Essex CHAMBERS

PERSONAL INJURY NEWSLETTER
April 2016

## INTRODUCTION
### James Todd

Since the last newsletter we have completed the move into our spectacular new accommodation at 81 Chancery Lane. Clients who have already visited will have seen how impressive the new facilities are and we look forward to welcoming those who are yet to come. Chambers is now housed in a single building and we have more conference rooms and meeting areas, as well as rather attractive views over Lincoln's Inn and the rooftops of Central London. We think the move will enable us to continue to forge ahead as one of the premier sets.

We also have good news on the membership front. We are delighted, as we know many of you are, that Derek O'Sullivan has been deservedly elevated to silk. And we welcome a new member to the PI team, Edmund Townsend. Edmund was called to the Bar in 2006 and brings with him a solid PI practice and client list. We wish both of them every success in this new phase of their careers.

The last few months have been an unusually busy time for high level decisions in the PI field. An old trope among veterans of the PI Bar had it that they spent the 1980s arguing about liability, the 1990s about quantum and the 2000s about costs. That left those of us still here in the 2010s with apparently little to do other than process claims. Fortunately that has proved not to be the case, certainly of late. Age old concepts such as vicarious liability, causation in disease cases and the methodology for calculating loss continue to evolve in fascinating and vibrant ways, as our contributors illustrate in this newsletter.

## Contents



In this bumper edition we have three short articles. We kick off with Kate Grange who takes us through the landmark Supreme Court decision on vicarious liability in Cox, before turning the vexing issue of applicable law in accidents abroad, on which we have an analysis from Charlie Cory-Wright and Bernard Doherty of their catastrophic RTA case involving an accident in Poland and a trial in England. Lastly, we have the second part of Simon Edwards's valuable article on capacity in the context of litigation.

After that, we have our usual team reporting on important decisions since the last newsletter. We know that readers find these shorter case summaries a useful addition to the daily Lawtel skim.

Time flies and our next newsletter will be the summer edition when our annual garden party will be almost upon us. In the meantime, we hope to see many of our readers at our regular talks and seminars, details of which are on the website and available from Alastair, Ben, Rick or Mike, our tireless and dedicated clerking team.

## THE SUPREME COURT ON VICARIOUS LIABILITY: a view from inside *Cox v Ministry of Justice*

**Kate Grange**

The law of vicarious liability has recently been revisited by the Supreme Court in two important cases: *Cox v Ministry of Justice*[1] and *Mohamud v WM Morrison Supermarkets Plc.*[2]

*Cox* was a case involving Stage 1 of the test for vicarious liability i.e. whether the relationship between D1 and D2 was capable of giving rise to vicarious liability. The issue was whether the prison authorities should be held vicariously liable for the actions of a prisoner who was working in the prison kitchen and who negligently injured a prison officer. The Court of Appeal had reached the conclusion that the relationship was 'akin to employment' and thereby satisfied the tests identified by Lord Phillips in *Various Claimants v Catholic Child Welfare Society*[3] (the '*Christian Brothers*' case). On appeal, the Ministry of Justice sought to distinguish the position of prisoners on the basis that the prison authorities were required by statute to provide 'useful work' to prisoners which was part of their rehabilitation and that such a relationship could not properly be described as one which was 'akin to employment'.

The Supreme Court (Lord Reed giving the judgment with whom Lord Neuberger, Lady Hale, Lord Dyson and Lord Toulson agreed) rejected the contention that the relationship between the prison service and the prisoner was insufficiently 'akin' to employment. He held that the general approach set out in the *Christian Brothers* case was not confined to sex abuse cases and was intended to provide a basis for identifying the circumstances in which vicarious liability would attach outside the employer/employee relationship. By focusing on the business activities carried on by the defendant and its attendant risks, the law had extended vicarious liability in such a way that victims of torts were protected, notwithstanding changes to the legal relationship between enterprises and members of their workforces. It was important not to be misled by a narrow focus on semantics such as 'enterprise', 'business' and 'benefit' since the defendant need not be carrying out activities of a commercial nature; it was sufficient that the activities were being carried out in furtherance of the defendant's own interests and a wide range of circumstances could satisfy those requirements. In addition, employers could not avoid vicarious liability based on technical arguments as to the employment status of the individual who committed the tort.

On the facts of *Cox*, the requirements in the *Christian Brothers* case were met; the fact that the work of the prisoners was in the public interest did not justify the conclusion that it was outside the scope of vicarious liability. The prison service had chosen to place prisoners in a position whereby they could commit negligent acts. None of the suggested points of distinction with an employer/employee relationship justified the conclusion that liability could not attach. In addition it was not always necessary to ask the question whether it was 'fair, just and reasonable' to impose vicarious liability; the fact that the tests in the *Catholic Brothers* case were satisfied was itself an indication of what was 'fair, just and reasonable' since those criteria were designed to align with the various policy justifications for the doctrine. However there was a legitimate distinction between work in the kitchens and rehabilitation activities such as educational classes or offending behaviour programmes which were not activities forming an integral part of the operation of the prison and for its benefit.

The decision is of particular relevance to non-profit making organisations. They will be liable for negligent acts committed by individuals who are acting in furtherance of their aims and objectives, even if some of the incidents of a 'normal' employment relationship are absent. The decision clarifies that 'enterprise' liability is of broad application outside the profit-making sphere. Consequently the acid test is whether harm

1 [2016] UKSC 10
2 [2016] UKSC 12
3 [2013] 2 AC 1

is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit (rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or of a third party), and where the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual in question.

*Mohamud* was concerned with Stage 2 of the test i.e. looking at the connection between D2 and the act or omission of D1. Mr Mohamud had entered a petrol station kiosk and, after being subjected to foul, racist and threatening language by a Morrison's employee, was ordered to leave. The employee followed Mr Mohamud back to his car and punched him; subjecting him to a serious attack. Both at first instance and in the Court of Appeal, Mr Mohamud's claim was rejected on the basis that there was an insufficiently close connection between what the employee was employed to do and his tortious conduct in attacking the claimant.

