



Annual Personal Injury Conference  
Thursday 17<sup>th</sup> July 2008

## **Schools and personal injury claims**

**Tim Petts and Angela Frost**

**Paper 1: Personal injury claims by children inside  
(and outside) the classroom**

**Paper 2: Claims by teachers against their employer**

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Personal injury claims by children inside (and outside) the  
classroom

12KBW Annual Personal Injury Conference  
Thursday 17<sup>th</sup> July 2008  
Speaker: Tim Petts

**PERSONAL INJURY CLAIMS BY CHILDREN**  
**INSIDE (AND OUTSIDE) THE CLASSROOM**



*Claims by children against schools – general issues*

**The duty of care owed**

1. The duty of care owed by a teacher or school to a pupil can be looked at as falling into two main areas: a "health and safety" duty to look after the physical welfare of the child, and an "educational" duty to look after a child's educational needs.<sup>1</sup> This paper looks at the former; claims for failing to assess/detect a child's special educational needs<sup>2</sup> are beyond its scope.
2. The traditional wording of the duty of a teacher towards a child in their charge is that a teacher is expected to show such care towards a child as a "reasonably careful parent" would exercise in such circumstances, taking into account the conditions of school life as distinct from home life, the number of children in the class and the nature of those children.<sup>3</sup>
3. This is the wording for claims for some breaches of the "health and safety" duty, at any rate. However, where there are a number of options open to a teacher for how a duty may be discharged, negligence is not established unless the choice made was outside the reasonable range of options in the circumstances.<sup>4</sup> For "educational" duty claims, and also for bullying claims, the test is also expressed in *Bolam* terms.<sup>5</sup>

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<sup>1</sup> See *Bradford-Smart v West Sussex CC* [2002] EWCA Civ 07 per Judge LJ, paragraphs 30-31

<sup>2</sup> See e.g. *X v Bedfordshire CC* [1995] 2 AC 633 and *Phelps v Hillingdon LBC* [2001] 2 AC 619

<sup>3</sup> Clerk & Lindsell paragraph 8-174; the very similar wording in the 17<sup>th</sup> edition was approved in *Gough v Upshire Primary School* [2002] ELR 169, HHJ Grenfell sitting as a Judge of the High Court (also on Lawtel).

<sup>4</sup> *Chittock v Woodbridge School* [2002] EWCA Civ 915, [2003] PIQR P81, per Auld LJ at Paragraph 18(iv)

<sup>5</sup> In *Mulvey v McDonagh* [2004] IEHC 48, Johnson J noted that it was agreed that the "prudent parent" test reflected Irish law. He noted that a professional negligence formulation was found in recent English and Scottish decisions, but said that this "had not yet been achieved in Irish law".

4. Even with the first type of duty, it is obvious that judging teachers by the standards of parents is an artificial exercise since the two situations are so very different. Teachers do not spend the amount of time with a child that parents do, and have virtually no control over the child's actions and associations outside school hours.<sup>6</sup> Furthermore, "the reasonable parent" tends not to have to control possibly as many as 30 unruly offspring, with varying degrees of willingness to learn or ability to behave. As Tucker J said in *Ricketts v Erith BC*<sup>7</sup>

"...in considering the facts of a case like this, one has to visualise a parent with a very large family, because 50 children playing about in a yard is, of course, a different thing from 4 or 5 children playing about together in a garden."

5. Conversely, parents are not expected to keep up to date with government guidance on educational safety in the way that schools are, nor are parents trained, monitored and supervised in the way that teachers are. Teachers have many sources of guidance available to them, particularly on organising school trips and tackling bullying— see later.

### **Parental liability**

6. Given the traditional formulation of the "health and safety" duty, before we look at when a teacher might be liable for an injury to a child, we perhaps ought to look first briefly at when parental liability can arise. In fact, perhaps surprisingly, a parent *qua parent* will only rarely be liable to a child for harm that the child sustains. Parental liability has been described as "quite exceptional" in English tort law.<sup>8</sup> Apart from RTAs and cases of intentional injury by a parent<sup>9</sup>, McIvor says that there has only been one reported English decision in which a parent has been sued for injuries sustained by their child: *Surtees v Kingston-upon-Thames BC*<sup>10</sup> where S sued her former foster-parents for scalding injuries to her feet. The effect of the Court of Appeal decision is that there is no *general* duty on a parent to protect their child from foreseeable harm. In the particular circumstances of that case, whilst the foster mother owed a duty of care since she had been in a

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<sup>6</sup> Leaving to one side questions of poor parenting and the problems that this could cause.

<sup>7</sup> [1943] 2 All ER 629

<sup>8</sup> *Third Party Liability in Tort*, Claire McIvor (2006), p.20

<sup>9</sup> Which can be distinguished, since liability would have attached even if there had been no parent-child relationship between victim and tortfeasor.

<sup>10</sup> [1991] 2 FLR 559

position to exercise *de facto* control over the child, the injury was too remote from any fault on her part. Sir Nicholas Browne-Wilkinson VC said:

"...the responsibilities of a parent (which in contemporary society normally means the mother) looking after one or more children, in addition to the myriad other duties which fall on the parent at home, far exceed those of other members of society. The studied calm of the Royal Courts of Justice, concentrating on one point at a time, is light years away from the circumstances prevailing in the average home. The mother is looking after a fast moving toddler at the same time as cooking the meal, doing the housework, answering the telephone looking after the other children and doing all the other things that the average mother has to cope with simultaneously, or in quick succession, in the normal household."

## **Risks**

7. Many childhood activities, both inside and outside of school, carry a degree of risk, however small. Children cannot be prevented from coming into contact with any risk at all as they grow up, both as a matter of the sheer impossibility of wrapping children up in cotton wool and because it would be undesirable to do so. Learning how to deal with risks is part of growing up. RoSPA, for example, have called for a "massive expansion" in schemes which allow children to experience risk in order to prepare them to situations faced in later life<sup>11</sup>, and have also said:

"We need to promote a culture where things are 'as safe as necessary' not 'as safe as possible'. Restricting children unnecessarily will not help them to cope confidently in later life."<sup>12</sup>

8. Teachers organising activities that enable children to learn to deal with risks, if these activities have been properly thought through, may well benefit from section 1 of the Compensation Act 2006 if an accident occurs:

"A court considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might—

- (a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or
- (b) discourage persons from undertaking functions in connection with a desirable activity."

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<sup>11</sup> [http://www.rospa.co.uk/news/releases/2007/pr560\\_05\\_11\\_07\\_education.htm](http://www.rospa.co.uk/news/releases/2007/pr560_05_11_07_education.htm) Press release, November 5 2007: "More schemes need to help children experience risk"

<sup>12</sup> [http://www.rospa.co.uk/news/releases/2008/pr592\\_05\\_02\\_08\\_education.htm](http://www.rospa.co.uk/news/releases/2008/pr592_05_02_08_education.htm) Press release, February 5 2008: "Plan to cut school trip red tape welcomed by RoSPA"

9. This links in with decisions such as *Tomlinson v Congleton BC*<sup>13</sup> where the courts have looked at the question of risk in the light of individual autonomy to run risks if so desired. As Lord Hobhouse put it,

"...it is not, and should never be, the policy of the law to require the protection of the foolhardy or reckless few to deprive, or interfere with, the enjoyment by the remainder of society of the liberties and amenities to which they are rightly entitled."

