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TGC Personal Injury

The Newsletter of the TGC Personal Injury Team

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A NOTE FROM THE EDITORS

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Assistant Editor: **Elizabeth Gallagher**

Welcome to the second edition of the Temple Garden Chambers Personal Injury Newsletter. In its second iteration we are excited to bring you a publication containing articles offering guidance and commentary on recent developments and judgments in the field of personal injury.

Temple Garden Chambers has long been regarded as one of the pre-eminent personal injury sets at the English Bar. The depth of talent at TGC welcomes a wide range of personal injury work at junior, senior and silk level. Chambers has cultivated a reputation as having experience and excellence when instructed by both Claimants and Defendants, with work across the Set split evenly between both camps. As such, practitioners frequently act for insurers, government bodies and companies, as well as representing accident victims and union members. TGC members also participate in several prestigious insurance panels, including those for the MIB, and in government civil panels.

We continue to edit and produce academic and practitioner resources. Members of Chambers have contributed to the Judicial College Guidelines, the Personal Injury law Journal, the Solicitor's Journal and the New law Journal. We are particularly looking forward to the upcoming publication of the 16th Edition of Bingham's' Personal Injury and Motor Claims Cases. 28 members of the TGC PI team, working with LexisNexis, have contributed to the newest edition, which covers all aspects of liability, quantum, procedure, costs and insurance related issues arising within the road traffic collision arena.

More widely, TGC has been committed to staying at the forefront of developments in this practice area. Members of Chambers attend the annual Peterhouse Medico-legal conference, which provides the opportunity for practitioners, solicitors, and experts to present on and discuss emerging issues in personal injury and clinical negligence law. In terms of public resources, Alex Glassbrook and Emma Northey's new TGC Automated and Electric Vehicle Law blog offers insight into the emerging field of litigation arising from the use of automated vehicles.

Turning now to recent legal developments, procedural changes have had a major role to play; the Ministry of Justice has published a consultation on issues relating to the extended fixed recoverable costs regime, with the final of the draft amendments coming into force on 1 October 2023. While alternative dispute resolution (ADR) continues to act as the hallmark of practice at the Personal Injury Bar, we have also had no shortage of interesting and significant reported cases which are discussed in greater detail in this edition of the TGC PI Newsletter:

Quantum judgments

Our newsletter begins with a discussion of three significant quantum judgements which will undoubtedly prove instrumental to practitioners for the purposes of litigation and negotiations:

- Richard Wilkinson explores the differing approaches of the High Court to the principle of proportionality in *CCC v Sheffield Teaching Hospitals and NHS Foundation Trust* [2023] EWHC 1770 (KB) and *Scarcliffe v Brampton Valley Group Limited* [2023] EWHC 1565 (KB). In *CCC*, the cost of installing and maintaining a hydrotherapy at-home pool for a Claimant with cerebral palsy was granted in full. Meanwhile. in *Scarcliffe* the Claimant was refused several heads of loss resulting from injuries sustained during his employment as a tree surgeon, receiving only £275,000 of his £6.2 million pleaded claim.

- I discuss the 2022 amputation quantum judgment of *Riley v Salford NHS Foundation Trust* [2022] EWHC 2417 (KC). It is the first judgment of its kind since *Swift v Carpenter* [2018] EWHC 2060 (QB); [2020] EWCA Civ 1295, in which I appeared before the High Court, and subsequently the Court of Appeal. For those practitioners who regularly encounter amputation claims this is an important judgment which outlines the Court's approach to quantifying various heads of loss, developing and updating the approach taken in *Swift*.

Fundamental Dishonesty

Our contributors then turn to recent additions to fundamental dishonesty case law, in which members of Chambers are frequently involved:

- Paul McGrath offers a thorough overview of the principles of fundamental dishonesty in relation to indemnity costs. He traces the development of fundamental dishonesty in case law from *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson* [2002] EWCA Civ 879 to the more recent case of Libyan Investment *Authority and others v King and others* [2023] EWHC 434 (Ch). Paul's article is also informed by his recent appearance in the appeal case of *Thakkar and others v Mican and AXA Insurance UK plc* in which the Claimants were awarded costs on a standard as opposed to the indemnity basis as pleaded.

- Continuing the discussion of fundamental dishonesty is Lucy Stock's article on *Attique Denzil v Usman Mohammed and UK Insurance Ltd* [2023] EWHC 2077 (KB). The case, concerning an alleged head injury resulting from an RTA, serves as an important reminder of the necessary requirements for a finding of fundamental dishonesty for the purposes of s. 57 of the Criminal Justice and Courts Act ("CJCA") 2015.

Practitioner Resources

The newsletter also offers several articles which grapple with matters of procedure; they provide guidance for dealing with issues arising out of the interpretation and application of the Civil Procedure Rules:

- In light of the reliance of the Personal Injury Bar on the use of Part 36 offers, Anthony Johnson's article on *Mundy v TUI UK Ltd* [2023] EWHC 385 (Ch), which clarified the ruling of *Seabrook v Adam* [2021] EWCA Civ 382, is of particular import. Here, the High Court confirmed that a liability only offer could not be compared with an 'all in' Part 36 offer.

- Paul Erdunast takes us through the Court of Appeal case of *Santiago v MIB* [2023] EWCA Civ 838 which provides a much-needed update to the overriding objective contained at CPR 1.1(2)(a). The Court found that translation fees were found to be recoverable under the fixed costs rules, signalling a step towards improved access to justice.

- Lionel Stride examines *Stait v Cosmos Insurance Limited Cyprus* [2022] EWCA Civ 1429, which confirmed the Court's approach to assessing domicile of service personnel in respect of the Brussels I Recast Regulation (Regulation 1215/2012). Although the case will feature less in the post-Brexit landscape, it illustrates that the Court's well-established approach to matters of jurisdiction will not be easily challenged.

- I have provided a quick-fire summary on the recent case of *Durham v Wagstaff* [2023] 7 WLUK 516 (KB), a useful guide for those attempting to gain summary judgment at an early stage of proceedings. In this RTA case, a Claimant requested that in accordance with CPR para 24.2 they be granted summary judgment on the grounds that the Defendant had no real prospect of successfully defending the claim. However, issues of liability and the need for accident reconstruction to be considered at trial prevented the judge from ruling in the Claimant's favour.

Liability

Looking more widely, our 2nd edition of the newsletter covers issues of liability arising in a variety of contexts, including sporting endeavours, workplace injuries, and road traffic accidents:

- With the intersection between sport and personal injury gaining international media attention, James Yapp's coverage of *Czernuszka v King* [2023] EWHC 380 (KB) is particularly topical. The case concerned the application of law when the Court was considering whether a tackle by an amateur professional rugby player, resulting in the Claimant's paraplegia, was negligent.
- Anthony Johnson writes on *Lewin v Gray* [2023] EWHC 112, the recent in a line of cases concerning breach of duty in common-law negligence in the light of the implementation of the Enterprise and Regulatory Reform Act (ERRA) 2013. Here a Claimant was rendered paraplegic when he fell from a roof whilst installing guttering. The Court stressed the importance of not conflating common-law negligence with statutory obligations imposed by express provisions.
- Ellen Robertson reviews *Parry v Johnson* [2022] EWHC 889 (QB), in which the driver of a tractor, towing an unlit overhanging seeding machine, came into contact with pedestrians walking in the path of the seeding machine on an adjacent grassy verge. The driver was found to be negligent in driving too fast and failing to allow himself enough time to stop.
- Lionel Stride examines the tragic liability-only trial of *FLR (a child by her mother and litigation friend MLR) v Chandran* [2023] EWHC 1671 (KB), concerning a 12-year-old claimant who sustained a life-changing head injury in an RTA. The judgment demonstrates that in certain situations it is not enough to merely drive below the speed limit, prevailing conditions may require more action to ensure a duty of care to pedestrians is not breached.
- In his second article for the liability section, Lionel Stride reviews the ramifications of *Taylor and anor v Raspin* [2022] EWCA Civ 1613, which clarified that a driver emerging from a minor road and turning right onto a major road owed a continuing duty to vehicles on the major road: how that duty was to be fulfilled would depend on the circumstances.

We hope that the second edition of the TGC PI Newsletter delivers insightful articles which prove of use and/or interest, whether in relation to practice or merely for intellectual enjoyment. Looking ahead, we hope that our next edition in 2024 will continue to highlight key cases and areas of development at the Personal Injury Bar.

Two Cracking Reads & A Point of Principle: Keeping Things in Proportion? *CCC v Sheffield Teaching Hospitals, NHS Foundation Trust & Scarcliffe v Brampton Valley Group Limited*

By Richard Wilkinson
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Come on. Be honest. How often do you actually find time to sit down and read through the entirety of a judgment in a complex quantum claim? You know you should, but the combination of busy lives and the daunting prospect of wading through pages of learned analysis sometimes just gets in the way. And really, it's just the outcome we need to know, isn't it? Maybe that's why you are reading this newsletter now? Comforted by the knowledge that the essentials will be helpfully distilled into a few digestible paragraphs.

Still, if time permits, this summer produced two blockbuster High Court judgments that really will repay your investment. Different judges and two outcomes that could not have been more contrasting for the Claimants involved: a resounding triumph in one[1], a crushing defeat in the other[2]. Two judgments that analyse the legal issues thoroughly but crisply, each spewing out a plethora of learning points on a range of topics for both practitioners and experts (especially care experts) alike. No short article like this could ever do them full justice. Read them if you can.

Instead, this article features on just one question: do the contrasting outcomes reflect not just differences in the merits of the underlying claims, but also a difference of judicial approach to an important question of principle?

Proportionality and damages

No-one practising in the field of personal injury could these days be unfamiliar with the concept of proportionality, lying as it does at the heart of the CPR and all things costs-related. But is the concept of proportionality relevant to the assessment of damages and if so, how? Obviously, the tortfeasor must take his victim as he finds him. Injure a wealthy income generator at your peril – just ask BBC Studios who in early October reportedly settled the claim by Andrew Flintoff arising from a Top Gear crash for a reported £9m, said to represent just two years' lost income. So, proportionality has no relevance to the recoverability of losses sustained in this sense. But what about claims for expenses said to arise from an accident to meet the injured person's needs? Is the cost of provision a relevant factor if need is established? Consider these 4 examples:

- A claim for £975,00 to install and run a home hydrotherapy pool for a young cerebral palsy victim, rather than making use of local swimming facilities.

- A claim for £185,000 to provide lifelong dog walking services for a claimant no longer able to walk his own dog.

- The cost of expensive environmental controls in the home of a disabled claimant to enable him to control features such as lighting, heating etc (even if always attended by carers).

- The cost of business class flights to a claimant unable to cope with the confines of economy seating on long-haul flights on holiday.

"Full compensation"

We all know that in accordance with the 'full compensation' principle, the purpose of an award of damages is, in so far as a sum of money can do so, to put a claimant, as nearly as possible, in the same position as he/she was in before the relevant injury was sustained. An injured claimant is therefore entitled to damages to meet his or her "reasonable needs" or "reasonable requirements" arising from their injuries.[3]

But how is reasonableness to be measured in the context of expenses incurred or to be incurred by a claimant? Specifically, with regard to proportionality, these recent High Court judgments suggest two rather different tests:

a. That there must be proportionality as between the cost to the defendant of any individual item and the extent of the benefit which would be derived by the Claimant from that item; or

b. that the Court's enquiry should be limited to asking whether the same, or a substantially similar result, could be achieved by other, less expensive, means.

Previous Case Law

As will be seen, both approaches have their roots in earlier case law. The notion that proportionality is a relevant factor in the assessment of damages seems to have first arisen in the judgment of *Swift J. in Whiten v St Georges Healthcare* [2011] EWHC 2066 (QB), at para. 5:

> *The Claimant is entitled to damages to meet his reasonable needs arising from his injuries. In considering what is "reasonable", I have had regard to all the relevant circumstances**, including the requirement for proportionality as between the cost to the defendant of any individual item and the extent of the benefit which would be derived by the Claimant from that item.***

Swift J. applied that approach when considering two disputed elements of the claim before her. The first was the disputed cost of an environmental control system in circumstances where the defendants contended it was unnecessary for the Claimant to be able to switch lights on and off or open and close his curtains as he would have carers present to do these things for him and in circumstances where his cognitive ability to operate the controls was uncertain. The judge agreed, concluding that it *"was unlikely he would ever have the requisite level of cognitive control to make it necessary or appropriate for him to be able to control lights and curtains.* ***The cost of a system that would permit him to do this would be disproportionate to the benefit he would derive from it***. He will have carers to attend to his needs and comfort."[4] (emphasis added).

Arguably, on these findings it wasn't necessary to invoke concepts of proportionality because the control system was simply not "reasonably required" for that particular Claimant given his limited cognitive abilities (and because the same result could be achieved in other ways – by his carers).

Later in her judgment, the judge considered the disputed cost of purchasing, adapting, and equipping a holiday home in France for the Claimant to be able to use for annual vacations. She rejected the claim, with what at first seems to be an application of pure cost / benefit analysis:

> *The sums involved in the adaptation and equipping of a holiday home to meet the claimant's needs would be very substantial indeed* ***and would be disproportionate to the benefit which would be derived by the claimant s****ince he would be staying there for no more than a few weeks a year.[5]*

However, she went on to conclude that the Claimant did not have a reasonable need for a holiday home because his needs would be met satisfactorily by simply identifying and renting a suitable property which contained the specialist fittings required. She thus limited the award to the additional costs of such a property.[6] In doing so, she was perhaps simply concluding that the same result (benefitting from a holiday home) could be achieved be less expensive means.

Subsequent attempts by defendants to invoke Swift J's approach literally have not generally met with success following the significant 'gloss' applied to her judgment by Warby J in *A (A Child) v University Hospitals of Morecambe Bay NHS Foundation Trust* [2015] EWHC 366 (QB), another birth injury cerebral palsy claim as follows:

> *13. Miss Vaughan Jones also relied on a proposition in the same paragraph of Swift J's judgment, that the relevant circumstances include "the requirement for proportionality as between the cost to the defendant of any individual item and the extent of the benefit which would be derived by the claimant from that item".* ***I accept, and I did not understand it to be disputed, that proportionality is a relevant factor to this extent: in determining whether a claimant's reasonable needs require that a given item of expenditure should be incurred, the Court must consider whether the same or a substantially similar result could be achieved by other, less expensive, means. That, I strongly suspect, is what Swift J had in mind in the passage relied upon.***
>
> *14. The defendant's submissions went beyond this. They included the more general proposition that a claimant should not recover compensation for the cost of a particular item which would achieve a result that other methods could not, if the cost of that item was disproportionately large by comparison with the benefit achieved. I do not regard Whiten as support for any such general principle, and Miss Vaughan Jones did not suggest that Swift J had applied any such principle to the facts of that case.(*) She did suggest that her submission found some support in paragraph [27] of Heil v Rankin, where Lord Woolf MR observed that the level of compensation "must also not result in injustice to the defendant, and it must not be out of accord with what society would perceive as being reasonable."*
>
> *15. Those observations do not in my judgment embody a proportionality principle of the kind for which the defendant contends, and were in any event made with reference to levels of general damages for non-pecuniary loss. Miss Vaughan Jones cited no other authority in support of the proportionality principle relied on. I agree with the submission of Mr Machell QC for the claimant, that the application to the quantification of damages for future costs of a general requirement of proportionality of the kind advocated by Miss Vaughan Jones would be at odds with the basic rules as to compensation for tort identified above.*

(*) arguably she did, as we have seen in relation to environmental control systems and the holiday home.