In the Supreme Court the claimant challenged whether the 'close connection' test was the appropriate standard to apply. Instead the claimant proposed a broader 'representative capacity' test i.e. whether a reasonable observer would consider the employee to be acting in the capacity of a representative of the employer at the time of committing the tort. But the Supreme Court (Lord Toulson giving the lead judgment with whom Lord Neuberger, Lady Hale and Lord Reed agreed) rejected the contention that the 'close connection' test was flawed; it had been followed at the highest level and there was nothing wrong with it as such.

However, applying the 'close connection' test on the facts of the case, the Supreme Court reversed the Court of Appeal decision and held that the test was satisfied. It was the employee's job to attend to customers and respond to their inquiries. His conduct in responding to the claimant's request with abuse was inexcusable, but interacting with customers was within the field of activities assigned to him by his employer. What happened thereafter was an unbroken sequence of events. The connection between the field of activities assigned to the employee and his employment did not cease at the moment when he came out from behind the counter and followed the claimant onto the forecourt. He had not metaphorically taken off his uniform the moment he stepped out from behind the counter and when he followed the claimant to his car and told him not to come back to the petrol station, that was not something personal between them, but an order to keep away from his employer's premises. In giving the order he was purporting to act about his employer's business. His motive in carrying out the attack was irrelevant.

This decision is of real significance in how the close connection test is to be interpreted. It will undoubtedly make it harder for employers to assert that a violent act by an employee fails to satisfy the test for vicarious liability, particularly where the act occurs at the workplace and the tortfeasor is purporting to act about his employer's business.

*Kate Grange and Stephen Kosmin appeared on behalf of the Ministry of Justice in Cox in the Supreme Court.*

## SYRED:[4] THE CONSEQUENCES OF ROME II'S APPLICATION TO AN ENGLISH CLAIMANT'S RTA IN POLAND

### Charlie Cory-Wright QC and Bernard Doherty

The claimant, Robert Syred, was a successful English building surveyor. In 2010, while he and his then girlfriend were visiting her family in Poland, they were involved in a very serious road accident. They were both back seat passengers in a car being driven by her brother. He turned left (across oncoming traffic), as result of which there was a very heavy side-on impact with a car travelling at excessive speed in the opposite carriageway. Mr Syred was not wearing a seat belt, and was thrown from the car as it span after impact, through (the experts agreed) the right hand rear window. He suffered a whole series of injuries, orthopaedic, neurological and psychological, including severe brain damage and a life-threatening torn aorta.

There was no issue as to primary liability – both drivers were to blame. There were however significant issues as to seat-belt contributory negligence and quantification and so, in many ways, this was a typical (if that word is ever appropriate in these circumstances) catastrophic injury case. What made it additionally complicated, unpredictable and difficult to resolve was the foreign element. Rome II applied: this meant that while the English Court had jurisdiction (the claimant

4 [2016] EWHC 254 (QB)

being domiciled here and the defendants being motor insurers), the applicable law for all relevant purposes – resolution of liability matters, contributory negligence and quantum – was the law of Poland. (NB: the old principle that quantification of loss is a procedural matter and therefore decided by the law of the forum no longer applies under Rome II.)

The parties were agreed that the main consequences of this related to the following issues.
(i) Contributory negligence: Polish law, like English law, applies a percentage deduction for contributory negligence. However, it has no "standard" deduction for seat belt contributory negligence (i.e. no equivalent to *Froom v Butcher*), and therefore there was a wide range of possible deductions, based on the Polish equivalent of culpability and causation arguments. The defendant was arguing for a 50% deduction; the claimant was arguing for 5%;
(ii) PSLA: the claimant argued for figures based on English PSLA awards (in the absence of any sufficient evidence of a coherent alternative in Poland). The defendant argued for the application of figures derived from a system of Polish social insurance awards, which were significantly lower than the English awards; and
(iii) deduction of benefits: the defendant argued that all future benefits throughout the claimant's lifetime should be deducted from his damages, because that is what would be required under Polish law – there being no equivalent to the English statutory 5 year cut-off point. (NB: there were arguments here as to the applicability of the relevant Polish law; the issue was ultimately compromised during the course of the hearing, and the judge therefore did not have to rule upon it.)

Otherwise the issues on liability and quantum were litigated precisely as they would have been had the accident occurred in England; the parties agreed that the Court should apply English principles in the absence of evidence of any contrary applicable approach. (This was not simply a convenient artifice; it was a function of the fact that English law requires the party seeking to rely on foreign law to prove not only its applicability but also its different effect, failing which English law is assumed to apply on the basis of a presumption of similarity.)

After a two week trial Soole J found as follows:

- Contributory negligence: that the most serious injuries (the brain injury and the torn aorta) had not been caused or contributed to by the claimant's failure to wear a seat belt; but that his other orthopaedic injuries had; and that applying the relevant Polish law there should therefore be a deduction of 5% for contributory negligence;

- "PSLA": that it was appropriate to look to the Polish law social insurance scheme as the starting point for assessment of PSLA; and that he should receive £50,000 (a figure significantly lower than if he had been applying English PSLA principles in accordance with the Judicial College Guidelines);

- Injuries and their effect: that the claimant was severely handicapped cognitively as a result of his brain damage, both in terms of function and in terms of disinhibition, as well as being physically disabled by his injuries;

- Care: that the claimant had significant long term care needs, which had been seriously underestimated by the defendant's care expert (essentially because she had ignored his cognitive damage), and which would in the future reasonably be satisfied by a combination of gratuitous care from his (devoted) wife and a professional care regime;

- Loss of earnings: that, notwithstanding his determined and sustained attempts to return to work as a building surveyor, he had no real prospect of doing so, albeit that he did have some very limited residual earning capacity.

All in all the claimant recovered a total of c£1.15m, including significant amounts for future loss of earnings and care, together with his costs. This was nearly double the defendant's Part 36 Offer of £600,000, and only just short of the claimant's part 36 Offer of £1.25m. The claimant got his costs on the standard basis, having agreed to forgo arguments for enhanced costs orders in return for the defendant agreeing not to pursue any appeal.

The case is instructive both as an example of the sorts of issues that arise, under Rome II, in cases concerned with foreign accidents within the EU, and more generally as a good example of the proper approach at trial to assessment of medical and, in particular, care evidence where there are significant differences between the experts.

