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TGC Personal Injury

The Newsletter of the TGC Personal Injury Team

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A NOTE FROM THE EDITORS

Editor: **James Arney KC**
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Welcome to the third edition of the Temple Garden Chambers Personal Injury Newsletter. 23 barristers from Temple Garden Chambers provide expert analysis of a wide range of cases. We are excited to bring you articles covering everything from sports injuries to Spanish penalty interest, and from lying claimants to liability disputes.

Updates from the TGC PI team

Temple Garden Chambers has long been regarded as one of the pre-eminent personal injury sets at the Bar. The depth of talent at TGC welcomes a wide range of personal injury work at junior, senior and silk level. We have a reputation for excellence and are instructed evenly by Claimants and Defendants. Members of chambers frequently act for insurers, government bodies and companies, as well as accident victims and union members. TGC members also participate in several prestigious insurance panels, including those for the MIB, and in government civil panels.

Members of Temple Garden Chambers remain at the forefront of developments in personal injury law. We are looking forward to the upcoming publication of the Supplement to the 16th Edition of Bingham's Personal Injury and Motor Claims Cases, where members of the TGC PI team discuss updates in road traffic collision litigation, spanning all aspects of procedure, liability, quantum, costs and insurance.

Temple Garden Chambers also enjoyed hosting the Faster, Fairer, Friendlier: Collaborative Litigation in Personal Injury Conference in October 2024. As a Set with experience on both sides of the divide, we were able to provide insight into how collaboration can help to resolve even the most difficult of claims. Just as importantly, this conference provided an opportunity to socialise with colleagues, clients and – whisper it – even opponents. We look forward to welcoming you all to future events.

The past year has seen a major overhaul to the Civil Procedure Rules, including the introduction of the Intermediate Track. The impact of these reforms is only starting to filter through to personal injury litigation, but we anticipate many more procedural skirmishes in the year ahead. Whilst this might be a theme for the future, we have been kept busy in the past year with a raft of decisions covering the full range of personal injury practice. We have had no shortage of interesting and significant cases to discuss in this latest edition.

Practitioner Resources

We begin with five decisions relating to anonymity orders; illegality; expert evidence; Spanish penalty interest; and requiring Claimants to undergo testing. These articles will provide a 'cut out and keep guide' for litigators encountering these issues in practice.

- I, **James Arney KC**, discuss the effect of Nicklin J's decision in *PMC v A Local Health Board* [2024] EWHC 2969 on applications for anonymity orders. I also consider the Court of Appeal's interim guidance provided to assist practitioners until the Supreme Court appeal is heard. The original Court of Appeal hearing was adjourned to await the Supreme Court decision in *Abbasi v Newcastle Upon Tyne NHS Trust* (which was handed down in April 2025 and reported as [2025] UKSC 15). I provide an *overview* of the *Abbasi* decision and provide my thoughts on what it could mean for the future of anonymity orders.

- **Paul McGrath** provides a useful overview of the main authorities on illegality, including *Gray v Thames Trains Ltd* [2009] UKHL 33 and *Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43. His article focuses on the Court of Appeal decision in *Lewis-Ranwell v G4S Health Services* [2024] EWCA Civ 138, where the Claimant successfully argued that these two cases should be distinguished. His case now heads for the Supreme Court.

- In the first of the two decisions involving criticism of medico-legal experts, **Lionel Stride** provides an overview of the decision in *Wilson v The Ministry of Justice* [2024] EWHC 2389. The claim arose from a prison stabbing which left the claimant with a spinal cord injury. The judgment is notable for its cutting criticism of the defendant's Spinal Rehabilitation Expert.

- The second article in this series is written by **Lindsay McNeil** (paralegal to Lionel Stride), who discusses *Samrai v Kalia* [2024] EWHC 3143 (KB). *Samrai* concerned allegations of abuse against a Hindu priest. It is a treasure trove of cautionary tales for practitioners, in relation to witness management, instructing partisan experts and unreliable witness evidence that didn't quite cross the threshold of fundamental dishonesty.

- Covering cross-jurisdictional developments, **Lionel Stride** discusses *Nicholls and another v Mapfre España Cia de Seguros y Reaseguros SA* [2024] EWCA Civ 718. This decision settled long-standing debate by holding that the Spanish penalty interest is a matter of substantive law. Accordingly, it will apply when English courts are quantifying damages in cases where Spanish law applies.

- **Polina Sokolovska** (paralegal to James Arney KC) rounds up this section discussing *Clarke v Poole & Ors* [2024] EWHC 1509 (KB) and its permission to appeal hearing. This case concerned whether claimants can be compelled to undergo medical tests when a defendant argues the claimant's pre-existing condition would have evolved similarly irrespective of the defendant's negligence.

Fundamental Dishonesty

The courts continue to grapple with issues around fundamental dishonesty. Recent decisions cover everything from costs arguments where dishonesty allegations fail, to admissions of dishonesty in without prejudice correspondence.

- **James Henry** reflects on the lessons we can take away from *Williams-Henry v Associated British Ports Holdings Ltd* [2024] EWHC 806 (KB). The court found a brain-injured Claimant fundamentally dishonest and provided guidance on the meaning of "substantive injustice".

- **Edward Hutchin** considers the Court of Appeal decision in *Thakkar v Mican & AXA* [2024] EWCA Civ 552. The court did not accept that there is a presumption in favour of defendants paying claimants' costs on an indemnity basis when fundamental dishonesty allegations fail. However, there was a warning for defendants whose allegations amount to a 'storm in a teacup'.

- *Mehmood v Mayor* [2024] EWHC 1057 (KB) is discussed by **Robert Riddell**. The claimant made an application for an interim payment in a claim where the defendant alleged fundamental dishonesty. The court held that an interim payment could not be awarded because, by making an allegation of fundamental dishonesty, the defendant denied liability to pay damages.

- The fundamental dishonesty section is rounded up by **James Laughland's** article about *Morris v Williams* [2025] EWHC 218 (KB). This was an astonishing case where the claimant was left with egg on his face after admitting fundamental dishonesty in "without prejudice" correspondence. The court admitted this correspondence because it came within the "unambiguous impropriety" exception to the without prejudice rule.

Public Liability

Two decisions from the Supreme Court and one from the Court of Appeal. These articles will be invaluable for those practising in this area.

- **Paul Erdunast** tells readers what they need to know about assumption of responsibility in the context of public authorities' duties following *HXA v Surrey County Council* [2023] UKSC 52. The Supreme Court applied the principles in *N v Poole BC* [2019] UKSC 25 to find that a local authority was not liable to the claimants for the abuse they suffered at the hands of their families.

- **Ben Casey** then discusses *Tindall v Chief Constable of Thames Valley* [2024] UKSC 33, a significant Supreme Court authority on the liability of the police for omissions and where the line is drawn between acts and omissions. The Court applied the "interference principle" to hold that parties can only be held liable if they "made matters worse". This could include acting in a way that was foreseeably likely to have the effect of putting off or preventing someone else from taking steps to protect the claimant from harm.

- The last public liability update is provided by **Anthony Lenanton**, covering the decision in *Chief Constable of Northamptonshire v Woodcock* [2025] EWCA Civ 13. This decision followed hot on the heels of *Tindall.* The Court of Appeal applied the Supreme Court's guidance to decide that the police were not liable for failing to warn the Claimant of reports that her partner, with a history of assaults, harassment and threats to life, was loitering outside her house.

Liability Updates

A number of interesting road traffic collision cases are discussed in this section, involving fatal accidents, pedestrians, motorcycles, lorries and highway authorities. We follow this up with another case where video evidence saw a defendant found liable for actions on the rugby field.

- **Anthony Johnson** provides an overview of two recent child pedestrian cases - *Atkinson v Kennedy* [2024] *EWHC* (KB) and *Gadsby v Hayes* [2024] EWHC 2142 (KB). In Atkinson, a 7-year-old attempted to cross the road close to the mouth of a junction when she collided with an HGV. In Gadsby, a 12-year-old was on a pedestrian crossing when she was hit by a car. Both claims were dismissed, with the courts making interesting observations about lay witness and accident reconstruction evidence.

- **Andrew Ratomski** considers *Palmer v Timms* [2024] EWHC 2292, a fatal accident claim arising out of a road traffic collision. The deceased motorcyclist was attempting to undertake a lorry when it suddenly swerved into his path. The lorry had been moving out of the way of another motorcyclist overtaking it on the other side. Liability was apportioned one-third – two-thirds in the Claimant's favour.

- **Emma-Jane Hobbs** discusses *Miah (acting by his Litigation Friend) v J & Aviva Insurance Limited* [2024] EWHC 92 (KB). A car travelling at night on an unlit rural road hit a pedestrian who had just alighted from a bus and proceeded to cross the road. The claim was dismissed because failing to recognise the presence of the bus or the claimant at night was not unreasonable.

- **Alex Glassbrook** discusses *Dormer v Wilson and Others* [2025] EWHC 523 (KB), an interesting case concerning illegality. A15-year-old Claimant was riding a motorcycle with his 16-year-old uncle when they were involved in an accident. The motorcycle had apparently been stolen a few days earlier. The court dismissed the ex turpi causa allegation, instead remedying any wrongdoing with a contributory negligence deduction of 20%.

- **Rochelle Powell** discusses the evidential lessons to take away from **Robertson v Cornwall Council** [2024] EWHC 2830 (KB). The Claimant had failed to establish that a raised kerb on a cycleway amounted to a hazard or trap.

- Finally, I, **James Yapp**, discuss a recent decision in sports injury litigation, *Elbanna v Clark* [2024] EWHC 627 (KB). After analysing video footage and contemporaneous comments from teammates caught in the footage, Sweeting J found that the Defendant was reckless in running directly at the Claimant and colliding with him. A recent appeal to the Court of Appeal confirmed that a finding of 'recklessness' encompassed the necessary finding of negligence.

Quantum Updates

The last section of the newsletter is dedicated to recent quantum decisions, concerning interim payments, loss of earnings and how to value 'mixed injuries' under the whiplash tariff.

- **Marcus Grant** provides an overview of two recent decisions on interim payment applications - *XS1 (A Child) v West Hertfordshire Hospitals NHS Trust* [2024] EWHC 1865 (KB) and *Lexi-Rae Speirs v St Georges University Hospitals NHS Foundation Trust* [2025] EWHC 337 (KB). Both cases remind us that it is important to provide comprehensive evidence in support of interim payment applications. The decision in *Lexi-Rae* also gives guidance on the application of *Eeles* 2 in cases where substantial contributory negligence deductions are made.

- **Richard Wilkinson** considers the recent decision in *Amadu-Abdullah v Met Police* [2024] EWHC 3162, where the court was limited to the one year Smith v Manchester award that had been pleaded by the claimant. Richard considers how the claimant might have pleaded his loss of future earnings claim on a multiplier/multiplicand basis.

- The last article of the newsletter is written by **Andrew Ratomski**, discussing the 'mixed injury' decision of the Supreme Court in *Rabot v Hassam* [2024] UKSC 11.

We hope readers will find this third edition of the Personal Injury Newsletter interesting and/or insightful. We look forward to sharing further updates with you in the future.

The Court of Appeal Interim Guidance in *PMC v A Local Health Board* [2025] EWCA Civ 176 and the Future of Anonymity Orders

By James Arney KC
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*PMC v A Local Health Board [*2024] EWHC 2969 (KB) concerned a failed application for an anonymity order made by a child Claimant who had already featured in articles and news reports and issued proceedings in his name a number of months prior to the application. The High Court decision was seen by many as controversial and contrary to the established legal principles. The Court of Appeal had adjourned the appeal in order to await judgment in *Abbasi v Newcastle Upon Tyne NHS Trust & Others* [2025] UKSC 15 but provided helpful interim guidance on anonymity orders. As the Abbasi judgment was published in April 2025, this article considers its relevant aspects and provides some thoughts on the future of anonymity orders.

High Court Decision

The High Court decision of *Nicklin J in PMC v A Local Health Board* [2024] EWHC 2969 (KB) was covered in detail by Lindsay McNeil in the Temple Garden Chambers Clinical Negligence Newsletter at pages 42-44. By way of a brief summary:

i. Nicklin J dismissed the application for an anonymity order made by a child Claimant with cerebral palsy in a clinical negligence matter because the Claimant had featured in articles and news reports previously, proceedings were issued in his name a number of months ago and had been available to view on Westlaw;

ii. Nicklin J held that the default position is open justice and that the names of the parties to the proceedings will be made public, unless the applicant provides clear and cogent evidence in support of granting an anonymity order. The court was unsatisfied that the Claimant had demonstrated why an anonymity order would be necessary, recognising that he lacks capacity but highlighting that the Claimant's affairs and property were managed by a professional deputy. Anonymising the Claimant at that stage would, therefore, be pointless and a disproportionate interference with the Article 10 rights of the media;

iii. The court distinguished *JX MX v Dartford and Gravesham NHS Trust* [2015] EWCA Civ 96 because it does not assist with the issue of pre-existing publicity and because the question of jurisdiction for

making an anonymity order was not considered, JX MX arising out of an approval hearing under CPR 21.10 [125];

iv. The court highlighted that *Khuja v Times Newspapers Ltd* [2019] AC 161 signifies that there must be a statutory basis for granting reporting restrictions that form part of an anonymity order and that neither CPR 39.2(4) nor section 6 of the Human Rights Act 1998 conferred such basis for granting anonymity orders. Nicklin J further concluded that s37 Senior Courts Act 1981 is limited in scope and that the Claimant did not fall within "one of the exceptional circumstances" when this provision would apply [125];

v. Nicklin J made obiter comments, doubting whether JX MX complies with the principle of open justice being the default position.

This decision caused an upheaval in the world of personal injury and clinical negligence, with both practitioners and courts being uncertain whether JX MX is still applicable or how anonymity order applications should be approached. An urgent appeal was made to the Court of Appeal, who decided to adjourn on 25 February 2025 in order to await the Supreme Court decision in *Abbasi v Newcastle Upon Tyne NHS Trust & Others* [2025] UKSC 15 but upon the encouragement of the interveners, gave an interim judgment with guidance on how anonymity order hearing should be approached in the meantime.

This article seeks to discuss the aftermaths of the High Court decision, the interim guidance given by the Court of Appeal and the future of anonymity orders in light of the Supreme Court's judgment in Abbasi handed down on 16 April 2025.

Post-High Court Decision

The confusion that ensued following Nicklin J's decision was threefold.

Firstly, it was no longer clear if *JX MX* is still binding authority in relation to approval hearings, particularly in light of Nicklin J's comments about *JX MX's* ostensible inconsistency with the principle of open justice and apparent limited scope, being an application under CPR 21.10 [123]. Anecdotal reports from the PI Bar suggest that many first instance judges were open to distinguishing or otherwise avoiding the consequences of PMC and/or were inclined to maintain the previous approach consistent with JX MX.

Secondly, Nicklin J's comments in relation to the jurisdiction for making anonymity orders have cast doubt on the basis for such orders, as many applicants previously relied on CPR 39.2, section 6 of the Human Rights Act and/or section 37 of the Senior Courts Act. This issue isn't discussed in detail in the reports, and that may be because unlike Nicklin J, with his background in media law, not many first instance judges wished to go down the rabbit hole of reporting restrictions. There is report, however, in February 2025, of Her Honour Judge Wall (sitting as a Deputy High Court Judge) making an anonymity order on the basis of section 37 of the Senior Courts Act – given that this door was left open by Nicklin J in his judgment in PMC.

Finally, there was confusion as to whether applicants for anonymity orders should continue using the PF10 form created by PIBA and accessed by applicants on Court Serve. Nicklin J gave a twelve-paragraph-long critique of this form, starting from its ostensibly erroneous reliance on CPR 39.2(3) and section 6 of the Human Rights Act, and extending to a line-by-line analysis of the language used [148-159].

This was supplemented by a Civil Procedure News issue 1/2025 (dated 14 January 2025) published by the White Book, which said the following: "*Given the errors noted in the draft order [PF10], urgent consideration of its terms and their revision by the [Civil Procedure Rules Committee] would seem to be justified. Practitioners should take care to note the guidance given in the judgment [of Nicklin J] and approach the draft order accordingly".*

Although Nicklin J suggested that applicants use examples of withholding orders and reporting restrictions contained in the Administrative Court Guide 2024 [156], the author was unable to find any instance of reliance on these templates for anonymity orders. A number of anonymity orders have been published on the HMTCS website since the PMC decision, with many continue to refer to CPR 39.2, section 6 of the Human Rights Act and/or s37 of the Senior Courts Act[i].

The Personal Injury Bar Association intervened in the appeal in and highlighted the above uncertainties plaguing personal injury litigation during the short hearing on 25 February 2025. As a result, the Court of Appeal agreed to issue a written judgment aimed at providing interim guidance for personal injury practitioners until the Court of Appeal is in the position to give judgment on the appeal.

Court of Appeal Interim Judgment [2025] EWCA Civ 176

i. The appeal was adjourned until the next available date after the Supreme Court hands down judgment in Abbasi, as it is anticipated that this decision would be relevant to the questions of:
   a. Jurisdiction for making anonymity orders; and
   b. The nature of evidence required for the balancing exercise between open justice and Article 8 right to private and family life under *In Re S* [2004] UKHL 47; [2005] 1 AC 593 ("*In Re S*").

ii. Practitioners and judges are best to continue using form PF10 for the time being; and

ii. First instance judges remain bound by the decision in JX MX.

The Future of Anonymity Orders

Abbasi

The Supreme Court handed down judgment in Abbasi on 16 April 2025. This appeal concerned Reporting Restriction Orders (RROs) made in respect of the names of doctors involved in proceedings to withdraw life-sustaining treatment of a number of gravely ill children. These orders were previously granted by the family courts in the course of the end-of-life proceedings on account of the Trusts' concerns that disclosing the names of clinicians would lead to those professionals receiving abuse from the public and would adversely affect the medical care provided to the children. After the children passed away, their parents had applied for these restrictions to be released so that they would be free to tell their stories to the media.

Held:
The Supreme Court dismissed the appeals and discharged the RROs. The Court examined the jurisdiction under which the original orders could have been made and under which they can be continued and decided that because the only basis for continuing the injunctions are the rights of the clinicians, they should have been the applicants. The generic evidence before the court also failed to demonstrate a specific risk of harm caused by naming the clinicians.

Of note, the Supreme Court made the following comments on:

1) Jurisdiction for an injunction
   i. The Supreme Court confirmed that although section 37(1) of the Senior Courts Act does provide an inherent and "theoretically unlimited equitable power" to grant injunction, this must be exercised in accordance with recognised principles and any other restrictions established by precedent and rules of court [83].

ii. Section 6(1) of the Human Rights Act should only be utilised by the courts to protect compliance with a Convention right if there is no other domestic cause of action available to the applicant.

> *"The court's inherent equitable jurisdiction is in principle sufficiently wide to enable it to grant an injunction when its failure to do so would be incompatible with Convention rights… However, domestic causes of action are the means by which compliance with Convention rights, including those protected by article 8, is normally secured. The function of the Convention is generally to set a boundary which domestic law cannot go beyond without contravening international obligations… the European court allows a margin of appreciation to national authorities. Our domestic law is determinative of rights and obligations within that margin of appreciation." [86-87]*

Citing paragraph 132 of the judgment in *Campbell v MGN Ltd* [2004] UKHL 22,

> *"The 1998 Act does not create any new cause of action between private persons. But if there is a relevant cause of action applicable, the court as a public authority must act compatibly with both parties' Convention rights."*

iii. The Court explained that the reasoning in In re S behind the court's jurisdiction under section 6 of the Human Rights Act "was highly unusual" and "reflected the absence from English law, at that time, of any general cause of action for the invasion of privacy" [93].

iv. Currently, domestic law provides the Claimants three relevant causes of actions – a claim in tort based on breach of confidence (which didn't exist when the decision in In re S was passed), parens patriae powers and the power to award injunctions under Broadmoor. A right to privacy tort was said by the Court to originate from *Campbell v MGN Ltd* and to be capable of providing basis for an injunction [79-80]. The Court also highlighted that the High Court also has an inherent parens patriae, performing the Crown's residual function of "protecting those who stand in need of protection", which activated once Trusts applied to withdraw life-sustaining treatment [38-41][95]. Finally, a Broadmoor injunction is available to a public body in order to prevent interference with its public responsibilities [67-78][96].

2) Evidence required when considering the In Re S balancing exercise

i. The Supreme Court stated that where it becomes clear to a Trust that proceedings have become necessary and there is a risk of publicity, it is acceptable for the Trust to make an application relying upon generic evidence as "the risk lies entirely in the future" and the nature of such proceedings is urgent [138-9, 148]. Any injunction issued at that point should expire either at the end of the proceedings or at the end of a cooling-off period thereafter [142].

ii. Upon the conclusion of any cooling-off period, the clinicians can in their own name apply to continue the injunction, at which point they should adduce evidence "specific to them which establishes why a relaxation of their anonymity should cause a disproportionate invasion of their rights to privacy" [146-149, 155]. The Court's reasoning stems from European court case law, which "firmly established" "the need for any restrictions [of freedom of expression] [to] be established convincingly" [159-160]. The Supreme Court proceeded to cite a number of European cases on this point, including Axel Springer AG v Germany (2012) 55 EHRR 6.

iii. The Court was critical that the only evidence provided was that of harassment of hospital staff in other cases, such as the "uncontrolled furore" which followed the cases of Charlie Gard and Alfie Evans, stating that reliance on generic evidence was understandable at the outset of proceedings but "less so after a number of years had passed" [155].

Where does this take us?

Jurisdiction

The Supreme Court's comments in *Abbasi* in relation to the application of section 6 of the Human Rights Act and section 37 of the Senior Courts Act support Nicklin J's decision in PMC that neither could form jurisdictional basis for a reporting restriction. They also contravene the Court of Appeal's obiter comments earlier this year in *Tickle v BBC* [2025] EWCA Civ 42 that if there was a jurisdictional basis upon which the trial judge could have made an order anonymising the names of judges involved in Sara Sharif's care proceedings, then it would have been under section 6 of the Human Rights Act.[2] In light of Supreme Court's decision in *Abbasi*, unless the Appellants in *PMC* successfully establish that there is no alternative domestic cause of action available, the Court of Appeal will likely be required to find that section 6 does not provide the jurisdictional basis for anonymity orders.

Evidence required

The Supreme Court in *Abbasi* was unequivocal that evidence in support of requesting a reporting restriction must relate to risks specific to the applicant, as opposed to generic risk. This is contrary to the principle arising out of *JX MX* that it is unnecessary for a court to "identify specific risks in order to establish a need for protection" [31]. This contradiction would need to be reconciled by the Court of Appeal by either distinguishing *Abbasi* on the facts or by overturning *JX MX* (an outcome that Nicklin J would seemingly welcome).

What is certain is that the approach to anonymity orders will be changing and I would strongly recommend that personal injury practitioners read the Court of Appeal decision in *PMC* once it is published.

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1. *Albeit in the Court of Appeal February hearing in PMC, Sir Geoffrey Vos did state respond to Counsel for the Claimant bringing up this aspect of the judgment in Tickle that those comments were obiter and the facts were different, including that the question of jurisdiction was not central in Tickle.*

Illegality and *Lewis-Ranwell v G4S Health Services (UK) Ltd and Others* [2024] EWCA Civ 138: A new turn in the well-worn road?

By Paul McGrath
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Lewis-Ranwell v G4S Health Services (UK) Ltd and Others [2024] EWCA Civ 138 is the most recent decision in a line of authorities relating to the illegality defence. In *Gray v Thames Trains Ltd* [2009] *UKHL 33 and Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43, both Claimants who had committed manslaughter failed in their claims in tort for damages arising from the crime. *Mr Lewis-Ranwell* successfully persuaded the Court of Appeal that these two cases should be distinguished as he was acquitted of manslaughter by reason of insanity but his case now heads for the Supreme Court.