10. The argument cannot be transposed neatly from situations involving adults to situations involving children, not least because those supervising children should be alert to the possibility that inexperience may lead children to fail to appreciate a risk that an adult would perceive. Nevertheless, concerns that all school trips will inevitably be discontinued to avoid accident claims are misplaced, with (even) the National Union of Teachers stating that:

"...school visits can be of substantial benefit to pupils in the development of their characters and social skills. For many they offer opportunities to broaden their horizons and enrich their experience; opportunities which would otherwise be unavailable in their lives. School journeys and visits are generally considered to be of educational value in developing the potential and qualities of children and young people."<sup>14</sup>

11. The question of risks in relation to schoolchildren in particular was most recently considered in the criminal case of *R v James Porter*.<sup>15</sup> Kian, aged 3¾ attended a private school in Bangor, Gwynedd run by Porter. There were two playgrounds, an upper and a lower playground, with a flight of brick steps leading from one to the other. At morning break, 59 children were playing with one teacher on duty. Kian went down the steps and jumped from the fourth step from the bottom. He suffered a head injury from which he was expected to recover, but MRSA intervened. Porter was charged with a breach of s. 3(1) of the Health and Safety and Work Act 1974.<sup>16</sup> The HSE later required the school to fit a gate on the steps. Porter was convicted, but his conviction was overturned on appeal.

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<sup>13</sup> [2003] UKHK 47, [2004] 1 AC 46

<sup>14</sup> "School Visits: NUT Health and Safety briefing March 2008", accessible at [http://www.teachers.org.uk/resources/word/SCHOOL-VISITS\\_SL.doc](http://www.teachers.org.uk/resources/word/SCHOOL-VISITS_SL.doc)

<sup>15</sup> [2008] EWCA Crim 1271

<sup>16</sup> s.3(1) It shall be the duty of every employer to conduct his undertaking in such a way as to ensure so far as is reasonably practicable that persons not in his employment, who may be affected thereby, are not thereby exposed to risks to their health or safety.

12. The prosecution called witnesses who taught at other schools who said that they operated levels of supervision at 2:26, as recommended by the Department of Health for nursery classes in schools run by LEAs. However, the Court of Appeal said that there was nothing to suggest that this was to apply to playgrounds, nor there was no evidence as to any guideline relating to supervision within a playground.
13. Whilst Porter's expert had no expertise in the conduct of children in a playground, the Crown called no expert evidence at all:

"It must be assumed that they could not find anyone of sufficient cogency to justify being called on behalf of the prosecution, or even to rebut the evidence given by Mr Barnard [the defence expert]. That expert took the view that insignificant risks could be ignored, such as those arising from routine activities associated with life in general. He pointed out the many risks to which young children are exposed at home and stressed what he regarded as the important feature, that nothing had been identified in the construction or placement of the steps which showed that they in themselves constituted a risk of injury. In his thirty years of involvement in health and safety, he had never found any scrutiny under the 1974 Act focused on such a flight of well-constructed external steps. He took the view that the steps did not create a foreseeable risk or possibility of danger, still less an unacceptable risk. Had he been the inspector, he would not have taken any enforcement action or remedial measures and would have had no concern about those steps."

14. The risk within section 3 which the prosecution had to prove had to be a "real" as opposed to a "fanciful or hypothetical risk".<sup>17</sup> In deciding that, the Court of Appeal said that the following factors were important:

- (a) the lack of any previous accident on these steps;
- (b) the lack of previous accident despite the same allegedly inadequate level of supervision;
- (c) the lack of anything wrong with the steps themselves;
- (d) the lack of previous accidents elsewhere, despite there being numerous places in the playground from which a child might choose to jump;
- (e) "The fact that a young child might slip or trip or choose to jump from one height to a lower level is part of the ordinary incidence of everyday life. That again is not determinative but is highly relevant."<sup>18</sup>

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<sup>17</sup> *R v Chargot Ltd* [2007] EWCA Crim 3032

15. Moses LJ went on to add this:

"21. We acknowledge that the fact that an accident is unavoidable goes primarily to the reasonable practicability of the measures which a defendant might take, rather than the risk to safety. But that is not exclusively so. As we have said, that the risk is part of the everyday incidence of life goes to the issue as to whether an injured person was exposed to risk. Where the risk can truly be said to be part of the incidence of everyday life, it is less likely that the injured person could be said to have been exposed to risk by the conduct of the operations in question. The judge fairly put that to the jury in his summing-up: He said:

"What you must decide is whether there was an unacceptable risk. The trivial risks of everyday life are not unacceptable. They are simply a fact of life, are they not?"

"22. Unless it can be said that this child was exposed to a real risk by the conduct of the school, no question of the reasonable practicability of measures designed to avoid that risk arises. No one in this case has suggested that every playground up and down the country for every 3-4 year old must have a flat surface and nothing from which an infant can choose to jump.

"23. In our view the evidence in the instant case was all one way. There was no evidence on which a jury properly directed could reasonably conclude that this child was exposed to risk by the conduct of this school. All the evidence suggested that there was no risk, other than the risk that every time a child was left other than closely supervised, that that child might go unsupervised down a flight of stairs. No one sensibly suggested that in every school or public building to which young children have access, a child must be "constantly supervised" (to use the words of the judge) when the child chooses to go downstairs."

### ***Accidents caused by the state of school premises***

#### **Under the Occupiers' Liability Act 1957**

16. Children are (generally) "visitors" to the school premises for the purposes of the 1957 Act and so the usual duty is owed to them: the school must take such steps as are reasonable in all the circumstances to see that pupils are reasonably safe when using the premises.

17. Courts are prepared to accept that school premises cannot be made "risk-free" to children. Even where foreseeable risks remain, it does not necessarily follow that it will be negligent not to have guarded specifically against such risks. The points made in *R v James Porter* arise here too.

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<sup>18</sup> Moses LJ, paragraph 18

18. Some particular factors to bear in mind are general OLA-type points; others are more specific to school accidents. For example, consider:

- (a) The previous accident history at this location;
- (b) The amount of use made of the location;
- (c) The school's general record in considering safety matters;
- (d) The school's general disciplinary record (on the basis that promoting good discipline helps to prevent children behaving inappropriately and exposing themselves to danger);
- (e) The age of the children potentially at risk (on the basis that older children can generally be expected to be more aware of risks<sup>19</sup>).

19. The first two factors worked in the defendant's favour in *Barrie v Cardiff City Council*.<sup>20</sup> A 6 year old girl tripped over a 15mm raised edge in the playground. The edge had never caused injury to a child in the past, despite the playground being used by between 100 and 125 children aged 4 to 7 years old every day. The court regarded the risk as one where danger could not have reasonably been anticipated from use and so the claim failed. Pill LJ referred to the jurisprudence on highway tripping accidents and said "A playground is also not to be criticised by the standards of a bowling green."

20. The next two factors helped the school in *Gough v Upshire Primary School*.<sup>21</sup> An 8 year old boy overbalanced on some school stairs, either by sliding down the banister or by climbing onto the banister. The stairs had been there since 1936, complied with the Building Regulations and had not been the subject of any previous accidents. Post-accident, studs were put on the banister to deter sliding. The judge said this:

"A reasonably careful parent, although he or she may not realise, is continually involved in risk assessment in the sense of balancing risk against actions to be taken or not taken. This can range from deciding whether the risk of contracting a particular disease justifies the risk of serious side effects, to deciding when it is safe to permit a child to cross the road by himself. The latter example involves an obvious and real risk, whilst the former may

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<sup>19</sup> Although this could cut both ways – a 5 year old might not be tempted to fiddle with a fire extinguisher, but a 15 year old might see the potential for mischief.

