Guildhall CHAMBERS

# Personal Injury Newsletter

Issue 17

## In this issue



I hope I am not alone in having the occasional strange dream driven by the pressure of work. I don't want to give too much away but, yes, it's the one where I find myself in the Court of Appeal wearing (if I'm lucky) my pyjamas. I imagine that Lord Dyson has been having a few of those recently. He had the one where the Courts became clogged with satellite litigation, lawyers lost all spirit of trust and co-operation and judges dismissed cases in their entirely for minor procedural wrongdoing. But of course this was no dream. The reality of the *Mitchell* decision was that confidence in the ability of the system to deliver justice was reducing faster than the value of my Rolf Harris art collection. So, obviously, something had to be done. And so it has in *Denton v White*. 'Trivial' is out, apparently. Now the buzz words are 'serious or significant' and common sense has been restored. I think. (The decision also marks the fact that none of this was the fault of the Court of Appeal – apparently the mess was all our fault for not reading *Mitchell* properly...)

Anyway, with so much attention being directed to ensuring absolute compliance it strikes me that it is time for a pause and some reflection upon the other legal developments in the personal injury world. Accordingly, we bring you a roundup of the more notable decisions of the Court of Appeal and House of Lords as well as some topical discussion. **Tom Panton** analyses the effects upon strict liability ofs.69 of the Enterprise and Regulatory Reform Act 2013 and **James Bentley** looks at Rule 3.9, the guidance given by the Court in *Denton and Ors* and the effect of Rome II following the decision in *Wall v Mutuelle de Poitiers Assurances* [2013] EWHC 53 (QB)).

Your comments and suggestions are welcomed and should be addressed to me at gabriel.farmer@guildhallchambers.co.uk.

**Gabriel Farmer, Editor**

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# PI Case Update

## Liability

### Vicarious Liability

#### *Cox v Ministry of Justice* [2014] EWCA Civ 132

**Facts:** The claimant was the catering manager at a prison. Under the claimant's supervision, the prisoners were unloading a consignment of food. Unfortunately, one of those prisoners dropped a sack of food onto the floor, causing it to spill everywhere. The prisoners were told to stop working until the spillage had been cleared. X (a prisoner under the claimant's supervision) continued to work, and as a result he dropped a sack onto the claimant's back, causing her injury. It was submitted that the MoJ was and should be vicariously liable for the acts of prisoners who were in X's position, since the relationship was 'sufficiently akin to employment'. The MoJ disagreed, adding that the Court should be wary of making such a finding because of the obvious arguments around 'public policy'.

**Held:** Looking at the features identified in *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56 (CCWS), it was clear that the features identified by Lord Philips applied in this instance. As to any argument surrounding public policy, the Defendant took the benefit of X's work and there was no reason why it should not share the burdens of it as well.

**Comment:** It is important to note that the claimant (sensibly) limited her submissions to focus on prisoners in this particular situation only and not upon prisoners per se. This effectively pre-empted the defendant's 'public policy' argument. It should be remembered how fact sensitive findings of vicarious liability can be, making it all the more important to plead one's case properly.

#### *Ahmed Mohamud v WM Morrision Supermarkets Plc* [2014] EWCA CIV 116

Facts: This appeal concerned one question: could a supermarket be vicariously liable for an assault committed by an employee? The claimant pulled into the garage and asked to use the printer. In response, he received a flurry of abuse from one of the defendant's employees (K). The claimant duly left, but K followed him to his car and punched him twice in the head.

The claimant submitted that K was representing the defendant in a customer facing role that was likely to sometimes involve provocative and/or difficult situations. There could be no improper extension of vicarious liability since the assault arose out of a simple customer relationship. The defendant responded that the critical question was the closeness between (a) the nature of the employment and (b) the tort in question. That was the only question that required answering.

**Held:** The claim was dismissed. If the test was one of 'fairness' then there would be strong grounds for allowing the appeal. That, however, was not the test. The test was to ask how closely was the nature of K's employment connected with the tort committed. On the facts held by the first instance Judge, the connection in this case was insufficient. To hold that there was a duty in this instance would be 'a step too far'.

**Comment:** It was readily acknowledged that if the question was simply one of 'fairness' then the claim might well succeed. It is unsurprising therefore that the claimant has sought leave to appeal from the Supreme Court, and it will be interesting to see whether their Lordships will consider any extension to the doctrine of vicarious liability as laid down in CCWS.

### Duty of Care/Assumption of Responsibility

#### *Mark Webley (A Protected Party Who Sues Through His Son and Litigation Friend Karl Webley) v (1) St George's Hospital NHS Trust (2) The Metropolitan Police* [2014] EWHC 299 (QB)

**Facts:** The claimant was a protected party. He was involved in a disturbance, arrested and was detained at a Police station where he was kept under constant watch. His behaviour was described as 'obviously disturbed'. He was assessed and subsequently 'sectioned' under Section 2 of the Mental Health Act to a nearby Hospital. On leaving the station, he attempted to run away, and on arriving at the Hospital he suffered a fit. On admission he was placed in a special cubicle with a security detail. Whilst under the protection of that detail the claimant escaped and ran into the road, colliding with an oncoming car and suffering a serious brain injury as a result.

**Held:** The police could not be liable on the facts. They had disclosed to the Trust the full and proper information about the claimant's behaviour and that was as far as any duty of care extended for them. The Trust however was well aware of the risk of absconding and had therefore failed in their duty of care towards the Claimant. There were no 'sufficient safeguards' to protect against a risk that they were well aware of, and which could foreseeably lead to injury.

#### *The Personal Representatives of the Estate of Cyril Biddick (Deceased) v Mark Morcom* [2014] EWCA CIV 182

**Facts:** The claimant (the defendant's neighbour) agreed to fit some insulation into a hatch which provided entry into the defendant's loft. The hatch was opened by pulling downwards on a long pole

with a hook at the end. The defendant was tasked with standing underneath the loft door with the pole, ensuring that the hatch was in a locked position. Whilst the claimant was working, the defendant left to answer the phone. It was found that this partially disengaged the latch, leaving the trap door in a precarious position and which the claimant subsequently fell through. The question was whether, and to what extent, the defendant had assumed a duty of care towards the claimant.

**Held:** The defendant had chosen to involve himself in what was a limited but hazardous activity that was being conducted by the claimant. Once he had taken the task upon himself to help, he had assumed a degree of responsibility and it was entirely foreseeable that there could be an injury if the trap door opened in the way that it did. However, a finding of 66% contributory negligence against the claimant was upheld since he had adopted an unsafe method of work.

### *Harrison v Technical Sign Co LTD and Ors* [2013] EWCA CIV 1569

**Facts:** The fascia of a shop became detached from a building and fell onto the pavement, injuring those below. Proceedings were brought against the company who had provided the sign (D1), the proprietor of the shop (D2), the company who carried out the remodelling of the shop (D3), and surveyors who had previously surveyed the shop (D4). A number of Part 20 claims were made between the defendants. At first instance it was held (amongst other things) that D3 and D4 were liable to the claimants and therefore were also liable to indemnify D1. D3 was therefore entitled to a contribution from D4. D4 appealed, contending that it owed no duty of care towards the claimants.