*Charlie Cory-Wright QC and Bernard Doherty appeared for the claimant in Syred.*

## CAPACITY IN THE CONTEXT OF LITIGATION

### *Part 2: Determination of Capacity in Practice*

Simon Edwards

**When to raise the issue**

The issue of a party's capacity, if raised, should be dealt with as soon as possible. The Court of Appeal so held in the case of *Masterman-Lister v Brutton*[5] (and in the context of care proceedings in *Re D (Children)*[6]). In the former, there was no Court of Protection ('CoP') involvement and the issue was whether or not the claimant was entitled to reopen litigation that had been settled on the basis that he had capacity and, therefore, had not had the approval of the court. Sometimes a deputy will have been appointed and the CoP will already have adjudicated upon the issue of the claimant's capacity pursuant to its powers under s15 of the MCA 2005 (to make declarations as to a person's lack of capacity). A typical CoP order appointing a deputy in relation to a patient's property and affairs will recite that the court has been satisfied that the patient is unable to make various decisions for him/herself in relation to matters concerning property and affairs because of an impairment of or disturbance in the functioning of the mind or brain.

Such a dispute came before Kenneth Parker J. in *Loughlin v Singh*.[7] There, the issue of capacity was dealt with at trial and, after hearing extensive evidence, the judge decided that the claimant lacked capacity both to conduct litigation and manage his property and affairs. It is of note that little, if any, attention was paid to the fact that the CoP had already determined that issue and, although the court plainly had before it documents from the CoP, it is not clear from the judgment whether or not the parties had sought permission from the CoP, pursuant to Court of Protection Rules 2007 rule 91, to use information relating to the CoP proceedings in the Queen's Bench proceedings.

Part of the reason why the QB Judge paid scant heed to the CoP declaration of incapacity is contained in the annex to the judgment: the judge was critical of the conduct of the claimant's solicitors and of one of the claimant's experts in the case. The expert had changed his view about capacity without proper explanation or grounds and the claimant's solicitors had presented the CoP with that evidence of incapacity without alerting the CoP to the fact that that was not the original view of that expert or to the fact that other experts held opposing views. At the end of the annex to his judgment Parker J said:

> *"All I need add is that the lamentable failures that occurred here, and the invidious position in which the judge in the Court of Protection was unwittingly placed, must never be repeated. The issue of capacity is of very great importance, and all involved must ensure that the Court of Protection has all the material which, on proper reflection, is necessary for a just and accurate decision."*

The absence of mention of the decision of the CoP highlights the question of the status of such a decision. Section 15 of the MCA 2005 gives the CoP specific power to make declarations as to a person's capacity but it must be recalled that such declarations are always decision-specific and time-specific. As regards the latter, in respect of many patients the lapse of time will not make matters better, but there are some patients whose capacity to make particular decisions will vary in time.

Some decisions by courts as to status are binding *in rem*; in other words, on the whole world whether parties to the action or not. For example, decisions as to the status of a person's marriage are thus binding. In one sense, a decision as to a person's mental capacity is a decision as to that person's status but that decision is, as discussed above, fact and time-specific. In *Hill v Clifford*,[8] the Court of Appeal held in relation to inquisitions under the then Lunacy Acts, that the result of such an inquisition could be read in a subsequent suit between third parties as evidence of the *'lunacy'*, but not conclusively, such that it might be traversed (see the judgment of Cozens-Hardy MR at 244).

It is likely that the same approach would be followed today, even though the MCA 2005 gives the CoP particular power to make declarations as to capacity. That is because circumstances might have changed. In the *Loughlin* case, if this issue had arisen, the defendant would no doubt have said that there was material that

5 [2003] 1 WLR 1511
6 [2015] EWCA Fam 749
7 [2013] EWHC 1641 (QB)
8 [1907] 2 Ch.237

was not put before the Court of Protection which ought to have been and which would have made a highly material difference to its deliberations.

A decision of the CoP to appoint a deputy, after having considered appropriate evidence, should not, however, be dismissed lightly. The correct approach in subsequent proceedings between the patient/claimant and a defendant would be for the civil court to ask itself the question whether or not there was material which undermined the CoP's decision to a significant degree. Was there something which was wrongly withheld from the CoP? Have circumstances changed? The subsequent civil court should not simply embark on its own investigation, feeling free to come to a different conclusion. That would undermine the status of the CoP, lead to potentially different conclusions by courts of competent jurisdiction and possibly bring the operation of the courts into disrepute.

**Can a defendant in a personal injury action intervene in capacity decisions in the Court of Protection?**

In the first instalment of this article, reference was made to the case of *Re SK*.[9] There, the defendant in the Queen's Bench proceedings sought to be joined in the CoP proceedings to be heard on the issue of what decision should be taken concerning the patient's rehabilitation. The defendant was concerned that if the CoP came to a decision that it was in the best interests of the claimant to have intensive rehabilitation, then, without the opportunity of being heard, the defendant would be *"stuck"* with that decision and that was unfair. What the defendant appeared to propose (see para 18) was a hearing where a single high court judge sitting in the CoP should decide the issue *"Where should (the claimant/patient) be accommodated and cared for, and with what level of rehabilitation?"* and that the decision in relation to that would be binding both in the CoP and in the Queen's Bench proceedings. But the judge decided that the defendant had no right to be joined, for two reasons.

First, the defendant did not have a sufficient interest in order to be joined as a party – see rule 75 of the Court of Protection Rules – because the defendant's interests were in preserving its own financial position and thus were not aligned with the best interests of the patient (see para 41). Second, it would not, in any event, be desirable to join the defendant within the meaning of rule 73. There were a number of reasons for that: the decision in the CoP and the Queen's Bench Division were different decisions, the decision in the Queen's Bench Division is a *"snapshot"*, whereas the decision in the CoP is for that particular time only and capable of variation. The judge also questioned whether, if there were multiple defendants, all defendants should be entitled to be joined and whether such would be an intolerable burden on the CoP.

A distinction can be drawn between the *SK* case and any case where the claimant's capacity is in issue. The decision that the CoP has to make is the same as the civil court would have to make but with one difference, namely that the latter would be making a decision on a *once-and-for-all* basis (at least at trial) and the former, of course, would not be a *once-and-for-all* decision, although in practice it might be.

