



## INTRODUCTION

### James Todd

We expect that many readers will be reading this newsletter on their way to or from holidays, or perhaps even while enjoying a cold drink beside the pool. With that in mind, we have packed it with some fascinating content covering a range of topics.

First, we have an article from Charlie Cory-Wright QC on the subject of what might be called hospital-induced nervous shock. It has been said that the whole topic of secondary victimhood is governed by policy and the case of *Ronayne* would seem to be no exception. Charlie's article breaks down the decision in an interesting and digestible way.

Sadie Crapper's contribution on procedural law includes a review of the *Hayward* case, from which insurers dealing with fraudulent PI claims might take the message that they should have the courage of their convictions rather than go for hasty settlements in the hope that they can come back later when the evidence is stronger. The Court of Appeal firmly backed the principle that there is public interest in the finality of settlements, particularly where parties enter those settlements with their eyes wide open.

Featuring in Quintin Fraser's review of quantum cases is the marathon decision in *Robshaw* in which three members of chambers appeared. The judgment will be useful to all practitioners seeking clues on how the court might deal with the arguments we run day in and in day out in catastrophic claims but rarely litigate.

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As usual, we also cover developments and significant decisions in the international arena, and in costs and liability. Richard Spearman QC, a rarer visitor to our corner of the law, provides us with his analysis of the decision in *Dunnage*, in which he appeared for a claimant who sought damages from an insurer when he was badly injured by a mentally ill relative.

For those doing MIB work, don't forget that the new uninsured and untraced drivers' agreements come into effect on 1st August. We hope to feature an article on these important new agreements in our next issue.

Lastly, it's not long before we move to our new building in Chancery Lane. It really is rather spectacular and we look forward to welcoming many of our readers there in the Autumn.

We wish everyone happy holidays and a great summer.

## ARTICLE

### What is sudden shock in secondary victim cases?

*Liverpool Women's Hospital NHS Foundation Trust v Ronayne*<sup>1</sup>  
by Charlie Cory-Wright

#### Introduction

A secondary victim claim is a claim for psychiatric damage caused by witnessing the injury, or the threat of injury, to another. For the reasons described below, it is one of a number of prerequisites to recovery in such cases that the psychiatric damage should have been caused by exposure to a sudden and shocking event. The main significance of this case is as to what level of sudden shock in terms of triggering event is necessary in order to found secondary victim recovery. The case is also of particular significance in that it arose in the hospital clinical negligence context. The claimant was basing his claim on the shock of seeing his wife looking disturbingly ill and swollen, connected to a drip, in hospital, all as a result of clinical negligence.

The defendant's case was that what the claimant saw was, while distressing, not out of the run of ordinary experience in a hospital. The fundamental issue was whether in those circumstances a secondary victim claim should be allowed to succeed. The defendant argued that if so then many claims in similarly "normal" circumstances would do so, and that would be wrong in principle. The appeal was of real significance to hospital trusts, since the ramifications of the first instance judgment were that any clinical negligence claim might engender secondary victim liability if visiting family members could prove psychiatric damage as a result. The Court of Appeal agreed with this and allowed the appeal.

#### The Facts

The claim was brought by the husband of a woman who had had a hysterectomy, which was (there was no dispute) negligently performed and as a result of which she suffered internal colon leakage and severe and distressing septicaemia. Luckily she made a full recovery, but in the meantime it was necessary for her to have a further inpatient stay for corrective surgery, with other distressing physiological consequences. She had brought a (quite separate) claim for damages for clinical negligence, which had succeeded. The husband claimed that he suffered psychiatric damage as a result of the sudden shock of seeing his wife after the operation, looking – as he graphically put it – *"like the Michelin man"*.

#### The Law

It is important in this context to distinguish between primary and secondary victim psychiatric damage cases. A claim for psychiatric damage caused by the threat of, or actual, injury to oneself is a primary victim claim, in just the same way as a claim for physical injury. A secondary victim claim is one brought by someone who was not threatened him or herself, but has suffered damage as a result of perceived or actual threat or injury to others.