<sup>20</sup> [2001] EWCA Civ 703, [2002] ELR 1

<sup>21</sup> [2002] ELR 169, HHJ Grenfell sitting as a Judge of the High Court (also on Lawtel).

involve a statistically minimal risk which is far outweighed by the more real risk of contracting the disease. In the same way within the parent's own house, he or she has to look at potential sources of danger to a child, then assess the risk associated with each potential source in terms of deciding what if anything needs to be done about it. He or she may look at the banister and decide whether it will be enough simply to impress on the child what will happen to him if he tries to slide down it. There will have come a time when that parent decided that it was safe for that same child to go up and downstairs without a stair guard, for example. Translated into the context of a school, those responsible for the safety of the pupils are constantly reviewing how risk of injury to pupils can be minimised. It is clear from a snapshot of the governors' minutes that this school was no exception. The clearest distinction between home and school is that the various risks are compounded by the fact that children in numbers are more likely to come to harm than individuals."

21. On the particular facts, it had simply not occurred to anyone that a child might injure themselves in this way. Discipline was generally of a high order – "Ultimately the most effective preventative measure for this and any other sources of danger from what children might do was promotion of good discipline, which I am satisfied existed in this school". Safety matters were regularly considered by the governors, including parent governors. The boy's mother said that the boy knew it was wrong and dangerous to try to slide down a banister. Whilst there was a foreseeable risk that a child might attempt to lean over or slide down the banister, it was not negligent not to have taken specific preventative steps against this.

22. In *Reffell v Surrey CC*<sup>22</sup> Veale J held that regulation 51 of the Standards for School Premises Regulations 1959 created a private right of action for damages:

"In all parts of the buildings in every school, the design, the construction and the properties of the material shall be such that the Health and Safety of the occupants shall be reasonably assured."

23. Accordingly, the current equivalent, when C was injured by putting her hand through the glass panel of a corridor door, it was held that there was an actionable breach of regulation 51 as well as negligence on the council's part. The current equivalent regulation is regulation 17(3) of the Education (School Premises) Regulations (No 2) 1999:

"Every part of a school building and of the land provided for a school shall be such that the health, safety and welfare of the occupants in aspects other than

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<sup>22</sup> [1964] 1 All ER 743

those referred to in paragraph (1) [escape in case of fire] are reasonably assured."

### **Under the Occupiers' Liability Act 1984**

24. Inevitably, some children may come to grief going where they should not and may then seek to rely on the Occupiers' Liability Act 1984. In *Young v Kent CC*<sup>23</sup> C (aged 12) clambered onto a roof to recover a football at a school being used for a youth club. He decided to test the weight of a skylight by jumping on it. He recovered 50% of his damages on the basis that the roof was an inherently dangerous place given the brittle nature of the skylight, and that it was known that children clambered up there, reduced by 50% for the fact that he knew what he was doing was dangerous.

25. However, the ratio of this case cannot survive the Court of Appeal decision in *Keown v Coventry Healthcare NHS Trust*<sup>24</sup> where C (aged 11) decided to climb up the underside of an external fire escape and then fell off. The Court of Appeal said that the premises were not dangerous – only C's use of the premises. D was not liable where a trespasser chose to use safe premises in a dangerous manner.

### **"Escapes" from the premises**

26. As well as being sufficiently safe for use, school premises may also have to be sufficiently "escape-proof" if liability is not to follow for an accident. For example, in *Carmarthenshire CC v Lewis*<sup>25</sup> the LEA was held liable where a boy just under 4 years old got onto the road through an unlocked school gate and a lorry driver was killed in avoiding him. The LEA was to blame for not having prevented this through better doors or gates. The teacher who had left him alone briefly to attend to another child, though, was not personally negligent.

## ***Activities at school***

### **Supervision of children**

27. Many of the claims relating to injuries sustained at school effectively boil down to questions of adequacy of the supervision. Should one or more children have been

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<sup>23</sup> [2005] EWHC 1342 (QB)

<sup>24</sup> [2006] EWCA Civ 39, [2006] 1 WLR 953

<sup>25</sup> [1955] AC 549

left without a teacher looking at them for the period of time that it in fact took for a child to hurt himself / someone else?

28. Schools have a difficult balance to strike between under-supervision and over-supervision, both of which can have their problems. In *Rawsthorne v Otley*<sup>26</sup> Hilbury J said that "it is not and has never been the law, that a schoolmaster should keep boys under supervision during every moment of their school lives." It is tempting to focus only on lack of supervision, failing to consider the effects and costs of over-supervision might have. As was noted in an Australian case:<sup>27</sup>

"Nor is it reasonable to have a system in which children are observed during particular activities for every single moment of time – it is damaging to teacher-pupil relationships by removing even the slightest element of trust; it is likely to retard the development of responsibility in children, and it is likely to call for a great increase in the number of supervising teachers and in the costs of providing them."

29. Courts tend to be more reluctant to impose liability for accidents in the playground than in the classroom. Playground supervision is more difficult than classroom supervision and would tend to be disproportionately intrusive for the injuries that supervision would prevent. Where an accident happens in a classroom or gym that proper supervision should have prevented, it will be harder for a defendant to escape liability.

30. Having said that, would the courts reach the same conclusion now on the facts of *Ricketts v Erith BC*<sup>28</sup> as Tucker J did in the 1940s? A 6 year old boy left the school playground through an unlocked gate, bought a bamboo bow and arrow from a nearby shop and then returned to the playground, where he fired an arrow into C's eye. The judge said that the supervision in the playground was adequate, and it was not incumbent to have a teacher continuously present in the yard for the whole of the break.

31. In *Wilson v Governors of the Sacred Heart Roman Catholic School*<sup>29</sup> a 9 year old was hit by another boy's coat as the second boy whirled it around his head at the end of the day, apparently trying to stop C passing. The claim was put on the

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<sup>26</sup> [1937] 3 All ER 902

<sup>27</sup> *Trustees of the Roman Catholic Church for the Diocese of Canberra and Goulburn v Hadba* [2005] HCA 31, 221 CLR 161.

<sup>28</sup> [1943] 2 All ER 629

<sup>29</sup> [1998] PIQR P145

basis that the school should have had a person on duty between the school buildings and the school gates to ensure good behaviour, and that this would have prevented the incident. The trial judge said that "hands-on" supervision was required at times when pupils are apt to be boisterous, namely lunchtime and "going home" time. However, the Court of Appeal noted that there was no history of incidents at "going home" time to suggest that additional supervision was required and instructions about good behaviour were issued in assembly. The incident could just as easily have happened later on the unaccompanied journey home as in the short distance between school and gate. The judge had set an unreasonably high standard, and the appeal was allowed.

32. A case that was perhaps only just the right side of the line for C was *Alexander v King Edward School Bath Governors*.<sup>30</sup> C was playing hockey after school. She said that when the session finished, pupils were swinging their sticks around dangerously and one stick hit her in the mouth. The judge found that the pupils were behaving disorderly. If one of the three teachers present had been standing by the gate, instead of attending to other matters, then the children would have behaved. There was apparently some evidence that boys had been warned in the past of the dangers of using hockey sticks inappropriately, but it is unclear from the judgment what should have put the teachers on notice that some increased supervision at this point was required.
33. However, lack of supervision coupled with a failure to enforce rules designed to minimise the risk of injury during unsupervised activities is a poor combination for a defendant. In *Kearn-Price v Kent CC*<sup>31</sup> the school had a policy banning full-size leather footballs in the playground. C was injured by a full-size leather football whilst in the playground before school started. The evidence was that the school did little to enforce the ban and that previous accidents, though less severe, had happened to the school's knowledge. Even though discipline at the school was generally good, liability was established. Evidence that pre-school supervision was not general practice, and so was unreasonable to expect of D, was very limited and not sufficient for the judge to conclude that D was acting in accordance with general standards.