**The role of lasting powers of attorney in PI claims**

Whilst a person may lack the capacity to manage their own property and affairs, they may still have the capacity to decide to make (and indeed revoke) a lasting power of attorney. If so, then the claimant can choose who should look after his/her property and affairs, specifically a personal injury award.

The claimant may choose to appoint a family member alone or a family member together with a professional. If the former, solicitors would have to advise of the risks associated with that choice and the reasons why the CoP does not, ordinarily, appoint a family member as sole deputy in relation to the administering of large personal injury awards (conflicts of interest etc.). There would be no need for a hearing to approve that course of action and no need to persuade the court that the disadvantages of having the award in a personal injury trust, such as want of supervision, outweigh the advantages of that course, e.g. reduced costs. The principle of autonomy would apply, namely that if the claimant is able to make a decision, then the claimant has the right so to do (whether the decision is wise or not). Come what may, the Practice Direction to CPR 21 makes clear that where there is a lasting power of attorney the damages award does not come under the jurisdiction of the Court of Protection.

9 [2012] EWHC 1990 (CoP)

## LIABILITY

### Katie Scott, Quintin Fraser and Nicola Kohn

Since the last edition of this newsletter there have been numerous appellate court decisions involving issues of liability. In this piece we attempt to summarise and tease out important points from eight cases. We begin with three cases involving the duties imposed on employers, and then look at a couple of recent material contribution cases (it would appear that the *Fairchild* exception isn't so exceptional after all) and finish with three recent road traffic accident decisions.

**Duties imposed on employers:** In the Scottish case of *Kennedy v Cordia (Services) LLP*[10] the Supreme Court heard an appeal in the type of slip case which comes before judges at first instance up and down the country on a daily basis. The success of the appeal might cause the savvy to purchase shares in any company producing anti-slip attachments for footwear.

Miss Kennedy was a carer. One wintry day she approached the home of an elderly lady for whom she provided home care, via a public footpath. There was snow on the footpath which sat upon underlying ice, and when Miss Kennedy walked on it she fell and suffered an injury. The claimant said that the defendant had breached both its statutory and common law duties in not adequately assessing the risks to which she was exposed while at work (in breach of s3(1) of the Management of Health and Safety at Work Regulations 1999) and in not providing suitable protective equipment (in breach of s4(1) of the Personal Protective Equipment at Work Regulations 1992). The Supreme Court agreed with the Lord Ordinary (who had been overturned on appeal) that the defendant was in breach of these regulations: the risk assessment was inadequate as the defendant had assessed the risk of a fall as "tolerable", when in fact the risk of a fall for home carers was "likely" and serious injuries might be sustained, and further no consideration had been given to the possibility of individual protective measures, but rather only a control measure of last resort – instructions to wear appropriate footwear – had been implemented. The Supreme Court held that the Lord Ordinary had been right to find that anti-slip attachments for footwear should have been provided, and would have been provided had there been an adequate assessment of risk, and that it could be inferred that these attachments would have prevented the accident.

The case is of some interest not only in reminding practitioners of the importance of risk assessments in demonstrating the adequacy or inadequacy of precautions taken, but also in demonstrating the burden which the PPE regulations place on employers. All that was required for the PPE regulations to become engaged was for the claimant to be exposed to risk during the course of her employment, even if that risk was one which people would face in their everyday lives such as the risk of encountering snow and ice on paths.

Finally, the extensive analysis by the Supreme Court of the appropriate use of expert evidence is worthy of consideration, leading as it did in *Kennedy* to the perhaps surprising conclusion, particularly in the post-Jackson reform era, not only that the claimant's reliance on a health and safety expert, who provided evidence on the suitability of the risk assessment and on the benefits of anti-slip attachments for footwear, was appropriate, but also that counsel for the claimant would have had difficulties in presenting her case properly without his evidence.

Now to two cases in which claimants have been unsuccessful in claims brought solely pursuant to the common law.

In *Humphrey v Aegis Defence Services Ltd*[11] the Court of Appeal held that the defendant employer, which provided protection services in connection with the reconstruction of Iraq after the war of 2003, had not breached its duty of care to the claimant (a former marine) by allowing Iraqi interpreters, who did not have to demonstrate the requisite level of fitness beforehand, to engage in an exercise designed both to ensure that they could respond appropriately to meeting armed insurgents and to test their fitness. The exercise required the interpreter to carry a loaded stretcher with the claimant and to pretend to withdraw under fire. In the course of the exercise the interpreter dropped the stretcher because of fatigue and the claimant suffered a shoulder injury. The Court of Appeal held that the judge at first instance had been entitled to have regard to the scarcity of interpreters, the importance of their

10 [2016] UKSC 6
11 [2016] EWCA Civ 11

role, the social utility of the reconstruction work, and the foreseeable risk of minor soft tissue injury only, in deciding that the defendant had acted reasonably.

Some of the facts of *Rathband & Essery v Chief Constable of the Northumbria Constabulary*[12] will be familiar to those readers who recall the manhunt for Raoul Moat in the summer of 2010. Shortly after midnight a day after shooting his former girlfriend and her new partner, Raoul Moat made a 999 call to the police saying that he was *"hunting for officers now"*. Within minutes he shot PC David Rathband at close range in the face, causing him devastating injuries. PC Rathband was not warned of the threat before he was shot as the superintendent in command that evening had decided to arrange cell site analysis (which might establish the area in which the call had been made) and a proper analysis of the contents of the call before any warning was issued to police officers.

Males J decided that the defendant had not owed any duty of care to PC Rathband. Whilst the defendant would ordinarily owe officers within his force a non-delegable duty to take reasonable care for their safety by ensuring both the provision and operation of a safe system of work, that duty could be excluded as a matter of public policy (per *Hill v Chief Constable of West Yorkshire*).[13] The duty was likely to be excluded from operational decisions concerning the investigation and prevention of crime taken under the pressure of time, particularly when the imposition of a duty might lead to defensive policing. The decision taken by the superintendent was one such decision and thus no duty of care was imposed on the defendant. In any event, if the defendant did owe PC Rathband a duty, the Judge found the superintendent had acted reasonably in delaying the issue of any warning: she had acted as other commanders might have done facing a similar dilemma.

