) If so, to what extent is it just and equitable to reduce his damages? The first two questions are hard-edged or yes-no questions. The third is a question of degree. In this case, the judge had found that the Claimant had failed to take reasonable care as he should have done for his own safety and that if the Claimant had done either of the things he should reasonably have done (waited before crossing or kept a lookout as he was crossing) the accident would have been avoided. That answered the first two questions. The Court of Appeal reiterated that the third question has two aspects: causative potency and blameworthiness. The Claimant's submissions focused on the latter. The Court of Appeal concluded that there was no basis on which to disturb the trial judge's conclusion that the Claimant had failed to take reasonable care for his own safety and the judge was entitled to conclude that the Claimant's misjudgement was culpable, which means the same thing as blameworthy.

In relation to the third ground of appeal, the Claimant's main point was that, even if the Claimant did fail to take reasonable care, his failures were totally eclipsed by the First Defendant's conduct. The question was whether it is open to a Court that has found a claimant to have suffered damage partly as a result of his own fault to make no reduction to his damages. However, no findings were made on this point. The Court of Appeal reiterated that the circumstances in which an appellate court can overturn a trial judge's decision under the Act are limited. Only a difference of view which exceeds the ambit of reasonable disagreement warrants a conclusion that the court below has gone wrong. The Court of Appeal concluded that the trial judge's decision did not exceed the ambit of reasonable disagreement and was not outside the range of reasonable determinations. It was noted that, although 10% was an unusually low reduction, there was no basis for saying that it was not open to the judge to adopt it. (This was in response to the Claimant's submission that the reduction was so modest that it called into question whether any reduction should have been made at all). It was noted that the Court has an "open-ended discretion" under the Act.

From a lay-person's perspective, the reduction for contributory negligence in this case is probably surprising, given the first Defendant's criminal conduct, as well as the age of the Claimant and his status as a pedestrian. However, the Court of Appeal judgment is a useful reminder for lawyers that: (1) the court has an open-ended discretion in relation to contributory negligence and (2) an appellate court will only disturb a trial judge's decision under the Act if the apportionment is outside the range of reasonable determinations. Alas, the interesting question of whether a judge, having found a claimant's damage to be partly the result of his own fault, could properly consider it just and equitable to make no reduction, remains unanswered.

Should There Be a Reduction for Contributory Negligence in Circumstances Where the Child Claimant Was Crossing the Road under the Supervision of Adults?

Lionel Stride with assistance from Philip Matthews

Lionel Stride examines *Alabady v Akram* [2021] EWHC 2467 (QB), in which the High Court rejected an argument that a 9-year-old girl was guilty of contributory negligence. Whilst *Alabady*, like all such cases, was decided on its own facts, the judgment contains a useful precis of the core principles surrounding contributory fault, particularly as they relate to minors.

The Claimant, a 9-year-old girl, was crossing a main road at a light-controlled crossing with her mother and 3 cousins. At the material time, the lights were indicating that pedestrians should not cross (i.e., there was a red man signal). As the group crossed, the Claimant strayed ahead of her family and was struck by the Defendant's vehicle (which had been travelling at 43mph in a 30mph zone). The Claimant suffered serious injuries as a consequence of the collision.

The Defendant admitted primary liability, but submitted that the Claimant, who was of an age to have road awareness, should bear responsibility for crossing at a red man signal and for her deliberate decision to move ahead from the family group.

The Law on Contributory Negligence & Minors

The standard of care to be expected of a minor Claimant is to be measured by what is reasonably to be expected of a child of the same age, intelligence and experience (***Ellis v Kelly*** [2018] 4 WLR 124). In ***Davies v Swan Motor Company Limited*** [1949] 2 KB 291, Lord Denning explained that there are two questions to be considered when analysing contributory negligence: (i) what was the 'causative potency' of the claimant's alleged contributory negligence; and (ii) how the damages should be apportioned having regard to the respective blameworthiness/responsibilities of those at fault. The issue was further considered in ***Gough v Thorne*** [1966] 1 WLR 1387, in which it was held that if a child is of such a young age that he/she cannot be expected to take precautions for his/her own safety a finding of contributory negligence is precluded.