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<sup>30</sup> Unreported save on Lawtel, Assistant Recorder Tyson, Bath CC 1999

<sup>31</sup> [2002] EWCA Civ 1539, [2003] PIQR P167

34. There is no authority that says that schools can only be liable between the first and last bells of the day; indeed, Dyson LJ specifically rejected this proposition in *Kearn-Price*. In *Ward v Hertfordshire CC*<sup>32</sup> a girl was injured running in the playground before school. Whilst Lord Denning MR gave as one of his reasons for allowing D's appeal that there was no duty to supervise at that time of day, the other members of the Court of Appeal did not decide the case on that basis, as Dyson LJ noted. However, Dyson LJ did agree that it might not be reasonable to expect schools to do as much outside school hours to prevent injury as during school hours. He did note in *Kearn-Price* that pre-school checks there would not have been onerous in the period shortly before first registration, when there were between 30 and 40 teachers in the staffroom.
35. Furthermore, liability has been found in some cases where the child was injured travelling on a school bus before or after lessons – e.g. *Ellis v Sayers Confectioners*<sup>33</sup> where an eight year old at a special school was injured crossing the road after getting off a school bus on the way home. The other driver was 80% liable but the school supervisor on the bus was 20% to blame for not acting as a reasonable parent and seeing him across the road safely.
36. In any event, C must prove that the lack of supervision was a cause of the accident. For example, in *Clarke v Monmouthshire CC*<sup>34</sup> one boy stabbed another in the leg with a knife in the playground. There was no negligence in not knowing that the boy had a knife. Supervision was adequate and, even if a prefect or master had been present, this would not have prevented the incident occurring as it happened in a fraction of a second.

### **Classroom misbehaviour and accidents**

37. In *Crouch v Essex CC*<sup>35</sup> a chemistry teacher warned the pupils about the chemical they were dealing with. Nevertheless, children proceeded to squirt it into C's face. The claim failed, since it was said that misbehaviour of this sort was not reasonably foreseeable given the general atmosphere and standard of the class.

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<sup>32</sup> [1970] 1 WLR 356

<sup>33</sup> (1963) 61 LGR 299

<sup>34</sup> (1954) 53 LGR 246

<sup>35</sup> (1966) 64 LGR 240

38. Even with the best will in the world, accidents can happen in the classroom even with a teacher close by. In *Nicholson v Westmoreland CC*<sup>36</sup> the teacher made herself a cup of tea during a lesson – she apparently did not get a proper break, given the size of the school – and put it on top of a cupboard. She turned round to discipline a boy, and another child reached up and pulled the cup over herself. The teacher was still within arm's length and the Court of Appeal said that this was a pure accident.

### **Injuries during sports lessons**

39. Sports lessons and games are another source of injury and litigation. Different pupils will have different abilities and aptitudes. Children will develop at different speeds. Many cases, though, turn on their own facts without depending on complicated legal principles. Examples include:

- *Wright v Cheshire CC*<sup>37</sup> – a group of pupils were vaulting the "buck", with each pupil required to wait at the receiving end to help the following boy over. When the play-time bell rang, the receiving boy ran off and C was injured. C's expert said that he would not have allowed a boy to act as received, but had to concede that it was the recognised method. The Court of Appeal said that there was no negligence in following this normal practice, and there was no reason to have anticipated that the boy would run off.
- *Cassidy v City of Manchester*<sup>38</sup> – a pupil tripped on the leg of a bench being used as the goal in an indoor hockey game. Liability established, even though there was evidence from the teacher that he was following what he had been taught at teaching training college and what was done in other local school. The Court of Appeal said it would have been different if the practice had been universal.
- *Jones v Hampshire CC*<sup>39</sup> – a pupil fell from a vaulting table and broke her arm. Trial judge (upheld on appeal) found that the teacher had not properly considered whether it was safe for pupils to carry out the exercise.

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<sup>36</sup> The Times, October 24 1962, Court of Appeal

<sup>37</sup> [1952] 2 All ER 789

<sup>38</sup> Court of Appeal, 1995, unreported

<sup>39</sup> Court of Appeal, 1997, unreported

- *Affutu-Nartoy v Clarke*<sup>40</sup> Hodgson J said that a teacher could take part in a game of rugby to keep the game moving and to demonstrate skills, but should not tackle 15 year old boys.

40. In *Van Oppen v Trustees of the Bedford Charity*<sup>41</sup> the Court of Appeal held that a school's responsibility to its pupils does not require the school to take out insurance for its pupils against accidental injury, nor to advise parents to do this. C had been injured in a school rugby match. The first-instance decision<sup>42</sup> that the school had not been negligent in its coaching or teaching of rugby was not appealed.

41. *Mountford v Newlands School*<sup>43</sup> is an interesting decision. C was injured in a U15 inter-school rugby match. The injury occurred in a tackle by a boy (R) who was over 15 (although this was not appreciated at the time) and considerably bigger than C. There was no absolute prohibition against playing over-aged boys, and R was not so big that he would have been withdrawn for others' safety if he had been under 15. The school said that, since he could have been legitimately picked to play in the match and could have played whilst being that size if of the correct age, there was no liability. The Court of Appeal upheld the trial judge, saying that R should not have been selected since there was no special reason why the rule that players should not normally play other than in their own age grouping should not have been followed, and the risk against which this rule guarded had transpired, namely that the superior size, weight and maturity of R contributed to C being injured.

42. Another sports-related school injury, although not strictly relevant to the main theme of the paper, is *Comer v Governors of St Patrick's RC Primary School*.<sup>44</sup> C was injured taking part in the fathers' race at the school sports day. He ran into a wall at the end of the course close to the finish line. The claim was rejected, and Court of Appeal agreed. This was an informal race for a bit of fun. C had participated before, knew the layout and could see the approaching wall. D was

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<sup>40</sup> The Times, February 9 1984

<sup>41</sup> [1990] 1 WLR 235

<sup>42</sup> [1989] 1 All ER 273

<sup>43</sup> [2007] EWCA Civ 21, [2007] ELR 256

<sup>44</sup> Unreported, Court of Appeal 1997.

reasonably entitled to expect C to look after himself and not to attempt to win the race at expense of his personal safety.

### ***Activities outside school***

43. Greater risks of injury tend to arise on school trips, either day trips or holidays. Children are in an unfamiliar location and may be less appreciative of risks.

44. There have in recent years been several high-profile instances of children being injured or killed on school outings. The death of Max Palmer, aged 10, whilst "plunge pooling" during an activity weekend in Cumbria led to an HSE investigation. The investigation came up with "10 vital questions" for anyone involved in an educational visit:<sup>45</sup>

1. What are the main objectives of the visit?
2. What is "Plan B" if the main objectives can't be achieved?
3. What could go wrong? Does the risk assessment cover:
  - The main activity
  - "Plan B"
  - Travel arrangements
  - Emergency procedures
  - Staff numbers, gender and skill mixes
  - Generic and site-specific hazards and risks (including for Plan B)
  - Variable hazards (including environmental and participants' personal abilities and the 'cut off' points).
4. What information will be provided for parents?
5. What consents will be sought?
6. What opportunities will parents have to ask questions (including any arrangements for a parents' meeting)?
7. What assurances are there of the leader(s) competencies?
8. What are the communication arrangements?
9. What are the arrangements for supervision, both during activities and 'free time' – is there a Code of Conduct?
10. What are the arrangements for monitoring and reviewing the visit?