***Fairchild* exception not exceptional:** Regular readers of the newsletter will recall the decision of our erstwhile Head of Chambers, Mr Justice Jay, in the case of *Heneghan v Manchester Dry Docks & others*[14] which we covered in the February 2015 edition. The issue in the case was when a worker had been exposed to asbestos by a number of different employers and had lung cancer as a result of his exposure, did the more *"benevolent"* approach to causation in mesothelioma cases established in the case of *Fairchild v Glenhaven Funeral Services*[15] (proof of material increase in risk as opposed to proof of causation of damage) extend to multi-defendant asbestos-induced lung cancer claims. At first instance, the defendants argued successfully that epidemiological evidence could not be used in this case to identify which of the defendants was responsible for the culpable exposure. Therefore, the claimant would be unable to prove his case against any of the defendants on conventional grounds even though they each admitted they had negligently exposed his father to asbestos. In those circumstances, Jay J found that the principle in *Fairchild* had to be extended to lung cancer claims as they are legally indistinguishable from mesothelioma claims. However, a consequence of this analysis was that the approach to apportionment set out in the case of *Barker v Corus UK Ltd*[16] also applied and the defendants were only liable to pay in respect of their 'share' of the cumulative exposure.

Upholding Jay J's findings when delivering the judgment of the Court of Appeal,[17] the Master of the Rolls confirmed that there is a fundamental difference between making a material contribution to an injury and materially increasing the risk of an injury. The material contribution test as prescribed in *Bonnington Castings Ltd v Wardlaw*[18] which would allow a claimant to recover damages in full from a defendant who had materially contributed to his injury, cannot apply in circumstances where it cannot be proven which, if any, defendant caused the cancer-inducing exposure. In those circumstances, as in the mesothelioma cases, the only plausible means of bridging the evidential gap is by way of the *Fairchild* exception.

***Bonnington* redux:** *Bonnington Castings* also formed the subject of the judgment of the Privy Council case of *Williams v The Bermuda Hospitals Board*.[19]

12 [2016] EWHC 181 (QB)
13 [1989] AC 53
14 [2014] EWHC 4190 (QB)
15 [2003] 1 A.C. 32
16 [2006] 2 A.C. 572
17 [2016] EWCA Civ 86
18 [1956] AC 613
19 [2016] UKPC 4

This case concerned a negligent delay in providing a patient, Mr Williams, with a CT scan and subsequent treatment for a suspected appendicitis. As a result of the various delays in his treatment, Mr Williams suffered several hours of pain, sepsis from a ruptured appendix and injury to his heart and lungs.

At first instance the judge found that while there had been negligence, it could not be proven that the culpable delay had caused the patient's complications: sepsis was setting in anyway and it was not possible to demonstrate that an absence of delay in ordering the necessary scans would have avoided it.

This judgment was overturned in the Court of Appeal where it was held that the first instance judge had raised the bar on causation unattainably high: the proper test was whether the hospital's breaches of duty had materially contributed to his injury.

Before the Privy Council counsel for the defendant hospital argued that the material contribution test in *Bonnington* could not apply. It was maintained that *Bonnington* was distinguishable from Mr Williams' case because it concerned the development of a disease in response to two simultaneous sources – silica originating from the operation of non-tortious pneumatic hammers and silica escaping from swing grinders as a result of the defendant's breach of duty. Mr Williams' case, in contrast, concerned the later development of sepsis due to the hospital's delay after naturally-occurring sepsis had already begun.

This submission was given short shrift by the Privy Council which confirmed that, as a matter of principle, successive events are capable of making a material contribution to a claimant's injury. Where it was right to infer that, on the balance of probabilities, the hospital had materially contributed to the progression of Mr Williams' sepsis, it should be found to have materially contributed to the damage sustained to his heart and lungs.

**RTA news:** The Court or Appeal considered the vexed issue of the illegality defence in the case of *Smith v Stratton & MIB*[20] at the end of last year. The claimant was a passenger in a vehicle in which he suffered a brain injury following a collision involving the police. The vehicle was driven by the first defendant and his insurers had avoided the relevant insurance policy for non-disclosure of material facts and misrepresentations made before the policy took effect; accordingly, he was an uninsured driver and the MIB became responsible to meet the claimant's claim against the first defendant if a judgment against the latter were unsatisfied.

There was no question but that the driver had driven negligently. The MIB's case was that they were in a joint enterprise of dealing cannabis from the car, that they had made off in the car when spotted by the police and that this had led directly to the collision and to the appellant's injuries. The MIB claimed to be entitled to avoid liability in reliance on either or both of two exceptions in clause 6 of the Motor Insurers' Bureau (Compensation of Victims of Uninsured Drivers) Agreement 1999 and/or the common law maxim *ex turpi causa non oritur actio* (the illegality defence).

While there was no direct evidence as to the claimant's involvement in the drug deal, the judge held the cumulative effect of all the evidence was to satisfy him that the MIB had proved to the relevant standard that the appellant had been involved in dealing in drugs from the car that evening. The Court of Appeal upheld the judge's findings that there was a joint criminal enterprise in which the claimant (amongst others) was engaged, and that this was sufficient therefore for the MIB to establish both the illegality defence and to avoid liability pursuant to clause 6 of the 1999 agreement.

In other news, the Court of Appeal dismissed an appeal against the rejection at first instance of the claim in the case of *Fertek v Aviva Insurance UK Ltd*.[21] This was a series of linked appeals in cases in which the claimants were alleged to have been involved in staged accidents with a generic modus operandi, namely a rear-end shunt into the claimants' vehicles after a decoy vehicle swerved and gave them a pretext for braking suddenly.

At trial, the judge considered the claimant's evidence to be unsatisfactory, and accepted the defendant's evidence that the claimant had braked harshly when there was no reason to do so. He found that it could not be proved that the collision arose from a staged accident involving another vehicle, although it was

20 [2015] EWCA Civ 1413
21 (unreported) 11 February 2016

highly suspicious, but that the accident was caused by the claimant's completely unnecessary act of bringing his car to a complete halt, done deliberately to cause the collision. He therefore dismissed the claim.