This more nuanced approach was applied, for example, without argument at first instance by Lambert J in *Swift v Carpenter* [2018] EWHC 2060 (QB) at para 16. However, in *Scarcliffe*, when reciting his "general principles", Cotter J made no reference at all to the gloss later applied by Warby J, as adopted in several subsequent cases. He instead simply repeated what he had said in his own judgment a year earlier in the case of *Muyepa v MOD* [2022] EWHC 2648 (KB), citing with approval the general approach taken by Swift J in *Whiten.*[7] In *Muyepa* he had further emphasised this point at para 295 of his judgment when he added:

> ***Damages will not be recoverable if the cost is disproportionate to the benefit.*** *The requirement of reasonableness is used to qualify and filter suggested requirements and there is no entitlement to have funding for a wish list of all care and expenditure which could conceivably provide any benefits.*

He then turned in *Scarcliffe* and applied that approach to the claim advanced by the Claimant for future dog walking costs, a claim with which he was clearly unimpressed.

> *207 Sometimes potential provision e.g. of equipment, is not reasonable in which case consideration should be given to reflecting any consequential loss within general damages for pain suffering and loss of amenity. An example in the present case is dog walking. Mr and Mrs Scarcliffe have one dog (described as Mrs Scarcliffe's dog). It is not walked and now exercises itself in the large garden. The schedule seeks £184, 633.21 for the services of a dog walker for future dog walking*

> *at one hour per day for the rest of Mr Scarcliffe's life.*[8] *Mr Hunjan KC argued that this was entirely reasonable as Mr Scarcliffe was entitled to have a family pet (it was not and could not be suggested the dog was an assistance or therapy dog rather it would just be a family pet with his children enjoying the benefits although, in the case of the able children, not the burden, of walking it). In my judgment the services of a dog walker in these circumstances is clearly not a reasonable necessity (it is not even needed now)* ***and the costs would manifestly be disproportionate.*** *However, to the extent that Mr Scarcliffe has lost the ability to walk a dog or keep one in future it could be reflected within damages for loss of amenity.*

It is unclear from either of his two judgments whether Cotter J was referred directly to Warby J's 'gloss', or whether he would have phrased his judgments differently if he had been. That said, it is relatively clear he would not have awarded damages for dog-walking, however the test had been formulated, despite it not being suggested there was any other way by which the same result (the Claimant enjoying the benefit of dog ownership) could be achieved.

By contrast, in *CCC*, having considered both Whiten and A, Ritchie J aligned himself four-square with Warby J's approach:

> *"113. I agree with Warby J.* ***Proportionality has a role to play but it is limited.*** *In my judgment the two gates through which the Claimant must pass to obtain an award of future special damage under any head are:*
>
> 1. Does the Claimant have a reasonable need for the expense as a result of her injuries, pain, suffering and loss of amenity with the twin aims of gaining some benefits and taking steps towards putting her back into the same position she would have been in but for the injuries; and
>
> 2. **Is the claimed expense reasonable compared with other less expensive methods of satisfying the reasonable need and taking those steps."**

He applied this approach when considering the disputed claim for a home hydrotherapy pool. The judgment is worth reading for the helpful review of case law and analysis of this issue alone. He summarised the position as follows:

> *185. In my judgment, from the case law set out above, it is apparent that there are 5 factors to consider when I am assessing whether to award damages for the installation of a 5m x 4m hydrotherapy pool at an adapted home for a seriously disabled person with severe CP.*
>
> *[1]* ***Past advice and use.*** *To determine whether the Claimant has been advised by her treating therapists that she needs hydrotherapy for her physical and psychological benefit in the years leading up to the trial and whether she has taken advantage of that advice and undergone hydrotherapy and swimming exercise in pools.*
>
> *[2]* ***Past benefit.*** *To consider and assess all of the evidence arising from the Claimant's past use of pools to elicit whether swimming exercise and hydrotherapy exercises designed by a physiotherapist in a pool have benefitted the Claimant physically and/or psychologically.*
>
> *[3]* ***Future benefit****. To consider whether in future starting or continuing with regular swimming and/ or hydrotherapy will benefit the Claimant physically or psychologically and will provide exercise amenity which she has been deprived of by her injuries. Such loss may be in other fields, for instance the sports she cannot take part in but would have enjoyed but for the injuries (tennis, cricket, hockey, soccer, rugby, horse riding, running, gym work, sea swimming, sailing, driving etc.).*
>
> *[4]* ***Out of home pool availability.*** *To consider and assess the suitability and regular availability to the Claimant of pools outside her home and in particular whether these provide sufficiently safe, regular and flexible access to enable her to obtain the exercise which she wants or needs for her physical and psychological benefit (if any).*

> [5] ***Relative cost.*** *To consider the relative transport, parking, congestion charge and booking costs of the proposed out of home pools in the local area with the cost of the installation and running of a home pool.*

It was only through the last of those 5 tests that proportionality played a (limited) role. Overall, the Judge was satisfied that, despite the significant cost, installing and running a home hydrotherapy pool was justified to meet the Claimant's reasonable needs.[9]

It is respectfully suggested that Ritchie J's approach to this issue is more consistent with previous case law, when fully analysed.

Some final thoughts

It is suggested the following additional learning / discussion points can be taken from these cases:

1. A defendant who wishes to advance the case that the "same or similar" benefit can be achieved from alternative means must adduce evidence to prove that assertion. In *CCC* Ritchie J was critical of the defendant's failure to provide fully worked out costings for the alternative proposal of the Claimant travelling to attend hydrotherapy at a local facility. As a result, he undertook the exercise himself (see judgment at para 191). He calculated that the overall cost of travelling to attend an external hydrotherapy pool would be more than double the annual running costs of a home hydrotherapy pool. Applying a life multiplier to that annual cost significantly eroded the difference between the two options overall, even taking into account the capital cost of installing the home hydrotherapy pool.

2. In both the recent cases, the judges expressly recognised that the approach they had taken would impact to some extent upon the award of general damages. As we have seen, Cotter J was prepared to accept that to the extent *"Mr Scarcliffe has lost the ability to walk a dog or keep one in future it could be reflected within damages for loss of amenity."* In *CCC*, Ritchie J said[10]: *"I take into account that part of the award for pain, suffering and loss of amenity is for lost sporting amenity and I have reduced that award a little due to this head of loss which I have awarded."*

3. From a defendant's perspective, it is always worth considering whether the issue can be approached from a different angle. For example, if a particular item is really very expensive and gives only a marginal benefit, in reality would the Claimant (in future) avail themselves of that service or item (and have they used interim payments in the past to do so)? If not, and they would likely choose a cheaper option or forego it altogether, that would justify disallowing the claim.

4. Is the answer to the dog walking question simply that the Claimant did not have "a reasonable need" to own a dog (whereas the Claimants in *A* and in *CCC* both had a clinical need for access to hydrotherapy)? Alternatively, might such a claim be limited to the life expectancy of a current dog, rather than any future replacements?

5. And what about the example of business class flights? Can it be argued that the same benefits (enjoying a holiday) can be gained from taking (cheaper) short haul flights? Is this a "substantially similar result"? Is a cocktail on a beach in Nice as nice as one in Barbados? An issue no doubt to be explored in future cases.

Finally, these cases serve as a useful reminder of a point familiar certainly to those who conduct PI litigation in Central London County Court, and no doubt, elsewhere around the country. Your "choice" of judge can have a huge bearing on the ultimate outcome of your case. Quite how practitioners are supposed to factor that imponderable into their advice to clients is a whole different question![11]

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AN IMPORTANT UPDATE FOR AMPUTATION QUANTUM CLAIMS *Riley v Salford NHS Foundation Trust* [2022] EWHC 2417 (KC)

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In Riley v Salford NHS Foundation Trust [2022], the High Court provided a useful exposition of the principles underlying the court's approach to determining heads of loss for amputation quantum claims.

The Claimant, aged 27 at the time of trial, suffered serious injuries to his lower right leg in a motorcycle accident in July 2015. His injuries consisted of fractures to the right femur, tibia and fibula. The hospital's subsequent clinical negligence in diagnosing compartment syndrome led to the lower leg's deterioration and the need for a below knee amputation.

The Claimant experienced multiple complications with his stump, which resulted in difficulties with effective prosthetic use. He had been unable to use his prosthetic limbs at all at one stage, and had been restricted to using crutches, an iWalker or a wheelchair. However, surgery 3 years pre-trial had improved these issues and at the date of trial, the Claimant's mobility was confirmed as SIGAM Grade F. Previously, the Claimant's main interest was sport, including football, racket sports, swimming, and the gym. He then went on to play golf and wanted to try wheelchair basketball. The claimant initially received an NHS prosthetic before private provision and trialling of the microprocessor ELAN foot, the Echelon VT foot and the Ossur Explore foot. The claimant had been able to return to some work and had taken several holidays abroad. He was a private individual with some difficulty accepting his disability and post-accident appearance.

The defendant, the NHS Trust, admitted amputation could have been avoided if the appropriate treatment had been provided. Issues as to the claimant's 'but for' condition remained in question, but these were ultimately resolved in the claimant's favour. The defendant's case as to the 'but for' condition and prognosis collapsed at trial when the defendant's orthopaedic expert conceded a central issue on non or delayed union of tibial fractures. This illustrates the importance of secondary experts (in this instance care experts) considering a range of medical opinion, rather than focussing exclusively on their own side's best case. David Allan KC (sitting as a Deputy High Court Judge) found that a good recovery would have been made within 12 months of the accident with minimal, ongoing pain and disability 'but for' the negligence. These findings undermined the defendant's case as to care needs.

a. Life Expectancy

The defendant's rehabilitation consultant suggested a reduction of 3 years to the Claimant's life expectancy due to impaired mobility and excessive BMI. Under cross-examination, however, the expert admitted to not being an expert in the subject and was merely producing a *"guesstimate"*: [30]. In fact, he admitted that there was no reliable study of below-knee amputees supporting a reduction in life expectancy and that any proper assessment would require a skilled analysis of plus and minus factors that had not been carried out.

The court was reluctant to engage in discussions on life expectancy where there was a failure to produce a suitable expert. The judge referred to the fact that "*No witness claiming to have expertise on the issue of life expectancy has given evidence in the present case"*: [32] As such, the Claimant was treated as having a full life expectancy and the full unadjusted life multiplier was applied.

I anticipate that this judgment might usefully be deployed at case management hearings in support of the need for bespoke life expectancy expertise at trial.

b. Future Loss of Earnings

In respect of future loss of earnings, although the Claimant had ambitions to pursue a career as a PE teacher, he had not pursued a degree after his BTEC extended Diploma in sport. It was also acknowledged that any future pursuit was precluded by the non-negligent injuries arising from the RTC. The court accepted his contention that 'but for' the negligence (and amputation), he would have secured a degree in IT in September 2016, graduated in 2019 and remained in the IT sector until retirement at 68 years of age. Alternative aspirations to be a nightclub manager were deemed too speculative.

The court made a number of findings in determining the award for future loss of earnings:

1. The defendant angled for the unusual, and ultimately unsuccessfully tactic, of contending for an initial *Blamire* award and subsequent return to a multiplier-multiplicand from 60-68. Judge David Allan KC found this to be counter intuitive given the greater inherent uncertainty in predicting far-off events. He held that a traditional *Smith v Manchester* award was inappropriate, citing the current edition of the Ogden Tables, in section B paragraph 39, which emphasises that *"merely because there are uncertainties about the future this does not itself justify a departure from the well-established multiplicand/ multiplier method"*: [61].

2. In respect of the Claimant's retirement age, *Riley* is an excellent illustration of strong evidence as to future degeneration giving rise to step changes towards reduced hours, in the instant case working part-time from 60 and early retirement at 64. Step changes are often difficult to establish where claimants may have many years to prepare and adapt to sustain full time employment to normal retirement age, and where the Table B and D reduction factors already expressly build in the greater risk of early retirement.

3. As to multiplicands and Reduction Factors, it was held that the residual multiplicand assumed close to full-time hours at the 25th centile for IT technicians, those hours reflecting the sedentary nature of Claimant's IT work. A full disability discount factor was applied to these residual earnings using Table B (0.50). These findings illustrate the courts' commitment to the Ogden methodology, even where "imponderables" exist.

The court held that the Claimant should not be considered disabled in terms of his 'but for' employment. If treated without negligence his ability to carry out his employment in IT would not have been compromised. Although the Claimant would have had to avoid roles requiring prolonged standing, walking or heavy lifting, the judge held that this did not amount to a *"substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities"*, and therefore did not constitute 'disability' for DDA purposes: [67]. Defendants may seek to utilise this ruling to support a denial of accident-related disability in other cases with similar actionable restrictions.

c. PSLA

The PSLA award in this case was impacted in part by the youth of the Claimant at the time of amputation and his pre-existing passion for sporting activities which had been curtailed. As such, the court held that the Claimant's award should fall within the upper end of the (£98k to £133k) bracket of the Judicial College Guidelines (JCG) for below-knee amputations, awarding £120,000.

However, Lambert J's Introduction to the 16th Edition of Judicial College Guidelines makes clear that any award should be updated by retail price index (RPI) changes between issues, from the timing of the data point they use, which for the 16th Edition was 9/2021. RPI change for 9/21 to 9/22 was 12.6%. Updating the JCG figures would have changed the applicable JCG range utilised in Riley to a range of £110,000-£150,000. By reference to this range, the £120,000 award fell short of the intended objective of an award in the upper end of the bracket.

Two points flow from this: -

a) Firstly, it illustrates the importance of updating JCG brackets by RPI, especially in times of high inflation, which ought in this case to have led to a higher award.

b) Parties should be cautious of using the *Riley* £120,000 award as a benchmark for future amputation claims. With updating, a figure in the region of £140,000 would have been a truer reflection of the value in this case.

d. Future Surgeries

The court was unwilling to order the percentage cost of a surgery argued for by the claimant, on grounds of potential need, due to the defendant expert's evidence of the technical difficulties which would likely prevent this surgery from taking place. Although this finding may be helpful to defendants seeking to avoid the cost of a small percentage claim for improbable future surgeries, the quid pro quo is the potential for an increased care and equipment claim, by reason of potentially alleviating surgeries not taking place. In such cases experts should therefore address the consequences of not having contemplated surgeries, as well as the cost and likelihood of surgery occurring.