The legal complications about secondary victim claims arise because of the difficulty the law has in deciding who may and who may not claim – where do you draw the line? In legal terms – the question relates to "proximity" – or, to put it another way – is the victim the tortfeasor's "neighbour"? With a primary victim, whether the injury is physical or psychological or both, it is normally easy to establish this: if one has suffered injury as a result of an RTA or an accident at work, proximity between tortfeasor and victim is easily established, and therefore the existence of the duty is established, and the real liability question is likely to be whether it is breached. With a secondary victim, however, it is less easy to answer the proximity question. For example, assume a horrifying event causing someone's death: should someone else who saw the accident but had no knowledge of the victim before be able to claim simply because they can prove genuine psychiatric illness as a result? What about someone who saw it on television? What about someone who was told about it?

<sup>1</sup> [2015] EWCA Civ 588 at:  
<http://www.bailii.org/ew/cases/EWCA/Civ/2015/588.html>

The answer is that there are additional rules relating to proximity in secondary victim cases. These “control mechanisms” are familiar from past cases. As well as proving that s/he has suffered genuine psychiatric illness as a result of the original tort, the secondary victim claimant must also prove

- a. that s/he has close ties of blood or affection to the primary victim;
- b. that s/he witnessed the accident, or came upon its immediate aftermath (whether at the original location or elsewhere); and
- c. that the psychiatric illness was caused by the sudden and shocking nature of what s/he witnessed.

#### **The Issues in this Case**

The issues in this case related to c. above – whether there was psychiatric illness caused by the sudden and shocking nature of what the husband witnessed. Those issues were specifically as follows:

- (1) Was the event that he witnessed sufficiently sudden and shocking to qualify him for recovery?
- (2) Did he suffer psychiatric illness at all (as opposed to an extreme reaction of anger and upset); and if so what: PTSD or Adjustment Disorder?
- (3) Was that psychiatric illness caused by the sudden shock of witnessing the incident?

#### **The First Instance Judgment**

The judge found for the claimant on all these issues (albeit he said that if he had to prefer a diagnosis it would have been Adjustment Disorder, not PTSD), and the claimant duly succeeded. The Trust appealed.

#### **The Court of Appeal's Ruling**

On appeal the issues were essentially (1) and (3) above; the defendant did not challenge the finding that the claimant suffered Adjustment Disorder, but did maintain that on the expert evidence sudden shock could not have caused an Adjustment Disorder.

The appeal was essentially resolved on issue (1). The Court of Appeal held that this event was not sufficiently shocking to found recovery. The claimant saw what one could and would expect to see in hospital. There was no sudden revelation; what he saw was a progression over a period of two days. (It was nothing like the horrifying and terrible experience that, for example, the claimant mother in *McLoughlin v O'Brian*<sup>2</sup> saw when she came to the hospital to find her children dead and injured.) The fact that he was an ambulance driver by training meant that he was likely to be used to this sort of thing. Thus the claim failed.

The court also stated that when visiting a hospital one must expect to see disagreeable things, such as patients connected to machines and drips, or in a bad physical state. A visitor is to a degree conditioned as to what to expect and it is likely that due warning will be given by medical staff of an impending encounter likely to prove more than ordinarily distressing.

It was unsurprising, so the Court of Appeal said, that there was only one previous reported case in which a secondary victim claimant had succeeded in consequence of observing in a hospital the consequences of clinical negligence (*Walters v North Glamorgan NHS Trust*<sup>3</sup>). That case was highly exceptional in nature.

Having found to that effect, the court did not need to make any findings as to issue (3), i.e. on causation. However it did observe that it did not agree with the judge's observation that labels and diagnosis were unimportant: on the contrary they were very useful. If it had been necessary to explore that issue it would have had grave reservations about the judge's finding that the claimant's psychiatric illness was, on the evidence, caused by the sight of his wife (which was the basis for recovery) as opposed to her state of health (which would not have done so).

#### **Further Observations**

This case is a natural progression from the last Court of Appeal case on this secondary victim cases – *Taylor v A Novo (UK) Ltd*<sup>4</sup> – which clarified the nature of the rules about proximity as referred to above. The general

2 [1983] 1 A.C. 410

3 [2002] EWCA Civ 1792

4 [2014] Q.B. 150

tendency continues to be one of restriction of these claims. There have been many claims advanced in recent years, often in the hospital context, on the basis that a partner or parent is shocked and distressed by what they see or hear when they come upon their loved one injured or in extremis. These claims are at a human level genuine and arise out of real distress, but they should not found recovery unless the necessary element of being exposed to a sudden and shocking event is present. This case makes it clear that it is not enough for a secondary victim simply to prove that they are genuinely shocked and distressed; they need to point to a specific and extreme event, prove that it had a sufficiently sudden and shocking nature; and prove that that sudden and shocking nature is what has caused their psychiatric illness.