The appeal was put on the basis that the judge, having rejected the staged accident scenario did not give the claimant the opportunity to deal with the scenario that the judge had held to have occurred. This was rejected by the Court of Appeal on the basis that the factual scenario as found by the judge did not require any different evidence from the staged accident scenario which had been put fully to the appellants. There had been therefore no error at first instance.

Lastly in *Wormald v Ahmed*[22] the Court of Appeal upheld the judge's finding at first instance that the defendant had been primarily liable for a collision with a pedestrian where he had failed to monitor the road ahead, albeit a finding of 40% contributory negligence was made.

## PROCEDURE
### Sadie Crapper

**Supreme Court on repeated applications for relief from sanctions:** The attention of the Supreme Court was given over to relief from sanctions applications in the case of *Thevarajah v Riordan*[23] in December 2015. The appellant failed to comply with an order for disclosure and found itself on the wrong end of an 'unless order', which it then breached. An application for relief from sanctions was made and refused such that the appellant was disbarred from defending the claim which proceeded to trial. The day before the trial started, and armed with new solicitors, a fresh application for relief from sanctions was made, this time supported by an affidavit and accompanied by full disclosure of the documentation envisioned by the original order. The trial judge granted relief but that decision was overturned by the Court of Appeal on the basis that the appellant had failed to show that there was any material change in circumstance between his two applications for relief.

Delivering the unanimous decision of the Supreme Court, Lord Neuberger emphatically approved the approach to relief applications set out in *Mitchell*[24] and *Denton*.[25] He also endorsed the words of Rix LJ in *Tibbles v SIG plc (trading as Asphaltic Roofing Supplies)*[26] when Rix LJ explained that a court which was asked to exercise its r.3.1(7) power to vary or revoke an order (which reasoning has equal validity in the context of an application for relief under r.3.9) should only normally do so if there had been a material change of circumstances since the order was made, where the facts on which the original decision had been made had been misstated or where there had been a manifest mistake on the part of the judge in formulating the order. As such, Lord Neuberger made clear that it was not normally open to a party subsequently to ask for relief which effectively required that the original interlocutory order refusing relief be varied or rescinded, unless there had been a material change in circumstances since the order was made. Further, the fact that the appellant had latterly complied with the unless order would not usually be a material change of circumstances entitling a party to make a second application for relief from sanctions.

Proof if ever it was needed that *Mitchell* and *Denton* are here to stay, and that any party in breach of an unless order who seeks relief from sanctions should put all their effort and energy into complying with the order before their first application for relief from sanctions is heard.

**Court sends a message on court fees:** In *Lewis v Ward Hadaway*[27] 31 claimants issued professional negligence claims at or near the end of limitation against their former conveyancing solicitor. The relevant letters of claim indicated that each claim was worth hundreds of thousands of pounds but the claim forms deliberately stated the value of the claim being brought to be less than £15,000 so that a much reduced claim fee was paid to the court. In every case the claim forms were then amended before service to reflect the larger claims and the balance of the correct fee was then paid. In a bold move, no doubt informed by a long history of dealing with the particular firm of solicitors instructed by the claimants who had found themselves in trouble for employing a similar practice in other cases, the defendant applied to strike out the claims on the basis that the claimant's conduct in issuing claim forms at a deliberate undervalue in order to stop time running

22 (unreported) 3 March 2016
23 [2015] UKSC 78, [2016] 1 W.L.R. 76
24 [2014] 1 W.LR. 795
25 [2014] 1 W.L.R. 3926
26 [2012] 1 W.L.R. 2591
27 [2015] EWHC 3503 (Ch), [2016] 4 WL.R. 6

for limitation purposes amounted to an abuse of the process of the court or otherwise likely to obstruct the just disposal of the proceedings.

John Male QC, sitting as a deputy High Court judge, found that the claimant used the court process for a purpose or in a way which was significantly different from the ordinary and proper use of that process and such conduct did amount to an abuse of process. However, as the potential liability of the defendant for the claims was £9m and given the limited prejudice caused to the defendant by the claimant's conduct, particularly as they had delayed in making their application and could still take limitation points in any event,[28] he went on to find that it would be disproportionate for the claims to be struck out in consequence of that abuse of process.

Albeit personal injury claims will often increase in value over time as expected recovery periods fail to eventuate, the profession is suitably warned that the practice of paying deliberately low court fees to stop limitation running has (on more than one occasion) been considered an abuse of process and is an extremely risky tactic to employ in the current climate. Practitioners might also have noticed that district judges are increasingly issuing orders at allocation stage for the payment of the proper issue fee where it is obvious that there has been an attempt to save money in the short term by understating the true value of the claim.

## QUANTUM
### Angela Rainey

**Compensation in fatal accidents cases:** In what will be a welcome decision for claimants, on 24 February 2016 the Supreme Court gave judgment in the long-awaited case of *Knauer v Ministry of Justice*[29] declaring that damages for future losses in fatal accidents cases should be assessed from the date of trial, not from the date of death. In doing so, the Supreme Court reversed the decision of the House of Lords in *Cookson v Knowles*[30] which many, including the Law Commission, had long since been advocating needed to be addressed.

Few will be unfamiliar with the facts of the case, particularly as this newsletter has been following the progress of the case since Autumn 2014, but for those of you who have had your heads in the sand: Mrs Knauer was employed by the Ministry of Justice as an administrative assistant in one of its prisons and sadly contracted mesothelioma as a result of exposure to asbestos in the course of that employment. She died in 2009 and her widower subsequently issued a claim for damages under the Fatal Accidents Act 1976. Liability was ultimately admitted and the matter came before Bean J for an assessment of damages hearing, the claimant contending that the time had come to depart from the *Cookson v Knowles* approach and to calculate the multiplier for future losses as from the date of trial. Bean J considered himself bound to follow the House of Lords' decision in Cookson but granted the claimant a leapfrog certificate, enabling him to proceed straight to the Supreme Court.