Ex Turpi Causa

As Lord Sumption said in L*es Laboratoires Servier v Apotex* [2014] UKSC 55; [2015] AC 430 at paragraph 25:

> *'The ex turpi causa principle is concerned with claims founded on acts which are contrary to the public law of the state and engage the public interest. The paradigm case is, as I have said, a criminal act. In addition, it is concerned with a limited category of acts which, while not necessarily criminal, can conveniently be described as "quasi-criminal" because they engage the public interest in the same way … this additional category of non-criminal acts giving rise to the defence includes cases of dishonesty or corruption, which have always been regarded as engaging the public interest even in the context of purely civil disputes…'*

Patel v Mirza

The most recent, and perhaps most significant, case in the area is *Patel v Mirza [*2016] UKSC 42; [2017] AC 467. The brief facts are that the Claimant had transferred funds to the Defendant with a view to the Defendant using them for insider trading. The Defendant did not, in fact, do so. The Claimant sought the return of the funds under the principles of unjust enrichment and the Defendant argued that the claim was barred by illegality. The Supreme Court reasoned that there were two discernible policy reasons for the common law doctrine or illegality as a defence to a civil claim: **the first** is that a person should not be allowed to profit from his own wrongdoing and **the second** is that the law should be coherent and not self-defeating, condoning illegality by giving with the left hand what it takes with the right hand. The Court further stated that public interest test would require

consideration of the underlying purpose of any prohibition that has been transgressed, along with any other relevant public policies that might be rendered less effective by denying the claim and also keeping in mind that any result ought to be a proportionate response to the illegality.

Gray v Thames Trains

Perhaps the most stark example of preserving coherence in the law and avoiding the law becoming self-defeating is offered by the cases concerning criminal acts. In *Gray v Thames Trains Ltd* [2009] UKHL 33; [2009] 1 WC 1339, Lord Hoffmann said, at paragraph 32, the following:

> *'The particular rule for which the appellants contend may, as I said, be stated in a wider or a narrow form. The wider and simpler version is that which was applied by Flaux J: you cannot recover for damage which is the consequence of your own criminal act. In its narrower form, it is that you cannot recover for damage which is the consequence of a sentence imposed upon you for a criminal act. I make this distinction between the wider and narrower version of the rule because there is a particular justification for the narrower rule which does not necessarily apply to the wider version.'*

The result in *Gray* was that the Claimant, who had committed manslaughter as a result of psychological problems caused by the negligence of a Defendant, was precluded from recovering compensation from that Defendant in respect of general damages and loss of earnings consequential upon the crime and the sentence imposed.

Henderson v Dorset Healthcare

This approach was endorsed by the Supreme Court in *Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43; [2020] 3 WLR 1124, rejecting that Patel v Mirza had somehow cleared the slate of usual precedent in the area. Henderson was a case where a Claimant, suffering from schizophrenia, had killed her mother and been convicted of manslaughter (on the grounds of diminished responsibility) and detained by way of a hospital order. She claimed damages from the NHS Trust in relation to losses arising from her loss of liberty and also for her share of the inheritance. The Claimant argued that *Gray* could be distinguished from Henderson because in *Gray* the Claimant could be said to be criminally culpable, whereas in Henderson she was not as culpable.

The Supreme Court considered the relevance of the personal responsibility for the illegality and said as follows:

> *"83. Although there does not appear to have been any specific finding by the trial judge in Gray as to the degree of his responsibility, I am prepared to assume that he was regarded as bearing a significant degree of responsibility. The difficulty for the appellant, however, is that the degree of responsibility involved forms no part of the reasoning of the majority. The crucial consideration for the majority was the fact that the claimant had been found to be criminally responsible, not the degree of personal responsibility which that reflected.*
>
> *84. At para 41 of his judgment Lord Hoffmann rejected the argument that the narrower rule does not apply in cases where the claimant's conduct "had not been as blameworthy as all that". At para 51 he explained that "the sentence of the court is plainly a consequence of the criminality for which the claimant was responsible ". In the same paragraph, he explained the wider rule as being justified on the grounds that a claimant should not be compensated "for the consequences of his own criminal conduct " (emphasis added).*
>
> *85. At para 69 Lord Rodger endorsed the narrow rule, explaining that "a civil court will not award damages to compensate a claimant for an injury or disadvantage which the criminal courts of the same jurisdiction have imposed on him by way of punishment for a criminal act for which he was responsible ". At para 85 he endorsed the wider rule on the basis that "a person is not entitled to be indemnified for the consequences of his criminal acts for which he has been found criminally responsible " (emphasis added).*
>
> *86. In my judgment Gray cannot be distinguished. It involved the same offence, the same sentence and the reasoning of the majority applies regardless of the degree of personal responsibility for the offending."*

Lewis-Ranwell

The Supreme Court has recently given permission for another appeal arising out of similar facts. In *Lewis-Ranwell v G4S Health Services* (UK) Ltd and Others [2024] EWCA Civ 138; [2024] KB 745 the Claimant had been held on remand and in the care of the Defendant. He was released on bail and whilst on bail killed three elderly men acting under a delusional belief. The Claimant sought to bring a claim against the Defendant for negligent care and releasing him when it was not safe to do so. The Claimant was tried for murder but was found not guilty by reason of insanity. He was detained pursuant to a hospital order and subject to restrictions.

The Claimant brought a claim for compensation against the Defendant, seeking, amongst other things, an indemnity against any claim as might be made against him by family members of those deceased. The Defendants sought to have the action struck out, relying on the defence of illegality. Garnham J. rejected the application and Court of Appeal, by a majority, upheld the first instance decision.

The Court of Appeal

The Court of Appeal rejected the Defendant's submission that there was no distinction to be made between the cases of *Gray* and *Henderson* and the present case. The court held that the insanity finding is premised on the individual not being able to distinguish between right and wrong and as such not having responsibility for his actions. As such, it would not be incoherent to take a different approach to such a case. In relation to the public confidence principle, Underhill LJ acknowledged that it was a difficult decision but ultimately was of the view that *'someone who was indeed insane should not be debarred from compensation for the consequences of their doing an unlawful act which they did not know was wrong and for which they therefore had no moral culpability'.* Underhill LJ noted some anomalies that might arise from this finding but decided that those would have to be considered on their own facts in due course (if arising).

Andrews LJ, in a dissenting judgment, disagreed. Andrews LJ said that she thought that there wasn't a sufficient distinction to be made between *Gray* and *Henderson* and the index case. She also noted that insanity would be no defence to a claim in tort and considered that there was indeed a degree of incoherence in making the Claimant liable in tort to

> *'pay compensation to his victims or their estates, and, on the other, permitting him to avoid the consequences of such liability, by passing responsibility for his actions to someone else, on the basis that he would not have committed those intentional and tortious acts had it not been for the defendants' negligence'. Andrews LJ preferred to determine the case on the basis that a person should not, generally, be permitted to rely on their own deliberate tortious act as a necessary ingredient in a claim against a third party. She decided that 'all the public policy considerations identified by Lord Hamblen JSC in Henderson as supporting denial of the claim are equally present here'.*

The Supreme Court, including Lord Hamblen JSC, gave permission to appeal. The appeal is yet to be heard.

Comment

The defence of illegality is wide and eludes a precise definition. This case deals with a specific aspect but is sure to draw wider guidance from the Supreme Court, especially in relation to the public policy aspects of the case and the defence more generally. The arguments are powerfully made on both sides and those with an interest in illegality as a defence are strongly encouraged to read the full judgment of the Court of Appeal because the analysis is incredibly clear (whether you agree with one side of the argument or the other).

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The Indispensability of Expert Independence: *Wilson v The Ministry of Justice* [2024] EWHC 2389

By Lionel Stride
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Mr Wilson, a prisoner at HMP Chelmsford, secured £5.4 million in damages after being left with a spinal cord injury as a result of the MOJ's negligence (allowing him to be stabbed by a fellow inmate). This judgment is a salutary reminder to experts and practitioners alike about their overriding duties to the Court. After Mr Kumar, the Defendant's Spinal Rehabilitation expert admitted during cross-examination to multiple errors and failing to maintain independence and objectivity, the court placed no weight on Mr Kumar's report or any of his contributions to the joint statement and entirely accepted the Claimant's medical evidence.

Background Facts

The Claimant was stabbed multiple times whilst working in the kitchen at HMP Chelmsford by another inmate who was serving a life sentence for murder, having also killed his original victim by stabbing him multiple times with a knife. He sustained life threatening injuries, including an incomplete spinal lesion at T5 to T7 and thoracic posterior vertebral fractures. Even after rehabilitation, he continued to experience mild weakness in his left leg, some tonal changes, involuntary spasms/spasticity, chronic pain at the sites of his stab wounds, and PTSD.

The Claimant brought a claim against the MOJ for their failure properly to risk assess his attacker, a convicted murderer, and permitting him to work in the prison kitchen with access to large knives. The Defendant made a (relatively) swift admission of liability in these circumstances.

The parties had permission for experts in seven disciplines: Spinal Cord Injury, Pain Management, Psychiatry, Physiotherapy, Care, Accommodation and Urology. At the Joint Statement stage, there was not a large degree of disagreement between any of the experts, indicating that the case would be settled at JSM, rather than requiring a trial. However, the Defendant then decided to abandon its care evidence and disclose two new reports from Mr Kumar, its Spinal expert. One commented on surveillance (disclosed after completion of the Joint Statements) and stated that the Claimant was consciously exaggerating his symptoms and had only minor disability. The other commented on the Claimant's care, accommodation and equipment needs.

The Defendant took the further aggressive steps of serving a report from its physiotherapist commenting on the surveillance footage, attempting to exclude the urology evidence despite it being obtained by agreement on a joint basis and serving a further report from its accommodation expert in which he reneged from his concessions in the Joint Statement. This renewed, hostile position was reflected in its Counter-schedule, which offered only £950,000, and a maximum Part 36 offer of £1.25 million. Upon the Defendant refusing the Claimant's counter-offer of £3 million, the case proceeded to trial where cross-examination of Mr Kumar spelled the Defendant's undoing.

Mr Kumar's cross-examination

Mr Kumar was cross-examined as to the contradictions between his first and fourth report, the latter of which alleged exaggeration on the part of the Claimant and asserted that he had only minimal care and equipment needs despite the severity of his injury. Unable to deny, downplay or escape the contradictions highlighted during cross-examination, Mr Kumar ultimately accepted that

> *"he had lost all independence and objectivity in this case".*

He conceded that his allegations of dishonesty were wholly unmeritorious and that he had trespassed beyond his realm of expertise by commenting on matters on which he was unqualified. In doing so, he admitted that he had breached his CPR Part 35 duties.

When re-examined, Mr Kumar attempted to backtrack from those admissions, saying *"I have tried to be an independent expert, I realised I made a mistake in talking about balance. I do not believe I have lost objectivity. I believe I have been an independent expert in my duty to the Court".*

Key Issues

HHJ Clarke considered two predominant issues: -

1. Quantification (in particular whether the Claimant was entitled to claims for future loss of earnings, rehabilitation costs and care needs); and

2. Credibility (in particular the credibility of the expert witnesses and the weight of their testimonies regarding the Claimant's condition and needs).

The Judge's Findings

An award of damages in the sum of £5.4 million was made, HHJ Clarke recognising the significant impact of the Claimant's physical and psychological injuries on his daily life, relationships and functions.

The Judge gave no weight to the evidence of Mr Kumar and accepted the Claimant's Spinal expert's opinion wherever dispute arose. She rejected his attempted retraction. At [44], she described him as *"a partisan witness who had admitted that he was advocating for the Defendant".* She found that Mr Kumar had breached his duties as an expert. The judge emphasised that,

> *"Pursuant to CPR 35.3, the duty of an expert to help the Court on matters within their expertise overrides any obligation to the person who instructs or pays them. CPR 35.10 states that an expert's report must comply with the requirements set out in PD 35. PD 35 is explicit in, inter alia: para 2.1 that expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation; para 2.2 that experts should provide objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate; and para 2.3 that they should consider all material facts, including those which might detract from their opinions." [47].*

HHJ Clarke also found that the Defendant had improperly shown Mr Kumar's evidence to their other experts and therefore Mr Burton (Accommodation Expert) had based his post-Joint Statement, hostile report on evidence ultimately found by the judge to be inadmissible.

The judge concluded:

> *"Mr Burton should not have allowed his initial assessment of Mr Wilson's accommodation needs as summarised in the joint statement, which I am satisfied was both independent and fairly arrived at on the evidence before him, to be corrupted in this way and the solicitors in the Government Legal Department should not have asked it of him."* [102].

HHJ Clarke also highlighted how biased, misrepresentative 'expert' interpretations of surveillance footage are damning: the Defendant's physiotherapist (Ms Keech) was criticised for her loss of independence as she, like Mr Kumar, stated that the footage showed a "*remarkable recovery*" when in fact the footage showed the Claimant limping, losing his balance and using the wall and the car for support. Despite admitting in cross-examination that she had seen this in the footage, Ms Keech omitted to make any mention of the Claimant's restrictions in her latest report. She was criticised for being *"partisan"* and *"unfair"* [102].

Conclusions

This case is an extreme example of the importance of ensuring that expert opinion relied upon by any party remains credible and supported by the objective facts. Compliance with the Civil Procedure Rules is not an optional extra, especially where credibility is being challenged.

Learning Points for Experts

For experts, they must not *"lose sight of the fact that their first duty [is] to the Court"* [45]. Where experts do make mistakes in initial reports, they should make immediate attempts to correct it themselves, for example in the joint statement, in correspondence or in a supplemental letter [46]. Further, if they change their opinion upon receipt of more information, they should explain clearly why the additional information prompted the change.

Experts should constantly remind themselves through the litigation process that they are not part of the Claimant's or the Defendant's "team" with their role being the securing and maximising, or avoiding and minimising, a claim for damages. Significant reliance may be placed on their analysis which must be objective and non-partisan if a just outcome is to be achieved in the litigation (see also **Muyepa v Ministry of Defence** [2022] EWHC 2648 (KB) at [284]).

Equally, experts must ensure that their initial assessments are not corrupted by draft or unsigned inadmissible expert reports (as Mr Burton's was).

Learning Points for Lawyers

This case exposes the disastrous consequences for legal advisors where they either blindly accept an expert over-stepping their domain or push them into indefensible positions.

Specific learning points for practitioners include:

1. Allow each expert to reach their own conclusions, free of pressure or 'contamination' by a party's settlement parameters or goals. This does not mean that expert opinion cannot be challenged or clarified appropriately in conference prior to service of their report but that experts should not be pressed into expressing unsupportable views.

2. Be astute to, and prevent, experts straying beyond their expertise lest they be easily vulnerable to challenge in cross-examination. Encourage them, instead, to defer to other experts on certain findings.

3. Analyse surveillance footage for yourself; do not rely unreservedly on an 'expert's' interpretation of the same.

4. Remind experts of their duties under Part 35, including the need to consider adverse evidence and to avoid selective inclusion or cherry-picking of facts.

5. As far as possible, ensure experts observe/examine the Claimant properly, not superficially. Mr Kumar's evidence, for example, was undermined by the fact that his only observation of the Claimant walking was "a couple of metres" from the front door to the lounge of his small flat; "He did not observe his outdoor mobility or see him shower, bath, get in or out of his car, or do any walking which made him fatigued."

6. Review expert reports for inconsistencies prior to service. In Mr Kumar's case, for example, an early warning sign of his lack of independence should have been the fact that he recorded in his report under "Mobility and Transfers" that Mr Wilson told him that he did not use a wheelchair, although he had later in the same report quoted Mr Wilson saying to him "I use a wheelchair when I go shopping". Further, Mr Kumar's statement in his report that "I did not find [Mr Wilson] to have any balance or weakness issues" was a mistake, given that he had consistently reported Mr Wilson as having poor balance due to his impaired sensation in his lower limbs and feet for light touch and pinprick and joint position.

7. View agreement at the joint statement stage as a good thing and in accordance with an expert's duty, rather than cause to abandon or re-instruct experts.

Essentially, it is important to let the evidence steer the experts, not the experts steer the evidence. This will ensure that an expert will retain his or her integrity when expressing a contrary view.

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Credibility and Competence on the stand: Lessons for Claimants, Legal Advisers and Experts alike where fundamental dishonesty and the CPR is in issue: *Samrai v Kalia* [2024] EWHC 3143 (KB)

By Lindsay McNeil
Paralegal to Lionel Stride

The judge in this multi-claimant trial of sexual and financial abuse allegations against a Hindu priest struck out two claims upon uncovering that those Claimants signed witness statements in English without speaking the language. Spencer J found that the rest of the claimants were not credible witnesses, but held back from finding them dishonest. The judge did not, however, hold back in finding that the Claimant's Psychology expert had breached her duties as an expert witness and that her evidence fell far below the standards detailed in CPR 35. This case provides insight into expert and witness management, and the exacting burdens of proof on both claimants – to substantiate their allegations and overcome limitation defences – and defendants, to prove fundamental dishonesty.

Background

The seven Claimants attended a Hindu temple in Coventry and made a series of allegation of sexual and financial abuse against the Defendant, the temple's founder and priest. These allegations spanned from 1989 to 2016.

In response, the Defendant denied any sexual activity with any of the Claimants and asserted that any unpaid work undertaken by them (which formed the basis of the financial abuse allegation) was Seva, a form of voluntary service as part of their devotional duty to the Temple.

The trial lasted 18 days and resulted in a 136-page judgment from Spencer J, which raised a number of interesting issues.

Strike out

During the course of trial, the fifth and sixth claimants' claims were struck out for wholesale failures to comply with procedural rules relating to their witness statements. It became apparent during their evidence that the fifth and sixth claimants could not read or proficiently speak English despite their signed witness statements being in English and not having been translated into their native language, Punjabi. Spencer J criticised their solicitors for

> *'having not done their duty appropriately in this case in that they have not engaged directly with the claimants, they have not established that which ought to have been established well in advance of this trial in relation to their ability to read and speak English, and this should have been raised at the pre-trial review so that appropriate steps could be taken.'*

The uncovering of this only at cross-examination stage amounted to '*a virtual contempt of the proceedings of this court.*'

Expert Evidence

The claimants relied on psychological expert evidence of Dr Blyth whilst Professor Maden was instructed on behalf of the Defendant.

At paragraphs 248-261 of the judgment, the judge highlighted the numerous ways in which both the form and substance of Dr Byth's reports represented a failure to abide by her expert duties:

1. Firstly, despite asserting she was *"familiar"* with CPR Part 35 and the guidance to experts issued in **2014 and also appended to Part 35**, none of Dr Blyth's reports contained a compliant expert's statements of truth or the required statements that she had understood and complied with her duty to the court.

1. There was no statement in some of her reports as to her instructions.

2. Documents relied upon to produce her reports were not listed or annexed to them, contrary to the guidance.

3. There was no mandatory summary of conclusions.

4. Dr Blyth asserted she took a full history of the Claimants but had not included it in her reports. She did not "think that it was of any relevance whatsoever" despite using the Claimants' full life histories to support aspects of her opinion.

5. She denied, at trial, that she asserted the Claimants had suffered from Religious Trauma Syndrome (also known as Spiritual Abuse) which is not included in DSM5, ICD 11. Yet, in one of her reports, she had made this diagnosis. Dr Blyth conceded in cross-examination that she had come to court and attested the truth of her reports without reminding herself of their contents.

6. Dr Blyth offered a partisan perspective on a key area of factual dispute. She suggested that the room at the back of the Temple in which the Claimants alleged they were abused may have been disassembled after the Defendant was arrested. This hypothesis was unevidenced, and assumed the veracity of those Claimants' assertions, despite Dr Blyth knowing that Defendant denied the existence of this room. Crucially, Dr Blyth conceded she would not have included this section in her report if she had been instructed by the Defendant.

7. Dr Blyth asserted that the First Claimant starved herself after the defendant criticised her weight, which led to severe health problems. This was unsupported by the First Claimant's medical records which Dr Blyth said she reviewed. The judge said, 'I consider that this statement in Dr Blyth's report was a pseudo-endorsement of Ms Samrai's account by reference to medical records which did not exist.'

8. Dr Blyth had plagiarised passages from an academic article without referring to it in her list of sources. Dr Blyth attempted to assert that she could not recall doing this and sought to argue that the author must have reached the same conclusion as her. However, during cross-examination it became evident that this was not the case when Dr Blyth was unable to explain the meaning of the term "prasad"– having copied it from the academic article.

9 Dr Blyth inaccurately stated that Dr Marlene Winell – whose article she had referenced - compared Religious Trauma Syndrome most easily to Complex PTSD (a condition different to PTSD). However, in fact, Dr Winell compared it to PTSD, but not to Complex PTSD.

Of the penultimate breach, Martin Spencer J said

> *"it is difficult to imagine a more blatant breach not just of the provisions of Part 35, the Practice Direction and the Guidance, but, more fundamentally, an expert's obligation to the court because these passages were, in effect, a deception practised on the court by Dr Blyth in pretending that these passages were her own words, representing her own opinions…"*

The judge concluded:

> ***"In my judgement no reliance whatever can be placed on the reports and opinions of Dr Blyth****. She demonstrated herself to be an expert who had little or no regard to the provisions of Part 35, the Practice Direction and the Guidance in preparing her reports and who was prepared materially to mislead the court by passing off the views of another person as her own by lifting large passages from that person's article and setting them out in her report as if they represented her own views without acknowledgement or reference to the originating source."*

Consequently, Spencer J rejected Dr Blyth's evidence in its entirety.

Factual Determinations

As to the primary allegation of sexual abuse, the court found that the Defendant had engaged in a sexual relationship with the first claimant but, it did not accept that she lacked the freedom and capacity to consent. Her claim for damages related to sexual abuse was consequently dismissed.

For the second, third and fourth claimants, the court declined to conclude on whether they had any sexual relations with the Defendant, but it was prepared to decide that, in any event, they had not been sexually *assaulted* by the Defendant. Despite the existence of some evidence that could have supported their claims, such as hotel bookings and similarities in their accounts, Spencer J found each the second, third and fourth claimants not to be credible witnesses.

The claim for financial abuse of the Seventh Claimant was dismissed on the basis that the judge did not consider the work done to have been forced or involuntary.

Credibility & Fundamental Dishonesty

The Defendant in this case made allegations of fundamental dishonesty against the witnesses. In respect of the first claimant, it relied on the following:

- The First Claimant's claim originally asserted she worked for the Temple on average 24.5 hours per day from 1993 – 2016 (an error later attributed to her mental health).
- Medical records documenting agoraphobia preventing her from leaving the house contradicted her assertion of working constantly at the Temple.
- The First claimant had offered £20,000-£25,000 to a witness in return for supporting her allegations.

However, the court determined that it was inappropriate to label the first claimant as fundamentally dishonest because it accepted her claim of a long-term sexual relationship with the defendant as true and therefore her overall credibility was not in question.

In respect of the second, third and fourth claimants, none were deemed credible witnesses because:

- The second claimant alleged the Defendant first raped her during her first year at university; however, a letter to the CPS in 2017 asserted it was before she started university.
- The second claimant led Dr Blyth to believe that the Defendant's psychiatric expert had failed to take into account the Defendant's actions during examination. Yet, she and the Defendant's psychiatrist had in fact agreed that it was in her interests not to be questioned on her allegations.
- The second claimant had failed to provide WhatsApp messages, despite a court order requiring her to do. It was not lost on the judge that she was a teacher in computing.
- The second claimant's claim for unpaid work amounted to working 24 hours a day for 36 years, which "had to be nonsense".
- Like the first claimant, the second claimant had attempted to bribe a witness.
- The third claimant inaccurately represented her relationship/depth of contact with one of the witnesses.
- The third claimant deleted her WhatsApp messages a week before a court order was made requiring her to disclose them.
- The fourth claimant was found to have been deliberately obtuse in her evidence concerning the reasons she left her job.

- The fourth claimant was unable to explain the methodology for the figures in her Schedule of Loss, despite the latest version having been signed less than 2 months before the trial.