**Held:** A duty of care did not exist between D4 and the claimants since they lacked the requisite degree of proximity. Their involvement as surveyors of the shop had nothing to do with the safety of passers-by. Neither did D4 owe a duty of care to D2 (the shopkeeper), since the nature of the particular relationship was adversarial (D2 wished to make a claim against the landlord for other (faulty) works carried out, and in that action D4 were approached as they agents of the landlord). The adversarial nature of that relationship with the shopkeeper was inconsistent with any assumption of responsibility.

## Travel Law

### *Cox v Ergo Versicherung Ag (Formerly Victoria)* [2014] UKSC 22

**Facts:** The claimant was the widow of H. H was an Army officer who, whilst serving in Germany was killed by a German national in a road traffic accident. Liability was admitted and the claimant brought her claim against the defendant insurer in England.

The accident was pre-Rome II and therefore the Private International Law (Miscellaneous Provisions) Act 1995 applied. In assessing damages, the Court had to decide whether either the Fatal Accidents Act 1976 applied or whether its German equivalent should apply instead. The significance was that the claimant had had two children by a new partner after H's death, which would have been taken into account under German law but not under the FAA 1976.

**Held:** The substantive law was the law of the place where the accident occurred (the lex causae) unless there was a much more significant connection with England. The relevant rules in this case were clearly substantive because they determined the scope of the defendant's liability. German law therefore applied.

The FAA 1976 only lays down rules once the Act itself applied, which it did not in this instance since this was an action to enforce a liability where the applicable substantive law was German. The only thing that might change this would be if there was something in the Act itself to suggest that it was intended to have extra-territorial effect, which in this case it did not.

### *Wall v Mutuelle De Poitiers Assurances* [2014] EWCA CIV 138

**Facts:** The claimant was injured in a motorcycle accident in France. The driver was French and insured by the defendant. Liability was admitted and the claimant brought his claim in England against the defendant. It was accepted by both parties that under Rome II, French law applied. However, when the claimant applied for permission to rely on several expert reports, the defendant contended that the matter of expert evidence was a matter of 'law' and not 'evidence and procedure'. As a matter of 'law' therefore, expert evidence should be governed by French law, the effect being that the claimant would be limited to one expert only, with possible input from two or so 'sapiteurs' (sub-experts).

**Held:** The Court of Appeal held that the matter of expert evidence was a matter of 'evidence and procedure' and therefore fell to be determined by the law of the forum. Rome II was not designed to arrive at uniformity outcome, merely certainty of outcome and those were two very different things.

**Comment:** The Court's judgment is interesting not merely because of what they say about procedure, but also because of what is meant by the term 'applicable law'. For a more in depth analysis see the article written by James Bentley within this newsletter.

### *Bloy and Ireson v MIB* [2013] EWCA CIV 1543

**Facts:** The claimants were injured in a road traffic accident in Lithuania which was the fault of an uninsured Lithuanian national. As the UK compensation body for the purposes of Directive 2009/103, the MIB was obliged to pay compensation and would be entitled to then claim a reimbursement from its Lithuanian equivalent. However, under Lithuanian law the MIB's counterpart capped awards at €500,000. The MIB argued that it was only liable to pay compensation assessed in accordance with Lithuanian law, and therefore the same cap applied as between them and the claimants. Furthermore, it was submitted that even if English law did apply, then the regulations nevertheless limited liability to the maximum recoverable under Lithuanian law, i.e. €500,000.

**Held:** The assessment of compensation came under the provision of Regulation 13 of the Motor Vehicles (compulsory insurance) Regulation 2003. Regulation 13 (2) states that compensation should be paid 'as if the Accident had occurred in Great Britain'. Given its ordinary meaning, the regulation meant that the assessment of compensation was governed entirely by the law of the UK. Whilst

that causes tension with the agreement signed by the MIB and its counterpart, there was nothing in the European legislation that required a different interpretation.

## Employers Liability

### *Yates v National Trust* [2014] EWHC 222 (QB)

**Facts:** The defendant engaged a tree surgeon to take down a diseased tree. The tree surgeon in turn engaged the claimant to work within his team. During the course of his work the claimant climbed a tree using a rope and fell from a height of around 50 metres, rendering him paraplegic. The claimant contended that: a) the defendant owed him a duty to take reasonable care to see that the methods of the tree surgeon were competent and safe, and b) that the defendant had been negligent in its choice of the tree surgeon as a contractor, since he did not hold the appropriate qualifications for dismantling operations.

**Held:** The defendant did owe a duty to the claimant under the Occupiers' Liability Act. However, that was not relevant in this case since the accident did not arise out of 'the state of the premises'. It was caused by the activities of a tree surgeon.

Although the Work at Height Regulations 2005 did impose a duty on a non-employer, that duty was dependent on the non-employer exercising control over the worker (the claimant). On the facts of the case the defendant did not have the requisite control over the claimant for the Regulations to apply.

Finally, as to common law negligence the claimant failed to establish a duty of care since although tree surgery was hazardous, it was not so hazardous as to warrant imposing a duty of care owed by the defendant in its choice of its contractors.

## Quantum

### *Haxton v Philips Electronics UK Ltd* [2014] EWCA CIV 4

**Facts:** The appellant's husband passed away as a result of contracting mesothelioma. The claimant had also contracted mesothelioma herself as a result of washing her husband's work clothing. Proceedings in H's capacity as a widow and administratrix of her husband's estate were settled by consent. However, she also issued proceedings in her own right. Amongst other things, she claimed for the difference between her future dependency claim as it was settled, and the future dependency claim she would have been able to bring had she not contracted mesothelioma. The question was whether this was a recoverable head of loss.

**Held:** There was no reason either in principle or policy why the claimant should be deprived of recovering damages which represented the loss she had suffered due to her life being cut short by the defendant's negligent actions. In her claim under the FAA 1976 she could not recover any more than was her actual loss, meaning that she could not recover the 'but for' dependency claim in that action. However, there was no reason why the common law could not step in to compensate for the diminution in the value of her statutory rights. In the same way that a loss of a contractual right might be recoverable, it was also the case that the reduction in the dependency claim was a loss actually suffered. The fact that the source was statutory and not contractual was immaterial.

**Comment:** Situations where the one act of negligence has cut short the life expectancy of two people will be mercifully rare. The case seems to have developed a new head of loss - that of 'diminution in value of statutory rights'. Practitioners should be alive to this head of claim as it has the potential to be quite large. In this particular instance it added a further £200,000 to the claim.