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<sup>45</sup> See <http://www.hse.gov.uk/schooltrips/index.htm> for the full details

## Cases

45. The leading case on liability for accidents on a school trip is *Chittock v Woodbridge School*.<sup>46</sup> C, aged 17½, went on a school skiing trip to Austria. He was one of three senior pupils accompanying more than 40 junior pupils (12 to 14 years old) and was a relatively experienced skier, capable of skiing the local black runs. The trip was led by five members of staff. The senior boys were (by parental agreement) permitted to ski unsupervised, reporting to staff at lunchtime and the end of the day. There were a couple of incidents involving the senior boys early in the trip (smoking with younger girls; skiing off-piste, once apparently by accident and once when they asserted they had permission) but there were no incidents of incompetent or otherwise irresponsible skiing. C had an accident on a red run well within his capabilities when he carelessly tried to go round some other skiers at too fast a speed. He fell down a slope and fractured his spine.
46. The trial judge decided that the school was liable because the teacher in charge should have confiscated C's pass after the second incident of off-piste skiing, or made him ski under supervision, and if either step had been taken the accident would not have happened. No reasonable teacher, he said, would have merely told the boys off. The Court of Appeal disagreed. A severe reprimand, coupled with an assurance from the boys that the behaviour would not be repeated, was within the range of reasonable responses.
47. On causation, the Court of Appeal said that as a matter of common sense any failure by the teacher to respond appropriately to the off-piste incident did not cause the accident. The accident was a skier's error on-piste, not one that occurred from repetition of previous misbehaviour. Furthermore, it could not sensibly be said that being supervised or having teachers nearby would have prevented such an accident.
48. *Chittock* is a very good case for schools since it emphasizes:
- (a) The need for a teacher to be shown to have acted outside a range of reasonable responses to an issue;
  - (b) The need to establish causation properly between a breach of duty and the injury. The causation argument, in particular, would have been effective to

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<sup>46</sup> [2002] EWCA Civ 915, [2003] PIQR P81

defeat the claim even if the case had involved misbehaviour by a junior boy who had skied off-piste due to lack of proper supervision that a boy of his age would have required.

49. Does a school have to inspect an outside location or activity centre before taking pupils there? *Brown v Nelson*<sup>47</sup> involved an accident at an Outward Bound course, where a cable supporting a rope suspended between two trees snapped. The school had made several previous visits without incident. The claim under the Occupiers' Liability Act 1957 against the camp warden succeeded; the claim against the school failed. Neild J said that the school knew from past experience that the premises were apparently safe and competently run. There was no obligation on the school to make specific inspection of the equipment before use. Similarly, in *Dickinson v Cornwall CC*<sup>48</sup> which arose from the murder of a 13 year old girl on a school trip in France, Steel J said that the LEA was not liable since the hostel had been used before without incident and was appropriately registered (and the attack was unforeseeable). Whilst there is probably no general duty to inspect every location before visiting for the first time, the obligation to take reasonable care to ensure safety of pupils is likely to require good checks to be carried out before arrival and at least some awareness of potential risks at the scene, particularly if local safety standards may not be as rigorous as English standards.

### ***Assaults and bullying***

"Bullying, especially within the school environment, is hateful, and it is insidious. The evidence which I heard ... demonstrated clearly that it is a phenomenon which is now far better understood in schools than it was, even in the 1980s. But it has existed for a long time, as for example, 19th century English literature bears out. I count myself as fortunate that at neither school which I attended, did I encounter it. Its hidden nature makes it especially difficult for teaching staff to discover and deal with. It is a constant, besetting problem."

– Lord Maclean in *Scott v Lothian Regional Council*<sup>49</sup>

49. Sadly, children can be extremely horrible to each other. In extreme cases, this can make a child's life an utter misery and affect their education and health.

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<sup>47</sup> (1970) 69 LGR 20

<sup>48</sup> Unreported, 10 December 1999 (

<sup>49</sup> [1998] ScotCS 14

50. A large hurdle for victims of bullying to overcome in such claims is that in the general law of tort, D does not owe C a duty to prevent X deliberately causing harm to C save in limited circumstances such as where, for example, D controls X – the borstal boys in the case of *Home Office v Dorset Yacht*, for instance.<sup>50</sup> Individual bullies are unlikely to be worth suing. Where and when does a school's control of its pupils end? The courts have set the standard of liability very high so that a bullied child will have difficulty recovering compensation from a school even if anti-bullying policies fail to work. For example, in one early case (*Walker v Derbyshire CC*)<sup>51</sup> the judge found that there was no breach, principally because the evidence of C and her witnesses was of slight complaints, mentioning "looks and atmosphere" only. The judge commented that C had caused herself more suffering by bringing the case than she had suffered through the bullying about which she was complaining.

## **Policies**

51. Schools have increasingly over the years recognised the dangers that bullying poses and will now tend to have anti-bullying policies in place. Of course, whether those policies are actually put into practice is another matter. However, the court has to decide not simply whether the policies comply with the guidance but:

- (a) whether any shortcomings were a breach of duty of care;
- (b) if so, whether any breach of duty of care was causative.

52. In *Faulkner v Enfield LBC*<sup>52</sup> the judge noted that C's expert on education matters criticised the school's anti-bullying policy for falling short of the DFE guidance in that it was not disseminated beyond staff. However, the judge said that, whilst the document should have been disseminated further, that was a "long way short" of establishing a material breach of duty. "It is far more important to focus on what was actually happening", he said. Before the incidents occurred, a new head teacher had been appointed who had instigated staff training on bullying. There was a zero-tolerance attitude towards bullying which was notified to parents and

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<sup>50</sup> [1970 AC 1004

<sup>51</sup> Nottingham CC; The Times, July 16 1994

<sup>52</sup> [2003] ELR 426

pupils alike through meetings and assemblies and backed up by suspensions and expulsions.

"There were, no doubt, ways in which the documentation fell short of the ideal and it is clear that the package of material referred to above is designed to assist schools develop their systems to mirror best practice. It would, in my judgment, be an error to regard such a package of material as a prescriptive list to be used as a stick with which to strike schools developing their own approach to these matters in the situation in which they find themselves. I therefore do not find that the school was in breach of duty in respect of its overall policy in respect of behaviour and bullying or in the systems which in practice operated at the school in respect of these matters."

### **Bullying inside and outside school**

53. The leading case is *Bradford-Smart v West Sussex CC*.<sup>53</sup> C said that she had been bullied at school in her first and second year (age 9 to 11) and bullied outside school, on the way to/from school and at school in her third year (age 11 to 12). The trial judge rejected the claim of bullying in year 1. He concluded that there was some "name-calling and uncouth behaviour on the bus" in the following year, but "nothing of the targeted and persistent nature required to constitute bullying." He did find that C had been seriously bullied outside school and on the bus to and from school, although the class teacher prevented bullying within school. He held that the class teacher did all she could to safeguard C, and did not fall below the standard to be expected of an ordinarily competent class teacher. She had achieved an "admirable balance" between protecting C and over-protecting her, by allowing her to spend some break periods in the classroom but otherwise encouraging her to play outside with playground supervisors keeping an eye.