Judgment

In this case, it was re-emphasised that the court had to *"gauge fault by reference to what could reasonably be expected of a child with the age and characteristics of the Claimant in the circumstances she found herself, bearing in mind that her road sense and experience were not what could be expected of an older person"* [paragraph 34]. HHJ Bird (sitting as a Judge of the High Court) found that, at its heart, the Defendant's submission assumed that the Claimant should be treated as though she had been on her own on the crossing. However, she was with a group under the general supervision of her mother and with her adult cousin. A child of her age would naturally work on the basis that it was safe to follow the lead both of her adult cousin and her mother. She would have confidence in them and work on the basis that they would take steps to keep her safe. It was therefore wholly unrealistic to say that a girl of a little over nine should have caused the group to stop and wait before crossing or should have stopped herself to check the road was safe. Similarly, she was not at fault by crossing the road when the red man signal was against her (with her family). When on the crossing, the Claimant's momentary lapse of concentration which caused her to move ahead of the group did not amount to fault (or, if it did, any reduction in damages would be *de minimis*). On this basis, the judge made no finding of contributory negligence against the Claimant.

Conclusion

The decision serves as a practical reminder of the principles that apply in determining whether a minor is guilty of contributory fault. Generally, English law takes a child friendly approach to the issue, and PI practitioners ought to bear this in mind when approaching similar RTA cases, particularly in cases where the child has followed the lead of other adults.

Mr Toby Oliver Chan v (1) Ms Paula Peters (2) Advantage Insurance Company Limited [2021] EWHC 2004 (QB)

James Arney Q.C.

In *Chan v Peters*, the High Court provided a helpful exposition of the law relating to contributory negligence.

The Claimant was 17 years old when he crossed the road outside his school. As a result of the accident he sustained a traumatic brain injury, a fractured skull, left traumatic optic neuropathy, muscle damage to his left knee, and lacerations to the face, left elbow, and right and left knee.

The Claimant's case was as follows:

- The Defendant's level of observation was the "central limb" of her failings.
- She had not taken notice of her surroundings in the manner that was expected of a reasonably competent driver, including students outside the school, and stationary and parked vehicles.
- The Claimant was there to be seen, being stood on the kerb ready to cross the road.
- The Defendant should have lifted her foot off the accelerator, covered the brake pedal and been prepared and ready to stop and sound her horn.
- The Defendant should have stopped in time and avoided the collision entirely.

On behalf of the Claimant, it was conceded that there was some contributory negligence, of up to 40%.

The Defendant's case was that a reasonably competent driver could not have been expected to see the Claimant until the very moment that he emerged into the road. The Claimant had leapt in front of her car, and to say that the Defendant should have already slowed down and have been covering the brake was a counsel of perfection.

Cavanagh J set out the law relating to contributory negligence, drawing on the case of ***AB v Main*** [2015] EWHC 3183 (QB). It serves as a helpful aide to practitioners as to the fundamental principles governing such cases:

- The standard of care is that of the reasonably careful driver, armed with common sense and experience of the way pedestrians, particularly children, are likely to behave: ***Moore v Pointer*** [1975] RTR.
- If real risk of a danger emerging would have been reasonably apparent to such a driver, then reasonable precautions must be taken; if the danger was no more than a mere possibility, which would not have occurred to such a driver, then there is no obligation to take extraordinary precautions: ***Foskett v Mistry*** [1984] 1 RTR 1.
- The Defendant is not to be judged with the benefit of 20/20 hindsight ***Stewart v Glaze*** [2009] EWHC 704, but must have borne in mind that they are in charge of a potentially dangerous weapon: ***Lunt v Khelifa*** [2002] EWCA Civ 801.
- It is dangerous to make precise findings where there are inherent uncertainties about the facts, and trial judges should exercise caution in relation to accident reconstruction experts: ***Lambert v Clayton*** [2009] EWCA Civ 237.
- Drivers' standards should not be judged in a vacuum, without reference to the actual circumstances of the actual collision against which the standard is to be judged: ***Sam v Atkins*** [2005] EWCA Civ 1452.
- The Defendant's negligence must have been causative of the accident ***Sam v Atkins*** [2005] EWCA Civ 1452.
- As for contributory fault, in ***Jackson v Murray*** [2015] UKSC 5, when giving the judgment of the majority of the Supreme Court, Lord Reed JSC said, at paragraph 28, that "the apportionment of responsibility is inevitably a somewhat rough and ready exercise."