However, the court held that this was not equivalent to a finding that they had "invented their allegations purely for the purpose of extorting money from the Defendant". Thus, Spencer J did not find them fundamentally dishonest.

This decision seems to suggest that a high bar has been set in findings of fundamental dishonesty in abuse claims, unless there is clear evidence that the abuse did not occur. Even if a claimant's evidence is exaggerated or untruthful in some aspects, without clear evidence of dishonesty regarding the abuse itself, the court is unlikely to make such a finding.

Perhaps of relevance to the Court's reluctance to find the claimants fundamentally dishonest was that the defendant's own evidence was found to have been untruthful and evasive at times. For example, he sought to downplay his role and influence at the Temple and, the judge found, did have sexual intercourse with the first claimant multiple times despite his complete denials.

The judge noted at paragraph 306 that

> *"the assessment of the facts in this case has been bedevilled by the way in which the evidence has been tainted with lack of candour, lies and attempts to conceal the truth. This has been the case for both sides."*

Ultimately, Spencer J only found 3 out of the 19 witnesses of fact to be reliable and wholly straightforward.

Limitation

The first four claimants sought the court's discretion under section 33 of the Limitation Act 1980 to allow their claims to proceed. The court noted that when limitation is tried alongside factual evidence, the first step is to determine whether the claims are factually and legally valid. In this case, the issues of credibility and the factors for exercising discretion were so intertwined that it was appropriate to address them together for each claimant.

In light of its abovementioned findings, the court declined to exercise discretion under section 33 for all claims. In reaching this decision, the court considered the following factors: the loss/destruction of evidence, the conduct of the Claimants, a lack of good reason for the delay, a lack of disclosure and significant issues with the sums and calculations in the Schedules of Loss.

Lessons for legal advisers

1. Firstly, Mr Justice Martin Spencer's trenchant findings about the conduct of Dr Blyth should be seen as a warning sign for practitioners. In Samrai, some of the issues in respect of Dr Blyth's reports could have identified (and potentially rectified) prior to trial; for example, not including the relevant statements in her reports from CPR 35 or Practice Direction 35, or the documents she had considered. Early conferences with experts to highlight and remedy deficiencies at latest before trial, but better, before service, should be arranged. Reminders to experts of the need to read their own reports thoroughly and be prepared to defend them at trial are never nugatory.

2. Secondly, careful witness management, including – if possible – face-to-face meetings, can help avoid undesirable surprises in court.

3. Thirdly, experts must comply with their duties to the court by producing independent, well-referenced, evidence-based reports which they remind themselves of prior to any trial.

4. For Defendant counsel, this case reminds that a Claimant failing to meet their burden of proving a claim on the balance of probabilities is not equivalent to a Defendant discharging their own burden of proving fundamental dishonesty. In other words, a dismissed claim is not a dishonest claim unless a Defendant proves as much with their own reliable, credible evidence.

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Spanish Penalty Interest is a matter of Substantive, not Procedural Law: *Nicholls and another v Mapfre España Cia de Seguros y Reaseguros SA* [2024] EWCA Civ 718

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The Court of Appeal resolved the prevailing uncertainty regarding whether Spanish Penalty Interest is a matter of procedural or substantive law for the purposes of Regulation (EC) 864/2007 (Rome II). Penalty interest is a matter of substantive Spanish law as it is part of the assessment of damages. In any event, English courts are entitled to award interest equivalent to the Spanish rates pursuant to their powers under s.35A of the Senior Courts Act 1981 or s.69 of the County Courts Act 1984.

This distinction matters because the Spanish penalty rate is a lot higher than the usual interest rates.

Facts

The Defendant insurer (Mapfre) appealed against awards of interest on damages made by courts in England and Wales (see S*edgwick v Mapfre Espana Compania De Seguros y Reaseguros SA* [2022] EWHC 2704) in respect of personal injuries sustained in Spain.

The accidents causing the injuries had happened in 2015 and 2016. The insurer admitted liability in respect of each of the individual respondents (N, W and S), who were domiciled in the UK. In each case, in accordance with Regulation (EC) 864/2007 (Rome II), damages were assessed under Spanish law, as that was the applicable substantive law, referred to in the Regulation as *"the law applicable to non-contractual obligations".* Article 1(3) of Rome II excludes matters of procedure from its scope; those issues are therefore governed by the law of the forum (which in this case was England).

In each case, interest payable at the rates under Art.20 of the Spanish Insurance Contract Act 50/1980 was ordered to be paid as part of the damages. Under Spanish law, an insurer who fails to pay compensation within three months of the accident faces a duty to pay interest for the first two years, at the current legal interest rate plus 50%; after two years, this rises to 20% per annum.

In S's case, the judge held that the interest payable under Act 50/1980 was a matter of procedure and so was governed by the law of England and Wales, and was not a matter of substantive law, which would be governed by Spanish law. Nevertheless, the judge awarded interest at the equivalent rate as a matter of discretion under the Senior Courts Act 1981 s.35A. S's damages included medical costs and her costs of repatriation to England. Those costs had been met by her travel insurer. Under Spanish law, if a

claimant had been paid by an insurer, they were considered not to have suffered any loss. Spanish law permitted the recovery of a third-party insurer's losses, but Spanish law required this insurer (as Claimant) to bring the claim in this regard. However, S's third-party insurance contract was an English contract governed by English law. If English law were to be applied, S could bring the claim for those costs as a subrogated claim.

In N's and W's cases, County Court judges held that the interest payable under Act 50/1980 was a matter of procedure, but awarded interest at the equivalent rate under the County Courts Act 1984 s.69. On appeal, the High Court decided that the recovery of interest under Act 50/1980 was in fact a matter of substantive law, which meant that it would be governed by Spanish law. The HC then (re-)awarded interest under Act 50/1980 on that basis.

Key Issues

The CA was thus tasked with considering three core issues:

1. Whether interest payable under Article 20 of Spanish Insurance Contract Law 50/1980 ("Spanish penalty interest") is a matter of "procedure" within the meaning of Article 1.3 of the Rome II Regulation (No 864/2007).

2. If a matter of procedure, whether s35A of the Senior Courts Act or s69 of the County Courts Act gives an English Court trying an accident abroad the discretion to still award interest equivalent to the rate which would apply under Article 20 of the Spanish Act.

3. Regarding S, whether she was entitled to bring in her own name the subrogated claim for (third party insurer funded) losses reflecting the costs of repatriation and medical expenses.

Judgment

The Court of Appeal dismissed Mapfre's appeals.

Issue 1: the status of Spanish Penalty Interest

The CA held that the interest payable under Act 50/1980 could not be detached as a procedural matter for the purposes of art.1(3) of the Regulation. Instead, it was governed by the law applicable to the non-contractual obligation, namely Spanish law (at [58]).

Under art.15(c) of the Regulation, "the existence, the nature and the assessment of damage or the remedy claimed" were matters of substantive law. The payment of interest at the Spanish legal interest rate was effectively part of the nature and the assessment of damage or the remedy claimed, because it was *"intertwined"* with the assessment of damages in Spain, which was governed by the laws of Spain. The fact that Spanish law differed in its approach to compensation compared to English Courts, i.e., that the amount of damages awarded could be substantially increased by the payment of the penalty interest, did not alter that conclusion. Moreover, the fact that, under Spanish law, an award of Penalty Interest under Article 20 precluded the uprating of damages to reflect the passage of time since the damage/loss was sustained was cited as further proof of the substantive nature of Article 20 Interest.

Issue 2: whether, if procedural, the Court had discretion to adopt a Spanish Law approach regardless

The CA concluded that a court in England and Wales was entitled to exercise its discretion to make an award under s.35A or s.69 which had the effect of awarding interest at the rate payable under Act 50/1980. Judges exercising their statutory discretion to award interest had long considered that they could take into account provisions of the overseas law relating to the recovery of interest *(Maher v Groupama Grand Est* [2009] EWCA Civ 1191 followed). Interest under Act 50/1980 was an integral part of the way in which damages for personal injuries paid by insurers were assessed in Spain. Accordingly, even if that was not enough to make it a matter of substantive law, it was certainly enough to justify the exercise of Courts' *"unfettered"* discretion to award interest.

Issue 3: the subrogated claim

The Court found that S had been entitled to bring the claim for repatriation and medical costs in her own name, even though she had been reimbursed for those costs by her travel insurer. She would hold any proceeds for her insurer under the normal rules of subrogation in England and Wales. The effect of art.19 of the Regulation was that the laws of England and Wales determined whether, and to what extent, the travel insurer was entitled to challenge S's rights. Under the laws of England and Wales, S could bring the claim against the appellant for the costs of repatriation and medical costs, subsequently paid to her by the travel insurer under her insurance (paras 74-76).

The Court interpreted Article 19 as meaning that

> *"[an accident victim] … has a … [tort] claim … [against a tortfeasor or, here, Spanish insurer], and … [a travel/medical insurer] has a duty to satisfy the … [victim], or has in fact satisfied the … [victim] in discharge of that duty, the law which governs the … [travel insurer's] duty to satisfy the … [victim] shall determine whether, and the extent to which, the … [travel insurer] is entitled to exercise against the … [tortfeasor/Spanish insurer] the rights which the … [victim] had against the … [tortfeasor/Spanish insurer] under the law governing their relationship."*

Conclusions

Helpfully, the *CA in Nicholls and ors* has clarified the dividing line between substantive and procedural rules within the meaning of Art 1.3. This is an issue of general importance in cross-border PI claims and can be summarised thus: -

- Rules which govern the administrative or judicial mechanics by which damages are assessed: procedural. To give procedure too wide a scope would risk undermining the objectives of Rome II: [33].

- Rules which are so integral to/intertwined with the assessment of damages i.e., loss suffered by the Claimant: substantive.

This case also reminds practitioners in this area that the Court's discretion to award interest under s35 or s69 is wide and it would have been "unusual" for the high Spanish interest rate figures to not have been included in the Court's exercise of its discretion (see [66]).

There are some concerns that clarity has come at a cost, i.e., the CA should instead have divorced Art. 20 from the assessment of damages as being designed simply to punish insurers who do not make timely offers, not to measure the quantifiable loss flowing from the tort. Despite this, permission to appeal was refused by the CA.

Foreign insurers should therefore take heed of the CA's judgment when considering settlement of disputes brought in English courts. The value of the claim will increase substantially each year; Claimants ostensibly emerge as the 'better off' party, with entitlement post-Nicholls and ors to recover damages; foreign penalty interest; Part 36 interest and their legal costs.

Whilst the case is of general application to cross-border disputes, there remains scope for it to be distinguished; for example, where other jurisdictions' interest provisions are very different from the Spanish penal interest provisions under Act 50/1980. Foreign penalty interest may not apply if it is not so intrinsically linked to the assessment of damages which the Claimant can recover.

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To Test or Not to Test: the Ten-Million-Pound Question: *Clarke v Poole & Ors* [2024] EWHC 1509 (KB)

By Polina Sokolovska

Imagine being given a choice: undergo testing to determine if you have symptoms of a genetic condition that you are not ready to confront, or forfeit a claim for £10 million in damages essential for your future needs. Is this truly a choice? Is it reasonable to put a claimant in this position to uphold a defendant's right to defend their claim? These questions lie at the heart of the decision in Clarke, which now heads to the Court of Appeal.

This article details the first instance decision, notable aspects of the permission to appeal decision, and offers reflections on the implications of this case.

The Facts

This claim arose out of a road traffic collision that left the Claimant with a severe traumatic brain injury, psychological injuries, right-sided weakness, balance and mobility issues. The Defendants contended that the Claimant would have suffered significant functional decline regardless of the collision, due to suspected myotonic dystrophy (DM1).

DM1 is a genetic condition that can lead to progressive muscle degeneration, including weakness and stiffness of the muscle tissue, but not all of its carriers develop symptoms. The Claimant's mother was diagnosed with DM1 and both parties' medical experts agreed that the Claimant had a 50% chance of also carrying the DM1 gene. The Defendants pointed to ptosis and frontalis over-activity as signs of DM1, whilst the Claimant's expert attributed these to the collision.

The Application

The Defendants applied for an order that the claim be stayed unless the Claimant undergoes neurophysiological electromyography (EMG) testing to determine if she has symptomatic DM1 or amends her pleadings to remove reliance on symptoms that the Defendants attributes to the condition.

Requesting EMG, as opposed to genetic testing, is a surprising decision from the Defendants as whilst a positive EMG result would make the Clamant "overwhelmingly likely" to have the DM1 gene, it would not provide absolute certainty afforded by genetic testing. Neither would EMG results assist with the disagreements in relation to future deterioration. However, opting for EMG testing was likely a tactical decision, since a prior attempt to compel genetic testing had failed in *Paling v Sherwood Forest Hospitals NHS Foundation Trust* [2021] EWHC 3266.[3]

Applicable Law

The parties agreed that the applicable test is set out by Kennedy LJ in *Laycock v Lagoe* [1997] PIQR 518 (split into multiple paragraphs for ease of reading):

> *"First, do the interests of justice require the test which the defendant proposes? If the answer to that is in the negative, that is the end of the matter.*
>
> *If the answer is yes, then the court should go on to consider whether the party who opposes the test has put forward a substantial reason for that test not being undertaken; a substantial reason being one that is not imaginary or illusory.*
>
> *In deciding the answer to that question the court will inevitably take into account, on the one hand, the interests of justice and the result of the test and the extent to which the result may progress the action as a whole; on the other hand the weight of the objection advanced by the party who declines to go ahead with the proposed procedure, and any assertion that the litigation will only be slightly advanced if the test is undertaken.*
>
> *But, if the plaintiff for example has a real objection, which he articulates, to the proposed test then the balance will come down in his favour."*

At this point, I would like to ask the reader to read this passage again. What did you understand the legal test to constitute? How many stages would the court approach this question in?

If your response is that it was a two-stage test, then your understanding accords with that of the authors of the White Book, Master Sullivan in *Paling v Sherwood Forest Hospitals NHS Foundation Trust* [2021] EWHC 3266, Master Stevenson in *Read v Dorset County Hospital NHS Foundation Trust* [2023] EWHC 367 (KB) and the Claimant's counsel in Clarke.

HHJ Gargan's Approach

HHJ Gargan, however, diverged from this consensus. His interpretation of the test was as follows:

i. *"The overarching question is whether it is just and proportionate to order a stay unless the claimant undergo medical testing."* (paragraph 84)

ii. *"**The** **starting** **point** is whether the defendant has shown that, absent the claimant's objections, it is in the interests of justice for the testing to be carried out."* (paragraph 85) If it is not, then the court "must" dismiss the application.

iii. **The second stage** is *"whether the claimant has put forward a substantial objection which is more than imaginary and illusory."* If it is not, *"then the outcome of the application must favour the defendant."* (paragraph 86)

iv. **The third stage** is to *"balance the competing rights, namely (i) the defendant's right to defend itself in the litigation; and (ii) the claimant's right to personal liberty."* (paragraph 87) Particular weight should be given to the claimant's objections if "*the test is invasive and/or involves pain/discomfort and/or the risk of physical/psychological harm."*

v. Finally, the court should consider **the terms of the stay** proposed as *"it is important that the stay do no more than is reasonably required to enable the defendant properly to defend the claim."* (paragraph 88)

2. Albeit the facts in Paling differ from Clarke. The Claimant in Paling was a child and their symptoms did not clearly fit with those expected from a person suffering from the condition that the Defendant wanted to test for, so potentially the risk to the Defendants in Clarke may not have been too great if they wished to apply for genetic testing.

Most strikingly, HHJ Gargan decided that, despite Kennedy LJ explicitly using the phrase "two-stage test", he intended to set a legal test containing three stages. This reading was suggested by the Defendants on the basis of *Starr v National Coal Board* [1977] 1 WLR 63, which was not cited in *Laycock* but the Defendants argued was nevertheless supported by the language used in *Laycock*.

HHJ Gargan decided that *Layock* must be read in the context of earlier decisions *Prescott v Bulldog Tools Ltd* [1981] 3 AER 869 and *Hill v West Lancashire Health Authority* (unreported, April 1996, 18). The court in *Laycock*, when setting out a two-stage stage, merely intended to "summarise and simplify" it and that the balancing exercise was always intended to form part of the test (paragraphs 77-79, 81-83).

The Decision

Applying this three stage test, HHJ Gargan ordered that the claim be stayed unless the Claimant undergoes EMG testing or concedes that she has active DM symptoms. HHJ Gargan reasoned as follows:

i. It is in the interests of justice for the testing to be carried out and the Claimant has put forward a substantial objection.

ii. Accordingly, the court proceeded to carry out the balancing exercise:

a) The results of the EMG will have a material bearing on the determination of that dispute and the Defendants had a right to carry out these tests.

b) Any physical risks posed by the test are very modest.

c) There are potential "therapeutic" advantages to the Claimant undergoing testing (which are notably never identified in the judgment – see paragraphs 22 and 94).

d) The claimant's anxiety arising from the testing process itself can be alleviated with a domiciliary visit or arrangement of local testing.

e) Although discovering that she has symptomatic DM1 is likely to adversely affect the Claimant's psychological health, a negative result would provide "significant comfort".

f) This case differs from Laycock in that the risk to Ms Clarke's health would not originate from the test itself but from the potential positive result.

Permission to Appeal: *Clarke v Poole* [2025] EWCA Civ 447

Permission to appeal was initially refused by Nicola Davies LJ. The Claimant applied to reopen this decision under CPR 52.30. The grounds for appeal were that HHJ Gargan erred as follows:

Grounds 1-2: Errors in law

> ***1.*** *"Failed to apply the principle, laid down by the Court of Appeal in Laycock v Lagoe [1997] PIQR P518, that a stay will not be granted if a Claimant has an objection to testing which is real, i.e. not imaginary or illusory.*
>
> ***2.*** *In doing so, failed to distinguish the decision in Starr v National Coal Board [1977] 1 WLR 64, which addresses a different question, namely whether and when a Claimant can refuse to be examined by a particular named expert."*

Grounds 3-5: Errors in application to the facts

> ***3.*** *"Failed to take into account that a stay would have the effect of requiring an interference with the Claimant's personal autonomy and/or bodily integrity.*
>
> ***4.*** *Failed to have regard to the finding that the Claimant would be likely to sustain injury in the event of testing.*
>
> ***5.*** *Failed to have regard to the limited nature of the benefit to be achieved by requiring the Claimant to undergo testing."*

Whipple LJ and Underhill LJ decided that the high bar for reopening Nicola LJ's decision has been satisfied and granted permission to appeal on all grounds.

Points of interest

This article will not delve into the reasoning of the court at great lengths but will only highlight a number of interesting points emerging from this judgment:

i. Underhill LJ stated that he is inclined to think that HHJ Gargan's reading of the ratio in *Laycock* is correct, although Kennedy J's reasoning could have been understood differently. It is therefore important that a settled approach is "authoritatively established" (paragraph 38).

ii. On the other hand, Whipple LJ stated that HHJ Gargan's approach *"substantially restates the legal test set down by a higher court in an earlier case [referring to Laycock] and implies that the White Book commentary on that case is wrong".* This will create uncertainty as to which approach is correct (paragraph 43).

iii. Whipple LJ emphasised that the crux of the appeal is personal autonomy, particularly the two main points (a) and (b) stated by Underhill LJ. (a) The Claimant feels very strongly about the court taking choice away from her after the accident already limited her autonomy. (b) The pressure to undergo testing would itself cause additional psychological injury.

iv. Whipple LJ noted that she does not currently have any inclination as to which formulation is correct and that she would wish to hear full argument before coming to a conclusion. However, *"there is at least a respectable argument"* that Laycock, as opposed to *Clarke v Poole, is correct as it implicitly recognises that a claimant objecting to testing "is likely to be objecting on grounds of personal autonomy which will weigh heavily in the balance and may well be determinative of the outcome"* (paragraph 44).

Comments

Following the Court's comments, particularly in relation to HHJ Gargan's reading of *Laycock*, and the impending Court of Appeal hearing, it is highly unlikely that any High Court judge could be persuaded to apply the ratio in *Clarke v Poole & Ors* [2024] EWHC 1509 (KB). As we await the Court of Appeal judgment, this article provides some comments arising from the decisions to occupy readers' intellectual curiosity in the meantime.

i. Would an application for genetic testing have led to a different outcome in the High Court? If so, it would seem to cement Paling as persuasive authority for the proposition that genetic testing is too intrusive for the courts to enforce.

ii. The court was rightly preoccupied with the argument that Defendants must be able to properly investigate and defend their claims. However, hundreds of claims settle every year despite parties' drastically different views on the claimant's diagnoses. These cover everything from the existence of brain injuries; or levels of spinal cord injury; to disagreement as to whether a claimant has a functional neurological disorder. Defendants in such claims are able to defend and even settle claims without ever resolving the question of diagnosis. Testing the opposing party's expert evidence always remains an option for Defendants without requiring a claimant to undertake testing that will cause them further psychological and physical harm.

iii. As Whipple LJ stated that personal autonomy *"may well be determinative of the outcome"*, there is some hope for claimants that the Court of Appeal will reconsider the Claimant's argument that Kennedy LJ intended for the balance to come down in the Claimant's favour if she has a substantial reason for opposing testing. HHJ Gargan rejected this argument because it contradicts the court applying a balancing approach (paragraph 79). If the Court of Appeal agrees with the Defendants that there is a third stage where the court will consider a number of factors, would it agree that this is a "balancing" exercise? By definition, balancing is an action aimed at ensuring equilibrium. If the Court of Appeal also agrees with the Claimant that the balance is tipped in her favour if she has a substantial reason to oppose testing, could the exercise at the third stage still be considered one of balancing or does that render the test a presumption that the Defendants need to displace?

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Williams-Henry v. Associated British Ports Holdings Ltd [2024] EWHC 806 (KB) – A good time for reflection?

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This case will need no introduction for most. It is the high water mark for the value of a genuine injury claim (assessed at £895,000 on a full liability basis; c. £600,000 after the agreed liability split) that was dismissed by reason of fundamental dishonesty (FD).

Williams-Henry was an emphatic victory for the defendant insurers concerned, but it is the rare sort of case that gives every PI practitioner (claimant and defendant alike) pause for thought. Perhaps now, a year on the from the judgment, is an appropriate time to reflect on lessons that can be learned on both sides.

A brief reminder

The claimant fell off Aberavon Pier and suffered a moderately severe brain injury with skull fractures and extensive frontal and temporal lobe damage, as well as pelvic and ankle fractures, ear damage and psychiatric sequalae. She underwent extensive NHS treatment and, notwithstanding her disability, was able to return to work at a major insurer. After liability was settled, a privately funded multi-disciplinary team was put in place. The MDT advised the claimant to take a sabbatical to focus on her treatment. That, Ritchie J determined, turned out to be truly catastrophic for the claimant's state of mind. By the time of the trial the claimant's mother had been appointed as her litigation friend due to her deteriorating mental health. This arose at least in large part due to the litigation, including service by the defendant of swathes of surveillance evidence and an allegation of FD.

Ritchie J analysed a 6-year chronology of the claimant's representations to her treating clinicians, employer, life insurer, the DWP, on social media postings, to medicolegal experts and to the court in witness statements, while making over 100 findings that the claimant had told lies. The entire claim was dismissed by reason of FD and the court found that such dismissal would not, on these facts, amount to substantial injustice.

Lessons

Build a complete chronology as soon as possible

By carefully presenting the chronology through cross-examination, the lies were laid bare for all to see, but the reality of the litigation process is that pieces of the puzzle emerge at different times. The legal teams could not have known that the claimant's assertion that she had noise intolerance in large crowds was a lie until her social media posts revealed her attendance at pop and rock concerts. The claimant should have provided her legal team with those documents at an early stage to allow an accurate chronology to be populated.

Collateral dishonesty is relevant to the determination of FD

The claimant had lied in applications to a life insurance provider and the DWP. Although the lies were not fundamental to the claim, they did prove that the claimant was a regular liar when financial benefit was her objective. These types of documents should be obtained at an early stage. Any discrepancies need to be addressed in the claimant's witness statement (and perhaps in the pleadings as well).