Discussion

Contested judgments such as *Riley* are few and far between; Riley following the previous amputation quantum judgment in Swift in 2018. There are several heads of loss for which it is particularly useful to compare these two benchmark cases, whether to ascertain important new developments in the landscape, or simply to corroborate or update what has gone before.

e. Prosthetics

In terms of prosthetics, with honours broadly even between the parties on contested prosthetic issues, *Riley* perhaps offers a less generous outcome than was enjoyed by Mrs Swift. The judgment does, however, offer consistency with *Swift* in terms of the provision of a primary microprocessor limb, an alternate everyday limb and a separate waterproof limb.

Five main issues emerged at trial in respect of which the court made the following findings:

1. The court preferred the defendant expert Mr Haidar's evidence for a cycle of 6 rather than 5 years for limb replacement.

2. The court awarded the Kinnex 2 microprocessor foot which had been opposed by Mr Haidar due to issues with its weight and charging mechanisms. The defendant conceded the limb up to age 60 but disputed it thereafter. The court allowed the foot to age 75, pointing both to the claimant expert Ms Croft's analysis of the microprocessor's advantages and the claimant's positive feedback from trialling it.

3. The Ottobock ProCarve Snowboarding Prothesis was awarded for a single cycle.

4. A mid-cycle replacement of the socket was allowed up to 60 years as opposed to 40 years as the defendant had argued. The rehab experts anticipated muscle atrophy affecting the socket fit with age.

5. Although the claimant contended that he should be granted a contingency award for the price increases of new technologies emerging on the prosthesis market, the court declined to engage in such speculation. The court favoured the defendant expert's counterargument that emerging technology could result in greater commercial competition leading to future price reductions.

The court therefore awarded the Kinnex 2, Echelon VT and Cheetah Explore up to the age of 60, followed by the Kinnex 2 and Echelon VT to 75 years. From age 75 the court awarded just a lightweight waterproof prosthesis, consistent with claimants being less likely to cope with the weight or maintenance of a microprocessor prosthesis and likely to become more wheelchair dependent. However, it is important to note that where a prosthesis award is reduced at an earlier age, the natural consequence is an increase in the care award commensurate with reduced mobility. This is an issue which must be explored with the relevant experts.

There is little attention given in the judgement to the issue of lifelike cosmetic silicone covering, which in *Swift* the court accepted as part of the justification for an alternate everyday limb. This is an issue which does not always receive the attention it deserves in a medico-legal context. Those representing claimants should ensure that claimants are aware at an early stage that this is an option, and to consider whether it would be of real value to them.

Riley does, however, illustrate the importance of trialling prosthetic limbs, and is yet another example of how the award of interim payments can significantly shift the status quo of a case where it allows a claimant to purchase or hire more expensive limbs and build evidential support for an award at trial.

f. Care and Case Management

The claimant accepted a *Housecroft v Burnett* discount of 25% to reflect that the past care was provided gratuitously by family members. The defendant argued that future care would likely be a hybrid model, mixing gratuitous and agency care. The court rejected this contention, noting that there was no guarantee there would be someone available to provide gratuitous care and awarded the costs of agency care.

The care judgment in Riley is arguably more generous due to the collapse of the defendant's orthopaedic expert's case upon which its care expert had relied. Although no annual breakdown was provided in *Riley*, £362,199 was awarded for the last 2-3 years of the claimant's life. Taking a rudimentary approach of £362,199 divided by 2.5 years, the final award of £144,879.60pa in *Riley* is over twice that provided in *Swift*, at £65,000pa. Similar disparity is found in the awards to age 80, with Mr Riley receiving £36,598 pa compared with Mrs Swift's £15,750pa. Several points can be extracted from this comparison: -

a) There is a natural trade-off between prosthetics and care claims in amputation cases, where an earlier wind-down of prosthetics use is likely to lead to higher care claims.

b) Having regard to care-costs inflation in the intervening period, and to the award in *Riley*, amputation care claims are now likely to be more valuable than the award in *Swift*.

c) Parties risk being left without credible evidence from secondary experts such as for care, where they fail to address needs under the opposing parties' case on the medicine.

Additional points of note in Riley are the allowance for 2 weeks pa for illness requiring additional care, and 5 weeks without the ability to wear a prosthesis or following surgeries. These are all aspects of amputation cases which must be addressed by the experts.

Future case management was awarded only for an initial 12 months following litigation, to re-start at age 70, with a substantial increase in the final 2-3 years of life. The judge followed the advice of the rehab experts, in preference to the claimant's care expert's much greater allowance. The £21,000 award, whilst greater than the £8,000 award in *Swift*, is still modest when compared with figures in other catastrophic injury cases such as brain injuries.

This will serve as a useful starting point for case management awards in amputation cases, as opposed to the exceptional "contingency only" award in *Swift*. The lump sum awarded in *Swift* was exceptional, reflecting Mrs Swift's resourcefulness. The approach in *Riley* is more representative, with modest provision throughout, but uplifted at the start and during latter years to reflect an increase in needs.

g. Holidays

In *Swift*, the claimant recovered for upgraded flights for accompanying children to age 18, including for a child not yet conceived. A similar principle was accepted in *Riley*, to include some business class travel, but the award was nonetheless relatively modest.

Holidays are yet to find a comfortable place in personal injury quantum litigation. Courts are still reluctant to embrace a new discipline of expert, and the system is otherwise poorly equipped to evidence and value such claims. Judges may be tempted to focus on actual expense during the post-accident period, when this period may be unrepresentative because a claimant's natural priority at that time will be rehabilitation and utilising scarce interim payments on essentials rather than upgraded flights.

h. Accommodation

In *Riley*, an interesting, albeit speculative, argument was raised by the defendant that the claimant had failed to mitigate his costs by not seeking a contribution from his partner, of £120,000, towards the cost of her residing in their new and more expensive post-accident property. The court rejected the argument for want of supportive authority. It was held that any benefit accrued by the claimant's partner living in improved accommodation was a benefit to the partner, and not the claimant himself.

As with most amputation cases, in *Riley* single level accommodation was deemed to be a reasonable expense, with 50% credit given for the claimant's 'in any event' property. Beyond this principled approach, there is little benefit in comparing the accommodation award in Riley with the exceptional award in *Swift*, given the geographical and house-price differences.

i. Transport, Aids and Equipment

Swift is often not a valid comparator for transport for fact-specific reasons; however, the court still allowed for £1,000 pa for automatic transmission, £1,560 pa for life for taxis, £215 for hoist and stowage and £510 pa for increased mileage.

In *Riley*, the cost of a new Audi Q7 was deemed to be reasonable at £57,950. Reliability and dependence were cited as reasons for allowing the cost of a new as opposed to a second-hand vehicle. The claimant's initially purchased vehicle, a BMW 1 series under the Motability scheme, was deemed too small given the claimant's height and issues with his prosthetic.

In respect of future costs, a new Hyundai Tuscon was permitted every five years at £32,860. A WAV was awarded from age 75, recognising that more space would be required for the claimant and his equipment, with an additional consideration for the claimant's extra mileage. The court denied the cost of a second car for the claimant's partner from age 75.

In *Riley*, for aids and equipment, the court allowed agreed items totalling £42,000 as well as: (i) E-motion propulsion to age 75 (£47k), (ii) powered wheelchair from 75 (£59k), (iii) mobility scooter from 70 (6k), and (iv) portable ramps (£1k).

Conclusion

Of the two cases, the more recent *Riley* decision is likely the better guide, particularly where the last few years of high inflation have materially increased previous figures. The *Rile*y decision also serves to corroborate and reinforce some of the approaches taken in *Swift*. The effect of these decisions is to narrow the realistic range of outcomes in amputation claims. They also give greater scope for early settlement without obtaining all expert evidence than might otherwise be needed, in that the outcomes in both cases followed full investigation and testing of experts at trial.

Each case is ultimately fact sensitive, and much will hinge upon a claimant's specific recovery, fitness and any relevant pre-existing health and circumstances. However, *Rile*y serves as a useful additional and updating benchmark authority to *Swift* for future amputation claims. It provides an informative guide for experts and offers a helpful checklist for issues and heads of loss which ought to be discussed in conference and considered when drafting schedules and counter schedules of loss.

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FUNDAMENTAL DISHONESTY AND INDEMNITY COSTS

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This article, appearing as it does in the Personal Injury Newsletter, considers this issue solely with a focus on personal injury claims. The concept of dishonesty is well known to the law in many different contexts, and the personal-injury specific concept of 'fundamental' dishonesty is acquiring its own legion of authorities. This article looks at what basis of assessment is appropriate in fundamental dishonesty cases.

The first, and basic, point to make is that it is for a claimant to prove their claim (including any entitlement to damages). If the defendant meets any such claim with an allegation of dishonesty, then it is generally for the defendant to prove any such allegation. I will consider two commonly arising situations: (i) where a defendant is successful in obtaining a costs award in their favour on the basis that the claim (or a part of it) was fundamentally dishonest and (ii) where a claimant is successful in obtaining a costs award in their favour, having beaten off an allegation of fundamental dishonesty.

Defendant Successful in proving Fundamental Dishonesty

This might have arisen in the context of a partially successful claim nevertheless dismissed under s57 Criminal Justice and Courts Act 2015 (on the basis that the claimant has been fundamentally dishonest in respect of the personal injury claim, or a related claim), or it might have arisen in the context of a claim that was dismissed and the claim was found on the balance of probabilities to have been fundamentally dishonest (CPR 44.16(1)).

In relation to the first, section 57 itself sets out a qualification for any costs order and award: section 57(5) provides: 'When assessing costs in the proceedings, a court which dismisses a claim under this section must deduct the amount recorded in accordance with subsection (4) from the amount which it would otherwise order the claimant to pay in respect of costs incurred by the defendant.' (i.e. the court must deduct the amount of damages that the court would have awarded to the claimant in respect of the primary claim but for the dismissal of the claim).

In respect of both, a defendant has a strong argument to say that the costs should be awarded on the indemnity basis: after all, pursuing dishonest claims, or relying on dishonesty to pursue a claim or a part thereof, would typically be seen as conduct 'out of the norm' and justifying a costs award that seeks to properly compensate a litigant resisting such a claim.

The final point to make is that the abovementioned costs orders made in the Fast Track are unaffected by the fixed costs restrictions because CPR 45.29F(1)(b) and (10) sets out that any costs awarded under CPR 44.15 and 44.16 are to be assessed without reference to the fixed costs that would otherwise apply to the defendant's costs order.

Claimant Successful in Defeating Allegation of Fundamental Dishonesty

Before I move on to consider the more nuanced position, I remind the reader at the outset that if a defendant is found to have been dishonest in a material way in the defence of the claim, then it is likely that any costs award would be on the indemnity basis for very similar reasons as mentioned above: the conduct would be 'out of the norm' and justifying such an order.

The more nuanced position is this: a defendant makes an allegation of fundamental dishonesty (perhaps without good faith or perhaps ill-advisedly or perhaps it was understandable to raise the issue) but then loses at trial. What is the position with the claimant's costs? Is the claimant therefore entitled to indemnity costs (either on the claim or the issue)?

By way of reminder, if costs are assessed on the indemnity basis, then the court must determine simply whether the costs have been reasonably incurred (with the receiving party having the benefit of the doubt). Proportionality is not a factor that must be taken into account, though it will of course be relevant to whether costs were reasonably incurred. Therefore, the difference might be significant.

Whether the court considers it appropriate to award costs on an indemnity basis will be determined on the court asking itself whether the paying party's conduct has taken the case 'out of the norm'.

In *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson* [2002] EWCA Civ 879, the Court of Appeal gave the following guidance at paragraph 32: 'In my judgment it is dangerous for the court to try and add to the requirements of the CPR which are not spelt out in the relevant parts of the CPR. This court can do no more than draw attention to the width of the discretion of the trial judge and re-emphasise the point that has already been made that, before an indemnity order can be made, there must be some conduct or some circumstance which takes the case out of the norm. That is the critical requirement.'.

In *CAT Ltd v Abbott Biotechnology Ltd* [2005] EWHC 357, the court said at paragraph 32: '… but it must be borne in mind that just because a party has lost a case, even lost a case badly, it does not necessarily mean that indemnity costs are appropriate.' And, at paragraph 33, that '… I think it is dangerous to place too much emphasis on the fact that some of the witnesses were found to be unreliable. Lord Grabiner for Abbott accepts that where witnesses have been found to be unreliable or worse, that is a factor which can be taken into account, but I agree with him that it is not determinative; it all depends upon the circumstances…'.

What amounts to 'out of the norm' was discussed in *Esure Services Limited v Quarcoo* [2009] EWCA Civ 595. The court said this at paragraph 25: 'The Recorder seems to have construed the word 'norm' as indicating that if the situation facing the court was one that quite often occurred that would mean that the situation was within the norm. In my view the word 'norm' was not intended to reflect whether what occurred was something that happened often so that in one sense it might be seen as 'normal' but was intended to reflect something outside the ordinary and reasonable conduct of proceedings.'

In *Axnoller Events Limited v Brake* [2022] EWHC 1162 (Ch) the court observed, at paragraph 39: 'As I observed during the hearing, an award of costs on the indemnity basis against the party is not made simply because that party lost the case, even badly. Sometimes litigants acting in perfect good faith make poor decisions about pursuing litigation or make those decisions on the basis of poor advice. Sometimes a case turns on which witnesses' evidence will be preferred at trial, and parties sometimes believe that their own witnesses are more credible than in fact they turn out to be. None of these things is a sound basis for indemnity costs to be awarded. Instead, as the authorities make clear, the test is whether there are circumstances and conduct which take the case out of the norm.'

I now turn to cases where the court has considered the position where allegations of dishonesty have been made and have ultimately failed.

In *Bishopsgate Contracting Solutions Limited v O'Sullivan* [2021] EWHC 2628 (QB) Mr Justice Linden said:

12. I note that, at paragraph 23, Waller LJ also said:

> *"Indeed if a court has found that a claim is dishonestly brought or has been dishonestly maintained, it seems to me that it will be normal for a court to seek to mark its disapproval by the costs order it makes. If the party is the losing party and thus would be the paying party even if the claim were honest, that disapproval can best be marked by an order for indemnity costs."*

13. Mr. Forshaw also referred me to paragraph 27 of the judgment of Waller LJ in the *Esure* case, and to paragraph 31 which formed part of the judgment of Longmore LJ. He submitted that the dishonest bringing or maintaining of a claim is a particularly weighty factor in deciding whether the conduct of proceedings falls outside the norm.