54. The judge rejected the submission that a school owes a duty to protect its pupils from abuse from other pupils even off school premises. The Court of Appeal thought that he had expressed the duty too restrictively, but upheld his dismissal of the claim on their formulation of the duty in any event. Judge LJ said:

"The school does not have the charge of its pupils all the time and so cannot directly protect them from harm all the time. At a day school that charge will

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<sup>53</sup> [2002] EWCA Civ 07

usually end at the school gates, although the school will have a duty to take reasonable steps to ensure that young children who are not old enough to look after themselves do not leave the school premises unattended: see *Lewis v Carmarthenshire County Council* [1953] 1 WLR 1439, CA, at 1443 (the speeches in the House of Lords proceeded on the same assumption: see *Carmarthenshire County Council v Lewis* [1955] AC 549). One can think of circumstances where it might go beyond that, for example if it were reasonable for a teacher to intervene when he saw one pupil attacking another immediately outside the school gates. It will clearly extend further afield if the pupils are on a school trip, educational, recreational or sporting. But the school cannot owe a general duty to its pupils, or anyone else, to police their activities once they have left its charge. That is principally the duty of parents and, where criminal offences are involved, the police. There was evidence from Mr Watling, an educational consultant, that some schools do patrol 'areas of concern' outside school to prevent incidents after children have left. But we agree with the judge that this is matter of discretion rather than duty."

55. Judge LJ said that, whilst a day school is not directly in control of pupils once they leave (the responsibility then being that of the parents), teachers could discipline children in some circumstances for out-of-school incidents. Where an incident outside school carried over into school and had a deleterious effect on C, then the school should investigate. There would be occasions when to fail to react to incidents outside school would be a breach of duty. However, such occasions would be "few and far between" given the factors that would need to be considered:

- (a) the foreseeability of harm to C through failure to act;
- (b) the extent of the risk;
- (c) the magnitude of the harm;
- (d) the practicability and likely effectiveness of steps that the school could take;
- (e) whether ineffective intervention would make the situation worse;
- (f) the need to balance the interests of all the children involved;
- (g) whether it was appropriate for the school to intervene if police/social services had not done so;

56. Here, at least, we are in classic *Bolam* territory and it will be difficult for victims of bullying to show that no reasonable school/teacher would have acted (or failed to act) in the same way. In the Scottish case of *Scott*, for instance, C did not report further acts of bullying to her parents or teachers after reporting the earlier

incidents and C's parents were hostile to the idea of further help being suggested by the school. In the circumstances, the teachers' "low-key" approach was not such that no reasonable teacher would have done the same and the claim failed.

57. In *Faulkner*, the school was aware of some incidents of bullying and decided to deal with the matter through speaking to the children involved without reporting to the victim's parents. This was held not to be a breach of duty. Reporting the matter to the parents risked causing a damaging overreaction (particularly where, as here, the parents were already regarded as problematic and had their own anger management problems).
58. An example of a victim succeeding on liability is the decision in *Cox v State of New South Wales*<sup>54</sup> in which C, aged 5 or 6 at the time, was harassed and physically assaulted by an older boy over a number of months. Complaints to the school did not solve the problem. An officer in the state's Education Department told her that "bullying builds character" and that he thought it was a "good thing" that C got bullied. There was no evidence of any anti-bullying measures in place at the school. Some actions were promised against the bully but these steps were either not taken or they failed to help. The judge found that the school responded "quite inadequately to an escalating problem". Liability was established.

### **Causation**

59. Further potential difficulties were identified in *Bradford-Smart*. C has to prove that the additional steps for which she contends would have prevented the bullying. "There must be a causal connection between the breach of duty and the injury. That will often be difficult to prove." Similarly in *Faulkner*, even if the differences between the school's policy and official guidance had been held to be a breach of duty, it is difficult to see how any failure would have been causative.

### **Damages**

60. Proving loss flowing from any breach will be difficult too. Was C of the personality type that would have suffered adversely even if the school had not been negligent? How much is bullying to blame for C's past and future problems and how much is due to other factors (e.g. dysfunctional family / social problems / traumatic life events)? For example, in *Cox*, there was an extensive family history

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<sup>54</sup> [2007] NSWSC 471, Simpson J

of psychiatric problems. Causation was, on the evidence, established, but a higher than usual discount for vicissitudes was made.

61. In one case that did succeed (*Cotton v Trafford BC*<sup>55</sup>) the damages awarded were just £1,500. Where damages are likely to be of a low level, problems of proportionality and difficulties with obtaining funding (on a CFA?) are likely to occur.

### **One-off incidents**

62. Where the incident is a "one-off" incident of targeted malice, then the courts are likely to be sympathetic to a school's position that nothing more realistically could have been done to prevent the incident. After all, anti-bullying policies are not guaranteed to be 100% effective. The same conclusion may result in some circumstances even when the victim has been bullied previously. For example, in *Faulkner*, the most serious incident came (as the parents saw it) as the last of a series of incidents involving verbal or physical aggression. However, the facts showed that the perpetrator had no connection with the individuals involved in previous incidents and, on the facts, this incident could not realistically have been prevented.

### **Expert evidence**

63. Before leaving the topic of claims by children, a word or two about expert evidence, at the risk of stating the obvious:

- (a) Consider whether the case needs expert evidence. Will reliance on official guidance be enough? Is there going to be an appeal to general standards prevailing in other schools e.g. about pre-school supervision? If representing a school, will the teachers be able to give sufficient lay evidence as to general standards? In *Kearn-Price* the Court of Appeal noted that the evidence relied upon as to reasonableness was limited:

"[The four teachers] who gave evidence said that in the schools where they had worked, there had been no pre-school supervision. They did not purport to vouch for the general position throughout the country."

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<sup>55</sup> Manchester CC, HHJ Holman 25<sup>th</sup> October 2000; unreported, but mentioned in Berman and Rabinowicz's article "Bullying in Schools Claims" in *Journal of Personal Injury Law* (2001) page 247

As a result, D's evidence on the issue of reasonableness was not as persuasive as had been hoped.

- (b) Consider the experience of your expert. In *Faulkner*, for example, the judge preferred D's expert who had 40 years of experience as a teacher (including 20 as a head teacher) over C's expert, whose evidence was "more theoretical" and who had no teaching experience whatsoever.

**TIM PETTS**

**12 King's Bench Walk**

**July 2008**

### **Appendix**

#### **Information and guidance relating to school injury claims**

There are various sources of guidance for teachers and lawyers may benefit from perusing these in preparing / defending claims. In particular:

- The Department for Children, Schools and Families website at [www.teachernet.gov.uk/visits](http://www.teachernet.gov.uk/visits) has links to the 1998 good practice guide "Health and Safety of Pupils on Educational Visits" as well as other guidance on adventure trips, risk assessment and water-based activities.
- It also has a section of various resources relating to bullying – see <http://www.teachernet.gov.uk/wholeschool/behaviour/tacklingbullying/>
- The National Union of Teachers website [www.teachers.org.uk](http://www.teachers.org.uk) has a section on health and safety, including a detailed bulletin on school visits (and also information about stress at work).
- RoSPA's website at [www.rospa.co.uk/safetyeducation/atschool/index.htm](http://www.rospa.co.uk/safetyeducation/atschool/index.htm) has a section on health and safety at school, including school trips.



## Claims by teachers against their employer

**12KBW Annual Personal Injury Conference**  
**Thursday 17<sup>th</sup> July 2008**  
**Speaker: Angela Frost**

## Claims by teachers against their employer

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## **CLAIMS BY TEACHERS AGAINST THEIR EMPLOYER**

Claims by teachers for injuries arising from faulty work equipment, slippery floors and the like are of course governed by the usual regulations imposed on the employer/employee relationship and the non-delegable common law duty to ensure that an employee is reasonably safe whilst at work. There are a myriad of reasons why a teacher might wish to sue his or her employer for personal injuries however this paper will focus on claims for assaults by pupils and stress.

The most recent official figures available (the government does not appear to be keen on keeping such statistics) are for 2005/2006 and show that in that year there were 221 injuries as a result of violent attacks on school staff. There were 1,128 reported injuries between 1999 and 2005/2006.