Substantial injustice

Williams-Henry is now the leading authority on the meaning of 'substantial injustice' (SI). Ritchie J set out the relevant factors to be taken into account (at [178]):

> *"(1) The amount claimed when compared with the amount awarded. If the dishonest damages claimed were small or moderate compared to the size of the assessed genuine damages which were substantial or very substantial this will weigh more heavily in favour of an SI ruling.*
>
> *(2) The scope and depth of that dishonesty found to have been deployed by the claimant. Widespread and gross dishonesty being more weighty against SI than moderate or minor dishonesty.*
>
> *(3) The effect of the dishonesty on the construction of the claim by the claimant and the destruction/ defence of the claim by the defendant. This would be measured by considering all matters including the costs consequences of the work done in relation to the dishonesty compared with the work done had there been no dishonesty.*
>
> *(4) The scope and level of the claimant's assessed genuine disability caused by the defendant. If the claimant is very seriously brain injured or spinally injured, then depriving the claimant of damages would transfer the cost of care to the NHS, social services and the taxpayer generally and that would be more unjust than if the claimant had, for instance, a mild or moderate whiplash injury. The insurer of the defendant (if there is one) has taken a premium for the cover provided. Why should the taxpayer carry the cost?*
>
> *(5) The nature and culpability of the defendant's tort. Brutal long term sexual abuse, intentional assault or drug fuelled, dangerous driving being more culpable than mere momentary inadvertence.*
>
> *(6) The Court should consider what the Court would do in relation to costs if the claim is not dismissed. The Judge should ask: will the Court award most of the trial and/or pre-trial costs to the defendant in any event because fundamental dishonesty has been proven? Also, will the claimant have to pay some or all of his/her own lawyers' costs out of damages if the claim is not dismissed? These both aim towards answering the question: "what damages will be left for the claimant after costs awards, costs liabilities and adverse costs insurance premiums are satisfied?" If the genuine damages to be received by the claimant will be substantially reduced or eradicated by the adverse costs awards, then it is less likely that SI will be caused by the dismissal.*
>
> *(7) Has the defendant made interim payments, how large are these and will the claimant be able to afford to pay them back?*
>
> *(8) Finally, what effect will dismissing the claim have on the claimant's life. Will she lose her house? Will she have to live on benefits, being unable to work?"*

The fact that the claimant would probably lose her home was a relevant consideration. It was not a strong enough factor to justify a finding of SI in circumstances where that outcome could be avoided by not ordering her to repay an interim payment of £75,000 . The Judge refused to order repayment of the interim.

Wasted costs

Following the handing down of the judgment, an application for a 'show cause' order was made against the claimant's solicitors on the basis that they (1) failed to collect and analyse relevant documents which revealed dishonesty; and, (2) pursued a hopeless case without making reasonable attempts to settle it. In dismissing the application, Ritchie J made the following findings that will offer some comfort to claimant lawyers:

There was no evidence that disclosure of social media accounts was 'standard disclosure' in moderately severe brain injury claims: "What issue would they go to? Are solicitors to spend days trawling through hundreds of thousands of TikTok posts, texts, WhatsApp messages and Twitter feeds (aka X) to harvest them, arrange them, delete personal ones, then disclose them to insurers? Which issues would each post go to? Would Masters allow the huge costs of this in every case in costs budgets? Would insurers wish to pay such costs routinely? Until dishonesty is alleged, I do not see the relevance of these." The same analysis is likely to apply to a range of personal injury cases.

- There was no doubt that in principle a lawyer is not liable to suffer wasted costs orders for running a difficult case. Ritchie J held that the principle goes further and provides that a lawyer is not liable for a wasted costs order for running a hopeless case on instruction.

- More would be needed before any adverse findings in relation to the claimant's solicitors handling of ADR could give rise to a wasted costs order.

- CFA funding puts more pressure on solicitors to terminate retainers in FD claims. The fact that the claimant's solicitors were brave enough not to "dump" the Claimant spoke to the firm's humanity and bravery, not of their negligence or unreasonableness.

Witness Statements

The findings in relation to witness statements, however, tell a cautionary tale. The defendant argued that it was unreasonable or negligent of the claimant's solicitors to allow the claimant to serve a witness statement containing lies when the lies could have been discovered by the solicitors by cross-referencing other material.

For example, the claimant's solicitors should have known and remembered that the claimant had been to Benidorm in the summer of 2022. She later asserted in a witness statement that she never went abroad. If the solicitor who drafted that statement knew that the sentence was a lie, that would have been a breach the solicitor's duty to the Court and would have amounted to both improper and unreasonable conduct. On the facts, Ritchie J was persuaded there was a 'stage 1' prima facie case of improper or unreasonable conduct, but that causation of wasted costs was not made out.

However, it is not difficult to think of situations where inconsistencies of that nature will cause an opposing party to incur wasted costs. It is therefore essential that witness statements are cross-referenced with source documents before service, both for the protection of the maker of the statement and the drafter.

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High Stakes: Indemnity Costs in Fundamental Dishonesty Cases *Thakkar v Mican & Axa* [2024] EWCA Civ 552

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Defendants who made failed fundamental dishonesty allegations were nevertheless not ordered to pay the Claimant's costs on an indemnity basis because such an order is still at the discretion of the courts. The Court of Appeal did, however, warn that *'an unnecessarily aggressive approach to litigation is unacceptable'* and that Defendants making baseless fundamental dishonesty allegations run a 'very significant' risk of being ordered to pay indemnity costs.

The Court of Appeal decision in *Thakkar v Mican & Axa* [2024] EWCA Civ 552 was welcomed by defendant insurers for confirming that there was no presumption of indemnity costs against defendants who made unsuccessful allegations of fundamental dishonesty.

Closer analysis of the decision however reveals a more nuanced judgment, with caveats for those who unsuccessfully accuse claimants of dishonesty – and a reminder that, even in claims where dishonesty is alleged, a calm and measured approach to litigation should be adopted.

The background

The claim concerned a straightforward road traffic accident. There was no dispute that on 18 May 2017 a collision occurred between the claimants' car and the van driven by the first defendant. Liability, however, was in issue: the claimants alleged that the first defendant drove into their car, the first defendant countered that the first claimant had pulled out from a parked position into his van.

Proceedings were commenced in the usual way by service of a Claim Notification Form within days of the accident. The second defendant, the first defendant's insurers, denied liability. However, the process then took a somewhat unusual turn.

An independent witness, Mr Patel, was identified, and the second defendant instructed an investigator to call on him at his home address. Mr Patel was not in, but that did not stop the investigator passing on a message suggesting that he may be accused of fraud. Unsurprisingly that did not encourage Mr Patel to assist, and although he had initially agreed to provide phone records to verify his account, on being made aware of the accusation of fraud, he withdrew his cooperation.

Notwithstanding this setback, after proceedings were issued, the defendants filed a defence putting in issue the claimants' credibility and honesty, although not actually alleging fundamental dishonesty. A subsequent application to amend the defendant to plead fundamental dishonesty was dismissed, the judge apparently being as unimpressed as Mr Patel had been by the defendants' accusations of dishonesty, describing them as a 'storm in a teacup'. The judge pointed out that witnesses' accounts of road traffic accidents were often entirely different, without that amounting to dishonesty or fraud. However, it was made clear that, as fundamental dishonesty did not have to be pleaded (Howlett v Davies [2017] EWCA Civ 1696) the defendants were not prevented from raising allegations of fundamental dishonesty at trial if appropriate.

The trial finally took place in April 2022, and the claimants were successful, largely because the judge accepted the evidence of Mr Patel. No allegations of dishonesty were raised during the trial or in the judgment – the judge simply preferred the evidence of the claimants and their witness.

The question of costs

That left the issues of costs. There was no issue that the costs to the date of the defendants' application to amend to plead fundamental dishonesty should be paid on the standard basis. Equally the trial costs were payable on the indemnity basis because the claimants had beaten their Part 36 offer.

That left the costs of the intervening period. The claimants contended that those too should be paid on the indemnity basis; the defendants argued that standard basis costs were appropriate.

The trial judge decided that the costs should be paid on the standard basis. That decision was upheld by Mr Justice Richard Smith on appeal.

The claimants duly appealed to the Court of Appeal, raising 3 main grounds:

i. that the judge had misdirected herself as to the test for indemnity costs;

ii. that she had reached a perverse conclusion;

iii. and, most significantly, that the failure of allegations of fundamental dishonesty attracted a 'presumption' of indemnity costs, and the judge had not identified any issues to dispel that presumption.

A presumption of indemnity costs

The key issue for the Court of Appeal was addressed by Coulson LJ at the outset:

> *'The appeal raises the question of whether there is some form of default entitlement to indemnity costs on the part of a claimant (or at least a presumption to that effect), in circumstances where a defendant has unsuccessfully suggested that the claim is fundamentally dishonest'.*

The starting point was that there was a wide discretion as to costs generally, and as to indemnity costs in particular. The court had to take account of all the circumstances of the case, including but not limited to the conduct of the paying party.

In order to obtain an order for indemnity costs, the Court of Appeal held that the receiving party 'must surmount a high hurdle', by demonstrating some conduct or circumstance 'which takes the case out of the norm'. It was preferable for the judge expressly to apply the test of 'out of the norm', but use of the word 'exceptional' may be consistent with the correct test.

Where based on the paying party's conduct, it was necessary for an applicant for indemnity costs to show such conduct was 'unreasonable to a high degree', but not necessary to show 'a moral lack of probity or conduct deserving of moral condemnation'. Merely because conduct occurred regularly in litigation did not mean it could not also be 'out of the norm' – it was intended to reflect 'something outside the ordinary and reasonable conduct of proceedings'.

The Court of Appeal noted that there were many cases in which a dishonest claim resulted in indemnity costs orders against claimants. However, there was no presumption of indemnity costs against defendants who unsuccessfully alleged fundamental dishonesty, or even a 'starting point' to that effect, reversing the burden of proof so that the paying party had to demonstrate why indemnity costs should not be ordered:

> *'there is no such presumption or reversal of the ordinary burden of proof. It will always depend on the circumstances of the particular case, and the judge retains a complete and unfettered discretion'.*

Thus:

> *'the default position is always that standard costs will be assessed and paid, unless the party seeking indemnity costs can demonstrate why they are appropriate in all the circumstances'.*

Other grounds of appeal

The Court of Appeal also rejected the other grounds of appeal. The trial judge's decision on costs was delivered in a short ex tempore judgment at the conclusion of the trial. Although she did not refer in terms to the test of conduct 'out of the norm', or even to exceptionality, it was clear that she had the correct test in mind. Equally the trial judge's reasons, though short, were adequate. Her decision was not perverse: she was aware of all the relevant facts, but concluded that, whilst there were a number of factors which might suggest indemnity costs were appropriate, in the final analysis the claimants did not surmount the high hurdle of demonstrating an entitlement to indemnity costs.

The sting in the tail

Whilst the Court of Appeal rejected the notion of a presumption of indemnity costs where fundamental dishonesty allegations failed, and upheld the trial judge's decision to award standard basis costs, the judgment confirms that the failure of allegations of dishonesty is a relevant factor which may be taken into account when considering whether to award indemnity costs.

Coulson LJ commented that:

> *'But nothing that I say there is intended to detract in any way from this statement of the obvious: that, because the making of a dishonest claim will very often attract an indemnity costs order against a claimant, a failed allegation of dishonesty will very often lead to the making of an indemnity costs order against the defendant, on the simple basis that "what is sauce for the goose is sauce for the gander"'.*

The case therefore contains a warning for unwary defendants:

> *'A defendant who makes allegations of this kind therefore runs a very significant risk that, if the allegations fail, indemnity costs will be awarded against them'.*

Conclusions

The decision of the Court of Appeal provides a helpful summary of the correct approach to costs following fundamental dishonesty allegations. It confirms that there is no presumption in favour of indemnity costs where allegations of fundamental dishonesty fail. The court must exercise its discretion taking account of all the circumstances. Those applying for indemnity costs have a high hurdle to surmount, and will need to identify conduct 'out of the norm' to establish that an indemnity costs order is appropriate.

However, the decision does not remove the risk of indemnity costs – indeed it acts as a clear warning against making allegations of dishonesty without a proper evidential basis to support them. The courts at all levels in this case were critical of the conduct of the defendants. The allegations were described as a 'storm in a teacup', and it was noted that the case had 'none of the hallmarks of the sort of fundamentally dishonest fraudulent claims that this court sees all too frequently'. To that extent the case should serve as a reminder to defendants not to allege fraud or fundamental dishonesty lightly, without a firm evidential basis, if they hope to avoid paying indemnity costs when the allegations fail.

The Lady Chief Justice, who delivered a concurring judgment, added some salutary words:

> *'This litigation has been characterised by parties on both sides far too ready to throw unnecessary and serious allegations against each other. In the appellants' case, this occurred from the very outset. The appellants' solicitors first email response to the second respondent spoke of the first respondent's "reckless" driving; within weeks they were referring to what they described as the first respondent's "fabrication of the truth" and "perversion of justice", and indicating that they would be seeking to recover their costs from the respondents on an indemnity basis'.*

That sort of approach was inappropriate:

> *'As the trial judge recognised, this was a relatively straightforward road traffic accident case involving conflicting witness evidence. It should have been approached by the parties as such, all in accordance with the overriding objective…As the courts have made clear repeatedly, an unnecessarily aggressive approach to litigation is unacceptable…Potential costs incentives are not a good reason for making unwarranted allegations of misconduct, let alone dishonesty'.*

Those reminders were intended to encourage all parties to take a more measured approach to litigation, even when dishonesty is suspected or raised. It remains to be seen whether, in the contentious arena of insurance fraud, that occurs in practice.

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A pleading of Fundamental Dishonesty? The Claimant Won't Succeed in Obtaining an Interim Payment: *Mehmood v Mayor* [2024] EWHC 1057 (KB)

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Can a claimant obtain an interim payment (IP) in a case where the defendant has raised an allegation of fundamental dishonesty that may result in the whole claim being dismissed? The answer appears to be no, according to the decision of Master Fontaine (sitting in retirement) in *Mehmood v Mayor* [2024] EWHC 1057 (KB).

Facts

The Claimant had suffered a significant brain injury when his motorcycle was involved in a collision with the Defendant driver. The Defendant admitted primary liability, and the claim proceeded in respect of contributory negligence, causation and quantum.

The medical evidence classified the Claimant's brain injury as Moderate to Severe and the Claimant brought the claim by a Litigation Friend. The Claimant's lack of capacity was disputed by the Defendant in an Amended Defence. The Defendant relied on medical and surveillance evidence to justify a pleading of fundamental dishonesty pursuant to section *57* of the Criminal Justice and Courts Act 2015 ("*s.57*").

This application was for retrospective approval of a £10,000 IP made pre-issue.The Claimant also sought a further IP of £75,000 to fund rehabilitation and treatment recommended by the Claimant's experts and the Defendant's neuropsychiatrist.

The surveillance and the experts

The surveillance videos showed the Claimant on-site at his restaurant carrying out tasks such as taking orders, serving and taking payment from customers, cooking, and dealing with delivery drivers. The Claimant appeared to be working long hours (from 11:30am until 11:30pm, not returning home until after midnight). He appeared to be able to communicate with staff and customers (including the surveillance operatives) independently and with no obvious difficulties.

The surveillance had been shown to both sets of experts, all of whom produced supplementary reports and/ or updated joint statements. The footage divided opinion, as might be expected, on party lines.

The main battleground lay between the neuropsychiatrists. Dr Ford for the Claimant considered it would be *"erroneous to form an opinion on the Claimant's neuropsychological functioning in the absence of additional, necessary evidence"* (albeit he did revise his recommendations for the Claimant's care needs). Professor Powell for the Defendanthad already concluded in his original report that the Claimant's performance of the Test of Memory Malingering was *"not credible"* and unlikely to have an organic explanation. He considered the surveillance evidence – some of which was captured on the same day as the Claimant's examination with him – was *"grossly inconsistent with his presentation upon assessment and interview"* and that *"accounts of his post-accident work activity have been inaccurate and have underplayed the extent of his work, and… this echoes his non-credible test performance".*

The legal issue

The application was made under CPR 25.7 and subject to the principles in *Cobham Hire Services v Eeles* [2009] EWCA Civ 204. The Claimant submitted the claim had a value exceeding £200,000, and the two limbs of the *Eeles* test were easily satisfied.

Unusually, the Defendant did not contend that the two limbs of *Eeles* were not satisfied. Instead, the Defendant submitted that the s.57 pleading, if successful, would result in the dismissal of the primary claim (absent any finding of substantial injustice) and therefore the Claimant had not satisfied the pre-requisite condition of CPR 25.7(1)(a) that *"the Defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the Claimant".*

The Claimant made three submissions in response. First, there was a good explanation for the surveillance footage. Second, the recommended rehabilitation and treatment would be for the benefit of both parties. Third, he contended that the court is often faced with a situation where each party may be financially prejudiced whatever the value of the IP, and the court is able to weigh up the relative prejudice to each party and reach a conclusion. He relied on the decision in *Salwin v Shahed* [2022] EWHC 1440 (QB), in which the court adopted a cautious approach to the parties' completely conflicting evidence of the claimant's future care needs.

The Claimant also raised issue with the Defendant's failure to file a witness statement in response to the application, particularly in respect of the surveillance evidence.

Decision

The Master rejected the complaint that the Defendant had not responded to the application. The surveillance evidence had been sent to all the experts, whose comments had been extracted, along with a detailed description of the surveillance, in the Amended Defence. There was no dispute about the accuracy of the Amended Defence, which had been verified with a statement of truth. In any event, the Defendant's arguments were legal points, which did not require any further supporting evidence.

The Master was clear that she was unable to resolve the question of the Claimant's dishonesty, let alone fundamental dishonesty, on a summary basis with only documentary evidence. The matter could only be determined at trial on hearing oral evidence from the witnesses of fact and medical experts.

However, there were a wide range of potential outcomes for the Claimant. The court could find that s.57 was engaged, in which case the primary claim would be dismissed, and the Claimant would recover nothing (unless the court found that the Claimant would suffer a substantial injustice). Or the Claimant could be found to have exaggerated his symptoms, but not in such a way as to be fundamental to his claim; damages would be consequently reduced. Alternatively, the Claimant's case could succeed, and he could recover significant damages. In other words, the range of what the Claimant may expect to recover *"is from nothing to the full amount he is seeking".* This was not a case where the Claimant was able to show that he was likely to succeed on an "*irreducible minimum*" part of the claim (per C*hiron Corporation & ors v Murex Diagnostics Limited* (No13) [1996] FSR 578).

Considering the application of CPR Part 25, the Master found it was not possible for the court to conclude what would be *"a reasonable proportion of the likely amount of the final judgment"* pursuant to CPR 25.7(4).

She also concluded that the Defendant's analysis of the impact of the s.57 pleading on CPR 25.7(1)(a) was correct – the Defendant had indeed denied liability to "*pay damages"* to the Claimant by virtue of the s.57 pleading.

The Master acknowledged that her decision could cause the Claimant injustice if he succeeded at trial and the Defendant's case on fundamental dishonesty was not accepted. However, the Claimant had the burden of satisfying the court he had met the requirements of CPR Part 25, and, in this context, he could not do so.

Conclusion

Although the Master provided a detailed description of the surveillance material and the experts' responses to it, her decision did not require her to assess its evidential value: fundamental dishonesty can only be determined at trial following oral evidence. However, where fundamental dishonesty has been properly pleaded and is supported by evidence, the court cannot make an order for an IP.

It follows that where fundamental dishonesty has not been properly pleaded or is not supported by appropriate evidence, the Claimant may still be able to obtain interim relief.

In this case, the Claimant had not sought to Reply to the Amended Defence denying the allegations; did not make any application either to strike out that part of the Amended Defence and/ or for summary judgment on it; and had not provided any evidence disputing the provenance, quality or interpretation of the surveillance material. These are all remedies available to claimants in circumstances in which a defendant may seek to use unparticularised warnings or vague concerns to avoid liability for damages, either at an IP application or indeed at trial.

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Beware The Trap of Unambiguous Impropriety *Morris v Williams* [2025] EWHC 218 (KB)

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Damned if you do. Damned if you don't. A tale where the Claimant's attempt to settle his claim through *"without prejudice"* correspondence backfired. The Court admitted the letter as evidence of fundamental dishonesty after finding that it fell within the *"unambiguous impropriety"* exception to the *"without prejudice"* shield.

Mr Morris wanted to settle (by means of discontinuance) his claim for damages for personal injury after the Defendant's insurers made an allegation of fundamental dishonesty against him. Disclosed surveillance gave grounds for the argument that Mr Morris had seriously and deliberately exaggerated the effect of the accident upon him.

The WPSATC Letter

In a letter marked *"Without Prejudice Save As To Costs"* ("*WPSATC*") his solicitors set out the terms on which he proposed to discontinue. Those terms included an offer to pay the insurers £20,000 to cover the interim payment previously received (£1,500) and as "*a contribution towards your legal costs and disbursements".* In hindsight, it might have been better for Mr Morris if the letter had stopped there. But it offered more. The offer letter proposed:

> *"that the Claimant will admit that he was fundamentally dishonest in respect of some of the representations made in respect to the claim".*

No doubt conscious of the potential implications of this, the letter continued:

> *"However, it should be noted that he is* ***only*** *prepared to make such an admission on the basis that it is contained in a non-disclosure agreement to the effect that the case cannot be discussed or reported in any way, with any third parties at all…".*

The issue soon became, how much of a shield did the *WPSATC* header on the letter give to this proposal? Was this an offer made in negotiations covered by the usual protections afforded to genuine attempts to settle?

The insurer rejected the terms proposed, so the litigation was set to continue. Mr Morris could have discontinued on the usual terms and waited to see if the insurer applied either to have that Notice set aside or seek an order for the fundamental dishonesty issue to be determined regardless of the discontinuance and make enforceable the deemed costs order made upon discontinuance. But the Claimant didn't, so neither did the Defendant's insurers, and the matter continued towards trial.

But what use, if any, could be made in the ongoing litigation of the contents of this WPSATC letter? The insurers sought an order that they be permitted to rely on it as evidence in the case and this matter came on for determination by District Judge Dodsworth in the Sunderland District Registry.

The Issues

What the author of the letter had perhaps not appreciated is that a WPSATC label (nor, indeed, the WP alone label) is not as much an impregnable shield as they might have thought. Whilst the general public policy is to exclude from consideration when determining liability any previous statements that had been made by either party in genuine negotiations for settlement, this must be balanced against "the public interest in full discovery between parties to litigation". More precisely, an exception to the usual rules concerning use of without prejudice material

> ***"relates to situations where to exclude material marked as without prejudice would act as a cloak for perjury, blackmail or other "unambiguous impropriety".***

Could Mr Morris' letter have been an example of the latter?

The Defendant's arguments centred on the fact that if the letter is excluded, the case would proceed to trial where a central issue would be whether the Claimant had been fundamentally dishonest. Yet, without the cloak of privilege being lifted, they would be unable to refer to the contents of the letter in which Mr Morris had indicated a willingness to admit he had been fundamentally dishonest in some respects.

Mr Morris' (new) solicitor argued that the letter as written did not contain any admission of fundamental dishonesty and that this exception to the usual rules should be construed narrowly. The impropriety had to be "*unambiguous*". It was argued that the letter had simply included terms that did not *"go beyond the bounds of what is permitted in negotiation"* and thus did not fall within the exception. The argument was that the second concession within the letter (the first being the offer on damages and costs) was simply an offer to potentially do something in the future (make an admission of fundamental dishonesty) so long as that was done "**only**" within the context of a non-disclosure agreement.

The Decision

The Judge rejected the Claimant's proposed construction of the letter. DJ Dodsworth held that it had been written by experienced solicitors who no doubt took care in its drafting. The letter contained an admission, not simply an offer to make an admission in the future subject to certain other related terms also being in operation. The offer to act in this way in the future was no different to the offer to pay £20,000 in the future if the offer had been accepted.