The decision of the Supreme Court was unanimous: *Cookson v Knowles* had been decided in a different era when the calculation of damages for personal injury and death was nothing like as sophisticated as it is now, when the Ogden Tables did not yet exist and where the use of actuarial tables as a means of calculating losses was discouraged on the basis that they could give a false appearance of accuracy in an area which involved a high degree of estimation and conjecture.

The fundamental proposition of tort law was, so far as possible, to place the person harmed in the position in which he would have been had the harm not been done: full compensation, no more but certainly no less. Therefore, as calculating damages from the date of death resulted in under compensation in most cases, it was plainly inappropriate that this approach should still be used and a date of trial calculation, with reduction factors applied to address the risk that the deceased would have died before trial, should therefore be adopted henceforth.

Schedules of loss on existing cases will now need to be recast in light of this far-reaching decision. Practitioners who have settled cases which require the approval of the court should ensure that the settlements agreed remain reasonable and claimant representatives may need to demonstrate to the court that the value of the claim has been reconsidered since judgment was handed down.

28 Indeed, the court gave summary judgment for the defendant on eleven of the claims following argument on limitation.
29 [2016] UKSC 9 (SC)
30 [1979] AC 556

**Uplifts in general damages:** on 11 February 2016 the Court of Appeal handed down its decision in *Summers v Bundy*[31] clarifying the effect of *Simmons v Castle*,[32] i.e. that a 10% uplift *must* be applied to all awards for general damages, with the only exception being those that fell within section 44(6) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO').

This appeal concerned a clinical negligence case and raised a short point as to the appropriate award for general damages. The trial judge, HHJ Gargan, had decided that the assessment of whether or not to award a 10% uplift on general damages was a matter of his discretion. The claimant, Mr Summers was legally aided throughout the claim and the judge took the view that, as a result, he should not be awarded an uplift on his general damages, stating that *'…The purpose of the 10 per cent increase was at this stage to compensate those claimants who had to pay the CFA uplift to their lawyers out of their general damages…Because the Claimant in this case is in receipt of legal aid he does not have any uplift to pay to his solicitor and it seems to me therefore that it would be wrong to penalise the Defendant who is not getting the benefit of a windfall…'*

Davis LJ giving judgment on the appeal held (at paras 21-23) that, as Mr Summers clearly did not come within the exception at s44(6) of LASPO, the judge at first instance did not have discretion as to whether to award the 10% uplift:

1. There could not be a principled basis for permitting some legally aided claimants to obtain an uplift and others not to, and therefore this would create uncertainty for parties in determining the form and content of Part 36 offers or other settlement proposals; and

2. The judge's approach was, quite simply, precluded by the two decisions in *Simmons*, which had been designed to produce 'simplicity and clarity'; furthermore

3. It was inconceivable that the Court of Appeal in *Simmons*, or the professional bodies appearing before it, would have overlooked the significant class of legally aided claimants had it been envisaged that there would be some further exception applicable to that class; accordingly

4. The judge's approach had been 'wholly inconsistent' with *Simmons* and with the treatment of conventional claimants;

5. The appellant was therefore entitled 'as of right' to an award of general damages with a 10% uplift.

## COSTS

### Caroline Allen

The finer points of costs management continue to occupy both courts and rule-makers. The impending changes to Practice Direction 3E – Costs Management, which came into effect on 6 April 2016, are set out below, together with two authorities providing further assistance on the correct approach to be taken by the courts to the budgeting process.

The changes to Practice Direction 3E are as follows:

- Budgets in low value cases (those with a value of under £50,000) are now to be filed with the directions questionnaire; in other cases they are to be filed 21 days before the first CMC;
- Budget discussion reports, setting out the figures agreed by phase, the figures not agreed by phase and a summary of the grounds of dispute, are to be filed 7 days before the first CMC;
- Only the first page of Precedent H is to be filed in cases where the value of the claim is under £50,000 (a new provision) or the costs are less than £25,000;
- In proceedings issued on or after 6 April 2016, claims made by or on behalf of a child are excluded from budgeting;
- In cases where the claimant has limited or severely impaired life expectancy, the court will ordinarily disapply costs management;
- A new paragraph PD3E 7.10 has also been added, clarifying the correct approach to be taken by the courts in setting budgets: *"The making of a costs management order under rule 3.15 concerns the totals allowed for each phase of the budget. It is not the role of the court in the costs management hearing to fix or approve the hourly rates claimed in the budget. The underlying detail for each phase used by the party to calculate the totals claimed is provided for reference purposes only to assist the court in fixing a budget".*

31 [2016] EWCA Civ 126
32 [2012] EWCA Civ 1039

**Costs management powers restricted to future costs:** The case of *Venus Asset Management Limited v Mathews*[33] confirms that the court's costs management powers are restricted to future costs, and that the court has no power to revise costs that have already been incurred. In *Venus*, a surveyor's negligence action in which directions had been given up to the exchange of witness evidence, budgets had been approved for the entire action, on the basis that the trial would last for 4 days. A further CMC was listed to provide directions to trial and *"to consider any application to revise costs budgets"*. At that CMC, both parties issued applications to revise their respective budgets both retrospectively and prospectively, arguing that the court could review costs already incurred as part of the remit of budget revision under PD3E 7.5, pursuant to which the court may give directions for the review of budgets. Chief Master Marsh disagreed however, holding that CPR r.3.12 and r.3.15 limit the court's costs management powers to future costs, as does PD3E at paragraphs 7.4 and 7.6. The futurity of costs is taken from the date of the revised budget (rather than the date of the hearing).

This approach accords with that of Warby J in *Yeo v Times Newspapers Ltd*,[34] who stressed that a party may need to act swiftly to apply for prospective revision of its budget if it appears likely that the costs to be incurred in a particular phase of litigation will exceed those which have previously been approved. In substantial cases, it may be worth seeking a direction for phased budgeting under PD3E 7.6, though this does run the risk of the other side incurring significant costs on phases which have not yet been budgeted that can only be challenged at detailed assessment.

**Proportionality applies throughout the budget:** In *King v Thipthorp*,[35] a recent case in the TCC, Stephen Furst QC held that reasonableness and proportionality are not assessed by reference to the overall budget figure alone: it may well be appropriate to look at individual items claimed (such as experts' fees, counsel's fees and time costs for individual phases) and determine whether these should be subject to reduction, even if the overall budget does not appear unduly large.