The Court found for the Defendant. As to the mechanism of the accident, it was found that:

- The Claimant had entered into the road from a parking bay, between a car and a bus, at a jogging pace;
- The Defendant was giving the parking bay a wide berth;
- The Claimant did not look right in the direction of the Defendant's car before he set off into the road;
- The Claimant did not see the Defendant's car;
- The Defendant was driving at about 25mph, within the 30mph speed limit;
- The Claimant was obscured by another vehicle until the Defendant was about 50m from the locus;
- The Defendant did not see the Claimant until he moved out into the road beyond the offside of this vehicle. This was 0.6 seconds before the collision;
- The impact between the Claimant and the Defendant's vehicle was at the side of the Defendant's car, rather than the front, but very close to the front of the vehicle;
- The Defendant performed an emergency stop as soon as the impact took place. Her PRT was 1.0 seconds.

Following these findings, the Defendant was not negligent. The Court further said that had it found the Defendant to be negligent, it would have reduced the Claimant's damages by 75% to take account of his contributory fault.

Discussion

This case contains evidential issues that personal injury practitioners will know well, and the findings do not come as a surprise.

The expert evidence was in the Defendant's favour, with the accident reconstruction joint report agreeing that the Claimant had jogged directly into the road, collided with the front nearside of the vehicle, and was projected along the road by the collision (suggestive that the collision was not a glancing one, and that the Defendant was braking at an emergency rate).

The experts also agreed that the Claimant could have avoided/reduced the likelihood of the collision in four different ways. The joint report agreed that the Claimant would have been visible only a small amount (4-5cm at 50m away) behind the parked car, leading the judge to find that "the Claimant would have been visible to the Defendant at most only a small fraction of a second before he emerged beyond the offside edge".

The Court found that, in all the circumstances of the case, 25mph was an appropriate speed at which to travel (preferring the Defendant's evidence of 25mph rather than the Claimant's of 27mph). The conditions were clear, it was not the end of the school day, there were no students misbehaving, and no one was getting off a nearby bus. The court was satisfied that a reasonably competent driver, in these circumstances, would not have stopped in time and avoided the accident entirely.

It was accepted on the Claimant's behalf that, at age 17, his age was no longer a factor to consider for the determination of the extent of contributory negligence. This is in line with existing case law on the point (for example ***Phethean-Hubble v Coles*** **[2012] EWCA Civ 349)**.

It is worth noting that claims have been dismissed where the Claimant was younger than in the present case. One notable example is ***Miller v C & G Coach Services Ltd*** **[2002] EWHC 1361**, where a coach driver driving at about 15 mph past a school bus parked on the other side of the road, was not culpable for hitting the 15-year old child who emerged from behind the back of the school bus. Likewise, in ***Moore v Poyner*** **[1975] RTR 127**, a 6-year old ran out from a concealed opening between houses, and then from behind a parked 30-foot coach, into the path of the motorist travelling at 25 – 30 mph. No liability was found.

In ***Chan*** Cavanagh J expressed great sympathy that the Claimant's momentary inattention had led to his serious injuries, but found that the case against the Defendant must be dismissed.

Hughes v Rattan [2022] EWCA Civ 107

Ellen Robertson

The Court of Appeal has considered the question of non-delegable duty of a dental practice to a patient as well as the question of vicarious liability. The Court considered in detail the first three factors of the test for a non-delegable duty as established in ***Woodland v Swimming Teachers Association and others*** [2014] AC 537, and also considered both ***Cox v Ministry of Justice*** [2016] UKSC 10 and ***Barclays Bank v Various Claimants*** [2020] UKSC 13 in relation to vicarious liability.