After also holding that the letter did contain an admission of having been fundamentally dishonest, it was then a short step for the Judge to conclude that the shield of WPSATC fell away by reason of the *"unambiguous impropriety"* exception. There had been more than simply an admission of some over-egging of the injuries and consequent symptoms, nor was it simply an admission that some aspects of his claim may be difficult to prove. Excluding the letter would not be compatible with allowing the matter to proceed to a trial at which the Claimant would be denying the allegation of fundamental dishonesty. This was sufficient to trigger the exception. Put simply, *"to refuse to admit the Letter would permit the Claimant to benefit from an unambiguous impropriety".*

As said at the beginning: damned if you do; damned if you don't. Mr Morris and his former advisors no doubt thought he was being pragmatic and realistic in proposing the concessions contained in the Letter. He no doubt intended to dangle a sufficiently attractive carrot to bring a swift end to the claim and to the predicament he had found himself in. But, from Mr Morris' perspective, the Letter went too far. Whilst someone who has been fundamentally dishonest should not get too much credit when they are prepared to admit to such, this decision will no doubt dissuade others in future from being so frank.

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HXA v Surrey County Council [2023] UKSC 52: What You Need To Know

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I have nothing original to write on *HXA v Surrey County Council* [2023] UKSC 52, the most recent Supreme Court decision on assumption of responsibility. However, I will give you what you need to know, and take as little of your precious time as possible in doing so.

Why should I care about HXA?

This is the last word of the Supreme Court on the basic principles in determining whether there has been an assumption of responsibility, particularly in the context of public authorities' duties.

What are the principles to apply?

Those set down in *N v Poole Borough Council* [2020] AC 780. As Lord Burrows and Lord Stephens set out at paragraph 102: "*As we have said, these cases turn on applying* N v Poole. *Our decisions in these appeals should remove any conceivable doubt that lawyers may have had in understanding the full impact of* N v Poole."

Well that didn't give me the principles I was after

The key point in N v Poole is that the mere existence of a statutory scheme will not generate an assumption of responsibility, unless the operation of that scheme fulfils the criteria of assumption of responsibility. Those criteria were set out in cases such as *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 and *Spring v Guardian Assurance plc* [1995] 2 AC 296 (see paragraph 50 of HXA). However, there will be no such duty if the statutory scheme is inconsistent with and/or excludes such a duty.

What the Supreme Court in HXA termed the "critical para" of *N v Poole*, paragraph 65, reads as follows:

> *"It follows (1) that public authorities may owe a duty of care in circumstances where the principles applicable to private individuals would impose such a duty, unless such a duty would be inconsistent with, and is therefore excluded by, the legislation from which their powers or duties are derived; (2) that public authorities do not owe a duty of care at common law merely because they have statutory powers or duties, even if, by exercising their statutory functions, they could prevent a person from suffering harm; and (3) that public authorities can come under a common law duty to protect from harm in circumstances where the principles applicable to private individuals or bodies would impose such a duty, as for example where the authority has created the source of danger or has assumed a responsibility to protect the claimant from harm , unless the*

> *imposition of such a duty would be inconsistent with the relevant legislation."*

If the answer is given by *N v Poole*, why did we need HXA in the first place?

The Court of Appeal, like my 8-month-old daughter, smeared food across the Supreme Court's beautifully arranged dining table, by holding that *N v Poole* did not decisively settle matters. Or, in Lord Burrows and Lord Stephens' words at [102]:

> *"the Court of Appeal has thrown the area into doubt - and would make it very difficult to strike out - by incorrectly stressing that this is an unclear developing area of the law so as to require the evidence to be heard at full trials in order to establish a body of case law. As we have said, these cases turn on applying N v Poole"*

Any other tips?

Did the Supreme Court give us any other tips for assessing whether there is liability in my case where harm has occurred to an individual on account of a public authority's alleged negligence?

Two principles stand out:

1. Ask yourself whether yours is a 'causing harm' case or a 'failure to benefit' case. If it is the latter, then the claimant will need to fit the case within one of the "exceptional principles" at paragraph 88. These include assumption of responsibility.

2.. Again, if this is a 'failure to benefit' case, consider whether a private individual would owe the same duties: paragraph 88.

Conclusion

The Supreme Court has now trenchantly affirmed the correct approach to public authorities' liability, in particular when it comes to cases requiring an assumption of responsibility. Readers will do well to go back to *N v Poole* and carefully assess their cases in line with the Supreme Court's analysis.

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For Better or For Worse? *Tindall and anr v Chief Constable of Thames Valley Police* [2024] UKSC 33

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The law of tort draws a distinction between acts and omissions. In general, subject to exceptions, there is no liability in negligence for failing to confer a benefit. Where should the courts draw the line between making matters worse and failing to protect a person from injury?

The Appeal

This appeal arose out of an application by the Chief Constable to strike out Mr Tindall's widow's claim on the ground that the facts alleged did not disclose a valid claim in law or, alternatively, for summary judgment on the ground that the claim had no real prospect of success. The application failed at first instance but succeeded on appeal to the Court of Appeal. The claimant then appealed to the Supreme Court.

The Facts

At around 4.30am on 4th March 2014 Martin Kendall lost control of his car on an area of black ice on the A413. His vehicle slid into a roadside ditch. Mr Kendall was not seriously injured. He got out of his vehicle and attempted to warn approaching traffic of the presence of the black ice in the hope of avoiding further accidents. He also called Thames Valley police who arrived at the scene around 30 minutes after his accident.

The police ascertained the facts of the accident from Mr Kendall and were aware of the presence of black ice on the road. They helped Mr Kendall into an ambulance in order that he be conveyed to hospital. The police then checked the road for debris from the accident and removed the same. Having done so, they removed a "police slow" sign which they had put out on attending the scene. They then called the Thames Valley Police control centre to request the attendance of a gritter, although the urgency of the request was not conveyed to the call handler. Following this, they left the scene.

Around 20 minutes later, another driver who was travelling northbound on the A413 lost control of his vehicle on the same patch of black ice. His vehicle travelled across into the oncoming carriageway and collided head on with Mr Tindall's correctly proceeding vehicle. Both the driver of the vehicle which had lost control on the black ice and Mr Tindall died in the collision.

The conduct of the police officers who attended the scene was considered by the IPCC, a police disciplinary complaints panel and by an inquest. The police disciplinary tribunal found two of the officers guilty of misconduct and a third of gross misconduct. In particular, the tribunal held that there had been significant errors by the police officers in the discharge of their duties to carry out an effective investigation at the scene. It also found that the officers left without knowing whether a gritter was on the way and that they should have re-evaluated the scene and done more. A five week jury inquest reached similar critical conclusions.

The Legal Principles

The Supeme Court noted that the failure of the police officers to take steps to protect road users from the danger posed by the ice hazard to which the officers had been alerted was a serious dereliction of their public duty owed to society at large. However, it also noted that it did not follow from that they were in breach of a duty of care in the tort of negligence owed to particular individuals.

The Supreme Court considered the case law and distilled the following general principles from those cases.

(i) There is a fundamental distinction between making matters worse, where the finding of a duty of care is commonplace and straightforward, and failing to confer a benefit (including failing to protect a person from harm), where there is generally no duty of care owed.

(ii) An example of the former (making matters worse), where there was held to be a duty of care owed by the police, is *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4. As regards other emergency services, a more difficult example is the Hampshire case in *Capital Counties plc v Hampshire County Council* [1977] QB 1004 (where the fire brigade worsened the situation by turning off the sprinkler system on their arrival at a fire).

(iii) A difficulty in drawing the distinction (between making matters worse and failing to protect from harm) is how to identify the baseline relative to which one judges whether the defendant has made matters worse. The cases show that the relevant comparison is with what would have happened if the defendant had done nothing at all and had never embarked on the activity which has given rise to the claim. The starting point is that the defendant generally owes no common law duty of care to undertake an activity which may result in benefit to another person. So it is only if carrying out the activity makes another person worse off than if the activity had not been undertaken that liability can arise.

(iv) Another way of stating the general rule is to say that a person owes a duty to take care not to expose others to unreasonable and reasonably foreseeable risks of physical harm created by that person's own conduct. By contrast, no duty of care is in general owed to protect others from risks of physical harm which arise independently of the defendant's conduct - whether from natural causes (as in *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74) or from third parties (as in *Michael v Chief Constable of South Wales Police* [2015] UKSC 2 and *Ancell v McDermott* [1993] 4 All ER 355).

(v) There are exceptions to the general rule that there is no duty of care to protect a person from harm, for example, where the defendant has assumed a responsibility to do so or has control of a third party.

The Claimant's Case

T's primary case was that the police made matters worse. The argument was founded on the allegation that, but for the arrival of the police at the scene of Mr Kendall's accident, Mr Kendall would have continued making attempts to warn other motorists of the ice on the road. It was said that the police made matters worse by displacing Mr Kendall's efforts without taking any comparable steps of their own to warn motorists of the hazard. While the police were at the scene, the blue

lights and the "police slow" sign placed on the northbound carriageway provided some warning. However, once the police left, taking the sign with them, road users were exposed to a risk of injury from skidding on the ice greater than if the police had never attended at all (because in that event Mr Kendall's evidence was that he would have persisted in his warning efforts).

Alternatively, T argued that, applying one of the exceptions to the general rule, the police came under a duty of care to protect from harm road users travelling on the icy stretch of road. In particular, such a duty was said to arise from the fact that the police took control of the scene upon their arrival and then relinquished control without having taken any steps to remove or reduce the hazard to which road users were then again exposed.

The Supreme Court's decision – Making Matters Worse

The Supreme Court had regard to the 'interference principle' as articulated by McBride and Bagshaw in their book on Tort Law, 6th ed (2018) pp 213-217. That principle can be summarised as follows:

> *"[I]f A knows or ought to know that B is in need of help to avoid some harm, and A knows or ought to know that he has done something to put off or prevent someone else helping B, then A will owe B a duty to take reasonable steps to give B the help she needs."*

The Supreme Court concluded that this principle was a correct statement of English law, *Kent v Griffiths* (No.3) [2001] Q.B. 36, [2000] 2 WLUK 96 and *Darnley v Croydon Health Services NHS Trus*t [2018] UKSC 50, [2019] A.C. 831, [2018] 10 WLUK 181 considered. It was simply a particular illustration or manifestation of the duty of care not to make matters worse by acting in a way that created an unreasonable and reasonably foreseeable risk of physical injury to the claimant.

There was no reason in principle why the conduct which created that risk should not consist of acts which were foreseeably likely to have the effect of putting off or preventing someone else from taking steps to protect the claimant from harm. It was also not artificial or nonsensical to treat different public rescue services for that purpose as independent actors, *OLL Ltd v Secretary of State for the Home Department* [1997] 3 All E.R. 897, [1997] 6 WLUK 262 disapproved.

The Court concluded that it was not enough to show that the defendant had acted in a way which had the effect of putting off or preventing someone else from helping the claimant. For a duty of care to arise, it was necessary to show that the police knew or ought to have known (i.e. that it was reasonably foreseeable) that its conduct would have had the effect of putting Mr Kendall off from waning other motorists of the black ice hazard.

However, in the instant case there was no evidence that the police knew or ought to have known that prior to calling 101 that Mr Kendall had been attempting to warn other motorists of the ice hazard. There was also no evidence before the Court of what the police knew or ought to have known about what Mr Kendall would have done if they had not arrived at the scene. As far as the police were concerned, Mr Kendall was someone who had been injured in an accident and no more than that. He was a victim not a rescuer.

The Supreme Court's Decision – The Alternative Case

In the alternative, T sought to argue that the police came under a duty of care to protect motorists from the danger posed by the ice by taking control of the accident scene. The leading case in this respect is that of *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 where prison officers had control over young offenders in their custody on an island. Some of those offenders escaped overnight and damaged the claimant's yacht in attempting to leave the island. In those circumstances the House of Lords concluded that the Home Office as the prison authority owed a duty of care to the claimant to prevent the boys under its control from damaging their property. Another illustration of the principle can be seen in *Carmarthenshire County Council v Lewis* [1955] AC 549 where a three year old boy ran out into the road from the defendant's nursery school. The driver of a lorry swerved to avoid the boy, struck a telegraph post and was killed. His widow successfully brought a claim in negligence against the defendant. In this case the House of Lords considered that a duty of care was owed by the defendant to the deceased on the basis that the defendant was in a position of control over the child.

In the instant case T argued that the principle of liability based on control is not confined to situations involving an assumption of parental or quasi-parental responsibility but extends to any situation where the defendant has control over a particular source of danger, whether it be a human being (as in the Carmarthenshire and Dorset Yacht cases) or an artificial or natural hazard, and the claimant is at special risk of suffering harm if such control is lost or relinquished.

The Supreme Court noted that there was no clear authority supporting the broad legal principle for which the claimant contended. In any event, even if such a principle did exist, which the Court plainly considered doubtful, it could not apply in the circumstances of this case where the police had taken control of the accident scene where Mr Kendall's vehicle had ended up but not of the patch of black ice which was 184 metres away. On the contrary, one of T's complaints was precisely that the police did nothing to take control of that patch of ice. There was no evidence to suggest that they even went to inspect it.

In the circumstances of this case, the Supreme Court therefore concluded that the police could not be held liable for making matters worse, and none of the possible exceptions to the general rule that there was no duty of care to protect a person from harm had been made out. As such, T's appeal was dismissed.

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Testing Tindall: *Chief Constable of Northamptonshire v Woodcock* [2025] EWCA Civ 13

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Woodcock was one of the first applications of the Supreme Court's decision in *Tindall v Chief Constable of Thames Valley* [2024] UKSC 33 ('*Tindall*') (see Ben Casey's separate article on *Tindall* elsewhere in this Update).

Facts

Woodcock involved two appeals which were heard together. The appeals were unrelated save that they both concerned whether the police may be liable in damages for failing to protect a person from harm caused by the criminal actions of a third party.

In the *Woodcock* case, Ms Woodcock was attacked and seriously injured by her former partner in March 2015. This followed a history of assaults, harassment and threats to her life, which had been reported to police. Shortly before the attack, a neighbour called 999 and told the operator that Ms Woodcock's former partner was loitering outside her house. Officers were sent to arrest him, but the attack occurred before their arrival, as Ms Woodcock left her house. Ms Woodcock claimed damages in negligence against Northamptonshire Police on the basis that she was owed a duty of care to protect her from the attack, to arrest her former partner earlier or warn her that he was outside her house. The claim failed at first instance, but Ritchie J allowed her appeal, holding that the police were under a duty to warn her of an imminent attack following the neighbour's call. The Chief Constable appealed.

The second case concerned five child victims, referred to as CJ and others, who were subjected to sexual abuse by a man referred to as MP between 2012 and 2015. In December 2012, Wiltshire Police opened an investigation into a laptop found to contain indecent images of children to which MP had access, but limited action was taken. In May 2014, examination of the laptop revealed MP was the likely suspect, but no action was taken. It was later established that after creating the indecent images, MP had gone on to commit sexual offences against the Claimants. Claims were brought in negligence alleging that Wiltshire Police owed a duty of care to protect them against MP. Spencer J dismissed the claim, holding that no duty of care was owed. The Claimants appealed.

Court of Appeal's judgment

Shortly before the appeals were heard, the Supreme Court handed down judgment in Tindall. That judgment had not, of course, been available to the judges below.

At the Court of Appeal hearing , it was common ground between the parties that there were three general rules: (a) the common law does not impose liability in the tort of negligence for omissions or failures to act; (b) the police do not owe a duty to individuals to protect them against harm caused by the criminal actions of a third party; and (c) foreseeability of harm is not in itself sufficient to give rise either to such a duty or to the narrower duty to warn.

The Court of Appeal considered Ms Woodcock's case fell within the scope of those general rules and so the outcome of the appeal turned on whether she could bring her case within one or more of the exceptions to those general rules.

In their judgment the Court of Appeal referred to the summary of the 'omissions principle' set out in an academic article by Stelios Tofaris and Sandy Steel, 'Negligence liability for omissions and the police' (2016) 75 CLJ 128 ('Tofaris and Steel'):

> *'In the tort of negligence, a person A is not under a duty to take care to prevent harm occurring to person B through a source of danger not created by A unless (i) A has assumed a responsibility to protect B from that danger, (ii) A has done something which prevents another from protecting B from that danger, (iii) A has a special level of control over that source of danger, or (iv) A's status creates an obligation to protect B from that danger.'*

The Tofaris and Steel summary was previously cited with approval by Lord Reed, giving the leading judgment, in *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4 ('***Robinson***') and also cited with approval in *Tindall* as a useful starting point for analysis of exceptions to the general rule.

As to the exception that arises in circumstances where a claimant asserts an assumption of responsibility by the police (the first Tofaris and Steel exception), the Court of Appeal held, at paragraph 121, that it will usually be necessary for the claimant to show, *'… something in the way of a specific representation or promise by the police to take particular action'* and that the promise was relied on. The question of whether there has been an assumption of responsibility will be highly fact specific. In Ms Woodcock's case, the Court held there had been no such assumption of responsibility.

Ms Woodcock further argued that this was a case where the 'interference principle' (the second Tofaris and Steel exception) – confirmed by the Supreme Court in *Tindall* – applied. She argued that the police interfered with the neighbour who (but for the involvement of the police) would have warned Ms Woodcock. The Court of Appeal held, at paragraph 123, that, '*preventing another person from protecting a victim is a form of making matters worse for the victim, and so may give rise to liability' but there must evidence that, 'both that the police knew or ought to have known that the other person intended to act protectively, and that the other person was deflected from doing so by the conduct of the police.'* This issue failed on the facts.

The Court of Appeal also rejected a submission (the third Tofaris and Steel exception) that the police had a special level of control over Ms Woodcock's former partner. The Court found that the police had no more control over him than the police generally have over persons suspected of crime but not yet arrested. The Court noted that if Ms Woodcock's submission was correct, it would render the general rule inapplicable to a substantial proportion of cases in which the police are accused of a culpable omission to act.

Comment

Woodcock is further illustration of the difficulty faced by claimants in establishing a duty of care on the part of the police. These difficulties go back to the 1989 case of *Hill v Chief Constable of West Yorkshire* [1989] AC 53 ('***Hill***'), in which the House of Lords held that police officers investigating the Yorkshire Ripper murders did not owe a duty to the murderer's potential future victims to take reasonable care to apprehend him. Hill was applied in a series of subsequent cases.

The modern approach to claims in respect of duty of care in negligence on the part of the police stems from the Supreme Court's decisions in *Michael v Chief Constable of South Wales Police [*2015] UKSC 2 ('***Michael***') (domestic murder; police mishandling of 999 call) and *Robinson v Chief Constable of West Yorkshire Police* ('***Robinson***') (police caused death of third party in course of effecting arrest) and now *Tindall*.

The starting point in dealing with such claims is to identify whether the conduct complained of involves an act (making things worse) or an omission (failing to confer a benefit or not making things better). If the claim concerns an omission, the question becomes whether an exception applies. The Tofaris and Steel summary provides a useful framework that points towards consideration of: (a) assumption of responsibility (what did the police do or say to the claimant and did he or she rely on it); (b) interference (who would have otherwise protected the claimant and did the police prevent that protection); and (c) control (did the police have actual control of the perpetrator).

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Lessons From Two Recent Child Pedestrian Cases: *Gadsby v. Hayes* [2024] EWHC 2142 (KC) and *Atkinson v. Kennedy* [2024] EWHC (KB)

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Gadsby and Atkinson are two recent High Court decisions where claims brought by child pedestrians failed. In Atkinson, a 7-year-old attempted to cross the road close to the mouth of a junction when she collided with an HGV. In Gadsby, a 12-year-old was on a pedestrian crossing when she was hit by a car. Both claims were dismissed, with the courts making interesting observations about lay witness and accident reconstruction evidence.

Two recent High Court decisions in which defendants were absolved of liability in cases involving collisions with underage pedestrians provide a helpful illustration of the paramount importance of carefully evaluating the questions of liability and causation and weighing up all of the available factual evidence before deciding whether to pursue or defend such a claim.

Gadsby v. Hayes [2024] EWHC 2142 (KC)

Facts

The Claimant, who was aged 12 at the time, suffered serious injuries when she was using a pedestrian crossing on her way home from school. The issues between the parties effectively amounted to a dispute of fact. The Claimant's case was that the traffic lights had been green in her favour throughout; she had turned back approximately half-way across the crossing and was walking back towards the nearside pavement when the Defendant struck her. The Defendant averred that the lights were actually green in her favour, and that she had slowed down on approach. The collision occurred when the Claimant stepped out into the crossing in front of her.

The Defendant's speed had been approximately 20-25mph. The Claimant alleged in the alternative that, even if the Defendant had been entitled to proceed, she should have slowed down to around 15mph when she was 50-60m from the crossing and should have been travelling at 10mph or less by the time that she arrived at the zig-zag road markings around 10m from the crossing.

Although there was expert collision reconstruction evidence from both sides, liability essentially rested largely on the Court's view of the lay witness evidence. The Claimant argued that the key evidence came from her sister whom she had been with at the time, whereas the Defendant placed great reliance upon the contemporaneous accounts that had been given to the police.

Decision

Dismissing the claim, Ms. Claire Ambrose (sitting as a Deputy High Court Judge) preferred the Defendant's version of events, giving the following five reasons in support:

(i) The Claimant's sister's evidence was not contemporaneous: her first Statement was given to the Claimant's solicitors almost a year after the accident and her second Statement was approximately four years after that;

(ii) She rejected the contention that the fact that the Claimant's sister was a participant in the incident gave her evidence more reliability. It was said to be of more relevance that she was not independent;

(iii) Comparison of the Claimant's sister's two Statements and her oral evidence created a suggestion that she had formed an ex post facto reconstruction of what had happened long after the events;

(iv) The evidence of the Defendant's witnesses was preferred. Their accounts were virtually contemporaneous and both gave consistent accounts independently; and

(v) The Claimant's account was considered to be a less credible explanation. If she really had been crossing for well over three seconds then she would have been able to see the Defendant's car throughout and even had time to revert to the nearside kerb.

The Judge also preferred the Defendant's case that the lights were green in her favour. She reasoned that if the traffic lights had been green in favour of pedestrians then it would have been incredibly unlikely that only the Claimant would have been crossing and that the other pedestrians would have been waiting.

Dealing with the question of whether the Defendant nevertheless bore some fault for the way that she was driving even on the facts as found, the Judge stated as follows:

> *"When the Defendant was approaching the junction at 50-60m or indeed at 10m there was no child on the crossing or running towards the crossing. There was a possibility of a child stepping or running onto the crossing notwithstanding the traffic lights being green (or turning green). Reasonable precautions required the Defendant to keep a lookout for children and reduce her speed to 20mph or less even if the lights were in her favour, and she did so. There was a large group of children beyond the crossing but only 3 to 5 of them actually waiting at the entry point on either side. Reasonable precautions did not require the Defendant to reduce her speed to 10mph (or indeed 14mph) when driving up to a green light at this crossing at this time of day."*

Atkinson v. Kennedy [2024] EWHC (KB)

Facts

The Claimant, who was aged 7 at the material time, suffered 'devastating' injuries when she was attempting to cross the road very close to the mouth of a junction. The Defendant's LGV was turning left into a side road at a speed of approximately 11mph; the Defendant did not see her make her way off the pavement. When he did notice the Claimant in one of his nearside mirrors, he brought the lorry to a stop, albeit not in time to prevent the nearside wheels of the LGV going over her legs.

One of the significant issues between the parties at trial related to the Defendant's driving in general, and his somewhat chequered driving history. The Claimant placed significant reliance upon the fact that the Defendant accepted that he had missed the 20mph limit signs, had exceeded the speed limit through the school zone and did not actually see the group of three (two children and one adult) who were waiting to cross the road.