#### **What does this mean in practical terms for lawyers dealing with these cases?**

The main point I think is that lawyers (and in particular claimant lawyers who may be carrying the financial risk of unsuccessful claims) must be careful even in the most apparently worthy of cases to analyse these claims carefully. Traditionally this has required:

- (i) analysis in terms of the familiar control mechanisms generally: ties of blood or affection, witnessing the accident or its aftermath, etc; and
- (ii) expert evidence to prove psychiatric damage and causation generally.

What this case shows is that it also requires separate analysis of:

- (iii) whether on the facts the events witnessed by the claimant were sufficiently sudden and shocking; and
- (iv) expert evidence as to whether it was that sudden and shocking nature of what was witnessed that caused the psychiatric damage.

*Charlie Cory-Wright appeared for the appellants in both Ronayne and Taylor v A Novo (UK) Limited.*

## **PROCEDURE**

### **Sadie Crapper**

***Finality of settlements even in fraud:*** The Court of Appeal gave judgment in what might well be the final instalment of the long-running case of *Hayward v Zurich Insurance Co plc*.<sup>5</sup> The underlying claim settled shortly before trial for around 25% of Mr Hayward's pleaded claim after Zurich had raised exaggeration against Mr Hayward on the basis of surveillance evidence. Zurich later obtained evidence to prove the exaggeration it had alleged and brought a claim in deceit to rescind the settlement.

Having survived a strike out application courtesy of a previous constitution of the Court of Appeal,<sup>6</sup> Zurich's deceit claim succeeded at first instance. The Court of Appeal overturned that decision. It held that as the misrepresentations which Zurich relied upon to rescind the settlement agreement comprised some of the same allegations that had been made before the case was settled, Zurich was not entitled to have the agreement set aside even though it could now prove those allegations.

As Underhill LJ put it, *"It cannot be right that a defendant who has made an allegation of fraud against the claimant but decided in the end not to have it tested in the court should be allowed, whenever he chooses, to revive that allegation as a basis for setting aside the settlement. It may stick in the throat that the claimant can retain the reward of his dishonesty, but the defendant will have made the deal with his eyes open to the possibility of fraud, and there is an important public interest in the finality of settlements."*

Albeit the decision of the Court of Appeal leaves the dishonest Mr Hayward in funds, there is a glimmer of hope for defendants in Briggs LJ's judgment when he said that he *"would gladly have embraced any sound basis for upholding the trial judge's decision to strip the Appellant of the grossly inflated amount which he received upon the settlement of his fraudulently exaggerated claim."*

***Limitation in sexual abuse cases:*** *RE v GE*<sup>7</sup> is worthy of report because it involves the rare refusal of an extension of limitation in a claim for historic child sex abuse. The case was unusual in that some of the allegations made by the claimant against her father had been considered

<sup>5</sup> [2015] EWCA Civ 327

<sup>6</sup> [2011] EWCA Civ 641

<sup>7</sup> [2015] EWCA Civ 287

in previous and historic divorce proceedings and findings made (in reliance on limited admissions) that the claimant had been telling the truth. The claimant's main argument on appeal was therefore that a fair trial of the issues was still possible and that this, in effect, trumped all other considerations. Susan Rodway QC successfully argued that this was only one of all the circumstances in the case and that other factors, in particular the claimant's failure to act reasonably and promptly once she knew that she had a potential claim for damages, meant that the court's discretion under section 33 of the Limitation Act 1980 ought not to be exercised in her favour.

**Stop press – new case on strike out:** The Court of Appeal gave judgment in the case of *Alpha Rocks Solicitors v Alade*<sup>8</sup> on 9th July 2015. The case concerns a claim by a firm of solicitors (AR) to recover their costs and expenses from a client who alleges that the bills were fraudulently exaggerated or misstated. The claim was struck out by a deputy judge of the chancery division at an interlocutory hearing who found, without the benefit of oral evidence, that there had been a deliberate exaggeration of one of the bills and that AR had fabricated another bill by putting items on it which were known to be false. The Court of Appeal held that the judge had been wrong to strike out the case, particularly in the absence of oral evidence from witnesses whose conduct was being impugned.