The Defendant was the owner and sole principal dentist of a dental practice in Kent. The Claimant received NHS dental treatment at the Defendant's dental practice on a number of occasions from 2009 to 2015. The Claimant was treated by six different dentists at the practice, four of whom she alleged were negligent. She was not treated personally by the Defendant. It was accepted by the time of the appeal that the Defendant was negligent for the conduct of one of the dentists, who was a trainee employed under a contract of employment. However, the three remaining dentists were self-employed associate dentists. The preliminary issue on appeal was whether the Defendant was liable for the acts/omissions of the self-employed associate dentists, by virtue of either a non-delegable duty of care or through vicarious liability.

At first instance before Heather Williams QC (now Heather Williams J), the preliminary issue was determined in favour of the Claimant on both the question of non-delegable duty and on vicarious liability. The Defendant appealed on both grounds.

Non-delegable duty

The Court of Appeal, in a judgment given by Bean LJ, held that the judge was "clearly right" to hold that the Defendant was under a non-delegable duty of care to the Claimant. The Court noted that the Personal Dental Treatment Plan signed by the Claimant named the Defendant as the provider of the treatment and did not name any other dentist. The Court considered in detail the first three of the five criteria identified by Lord Sumption in the leading case of Woodland for the existence of a non-delegable duty.

The Court considered that the ***Woodland*** criteria for a non-delegable duty were met. In respect of the first criterion (that the claimant is a patient, child or for some other reason especially vulnerable or dependent on protection of the defendant), the Court noted that the use of the word "patient" in relation to the first factor could not be re-written to suggest that the Claimant had to be within a subset of especially vulnerable patients – receiving dental treatment was sufficient to establish the Claimant as a patient and satisfy the first criterion.

On the second factor (an antecedent relationship between the claimant and defendant), the Court considered that an antecedent relationship was established between the parties at or before the point that the Claimant signed the Personal Dental Treatment Plan. That relationship placed the Claimant in the care of the Defendant, as the owner of the Practice. Whilst the Defendant might delegate the actual work, the duty remained his to positively protect the Claimant from injury.

The Court was also satisfied as to the third factor in ***Woodland*** (that the claimant had no control over how the defendant chose to perform those obligations), noting "The fact that a prisoner or immigration detainee cannot decide to seek treatment elsewhere does not mean that any patient who can do so is not owed the non-delegable duty of care." The Court held that the Claimant had no control over how the Defendant performed his functions; she could express a preference for¬¬ a different dentist, but no more than that. The fact that she could refuse all treatment was not relevant – that would apply to all sentient patients.

There was no dispute on the fourth and fifth factors of ***Woodland*** regarding delegation and performance of the function delegated, and so the appeal therefore failed. Although this made it strictly unnecessary to consider the second ground of the appeal, the Court did so anyway given the wider importance of the question.

Vicarious Liability

The Court noted the judge's consideration at? first instance of ***Cox v Ministry of Justice***, where the critical question in considering vicarious liability was expressed as whether the individual carried on activities as an integral part of the business activities carried on by the defendant and for its benefit. The Court noted that on that test the Defendant would be vicariously liable for the dentists. However, Bean LJ noted the judgment of Baroness Hale in ***Barclays*** confirmed that nothing in the concept of that business integration as expressed in ***Cox*** served to erode the classic distinction between employment and relationships akin or analogous to employment, and independent contractors.

Bean LJ held that the test was not met. The associate dentists were free to set their own hours, work for other practices, and made their own clinical judgments. They chose which laboratories to use and shared the costs, and were responsible for their own tax and national insurance arrangements. They shared the risk of bad debts, held their own indemnity insurance and were required to indemnify the Defendant against claims made against him in respect of their treatment of patients. They paid for their own professional clothing and professional development, and any additional equipment they wanted. There was no disciplinary or grievance procedure.