14. It is important to emphasise, however, that the fundamental requirement on the court is to deal with matters justly, and that each case will turn on its own facts and circumstances. I also accept that, as Mr. Chaisty submits, the conduct which forms the basis for an order for assessment on the indemnity basis must involve a sufficiently high level of unreasonableness or inappropriateness to justify such an order. As Sir Anthony Colman put it in *National Westminster Bank v Rabobank* [2007] EWHC 1742 (Comm) at paragraph 28 :

> *"Where one is dealing with the losing party's conduct, the minimum nature of that conduct required to engage the court's discretion would seem, except in very rare cases, to be a significant level of unreasonableness or otherwise inappropriate conduct in its widest sense in relation to that party's pre-litigation dealings with the winning party or in relation to the commencement or conduct of the litigation itself."*

15. It is also important to emphasise, as Mr. Chaisty does, that assessment of the reasonableness of the conduct of the parties should not be based on hindsight *"i.e. 'assessing the conduct with the knowledge of the outcome of the case and with knowledge of how a particular issue was resolved'"* : see *Williams v Jervis* [2009] EWHC 1837 (QB) at paragraph 13 .

16. Various decided cases illustrate the sort of situation in which an order for an assessment on the indemnity basis may be made although, in my view, they do no more than this. Thus, as Mr. Forshaw points out, examples of where such orders have been made include:

i) where a claim is dishonest and/or is dishonestly maintained, as I have pointed out;

ii) where a claim is "speculative, weak, opportunistic or thin" : see *Three Rivers District Council v The Governor of the Bank of England* [2006] EWHC 816 (Comm) at paragraph 25 (5);

iii) where a claim is pursued for reasons or purposes unconnected with any real belief in their merit. As *Coulson LJ put it Lejonvarn v Burgess* [2020] EWCA Civ 114 at paragraph 66 : "An irrational desire for punishment unlinked to the merits of the claims themselves is precisely the sort of conduct which the court is likely to conclude is out of the norm."

iv) where allegations of fraud or dishonesty are made which have failed: see *Clutterbuck v HSBC PLC* [2015] EWHC 3233 (Ch) at paragraphs 16 and 17 . In relation to this authority, Mr. Forshaw came close to submitting that as a matter of course, if allegations of fraud or dishonesty have failed, costs must be ordered to be assessed on an indemnity basis. In so far as that was his submission, I do not agree. There is, in my view, no such rule in the context of applications for indemnity costs although, as I have said, where such allegations are made and fail, that may be a reason for making such orders [...].

In L*ibyan Investment Authority and others v King and others* [2023] EWHC 434 (Ch), Mr Justice Miles said, at paragraph 9: 'It seems to me in the light of these authorities that the failure of a case of fraud or dishonesty is a factor that the court may take into account in deciding on the basis of assessment but there is no automatic or rule that the making of such allegations which fail at trial will justify an order for indemnity costs or even operate as a starting point in the sense that the paying party is then required to explain why indemnity costs are not appropriate. It is also right to recall that the default position is that standard costs are to be paid unless the court orders otherwise.'

I appeared in a recent appeal, *Thakkar and others v Mican and AXA Insurance UK plc*, where a defendant had, at trial, failed in its allegation of dishonesty. The claimants sought their costs on the indemnity basis, but the trial judge awarded costs on the standard basis.

The claimants appealed, arguing that the learned judge had misdirected herself and that the weight of the evidence justified an indemnity costs order and that the trial judge erred in refusing to award indemnity costs where an allegation of fundamental dishonesty was made and pursued but unsuccessful. The defendant submitted that the experienced judge had clearly directed herself properly in spite of short reasoning (relying on *Piglowsk*i [1999] 1 WLR 1360 and *Whaleys* [2017] EWCA Civ 2143) and that (i) there was no rule or practice suggesting that indemnity costs ought to be ordered where an allegation of fundamental dishonesty or fraud was unsuccessfully pursued (relying on *Excelsior* [2002] EWCA Civ 879 (para' 32), *Axnoller* [2022] EWHC 1162 (para' 39), *Clutterbuck* [2015] EWHC 3233, *Bishopsgate* [2021] EWHC 2628 (para's 10-16), *Libyan Investment Authority* [2023] EWHC 434 (para' 9) and that (ii) in any event, the judge's decision was plainly within the wide ambit of her discretion and could not be said to be 'wrong' in accordance with *Tanfern* [2000] 1 WLR 1311, *Lamport* [2023] EWHC 667 and *Gill* [2023] EWHC 403.

Mr Justice Richard Smith rejected the claimants' contentions and agreed with the defendant. There was no misdirection and no rule of law that unsuccessful allegations of fundamental dishonesty necessarily led to indemnity costs orders. There was no error of law and the judge had acted perfectly within the ambit of her discretion. The appeal was dismissed, and the claimants were ordered to pay the defendant's costs of the appeal, which were to be set off against the claimants' own costs that are to be assessed in due course.

Therefore, whilst a failed allegation of fundamental dishonesty certainly can form the basis of a submission for indemnity costs, the ultimate decision will rest on an overall examination of all of the circumstances of the case. The following factors will typically be considered:

- Whether there was a reasonable basis for the allegation when first made.
- Whether the allegation was reasonable in scope.
- Whether there was a reasonable basis for maintaining any such allegation (e.g. if the evidence changed during the case progression, this might indicate that it was no longer reasonable to allege dishonesty).
- Whether the allegation was pursued in a reasonable manner.
- Whether the claimant has been put to additional expense.

There are many other factors that might be relevant when considering such a case and the claimant and defendant will be well-advised to consider these matters prior to the conclusion of the case and ensure that the advocate at court has all that they will need to argue the point one way or another.

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VARIOUS SHADES OF DISHONESTY *Attique Denzil v Usman Mohammed and UK Insurance Ltd* [2023] EWHC 2077 (KB)

By Lucy Stock

Fundamental dishonesty: overview of legal principles

Despite the plethora of misinformation peddled about the onslaught of false personal injury claims, the prevalence of truly fraudulent claims is often exaggerated. There is in fact a wide range of honesty demonstrated by claimants in this practice area: some are honest but unable to prove their injuries on the balance of probabilities, others exaggerate legitimate claims, and some are wholly dishonest as to the existence, value, or extent of their injuries. It has therefore fallen to the courts to ensure that those whose intention it is to bring a falsified case are not afforded the protection available under the Qualified One-way Costs Shifting principle and by extension dissuade any claimants with similar intent from following suit.

The key issue to be determined is whether a finding of dishonesty is fundamental to the primary claim, as required under s. 57(1)(b) of the Criminal Justice and Courts Act 2015. A handful of authorities, considering both the 2015 Act, and by extension the Civil Procedure Rules concerning one-way cost shifting (QOCS), specifically rule 44.16, are regularly cited as guidance for assessing whether dishonesty is fundamental.

A finding for dishonesty itself must meet the two-limb test set out by the Supreme Court in *Ivey v Genting Casino* (UK) [2017] UKSC 67 (confirmed in *DPP v Vickey Patterson* [2017] EWHC 2820 (Admin)): *"once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people"*: [74]. The definitive test, supplanting the prior test in *R v Ghosh* [1982] EWCA Crim 2, requires a subjective consideration of a defendant's state of mind, and an objective consideration of whether a defendant's conduct was dishonest.

As to whether dishonesty should be considered fundamental, the judgment of Judge Moloney QC in the Cambridge County Court in *Gosling v Hailo* (unreported) has been adopted by the higher courts, notably by Newey LJ in the often-cited Court of Appeal case of *Howlett v Davies* [2017] EWCA Civ 1696, as confirmed in *Pegg v Webb* [2020] EWHC 2095 (QB). The dishonesty must go to the root of either the whole, or a substantial part of the claim which was itself dependent upon the dishonesty to a substantial degree. A claimant should also be found to be fundamentally dishonest if the dishonesty *"substantially affects"* the presentation of their case (per London Organising Committee of the Olympic and Paralympic Games v Sinfield [2018] EWHC 51 (QB)). The relationship between a claimant's dishonesty and their case as a whole is dealt with by Julian Knowles J in *LOCOG v Sinfield* [2018] EWHC 51 (QB) and applied in Denzil: dishonesty

will be found to be fundamental where it *"substantially affected the presentation of [a claimant's] case […] in a way which potentially adversely affected the defendant in a significant way"*: [62-63].

The recent case of *Cojanu v Essex partnership University NHS Trust* [2022] EWHC 197(QB) has provided a useful five-stage test at [47] for a finding of fundamental dishonesty: (i) the section 47 defence should be pleaded; (ii) the defendant bears the burden of proof to the civil standard; (iii) there must be a finding of dishonesty; (iv) the dishonesty must relate to a matter central to the claim; (v) and it must have a substantial effect on the presentation of the claim. *Jenkinson v Robertson* [2022] EWHC 791 (QB) also detailed that fundamental dishonesty must be raised with enough adequate warning given to the claimant of the contention.

Denzil v Mohammed: factual background

The recent High Court judgment of *Attique Denzil v Usman Mohammed and UK Insurance Ltd* [2023] EWHC 2077 (KB), on appeal from a circuit judge to a King's Bench judge, provides a useful analysis of the necessary elements for a finding of fundamental dishonesty, in particular where there has been an uncontested finding of dishonesty.

At first instance, in front of HHJ Khan, the Appellant asserted he had suffered various injuries in a road traffic accident on 28 January 2019. Specifically, the Appellant sought damages for injuries to his neck and back, which he claimed had escalated from moderate to severe symptoms by 3.5 months after the accident.

During evidence, however, the Appellant also alleged he had suffered an injury to his head, resulting in swelling for three to four days. The head injury had not been pleaded in the particulars of claim; it was also not referred to in the medical evidence nor in the CNF. It appeared in the Appellant's witness statement (see paragraph 36) and oral evidence but was not pleaded in closing submissions as part of PSLA. It was the absence of reference to the alleged head injury in the CNF or in discussions with the medico-legal expert that persuaded the judge that there was never a head injury.

The judge held that, on the balance of probabilities, the accident had taken place; however, he found that numerous contradictions throughout the Appellant's evidence supported the finding that the whole of the claim regarding personal injury had not been proven to the sufficient standard, although there was no dishonesty in respect of these claims (for the neck and back). In respect of the alleged head injury, the judge held that the Appellant's dishonesty was "fundamental" for the purposes of s. 57 of the Criminal Justice and Courts Act ("CJCA") 2015.

He found that although the alleged head injury was "nominal" in respect of the overall injuries- the damages for the head injury alone were 3-4 days swelling compared with 9-10 months of neck and shoulder injuries- the Appellant's *"dishonesty [went] to the root of the claim because of the assertion of head injury in circumstances where no head injury was sustained":* [17]. In a cursory assessment at paragraph 53, the judge considered it "axiomatic" that the dishonesty was fundamental.

Issues on appeal: was the dishonesty "fundamental"?

On appeal to Mr Justice Freedman, the Appellant withdrew an initial ground of appeal concerning the finding of 'dishonesty'; instead, therefore, the Appellant argued that the judgment should be appealed as there was no basis to find that the dishonesty went to the root of the case.

The Appellant contended that his injury had not been put to the court by counsel as part of his quantum claim and therefore had no substantial bearing on the validity or presentation of his overall case. Paragraph 27 of the judgment outlines the Appellant's four main submissions: (i) the head injury was not part of the pleaded claim and did not appear on the Particulars of Claim; (ii) the Appellant's PSLA claim did not concern the alleged head injury, (iii) nor was the judge invited to include the head injury in the PSLA claim in oral submissions; and, (iv) the head injury was not included in the assessment for quantum of damages. The Appellant argued that the judge also failed to identify why the dishonesty he had found was fundamental, refuting that his assessment of the head injury being "nominal" was sufficient reasoning.

The thrust of the Respondent's main argument was that the issue was not the quantitative value of the head injury, but rather the substantive merits of the claim which was intended to reinforce the Appellant's credibility in respect of his wider claim: *"the lie was not a passing concoction but a mercenary deception"*:[29]. The Respondent further argued that the court should be slow to displace the trial judge's findings of facts, especially given the nuances of judging the presence of deceit (see para 32). Citing *Assicurazioni Generali*

*SpA v Arab Insurance Group [*2002] EWCA Civ 1642, per Clarke LJ at [14]–[22], the Respondent stressed that the trial judge has the benefit of seeing and assessing the evidence of witnesses. Freedman J acknowledged *"the need to give great weight to the evaluative judgmen*t" ([40]) of the trial judge; however, he emphasised that such familiarity with the facts of the case does not compensate for deficient legal reasoning.

By way of a footnote in their skeleton argument the Respondent also tentatively argued that HHJ Khan's previous experience as a district and subsequently circuit judge meant he was fully familiar with the concept of fundamental dishonesty. Freedman J disagreed and emphasised that the lack of analysis as to why the dishonesty was fundamental was fatal. The case therefore acts as a lesson not only to practitioners but also to those on the bench, that thorough reasoning is always required when giving judgment even where extensive experience may support one's decision. No issue was taken with the finding of dishonesty, only its *"fundamental"* nature. Specifically, Freedman J took issue with HHJ Khan's use of the term *"axiomatic"* to describe the fundamental dishonesty, regarding it as amounting to an assumption without *"grappling with the question of why it was fundamental to the claim*": [15] & [42(i)].

At paragraph 25 of the first instance judgment, counsel for the Appellant, in line with the practice established E*nglish v Emery, Reimbold & Strick Limited* [2002] 1 WLR 2409, had sought further reasoning for the finding, which HHJ Khan provided at paragraph 55. He asserted that irrespective of whether the head injury was *"nominal"*, this did not impact the fact that the dishonesty went to the *"root of the claim"*: [28]. Freedman J, however, found this to be equally deficient in explaining why the dishonesty was fundamental, and undertook his own assessment of the merits of the appeal, citing the following key principles:

1. The statutory word "fundamental" should be given its plain meaning, which may be assisted by the dicta in *LOCOG* at paras 62-63;

2. In every case, it is a question of fact and degree as to whether dishonesty is fundamental (as per *Elgamal v Westminster City Council* [2021] EWHC 2510 at para 72): [41(iii)];

3. The judge ought to undertake a holistic exercise in determining whether dishonesty is fundamental, considering the impact of the dishonesty on both the Appellant's case on liability and quantum and whether the dishonesty substantially affected the presentation of their case (following *LOCOG v Sinfield* [2018] EWHC 51 at paras 62-63 and Elgamal at para 73): [41(ii) & (iv)].