## Limitation

### *Davidson v (1) Aegis Defence Services (BVI) Ltd (2) Aegis Defence Services Ltd* [2013] EWCA Civ 1586

**Facts:** The claimant brought a claim against his employers following a back injury sustained during a medical training course. The claim was not served in time, but after instructing new solicitors, fresh claim forms were issued and served with a Section 33 application. The first instance judge applied the dictum in *McDonnell v Walker* [2009] EWCA Civ 1257, namely that it should not be easy for a claimant to simply commence a second action and obtain a disapplication of the limitation period. On appeal it was submitted that McDonnell was inconsistent with *Aktas v Adepta* [2010] EWCA Civ 1170 (which held that the judge had not taken into account that in reality a professional negligence claim would be unsatisfactory). Furthermore, it was also wrong to say that there had been prejudice to the defendant.

**Held:** There was no conflict between McDonnell and Aktas. The judge had followed the guidance in *Cain v Francis* [2008] EWCA Civ 1451. That was the leading authority. Although a loss of a chance claim was indeed second best, it was something that Judge usually should take into account. As to the prejudice suffered by the defendant, the judge had properly considered all the usual factors (i.e. that memories become less reliable the more stable an action became).

**Comment:** Whilst the comments in Aktas and McDonnell are relevant, this case reinforces the primacy of *Cain v Francis* as the leading authority when making a Section 33 application in similar circumstances.

### *Nemeti and Ors v Sabre Insurance Co Ltd* [2013] EWCA CIV 1555

**Facts:** The claimants were Romanian nationals involved in an RTA in Romania. The car was owned by the driver's father and was insured by the defendant. The claimants brought a claim against the defendant just before the limitation period expired. However, it transpired that the defendant had taken the car without permission and the defendant sought to strike out the claims.

The claimants were forced to therefore add and/or substitute the driver's estate to the litigation under s35 of the Limitation Act 1980. The Master held that the claims in negligence against the estate

were essentially the same as claims in statute against the defendant, since both were claims for damages following personal injuries. The substitution therefore was allowed. On appeal, the judge held that s35 did not apply and there was no power to order substitution.

**Held:** The wording of Section 35 (3) was clear - there was no power to amend except as provided for by the Act or by rules of court (e.g. CPR). The claimants could not bring themselves within Section 35 because the original cause of action was a statutory one and the cause of action they wished to pursue was one in negligence. The substitution they wished for was designed to launch a new claim against a new party and not to maintain the original claim itself. The appeal therefore was dismissed.

### *Collins v SS For Innovation Business and Skills and Stena Line Irish Sea Ferries Ltd* [2014] EWCA Civ 717

**Facts:** C was a dockworker between 1947 and 1967 who had worked with asbestos. He was diagnosed with inoperable lung cancer in 2002 and was seen a number of times by his Doctor between then and 2008. He instructed solicitors in 2009 and issued in May 2012. The Defendant contended that the claim had been brought out of time. The Judge at first instance agreed, holding that whilst the Claimant did not have actual knowledge of the link between asbestos exposure and cancer until 2009, it would have been reasonable for him to ask about the causes of the cancer in mid 2003. Had he asked, he would have been told that it was down to asbestos exposure. Therefore time ran from then and the claim was out of time.

**Held:** The Court of Appeal upheld the judge's reasoning on constructive knowledge. The Claimant should have asked about the possible cause of his cancer in mid 2003. As to the s33 application the judge had not given undue weight to lengthy period of delay as a factor. The appeal therefore was dismissed.

# Procedure

## Relief From Sanctions

### *Denton and Ors v TH White and Ors* [2014] EWCA Civ 906

**Facts:** The Court heard three conjoined appeals concerning relief from sanctions. In the first case (Denton) the claimant sought to introduce six new witness statements approximately four months late and one month before trial. Relief was granted. In Decadent (the second case) the claimant failed to pay the Court fees on time, falling foul of an 'unless order' which struck the claim out. The reason was that the cheque was lost in the post. Relief was refused. Finally, in Utilise the claimant filed a cost budget 45 minutes late and notified the Court of the outcome of negotiations 13 days late. It was held that the second breach made the first one non-trivial and relief was refused.

**Held:** All three appeals were allowed. The Court took the opportunity to clarify their guidance in the now infamous Mitchell case, and what was meant by the terms 'trivial', 'paramount importance', and 'all the circumstances of the case'. It would be only in the 'exceptional case' that an application for relief should be contested and if a party were to take advantage of a minor inadvertent error, 'heavy costs sanctions' would follow. For a more detailed analysis, see James Bentley's article summarising the judgment in full.

## Evidence

### *White v Nursing And Midwifery Council* [2014] EWHC 520

**Facts:** The appellant nurses appealed against a decision of the NMC's fitness to practise panel that had struck them off the register. The council adduced in evidence three anonymous letters which were admitted in the proceedings. The letters were allowed since: a) they were not the only evidence in the case, and b) could be subject to submissions about the weight that should be attached to them. The appeal raised an issue of principle as to whether anonymous hearsay evidence should be admitted in disciplinary proceedings.

**Held:** It was difficult to conceive of circumstances in which the admission of anonymous hearsay evidence in disciplinary proceedings would be fair, save for very limited exceptions such as business and medical records where the author could not be identified. In this case there was therefore a clear breach Article 6 (1) of the European Convention on Human Rights. The findings of the panel that had been based (either in whole or in part) upon the anonymous hearsay evidence were duly quashed. However, the panel's conclusions on the main charges were expressly based on admissible evidence and those core charges would still stand.

## Disclosure

### *Henry Allen Smith v Secretary of State for Energy and Climate Change* [2013] EWCA CIV 1585

**Facts:** This was a hearing loss claim in which the claimant requested further pre-action disclosure of documents that might go towards helping him to establish the levels of noise in the pits in which he had worked. After initially being allowed, the claimant's application for pre-action disclosure was refused on the ground that he had failed to provide evidence that the claim was more than merely speculative.

**Held:** The judge had been wrong to find that CPR 31.16 3(a) and 3(b) meant that there was any sort of threshold of 'arguability'. Indeed, the language of arguability should be avoided entirely, particularly where the proceedings had not yet begun. Instead, the question was whether a) the claimant had some reason to believe he might have suffered a compensatable injury, and if so, b) with what degree of likelihood. The first instance judge had in this particular case correctly exercised his discretion by allowing the application without an audiogram or a medical opinion. Their Lordships warned however, that potential claimants in other cases might well need to provide further evidence than the evidence that was provided in this case.

# Costs

## *Rehill v Rider Holdings* [2014] EWCA CIV 42

**Facts:** The claimant was injured whilst crossing the road. Liability had been apportioned and an offer was made in April 2007 for £75,000 in full and final settlement. That offer was not accepted, and so in November 2007 a Part 36 offer was made for £100,000. That too was rejected, and was withdrawn in January 2008 (by which time the claimant had reached the end of his recovery period). In June 2009, the defendant made a Part 36 offer at £40,000, which was again rejected. The defendant's final offer of £17,500 was made immediately before the quantum trial and was accepted.