Bean LJ noted that there were some factors pointing in favour of vicarious liability – he noted that the Defendant set the practice hours, and that the Defendant's degree of control was limited by his obligations to the NHS. The associate dentists were also under a contractual duty to follow the Practice policies. However, on balance and "with some hesitation", he considered the ***Barclays*** test was not met.

Implications

The finding of a non-delegable duty will be welcome news to some patients who have received ongoing treatment from a number of dentists, who may be able to proceed against a single practice instead of multiple dentists. The decision is likely to have wider implications for claimants and treatment providers outside of dentistry, although it may have a more limited effect on private treatment. The fact that the treatment was provided on the NHS was an important factor, as the Personal Dental Treatment Plan stated the Defendant's name as the Contractor under the relevant General Dental Services Contract with the NHS. Without that Plan, the Court may well have reached a different decision on the second ***Woodland*** factor.

Treatment providers will welcome the decision on vicarious liability, and in particular the continued emphasis placed on the distinction between employment (and relationships akin or analogous to employment) as opposed to relationships with independent contractors. Practitioners should note that both decisions were highly fact-specific, considering in detail the practices and policies of the Defendant's Dental Practice.

Another Appeal Dealing with the Scope of Vicarious Liability

Rochelle Powell

Rochelle Powell considers the Court of Appeal decision in *Chell v Tarmac Cement and Lime Ltd* [2022] EWCA Civ. The decision is of importance to PI practitioners grappling with the recent spate of cases on the issue and confirms that vicarious liability is no longer 'on the move'.

Mr Chell, ('the Appellant'), was employed as a site fitter by Roltech Engineering Limited ('Roltech'). He was contracted out to the Defendant, Tarmac Cement and Lime Limited ('Tarmac'). Tarmac also directly employed its own fitters on site. Tensions arose between the Roltech fitters and those employed by Tarmac. On 4 September 2014, one of the Tarmac's fitters, Anthony Heath ('AH'), entered the workshop on the site where the Appellant was working. The Apellant bent down to pick up a length of cut steel, Mr Heath put two pellet targets on the bench close to the Appellant's right ear and hit them with a hammer causing a loud explosion next to the Appellant's right ear. As a result the Appellant suffered injury: a noise induced hearing loss in his right ear and tinnitus.

The Appellant brought proceedings against Tarmac, alleging that Tarmac was vicariously liable for the actions of AH and alleging negligence directly against Tarmac. HHJ Rawlings dismissed both claims at first instance and his findings of fact and determinations were upheld by Martin Spencer J on appeal. The Appellant obtained permission to bring a second appeal in the Court of Appeal.

Findings of Fact

At first instance, the judge made the following (unchallenged on appeal) findings of fact:

1. Immediately before the index incident the Appellant and AH were not working in the same part of the premises.
2. AH did not have any supervisory role in relation to the work which the Appellant was carrying out.
3. AH had access to the workshop as part of their role as fitters.
4. AH's actions represented a joke at the Appellant's expense which was connected with the tensions between the Tarmac and Roltec fitters.
5. The bad feelings of the Tarmac fitters directed at the Roltec fitters eased in the time shortly before the index accident occurred.
6. The Appellant and his brother, Gavin, told Mr Gain, their supervisor, about the tensions on the site between the Roltec fitters and the Tarmac fitters.
7. The friction between the Tarmac fitters and the Roltec fitters did not include express or implied threats of violence.
8. The issue of tension between Roltec fitters and Tarmac fitters was only raised with Mr Grimley, the manager employed by Tarmac, on one occasion.
9. Neither the Appellant nor his brother had asked to be taken off the site;
10. When reporting friction with Tarmac employees, the Appellant and his brother did not specifically refer to AH.
11. AH was previously suspended for misrepresenting the amount of time he had spent at work by cheating Tarmac's clocking-in and clocking-out system.