Unlike in Gadsby, there was relatively little in the way of live, oral evidence of fact. Instead, the main focus of the dispute between the parties concerned the evidence of the accident reconstruction experts, Mr. Blackwood for the Claimant and Mr. Murdoch for the Defendant.

Decision

Freedman J. ultimately held that the Defendant was not negligent. The Defendant had been under no obligation to stop at the mouth of the junction as it was not foreseeable that the Claimant would step into the road when she did. He clarified that the current version of Rule 170 of the Highway Code does not create a mandatory requirement that every time a pedestrian is standing on a footpath evincing an intention to cross the road, a vehicle must immediately come to a halt. He found that the LGV was so readily visible to pedestrians on the footpath and was being driven at such a speed

that, in context, there was no requirement to bring it to a halt. Further, it was held that, on the facts as found, the Defendant reducing his speed would not have avoided the impact.

The Judge was particularly persuaded by Mr. Murdoch's evidence, which was said to focus more on the accident itself. Having assessed the realistic perception reaction time, the brake build-up time and other factors, and carefully considered all of the alternatives, he had reached the opinion that the Defendant could not have avoided the accident whatever happened.

In contrast, it was held that Mr. Blackwood's evidence on behalf of the Claimant was flawed in that he only considered what had happened if the Claimant had walked from the pavement rather than running (and, if so, whether it was 'full speed' running). This was in spite of the fact that this had been raised in Mr. Murdoch's evidence. The Judge felt that this left a lacuna in the Claimant's expert evidence, which was filled during cross-examination when Mr. Blackwood agreed that if the Claimant had run out then there was nothing that the Defendant could have done to avoid the accident, even if the Defendant had been travelling at a lower speed.

The Claimant placed reliance upon *O'Connor v. Stuttard* [2011] EWCA Civ 829, where Dame Janet Smith stated:

> *"In my judgment, it behoved the Defendant to ensure that the Claimant was aware of his presence and was keeping still before he proceeded. If that meant stopping his car, so be it. I do not think that such would be a counsel of perfection in these circumstances. He was going only slowly so there would be no difficulty in stopping. His was the only moving vehicle in the street at the time, so there was no pressure upon him to keep traffic moving. It may be, I cannot say, that it would have been possible for the Defendant to ensure that the Claimant looked at him and stopped playing by sounding his horn but without actually stopping his car. But, in these circumstances, the onus was on him, as an adult and as the driver of the car, either to sound his horn or stop or both so as to ensure that the Claimant kept still while he proceeded. This may sound exacting, but, in my judgment, it is not an unreasonable burden to place on a motorist who is driving very close to a young child."*

FreedmanJ dealt with this this at paragraph 80 of his judgment:

> *"Of course, there can be no challenge to the general thrust of what Dame Janet Smith said in O'Connor. However, I say again that context is critically important. A motorist travelling along a very quiet residential street where a young boy is kicking a ball against a wall on the pavement is an altogether different scenario from two girls standing on the footpath in the company of an adult. It was eminently foreseeable that the ball would go into the road and the boy would run after it. In marked contrast, in my judgment, it was not foreseeable that either the Claimant or Amelia would step or jog into the road at the moment when they did."*

Lessons from *Gadsby* and *Atkinson*

Both of these cases are very fact specific, and neither create any new propositions of law. Instead, it is suggested that consideration of both judgments can create a useful checklist of matters to consider (and to be wary of) for practitioners running high value child pedestrian claims to trial on both sides. It is suggested that the main 'lessons' are as follows:

1. Whilst in higher value cases it is close to inevitable that there will be a combination of both lay witness evidence and expert reconstruction evidence, particularly in child cases where claimants may not be in a position to give direct witness evidence themselves, it is important to step back and consider at a relatively early stage which is likely to become the main battleground at trial;

2. Particularly in 'expert-led' cases, it is important to ensure that the accident reconstruction expert has dealt with every possible finding of fact that the trial judge could realistically make, as otherwise it could provide the court with a basis to reject the expert's conclusions entirely;

3. Whilst it is not necessarily suggested that this occurred in *Atkinson,* it is the writer's experience that some accident reconstruction experts can need to be reminded of the importance of carefully considering all alternatives beyond whichever 'pet theory' they consider is the most likely explanation for the accident;

4. Particularly in cases that are led by the lay witness evidence, it is important to factor into the analysis of the parties' respective evidence: *(i)* when the evidence was first obtained; and *(ii)* whether the witness in question is independent. Independent, contemporaneous accounts give to the police are likely to attract significant weight if they cannot be gainsaid;

5. Wherever possible, proofs of evidence or Statements from actual or potential witnesses should be taken at the earliest possible opportunity. If a child is too young to give a formal Statement then a contemporaneous video of their evidence could be a useful record that can be referred to later on, and potentially disclosed;

6. It is generally accepted that the tenor of the leading authorities in child pedestrian cases favour the claimants and place a heavy burden on the defendants (e.g. *Eagle v. Chambers* [2003] EWCA Civ 1107 and *Kelly v. Nugent [*2011] NIQB 79). However, both of these cases were raised on the claimant's behalf in Gadsby and they did not alter the outcome. Whilst accepting that these authorities confirm that a pedestrian crossing requires heightened caution, the Judge rejected the Claimant's contention that this effectively required a 'crawling' speed at the index location. A similar analysis can be applied to the judicial treatment of the case of *O'Connor* in *Atkinson*;

7. However sophisticated an analysis that can be made of the lay and expect evidence, it is important to consider the general plausibility of the party's accounts. Where two rival accounts are both presented credibly, the general likelihood of them occurring may well come into play. It can never hurt to seek the views of a third-party on the differing factual circumstances that are being presented; sometimes this can be achieved most effectively by asking the views of somebody who has no background in personal injury law whatsoever!

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A "Robust and Common Sense Approach" to Contributory Negligence in a Motorcycle-Lorry Fatal Claim *Palmer v Timms* [2024] EWHC 2292 (KB)

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Palmer v Timms [2024] EWHC 2292 (KB) provided various lessons on primary liability and contributory negligence. The judgment will assist both claimants and defendants contesting liability following the acquittal of an insured party in criminal proceedings.

Introduction

The claim arose from a collision between a motorcyclist and a lorry in rush hour London traffic. Quantum had been agreed subject to liability.

A number of aspects of the trial were notable. First, the accident reconstruction expert evidence was largely agreed and the experts were not called to give evidence. Second, the only witness who gave live evidence was the Defendant driver Mr Timms. Third, the CCTV footage of the collision was clear and uncontroversial. Fourth, the civil trial followed a criminal trial where Mr Timms had been acquitted.

The judgment illustrates the difficulties defendants may encounter when inconsistencies emerge between the evidence relied on in each set of proceedings and from running a defence in the civil case not relied on in the preceding criminal case.

The Facts

Mr Palmer was riding his Honda motorcycle on the Holloway Road in North London at around 8.35am in heavy rush hour traffic. Mr Timms was driving his employer's DAF LGV motor lorry. Mr Timms was an experienced HGV driver. A second motorcyclist, Mr Dominic Molyneux, was passing the lorry on the offside at the same time although this second motorcyclist did not give evidence . There was comprehensive CCTV footage showing the progress of the vehicles as well as headcam footage from Mr Molyneux and from cameras fitted to the lorry. There was therefore a *"very clear and non-controversial"* factual foundation for how the accident occurred.

The lorry was proceeding at about 18mph whilst Mr Palmer was travelling more quickly at 25 to 26mph. The section of road had a speed limit of 30mph.

Mr Palmer was filtering through slower-moving traffic and undertaking. Mr Molyneux, the second motorcyclist, was doing the same but by overtaking. When Mr Palmer reached the lorry, he began passing it on its nearside. Mr Timms caused the lorry to move to its left reducing the space available for Mr Palmer's manoeuvre. The top box of the motorcycle made contact with a camera mounted on the lorry. Mr Palmer lost control of his motorcycle, fell sideways towards the pavement and hit a metal bollard. He died as a result of his injuries.

The Parties' Cases

Mr Palmer's widow brought a claim in trespass, her primary case being that Mr Timms deliberately or recklessly moved his lorry to the left to block Mr Palmer Alternatively, she alleged that it was negligent for him to have moved to his nearside without checking it was safe to do so.

The Defendant contended that there was no evidence to support the trespass case. Negligence was denied but, were it established, the Defendant contended a substantial deduction to reflect contributory negligence on the part of Mr Palmer of as high as 75% was merited.

Witness Credibility

The credibility of the single witness, Mr Timms, was central to the Judge's decision. He was held to lack credibility in significant regards . It was held he did not have a clear recollection of the accident.

That conclusion was reached in part because of inconsistencies between his initial account to the police and a paramedic at the scene; his "no comment" police interview; and, notably, that the defence expert and the defence statement from his criminal trial did not put forward the theory of the case relied on in the civil claim. He was also held to be defensive, at times using overly dramatic terminology when answering questions in order to deflect blame.The Judge had some sympathy for this given the tragic consequences of the collision.

Primary Liability

The Claimant's primary case of trespass by deliberate blocking was dismissed. The Judge held it lacked sufficient foundation in the evidence or on inferences that could be safely drawn. Although Mr Timms was held to be an unreliable witness, it did not follow that he acted intentionally in blocking the way of Mr Palmer.

The explanation of deliberate obstruction on the nearside was found to be "the least likely" explanation for the lorry's movement to the left.

However, negligence was made out.Specifically, that it was unsafe to have steered or allowed his vehicle to move to the left. Mr Timms' explanation that he had made a specific assessment of the risk that someone was not undertaking at that moment was rejected. Given the Claimant's primary case, it had not been suggested that Mr Timms was ignorant of Mr Palmer's presence.

Moreover, the judge considered Mr Timms did not need to move to the left or brake to facilitate overtaking by Molyneux, the second motorcyclist, on the offside. It was held to be "an action born of inattention". For a lorry driven in these circumstances, it should not have been surprising that a motorcyclist would seek to filter between traffic and the pavement. The judge considered that Mr Timms should have carried out basic checks before moving his lorry to the left. Moreover, had Mr Timms maintained a straight course, the collision would most likely have been avoided.

Contributory Negligence

The Defendants argued for a 75% reduction to reflect contributory negligence whilst the Claimant maintained any reduction should not exceed 20%. The judge settled on 1/3 to 2/3 in the Claimant's favour.

The judge considered the seminal Supreme Court judgment in *Jackson v Murray* [2015] 2 All ER 805 and numerous authorities cited by counsel.

The judge observed that *"this is not an apt field for hard case law and well-founded distinctions between cases… the exercise of making a just and equitable apportionment of liability is extremely fact sensitive and highly evaluative".* The judge approached the concepts of "*causative potency"* and "*blameworthiness"* as being *"aids to analysis and judgment"* rather than rigid categories or mutually exclusive considerations.

First, the Judge attached weight to the fact that a large lorry travelling through a busy urban environment surrounded by two-wheeled vehicles created a hazardous situation.

Second, the judge considered the *"disparity of vulnerability"* between the lorry and the other traffic.

Third, Mr Palmer was not absolved of having a responsibility to ensure his own safety. The gap he sought to navigate was narrow. It was not a complete answer that he could have negotiated that gap safely were it not for the lorry's move left.

Fourth, it was relevant that there were limited options open to Mr Palmer to avoid the hazard once created. Having no time or space to react to the hazard offset in part the causative potency of his initial decision to enter the gap.

Fifth, Mr Timms blameworthiness was found to be greater and significantly outweighed Mr Palmer's decision to trust the lorry driver.

With those factors in mind, the judge settled on his *"robust and common sense"* apportionment. This conclusion was unsurprising given the other findings that had been made about Mr Timms' decision-making.

Conclusion

The following takeaways are worth noting from this case overall:

1. Although this accident preceded the January 2022 changes to the Highway Code and the introduction of a hierarchy of road users, it is a useful example of a decision where the motorcyclist's vulnerability and that of the secondary motorcyclist were highly material to the assessment of primary liability.

2. Whilst for a claimant a case in trespass may have distinct advantages, notably that it precludes a defence of contributory negligence, it will always be extremely challenging to prove intention and to find evidence that can support a case of deliberately dangerous driving (especially absent a conviction). The Judge was particularly careful in this case to distinguish evidence going to fault on the part of Mr Timms from inferences that could not properly be drawn as to his apparent motivations.

3. The *"destructive disparity"* and the "*disparity of vulnerability"* factors were not sufficient to outweigh what the judge held was an error of judgment by the motorcyclist.

4. When a civil trial follows criminal proceedings, scrutinise the evidence and the party's case theories with care. The Defendants encountered significant problems in running their defence in this case because of changes to Mr Timms' account and his stance as to his own state of mind at the time of the collision.

5. Past contributory negligence decisions are an aid to analysis, but judges are very reluctant to consider themselves bound by them. Blameworthiness and causative potency should be addressed as factors which overlap. In fatal cases in particular practitioners can do no better than seek to persuade the court that your case on contribution is the *"robust and common sense"* approach to the particular facts.

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Another RTA Liability Update: *Miah (acting by his Litigation Friend) v J & Aviva Insurance Limited* [2024] EWHC 92 (KB)

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Miah concerned a collision between a car travelling at night on an unlit rural road and a pedestrian who alighted from a bus and proceeded to cross the road in front of the car. The claim was dismissed because failing to recognise the presence of the bus or the claimant at night was not unreasonable.

The Accident

The Claimant, acting by his Litigation Friend, brought a claim against Dr J ("the First Defendant") and her insurers, Aviva Insurance UK Ltd, ("the Second Defendant) for damages for the life changing injuries he sustained in a road traffic accident which occurred at about 9.40pm on 17th September 2018 on the A487 in North Wales.

The Claimant was a pedestrian crossing the A487 near to the Madiha Tandoori Restaurant when he was struck by a car being driven by the First Defendant in the easterly direction. The A487 is a rural road which is straight in both directions and the National Speed Limit (60 mph) applied. The Claimant had been on a bus travelling in the westerly direction and had alighted from the bus which had stopped directly opposite a restaurant on the A487, even though there was no bus stop. The Claimant waited for the bus to depart and then walked across the road when he was struck by the First Defendant's vehicle. It was dark and there were no streetlights.

The Claimant alleged that the First Defendant was travelling too fast; that she failed to anticipate that the bus might have been dropping off passengers who may have wished to cross the road to the restaurant; that she should have braked; kept a proper look out; and used her main beam rather than dipped headlights. It was conceded that a finding of contributory negligence against the Claimant was inevitable for failing to look before crossing the road.

The Defendants' case was that the First Defendant was driving at a reasonable speed for the location; the bus was stationary in a place other than a bus stop; it would not be reasonable for her to anticipate that someone would attempt to cross the road from behind the bus, and that she reacted as soon as it was reasonably possible to do so given the circumstances.

The Claimant suffered a significant head injury (in addition to orthopaedic injuries) as a result of the accident and was consequently a protected party in the litigation. He had little or no recollection of the collision and was not in a position to give evidence at the trial, which was listed for a 2-day hearing on liability only. Some lay evidence was called by the Defendants (including from the First Defendant and a couple of eyewitnesses outside the restaurant). Permission was given to the parties to rely upon expert accident reconstruction evidence. Both parties' experts attended trial and gave evidence orally. Both were described as "careful" and "measured" witnesses.

The Claimant argued that the duty of care started when the First Defendant came over the brow of the hill and saw the bus and continued until the collision occurred. The Claimant's case was based on the presence of the stationary bus directly opposite a restaurant. It was argued that a reasonably prudent driver would have anticipated the risk that someone may have alighted from the bus to cross the road to the restaurant and would have slowed down.

The Law

The Judge set out a general summary of the legal principles involved as follows:

i. A Defendant will be liable in negligence if they failed to attain the standard of a reasonably careful driver and if the accident was caused as a result.

ii. The burden of proof, on the balance of probabilities, rests with the Claimant.

iii. The standard of care is that of the reasonably careful driver, armed with common sense and experience of the way pedestrians, particularly (in this case) children, are likely to behave; *Moore v Pointer* [1975] RTR, per Buckley LJ.

iv. If a real risk of a danger emerging would have been reasonably apparent to such a driver, then reasonable precautions must be taken; if the danger was no more than a mere possibility, which would not have occurred to such a driver, then there is no obligation to take extraordinary precautions; *Foskett v Mistry* [1984] 1 RTR 1, per May LJ.

v. The Defendant is not to be judged by the standards of an ideal driver, nor with the benefit of "20/20 hindsight"; *Stewart v Glaze* [2009] EWHC 704, per Coulson J.

vi. Drivers must always bear in mind that a motorcar is potentially a dangerous weapon; *Lunt v Khelifa* [2002] EWCA Civ 801, per Latham LJ.

vii. Drivers are taken to know the principles of the Highway Code.

viii. *"If there are inherent uncertainties about the facts, as there were here, it is dangerous to make precise findings. This may well mean that the party who bears the burden of proof is in difficulties. But that is one of the purposes behind a burden of proof; that if the case cannot be demonstrated on the balance of probabilities, it will fail." Lambert v Clayton* [2002] EWCA Civ 237 per Smith LJ.

ix. Trial judges should also exercise caution in relation to the evidence of accident reconstruction experts. In *Stewart v Glaze* Coulson J warned of the danger of: (i) such experts giving opinions on matters beyond their expertise and acting as advocates seeking to usurp the role of the judge; (ii) elevating their admissible evidence about reaction times, stopping distances and the like into a *"fixed framework or formula, against which the defendant's actions are then to be rigidly judged with a mathematical precision."*

x. The question of whether or not the defendant's driving fell below the requisite standard should not be approached in a vacuum, without reference to the actual circumstances of the collision in question: per *May LJ in Sam v Atkins* [2005] EWCA Civ 1452.

"Coincidence of location fallacy"

The Defendants, whilst in agreement with the general summary of the law, raised a legal argument particularly relevant to causation and the issue of "avoidance potential", as espoused by the Claimant's accident reconstruction expert, Mr Smalley. His opinion was that if the Claimant had less than a second longer to cross the road, a modest reduction in the average approach speed from the First Defendant's vehicle could have produced that additional time, thus enabling the Claimant to pass without incident (i.e. if she had driven more slowly along the stretch of road from the brow of the hill to the accident location.)

In *Gray v Botwrigh*t [2014] EWCA 1201, Lord Justice Jackson explained what *"the coincidence of location fallacy"* meant, as follows:

> *"The coincidence of location fallacy may be illustrated by the following hypothetical facts, which are not this case. A defendant acts negligently and, as a result of that negligence, he is in a position where an accident of some sort occurs, but the occurrence of that accident was not within the scope of the duty of care which the defendant breached when acting negligently. Suppose, for example, a motorist drives at excessive speed between point A and point B. The motorist then slows down to a proper speed and is involved in a collision which is not his fault. The motorist would not have been at the point of impact if he had not driven too fast on an earlier occasion, but that earlier negligence of driving too fast is not causative of the collision. This is because once the motorist had passed point B, he was at a location where the impact would not be within the scope of any duty of care which the defendant had breached. That, as I say, is the point of interest in this case and is the reason why permission to appeal was granted."*

Findings of Fact

The factual disputes between the parties were quite narrow. The expert witnesses were agreed about most of the issues in the case.

The Judge (His Honour Judge Gosnell sitting as a Judge of the High Court) made the following findings of fact:

1. The First Defendant was not unduly fatigued and was following her normal route home. She was familiar with the accident location and was aware of both the location of the restaurant and the nearby bus stops.

2. She was probably travelling at between 55mph and 58 mph on a long straight stretch of road in a rural area, at night, with no ambient lighting or street lighting.

3. When she reached the brow of the hill to the west of the accident scene she was approximately 370-390 metres away from the accident scene.

4. The First Defendant did not remember that she had passed a bus because she had not realised that it had stopped opposite the restaurant at all.

5. The Claimant walked across the road without looking to his left.

6. By the time the First Defendant saw the Claimant in her field of vision, it was too late for her to avoid hitting him.

Liability

Liability was not established.

It was held that the First Defendant had not been negligent in failing to reduce her speed to a level where she could have stopped in time to avoid a collision with the Claimant when he crossed the road without looking, and she had not fallen below the standard of the reasonably prudent driver by driving at just under the National Speed Limit. The road had been assessed as suitable for the National Speed Limit and there were no streetlights because it was a rural area with much less likelihood of pedestrian traffic.

The Judge found that when the First Defendant drove over the brow of the hill, she did not fall below the standard of the reasonably prudent driver by failing to identify the presence of a stationary bus about 380 metres away. At that distance, with the Claimant wearing dark clothing, she had no real opportunity to see him get off the bus. Furthermore, it was not negligent of the First Defendant to leave her headlights dipped (rather than activating her "full beam") once she had passed the bus, given the (agreed) presence of an oncoming vehicle a few hundred metres behind the bus. Expecting the First Defendant to recognise the presence of a stationary bus, some 370-390 metres away, at night, represented a counsel of perfection and ignored the reality of the situation, namely that the First Defendant was travelling along a straight road, within the speed limit, with no hazards in her path.

In light of those findings, it was not necessary to resolve the arguments raised about "the coincidence of location fallacy", as that (and the Claimant's expert's evidence about "avoidance potential") could only be relevant if the court had found that the First Defendant did not meet the standard of the reasonably prudent driver as soon as she crossed the brow of the hill.

The claim was dismissed.

Comment

The judgment contains a useful general summary of the relevant legal principles, which is likely to be of assistance to personal injury practitioners dealing with similar cases and offers an example of how a court might approach liability in a case involving an adult pedestrian hit by a motor vehicle.

Claims involving minor children will involve somewhat different considerations. That is because it is accepted that children can be unpredictable, imprudent and are highly vulnerable, and drivers should drive with children in mind and anticipate how they might behave (*Moore v Pointer* [1975] RTR 127, per Buckley LJ.)

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Scrutiny of Evidence of Joint Enterprise in an RTA Passenger Claims Where the Defendant Pleads Illegality *Dormer v Wilson and Others* [2025] EWHC 523 (KB)

The Claimant was 15 years old at the time of the collision, riding a motorcycle with his uncle (aged only one year older), which had apparently been stolen a few days prior. It was alleged that the Claimant was party to a joint enterprise and the claim was barred by reason of illegality. His Honour Judge Tindal found that illegality will only apply if the RTA was caused by dangerous, not careless driving, and that there is insufficient evidence of the Claimant's knowledge of the stolen status of the motorcycle. Instead, a contributory negligence finding was made.

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The Case in *Dormer v Wilson*

At the time of the collision in April 2017 the Claimant was a child and later (due to the severity of his brain injuries) a protected party. He was the passenger on a motorbike, the rider of which was his uncle *("However, whilst the latter is strictly the Claimant's uncle, he was only born a year earlier in November 2000 (so was 16 in April 2017), so they grew up like cousins and went to the same school"* [20]).

The First Defendant rode the motorbike *"through a red light at a crossroads and collided with a car (which I shall refer to as 'the Mini' as its driver was blameless)"* [2].

The motorbike had previously been stolen, although whether the Claimant was aware of that fact at the time of the RTA was in issue. Neither the Claimant nor the rider of the motorbike were wearing helmets, so contributory negligence was, in any event, likely to be found on that factual ground (as it was).

The Defendant insurer (who was, depending upon the court's finding, either RTA 1988 insurer or Article 75 insurer taking the place of the MIB) disputed liability on the ground of illegality *(ex turpi causa non oritur actio)*, alleging that the Claimant had been aware that the motorbike was stolen. In the event of that fact being established but not amounting to *ex turpi* illegality barring the claim, the Defendant relied upon such knowledge as a further ground of contributory negligence.

The judgment of His Honour Judge Tindal, sitting as a High Court Judge, is precise in its formulation of the several issues and its treatment of the "*several rather complex points of law"* going to *ex turpi* and statutory insurance and MIB coverage [6]. However, the key to the case was in the evidence of the Claimant's knowledge before the collision that the motorbike was stolen, as that would determine the core legal issues [6, 7].