Applying the legal principles, Freedman J found that the judgment was unsatisfactory (see paras 42(i)-(iv)) and the trial judge's finding of fundamental honesty was subsequently set aside (see paras 48 & 51) and the claimant's appeal was allowed. The alleged head injury was not part of the pleaded claim and counsel had not invited the judge to include it when assessing quantum of damages. Although ironically it was these very elements which persuaded HHJ Khan that the claimant had in fact been fundamentally dishonest. The head injury was also not considered in light of the pleaded claim for PSLA (see paras 42(iii) & (iv)). As such, utilising the language of Julian Knowles J in *LOCOG*, the evidence of the 3-4 day head injury did not "*substantially affect the presentation of the case, either in respects of quantum or liability or both, in a way which potentially adversely affected the defendant in a significant way"*: [46]. Freedman J at paragraph 23 also warned of the dangers of utilising "corollary" terms; although something may not be found to be fundamental to a case, it does not necessarily follow that it must be "*incidental"* or *"collateral".*

Conclusion: food for thought

This case serves as a reminder that, although a claimant may have been found to be dishonest, this does not necessarily mean that s. 57 of the Courts and Legal Services Act 2015 will apply. It remains to be proven that such a lie was fundamental to the case in question. There must be a distinction drawn between the subjective view of a claimant's case as 'fundamentally dishonest', with the objective view that a claimant's dishonesty is 'fundamental' to their case.

By Lucy Stock

Offering the unofferable: when is a part 36 offer not an offer? *Mundy v. TUI UK Ltd.* [2023] EWHC 385

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In *Mundy v. TUI UK* Ltd. [2023] EWHC 385, Collins Rice J. (sitting in the Chancery Division) upheld a decision that the claimant was not able to rely upon a 90:10 'liability split' (purported) Part 36 offer in order to negate the defendant's reliance upon a Part 36 offer in respect of the entire claim that it had managed to beat.

Part of the rationale behind the decision in Mundy revolved around the application of the court of Appeal's decision in *Seabrook v. Adam* [2021] EWCA Civ 382 (in which I appeared for the successful claimant). In accepting that *Seabrook* applied in a situation that went further than its own facts, the judge effectively confirmed that this is an area fraught with difficulty for a putative offeror (certainly in a situation where 90:10 is not a likely or even possible outcome on liability on the facts of a claim).

It is clear from the judgment that the scope of liability split offers attracting adverse consequences pursuant to CPR 36.17 is not as wide as many practitioners had anticipated or assumed (it being acknowledge by both counsel in *Mundy* that the practice of claimants putting forward 90:10 liability split offers was widespread). Whilst *Mundy* is certainly not authority for the proposition that such offers can never take effect, it shows that particular care needs to be taken whenever they are to be put forwards.

Mundy concerned a 'travel sickness' claim whereby the claimant alleged that he had suffered food poisoning on a package holiday provided by the defendant; he sought damages that were quantified as being likely to fall somewhere in the region of £25,000 to £35,000. The case came before a judge in the County Court for trial who determined that the claimant had suffered an injury as a consequence of the defendant's breach of the applicable Regulations that was 'very unpleasant', but which was less severe and long-lasting than he had claimed. The claimant was awarded damages of £3,805.60, which consisted of £3,700 general damages and £105.60 special damages.

On 02.11.18, the claimant made a purported Part 36 offer to settle the issue of 'liability' 90:10 in his favour. He also made a global Part 36 offer of £20,000 (from which it can be inferred that at that stage it was believed that the notional 100% valuation of the claim was a shade over £22,200). Neither were accepted by the defendant. On 28.11.19, the defendant made a Part 36 offer to settle the whole of the claim for a sum of £4,000; the claimant did not accept this offer. Following the conclusion of the trial, the costs issues were decided in the defendant's favour and the claimant appealed. Both parties maintained their position that they had beaten their offers, the claimant relying, inter alia, upon the fact that his offer came first

chronologically. Part of the significance of this fact was said to be that if the 10% 'additional sum' had been added pursuant to CPR 36.17(4)(d) as at the date of the offer then the total awarded to the claimant would have exceeded the defendant's global offer of £4,000 in any event.

Collins Rice J. held that, in the context of the index claim, there were no genuine considerations of split liability and that it was effectively an 'all or nothing case' (the trial judge having found that the defendant's pleaded contributory negligence claim was 'hopeless'). Although the meaning of 'liability' in the context of the 90:10 offer was not defined, it was clear that causation would have remained live as part of the assessment of quantum. As in *Seabrook*, therefore, it was difficult to see what could have been achieved by the making or the acceptance of the offer.

At paragraph 42 of her judgment, the judge held:

> *I am unpersuaded this rejected 90:10 liability offer can be fitted into the terms of CPR 36.17(1)(b) consistently with the wording, integrity and practicality of the CPR 36.17 mechanism. Trying to do so strains the language of the provision, undermines its careful balance, and introduces a degree of complexity and uncertainty which I am not persuaded is within its contemplation. It is a provision that relies on its clarity, simplicity and predictability for the incentivising effects which puts it at the heart of the Part 36 code.*

She went on to find that, referring to Seabrook and having regard to all the circumstances of the case pursuant to CPR 36.17(5), the claimant's offer could not be considered a 'genuine attempt to settle the claim'. Even if the offer had been beaten then the court was correct to deem it unjust for the claimed CPR 36.17 consequences to follow.

This is consistent with earlier in the judgment where it was stated at paragraph 40:

> *[The claimant's] 90:10 liability offer was not an offer to settle the claim, or a quantifiable part of or issue in the claim. It is difficult to fit into the Part 36 scheme altogether. If accepted, in what sense will that produce the result that 'the claim will be stayed' (CPR 36.14(1))? If rejected, in what sense does that produce a quantifiable proposition capable of being compared with what a claimant got 'in money terms' from a judgment – that is, from the judgment itself and not from a private algorithm pre-attached to the judgment? A simple case like this in which liability is not fought on a distinct issues basis but in its entirety cannot produce anything other than a 100% result on liability either way; the value of a win on liability 'in money terms' is difficult if not impossible to separate from the quantum of damages awarded, and that will always and axiomatically be more advantageous to a claimant than 90% of it. There is a problematic degree of artificiality in all of this.*

She considered that it was very unsatisfactory for the claimant to secure the benefits of beating his own offer despite failing to beat the defendant's global monetary offer. Rejecting the submission that the County Court judge had been 'wrong', she stated in paragraph 45:

> *I recognise, in the strong instincts expressed by the County Court judge in this case, substantial consistency with the analysis I have set out above. He started in the right place – by considering the question posed by CPR 36.17(1)(a). The obvious answer to it was 'yes' – [the claimant] had failed to obtain a judgment more advantageous than TUI's Part 36 offer.*

Whilst at first blush it may be felt that the interpretation of Seabrook in Mundy makes it nigh on impossible for a claimant to ever make an effective 90:10 (or other split) liability offer, the judge did address this point on the face of her judgment at para.43-44 of her judgment:

> *How, then, does this 90:10 liability offer fit into the scheme of CPR 36.17, if not in the manner suggested by [the claimant]? The simplest answer to that lies in CPR 36.17(5). In a case like this – an otherwise straightforward CPR Part 36.17(1)(a) case in which a claimant has failed to beat a defendant's offer – a court considering whether it would be unjust to visit the subsection (3) consequences on the claimant must take into account all the circumstances of the case. I can see that in an appropriate case – and whether or not a 90:10 liability offer counts as 'any Part 36 offer' for the purposes of CPR 36.17(5)(a) – a court may be invited to consider any injustice arising by virtue of the defendant having rejected that offer.*
>
> *The 'unjust' bar of course remains a high one: a 'formidable obstacle' as [the claimant] acknowledged. The default provisions of CPR 36.17 cannot be expected to be diluted by considerations relating to rejected 90:10 liability offers to the extent that it loses the very clarity, simplicity and predictability on which its incentivising effects*

> *depend. It may be that 90:10 liability offers, where no issue of split liability genuinely arises, largely need to rely on any inherent attractiveness and incentivisation they may have in the context of a particular case to achieve an outcome – agreement to avoiding a liability trial – if that is in the commercial best interests of both parties. It may be that they cannot rely on the incentivisation furnished by the 'Part 36' consequences of rejection. It may be, in other words, that in a simple case like the present they are all carrot and no stick. If so, that is a result which seems to me entirely consistent with the letter and spirit of the Part 36 code, and its focus on backing sensible money offers to settle claims or quantifiable parts of claims.*

At paragraph 48, she also considered the causation aspects of the case in the context of the judgment in Seabrook:

> *The difficulties of applying a 90:10 liability offer to issues of causation are illustrated in the decision of the Court of Appeal in [Seabrook]… hence the observation there that, in relation to a claimant's offer 'if the issue to be settled is 'liability', it would be sensible to make clear whether the defendant is being invited only to admit a breach of duty, or, if the admission is intended to go further, what damage the defendant is being invited to accept was caused by the breach of duty'. The offer in this case did not do that. Where extent to which debility and damage were caused by the defendant's fault is the core of the dispute, as it was here, it is hard to see that the County Court judge was 'wrong' to see injustice in the conventional operation of CPR 36.17(4) in the present case had he been persuaded it applied here.*

It appears, therefore, that any claimant contemplating making such an offer, should bear in mind the following points in order to give themselves the best chance of a court being prepared to attribute CPR 36.17 consequences to such an offer:

i. The offer should represent a 'real compromise'- where this is not necessarily apparent on its face, it should be spelled out in the letter accompanying the offer;

ii. The offer should make clear whether it is intended to apply solely to the issue of breach of duty or whether the defendant is also being invited to accept that some loss and damage applied from that breach of duty, and, if so, what;

iii. Similarly, it would be sensible if the letter also spelled out the proposed costs consequences of its acceptance and rejection; and

iv. In the event that a 'rival' Part 36 offer is received from the defendant, it would be sensible to write to the defendant and set out the suggested costs consequences in the event that both offers are beaten (as occurred on the facts of *Mundy*).

Although not a conclusive feature on the facts of Mundy, it certainly appears that the claimant's simultaneous global Part 36 offer at a level valuing the claim more than five times higher than was eventually recovered was a factor that weighed upon the judge's consideration of the justice of the situation. It may be prudent to make any global financial offers separately from any proposed liability split offer.

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Increased role for access to justice in interpreting the CPR *Santiago v MIB* [2023] EWCA Civ 838

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Translation fees were found to be recoverable under the fixed costs rules in the Court of Appeal case of *Santiago v MIB* [2023] EWCA Civ 838. While the improvement in access to justice – and increase in profit margins of solicitors running these cases for claimants, together with extra outlay for defendant insurers on the other side – should not be understated, this is not the interesting point about this case.

The key point is that the 2021 amendment to the overriding objective at CPR 1.1(2)(a) that parties "can participate fully in proceedings, and that parties and witnesses can give their best evidence" gives increased teeth to the argument that provisions of the CPR should be interpreted in light of the principle of access to justice, beyond what (a) the provision in the overriding objective for parties to be on an equal footing, (b) the protection the common law right of access to the courts or (c) Article 6 ECHR would necessarily provide. Access to justice points can come up in all sorts of ways in civil cases, and it is advisable for both claimant and defendant practitioners to be attentive to them when they crop up. Examples include by what means someone may be able to give evidence and what costs someone might have to pay simply to access court and whether these might be recoverable.

The common law right of access to the courts and the applicable test in *UNISON v Lord Chancellor*

The common law right of access to the courts is an enforceable right which can be relied on in judicial proceedings to achieve legal results: these have included a vexatious civil litigant being allowed to institute criminal proceedings without needing judicial permission[12]; a prison governor who obstructed a legal letter by a prisoner being held in contempt of court[13]; and an order which increased court fees while simultaneously removing the fee exemption for people on income support being declared unlawful[14]. The right has been termed a 'constitutional right' since at least the beginning of the twentieth century[15].

The leading modern case on the right is *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2020] AC 869. The Supreme Court quashed an Order increasing employment tribunal fees. It was found "*sufficient in this context if a real risk is demonstrated*" that *"a significant number of people who would otherwise have brought claims have found the fees to be unaffordable"*, as opposed to conclusive documentary or witness evidence of people who were not able to afford the court fee. The Supreme Court came to this conclusion from the evidence of the sharp, sustained drop in the number of

employment tribunal claims following the fees Order. The Supreme Court, like the courts below, required evidence that people were not bringing claims because to do so would sacrifice *"the ordinary and reasonable expenditure required to maintain what would generally be regarded as an acceptable standard of living"*. For the Supreme Court, *"Access to justice is not prevented where the decision on whether to make a claim is the result of making a choice between paying the fee and spending one's income in some other way."*

The reasoning in *Santiago v MIB*

The claimant in *Santiago* sensibly did not rely on the case law on the right of access to the courts or Article 6. There was, crucially, no evidence as to whether Mr Santiago could pay the interpreter fees out of his own pocket. There was no evidence as to whether the number of claims from people requiring interpreters was lower than if interpreter fees were recoverable. Rather, he based his argument on the new amendments to the overriding objective quoted in the introduction and the accompanying PD1A on vulnerability (alongside basic interpretative principles, and a minor submission on Article 6 and Article 14 that was not decided upon). Though Stuart-Smith LJ accepted the claimant's argument on the standard interpretative principles and stated that he would have decided the case in the same way prior to 2021, he importantly added at [62]:

> *The effect of the 2021 Amendments is to clarify and reinforce the overriding objective and, thereby, to make express the obligation of the court to interpret the provisions with which we are concerned so as to enable a party or witness to participate fully and to give their best evidence.*

This appears to have motivated the key finding at [60], namely *"I would therefore hold that an interpretation of sub-paragraph (h) that precluded the recovery of reasonably incurred interpreter's fees in a case such as the present would not be in accordance with the overriding objective because it would tend to hinder access to justice by preventing a vulnerable party or witness from participating fully in proceedings and giving their best evidence. I would go further and say that it would not be in accordance with the objective of ensuring that the parties are on an equal footing, for essentially the same reasons."*

With regard to how a court should interpret CPR provisions that may in your case run counter to access to justice, Stuart-Smith LJ's comment at [61] provides insight: *"That conclusion would not justify allowing the present appeal if the application of normal principles of interpretation precluded it"*. It is highly arguable therefore that where a court is faced with a choice between two competing interpretations, one which would "*tend to hinder access to justice"* and the other which would not, then unless normal principles of interpretation preclude it, the interpretation in favour of access to justice should prevail*: even if it is the less likely interpretation or one which accords less with (but is not wholly prevented by) the natural wording or structure of a section of the CPR.* This is a strong interpretative principle, and is well worth bearing in mind when you have a case where an access-to-justice type argument may apply.

Conclusion

The effect of the 2021 Amendment to the overriding objective was expressed by Stuart-Smith LJ as *"to make express the obligation of the court to interpret the provisions with which we are concerned so as to enable a party or witness to participate fully and to give their best evidence".* They arguably mean that where the literal wording of a provision in the CPR would tend to favour an interpretation less consistent with access to justice but does not preclude a less likely interpretation consistent with the principle, the less likely interpretation that is more consistent with access to justice should prevail.