Vicarious Liability

The issue for determination was whether AH's wrongful act was done in the course of his employment. At first instance, the judge considered a number of authorities which included: ***Cox v Ministry of Justice*** **[2016] UKSC 10**, ***Muhamud v WM Morrisons Supermarkets plc*** **[2016] UKSC 11**, ***Lister v Hesley Hall Limited*** **[2001] UKHL 22** and ***Graham v Commercial Bodyworks Limited*** **[2015] EWCA Civ 47**. In Graham, Longmore LJ considered the issue of vicarious liability in respect of a practical joke which occurred during the working day. He held at [14], that it was *"difficult to say that the creation of the risk was sufficiently closely connected with [the] highly reckless act"*. The Appellant took no issue with the judge's identification of the relevant law and legal principles, but contended that he erred in his application of the law to the facts as found. Nicola Davies LJ disagreed. In her view [26]:

"the careful and detailed findings of fact made by the judge, unchallenged by the Appellant, are fatal to this appeal. What they demonstrate is that there was not a sufficiently close connection between the act which caused the injury and the work of Mr Heath so as to make it fair, just and reasonable to impose vicarious liability on Tarmac."

The absence of such a connection was evident from the facts of the case: the real cause of the Appellant's injuries was the explosive pellet target – it was not the employer's equipment; it was no part of AH's work to use target pellets; there was no abuse of power because AH did not have a supervisory role; any friction between the Tarmac and Roltec fitters had eased in the run-up to the incident; there were no threats of violence made; the Claimant did not ask to be removed from site; and, the risk created by AH was not inherent in the business. AH was not authorised to do what he did by Tarmac, nor was his act an unlawful mode of doing something authorised by the Defendant. Accordingly, there was not a sufficiently close connection between the act which caused the injury and the work of the employee so as to make it fair, just and reasonable to impose vicarious liability.

Breach of Duty

The Appellant submitted that "employers' liability" provides the basis in fact for the closeness of the relationship test for the purposes of vicarious liability, it provides the context for consideration of whether vicarious liability should be imposed and the judge fell into error by not considering the issues as being interrelated. It was accepted that horseplay, ill-discipline and malice could provide a mechanism for causing such a reasonably foreseeable risk. However, the trial judge had found that the tensions reported to the respondent did not support any suggestion of threats of violence, still less actual violence, and there was no indication that AH would behave in the way he did. The mere fact that heavy and dangerous tools were available did not of itself create a reasonably foreseeable risk of injury due to misuse of a tool. Nicola Davies LJ held that [36]:

"Even if a foreseeable risk of injury could be established, on the facts of this case, the only relevant risk which could have been included in an assessment was a general one of risk of injury from horseplay. ... Common sense decreed that horseplay was not appropriate at a working site."

Accordingly, delivering the unanimous judgment of the Court, Nicola Davies LJ dismissed the appeal.

Comment

There have been a number of recent decisions on vicarious liability and it is clear that the courts are taking a hard line on the liability imposed on employers for the actions of its employees, servants and/or agents. Where actions are committed during the course of a claimant's employment but that kind of action could not reasonably be expected to have been taken into account in a risk assessment, the claim will fail. This approach is clear in the recent decisions of the Supreme Court in ***Barclays Bank plc v Various Claimants*** **[2020] UKSC 13** and ***Morrisons v Various Claimants*** **[2020] UKSC 12**, indicating a move toward the scaling back of vicarious liability. This is reinforced by the decision in ***Chell***.

BSC (a child, by his father and litigation friend) v TGL [2022] EWHC 394 (QB)

James Arney Q.C.

***BSC* contains helpful guidance for Claimant teams preparing for approval hearings. Master Davison was asked to approve a settlement of £2.35million for injuries sustained by an 11 year old Claimant who had been struck by a taxi when he was crossing a road on his scooter.**

Because proceedings had not been issued, there was no schedule of loss and no counter-schedule before the judge. The offer of £2.35m had been accepted on the basis of a one third reduction for contributory negligence, meaning that on a full liability basis the settlement was worth £3.525 million. The judge noted that the Claimant's Counsel had commended the settlement, and valued various heads of loss to the total of the £3.525m figure.