When discussing the principles involved in applications relating to strike outs for abuse of process, Vos LJ said *"In my judgment, the court should exercise caution in the early stages of a case in striking out the entirety of a claim on the grounds that a part has been improperly or even fraudulently exaggerated. That is because of the draconian effect of so doing and the risk that, at a trial, events may appear less clear cut than they do at an interlocutory stage. The court is not easily affronted, and in my judgment **the emphasis should be on the availability of fair trial of the issues between the parties.** As CPR Part 3.4(2)(b) itself*

*says, "[t]he court may strike out a statement of case if ... the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings" (emphasis added).*<sup>9</sup> (**bold emphasis added**)

Whilst the decision is unremarkable on the facts, many in the defendant insurance world will consider Vos LJ's elevation of the fairness of trial to a factor of particular importance to be a backwards step and not in keeping with the express wording of rule 3.4(2)(b), or the decisions in *Summers*,<sup>10</sup> *Arrow Nominees v Blackledge*<sup>11</sup> or *Masood v Zahoor*<sup>12</sup> to which Vos LJ was referred. As Lord Clarke made clear in *Summers* itself, misconduct which is so serious that it would be an affront to the court to permit a claim to continue could render strike out appropriate, without the additional necessity for the court to determine whether a fair trial will still be possible as a necessary condition of access to that power. Indeed in *Masood v Zahoor* Mummery LJ made clear (in a passage which was expressly approved by Lord Clarke SC in *Summers*<sup>13</sup>) that one of the very objects to be achieved by striking out an abusive claim at an interlocutory stage is to stop proceedings and prevent the further waste of precious resources on a claim which the claimant has forfeited the right to have determined (emphasis added). Many would argue that this places the emphasis squarely upon the claimant's conduct, rather than the fairness of any possible trial. We wait to see how this decision is applied in the future.

Watch out also for the new Practice Direction for Committal for Contempt of Court issued on 10 April 2015<sup>14</sup> which applies to all applications for committal and supplements Part 81 of the CPR: it deals with the need for public hearings and judgments and the situations in which a private hearing can be justified. For reasons of space, the detail cannot be reproduced here but its contents are commended to anyone dealing with or advising on a contempt application.

9 [21]-[22].

10 [2012] 1 W.L.R. 2004 at [35], [41], [42]

11 In *Arrow Nominees Inc v Blackledge* [2000] 2 B.C.L.C. 167

12 [2009] EWCA Civ 650 [2010] 1 W.L.R. 746 [73]-[74]

13 See [62]

14 <https://www.judiciary.gov.uk/wp-content/uploads/2015/03/practice-direction-committals-for-contempt.pdf>

## LIABILITY

### Richard Spearman QC

**Liability of an insurer to a rescuer for harm caused by a person of unsound mind:** the case of *Dunnage v Randall*<sup>15</sup> concerned issues which had not previously been examined by the Court of Appeal relating to the negligence liability of a person with paranoid schizophrenia.

In October 2007 the claimant was visited in his home by his uncle Vincent with whom he had been on good terms, but who was diagnosed post-mortem as having suffered florid paranoid schizophrenia. The claimant, a rescuer to whom both the judge and the Court of Appeal paid tribute, was extremely seriously burned to face and body as a result of his uncle pouring petrol over himself. The claimant struggled unsuccessfully to prevent him igniting the petrol with a lighter, and both were engulfed in flames. His uncle died at the scene. The claimant jumped to safety from a balcony.

The claimant sought damages for negligence against his uncle's estate, and the insurance company which provided household cover to his uncle's widow was joined as a defendant and assumed control of the defence. The claimant contended that his uncle owed him a duty of care and that his mental illness was no bar to recovery of damages. Further, that his uncle did not intend to cause the claimant harm, rather it was a consequence of his unsound mind and was accidental. The claim was founded on section 3 of the insurance policy, which provided: "*We will indemnify ...your family against all sums which you become legally liable to pay as damages for ... accidental bodily injury... to any person ... in the circumstances described in the contingencies.*"

The judge dismissed the claim. He reasoned that the acts were involuntary, and that there was no legal liability to the claimant.