This new provision in the overriding objective, at least in the area of interpretation of the rules in the CPR, has "teeth" even where the common law right of access to the court and Article 6 ECHR would not necessarily apply. These principles apply both to claimants and to defendants, and both claimant and defendant practitioners should not be afraid to use such arguments when they crop up.

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Domicile and the brussels i recast regulation: facts, settled principles, and the absence of special rules *Stait v Cosmos Insurance Limited Cyprus* [2022] EWCA Civ 1429

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In *Stait v Cosmos Insurance Limited Cyprus* [2022] EWCA Civ 1429, the Court of Appeal addressed an issue of now mainly historical importance: to what extent should the court apply a modified approach to service personnel when assessing domicile for the purpose of the Brussels I Recast Regulation (Regulation 1215/2012)? Whilst the decision is of limited significance in the post-Brexit legal landscape, it serves to illustrate the court's reluctance to depart from well-established principles when assessing matters of jurisdiction.

Procedural History

The claimant was a 39-year-old RAF officer who was stationed at the Sovereign Base Area at Akrotiri ('the SBA'). He sustained serious injury in a cycling accident which took place on a road outside the SBA in the Republic of Cyprus. On 29 October 2020, he issued proceedings in the King's Bench Division against the defendant, who insured the driver of the car alleged to have caused the accident. Cosmos subsequently sought a declaration pursuant to CPR Part 11 that the courts of England and Wales lacked jurisdiction to try the claim.

In 2016, prior to the accident, the claimant had started work on a 5-year contract as an electronic equipment technician for the RAF in the SBA. He intended to return to the UK when the contract expired (and in fact did so in 2021). Significantly, the SBA has never been part of Cyprus or the United Kingdom, and had never been part of the EU; it is a former colony of the UK, and the UK retains an RAF base upon it. By contrast, the Republic of Cyprus, which gained independence from Britain in 1960, became a member state of the EU in 2004. Its territory excludes the SBA.

By a judgment handed down on 24 June 2021, District Judge Griffith granted the defendant's application and held that the claimant was not domiciled in England and Wales at the time proceedings were issued. Accordingly, service of the claim form was set aside. On 11 November 2021, Andrew Baker J granted permission to appeal and 'leapfrogged' the appeal direct to the Court of Appeal pursuant to CPR 52.23(1).

Legal Framework

It was uncontroversial that, by reason of regulation 92 of the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulation 2019, jurisdiction was governed by the provisions of the Brussels I Recast Regulation. Article 11.1(b) of the Regulation provides that an insurer domiciled in an EU Member State may be sued in the courts of another Member State where the claimant is domiciled. By the European Communities (Rights against Insurers) Regulations 2002 [SI 2002/3061], an entitled party may issue proceedings in relation to a motor vehicle accident directly against a liable person. Article 62 of the Brussels I Recast Regulation provides that, in determining whether a party is domiciled in the Member State whose courts are seized of a matter, *'the court shall apply its internal law'*.

As the Court of Appeal emphasised at [27], by contrast to the concept of domicile in the law of the United Kingdom and Ireland, the continental concept of domicile is *'essentially concerned with the connection of a person to a place'* rather than *'where a person has their roots'.* The concept of domicile enshrined in s.41 of the Civil Jurisdiction and Judgments Act 1982, the instrument by which the 1968 Brussels Convention was implemented domestically, is closely aligned with the continental European definition. It is distinct from the parallel concept of domicile in the common law. The concept was subsequently enshrined in paragraph 9 of Schedule 1 of the Civil Jurisdiction and Judgments Order 2001 [SI 2001/3929], which provides that:

(2) An individual is domiciled in the United Kingdom if and only if –

(a) He is resident in the United Kingdom; and

(b) The nature and circumstances of his residence indicate that he has a substantial connection with the United Kingdom.

Reasoning at First Instance

At first instance, the judge held that the claimant had a substantial connection with England and Wales and met the test in paragraph 9(2)(b). However, he was not resident within the jurisdiction for the purposes of paragraph 9(2)(a) because of his *'clear and settled pattern of life at and around the SBA'*, so indicating his residence within the SBA.

The judge emphasised that the SBA was where he lived in accommodation with his family; where his children attended school; where he worked; and where he received his primary medical care. Whilst he had previously had a settled pattern of life in England and may at some point 're-establish' such a pattern, this was irrelevant to the question of whether he had one at the relevant time (i.e., the date at which proceedings were issued: *Canada Trust Co v Stolzenberg* (No 2) [2000] 3 WLR 1376). Accordingly, the judge held that the court lacked jurisdiction to hear the claim.

Grounds of Appeal

On appeal, the claimant's grounds of appeal asserted that the judge failed to give any or sufficient consideration to the following factors:

(a) That the claimant had been resident in England and Wales until at least 2016 and had not abandoned his residence;

(b) The possibility of multiple residences;

(c) The 'unusual factors' arising from the claimant's employment with the RAF; and,

(d) The consequence of the judge's ruling, namely that members of the British armed forces would lose the jurisdictional rights associated with their residency within the UK when posted abroad such that their rights were unfairly circumscribed.

Following a thorough review of both binding and first-instance authorities, the court dismissed each ground of appeal. In relation to grounds (c) and (d) above, the court robustly rejected the contention that it was *'necessary to confer special protection on the British armed forces to ensure that they do not lose their rights to sue for personal injury in the UK'* when working with the armed forces abroad. In this regard, neither the Regulation nor the statute or order implementing it domestically *'carve[d] out'* a different position for servicemen and women; the claimant's status as a member of the armed forces was no more or less than one of the *'overall facts of the case'*. It was neither necessary nor desirable to create a special category for service personnel.

In relation to grounds (a) and (b), the court acknowledged that there were factors which went both ways in relation to residence in England and Wales. However, undertaking the 'evaluative exercise' required in assessing the issue, the factors pointing to sole residence in the SBA outweighed by some margin those suggesting that residence was retained in the UK throughout. Amongst the relevant factors were the fact that the claimant was working full-time in the SBA throughout the relevant period; the 5-year length of his contract, which meant that by October 2020 he had lived and worked in the SBA for 4 years; his physical presence in England for only very brief periods; the fact he had let out his home in Cumbria to tenants throughout his absence; and the fact that his pattern of life had *'moved [to the SBA] completely'*.

Whilst the court accepted his intention to return to the UK was relevant, that he did not build up any 'community ties' with Cyprus, and that his salary was paid into his UK bank account, these countervailing factors were of more limited significance. Although, as acknowledged in *Levene v Commissioners of Inland Revenue* [1928] AC 217, residence in more than one jurisdiction was possible, such duality was not present on the facts of this case: the factors which rendered the claimant resident in the SBA rendered him no longer resident in the UK. Accordingly, the court dismissed the appeal.

Conclusion

The impact of the decision in Stait is necessarily limited given the revocation of the Brussels I Recast Regulation by regulation 89 of the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019, SI 2019/479; and by the limited prospect, at least in the short- to medium-term, that the United Kingdom will rejoin the Brussels I Recast regime. Its interest is historical save in relation to the cases issued before 31 December 2020, to which the Brussels I Recast Regime remains applicable pursuant to Article 67.1 of the Withdrawal Agreement.

Beyond Brussels I itself, however, the judgment provides a salutary insight into the court's reluctance, in addressing the issue of jurisdiction, to displace or modify well-established principles in relation to particular classes of claimants such as service personnel. Rejecting the invitation of his counsel to provide guidance for other individuals in the claimant's position, Whipple LJ emphasised that the court *'applies the law, and on the law as it stands there is no special rule for members of the armed services'*: [74]. The judgment suggests that arguments based on a claimant's status or role are unlikely to find favour when jurisdiction is determined in a non-Brussels context – including when applying the common law forum non conveniens rules on jurisdiction.

A further theme can be drawn from the court's reasoning: a reluctance, when addressing jurisdiction, to provide additional guidance on well-established principles which govern the issue or to restrict the essentially fact-specific nature of the court's endeavour. Stait suggests the Court of Appeal is unlikely to greet with enthusiasm any invitation to lay down definitive guidance on the common law test for jurisdiction which falls to be applied post-Brexit. As Whipple LJ emphasises in relation to the test for domicile: *'It seems to me that the principles are settled and their application is fact specific'*: [73].

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Time for summary judgment? *Durham v Wagstaff* [2023] 7 WLUK 516 (KB)

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In the High Court King's Bench Division, Mr David Pittaway KC, was asked to award summary judgment on the issue of primary liability in a road traffic accident on the grounds that the defendant had no real prospect of successfully defending the claim, in accordance with CPR para 24.2.

The index incident in *Durham v Wagstaff* [2023] 7 WLUK 516 (KB) took place at around midnight on 23 and 24 April 2021, when the claimant, alighting from a taxi, driven by the third defendant ("D3"), and insured by the fourth defendant ("D4"), was struck by the first defendant's vehicle ("D1), insured by the second defendant ("D2"). She was the fourth of three friends to alight from the taxi and was in the road for three seconds before being struck. The claimant suffered serious brain injury as a result. At the time of the hearing, she was vulnerable, lacked capacity and had extensive rehabilitation needs.

D1 had been driving in excess of the 30mph speed limit and was convicted of driving without due care and attention. Although he accepted that he had been negligent in driving too fast, he denied that this had been causative of the accident. Rather, he alleged that his vision of the claimant was obscured by D3, who had his full beam lights on.

The claimant accepted as part of the factual matrix, for the purpose of the application, that D3's full beams had been in use. It was, however, the claimant's case that on being confronted with these headlights, if D1 had been driving in accordance with the Highway Code, he should have "slowed to a crawl or stopped": [8]. Had D1 acted accordingly, the accident could have been avoided.

D1 claimed to have slowed down on seeing the headlights, although he was still in excess of the speed limit at the point of impact. He contended, however, that even if he had been driving below the speed limit, the dazzle from the taxi's full beam headlights would have prevented him from seeing the claimant until she was only a few meters away from him. Without expert evidence it remained a possibility that the accident might not have been avoided even in the event he had slowed to a crawl. As such, D1 reasoned that a summary judgment would in effect result in the court conducting a premature trial of the facts.

Judgment

The legal principles underpinning such an application are set out in the case of *Easyair Ltd (t/a Openair) v. Opal Telecom Ltd* [2009] EWHC 339 (Ch) and approved by the Court of Appeal in *AC Ward & Son v Catlin (Five) Ltd & Ors* [2009] EWCA Civ 1098. At its core, a claim will not be summarily dismissed should it have *"a realistic as opposed to a fanciful prospect of success",* which is described as *"carrying some degree of conviction beyond being that which is merely arguable"*: [7].

In applying these principles, Mr David Pittaway KC (sitting as a Deputy Judge of the High Court) was also *"alive to the fact that [he] should not conduct a mini trial in this case":* [10]. He also noted that it was likely that steps had already been taken to secure accident reconstruction evidence and it would benefit a judge at trial to have access to this evidence, joint statements and cross-examination of the experts. As such, it was found that an application for summary judgment would be *"premature"*: [11].

The judge distinguished the case of *Hewes v. West Hertfordshire Hospitals NHS Trust & Ors (3)* [2018] EWHC 2715 (QB), cited by D1 to rebut summary judgment, due to its specific factual matrix, but he acknowledged its importance as guidance for whether summary judgment should be granted at such an early stage of proceedings.

Compelling issues, such as the speed at which D1 was travelling and the avoidability of the accident, still needed to be resolved with the benefit of expert evidence and by extension its analysis at trial. Alternatively, although a summary judgment might have deterred any further pursuit of a claim against D3, the judge held that the unresolved issues of liability between D1 and D3 also precluded any findings at that stage. The issue of contributory negligence was also of particular importance and yet to be determined, this included whether the individuals alighting from D3's vehicle were intoxicated, and whether the claimant was standing in the middle of the road when struck.

Conclusion

Despite the valid reasons as to why a claimant may wish to obtain judgment as soon as possible, these did not outweigh the importance of ensuring a fair assessment of the facts of a case. The court held that an attempt to split the issues of liability and determine their validity at such an early stage could potentially *"tie the hands of the judge"*: [16]. Summary judgment was therefore not granted.

The case is a warning shot to those who might attempt to gain summary judgment before the evidence gathering stage of a case has commenced, especially in key areas such as accident reconstruction which may be determinative. *Durham* also illustrates the court's aversion to premature assessments of a case's facts especially when complex issues of liability are at play, or multiple parties have competing interests.

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Watch out for pedestrians on county lanes! *Parry v Johnson* [2022] EWHC 889 (QB)

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The recent High Court decision of *Parry v Johnson* acts as a useful illustration of the obligations owed by drivers to pedestrians walking along country lanes, and the circumstances in which pedestrians will be found contributorily negligent in road traffic collisions. It is also a useful reminder of the approach taken by the courts to expert and lay witness evidence when assessing factual disputes that go to the question of liability, and that Latham J's guidance in *Lunt v Khelifa* [2002] EWCA Civ 801 as to the high burden placed on drivers will continue to inform the judicial view of primary liability and contributory negligence in all road traffic accidents involving pedestrians.

In *Parry v Johnson*, the claimant and his wife were walking along a country lane at dusk when a tractor approached, driving towards them along the country lane. Unknown to the claimant and his wife, the tractor was towing an unlit seeding machine which overhung the grass verge by around 20 to 30 centimetres on each side. The claimant and his wife were hit by the seeding machine, causing the claimant to suffer serious injuries and his wife to sustain more minor injuries.

The claimant's wife gave evidence that the claimant had been wearing a light shirt, a green fleece, light beige shorts and white trainers, and she was wearing black jeans and a purple fleece. They were walking on the right-hand side of the lane when the tractor approached, and both moved as far as possible to the right-hand side and stopped to allow it to pass. It did not stop or slow down beforehand and hit both the claimant and his wife. The claimant's wife considered that visibility was good and clear, and it was light enough. She considered the hedge was overgrown.

Ritchie J identified three main issues: the visibility and conspicuity of the claimant and his wife, the nature of the first defendant's driving, and the claimant's behaviour and movements as a pedestrian.

Witness evidence

Ritchie J's detailed analysis of the evidence of the first defendant is a useful reminder that courts will rarely be impressed by a witness whose account develops over time to exculpate themself.

The court noted that in an initial police interview just one hour after the incident, the first defendant described passing a single parked car prior to the accident, and had estimated his speed at around 25 to 30 kilometres an hour. He had also claimed that visibility was good, that it was around

dusk but it wasn't dark. He then provided a proof of evidence to his criminal solicitors which estimated his speed at 20 to 25 kilometres per hour. When he gave his first witness statement for the civil claim, however, he asserted there were two parked cars and maintained the lower speed of 20 to 25 kilometres per hour.

The first defendant was unable to explain the increase from one parked car to two; however, he gave an explanation for the reduction in his estimated speed. He claimed that he had driven the lane subsequently and considered his estimate to the police had been too high. The court found that explanation unimpressive, noting that he had driven that lane many times prior to the accident, including driving it with the seeding machine.