In deciding costs, the recorder held that the defendant should pay the claimant's costs up until June 2009. The claimant should then however pay the defendant's costs from then onwards. It was reasonable to refuse the offers in 2007 since the prognosis was uncertain and although he had exaggerated and inflated his claim, his actions were not so dishonest as to warrant a penal costs order.

**Held:** The consequences of Part 36 do not apply to an offer that had been withdrawn. Such an offer fell within CPR 44.3, which required the court to take into account any admissible offer to settle. Bearing that in mind, the relevant question was - had the claimant been reasonable in not accepting one of the previous offers?

What was 'reasonable' depends on what the claimant knew at the time, not on what his lawyers knew. In this instance the claimant had reached the end of his recovery period by December 2007. It was clear that there were no concerns surrounding the claims for orthopaedic injuries when the November 2007 offer was made, and those injuries formed the bulk of his claim. It therefore had been unreasonable for him not to accept the November 2007 offer, and so he was ordered to pay the defendant's costs from 21 days after the date of that offer.

## *SS Energy and Climate Change v Jeffrey Jones* [2014] EWCA Civ 363

**Facts:** The claimants were all funded by way of a conditional fee agreement. Under those agreements, although their solicitors' fees were only payable if the claims were successful, disbursements were payable regardless. In order to fund disbursements the claimants entered into individual disbursement funding arrangements under which the solicitors agreed to provide them each with credit of up to £5,000 for the payment of any of the said disbursements. The agreements were expressed to be credit agreements that were exempted from the Consumer Credit act 1974 and contained an interest charge of 4% above base rate. The defendant objected, and said that the rate should be reduced to 1% above base rate, and that the solicitors' means should have been taken into account rather than the claimants' means.

**Held:** The purpose of the power to award interest on costs was to compensate a party who had to borrow money in order to pay for those costs. The claimants were of modest means who all brought the actions for their own benefit. The judge had been entitled to make the order as she did. The relationship between the claimants and their solicitors was governed by the agreement and it gave rise to a real liability on the claimants' part as borrowers. The fact it was the solicitors who had funded the litigation made no difference. In the same way as if the agreement had been made by the claimants with a bank or other commercial lender, the liability to pay the interest was the claimants', and that was what mattered.

## *Forstater v Python (Monty) Pictures* [2013] EWHC 3759 (Ch)

**Facts:** The court was required to determine costs in a multi-party action where several different causes had been pursued. It was held that the overall winner was F2. In the second action however, P and N had been the overall winners against F1 and F2. The court had to decide the basis on which costs would be awarded. This included: how to deal with the fact that one of the issues had been discontinued, F2's entitlement to a success fee when it had failed to provide information about funding arrangements, whether any party was entitled to an interim payment on account of costs, and if so, what proportion of those costs they were indeed entitled to.

Held: Where a plethora of issues and sub-issues are raised there was much to be said in keeping the costs proceedings as simple as possible. However, whilst a broad-brush approach was desirable it did not mean that percentages should be plucked from the air. A principled approach was still required, and any discretion that was exercised should be properly grounded in sound reasoning. Since F2 was the overall winner they were entitled to their costs on the standard basis, and discontinuance of one issue would not justify a departure from this presumptive position, since it was merely a sub-issue. As to any interim payments that were due, a reasonable proportion of the sum claimed would be awarded. However, the Court should remain cautious in not awarding too much, lest any costs be knocked down on detailed assessment.

**Comment:** There are no new principles raised here, but now that a payment on account of costs is compulsory, it is a timely reminder that parties should not simply pluck figures out of the air. A Court is likely to want to explore some of the issues behind a schedule of costs if any more than 50% is claimed for a payment on account.

## *Hussain v Chartis Insurance UK Ltd* (Unreported – High Court, 9th December 2013)

**Facts:** The claimant had been in a road traffic accident and had sustained serious injuries as a result. There were disputes in relation to liability, causation and contributory negligence, but the claim was settled by way of Part 36. The claimant was funded by two CFAs and sought a higher success fee than the usual 12.5% since, pursuant to CPR 45.18 (2) (c), it was reasonable to expect that if the court had awarded damages they would be greater than £500,000 (ignoring any reduction for contributory negligence). The application for the uplift was dismissed. The Master was not satisfied that even if the claimant had established negligence he would've established causation in respect of his head injury. Therefore it was not reasonable to expect that the court would have awarded damages greater than £500,000, since causation was still in dispute. The claimant appealed.

**Held:** The appeal was allowed. In construing CPR 45.18 (2) (c), liability encompassed the question of breach and causation. Causation was not for these purposes a separate issue. If the claimant had to prove that causation would have been established, the wording of the rule would have said so. The decision was remitted to the Master for determination, assuming that liability and causation had indeed been established.

# What a Relief! *Denton and Ors v TH White* and Rule 3.9

"We think we should make it plain that it is wholly inappropriate for litigants or their lawyers to take advantage of mistakes made by opposing parties in the hope that relief from sanctions will be denied and that they will obtain a windfall strike out or other litigation advantage." Paragraph 41 of Denton and Ors v TH White and Ors [2014] EWCA Civ 906.

A collective sigh of relief was felt across offices as the Court of Appeal revised the guidance it gave in Mitchell and handed down its judgment in ***Denton and Ors***. A modicum of common sense has been restored and the flurry of applications experienced in the last six months will hopefully now settle down. That is not to say however that it means a return to business as usual. The Court has tried to find a middle way between the pre-***Jackson*** approach (too lax) and the post-***Mitchell*** Approach (too harsh). The guidance given by the Court in ***Denton and Ors*** is summarised below and hopefully will be of some assistance.

## The First Stage

Under Mitchell, the first stage of the test for relief was to ask whether or not the breach was 'trivial'. In Mitchell the Court used the words 'minor' (para 59) and 'insignificant' (para 40). This word was apparently being misconstrued, and therefore it is now preferable to ask instead whether or not the breach was 'serious or significant' (see para 26).

What is a 'serious of significant' breach? Often the answer will be determined by whether or not a breach has had a material effect on the case specifically and litigation generally. However, there are instances where materiality will not be an appropriate test. There are breaches which are incapable of affecting the efficient progress of the litigation, even though they are serious (e.g. the failure to pay Court fees). What is 'serious or significant' is therefore not a hard-edged concept, but is one that should be approached with a degree of common sense. Note also that the Court specifically stated that in assessing the seriousness of a breach, the history of compliance is not to be considered. That is something for the third stage.

## The Second Stage

In looking at what constitutes a 'good reason' Mitchell remains good law. Mere overlooking of a deadline or the general pressures of work will still not constitute a good reason for failure to comply.

## The Third Stage

Some understood Mitchell as saying that once the breach is serious and there is no good reason for it, it followed that relief would be refused. The reason for this misunderstanding was that under Mitchell, factors (a) and (b) in rule 3.9 were to be given 'paramount importance'. In order to rectify this misunderstanding, they should now be given only 'particular importance'.