On appeal, the claimant argued that the judge was wrong when he (a) held that an individual who acts as a result of insane delusions satisfies the objective standard of the ordinary reasonable person, (b) equated unwilling acts resulting from physical causes or third party intervention with willed acts directed and controlled by a conscious mind which is confused, disordered or disorientated,

(c) found that because the uncle's mental illness was extreme, the case did not need consideration within the wider context of tortious liability of the mentally ill, and (d) paid no regard to broader issues of policy and justice. At the appeal hearing, the question raised was "*What is the liability of a person suffering from mental illness for an act which is on the face of it negligent and a tort?*" or, more narrowly "*Is a person suffering mental illness to the extent that his actions are entirely directed by his deluded and deranged mind liable in damages to a person injured?*"

The Court of Appeal allowed the appeal, concluding that there is no justification for treating mental and physical illnesses differently – what matters is the effect of the illness, and in particular whether it entirely eliminates fault or responsibility for the injury caused. Also, that an adult who suffers from mental illness is required to meet the objective standard of the ordinary reasonable person, not a modified standard which takes account of that mental illness. On the facts, unwell though he was, the claimant's uncle was not divested of responsibility for his acts. The injury was an accident, and all the insurer's other arguments on the policy wording failed.

*Richard Spearman QC acted for Mr Dunnage.*

### Nicola Kohn

**Duty of care to trespassers:** in *Buckett v Staffordshire County Council*<sup>16</sup> HHJ Main QC considered the duty of care held by a school to a pupil who broke in during school holidays and suffered a serious and life-changing injury. The claimant got into the school grounds with a group of friends, initially to play football; later to trespass on and cause damage to school property. He climbed onto a flat section of roof and jumped onto a skylight which gave way, depositing him onto the floor below and causing significant head injuries which left him a protected party. While he admitted his own trespass, the claimant maintained that the school was negligent within the terms of s.1(1)(a) of the Occupiers' Liability Act 1984. The defendant countered that the claimant had been involved in vandalism and criminal damage while trespassing on school grounds – he had broken into the building and raided the tuck shop – and should not recover damages on the principle of *ex turpi causa*.

The judge found as a matter of fact that the school was well aware of the possibility of trespass, having repeatedly suffered from break-ins. Fencing and security of the school grounds were poor and it was entirely foreseeable that trespassers would access the grounds and that they would climb upon the roofs – as the claimant and his friends did. The school was criticised for the fact that there was no risk assessment of trespass on the flat roof despite well-documented evidence of this happening in the past. Further, it was held that while the claimant might have been involved in criminal acts in the moments prior to his fall, the fact of his fall had no relation to any acts of criminality. The judge observed that a claim would have to be connected to the turpitude for the *ex turpi causa* principle to bite.

Despite these findings, the claim failed. Absent any danger being due to the state of the premises or things done or omitted to be done to them, the judge found that no duty of care arose. The school's skylights (though made of Georgian, wired, un-strengthened glass) were not inherently dangerous. They were manifestly not intended to be walked upon and would not be stepped upon inadvertently. As such, the injuries sustained by the claimant stemmed directly from his own act of jumping onto the skylight pane, an action for which the defendant did not owe him any duty: the defendant had no duty to control the claimant's activity even though his presence in the vicinity of the skylight was reasonably foreseeable.

Of passing interest is the fact that the claimant was permitted to rely on three late witness statements as to the circumstances of the accident – a reflection of the more balanced, post-Denton mood currently prevailing in the courts.

*William Norris QC and Quintin Fraser acted for Staffordshire County Council.*

**Adequate warning before launch:** In *Jason Lowdon v Jumpzone Leisure UK Ltd*<sup>17</sup> the Court of Appeal (Tomlinson, Kitchen and Gloster LJJ) upheld the judgment of HHJ Waddicor that there was a foreseeable risk of injury in launching a customer on a 'Hyper Jump'

ride without adequate warning. The claim arose out of a ride operated on Brighton beach which involved a rider being harnessed, suspended slightly off the ground and then propelled high into the air by release of a handle. The ride operator's own guidelines stipulated that release of the handle should follow only after a verbal or physical signal that the customer was ready to 'jump'. The claimant 'jumped' twice but on the second occasion he was released without a warning while he was looking downwards and suffered a whiplash which dissected his vertebral artery and caused a sudden loss of vision. The defendant argued on appeal that releasing a customer who was properly strapped in without warning could not be negligent in law as it would not be reasonably foreseeable that this would cause injury. This argument was premised on the fact that the ride had operated for several years without any claims for injury arising. Gloster LJ disagreed: the risk of a neck injury was a foreseeable consequence of launching a customer without warning and before they were adequately braced. Accordingly, the finding of negligence was upheld.