Master Davison had 3 concerns. Firstly, the Claimant was 15 and the prognosis for his brain injury was unclear. Secondly, the lack of pleadings from the Defendant made it difficult for him to assess the likely value of the heads of loss. Finally, the agreed reduction for contributory negligence was too high.

The Master asked the parties to prepare a table with four columns setting out (1) each head of loss, (2) the Claimant's claim in respect of that head, including, where appropriate, the relevant multiplier, (3) the Defendant's response and (4) the claimant's estimate of the range of likely court awards. (This final column remained privileged).

Master Davison said "Such a Table is a very useful tool for approval hearings"

Having been furnished with the table, the Defendant's Position Statement, and a summary of liability apportionments involving child pedestrians, the Master ordered the following:

1. The reduction for contributory fault remained too high;
2. However, the Claimant's advisers had valued the case very optimistically. Had the case gone to court, the final award would likely be much nearer the Defendant's figures than those of the Claimant.
3. The overall sum was therefore generous, in the Claimant's best interest to have accepted it, and for the Master to approve it.

Whilst the Claimant's brain injury prognosis remained unclear, there were clear advantages for him settling the case now on a generous basis. Master Davison was satisfied he would be well provided for in the future.

The case report contains some helpful guidance as to how best to assist the Court at approval hearings, especially where certain issues are subject to scrutiny. Here the Master had to balance a relatively high compromise on contributory negligence with a guarded prognosis of a TBI in a young Claimant. Detailed information from each party, especially as to the "big ticket" items, will go a long way to satisfying the Court that the overall settlement is in the claimant's interest, such that it merits the Court's approval.

Hill v Ministry of Justice [2022] EWHC 370 (QB)

Rochelle Powell

The case concerned an appeal against the order of Recorder Bright QC dismissing a claim for personal injury suffered by Mr Hill ("the Appellant") in the course of his duties as a probationary prison officer. The Appellant was instructed to escort two young offenders when one of the prisoners ("DB") assaulted him, causing the appellant to sustain a spinal injury.

The recorder found that whilst DB was a "volatile, impulsive, manipulative and troubled young man who could be violent and fell into the worst 25% of prisoners in terms of conduct", he was not a very dangerous prisoner and it was not necessary to automatically deem him as high risk whenever he left his cell. Further, DB did not pose any specific, imminent or foreseeable risk to staff beyond that routinely faced by prison officers.

The Appellant submitted that the recorder had erred by (i) having regard the actual circumstances of the assault in assessing whether some injury was foreseeable; (ii) applying an incorrect and unduly onerous test of immediacy of harm in assessing whether any injury to the Appellant was foreseeable; and (iii) failing to find that the respondent should have taken certain precautions.

Dismissing the appeal, Cotter J held that the judge had been entitled to dismiss the claim. The common law principles applicable to inherently dangerous occupations were the same as those applicable in any other type of occupation. However, for prison officers, the risks in question could not be wholly eradicated save by measures which would be impracticable, unacceptable, unlawful or too costly. Escorting inmates to their cells was a routine task which carried a baseline risk of violence. The recorder had been entitled to find that there was no risk sufficiently above the baseline risk posed by many young offenders to require additional measures.

Walkden v Drayton Manor Park Ltd [2021] EWHC 2056 (QB)

Ellen Robertson

An appeal to the High Court on the ground that the trial judge had erred in making a finding of fundamental dishonesty was unsuccessful.

In a decision that attracted some press attention, a former company director's claim for injury was found fundamentally dishonest at trial by HHJ Murdoch. The Claimant had alleged he had suffered severe chronic pain syndrome which had cost him his business and caused him to require daily care from his wife.

HHJ Murdoch held that the Claimant had exaggerated his symptoms, giving misleading evidence on a number of matters. His presentation to multiple medicolegal experts was not consistent with the surveillance evidence obtained by the Defendant. Drawing all of those matters together, the Claimant was not a credible witness and had exaggerated his injury to the experts in the case. The judge found that the Claimant had lied in order to support a large loss of earnings claim.