In gauging whether an application is likely to fall at the third stage, one must then consider all the circumstances of the case. The promptness of the application will still be a factor, as will the history (if any) of past breaches of the rules, practice directions and orders. The approach generally over the last six months has been to produce results that are 'manifestly unjust' and 'disproportionate'. A 'more nuanced' approach is now required.

## Important Points to consider

The third stage of the test for relief is still liable to be misunderstood. The comments that clarified the third stage of the test should give practitioners vital guidance as to what type of applications will fail and what type of applications will succeed. The Court wished to:

*"...make it plain that it is wholly inappropriate for litigants or their lawyers to take advantage of mistakes made by opposing parties in the hope that relief from sanctions will be denied and that they will obtain a windfall strike out or other litigation advantage."* (See para 41).

Courts should punish such rank opportunism with heavy costs penalties. This will include (for example) recording in the Order that the failure to cooperate constitutes 'unreasonable behaviour' within the meaning of CPR 44.11.

Finally, it should be remembered that the Courts themselves have some responsibility for the orderly and efficient conduct of litigation. They should also be slow to grant unless Orders and should make sure that they impose realistic and achievable directions timetables (See para 44) – two points that should not be forgotten when one is appearing at a directions hearing.

# Accidents Abroad: The difference between 'law' and 'evidence and procedure' under Rome II

## Introduction

Regulation (EC) 864/2007 ('Rome II') governs the law applicable to all non-contractual obligations involving those from Member States. It will apply where (for example) an Englishman is injured in a road traffic accident in France by a French national. In that instance, by virtue of Rome II, French law will apply.

If a matter is considered to be a matter of 'law', then it will fall to be determined by the law of the country in which the incident occurred – i.e. the lex causae. However, if it is a matter of 'evidence and procedure' it will fall to be determined by the law of the forum i.e. the lex fori, (which was in this case English law).

The defendant contended that the matter of expert evidence was a matter of 'law', and not a matter of 'evidence and procedure'. The effect would be that, despite the fact that he was paraplegic, Mr Wall would only be able to rely on one medical expert, who may (or may not) rely in turn on supplementary experts (or 'sapiteurs').

At first instance, the Court agreed with the claimant that expert evidence was a matter of evidence and procedure. Mr Wall was entitled (in principle) to rely on the usual range of experts and the defendant appealed. The Court of Appeal dismissed the appeal and in doing so offered guidance on what the difference was between 'evidence and procedure' and 'applicable law'.

## 'Evidence and Procedure'

The Court of Appeal agreed with the Judge at first instance that expert evidence was a matter of 'evidence and procedure' and not 'law'. Giving the leading judgment Longmore LJ held that the fact that there was the specific exclusion of 'evidence and procedure' in the Treaty under Article 1 (3) meant that there were always going to be differences in outcome depending on where the claim was brought. The very existence of Article 1 (3) meant that the Defendant must necessarily be wrong about the Treaty's purpose being uniformity of outcome. To 'seek such uniformity was to seek the unattainable'.

In reaching this conclusion their Lordships were not simply concerned with strict rules of interpretation. The practical effects of the defendant's contentions were found to be deeply unattractive.

The English Courts were ill-equipped to deal with evidence in the French manner, and vice versa. Jackson LJ cited examples of the German and Dutch procedure to illustrate how inappropriate it would be if expert evidence were indeed a matter for the lex causae (See [43]). In his (and the Court's) view, to expect the English Courts to adopt foreign procedures would be 'unrealistic and inefficient'.

## 'Applicable Law'

So if 'applicable law' does not encompass expert evidence, then what does it cover? Specifically, should it include 'judicial customs and practices', which, although not 'law' (in that such matters are not technically binding), are nevertheless followed in a vast majority of cases? Or should it be limited simply to 'hard law' i.e. binding rules that dictate the result?

The claimant contended that the latter construction was appropriate. It was submitted that if the drafters of Rome II intended for 'customs, guidelines and practices' to be encompassed by Article 15, this would have been made explicit within the Commission's proposals. That submission was supported by commentary in *Cheshire North and Fawcett on Private International Law (14th ed.)* Against that however, the Defendant relied upon commentary from *Dicey, Morris & Collins, the Conflict of Laws (15th ed)*, and *Dickinson, The Rome II Regulation (2008)* which were both of the contrary view, namely that 'law' did encompass the customs, guidelines and practices of the lex causae. The Court agreed with the defendant. Whilst such matters might be 'soft law' as opposed to 'hard law', they were law nonetheless and therefore fell within the lex causae.

The significance of the above was that in France, the Court assessing non-pecuniary losses will usually follow following the Dintilhac headings (the French equivalent of the JC guidelines). These are discretionary guidelines, recommended by the Lord Chancellor in 2007, and which French Courts will nearly always follow (although they are not obliged to). The Court of Appeal were of the view that these were 'law' for the purposes of Article 15 and therefore should be used instead of the usual English JC guidelines when it comes to assessment. Note however, Courts are only obliged to follow the approach of the Judge in the equivalent country to *the extent that that Judge is obliged to do so.* It is conceivable that if a party can elicit evidence that it is possible that the equivalent Court (in say, France)

would depart from the guidelines, the English Court should also consider the possibility of doing so (See Clarke LJ at [53]).

## The Court's Analysis of 'applicable law'

Jackson LJ in his concurring judgment explained that there were both jurisprudential and practical reasons for why 'applicable law' should be construed broadly.

As a matter of jurisprudence, Jackson LJ cited philosopher Professor Dworkin's works: 'Taking Rights Seriously' and 'Law's Empire'. Professor Dworkin argued that whilst principles might not dictate results they do exert influence and as such, we use them to decide what he calls 'hard cases' i.e. cases where the strict rules conflict. The point is that 'law' is clearly not a matter of black letter rules only. Customs, guidelines and practices can in theory therefore count as 'law', in the same way that principles do.

Perhaps more importantly however, to not include customs and guidelines within Article 15 would achieve bizarre results. For example, although in France the Dintilhac Headings are discretionary, the Spanish equivalent is on a statutory footing and therefore binding. If 'law' did not include customs, practices, guidelines etc, it would mean that if an English national was injured in France he/she would receive the benefit of the JC guidelines, but if they were injured in Spain, they would not receive that benefit. Jackson LJ viewed this as a 'bizarre result', and one that was not intended by the drafters of the Treaty.[1]

## Practical guidance

As to practical guidance, the following is important to note:

1) In asking whether something is a matter of 'evidence and procedure' one should ask whether it is either the **basis** for assessment, or whether it is the **mode** of assessment. If the **basis** for assessment (e.g. a head of loss) then it is a matter of law, if it is a **mode** of assessment (e.g. expert evidence) then it is evidence and procedure.
2) Expert evidence will be crucial. The costs are clearly necessary and as long as they are proportionate, should be recoverable. Practitioners should therefore consider at an early stage obtaining expert evidence on (amongst other things):
    i. What heads of loss can be claimed;
    ii. Whether there is a statutory cap on damages;
    iii. What the method of assessment of damages is in the country where the accident occurred; and
    iv. Whether the English judge is entitled to depart from any customs, guidelines and/or practices which would be applied in the lex causae.