***Ex turpi causa – successes and failures of the defence:***

In *McCracken v Smith*<sup>18</sup> the Court of Appeal found that a judge had not erred in finding a minibus driver, Darren Bell, negligent for failing to check at a junction before colliding with a trials bike, despite its being stolen and ridden dangerously on an adjacent cycle path. The claimant had been the pillion passenger on the stolen bike which his friend, Damian Smith, was driving. Both the claimant and Mr Smith were teenagers at the time of the accident, neither wore a crash helmet; Mr Smith had neither licence nor insurance and was riding too quickly on a cycle path for which the bike was unsuited. In the absence of a valid policy of insurance held by Mr Smith, the MIB was joined as the second defendant.

At first instance, the MIB and Mr Bell argued *ex turpi causa non oritur actio*, arising out of the claimant's knowledge that the bike was stolen: this was rejected as the MIB did not prove that the claimant had actual or constructive knowledge that the bike was taken unlawfully (though it proved that the claimant knew the bike was used without insurance and its liability was therefore excluded by clause 6.1 of the Uninsured Driver's Agreement). As to

the minibus driver, Mr Bell, he had driven negligently but the claimant was 45% contributorily negligent. Liability was apportioned 80:20 between Mr Smith and Mr Bell, who was also required to pay 90% of the MIB's costs.

On Mr Bell's appeal, the claimant's contributory negligence was increased to 65% in recognition of his choosing to engage in a joyride with the motorcycle's driver and his failure to wear a helmet.

As to the *ex turpi causa* defence, the Court of Appeal found that there had been a joint enterprise between the claimant and Mr Smith to ride the bike dangerously, and that the claimant could not therefore bring a claim against Mr Smith for his own negligent act. The *ex turpi causa* defence should not have been rejected out of hand; rather, causation of the accident should have been considered separately as between the dangerous driving of the motorbike and the negligent driving of the minibus.

Although the MIB had not appealed the finding against it, Richards LJ considered that the claimant should not have been allowed to succeed against Mr Smith given his share in riding the bike dangerously. However, Mr Bell's defence of *ex turpi causa* had been correctly rejected at first instance because the relationship between the claimant's turpitude and his claim in negligence against Mr Bell was not such as to debar the claim.

## QUANTUM

### Quintin Fraser

**Quantification in a catastrophic claim:** In January 2015 three members of chambers were involved in the case of *Robshaw v United Lincolnshire Hospitals NHS Trust*.<sup>19</sup> Liability was admitted for the negligent mishandling of the claimant's birth in 2002 and it was accepted that the claimant had suffered significant brain damage as a result. The claim proceeded to a trial on quantum only, and evidence was heard over the course of 10 days. The award which followed was the largest ever against the NHS for a clinical negligence action, with a likely final capitalised figure in excess of £14m.<sup>20</sup> Many heads of damage remained in issue at trial and a short article of this nature cannot even attempt to do justice to a

judgment of 114 pages, but in particular awards were made for the cost of a motor home (the claimant's family were keen campers and caravaners) and for the cost of a home swimming pool. This is the first reported case of the court awarding damages for such a pool for non-therapeutic reasons, and it was based on the "real and tangible psychological and physical benefits that swimming will give". Foskett J stated, however, that "the decision in this case should not be seen as a green light for claiming a home-based pool in every case" and indeed in the following case of *HS v Lancashire Teaching Hospitals NHS Trust*<sup>21</sup> William Davis J referred to the judgment in *Robshaw* and declined to award the cost of a home hydrotherapy pool when there was no therapeutic value, albeit the claimant derived pleasure from it as was considered reasonable for the claimant to attend a public pool 40 minutes from her home.

*Susan Rodway QC acted for Robshaw and Neil Block QC and Nicola Greaney acted for the Hospital Trust.*

**Basic rate of hire in credit hire claims:** In *Karl Stevens v Equity Syndicate Management Ltd*<sup>22</sup> the Court of Appeal have provided further assistance on the calculation of the basic hire rate (BHR) in credit hire claims. In the only full judgment of the court, Kitchen LJ held that the lowest reasonable rate quoted by a mainstream supplier for hire might be considered to be a reasonable approximation to the BHR. This is likely to be welcome guidance for those judges dealing with credit hire cases on a daily basis, and may relieve some of the financial liability on defendants who hitherto have often faced judges deciding a BHR based on the middle hire rate from a range of options.