**The indemnity principle:** In *Engeham v (1) London & Quadrant Housing Ltd (2) Academy of Plumbing (In voluntary liquidation)*,[36] an extempore decision of the Court of Appeal, it was held that the successful claimant in a personal injury action had 'won' her case for the purposes of a conditional fee agreement she had entered into with her solicitors by settling it with a Tomlin order requiring only the second defendant to pay her damages, although when the agreement was entered into only the first defendant was in contemplation. Consequently, and no doubt to the considerable relief of the claimant and her solicitors, the Court found that the indemnity principle had not been breached and the second defendant was obliged to pay the claimant's costs of the action: the claimant had plainly derived a 'benefit' from the claim irrespective of who was to pay and was therefore liable for her solicitors' fees. The parties could not have contemplated that only the first defendant could pay her costs: the Tomlin order was an agreement to pay damages for the purposes of the CFA, and it was not relevant that it was the second rather than the first defendant paying.

**Fixed costs/indemnity costs:** In an important judgment concerning the interaction between the fixed costs regime set down at CPR Pt 45 s.IIIA and the rules governing indemnity costs awarded under Part 36, the Court of Appeal considered the appropriate costs order to make where a claimant in a low value personal injury action who would otherwise only be entitled to fixed costs pursuant to CPR Pt 45 s.IIIA makes a Part 36 offer and subsequently obtains judgment which was more advantageous than the offer made.

In *(1) Broadhurst (2) Taylor v (1) Tan (2) Smith*[37] the first claimant and second respondent were personal injury claimants whose claims were subject to the fixed costs regime for low value personal injury claims at CPR Pt 45 s.IIIA. Both had made Part 36 offers which were rejected by the respective defendants and both had gone on to obtain more advantageous judgments. In the first appellant's case, the judge at first instance had indicated that there was no difference between profit costs assessed on the indemnity basis and the fixed costs prescribed by Pt 45. In the second respondent's case the judge agreed that r.36.14(3) applied but held that indemnity costs should not be equated with fixed costs.

33 [2015] EWHC 2896
34 [2015] EWHC 209
35 11 February 2016 (Unreported)
36 LTL 2/12/2015
37 [2016] EWCA Civ 94

It was held by the Court of Appeal that r.45.29B, which provides that the only costs to be awarded in s.IIIA cases are fixed costs, did not stand alone and that the need to take account of Part 36 offers in s.IIIA claims was recognised by the draftsman of the rules: r.36.14A was even headed "costs consequences following judgment where section IIIA of Part 45 applies". The effect of r.36.14 and r.36.14A when read together was that a claimant who made a successful Part 36 offer was entitled to costs assessed on the indemnity basis: r.36.14(3) had not been modified by r.36.14A and continued to have full force and effect. Fixed costs were not to be equated with indemnity costs and any tension between r.45.29B and r.36.14A had to be resolved in favour in r.36.14A.

Fixed costs and indemnity costs were conceptually distinct: fixed costs were awarded whether or not they were incurred and whether or not they represented reasonable or proportionate compensation for the effort expended. Assessed costs, on the other hand, reflected the work actually done: the court examined whether the costs were incurred and then asked whether they were incurred reasonably or proportionately. Where a claimant had made a successful Part 36 offer in a s.IIIA case he would be awarded fixed costs to the last staging point provided by r.45.29C and Table 6B. He would then be awarded costs to be assessed on the indemnity basis from the date when the offer became effective. Whilst this would lead to a generous outcome for the claimant, it would not be an outcome so surprising or so unfair to the defendant that it required the court to equate fixed costs with indemnity costs.

**Fundamental dishonesty / QOCS:** Whilst only a County Court authority, the recent case of *Rouse v Aviva Insurance Ltd*[38] provides useful guidance concerning the approach to be adopted by the courts where a claimant discontinues and a defendant seeks a finding of fundamental dishonesty under CPR 44.16 in order to disapply QOCS.

HHJ Gosnell affirmed that the relevant procedure to be adopted was a matter for the court's discretion: under PD 44.12.4(c) the court has the discretion to direct a paper determination, limited inquiry or full formal hearing. He made the following general observations:

- Where there was a prima facie case of dishonesty from the paperwork, it was only fair to the claimant (and the court) to allow the claimant to explain why he made a claim and discontinued. Where he failed to give evidence or did not explain the discontinuance, the defendant could invite adverse inferences;

- A hearing might be proportionate where, for example, the case was virtually ready for trial and the evidence had been exchanged. If discontinuance occurred just after service of the defence, that weighed strongly against incurring substantial further costs.

**Part 36 offer / CRU:** Finally, a Court of Appeal ruling determining the meaning of 'net of CRU' for the purposes of Part 36 offers. In *Crooks v Hendricks Lovell Ltd*,[39] the Defendant made a Part 36 offer of £18,500 'net of CRU', which was just over £16,000 at the time of offer. At trial a few months later the claimant obtained judgment for £29,550. A decision on costs was postponed pending the claimant's appeal against the CRU certificate; a revised certificate showed deductible benefits of only £6,760. The defendant argued successfully at first instance that its offer had comprised the £18,500 plus the CRU sum outstanding at the time of its offer, which the claimant had accordingly failed to beat. The Court of Appeal disagreed, holding that the regime in r.36.14 applied to the circumstances as they were once judgment had been given, though not necessarily only at the moment of delivery: the phrase "upon judgment being entered" meant "once judgment has been given and not before then". There would be cases in which a judge was entitled not to make his decision on costs straightaway, the facts of the instant case demonstrating why that had to be so: the judge knew that the correct amount of recoverable benefits remained to be determined. He was not constrained by r.36.14(1) to make his decision on costs in ignorance of the outcome of the CRU appeal. The real measure of whether the claimant had bettered the offer after issue of the revised CRU certificate was whether the total payment he actually received was more or less than the amount of the offer: the focus of r.36.14 (1), (1A) and (2) was on the comparative advantage to the claimant as between offer and judgment, not disadvantage to the defendant.

38 (unreported) 15 January 2016 (Bradford County Court)(Westlaw)
39 [2016] EWCA Civ 8

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