The appeal was dismissed. Mrs Justice Tipples DBE found that the trial judge's approach to considering and making findings in relation to the witnesses could not be faulted, and that some of the grounds were based upon a mis-reading of the judgment. The failure to address fundamental dishonesty in the initial written judgment was at the request of Counsel for the Claimant, who sought to address the judge. The trial judge had ample evidence on which to conclude that the Claimant had been fundamentally dishonest and had given clear reasons for doing so in his extempore judgment.

Campbell v Advantage Insurance [2021] EWCA Civ 1698

Anthony Johnson

The Claimant appealed to the Court of Appeal against a finding that he had been 20% contributorily negligent in a situation where he had been deemed by the trial judge to have consented to be a passenger in a vehicle that was driven by a driver who was visibly extremely intoxicated.

The Claimant had been on a celebratory night out with two friends during the course of which they had all become extremely intoxicated. At around 1–2am, the Claimant was very drunk and so his friends took him back to the vehicle that they had driven to the nightclub in and placed him in its front passenger seat, where he promptly passed out. Approximately an hour later they returned to the vehicle, which was subsequently involved in a very serious accident that killed the driver and caused the Claimant serious brain damage.

The trial judge's reasoning was that the Claimant was in a rear passenger seat at the time of the collision, which meant that he must have been awake at the point when he moved from the front seat where he had passed out. If the Claimant had capacity to consent to a change of position in the car then he also had capacity to consent to being driven in the car. He must have been aware that the driver had consumed so much alcohol that his ability to drive safely would have been impaired.

The Court of Appeal upheld the trial judge's decision. It was emphasised that the relevant test to be applied is that of the reasonable, prudent and competent adult, and the judge had rightly concluded that such a person in the passenger's position would have appreciated that the driver had drunk too much to be able to drive safely.

Although at first blush it may seem as if the case was establishing a new principle in relation to deemed consent to travel, Underhill LJ emphasised that it was merely an application of the existing legal position. He gave the example of a passenger who had been placed in a car whilst unconscious or in a stupor could not be treated as having consented to whatever things may happen to them when they were in that state. Where to draw the line between voluntary and involuntary conduct in a particular case is fact specific. He speculated that the position may have been different if the vehicle had been driven off when the Claimant initially passed out in its front passenger seat.

Moreira (a protected party by his wife and litigation friend) v Moran (trading as ACH Joinery and Building Contractors) [2021] EWHC 1800 (QB)

Elizbeth Gallagher

The Claimant worked for the Second Defendant, who was a self-employed builder. The Third Defendant was a small company that hired the First Defendant to construct an office on the mezzanine of factory premises. The First Defendant, who was a self-employed joiner and builder, planned the work and subcontracted to the Second Defendant to assist on the project. The Claimant joined them on the work. The Claimant and the Second Defendant were working on an unguarded section of the mezzanine when the Claimant, who was carrying a number of wooden boards, overbalanced. He fell onto a concrete floor, sustaining skull fractures and brain injury.

The court held that the Second Defendant owed the Claimant a duty as his employer. The First Defendant also owed him a duty to plan and organise the work so that it could be carried out safely. The decision to work on the section of mezzanine with an unguarded edge created an obvious risk of a fall and serious injury. Neither of the Defendants addressed their minds to that risk. Both had breached their duty of care to the Claimant. They were equally to blame for the accident and liability was apportioned 50/50.

It was the condition of the premises that created the danger. However, the Third Defendant had a barrier in place designed to prevent access to the mezzanine. The Third Defendant was unaware that the Second Defendant and the Claimant had removed the barrier and did not realise that an unsafe system of work had been adopted. The Third Defendant had no knowledge of construction work and was entitled to take the view that skilled workmen would guard against obvious risks. The Third Defendant had not breached its duty of care under the Occupier's Liability Act 1957.

The Claimant was not guilty of any contributory negligence as he had been acting under the direction of the Defendants.

Disclaimer

These articles are not to be relied upon as legal advice. The circumstances of each case differ and legal advice specific to the individual case should always be sought.

The views expressed within this newsletter are those of the individual authors of each article, they do not reflect the views of Temple Garden Chambers.

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