In our February 2015 newsletter there was some discussion about the decision of *Billett v MOD*<sup>23</sup> in which Andrew Edis QC (as he then was) found that the injured claimant was properly classified as disabled for the purposes of an Ogden 7 calculation of his future loss of earnings. Before the appeal hearing Dr Wass published an article<sup>24</sup> in which she addresses some of the issues considered in the judgment, and sets out why she disagrees that the claimant's impairments and limitations justified his categorisation as 'disabled' (with

<sup>19</sup> [2015] EWHC 923 (QB)

<sup>20</sup> The fine detail of the award is still to be finalised.

<sup>21</sup> [2015] EWHC 1376

<sup>22</sup> [2015] EWCA Civ 93

<sup>23</sup> [2014] EWHC 3060, [2014] All ER (D) 181 (Sep)

<sup>24</sup> JPIL 2015, 1, 37-41

the attendant increased reduction factors that entails). Dr Wass reiterates in this article that the appropriate adjustment for mild disability should not be a mid-point between the disabled/non-disabled reduction factors but instead the court should consider adjustments using reduction factors for other characteristics negatively associated with employment prospects, i.e. level of qualification. The MOD's appeal on a number of grounds, including the classification of the claimant as disabled, the appropriateness of use of the Ogden 7 tables, and the mid-point disabled/non-disabled reducing factor fixed on by the judge, was recently heard by the Court of Appeal and judgment is awaited.

## INTERNATIONAL

### Katie Scott and Caroline Allen

**Challenge to jurisdiction:** In *Brownlie v Four Seasons Holdings Inc* the Court of Appeal also gave consideration (amongst other matters) to the interaction between Rome (II) and CPR PD 6B para 3.1(9)(a) (the 'tort jurisdictional gateway') which permits service outside the jurisdiction of claims made in tort "*where (a) damage was sustained within the jurisdiction*".

The claimant had been injured and her husband killed in a road traffic accident whilst on a sightseeing excursion in Egypt. They were both British citizens residing in the UK and the excursion had been arranged by the concierge of the hotel they were staying at. The claimant brought proceedings in the UK to recover damages in contract and tort. Her three tort claims were in respect of her own injuries, her loss as a dependent of her husband under the Fatal Accidents Act 1976, and for the loss and damage suffered by her husband in her capacity as executrix of his estate. On a without notice application the claimant was granted permission to serve proceedings on the hotel company in Canada. The defendant successfully applied to set that permission aside, the Master holding that the court had no jurisdiction to try the claim. The claimant successfully appealed that decision before a High Court judge. On the defendant's appeal, the issues were whether the judge (i) had erred in finding that the claimant had a good arguable case that the hotel company was the other contracting party to the contract for the excursion; (ii) had erred in holding that

the claimant had a good arguable case that the contract for the excursion was made in England; and (iii) should have held that the damage was sustained in Egypt.

Issues (i) and (ii) were determined in the claimant's favour, on the facts. As to issue (iii), in her leading judgment (with which the other judges agreed) Arden LJ concluded that the tort jurisdictional gateway must be interpreted consistently with Article 4 of Rome II, and that Article 4 should be interpreted in the same way as Article 5(3) of the Brussels Convention. The CJEU has interpreted the requirement in Article 5(3) of the Brussels Convention for damage to occur in the jurisdiction to mean that it is insufficient that consequential loss should occur in the jurisdiction: see *Marinari v Lloyds Bank plc*<sup>25</sup> at [14] and [15]. No distinction should therefore be based on the fact that the tort gateway spoke of 'damage', which would ordinarily mean 'any damage' rather than 'the damage' or 'the direct damage'. Accordingly the claimant's personal injury claim and her claim as executrix of her husband's estate had to be brought in Egypt. However that conclusion did not apply to her loss as a dependent under the Fatal Accidents Act 1976, to which English law was applicable. The claim under the FAA was a separate statutory cause of action and was therefore independent rather than consequential or derivative loss.

It was also held that, in the absence of proof as to Egyptian law, the court could apply the presumption that Egyptian law was the same as English law: *O v A*<sup>26</sup> applied, in which it was held that Article 4(1) of Rome II did not exclude the presumption. (Although this must be treated with a degree of caution as *O v A* was overturned by the Supreme Court, albeit that this point was not considered.)