Chambers' Books Dealing with the Defence of Illegality

The defence of illegality as it applies to road traffic claims has been described in detail in two recent books by members of chambers:

i. In Chapter 2 of Bingham's Personal Injury and Motor Claims Cases (Anthony Johnson (General Editor) and Members of Temple Garden Chambers), 16th edition, 2023, *('Denials, Defences and Contributory Negligence')* Sebastian Bates discusses the effect of the Supreme Court's judgment in the leading e*x turpi* case of Patel v Mirza [2016] UKSC 42; [2017] AC 467 upon RTA claims in which illegality is invoked.

ii. In Chapter 11 of Advanced, Automated and Electric Vehicle Law, Bloomsbury Professional, 2024, *('Passenger Claims')* Alex Glassbrook describes the likely applications of the illegality defence to passenger claims involving new vehicle technologies such as e-scooters, e-bikes and e-motorbikes.

Both books go into the detail of RTA illegality cases including M*cCracken v Smith* [2015] EWCA Civ 380; [2015] PIQR P19, *Clark v Farley* [2018] EWHC 1007; [2018] PIQR P15; [2019] RTR 21 and *Wallett v Vicker*s [2018] EWHC 3088; [2019] PIQR P6.

Those cases emphasise the Supreme Court's analysis of the criminal law as to the requisite mental element of joint enterprise in *R v Jogee* [2016] UKSC 8; [2017] AC 387.

Evidence of the Mental Element of Joint Enterprise: Jogee

In *Dormer v Wilson*, His Honour Judge Tindal noted at [56] that in both *Clark v Farley* and *Wallett v Vickers* the court had criticised a lack of focus upon

> *"the necessary 'conduct element' and 'mental element' (what used to be called 'Actus Reus' or 'Guilty Act' and 'Mens Rea' or 'Guilty Mind') of a joint enterprise of dangerous driving between the two drivers racing consistent with the Supreme Court's analysis of joint enterprise in R v Jogee [2017] AC 387 (SC) at [7]-[9]:*
>
> > *"Accessory liability requires proof of conduct element accompanied by the necessary mental element. Each element can be stated in terms which sound beguilingly simple, but may not always be easy to apply. The requisite conduct element is that D2 has encouraged or assisted the commission of the offence by D1…..[T]he mental element in assisting or encouraging is an intention to assist or encourage the commission of the crime and this requires knowledge of any existing facts necessary for it to be criminal …"*"

Level of illegality required for the ex turpi defence to operate

As to the level of illegality required, HHJ Tindal [57] followed dicta of Mr Justice Males (as he then was) in *Wallett v Vickers* [38] that -

> *"careless driving is a criminal offence but nobody would suggest [it] prevents the recovery of damages (reduced as appropriate on account of contributory negligence) in a road traffic case where both drivers are partly to blame. In such a case the recovery of damages does not offend public notions of the fair distribution of resources and poses no threat to the integrity of the law."*

- and in D*ormer v Wilso*n HHJ Tindall therefore accepted that *"a finding of joint enterprise dangerous as opposed to careless – driving … between a motorcycle rider and passenger can found the illegality defence where the passenger is foreseeably injured during it"* [57].

Furthermore, the judge rejected a submission for the Defendants that joint enterprise in contravening the strict offence of driving without insurance alone would be a basis for the illegality defence, which he found could be penalised by applying the alternative partial defence of contributory negligence:

> *"… recovery of damages when a subsequently-injured passenger has (even knowingly) caused a driver to drive without insurance contrary to s.143 RTA is not harmful to the integrity of the legal system in the same way as dangerous driving. Again, a claimant is not compensated for the consequence of his own criminal act in encouraging driving without insurance, but for the consequences of the driver's negligence in injuring him and his foolishness can (and here in my view, does) sound in contributory negligence." [59]*

Judicial wariness of barring a passenger claim as *ex turpi*, unless there is clear evidence of joint enterprise

The mental element of joint enterprise when applied to a passenger claimant in an RTA personal injury claim leads to a judicial approach that is wary of barring a claim for illegality, rather than reflecting lack of regard for the law in contributory negligence.

In *Clark v Farley*, Mrs Justice Yip, applying *R v Jogee*, found that the defendant had failed to prove that the claimant passenger riding without a helmet on an off-road motorbike on a piece of land known commonly as *'the Mad Mile'* knew that the motorbike would be ridden dangerously, so as to bar the claim as ex turpi. The claimant had, however, contributed to his injury both by failing to wear a helmet and by his failure *"to have foreseen the inherent risk in riding pillion along the path"* [75] so his claim was reduced by 40% for contributory negligence [78].

In *Dormer v Wilson,* His Honour Judge Tindall made findings of fact [20-39] including that the claimant's teenaged uncle *"must have known that [the motorbike] had been stolen"* [26] but was not satisfied that the claimant had the same knowledge:

> *"Many of us would have a natural curiosity when a friend or close family member suddenly acquired a fascinating 'new toy' like a motorcycle. But the Claimant was adamant that he did not ask the First Defendant about that because that would be considered what he called 'enough' or 'extra' in his family – meaning what I might call 'nosey'"* [28].

As in *Clark v Farley* (to which the court compared the present case on the percentage reduction), contributory negligence applied not only in relation to the failure to wear a helmet but also to the decision to ride together on the motorbike *"when the First Defendant had only had the Motorbike a few days and was very inexperienced, as the Claimant well knew … In my judgment, bearing in mind the Claimant's young age and inexperience, his trust in the older First Defendant who is clearly mainly responsible for the injuries and this being a case of poor decision-making by the Claimant rather than reckless 'fun',* ***the appropriate overall reduction (including for the absence of a helmet) is 20%****"* (emphasis added) [84]

Conclusion

Dormer v Wilson emphasises that the illegality defence will only apply to bar a passenger's RTA injury claim caused entirely by the rider or driver's negligent driving when the driving was dangerous in the criminal sense and there is sufficiently strong evidence of joint enterprise to the *R v Jogee* standard in that dangerous driving. When a case does not reach that illegality defence standard, any proven lack of care on the part of the passenger will be reflected in contributory negligence, rather than by barring the claim entirely.

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A gap in The Evidence: *Robertson v Cornwall Council* [2024] EWHC 2830 (KB)

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Mr Justice Linden dismissed an appeal where the claimant failed to establish that a raised kerb on a cycleway amounted to the existence of a hazard or trap. The commentary on the paucity of the claimant's evidence is a lesson to practitioners dealing with any case regarding alleged highways hazards.

The Facts

The index accident occurred on 20 May 2018, when the claimant and his wife, were cycling along a major road. They were required to use a cycleway which was not flush with the road surface. Instead, there was a kerb over which bicycles had to pass in order to join the cycleway from the road.

Both the claimant and his wife were keen and experienced cyclists. Mrs Robertson went over the kerb to join the cycleway first. She wobbled and almost lost control of her bicycle. The claimant did not see her wobble. His last recollection of the incident was that he was lining his bicycle up to cross from the road onto the cycleway. His wife heard him fall and, when she looked back, saw him unconscious on the cycleway. The claimant sustained a head injury.

The Claim

The claimant argued the raised kerb was a hazard or trap which had been created in breach of a non-delegable duty owed by the defendant local authority. At trial, it was not disputed that the cycleway had previously been flush to the road surface. However, resurfacing works were carried out on the road and the cycle path by different contractors. This had resulted in the kerb stones standing proud of the road surface. The Claimant's case was that the court could be satisfied to the requisite standard that the raised kerb stone caused him to fall, as there was no other explanation.

The claimant relied on various sources of evidence that the kerb was dangerous. In particular, a road safety audit was carried out which included two visits to the cycle path in February 2018. The audit assessed the facilities for cyclists and it was noted that there were a number of locations where dropped kerbs, providing cyclists access from the carriageway to the cycle lane, were not completely flush with the carriageway. The risk that a cycle wheel could slip and a cyclist fall off, particularly when a cyclist went from the carriageway to a shared-use facility, was expressly identified. It was noted that the risk *"would be affected by a number of factors such as the speed and angle of approach, the height of the kerb, the type of bicycle wheel and whether the surface was dry or wet..."*. A formal audit report dated 21 March 2018, recommended that steps were taken to ensure that "*all dropped*

kerbs for cycle access/egress were [made] suitable for cyclists using them at an angle". The defendant agreed to undertake the work to make the entrance to the cycleway flush to the surface of the road. However, this was not carried out until three months after the accident. The claimant also relied on evidence from a police officer that the raised kerb presented a danger to cyclists, and a Principal Project Manager who accepted that cycleways should be designed so that they were absolutely flush.

However, there was a notable lack of objective evidence adduced by the claimant. There were no measurements of the gap or drop between the cycleway and the road, nor any evidence of an objective standard of what gap would generally be regarded as hazardous for bicycles.

It was also clear from the photographs that the extent to which the kerb stood proud of the road was not uniform. The claimant did not identify the specific part of the kerb was alleged to have caused him to fall.

The defendant denied that the kerb was dangerous, and disputed causation. With reference to James & Thomas v Preseli Pembrokeshire District Council (1993) PIQR P114 the defendant submitted that "C has to prove the specific index defect on a balance of probabilities rather than a general criticism of the whole kerb".

Further, it was contended that the premise of the Claimant's case, that the transition from a road to a cycleway must always be entirely flush, was flawed and/or had not been proved by evidence. The photographs showed a relatively unremarkable kerb and a small height difference which was clearly capable of being traversed by a cyclist who was paying attention.

First Instance Decision

The trial judge found that the claimant had not established the cause of the fall, or that a part of the kerb was unduly hazardous. The claimant's images of the location were noted to be poor. Whilst the kerb shown in the claimant's photographs was quite high in some places, it was *"nowhere near"* as severe in others and there were no measurements to assist. The judge found that there could be many possible reasons why as cyclist may fall and the evidence put forward by the claimant did not address the *"gap in the evidence"* as to the mechanism of the accident. In any event, the lack of measurements and the fact the kerb was lower in some places than others meant the claimant could not establish the kerb was hazardous.

The Appeal

The claimant appealed. Dismissing the appeal, Linden J held that the reasons for the trial judge's decision were not inadequate. The kerb was not a hazard throughout the whole of its length, and it had not been shown that the cause of the Claimant's fall was a part of the kerb which was sufficiently raised to constitute a hazard.

The proposition put forward by the defendant, and accepted by the trial judge, that there was a general rule that *"the precise mechanism of the accident must be proved in every case"* was rejected. The correct position, as set out in Clerk & Lindsell (24th Edition) at 2-07, is that:

> *"The claimant must adduce evidence that it is more likely than not that the wrongful conduct of the defendant in fact resulted in the damage of which he complains. On the other hand, there are occasions when the court is permitted to draw an inference that there must have been a causal link, taking a common-sense and pragmatic approach to the evidence, in circumstances where the indications are somewhat equivocal."*

As a matter of common sense, the only inference open to the trial judge on the evidence was that the kerb was the cause of the incident. All of the evidence pointed to the kerb as the cause and there was no evidence of any other cause. Accordingly, the trial judge's finding that the kerb was not the cause of the claimant's fall was "surprising". Nevertheless, in light of the poor evidence provided by the claimant, the trial judge was entitled to conclude that the claimant had failed to show the kerb, in whole or in part, was a hazard.

The Judge was also entitled to take the view that the findings of the audit was that if the cycleway was flush to the surface of the road, it would entirely eliminate the risk identified. However, that is not the same as accepting that any other state of affairs was necessarily a hazard in law. The degree of risk was dependent on factors such as the speed and angle of approach, the height of the kerb, the type of bicycle wheel and whether the surface was dry or wet. Moreover, even if the only interpretation of the audit was that that anything other than a smooth transition onto the cycleway was necessarily a hazard in law, the judge was not bound to accept this view. It was for the judge to make a finding based on his assessment of the evidence.

The photographs on which the claimant relied were not of the highest quality for the purposes of making this assessment. Linden J considered the photographs and agreed with the trial judge's findings: it appeared as though that the kerb was very nearly flush towards to the middle. In those circumstances, he was entitled to take the view that he would have been assisted by measurements which demonstrated the height of the kerb at different points, particularly given the quality of the photographs. Further, the quality of the photographs, were such that it was not appropriate for a conclusion to be based on these alone.

Following *James & Thomas v Preseli* , the fact of claimant's fall itself did not necessarily prove that he had crossed at a hazardous point in the kerb. Whilst the trial judge might have been prepared to draw an inference that the very fact that the claimant fell off his bicycle on crossing the kerb must indicate that he probably crossed at a point which constituted a hazard or danger, he was not bound to do so.

Conclusion

This is a useful reminder of the importance of both the nature and quality of evidence required when establishing the existence of a hazard or defect. Claimants are likely to struggle in the absence of measurements, whilst poor photographs alone could defeat a claim. It is for the judge to make a finding based on their assessment of the evidence - the value of objective evidence cannot be understated.

The decision also confirms that the question as to causation requires only proof of the probable cause of an accident and not the precise mechanism. In doing so, the court is permitted to take a common-sense and pragmatic approach and draw inferences from the evidence.

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Midsomer Misconduct – Reckless Running on the Rugby Field *Elbanna v Clark* [2024] EWHC 627 (KB) and *Clark v Elbanna* [2025] EWCA Civ 776

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The Claimant suffered a serious spinal cord injury during an amateur rugby union match. After analysing video footage and contemporaneous comments from teammates caught in the footage, Sweeting J found that the Defendant was reckless in running directly at the Claimant and colliding with him.

In dismissing the subsequent appeal, the Court of Appeal held that a finding of recklessness was sufficient but not necessary to establish liability in negligence. If a finding of recklessness is properly made, then this will encompass a finding of negligence.

Introduction

Elbanna is another reminder of the value of video recordings in sports injury litigation. An incident on the field was largely missed by the referee. The Claimant was nevertheless able to establish liability with the benefit of high quality video footage. Whilst incidents happen 'in the blink of an eye', video footage can be scrutinised frame-by-frame years after the whistle has blown.

The Facts

The incident occurred during an amateur rugby union match between Cheltenham Tigers and Midsomer Norton. The match had been recorded for referee training purposes.

The Defendant's team kicked off at the start of the second half. The Claimant was standing around 12 metres into his half, more or less on the 15 metre line. As the ball passed overhead, he turned towards his own try line. The Defendant sprinted along the same 15 metre line, straight towards the Claimant.

Shortly before impact, the Claimant moved slightly to the right, as did the Defendant. The Defendant braced for impact and his shoulder collided with the Claimant's back. The Claimant, unaware of the impending contact, was knocked to the ground and suffered a serious spinal injury as a result.

The fullback of the Claimant's team had a good view of the incident. His concerns were relayed to the referee by his team captain. The captain reported *'a cheap shot in the back, just came in for no reason'.* The referee did not have a clear view. No penalty was given.

The Defendant was cited for foul play. The disciplinary panel concluded there were no grounds to rule that the collision was dangerous and/or contrary to good sportsmanship and an appeal against the disciplinary decision was unsuccessful.

The Legal Test

The legal test for establishing negligence was uncontroversial. Sweeting J adopted the formulation from *Czernuszka v King* [2023] EWHC 380 (KB): whether the Defendant failed to exercise such degree of care as was appropriate in the circumstances. Unlike in *Czernuszka*, there was no suggestion that the Claimant had to prove recklessness or a very high degree of carelessness.

Sweeting J cited the dicta of Kitto J From the case of *Rootes v Shelton* [1967] HCA 39[4], which stated that reasonableness depends upon the circumstances. These include the rules of the game, but non-compliance with the rules is only one consideration.

Expert Evidence

Both parties presented expert evidence. The Claimant's expert had been a professional referee. The Defendant's expert had chaired the RFU's laws sub-committee. The experts agreed that there was a way in which the collision could have occurred without foul play, thus recognising that there was a qualitative distinction between playing an opponent without the ball and a simple coming together on the field.

The Claimant's expert described the Defendant 'tracking' the Claimant to the right. He plainly considered the Defendant intended to make contact and changed his line as his 'target' moved. On the other hand, the Defendant's expert suggested the Claimant had performed an unusual movement at 90 degrees to the touchline. He could offer no tactical reason for a player making that movement and suggested it was an illogical movement to make.

Sweeting J preferred the view of the Claimant's expert. He was not able to see the 90 degree movement on the footage. Its illogical nature tended to confirm the view that it did not occur.

The rejection of this part of the Defendant's expert's evidence highlights the importance of scrutinising expert evidence against the objective factual evidence available.

Further, Sweeting J noted that the Claimant's expert – with his background as a referee – 'provided a more realistic assessment of the behaviour which could be observed', the implication being that the expert's experience 'at the coalface' was persuasive.

The decision

The Judge found the Defendant's conduct fell below the required standard and that the collision could have been avoided or at least mitigated.

> *'Whether or not the collision was intentional, to have run directly at the Claimant at full speed and to have collided with him in the manner in which the Defendant did was reckless. It amounted to playing an opponent without the ball in contravention of the laws and courted the risk of injury'.*

Practical Takeaways

1. **A (moving) picture is worth a thousand words:** Early identification and preservation of any video footage is critical. If there is no footage available, then this will influence settlement strategy.

   In *Elbanna*, video evidence enabled the Judge to make detailed findings about split-second movements. Where there is no footage, other details – such as the referee's decision and match report – will invariably take on greater importance.

2. **Contemporaneity is key:** Early accounts from witnesses are likely to carry more weight than those taken much later. The Judge placed a good degree of weight upon the comments made by the Claimant's captain which were captured on the video. These were based upon the fullback's reaction 'in the moment' and had not been filtered by repeated recollection of events.

   Recollections can fade quickly in an emotionally charged sporting context. Players' perceptions are often filtered by their teammates' perspectives when discussing an incident. On a practical level it can also be increasingly difficult to track down players some years after the event.

3. Previously cited with approval by the Court of Appeal in Condon v Basi [1985] 1 WLR 866.

3. **The laws of the game:**
A breach of the laws of the game will usually be necessary, but not sufficient, to establish negligence. Obtaining a copy of the applicable laws along with a match report from the referee (if available) is a crucial early step in considering the merits of a claim.

4. **The referee's decision is (not always) final:**
The decisions of match officials do matter, but context is key.

In *Elbanna* the court did not place significant weight on the decision of the referee. This was, perhaps, unsurprising given his poor view of the incident and the clear video evidence available.

Contrast this with *Fulham Football Club v Jones* [2022] EWHC 1108 (QB) where the court failed to properly account for the fact that the referee had seen the incident and not awarded a foul and this led to a successful appeal. Having proper regard to the decisions of the officials tasked with administering the laws of the game was an 'important policy consideration'.

Practitioners should bear in mind that the referee's decision will usually be a very important factor where there is no video evidence to call that decision into question.

5. **When the rubber hits the road**:
When assessing prospects at an early stage, it is necessary to carefully assess the evidence, particularly in cases where the alleged breach falls short of egregious conduct. Whilst the legal test does not require recklessness, the sporting context means that the standard of care will not easily be crossed.

In *Tylicki v Gibbons* [2021] EWHC 3470 (QB) – a horse racing case – HHJ Walden Smith 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 competitor.

6. **'Win at all costs?':**
The standard of care may vary depending upon the nature of the sport and the level of the competition.

In Fulham the Recorder had erred by refusing to take account of the realities of the playing culture of professional football. It was a fast-paced, competitive game necessarily involving physical contact.

Czernuszka illustrates the other side of the same coin. The rugby match in question was part of a development league. This meant that 'enjoyment and learning were the main objectives, not winning'. Accordingly, 'at this level and against this opposition the Defendant should have modified her conduct'.

7. **At this level:**
It is important an expert has experience of not only the laws of the game, but also the relevant level of the sport. In *Elbanna* the Claimant's expert was able to give persuasive evidence that a player of the Defendant's level should have known how to minimise or avoid contact but instead led with his shoulder.

Conclusion

The decision in *Elbanna* reminds us that small details – especially those caught on camera – can tip the scales in litigation. Just as a TMO review can overturn an on-field decision, video evidence in civil claims can transform a fleeting moment of contact into a finding of liability, even years after the final whistle has blown.

What next?

Whilst the Claimant was successful, the Judge's reliance on 'recklessness' prompted an appeal. The Defendant was granted permission to appeal because the Judge found that the Defendant was reckless instead of expressly making a finding of negligence. 'Recklessness' was not a concept the Judge had explained, nor was it the test which had been agreed between the parties.

The Defendant was given short shrift on appeal. The Court of Appeal did not need to hear from the Claimant before giving an ex tempore judgment dismissing the appeal.

The court was satisfied that the finding of recklessness encompassed a finding of negligence to a degree which distinguished the Defendant's conduct from a momentary error or misjudgement.

In the reported judgment, Nicola Davies LJ emphasised that 'recklessness' was not necessary to establish negligence. The word imported a *"higher and more stringent test".* Accordingly, a properly made finding that a player was reckless *"will encompass a finding of negligence".*

Even if the standard of care does not require recklessness, courts often fall back on the language of recklessness in a sporting context. Proving negligence without proving recklessness can, in practical terms, be difficult.

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Interim Payment Applications – An Update: *XS1 (A Child) v West Hertfordshire Hospitals NHS Trust* [2024] EWHC 1865 (KB) and *Lexi-Rae Speirs v St Georges University Hospitals NHS Foundation Trust* [2025] EWHC 337 (KB)

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There have been two High Court decisions on Interim payments in the last 12 months that merit close attention when preparing to make or defend similar applications.

XS1 (A Child) v West Hertfordshire Hospitals NHS Trust [2024] EWHC 1865 (KB) - Master Stevens

Essential facts

C was a 10-year-old cerebral palsy clinical negligence survivor. Liability was compromised and approved with a 70% split in her favour. She sought an interim payment of £1.65 m to purchase a specific property that was suitable for her needs.

D contended the application should be dismissed or adjourned, because it was not ready to respond with its expert evidence and because it did not want to take the accommodation issue off the table before trial.

The decision

The Court was mindful that it should not withhold damages from a Claimant provided the threshold tests for eligibility for such a payment have been satisfied. However, it should guard against the risk of overpayment.

The Court was unsympathetic to D's contention that it did not have its own expert evidence in a disclosable form citing Yip J's observation in *PAL v Davison [2021] EWHC 1108 @ §15, that*

> *'It was their right not to seek expert evidence at an early stage, but they cannot then complain about being required to respond quickly to an application that was readily foreseeable.'*

The Court also cited Sweeney J in *Sellar-Elliott v Howling* [2016] EWHC 443(QB) that there was no authority before the Court that a judge hearing applications of this nature should have expert evidence available from the Defendant before reaching a decision.

The Court also cited Yip J's ruling in *PAL v Davison* [2021] EWHC 1108 @ §26, that

> *'the "starting point" is to consider the valuation of damages to the date of the application, but that there will be many instances where it is entirely appropriate in making the conservative assessment at the first stage to bring in special damages which have not yet accrued but will do so before trial'.*

The decision of the judge hearing the application will be fact sensitive, taking account of the degree of confidence that special damages 'yet to accrue will form part of the likely amount of the lump sum' (at §27 of *PAL*). Yip J also referenced the length of time to trial as being significant, and the undesirability of forcing a Claimant to make further interim payment applications.