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1 As an aside it is arguable that in fact such results are not bizarre. They might be different, but not bizarre. That they are different should not have caused the Court too much consternation as their Lordships had already accepted that the way Rome II operates will necessarily lead to different consequences. One could ask therefore why differences in outcome are acceptable when Article 1 (3) is concerned, but not when Article 15 is concerned.

# Strict liability after The Enterprise Act 2013

The title of this article should probably refer to "no fault" rather than "strict" liability. My objective is to examine to what extent, in the world after 1.10.13, liability may still attach to defendants who have not actually done anything negligent. Strict liability in that sense has been such an entrenched feature of our litigation culture for so long that I suspect many will try to keep it going. By examining some of the ways in which no-fault liability survives section 69 of the Enterprise and Regulatory Reform Act 2013 ("ERRA") I hope to provide some degree of guidance as to what are and are not likely to be sound arguments in that regard.

I am sure everyone has heard quite enough about the practical effects of section 69. The likelihood is that we shall probably not feel those effects in terms of decided cases for some years. Even a quick thumbnail chronological outline assuming an accident on 1st October 2013 (allow a month or so to take instructions, 3 months for the protocol response letter, et cetera) shows that it seems unlikely that many cases under ERRA will be litigated this calendar year. That said, there is undoubtedly a degree of educated crystal-ball-gazing we can do even at this stage.

One of the ironies of ERRA is that despite its avowed intentions (to reduce situations where people could be found liable despite having exercised all reasonable care) it did not actually abolish strict liability. What it has done, however, is to shift the discussion into different areas of law. I cannot cover all of them in full in an article of this length. My intention is to cover two areas (defective equipment and consumer protection) in detail before simply 'flagging up' a number of others.

## Employers' Liability for Defective Equipment

Under this heading our story starts with the House of Lords' decision in *Davie v New Merton Board Mills* [1959] AC 604.

One of the defendant's maintenance fitters was knocking out a metal key by hitting a piece of metal called a 'drift' with a hammer. At the second blow of the hammer a particle of metal flew off the head of the drift and into his eye. The drift had been provided for his use by his employers. Although apparently in good condition it was excessively hard at one end due to a manufacturing defect. It had been made by reputable makers who sold it to a reputable firm of suppliers who in turn sold it to the employers. The employer's system of maintenance and inspection was not at fault. The fitter claimed damages for negligence against his employers on the ground that they had supplied him with a defective tool.

It was found at first instance, and not challenged, that no examination short of a test of the drift would have revealed the problem, that no intermediate inspection between manufacture and use was reasonably to be expected, and that it was unreasonable to expect an employer to test a drift for hardness before issuing it.

In the course of a long judgment their Lordships found that the employer's common law obligations did not extend so far as to make them liable. The debate (which now reads as a little dated) centred around whether the employer's non-delegable duty of care extended to make them liable for faults by the manufacturers of equipment. In short, it did not. It was held that the employers, being under a duty to take reasonable care to provide a reasonably safe tool, had discharged that duty by buying from a reputable source a tool whose latent defect they had no means of discovering.

In occasionally almost intemperate language, Viscount Simonds found that an employer would not be liable in respect of the negligence of "a manufacturer with whom he never contracted, of whom he may never have heard and from whom he may be divided in time and space by decades and continents". The employee's claim, he thought, was "against reason" and "contrary to principle", let alone (as he saw it) "barely supported by authority".

Evidently Parliament disagreed with him, because a little under ten years later it passed the Employer's Liability (Defective Equipment) Act 1969

The key provisions in the Act are these:

*(1) Where after the commencement of this Act*

*(a) an employee suffers personal injury in the course of his employment in consequence of a* ***defect in equipment provided by his employer for the purposes of the employer's business****; and*

*(b) the defect is attributable wholly or partly to the **fault of a third party** (whether identified or not),*

*the injury shall be deemed to be also attributable to negligence on the part of the employer…*

Case law on the 1969 Act is sparse, perhaps unsurprisingly given the advent of the Provision and Use of Work Equipment Regulations 1992 ("PUWER") 23 years later. Aside from passing (sometimes confused) references in various cases, mostly Scottish, the key area of controversy has been whether particular items fell within the scope of the Act. *Coltman v Bibby Tankers* [1988] 1 AC 276 dealt with whether the MV Derbyshire, a 97,000 tonne merchant vessel, fell within the Act (it did). In similar vein *Knowles v Liverpool City Council* [1994] ICR 243 dealt with whether a flagstone being laid by a highway worker fell within the Act (again, it did said the Lords).

*Coltman* in particular makes interesting reading because of these dicta from Lord Oliver which emphasises the sheer breadth of the Act's coverage, in accordance with Parliament's intentions:

"The key word in the definition is the word "any" and it underlines, in my judgment, what I would in any event have supposed to be the case, having regard to the purpose of the Act, that is to say, that **it should be widely construed so as to embrace every article of whatever kind furnished by the employer for the purposes of his business**. Thus it is not just particular plant and machinery or vehicles (for instance, a combined harvester) or particular types of aircraft (for instance, a crop-spraying aeroplane) which are to be regarded as "equipment" but plant and machinery, vehicles, aircraft and clothing of all types and sizes subject only to the limitation that they are provided for the purposes of the employer's business" (299A, my emphasis)

In similar vein, in what I expect to be an oft-cited dictum:

"The purpose of the Act was **manifestly to saddle the employer with liability for defective plant of every sort with which the employee is compelled to work in the course of his employment** and I can see no ground for excluding particular types of chattel merely on the ground of their size or the element upon which they are designed to operate." (301B, my emphasis)

My researches for this article have revealed a widely-held assumption that the Act, to all intents and purposes, means the effective survival of PUWER. My question then is, to what extent is that assumption justified?

The starting point is plainly the statutory language. A direct comparison is revealing. See the table at the bottom of this page.

The Act and the Regulations plainly operate in different ways. That said, given what was said in *Coltman* and *Knowles* I doubt any distinction will arise in relation to what sort of equipment is covered. There are two questions which have not yet been litigated, but which I expect may be controversial.

## How strictly will the Courts treat the requirement for equipment to have been "provided by the employer"?

The PUWER case of *Smith v Northamptonshire County Council* [2009] ICR 734 neatly illustrates the difficulty. The employee in that case was using a ramp that was provided by an outside agency to access a service-user's home. The ramp broke and she fell. She failed in her claim under PUWER because their Lordships held that the equipment was outside of her employer's "control" (Lord Neuberger) and/or had not been adopted or incorporated into their undertaking (Lord Mance). Presumably the same result would pertain under the 1969 Act but for the more simple reason that they had not "provided" it.