The court considered the first defendant was prepared to try to improve his case, statement by statement, by altering his evidence.

In contrast, the court found that the claimant's wife had been an impressive witness. She had refused to embellish her evidence or to change it, and when she could not remember something she said so plainly.

Expert evidence

The court heard reconstructive expert evidence for both parties. The defendants' expert accepted in her oral evidence that her report's conclusions were focused upon trying to explain physically how events had occurred, on the basis that the court found the first defendant was paying sufficient attention. The court viewed videos filmed by the defendants' expert from the verge, of the first defendant driving the tractor with the seeding equipment, in which she had asked him to drive "normally". The court noted he had driven at about 3 to 6 miles per hour in that video and not at his estimated speed on the day of the accident.

The court noted that the defendants' expert *"saw no conflict between her focus on her constructing [her theory as to the collision] and her general duty to advise the court objectively on the issues in the case"*. The expert had also chosen not to express any view on the need for a reduced speed or for the use of main beam.

The court found the opinions of the defendants' expert *"unpersuasive"*. The court noted that the expert had no explanation as to why she did not ask the first defendant whether her videos taken during the reconstruction were a fair reflection of the light. She had not been able to explain her failure to consider the first defendant's account of the lighting conditions as given to the police, which the court considered *"unsatisfactory"*. The court considered her failure to take any videos of the first defendant using main beam headlights was *"indicative of her focus on exculpating the first defendant rather than assisting the court in an objective way on all relevant matters."*

Findings of fact

The court found that it was twilight but not yet dark when the claimant and his wife were walking down the lane. The first defendant was travelling at around 25 to 30 kilometres at the time of the collision, because it was light enough for him to see the road was clear and he took no account of the potential presence of pedestrians. The first defendant was well aware that pedestrians walked along the road in the day and at night, and that his seeding machine overhung the grass verge by between 20cm and 30cm on each side. He did not see the pedestrians beforehand.

The court found that on hearing the tractor, the claimant and his wife had stepped into the verge and were moving on the verge as the tractor approached.

The claimant's expert evidence was accepted as establishing that the claimant and his wife were sufficiently conspicuous for a reasonable driver to see them in the circumstances. The defendant's expert's theory with various convoluted stages was rejected as *"inherently unlikely"*.

Liability

Considering the evidence of the first defendant and of the claimant's wife, as well as the photographs and video of the scene and the expert evidence, the court found that the first defendant should have been driving at a much lower speed than 25 to 30 kilometres per hour. The first defendant was towing a piece of equipment that was wider than his vehicle, and which overhung the grass verge by around 20 to 30 centimetres, on a narrow road with verges close to the edge of the road. It was incumbent upon him to drive at a speed that gave him a reasonable opportunity to react to the presence of any pedestrians on the grassy verges. The court found that an appropriate speed would have been between 5 and 10 kilometres per hour.

The first defendant was also in breach of duty for his failure to use his main beam headlights. The court found that the dipped beam headlights had lit the road surface well but did not light the grass verges particularly well. Using main beam headlights would have illuminated considerably more of the grass verge.

However, the court found that even without the use of main beam headlights, both the claimant and his wife were visible, conspicuous and discernible to any reasonably prudent driver. The first defendant had failed to keep a proper lookout as he drove down the lane eager to get home to have his "tea", and for that reason he had failed to see them.

Contributory negligence

The court rejected the submission that the claimant and his wife had been negligent in failing to stay in the road until they were sure the first defendant had seen them, finding that the vast majority of the public would not consider it wise to stay in the path of an oncoming tractor at twilight hours. The claimant and his wife would have had no idea the traffic was towing an unlit and dangerous seeding machine which overhung the verge.

The court found that the claimant's shorts, bare legs and white trainers, as well as his grey hair, face and hands all would have made him visible. The court also placed reliance on the guidance as to the high burden placed upon drivers as given in *Lunt v Khelifa* [2002] EWCA Civ 801.

Judgment was therefore given for the claimant with no finding of contributory negligence.

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The red mist descends – sporting injuries and the standard of care *Czernuszka v King* [2023] EWHC 380 (KB)

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The claimant was playing in her first competitive game of rugby. She bent down to pick up the ball at the back of a ruck. As she did so, the defendant tackled the claimant in an unconventional fashion. The claimant suffered a serious spinal injury and was paralysed from the waist down.

Liability was disputed. The defendant did not contend that this was a mistimed or misjudged tackle in the heat of the moment. She argued that she would have done the same again if faced with the same situation.

The key legal issue was whether, in order to establish negligence in the particular circumstances of the case, the claimant needed to prove that the defendant was reckless or exhibited a very high degree of carelessness.

Martin Spencer J held that she did not. The test was whether the defendant failed to exercise the degree of care that was appropriate in all the circumstances. He found in favour of the claimant.

The facts

The match was captured on film and still images of the tackle appear within the judgment. The tackle involved *"parcelling up"* the claimant by pinning her torso towards her own legs. The Defendant then put *"her whole bodyweight forward and down on the claimant's back"*.

The game was part of a development league aimed at introducing women to the game. Most of the players were inexperienced. The defendant, the captain of her side, was a large and experienced player. The judge found she was attempting to dominate the match by using her physicality and *"trash talk"*. She had been unsuccessful, and her team were losing.

Shortly before the injuring tackle, the defendant had winded herself when tackling the claimant. The judge found the defendant had expressed a desire to *"smash"* the claimant.

Expert implosion

Both parties called expert evidence from distinguished former professional referees.

The claimant's expert opined that the claimant was at no point in possession of the ball, and thus should not have been tackled. He said he had never seen such a reckless incident on the rugby field.

The defendant's expert initially opined that this was a legal tackle. In cross-examination he changed his evidence significantly. He accepted it was *"the very epitome of dangerous tackling"*. He conceded that the defendant only had eyes for the claimant and did not at any point attempt to play the ball. He had only seen 2 such tackles in his career as a referee.

The outcome

Her expert's change of evidence left the defendant in considerable difficulty.

Martin Spencer J made a number of findings regarding the background circumstances, including:

a) The nature of the development league was such that *"enjoyment and learning were the main objectives, not winning"*.

b) The defendant's approach was inappropriately aggressive and intimidatory.

c) In executing the offending tackle, the defendant was intent only on exacting revenge

d) The defendant closed her eyes to the clear and obvious risk of what she was doing. The red mist had metaphorically descended following the winding incident a few minutes earlier.

In light of the expert's concessions and these factual findings, it is perhaps unsurprising that the judge found in favour of the claimant.

The standard of care

The parties disagreed as to whether – following *Blake v Galloway* [2004] 1 WLR 2844 – the claimant needed to prove recklessness or a very high degree of carelessness on the part of the defendant.

In *Condon v Basi* [1985] 1 WLR 866, the Court of Appeal had held that the duty owed by one footballer to another was to exercise such degree of care as was appropriate in all the circumstances.

The Court of Appeal followed this approach in *Caldwell v Maguire* [2001] EWCA Civ 1054, a horse racing case. Tuckey LJ rejected the suggestion that recklessness was required. Two instructive points emerged from the judgment of Judge LJ in that case:

a) A breach of the rules of racing would not be determinative of liability in negligence.

b) There is a distinction between negligent conduct and errors of judgment, oversights or lapses of attention in the hurly burly of a race.

In *Blake*, 15 year old boys were throwing twigs and bark at one another. One of the boys suffered a significant eye injury. Dyson LJ noted the informal nature of the horseplay and that there was no expectation that the participants would exercise any particular level of skill or judgment. In that context, the Court of Appeal held that there would be no breach absent recklessness or a high degree of carelessness.

Martin Spencer J did not see any conflict between Blake and the other cases cited. He did not consider the Court of Appeal intended in that case to lay down a general rule that recklessness or a high degree of carelessness was required. Instead, that was simply the standard to be applied in that particular 'horseplay' context given the particular prevailing circumstances.

He cited the case of *Smoldon & Whitworth & Nolan* (1997) ELR 249 as an example of the Court of Appeal rejecting a suggestion that a claimant needed to prove recklessness.

Recent cases not cited

HHJ Walden-Smith considered the standard of care required in *Tylicki v Gibbons* [2021] EWHC 3470 (QB). The judge emphasised the distinction between legal principle and the practicalities of the evidential burden. Whilst the standard is 'reasonable care and skill in the circumstances', it may be difficult to prove the defendant fell below this standard without proving conduct that amounts to a reckless disregard for another player's safety.

The decision of Lane J in *Fulham FC v Jones* [2022] EWHC 1008 (QB) emphasises the importance of considering the context in which an incident occurred. The club's appeal against a finding of liability was upheld and the case was remitted for a retrial. Among the successful grounds were:

a) The Recorder had been wrong to suggest certain breaches of the rules would be *"very likely"* to amount to negligence. It is important to not reduce the focus simply to whether an act was in breach of the laws of the game.

b) The Recorder had been wrong to afford no weight at all to the fact that the referee did not award a foul. In so doing, he failed to have any regard to the important policy consideration to pay proper regard to the decisions of the officials.

c) The Recorder had found that it did not matter that the tackle was *"made in a fast moving heat of the moment context"*. In so doing he had erred by expressly refusing to take into account the context of the tackle and the realities of the playing culture of professional football, a fast-paced game necessarily involving physical contact.

Take away points

1) Test evidence in advance. The concessions made by the defendant's expert in the witness box were devastating.

2) There will be no liability for errors of judgment, oversights or lapses of which any participant might be guilty in the context of a fast moving contest. Something more serious is required

3) There is no overarching requirement to prove recklessness to establish liability.

4) The standard of care is an objective one but depends upon all the surrounding circumstances.

5) Proving the broader circumstances in which an incident took place can be important. In Czernuszka the judge had the benefit of eyewitness accounts and a recording of the whole match.

6) A breach of the rules of the game will usually be a necessary but not sufficient condition for establishing negligence.

7) The court should have regard to the decisions made by match officials or stewards, but is not bound by those decisions.

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No ‘backdoor’ for strict liability in employment cases *Lewin v. Gray* [2023] EWHC 112

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Lewin v. Gray [2023] EWHC 112 is a useful case setting out the limits of fault in employers’ liability cases. It reflects a trend of recent cases emphasising the importance of the claimant’s representatives making out a case of breach of duty in common-law negligence in the light of the implementation of the Enterprise and Regulatory Reform Act (ERRA) 2013 which came into force on 01.10.13.

The claimant was contracted by the defendant to install guttering on a barn next to a farmhouse; due to the narrow gap between the gable end of the farmhouse and the edges of the roof sheets that were to be replaced, it was awkward to move the guttering into place. The claimant, who was very experienced and had significant control over how the task was performed, decided to carry out the task whilst standing on a fragile part of the roof. It was as he was reaching for a length of guttering, passed to him by his son who he was working with, that his foot slipped off the board upon which he was standing. As a consequence, he fell through the roof onto the ground, in the process suffering catastrophic injuries which rendered him paraplegic.

In addition to other allegations, e.g. breach of the common duty of care pursuant to the Occupiers’ Liability Act 1957, the claimant pleaded that the defendant was in breach of the Construction (Design and Management) Regulations 2015, including that the defendant had been negligent in failing to ensure that the claimant had completed a ‘Construction Phase Plan’ (as referred to in Regulation 4 of the CDM Regulations). It was common ground that the defendant had not even heard of the CDM Regulations prior to the accident, let alone the requirement for such a Plan.

The defendant relied upon the provision in section 69 of ERRA 2013 that there is no longer an assumption of civil liability for breaches of the Health and Safety at Work Act 1974 and Regulations made thereunder. In response, the claimant argued that, notwithstanding this, the Regulations created mirrored duties in common law. Relying upon section 11 of the Civil Evidence Act 1968, the claimant argued that it was admissible evidence for the purposes of proving negligence that the defendant accepted that it had not met the standard of care expected by the criminal law, notwithstanding that there had never actually been a prosecution or conviction.

HHJ Robinson (sitting as a High Court judge in the King's Bench Division) rejected the claimant's argument, holding that it would not be fair, just or reasonable to override the express provision in Section 69 of ERRA by creating a common law duty in the same terms. Paragraph 85 of his judgment stated:

> *Whilst each case must be fact specific, in my judgment there is no justification in this case for overriding the clear words of Section 47 of the 1974 Act (as amended). Absent the obligation placed upon a "client" in the position of the defendant to ensure that a competent contractor produced a Phase Construction Plan, there could be no justification, in my judgment, for imposing any such obligation at common law upon a person such as the defendant. It is only because of the existence of the duty under the Regulations that an argument such as that advanced [on the claimant's behalf] gets off the ground. But in this case, the claimant is a "one man band" and so is the defendant. The claimant had worked for the defendant's father on and at the farm for many years. The defendant had only recently taken over the farm following the death of his father. The claimant was the older and far more experienced man. The relevant authorities saw no reason (so it appears) to institute criminal proceedings against the defendant. In such circumstances I simply do not accept that it is fair just and reasonable to override the express provision in Section 47 of the 1974 Act (as amended) that breach of the Regulations "shall not be actionable". In my judgment, absent other authority to the contrary, that means that there is no civil liability in this case in respect of the facts giving rise to the breach of the Regulations.*

Although the decision in *Lewin* does not create any new law, indeed it is strongly arguable that HHJ Robinson did nothing more in his judgment than adopt a straightforward interpretation of section 69 that took its wording at face value. The case is extremely useful in illustrating the perils that can arise from the approach that is oft pleaded by claimants that a breach of the 1974 Act is tantamount to common-law negligence because it evidences a departure from the standard of the reasonable employer (i.e. the allegation is premised upon any reasonable employer always following the applicable regulations).

It is not suggested that Regulations such as the 'Six Pack' Regulations and similar have no role in determining liability in employers' liability claims for personal injury. They play a very important role in disseminating direction on best practice of which employers would be expected to have had awareness and to which they ought to give consideration. It may well be that there are some cases where the Regulations are sufficient to determine the outcome of the case, particularly where the Regulations in question are quite prescriptive (e.g. some provisions of The Work at Height Regulations 2005). Such an approach is certainly not precluded by the decision in *Lewin*. The role that the Regulations play may be usefully thought to be akin to non-statutory instrument guidance, e.g. publications of the Health and Safety Executive.

The judgment concluded, *"I find it impossible to leave this case without expressing my admiration for the manner in which the claimant has conducted himself in the face of terrible adversity, and my regret that after so many essentially injury free years of devoted service to countless clients his career has to end in this manner."* As is alluded to in the introduction above, another salutary lesson that arises from the facts of Lewin is that claimant practitioners must be wary of counter-intuitive situations where it can instinctively and reflexively feel (to both a lay person and a specialist practitioner) as if the conduct in question is of a type that seems that it must be negligent. If there is any doubt then it is necessary to revert to first principles, i.e. the constituent elements of the tort of negligence, to consider the existence of a duty outside the Regulations, and if so whether the same has been breached.