### **Correct measure of compensation heading to the Supreme Court:**

Gilbart J delivered judgment in the important case of *Moreno v MIB*<sup>27</sup> in April. The issue which is explored in the very careful 43 page judgment is whether in a claim for personal injury brought by a claimant domiciled in England arising out of a road traffic accident in Greece caused by an uninsured Albanian driver, the measure of compensation is to be assessed in accordance with

<sup>25</sup> [1995] ECR I-2719, [1996] QB 217 and C-200/88.

<sup>26</sup> [2014] EWCA Civ 1277; [2015] E.M.L.R. 4

<sup>27</sup> [2015] EWHC 1002

English or Greek law. The court was obliged to find for the claimant (that English law applied) given the binding authority of *Jacobs v MIB*.<sup>28</sup> That was the case in which the Court of Appeal held that in a claim brought against the MIB in respect of an uninsured or untraced driver, compensation is assessed in accordance with the law of England in accordance with the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003. However the court expressed considerable doubts about whether in light of Rome II this was correctly decided. The parties have agreed that this judgment should be appealed straight to the Supreme Court, so watch this space.

**Article 6(1) of the Brussels Regulations and PI:** The other decision of note is the judgment of Jay J in *Shannon v Global Tunnelling Experts UK Ltd*<sup>29</sup> in which he examines when article 6(1) of the Brussels Regulations applies in personal injury litigation, and concludes that in a claim brought against an employer (domiciled in the UK) and also against the main contractor (domiciled in Belgium) in respect of an injury suffered on a building site abroad, the English court had jurisdiction over the Belgian main contractor pursuant to regulation 6(1) on account of the risk of irreconcilable judgments arising if there were separate proceedings brought against them in England and Belgium. He further concluded that articles 18 – 20 of the Brussels Regulation applies to claims for damages in personal injuries where a relevant contract of employment exists between the claimant and the defendant who is seeking to rely on those articles. It would not apply to a contract of employment between the claimant and another defendant to the proceedings.

## COSTS

### Caroline Allen

**NIHL – injury or disease?:** In *Dalton & Others v BT Telecommunications plc*<sup>30</sup> consideration was given to whether noise-induced hearing loss was an injury or a disease for the purposes of the former Part 45 of the Civil Procedure Rules. The relevance being, of course, that under section V of the old style Part 45 the fixed success fee recoverable from a defendant in employer

liability disease claims which settled before trial was 62.5%, but just 25% for employer liability injury claims which fell within section IV. It was held by Phillips J that consideration of the legislative history strongly indicates that parliament intended the term “disease” in sections IV and V to include any illness, whether physical or psychological, other than a physical or psychological injury solely caused by an accident or other similar single event. Accordingly there was no doubt that NIHL was a disease that fell within section V and claims for damages for NIHL therefore attracted a 62.5% success fee if settled before trial.

**Relief from sanctions / retrospective CFAs:** *O'Brien v (1) Shorrock (2) MIB*<sup>31</sup> deals with a number of different costs issues, including an application for relief from sanctions by a party which had given inaccurate information concerning the date on which a CFA had been entered into. The defendant (and paying party) was not informed of the fact that the CFA had been back-dated by almost a year, and that its start-date and the date of agreement were therefore nearly a year apart. The Notice of Funding gave only the start date rather than the date on which the agreement was entered into. Edis J held that whilst retrospective CFAs were not contrary to public policy per se, they should be treated with a degree of scepticism, particularly when considering inter-partes costs liability. He held that there had been a significant breach of the Practice Direction, which required the receiving party's solicitors to give notice of the date of the agreement itself, regardless of whether that was the date when the agreement was to come into force. This had been compounded by the claimant's solicitors' refusal to disclose the CFA to the defendant and the way in which the bill of costs was drafted (which did not make the position clear). Notwithstanding the seriousness of the breach, relief from sanction was granted and the claimant was entitled to recover a success fee from the back-dated start date of the agreement, albeit at a lower rate than was permitted from the date of the agreement itself. The case exemplifies the continued rowing-back from *Mitchell*, and is indicative of the more pragmatic approach taken by the courts following *Denton*.

28 [2010] EWCA Civ 1208

29 [2015] EWHC 1267

30 [2015] EWHC 616 (QB)

31 [2015] EWHC 1630 (QB)

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