There might be considerable scope for argument over what amounted to "provision" for the purposes of the 1969 Act.

| PUWER | Defective Equipment Act |
|---|---|
| Reg 2(1)<br>"work equipment" means any machinery, appliance, apparatus, tool or installation for use at work (whether exclusively or not); | Section 1(3)<br>"equipment" includes any plant and machinery, vehicle, aircraft and clothing; |
| Reg 3(2)<br>(2) The requirements imposed by these Regulations on an employer in respect of work equipment shall apply to such equipment provided for use or used by an employee of his at work. | Section 1(1)(a)<br>"…equipment provided by his employer for the purposes of the employer's business;" |
| [Various specific duties rr4-35] | Deemed negligence under section 1:<br>If "the defect is attributable wholly or partly to the fault of a third party (whether identified or not)" then the injury shall be deemed to be also attributable to negligence on the part of the employer" (*without prejudice to contributory negligence, right of recovery from third party, etc*) |

### How strictly will the Courts treat the requirement for "fault" on the part of the third party?

"Fault" is defined in section 1 (3) of the Act to mean "negligence, breach of statutory duty or other act or omission which gives rise to liability in tort in England and Wales or which is wrongful and gives rise to liability in damages in Scotland".

Will it be sufficient proof simply to show that the equipment failed? In principle such an approach seems unsatisfactory because the failure itself could have multiple causes, including simple maintenance issues. If the employer has a good system of maintenance which could not reasonably have detected and remedied the problem, then it seems to me that he should theoretically escape at common law, and for there to be no third party at fault to engage the 1969 Act. The claim should surely then fail, when it would have succeeded under PUWER.

What if nobody can establish why the equipment failed? This is an issue that has troubled the courts from well before the Act or PUWER. As long ago as 1884 we find this in the judgment of Lord Moncrieff in *Macfarlane v Thompson* (1884) 12 R 232:

"provided that it is proved that some defect in the machinery or plant caused the accident, it is not necessary to show the precise nature of that defect, and an onus is thrown upon the master to show that the defect was one for which he was not to blame".

His Lordship was at pains to explain that this only applied where equipment was implicated in some way. It did not apply to every case which happened to involve equipment and where the cause was unexplained. Nevertheless, it might well be thought that, to some extent, in cases involving injury caused by equipment, claimants may think they have a vested interest in avoiding discussion of precisely why it happened.

My concluding point in this section however is that the 1969 Act was plainly passed for a very specific purpose and its ambit is more limited than might first appear. Certainly as I see it, and on the present state of the law, it would be wrong to simply assume that PUWER survives in full by an alternative statutory mechanism.

## The Consumer Protection Act 1987

The Act was born of the Product Liability Directive 85/374/EC passed in July 1985. It and its huge quantity of subordinate safety Regulations are unaffected by ERRA. It is quite a technical piece of legislation and my objective here is to provide an overview of its core provisions and some pointers as to likely key areas.

Anyone seeking a full and well-reasoned guide to the Act could do worse than to read the judgment of Burton J in *A v National Blood Authority* [2001] 3 All ER 289.

In simple terms the Act imposes strict liability in respect of damage done by defective products. Beyond that straightforward outline however there are a series of particular questions which have to be worked through in any given case if the Act is to apply.

## Who is entitled to sue under the CPA?

Persons entitled to sue are not specified within the Act but the short answer is anyone who has suffered "damage" as defined in section 5, which includes death or personal injury. (There are specific provisions in relation to damage to property which I shall not cover here).

## Who can be liable under the CPA?

The relevant provisions are in section 2. Parties to whom strict liability can attach fall into the following categories under subsection (2):

a. The **producer** of the product (defined in section 1 to include the manufacturer. Products which are not 'manufactured' but brought into being by other means e.g. being abstracted are addressed separately);

b. Any person who by **putting his name or trademark** or other distinguishing mark on the product has held himself out to be the producer of the product;

c. Any person who has **imported the product** into a Member State from outside the Member States.

There is then an interesting further provision in s2 (3) attaching liability to **suppliers** of products who are reasonably asked for, but fail to provide within a reasonable period, the identity of the person to whom the subsection (2) criteria apply.

## To what does the Act apply?

"Product" is defined widely by section 1(2) to mean any goods or electricity. "Goods" is defined in section 45 to include substances, growing crops and things comprised in land by virtue of being attached to it and any ship, aircraft or vehicle. In the Blood Authority case the term was held to be wide enough to cover transfused blood. It seems to be accepted that it does not cover information, services, or advice.

## What is a "defect"?

This is a key area. The starting point is section 3 which provides as follows:

***3. Meaning of "defect".***

*(1) Subject to the following provisions of this section, there is a defect in a product for the purposes of this Part if the **safety of the product is not such as persons generally are entitled to expect**; and for those purposes "safety", in relation to a product, shall include safety with respect to products comprised in that product and safety in the context of risks of damage to property, as well as in the context of risks of death or personal injury.*

*(2) In determining for the purposes of subsection (1) above what persons generally are entitled to expect in relation to a product all the circumstances shall be taken into account, including:*

*(a) the manner in which, and purposes for which, the product has been marketed, its get-up, the use of any mark in relation to the product and any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product;*

*(b) what might reasonably be expected to be done with or in relation to the product; and*

*(c) the time when the product was supplied by its producer to another;*

*and nothing in this section shall require a defect to be inferred from the fact alone that the safety of a product which is supplied after that time is greater than the safety of the product in question.*

The test of what is objectively safe is the governing standard. Interestingly, a product that is found to be safe overall will therefore not be 'defective' even if strictly-speaking it was not as intended.

This point is illustrated by the decision in *Tesco Stores v Pollard* [2006] EWCA Civ 393. A container of dishwasher powder had a manufacturing glitch that meant it was not as childproof as it would otherwise have been, the consequence being that a little child was able to get at it and eat its contents. The Court nonetheless held that the product was as safe as persons generally were entitled to expect, and therefore it was not 'defective'.

Famously there is also nothing deficient in products which carry obvious risks – *B (a child) v McDonalds* [2002] EWHC 490 (QB) held that piping hot coffee and tea in polystyrene cups were not defective products because customers liked their drinks like that and knew the risks.

Having said that, some products which are inherently dangerous (e.g. knives, guns, chainsaws, some types of drugs, et cetera) can be 'defective' if not subject to proper warnings, advice, et cetera. Section 3(2) (a) makes it quite clear that instructions are a specific part of the test. There is an interesting debate to be had over precisely how the Court should approach products of this kind. Will general knowledge amongst the public about the qualities of a product be sufficient?

The most interesting questions arise in relation to questions of proof. There is no doubt that the burden of proof of deficiency is upon the Claimant. The difficult question arises in relation to what evidence will be regarded as sufficient to discharge that burden.

It seems reasonably clear in the UK that it is not enough merely to show that the product failed and caused injury. *Foster v Biosil Ltd* (2000) 59 BMLR 178 (involving the unexplained rupture of a breast implant) and *Richardson v London Rubber Co Ltd* [2000] PIQR P164; [2000] Lloyd's Rep Med 280 (involving the failure of a condom) are authority for that proposition.