The Court was critical of the quality of evidence available to it to determine the issues. For example, the Master observed:

> *'I was not provided with evidence of the remaining balance of past interim payments with which the Claimant's needs were to be met for the remaining year before trial.*
>
> *There was no indication that a further interim payment application would be made (as in PAL). Even if I had been given the remaining Deputyship balance of account, it was not clear to me, due to the time periods adopted in the Schedule of Loss, precisely what the expense rate is likely to be through to trial.*
>
> *There was no witness statement from the Deputy, nor from the conducting solicitor, albeit he had provided evidence of need, as he saw it, on Form N244 applying for an interim payment to allow the purchase of an identified property.*
>
> *I am distinctly uncomfortable with the figures put to me by both parties. The Claimant's figures contain errors and the Defendant's figures are broad brush. I do not know the range of opinion over life expectancy.*
>
> *The need to be more precise is even more acute as it is a 70% liability claim, rather than a 100% one.*

second limb of the *Eeles*[5] test allows a judge to take into account elements of future loss in the assessment of an interim payment (a) if the judge has a high degree of confidence that the trial judge will award them by way of a capital sum (b) there is a real need for the interim payment in advance of trial. In this case the Judge was not satisfied in relation to either, observing:

> *'On the question of whether there is a "real need" for alternative accommodation now I am not satisfied that the well-established test is currently satisfied*
>
> *I do not have enough information about the reasonableness of the intended property itself but having reached my decision above on one of the essential threshold tests, there is no need to consider the other relevant thresholds under Eeles 2.*
>
> *I will, however, state that I accept in a partial liability case a trial judge is much more likely to award more heads of loss by way of capital sum than in a 100% liability case.'*

The Court agreed to adjourn, rather than dismiss the application, stating:

> *'If the Claimant still wishes to proceed with the application, after taking account of the missing information which the Court has identified as relevant, an early return date will be provided during vacation.*
>
> *The Court would be greatly assisted if those instructed by the parties could liaise further as to suitable consequential directions for my consideration. If the application is to proceed further at this time, the Court would be greatly assisted if a joint schedule, in Word format, could be compiled, comparing their respective positions on each head of loss claimed with a column left for completion by the Court.'*

4. Cobham Hire Services v Eeles [2009] EWCA Civ 204

Legal takeaways

- Make sure you turn up at IP applications with comprehensive evidence.
- Claimants should prepare updating interim schedules that identify past losses to the date of the IP hearing, and the anticipated future losses between the date of the IP hearing and trial, properly evidenced with estimates from the case manager.
- Place clear evidence before the Court in the form of statements from the solicitor and/or possibly also from the Deputy, if appropriate.
- Defendants should not place too much store in asserting that the IP application is too early because they have not finalised their expert evidence. Obtain some CPR 35 compliant evidence that substantiates the arguments you wish to raise.
- Try to make the Court's task easier by preparing a Scott Schedule; this is easier for Defendants to prepare as they are responding to the claim, leaving a third blank column for the Court to complete.
- Note how Courts are more likely to bring Eeles 2 into play and capitalise certain heads of claim when there has been a liability discount and the Claimant is recovering less than 100% of their claim – see the next case.

Lexi-Rae Speirs V St Georges University Hospitals NHS Foundation Trust [2025] EWHC 337 (KB) Senior Master Cook

Essential facts

This was an *Eeles 2* interim payment application in which C conceded that the interim sought exceeded an *Eeles 1* threshold test.

C was aged 16 and bringing a cerebral palsy claim for alleged clinical negligence at birth. Liability had been compromised and approved by the Court on a 50:50 basis. She had already received £340,000 by way of IP which exhausted the Eels 1 threshold. Her needs were currently being met and authorised by her Deputy at 100% of the private sector costs, notwithstanding that she would only be recovering 50% of her losses.

The decision

The Court was critical of the witness statement from C's solicitor which was used as a vehicle to advance submissions. Also, the Court criticised the lack of a proper Schedule of Loss verified with a statement of truth, prepared on an interim basis. Nevertheless, the Court was prepared to proceed with the application in light of written and oral submissions.

D was critical of C's solicitor observing in her statement that by reference to her experience the NHS was unlikely to offer a PPO for future loss of earnings. The Court reminded itself of the warning in *Eeles* not to speculate as to what a trial judge may do in relation to capitalisation of future heads of loss.

Notwithstanding, the Court found that it was 'almost inevitable' that a proportion of C's future losses would have to be used to offset past expenditure given her current needs and the fact of 50% recovery and the only realistic candidate for consideration was the future loss of earnings claim.

Against that backdrop, the Court was persuaded to order a further interim payment of £99,196, indicating that there would be no more before trial.

Legal takeaways

- Make sure you turn up at IP applications with a fully particularised interim Schedule of Loss quantifying past losses up to the date of trial, verified with a statement of truth.
- Ensure that the witness statement in support sets out facts not submissions; leave that for skeleton arguments.
- In cases where there is a substantial finding of contributory negligence, courts are more likely to conclude that some heads of future loss will need to be capitalised, rather than incorporated in a PPO; if they are satisfied that there is a need, they are more likely then to fetter the trial Judge's discretion by acceding to an *Eeles 2* application.

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Child's Play? Assessing Loss of Earnings for Those Who Have Yet to Start Work - *Amadu-Abdullah v Commissioner of Police of the Metropolis* [2024] EWHC 3162

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In *Amadu-Abdullah*, a child Clamant had aspired to be a professional footballer. He was Tasered by a police officer and suffered a number of vision impairments that led to him no longer being able to pursue this career. The Judge was restricted to the one year *Smith v Manchester* claim that was pleaded.

Many children dream of becoming professional footballers. Most know that it is but a pipedream, though don't necessarily have a clear Plan B. Assessing the future loss of earnings in such cases is notoriously difficult. This article considers the approach taken by Ritchie J in the recent case of *Amadu-Abdullah v Met Police* [2024] EWHC 3162, the principles underpinning the assessment of "handicap on the labour market awards" more generally and the key learning points to take from the decision.

The Facts

The Claimant was a 14-year-old boy who suffered facial injuries after being "Tasered" by the police in circumstances which Ritchie J found were not lawful or justified.

Prior to the accident, the Claimant had been a talented youth footballer. He had trialled twice for Chelsea FC and had signed a two-year contract with Leyton Orient just a month before he suffered his injuries. As a result of being Tasered the Claimant suffered a fracture of the left eye socket and a left optic neuropathy. Consequences included:-

- Severely reduced vision in the left eye (6/120).
- Loss of peripheral vision on his left side.
- Inability to see the colour green.
- Loss of 3D vision such that he would often miss something that was handed to him.

The medical expert (Dr Starr) confirmed that the Claimant's injuries would affect his ability to play football at a top level, that it would be unsafe for him to work at heights, near people with power tools, and that he would be unfit to work in the police, army or to drive HGVs. He would however be fit for desk or computer work.

The Claimant tried to return to playing football at Leyton Orient, but they released him after receiving the medical report from his ophthalmologist. The Claimant continued playing football socially, wearing protective glasses, but realistically accepted that his prospects of becoming a professional were now extremely low.

He passed 8 GCSEs, but mostly at low grades (2-4) and then started a two-year sports science course but dropped out after the first year. By the time the case reached trial the Claimant was just shy of his 19th birthday and (it appears) was not working – at least no evidence of his current earnings was adduced at trial.

Assessment of loss of earnings capacity

The clear inference from the judgment is that Ritchie J felt somewhat restrained in the award he could make by the way in which the Claimant's case had been pleaded, observing: *"I am bound to determine the claim on the pleadings"* [para 59]. He further noted:-

- The claim could have been put on the basis of a lost career as a professional soccer player[6], but it was not. [para 56]
- That a claim for loss of future earnings on a multiplier and multiplicand basis had not been pleaded. [para 58] Thus, there was no suggestion that the Claimant was 'disabled' for Ogden purposes or even that he would now earn less in his future career than he would otherwise have done but for his injuries. The Judge did note it would have been difficult for the Claimant to present a claim based on differential earnings given the uncertainty of his 'but for' career.
- The Claimant sought an award of one year's gross earnings to reflect his disadvantage on the open labour market. [para 62]

The approach taken by the Judge serves as a useful reminder of the steps to consider when determining whether to make an award for loss of earnings, and if so, on what basis. First, he determined the Claimant's likely future earning capacity but for his injuries. After considering a range of potential career options he alighted on a figure of £32,000 gross pa. Next, he considered the principles upon which a Smith award could be made – where an injury restricts the range of work a Claimant can do and thus may cause longer gaps when looking for work and an increased risk of losing or leaving a job. He then considered the medical and factual evidence to satisfy himself that there would be such an impact in the Claimant's case, taking into account in particular the Claimant's desire to work in a physical field rather than a desk job. And finally, he looked at previous cases to guide him in assessing the level of award to be made.

His conclusion was that it was appropriate to make an award of one year's loss of earnings, albeit he correctly determined that this should be based on net rather than gross earnings. The award made was therefore **£26,560**.

Learning Points

1. **Lost Chance?** A claim based on the proposition that the Claimant would have achieved his ambition of becoming a professional footballer would inevitably have involved a great deal of uncertainty. At best, any such claim could only conceivably have been approached on a loss of a chance basis (see for example the kick-boxing case of ***Langford v Hebran*** [2001] EWCA Civ 361). Whether the evidence would have been sufficient to cross the threshold of showing that such chance in the Claimant's case was more than "merely speculative" is not known. It would have required evidence from his coaches at Leyton Orient for example. But even in League One (in which Leyton Orient currently play), the potential earnings dwarf the Claimant's likely earnings from other jobs. The median League One salary in 2023/4 is reported to have been £6,000 per week (£312,000 pa)[7]. Even a small lost chance could have resulted in a significant award (or could at least have contributed to a higher claim for handicap on the labour market).

2. **Proving Disability:** The Judgment provides the starkest of illustrations of the significance of a finding that a particular Claimant is, or is not, disabled based on the well-known definition in the Disability Discrimination Act 1995 ("DDA"). Here, even if the Judge had accepted that the Claimant was still capable of earning the same in the future as he would have but for his injuries, a finding of disability could have resulted in a future loss of earnings award of nearly £650,000 on the basis of the following:-

5. The learned Judge's word, not mine!
6. See https://www.888sport.com/blog/football/league-one-salary

- Multiplicand: £26,560.
- The starting multiplier for males aged 19 retiring at 68 at a 0.5% discount rate: 42.41.
- Table A adjustment for but for earnings if the Claimant was able bodied with Level 1 academic qualifications and employed: 0.86, resulting in a multiplier of 36.47.
- Table B adjustment for residual earnings if the Claimant is disabled with Level 1 academic qualifications and employed: 0.29, producing a multiplier of 12.30.
- The claim would therefore amount to £26,560 x (36.47 – 12.30) = £641,955.

Whilst not specifically discussed within the Judgment, the Guidance notes issued for the purposes the DDA do illustrate the difficulty the Claimant would have faced if he attempted to argue that he was disabled. The examples given of an impairment to eyesight which would be treated as affecting a person's ability to carry out normal day-to-day activities include:-

- Inability to see to pass the eyesight test for a standard driving test [i.e. not that required for HGVs].
- Total inability to distinguish colours [i.e. not a single colour]
- Inability to walk safely without bumping into things [whereas the Claimant was still able to play football].

3. **Primacy of the multiplicand / multiplier approach.** There has been a succession of cases in which the Courts have strongly encouraged the use of the 'Ogden' methodology over resorting to broad brush 'lump sum' awards (whether 'Blamire' or 'Smith' awards). See for example ***Inglis v. MOD*** [2019] EWHC 1153 where Peter Marquand, sitting as a Deputy High Court Judge held (at para 213):-

> *"The multiplier/multiplicand method is the conventional method of calculating future loss of earnings and should normally be used. However, where a claimant has a handicap in the labour market a Smith v Manchester award will be appropriate where there are many uncertainties which mean the multiplier/multiplicand method cannot be used and the matter is one for a broad judgement."* [8]

Here it would seem the Claimant was unable to establish with the requisite degree of certainty that his residual earnings potential would be any different to his likely but for earnings. In such circumstances (and in the absence of a finding of 'disability') there is little option but to fall back on a lump sum award.

4. **Proving 'but for' earnings.** The figure of £32,000 gross pa alighted upon by the Judge to reflect the Claimant's likely but for earnings was in fact higher than the figure pleaded by the Claimant (£31,000 gross pa). The Claimant's Schedule pleaded that the Claimant's career was likely to be in the sports industry, referencing jobs such as sports teacher, physiotherapist and agent. Average salary figures were taken from a website (Glassdoor.co.uk) but the Judge noted these had not been formally put in evidence.

One option in such cases would be to seek permission to rely on evidence from an employment consultant, but the Courts are notoriously sceptical of such evidence in cases where the expert does little more than recite publicly available sources of information. Evidence of earnings from wider family members can be instructive (particularly older siblings), although in this case the Judge expressly disavowed reliance on the fact that the Claimant's mother was a part time cleaner, noting that she had not been educated in England and could not read or write.

7. See also Bullock v. Atlas Ward Structures Ltd [2008] EWCA Civ 194 @ §§19 & 21 and Kennedy v. London Ambulance Service NHS Trust [2016] EWHC 3145 (HHJ Hughes QC): "the Court should not depart from the multiplier/multiplicand approach unless, as in Billett, it throws up an obviously unreal result."

Instead, the judgment serves as a useful reminder that Judges can take judicial notice of the best available evidence which is currently provided by the government's **ASHE figures** and published in both Facts & Figures and in Kemp. The Judge identified seven potentially relevant categories which he then used to identify a range of potential earnings.

Practitioners should note how the inclusion or omission of just one category can skew the figures. Surprisingly, the Judge's categories here included "physiotherapists" whose earnings (£43,000) were much higher than any of the other categories, despite the Claimant's academic achievements falling far short of what would be required to qualify as a physiotherapist.

5. **Mean or Median?** There is often a significant difference between the mean earnings figure (the average) and the median (the middle value in the dataset). Ritchie J noted for example that in 2023 mean earnings were £44,611 gross pa whereas median earnings were just £37,700 gross pa. He used mean figures. It is unclear from the Judgment whether there was any discussion about this, but the Introductory Notes in Facts & Figures make clear that the ONS's preferred measure is median earnings because the figures are less affected by a relatively small number of high earners. *"The median provides a better indication of typical earnings than does the mean"*.[9]

6. **Quantifying the 'Smith' award:** Ritchie J referred to the guidance given in Kemp at 10.35.1 to 10-036.1 from which he discerned three categories of award: the lowest category reflecting awards ranging from 3 – 12 months net earnings; the middle category reflecting awards of 1 – 2 years net earnings and finally the higher category reflecting 2 – 5 years net earnings. Two points arise

The first is whether the Judge would have awarded a higher sum if the Claimant's pleaded case had not been limited to one year's earnings. The Claimant had a very long working life ahead of him (almost 50 years) such that it was inevitable he would find himself on the labour market more than once (especially as he was not working at the time of trial). The Judge accepted that his injuries, which were permanent, would adversely affect his employability in physical work roles and that this would impact the Claimant because he was unlikely to seek desk-based work given his educational qualifications and interests. All of those were factors which would seem to support an award at the higher end of the scale. In ***Billett v. MOD*** [2015] EWCA Civ 773 it will be recalled that the award made reflected two years' net loss of earnings to a 30-year-old Claimant who was in stable employment and had already demonstrated a consistent ability to earn as much working as an HGV driver as he would have but for his injuries.

Claimants of course are not strictly obliged to quantify their claims for handicap in the labour market within their Schedule of Loss. If choosing to do so, practitioners should think very carefully about the level of award claimed.

The second point is that Ritchie J queried whether the cases which justified the higher category of awards (based on 2 – 5 years lost earnings) have survived the change in approach to calculation of loss of earnings since the publication of the 6th Edition of the Ogden Tables. With respect to the Judge, his concern seems misplaced. Billett itself was of course a case that (just) comes into the higher category. Pre-Ogden 6, many 'Smith' awards were relatively low as they were a mere adjunct to a separate award for partial loss of earnings calculated on a conventional multiplier / multiplicand basis. Such 'combined' awards are now rare because the handicap on the labour market element is subsumed within the disability adjustment. However, in cases where the Claimant does not meet the strict 'disability' criteria, there seems no logical reason to impose an arbitrary cap on the award for handicap on the labour market. Each case must instead reflect its particular facts.

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8. Facts & Figures 2024/5: F8: Average earnings statistics, para 7.

A Case of "Large and Small Apples" Rather Than "Apple and Pears": Mixed Injury Cases Following *Rabot v Hassam* [2024] UKSC 11

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The Supreme Court provided guidance on assessing damages for mixed whiplash tariff and non-whiplash tariff injuries. This article discusses the approved approach in detail – as well as some aspects of the judgment that may have been overlooked by practitioners.

Introduction

The Supreme Court's decision in Rabot v Hassam was handed down as long ago as 26 March 2024 and was at the time hotly anticipated. The Supreme Court was asked to adjudicate on the correct approach to assessing general damages for pain, suffering and loss of amenity ("PSLA") in cases where a claimant had suffered a whiplash injury, subject to the Whiplash Injury Regulations 2021 ("the 2021 Regulations"), as well as one or more non-whiplash injuries that fell to be assessed in accordance with common law principles, in the same accident.

The impact of the decision was felt immediately. The courts have now been applying the settled approach in *Rabot v Hassam* for over a year. The ratio will be familiar to almost all personal injury lawyers and particularly those with a substantive caseload in Small Claims Track, Fast Track and Protocol work. In this article, I will summarise the decision and highlight aspects of the court's reasoning which may have been overlooked before turning to consider some practical difficulties that remain in mixed injury cases.

Facts

Two appeals came before the court. In *Rabot v Hassam* the claimant was a passenger in a car that was hit from behind whilst stationary. The claimant suffered whiplash injuries to his neck and back and soft tissue injuries to both of his knees. The case proceeded to a contested Official Injury Claim Portal quantum disposal hearing before District Judge Hennessy. The tariff injuries were assessed at £1,390 and the common law damages at £2,500. The judge made a Sadler reduction of £790 and a total award therefore of £3,100.

In *Briggs v Laditan t*he claimant was the driver of a car hit from behind whilst he was slowing down at a roundabout. He suffered whiplash injuries to his neck, and upper and lower back. He also suffered soft-tissue injuries to his left elbow, chest, left knee and hips. District Judge Hennessy in this case assessed the tariff amount for the whiplash injuries at £840 and the non-whiplash injuries as £3,000. An overall award of damages of £2,800 was made.

Summary of the decision

The court was asked to consider what impact the whiplash reforms had on damages for PSLA in respect of non-whiplash injuries suffered by a claimant in the same accident where they suffered a whiplash injury. The controversy concerned concurrent PSLA and how to value that in respect of both the whiplash and the non-whiplash injury. Lord Burrows JSC gave the unanimous judgment of the court and at paragraph 52 summarised the approach the courts should adopt:

(i) The court should assess the tariff amount by applying the table in the 2021 Regulations.[10]

(ii) The court should assess the common law damages for PSLA for the non-whiplash injuries.

(iii) The court will add those two amounts together and then "step back" to consider whether to make an adjustment, applying *Sadler v Filipiak* [2011] EWCA Civ 1728. In this context the adjustment is very likely to be a reduction, but it should be made in a "rough and ready way" to reflect the need to avoid double recovery for the same PSLA. Lord Burrows explained that the court must respect the fact that the legislation has laid down a tariff amount for the whiplash injuries "that is not aiming for full compensation". It follows that the Sadler adjustment is a different exercise from that where only common law damages are being assessed for multiple injuries.

(iv) If a deduction is needed, it is to be made from the common law damages.

(v) The court must be mindful of the "caveat" identified by the Court of Appeal, which is that any final award cannot be lower than what would have been awarded in common law damages for PSLA had the claimant only suffered the non-whiplash injuries. In practical terms, whilst the deduction is made from the common law damages, it cannot be for an amount greater than the tariff award – meaning that the final award cannot be lower than the amount of common law damages.

Other points to note

The reasoning of Lord Burrows is a resounding endorsement of the judicial role in assessing common law damages. Practitioners will want to note some more subtle aspects of the judgment.

First, the decision is endorsement at Supreme Court level of *Sadler*, a decision that is praised for its "rational clarity" and is commended as the "standard approach" to dealing with damages for PSLA in respect of multiple injuries.

Second, Lord Burrows reminded practitioners that the general aim of damages for a tort is to compensate the claimant's loss. Whilst the aim of compensatory damages is to put the claimant into as good a position as he or she would have been in had no tort been committed, references to "restitution" are unhelpful and to be avoided in this context.

Third, whilst compensation for PSLA can never be precise and is a determination of what is "fair, just and reasonable" – taking into account the interests of claimants, defendants and society as a whole – the aim (of PSLA) is to provide full compensation.

Fourth, Lord Burrows considered the issue raised by the appeals was one of statutory interpretation and proceeded to construe the 2021 Regulations and Part 1 of the Civil Liability Act 2018 ("the 2018 Act"). Lord Burrows held that section 3(2) of the 2018 Act confined the tariff amount to damages for PSLA "in respect of the whiplash injury or injuries" and that wording plainly does not extend the tariff amount to non-whiplash injuries. Moreover, the statute does not seek in general to depart from the standard common law approach to assessing damages for multiple injuries and this interpretation was said to be supported by the well-established presumption that where a statute is departing from the common law, the departure should be presumed to be as limited as possible.

Fifth, Lord Burrows also highlighted that in respect of the purpose of the 2018 Act, there was nothing to indicate it was to extend the lowering of PSLA damages beyond whiplash claims. He also cautioned that were it to be the case that claimants were thwarting the purpose of the whiplash reforms by claiming for multiple injuries, that would be a policy problem for Parliament to address and not a factor that should influence the court's task of statutory interpretation.

9. N.b. those amounts are soon to be uplifted to reflect inflation for accidents that occurred on or after 31 May 2025 – see The Whiplash Injury (Amendment) Regulations 2025.

Sixth, Lord Burrows also emphasised in explaining why the court was endorsing the approach taken by the Court of Appeal that the tariff amount "does not purport to be full compensation" and the analogy between the tariff amount and common law damages is one of "large and small apples" rather than "apples and pears".

Practical Issues

Busy District Judges and the County Courts have been grappling with the impact of *Hassam* for over a year now. That is in part because thousands of quantum disposals were stayed whilst parties awaited the Supreme Court's conclusive guidance. It would appear that some practical issues remain with both adopting the *Hassam* approach to valuing mixed injury cases and that claimants in particular face difficulties with valuing these claims. In my view, the following issues remain unresolved and may be explored in future decisions of senior courts:

1. Despite the clear guidance in Hassam, defendant insurers are on occasion using the tariff amounts as a weighting when assessing and making offers for concurrent PSLA for non-tariff injuries. Judges should ensure that the particularly low tariff amounts do not influence the assessment of PSLA awards for non-whiplash injuries.

2. Issues also remain when making a Sadler adjustment to the common law damages (which in practice should be limited to the amount of the tariff award). In my experience the adjustment is especially challenging when the common law damages are significantly greater. Should the court adopt a percentage deduction to the small tariff amount or is it appropriate to make almost 100% reductions in many cases?

3. Where a claimant has suffered multiple non-tariff injuries, should the court assess all of those common law damages together and adjust for overlapping PSLA before undertaking a second adjustment in respect of the tariff amount or should there only be a single adjustment? Arguably, Hassam precedes on the basis that a single amount for common law damages is arrived at before combining that award with the appropriate tariff amount.

4. The concept of minor psychological injuries compensated for under the tariff also creates some confusion. First, if a claimant is made an award of a higher tariff amount to reflect minor psychological injuries, will he or she be precluded from claiming any additional sum for a diagnosed psychiatric injury? It remains unclear what the correct definition of minor psychological injuries should be. A further problem arises when assessing the tariff amount where the psychological injuries have a substantially longer prognosis period than the physical whiplash injuries. The common approach is to determine the tariff amount based on the physical symptoms but is there a point at which the duration of psychological symptoms takes that injury outside of the tariff regime? More judicial input is awaited.

5. Finally, even with the guidance of Hassam, there remains ample scope for disagreement about what constitutes concurrent and overlapping PSLA. Some medical experts may opine that a particular injury or symptom classifies as a "whiplash" injury or a "non-whiplash" injury. For example, headaches in one case might be said to have an independent cause or to be symptoms of a neck or shoulder whiplash injury in another. It remains ripe for argument as to whether it is for the court to assess into which category an injury or particular symptoms fall (and therefore whether they will be assessed under the 2021 Regulations) or whether the court should be deferring to the expertise of medical experts who have assessed the actual injuries. Disputes about whether an injury is properly a large apple or a small apple are likely to continue for some time.

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