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Child pedestrians, crossings, and the distinction between a speed limit and reasonable speed *FLR (a child by her mother and litigation friend MLR) v Chandran* [2023] EWHC 1671 (KB)

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This is a judgment arising from a tragic liability-only High Court trial. The claimant, a 12-year-old girl, sustained a life-changing head injury after stepping into the path of the defendant's car. The judge found that the defendant, who was driving at 28 mph and therefore within the 30 mph speed limit, had nevertheless breached her duty of care in driving too fast for the prevailing conditions.

Facts

On 15 January 2018, the claimant left her home in Oxfordshire on a dark and rainy Monday morning with the intention of travelling to school. Her intended route would have taken her over the Buckingham Road at a controlled pedestrian crossing. On reaching the crossing, she stepped into the northbound carriageway without waiting for a green light and was struck by the defendant's vehicle. Her skull struck the nearside windscreen of the car, causing serious head injury; she was thrown 11 metres beyond the pedestrian crossing. The parties agreed that, pre-collision, the defendant had been driving at 28 mph, below the applicable speed limit of 30 mph.

The claimant alleged that the incident was caused wholly by the negligence of the defendant in driving too fast for the prevailing conditions; and that, in the absence of her excessive speed, the collision would not have occurred. The defendant denied liability on the basis that she had been driving at an appropriate speed for the prevailing conditions and that the accident was wholly the fault of the claimant. Live evidence was provided by the defendant and by accident reconstruction experts instructed by both parties.

The Court's Approach to the Issues

Dexter Dias KC, sitting as a deputy High Court judge, summarised the issues the court was required to determine as follows:

i. Finding of fact: What was the reasonable speed for the prevailing conditions and road situation in the material stretch of Buckingham Road at the time of the accident?

ii. Breach: Was the defendant driving in excess of the reasonable speed and/or otherwise in breach of duty?

iii. Causation: If the defendant were driving at the reasonable speed, would the collision have occurred?

iv. Contribution: Did any negligence by the claimant contribute to the accident?

v. Apportionment: If (iv) is established, what is the appropriate apportionment of liability?

The Expert and Lay Evidence

Whilst the parties each instructed an accident reconstruction expert (Dr Hill on behalf of the claimant and Ms Eyres on behalf of the defendant), by the conclusion of their oral evidence, a broad measure of agreement had been established. Among other matters, it was agreed that the lights had been green for approximately 8 seconds before the accident; that the claimant had been stationary at the crossing for approximately 2.3 seconds prior to emerging; she had been on the carriageway for 0.4 seconds before impact; and the defendant could have seen the claimant from approximately 30 metres away. The judge further concluded, based on CCTV footage, that the defendant *'should have seen the claimant as a pedestrian in a position to cross the road'*: [34].

As to the lay evidence, the defendant asserted that she consistently drove within the speed limit and had driven the route (her daily commute) many times within the past ten years. She stated that she was not aware of anyone at the pedestrian crossing until she felt a 'thud' on her vehicle. The judge accepted that the defendant had not been aware of the claimant's presence at the crossing, or at least that she had not been *'conscious of seeing [her]'*: [45]. He dismissed defendant counsel's submission that she had been *'alert'* or *'hyper alert'* at the time of the accident: [48].

Were Driving Adjustments Made?

In assessing the presence of any driving adjustments made by the defendant in response to the conditions and situation she faced, the judge concluded that the defendant had made *'no or no material adjustment'* to her driving on this basis: [51]. He further concluded that she was principally guided by two factors: the maximum speed limit, within which she travelled; and her own safety. He further emphasised at [52]:

> *This case is a paradigm example of why it is so essential to be prudent and vigilant when children are or are likely to be in the vicinity of vehicles moving at speed. Further, I cannot accept defendant counsel's submission that the "mere presence" of children is not the hazard, but what they are "up to", and whether they are in "high spirits", and that they are unlikely to be so on a Monday morning.*

The judge robustly rejected the defendant's submission that the presence of children was of itself not enough to require an adjustment to speed. The presence of children in the immediate vicinity of the road was *'certainly'* capable of requiring such an adjustment: [54].

Reasonable Speed

The judge next turned to the issue of the reasonable speed at which the defendant should have travelled. The judge took as his starting-point Rule 125 of the Highway Code, which provides:

> *The speed limit is the **absolute maximum** and does not mean it is safe to drive at that speed irrespective of conditions. Driving at speeds too fast for the road and traffic conditions is dangerous. You should always reduce your speed when the road layout or condition presents hazards, such as bends sharing the road with pedestrians, cyclists and horse riders, particularly children, and motorcyclists.*

The judge expressly rejected the defendant's submission that *'the only obligation for a reasonable driver is to drive below the speed limit and to have a very heightened sense of alertness'*: [71]. Rather, Rule 125 made clear that the designated speed limit of 30 mph was the *'absolute maximum'* and should be subject to reduction in appropriate circumstances.

Taking into account the low light levels, the presence of the claimant at the crossing, the poor weather conditions (including 'standing water' on the road), the two nearby bus stops, and the fact children could be expected to be in the vicinity of a 'substantially residential' area, the judge determined that the reasonable speed would have been approximately 20 mph (from 19 to 21 mph): [74]. On this basis, the defendant was driving *'significantly in excess of the reasonable speed by a factor of 1/3 to 1/2'*, such that her speed was excessive, unreasonable and unsafe: [76]. The defendant's failure to realise the presence of the claimant was indicative of the insufficient attention she was paying and her driving contained *'an element of autopilot'*: [78].

Causation

The judge then turned to the issue of causation, concluding that, had the defendant been driving at 20 mph, the accident was unlikely to have occurred. Based on his own calculations, if the defendant had been travelling at 20 mph, her vehicle would have been 7 metres further away from the claimant when she stepped into the road, in addition to the 5 metres' separation which actually occurred. The claimant would, on balance, have been able to traverse the carriageway because she was running and would therefore have 'comfortably covered' most if not all of the carriageway. Instead of 'freezing' because of the car's close proximity, the judge concluded she would likely have kept running in the understanding that she could make it across safely.

Contributory Negligence

Having determined that causation was established, the judge concluded that, using a broad and common-sense approach, a reduction of 40% was appropriate to reflect the claimant's decision to enter the carriageway when it was unsafe to do so. Whilst, consistent with *Lunt v Khelifa* [2002] EWCA Civ 80, he took into account the '*high burden'* placed on drivers to ensure other road users' safety, the claimant's contention that the reduction should not exceed 33% was judged unrealistic.

Conclusion

FLR is inevitably a case which turns closely on its facts. As the judge himself notes at [14], little assistance can be derived from 'previous decisions on the facts in previous trials of road traffic collisions' because they are *'intensely fact-specific decisions'*: as Lord Hamblen emphasised in *HA (Iraq) v Secretary of State for the Home Department* at [96], '*[t]here is no such thing as a "factual precedent"'*. No doubt alternative conclusions were open to the judge as to the reasonable speed of travel, given the factors he identified, and alternative conclusions on the key issues can readily be imagined.

Nevertheless, the case provides an important illustration of the circumstances in which a motorist driving well within a 30 mph maximum speed limit may, solely by reason of speed and inattention, be judged in breach of duty to a pedestrian. It forms a sharp reminder that, where significant factors requiring adjustments to driving are present, the assumption that a duty of care has been discharged merely by travelling within the maximum speed limit may be misplaced. Where such overlapping factors are present alongside a child or other vulnerable person in close proximity to the carriageway, a very substantial reduction to speed may be required even in the absence of any clear indication that they represent an imminent hazard.

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Must i really check again? Second looks and accident reconstruction evidence *Taylor and anor v Raspin* [2022] EWCA Civ 1613

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In *Taylor and anor v Raspin* [2022] EWCA Civ 1613, the first defendant and her insurer appealed against a finding that she was liable by reason of her failure to look leftwards for a second time when turning right out of a minor road. Rejecting the appeal, the Court of Appeal confirmed that such a duty will arise in appropriate cases and offered guidance on the role of expert liability evidence where lay evidence is both clear and consistent.

Facts and Evidence

The claimant was riding his motorcycle along Ackworth Road in Pontefract. As he approached the junction with Hardwick Court, a minor road on his right, the defendant's car emerged from the minor road and turned right into Ackworth Road. The defendant's car subsequently collided with the claimant's motorcycle. Whilst the car was fully within the carriageway where the motorcycle was turning, it was at an angle and had not completed its turn at the point of collision; the motorcycle collided with the front nearside of the car around the area of the passenger door.

The defendant's evidence was that she had omitted to look left a second time when exiting Hardwick Court; that, at the time she pulled out, the claimant had not been visible; and that she had been shocked to hear the thud of the collision. Whilst the defendant averred that no traffic had been visible to the right when she emerged, this was contradicted by the evidence of two independent witnesses who had been approaching the junction from that direction. The consensus of both accident reconstruction experts was that a person in the defendant's position could see around 80 metres (or slightly less) to the left; and that the view to the left was a little further.

The Decision at First Instance

Following a liability-only trial, Upper Tribunal Judge Ward, sitting as a High Court judge, found that the collision had been caused by the defendant's negligence (subject to a 45% reduction to reflect the claimant's negligence in approaching the junction at excessive speed). Concluding that the defendant had looked right, left and right again before emerging from Hardwick Court, the judge determined that the failure to look left a second time had amounted to a breach of duty and had been causative of the accident.

Whilst the judge accepted that the reasonable driver turning right from a minor road would not necessarily be obliged to look right for a second time when emerging, on the facts in this case such a duty would arise taking into account the restricted leftwards visibility available to the defendant. Emerging onto a road with fast-moving traffic may require a 'second look' to ensure that the gap perceived as adequate on the 'first look' remained so.

Grounds of Appeal

The defendant appealed against the judge's decision on two core grounds. Firstly, she argued that the judge was wrong to conclude that she had a duty to look left for a second time as she emerged from the minor road. The defendant argued that the requirement for a 'second look' in effect elevated an action which *might* have been taken into a duty; that the junction was not unusual; and that the approach of a motorcycle at speed had not been reasonably foreseeable.

Secondly, the defendant argued that the judge had erred in concluding that the omission, if it were negligent, had been causative of the collision. In relation to this ground, the defendant argued that the judge had not considered where the defendant was on the road when the claimant first came into view, such that the 'starting point' for causation was not established. In addition, there was no finding by the judge about the length of time a reasonable driver would need to realise braking was required. Moreover, the judge had not said where the defendant's car would have ended up if she had taken appropriate steps on seeing the motorcycle/ claimant. The claimant did not cross-appeal in relation to the finding of contributory negligence or the amount of the reduction.

The Court of Appeal's Decision

The court had no difficulty in rejecting the first ground of appeal. The judge's findings did no more than to reflect the duty of the defendant *'not to drive onto the carriageway along which the motorcycle was travelling and into the path of the motorcycle'*: [25]. The requirement to take a second look was not excessive given the limited visibility facing the defendant and the fact that she had exited the junction slowly. The situation was to be contrasted with that in which there was a *'lengthy and uninterrupted view to the driver's left'*: [24]. Nor did the judge purport to impose a *'general duty'* to look left twice in all circumstances: [27].

As to causation, the judge's conclusions on the issue were not vitiated by the failure to make precise findings as to the matters raised by the defendant. The only sensible interpretation of the overall evidence was that, at the time at which the motorcycle came into view, the defendant's car had yet to move into the carriageway. Whilst there was insufficient evidence on which the judge could reach a specific conclusion as to the reaction time of the defendant, the evidence was sufficient to allow him to conclude that the defendant had enough time to avoid encroaching *materially* on the carriageway. The Court of Appeal also felt that it was clear from the first-instance judgment that, had the defendant taken appropriate action, the car would have stopped such that it did not materially encroach on the carriageway. The appeal was therefore dismissed.

Relevance of the Decision

The judgment provides helpful (if broad) guidance on two key issues that practitioners are likely to encounter with regularity: firstly, the nature of the obligations on a motorist turning out from a minor road in which visibility is restricted; and, secondly, the role of expert accident reconstruction evidence in which there is extensive evidence of fact going to the key issues.

Duties of Driver of Emerging Vehicle

As to the former, the case usefully illustrates how the duty of a motorist emerging from a minor road should be fulfilled in circumstances of restricted visibility. *Taylor* suggests that, where (i) leftwards visibility when emerging from a junction is limited and (ii) a regular flow of traffic can be anticipated on the major road, such a duty is likely to encompass an obligation to check for a second time that it is safe to proceed before emerging. Whilst all such cases are inevitably fact-specific, *Taylor* suggests that any argument to the effect that requiring a *'second look'* imposes too onerous a duty is unlikely to find favour in such circumstances. This is especially so where there is no evidence of a *'split-second decision'* or a driver *'dealing with the agony of the moment'*: see [30]. Moreover, although there is no duty to *'keep the major road clear'* (as William Davis LJ put it at [25]), the driver must also consider the risk of another road user speeding on the major road.

Expert Accident Reconstruction Evidence

As to the significance of expert evidence, *Taylor's* brief obiter coda provides a helpful steer on the limits of expert evidence where there is consistent lay evidence which addresses the key issues relating to liability. Citing the dicta of Coulson J (as he then was) from *Stewart v Glaze* [2009] EWHC 704 (QB) at [10], the Court of Appeal endorses the following observations:

'it is the primary factual evidence which is of the greatest importance in a case of this kind. The expert evidence comprises a useful way in which that factual evidence, and the inferences to be drawn from it, can be tested. It is, however, very important to ensure that the expert evidence is not elevated into a fixed framework or formula, against which the defendant's actions are then to be rigidly judged with a mathematical precision'.

> The court's remarks on expert evidence in Taylor support and reinforce the existing body of judicial guidance on the limited scope of accident reconstruction evidence and the dangers inherent in overreliance upon it. In *Ellis v Kelly* [2018] EWHC 2031 (QB), Yip J noted at [22] that *'[t]here is always a danger of elevating accident reconstruction evidence to something more than it is'.* Observing that *'the expert evidence is but one piece of the evidential jigsaw',* she emphasised that such evidence 'must always be cross-referenced with the other evidence and the court must reach its own findings on the balance of probabilities taking everything into account'.

In *Liddell v Middleton* [1996] PIQR P36, a case in which accident reconstruction evidence was judged unnecessary and superfluous, Stewart Smith LJ emphasised that '*the function of the expert is to furnish the judge with the necessary scientific criteria and assistance based upon his special skill and experience not possessed by ordinary laymen to enable the judge to interpret the factual evidence of the marks on the road, the damage or whatever it may be'*; it is not to usurp the function of either judge or lay witness. *Taylor* serves as a useful reminder that these principles remain essential in assessing the evidential landscape where there is significant agreement between lay witnesses on crucial issues.

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