The Association of Teachers and Lecturers commissioned its own survey on violence in schools and found that 29% of teachers faced physical aggression at work and 9.3% said that dealing with a disruptive pupil had resulted in physical injury. Rather alarmingly when asked what form the violence took 66.9% said punching/fists, 45.3% said kicking, and 3.3% said stabbing/attempting to stab. 34% of teachers claimed to have suffered stress/mental health problems as a result of poor pupil behaviour. It has to be borne in mind however that the survey was only carried out on the association's members and even then only 813 people took part.

As with society as a whole there is a perception that violence in schools is on the increase. The limited data available would suggest that the number of incidents of violence or the reporting of them is on the rise. There are potentially a number of factors which could be contributing to the increasing violence in schools.

- The process for excluding children has become more involved and to an extent bureaucratic therefore pupils who would have historically been excluded are remaining in schools for longer periods and it can reasonably be

said that this is a high risk group as far as incidents of violence and worsening of discipline are concerned.

- Another high risk group as those pupils who might be termed 'challenging' or who have special educational needs. The increased retention of such pupils in main stream schools could also be a contributing factor.
- Class sizes have been growing which can have a detrimental effect on discipline.
- Low morale amongst teachers. Ask any teacher about their paperwork and number of hours worked per week and they will tell you that the burden upon teachers in terms of paperwork has increased significantly over the years as a result of tighter regulation, increased examinations and league tables. Pay and the increasing reliance on unqualified teaching assistance are also factors that contribute to this issue. Low morale amongst teachers will also have a negative impact on the quality of teaching and therefore discipline.

These factors are also likely to contribute to the increasing levels of stress amongst teachers.

When considering these issues in the context of litigation it is worth bearing in mind that a number of these factors are down to parliament and are therefore not for the courts to determine. An employer cannot be negligent in carrying out a policy laid down by parliament.

- The decision to educate SEN pupils in mainstream school
- Exclusion process prescribed by parliament and subject to a judicial process
- Assessment of pupils in respect of special educational needs is governed by a statutory framework

In the context of litigation the injured teacher wishing to claim against his/her employer will have to focus on what might be considered marginal issues, such as training and information and perhaps less commonly disciplinary policies and assistance available.

It is helpful to look at the way the courts have approached these types of claims:

**Rigby v Wandsworth London Borough Council [2006] EWCA 224 (QB)**

An assistant head teacher claimed damages for personal injury arising out of 2 incidents occurring at work. The school where the claimant worked catered for pupils with severe learning difficulties and autistic spectrum disorder. Both incidents involved the same pupil who had significant learning difficulties. In the first the pupil leaned over a pan of boiling water and the claimant wrenched her arm trying to pull the pupil away. In the second incident the teacher was on a short excursion with another member of staff and three pupils, the pupil jumped onto a car and started to hit the windows, when claimant tried to pull him off the pupil grabbed her clothing and pulled her arm. The school had sought one to one funding for the pupil in 2001 following an incident when he pushed a classroom assistant into a window. The claimant contended that:

- 1) the pupil required one to one supervision from when he joined the school in 1997 and the local authority knew or ought to have known that;
- 2) she received no adequate induction;
- 3) there was no health and safety policy or risk assessment;
- 4) staff were not aware they had to complete incident sheets;
- 5) there was a failure to provide adequate behaviour management plans.

Mrs Justice Dobbs found that the reality was that the claimant was working with the pupil in a one on one situation and the claimant was aware that one to one supervision was required and that funding for it had been applied for. The local

authority could not be criticised for not applying for funding at an earlier stage. It was difficult to see how induction training would have made any difference. The claimant had been at the school for two years by the time of the first incident and had received informal but substantial induction training when she first joined. Although there was no health and safety policy document, neither OFSTED nor the health and safety report indicated that the school did not operate a safe system of work. There was an awareness of the need to fill in incident reports and these were adequate for their purpose. Finally, given the number of documents in existence about the pupils behaviour and the frequent meeting and the claimant's state of knowledge of the pupil in question, the criticism's concerning behaviour management plans did not assist her case.

### **Millward v Oxfordshire County Council 2004 QBD (Hughes J)**

The claimant was a teacher who taught one day a week at a secure residential unit, she suffered PTSD following an assault by a pupil. The claimant was assaulted by the pupil 10 days after the pupil arrived at the unit. He had assaulted a number of members of staff at previous homes and has shown a propensity to assault women. He did not arrive with any documentary evidence about the previous assaults. There was a meeting about the pupil's propensity to violence the day after his arrival but the claimant was not directly informed of the pupil's history. In class the pupil assaulted the claimant when she asked him to shut up. The local authority was liable for failing to inform the claimant of the risk posed by the pupil. The claimant's damages were reduced by 25% because the way she spoke to the pupil was wrongly confrontational.

### **Waugh v Newham London Borough Council [2002] EWCA 802 (QB) (Cooke J)**

The claimant was a teacher at a special school and was assaulted by a pupil with multiple handicaps and challenging/dangerous behaviour. The pupil was brought to

school by a pupil escort. On the day of the incident, the pupil was brought by an escort who had never taken responsibility for this pupil before and was given no prior information about this pupil's behaviour, or instructions about how to hand over at the school. The pupil was brought to the school before the start time and taken to the head teacher's office where he escaped from the escort and attacked the claimant. The issue for the court was to determine how the pupil became able to launch the attack on the claimant and whether the council was responsible in law because of the escort's negligence or because the council had not implemented a proper system of handover. The council accepted responsibility for any negligence on the part of the escort. The court found that the fact that the escort had brought him into school before the start time had little effect, however if the escort had been given adequate prior information and instruction about the pupils behaviour he would have taken steps to prevent him escaping and the escaping was what caused the assault. The Council was therefore negligent, it had a duty to take reasonable care to minimise the risk to staff and it had breached this duty.

**Etheridge v Kitson & East Sussex County Council 1998 HHJ Baker QC unreported**

The claimant was a teacher at a community college, during a change over between classes the claimant was making her way up a staircase, which was busy with pupils ascending and descending, there was a rule that priority was given to those descending. One pupil had a basketball with him. There was no rule in place that balls had to be kept in lockers. The ball was taken from this pupil and it was passed such that it came to Kitson, another pupil. Kitson was on the staircase and attempted to pass the ball to another pupil further down the stairs, the recipient did not catch it and it bounced striking the claimant on the head. The claim against Kitson was swiftly dismissed the court concluding that an ordinary prudent thirteen year old would not have realised that such an action gave rise to a risk of injury. In respect of the council, it was found that the school did not have any particular problems with

behaviour and largely pupils behaved themselves. The court acknowledged that had the school banned the carrying of basket balls that may have prevented the accident, however the court held that the council's duty was not to guarantee the safety of the claimant their duty was to have the premises reasonably safe and a proper system of work, which on the evidence they had.

Key points to look for:

Pupils with a history of violence or poor behaviour or those with special educational needs:

- behaviour assessments
- risk assessments
- meetings between management and key staff regarding the pupil
- training: i.e. in techniques to handle that particular pupil/specific classes of pupil, general restraint training

More generally

- levels of supervision
- Standards of discipline and any disciplinary policies

Even where failings in the information provided or training given are identified, it can often be difficult to establish that such failings were causative of the assault as by their very nature assaults can happen suddenly and without much warning. The successful claimant will have to focus on the build up to the incident to find evidence that training or supervision would have prevented the assault occurring.