As the authors of Clerk & Lindsell point out, courts elsewhere in Europe don't necessarily accept this proposition. Other countries' approach to product liability is to treat failure as proof of deficiency. To date, the UK Courts have stopped short of adopting such a principle.

Having said that, the Courts may accept proof by inference if, for example, the product fails in use and the defendant cannot put forward any explanation for why it would have done so other than the existence of a defect. Thus in *Ide v ATB Sales Ltd* [2008] EWCA Civ 424; [2008] PIQR P13 the Court of Appeal upheld a decision in favour of the rider of a bicycle who had suffered a serious fall. The bike's handlebar had broken and the Defendant sought by expert evidence to explain that this was as a consequence of the fall rather than a cause. The Judge, having rejected that evidence, was (it was held) entitled to find that the handlebar had caused the fall notwithstanding the absence of evidence of a specific defect.

It is interesting to consider how this sort of approach chimes with the approach of Lord Moncrieff to defective equipment in the EL context (see above).

## Is there a Defence?

The CPA imposes strict but not absolute liability. Section 4 provides a number of defences. The list in simplified form is:

- Compliance with a legal requirement;
- Product not in fact supplied to anyone;
- Supply otherwise than in the course of a business;
- Defects arising subsequently to the 'relevant time' (usually the time of supply);
- Lack of scientific or technical knowledge (the so-called "development risks" defence);
- Defects in subsequent products (the 'component' defence)

Some of these are politically interesting but probably of only rare application in practical legal terms (e.g. compliance with legal requirement, development risks). The crucial feature of them all is that the burden of proof is upon the defendant. Thus in the most commonly deployed defence (that the defect was not present in the product at the time of supply) the burden of proof rests upon the defendant and not upon the claimant (something which seems to have been overlooked in the Scottish case of *McGlinchey v General Motors UK Ltd* [2012] CSIH 91). As we have seen, the claimant has to prove the defect, but once that is done then the burden passes to the defendant. It can be hard burden to discharge.

## Final thoughts on the CPA and PUWER

For defendants in PI claims I find myself looking at the CPA almost exclusively in the context of potential contribution proceedings. For claimants, like many others in equipment cases, I am used to having to look no further than PUWER. PUWER ironically made life a little easier for Defendants because liability would at least be clear-cut – if something went wrong with a piece of equipment then the employer was extremely likely to be liable under r4 if not r5. Will a similar state of affairs persist under ERRA? Ironically I suspect it probably will. However, I think cases have to be divided into two categories:

i. Cases where the reason for the failure is known and identifiable. In these cases it should be tolerably straightforward to work out the position. Defective maintenance will (I would have thought) usually end up coming back to the employer under their non-delegable duties of care at common law. There may be a few cases where it can be shown that no reasonable maintenance system could have avoided the problem. Cases of identified manufacturing defects will also end up at the employer's door via the 1969 Act although one would hope for good prospects of recovery from the manufacturer under the CPA.

ii. Cases where the reason for the failure is unknown and unascertainable. These could well end up at the employer's door if the Court adopted a sympathetic approach to the issue of proof. I.e. that the employer bears an evidential burden of coming up with an explanation for the failure and will be liable if it cannot (as per Macfarlane). Ultimately it is a question of how far the Courts will be prepared to go.

The practical problem will remain the difficulty of identifying what has gone wrong. Tools and other equipment which cause injury are not always retained – the first reaction to an accident can often be to assume employee error and it is only at later stages that the person (sometimes more in self-exculpation than anything else) blames equipment for their injury. Engineering evidence is expensive. I suspect however that many work equipment cases may be heading down the same path as Noise-Induced Hearing Loss and Hand Arm Vibration cases have been for some time, even on the fast track, i.e. routine single joint instruction of Consulting Engineers.

It is interesting to consider who would win and who would lose in the new era. Would Mr Stark (*Stark v Post Office* [2000] ICR 1013) still succeed? The defect in his bicycle was not identified (although it was said somewhat loosely that it was "either metal fatigue or some manufacturing defect".) He did not rely on the 1969 Act and of course did not have to because he had PUWER. It tends to be assumed that he would have failed at common law because the employer's system of maintenance was reasonable. If the above had been the only evidence, could the employer have argued that there was no evidence of any fault on the part of a third party either (and thus no deemed negligence under the 1969 Act?). Or would the Court have taken a sympathetic approach and said the failure raised a prima facie case of deficiency which the employer could not rebut? In the modern climate the answer could well be the latter.

What about Mr Hide (*Hide v The Steeplechase Co Ltd & Ors* [2013] EWCA Civ 545)? His case rightly made headlines in the PI world because of the sheer strictness of the Court of Appeal's approach to regulation 4 of PUWER (despite which the Supreme Court has refused permission to appeal, and so the decision will continue to loom over pre-1/10/13 cases involving all health and safety Regulations). Hide's injury was caused by a guardrail, which in the broad sense had nothing defective about it and was essentially just a piece of racecourse furniture. The common law claim would have failed due to the lack of any reasonably foreseeable injury (as found by the judge at first instance). In the post-ERRA world could the employee have relied upon the 1969 Act? Personally I doubt it – if there was no foreseeable risk of injury, where would be the 'fault' of a third party?

# No-fault liability at common law

The particular areas I would flag up for consideration are as follows.

## Vicarious liability

This is a familiar topic but bears mention because plainly it involves no fault on the part of the actual employer. It is a huge topic in its own right and I shall not try to analyse it here.

## Non-delegable duties of care

We could have a nice debate over whether these are 'no-fault' cases, although certainly they do involve no fault on the part of the duty-holder. Again they are a separate topic in themselves, of vital (but familiar) importance in the context of employer's liability, and of course to some extent highway maintenance.

## *Rylands v Fletcher* (1868) LR 3 HL 330

You will probably recall that this line of authority concerns liability for the escape of dangerous things from land. It doesn't arise unless the defendant has brought the thing onto land in the course of an artificial change from its natural use, and harm or injury must be foreseeable. There is some doubt as to whether it applies to personal injury cases at all, although some actions have succeeded. I think this doctrine plainly has a fairly limited ambit and I cannot see that it will be relevant in many cases.

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# Team News

There have been a number of changes to the team since the last newsletter including the arrival of Tom Panton in February 2014 from Ropewalk Chambers in Nottingham. Tom was called in 2002 and enjoys a busy practice focusing on EL and disease cases as well as other complex/high value claims. James Bentley joined us as a pupil in 2013, commenced his second six in April and is doing very well.

Our clerks' room also saw the arrival in 2013 of Wendy Shaw. Formerly employed in a solicitor's firm Wendy brings a wealth of experience and pragmatism to the team, not to mention considerable marketing ability.

The team ran a very enjoyable defendant seminar in June with guests including Dr Leigh Neale, a Consultant Psychiatrist and Nick Lee from Paragon Costs.

**The claimant seminar is due to take place in Bristol on Thursday 20th November and places will be advertised in due course.**

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