Where the case concerns a pupil who has no history a claimant is going to find it extremely difficult to establish that the school should have known about the propensity to assault and done something about it, the reasons for the assault are more likely to be related to the matters set out above which are largely out of the

schools control, i.e. class sizes, difficulty in excluding pupils etc. If however the assault involves a weapon then there may be more scope to attack the school for any policy it may have on weapons, however beware the rather controversial issue of searching bags/security scanners etc.

The reality is that a random attack from an otherwise reasonably behaved pupil is going to be a rare occurrence and should it occur the teacher's recourse is likely to be through the criminal injuries compensation scheme, rather than a claim against the local authority.

### **STRESS CLAIMS**

Again it would seem that stress claims across the public sector are on the increase. There is an overlap between claims in the employment tribunal arising out of stress and claims in the civil courts for personal injury. Stress in the workplace is a whole topic of its own and there is only time to touch on some of the principles here.

The Court of Appeal in **Sutherland v Hatton [2002] EWCA Civ 76** set out a number of helpful points for the courts to consider when dealing with stress claims

(1) There are no special control mechanisms applying to claims for psychiatric (or physical) illness or injury arising from the stress of doing the work the employee is required to do. The ordinary principles of employer's liability apply.

(2) The threshold question is whether this kind of harm to this particular employee was reasonably foreseeable: this has two components (a) an injury to health (as distinct from occupational stress) which (b) is attributable to stress at work (as distinct from other factors).

(3) Foreseeability depends upon what the employer knows (or ought reasonably to know) about the individual employee. Because of the nature of mental disorder, it is harder to foresee than physical injury, but may be easier to foresee in a known individual than in the population at large. An employer is usually entitled to assume that the employee can withstand the normal pressures of the job unless he knows of some particular problem or vulnerability.

(4) The test is the same whatever the employment: there are no occupations which should be regarded as intrinsically dangerous to mental health.

(5) Factors likely to be relevant in answering the threshold question include:

(a) The nature and extent of the work done by the employee. Is the workload much more than is normal for the particular job? Is the work particularly intellectually or emotionally demanding for this employee? Are demands being made of this employee unreasonable when compared with the demands made of others in the same or comparable jobs? Or are there signs that others doing this job are suffering harmful levels of stress? Is there an abnormal level of sickness or absenteeism in the same job or the same department?

(b) Signs from the employee of impending harm to health. Has he a particular problem or vulnerability? Has he already suffered from illness attributable to stress at work? Have there recently been frequent or prolonged absences which are uncharacteristic of him? Is there reason to think that these are attributable to stress at work, for example because of complaints or warnings from him or others?

(6) The employer is generally entitled to take what he is told by his employee at face value, unless he has good reason to think to the contrary.

He does not generally have to make searching enquiries of the employee or seek permission to make further enquiries of his medical advisers.

(7) To trigger a duty to take steps, the indications of impending harm to health arising from stress at work must be plain enough for any reasonable employer to realise that he should do something about it.

(8) The employer is only in breach of duty if he has failed to take the steps which are reasonable in the circumstances, bearing in mind the magnitude of the risk of harm occurring, the gravity of the harm which may occur, the costs and practicability of preventing it, and the justifications for running the risk.

(9) The size and scope of the employer's operation, its resources and the demands it faces are relevant in deciding what is reasonable; these include the interests of other employees and the need to treat them fairly, for example, in any redistribution of duties.

(10) An employer can only reasonably be expected to take steps which are likely to do some good: the court is likely to need expert evidence on this.

(11) An employer who offers a confidential advice service, with referral to appropriate counselling or treatment services, is unlikely to be found in breach of duty.

(12) If the only reasonable and effective step would have been to dismiss or demote the employee, the employer will not be in breach of duty in allowing a willing employee to continue in the job.

(13) In all cases, therefore, it is necessary to identify the steps which the employer both could and should have taken before finding him in breach of his duty of care.

(14) The claimant must show that that breach of duty has caused or materially contributed to the harm suffered. It is not enough to show that occupational stress has caused the harm.

(15) Where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered which is attributable to his wrongdoing, unless the harm is truly indivisible. It is for the defendant to raise the question of apportionment.

(16) The assessment of damages will take account of any pre-existing disorder or vulnerability and of the chance that the claimant would have succumbed to a stress related disorder in any event.

The employer has a balance to strike between interfering and prying into the lives of its employees and ensuring that it takes the steps that are reasonable to protect them. An employee could be suffering stress or psychological problems but it is difficult for an employer to broach the issue without seeming impertinent or nosy.

Some cases on stress involving teachers:

**Vahidi v Fairstead House School Trust Ltd [2005] EWCA Civ 765**

This was an appeal against the dismissal of the claimant's claim against her employer for negligence and breach of contract. She claimed that the employer had caused her to suffer severe clinical depression, because it had failed to provide her with sufficient support in order for her to return after a period of absence caused by stress as a result of a government scheme that made changes to the school's teaching methods (the introduction of 'desired learning outcomes' for children age 3-5).

Upon the claimant's return to school the school allowed two weeks for the claimant and her reception class to get to know each other and to settle down. They arranged for weekly support meetings between the claimant and a senior colleague for her to go through the work she intended to do with the children. They also ensured that the

claimant had an assistant teacher who would have a weekly brainstorming session with the claimant.

The trial judge held that the claimant's depressive illness was not caused by the any breach of duty on the part of the defendant. The appeal was dismissed. The evidence showed that the claimant's mental condition collapsed under the strain of trying to make fundamental changes to her teaching methods. The defendant had put in place support mechanisms and short of abandoning the government imposed scheme it was difficult to see what else the defendant could have done without seeming intrusive or unsupportive. It was found that the claimant's complaint that she should have been sent home had no merit as this could have been seen as an indication of a lack of confidence in the claimant and could in itself have brought on a relapse.

**Hatton v Sutherland Group of cases [2002]EWCA Civ 76 (Barber appeal [2004] UKHL 13)**

This was a group of cases heard together in the court of appeal. At first instance the claimant teachers had all established liability against their employer in relation to stress related psychiatric illness. The Court of Appeal allowed the appeals by the employers in Hatton, Barber and Bishop, but not Jones. The case of Barber was subject to an appeal to the House of Lords and the decision of the trial judge was upheld.

Hatton – the French teacher in this case had no greater workload than any other teacher in a similar school. She did not complain about her workload. Following the retirement of the head of department English supply teachers were used for a while. No one knew that this was involving Mrs Hatton in more work outside school. She was off work for a substantial portion of the year at this time but did not tell anyone it was down to overwork. The use of the English supply teachers stopped and Mrs Hatton's work returned to normal, the only other difference in her teaching day was the retiming and reduction by one in her free periods about which she did complain. She had time off work but did not attribute this to overwork and in fact attributed it

to her sons' illness. Mrs Hatton's case failed at the first test of foreseeability. The school could not be expected to probe into her periods of absence when she herself had attributed them to something else. Even if she had got over this threshold, the only possible areas for breach of duty were the failure to deal with the complaint about the free period or enquire about her later periods of absence, but in any event it was difficult to see what difference this would have made at that stage. Mrs Hatton had tried to argue that as teaching is a stressful profession and people may be reluctant to reveal their difficulties schools should have in place a system to combat this reluctance. The Court of Appeal commented that whilst an employer who has such a system is unlikely to be in breach of duty, it was not for the court to impose such a duty on all employers in a particular profession.

Barber – Mr Barber was an experienced teacher and head of department in a comprehensive school in a deprived area. The school was under pressure in 1995/96 due to a fall in resources and restructuring was inevitable. There was comparatively little effect on the department in which Mr Barber worked. As a head of department Mr Barber was given a new management role and in order to keep his former salary level he took on another role as project manager for PR. He worked long hours. All those in a similar role were suffering from work overload at that time and Mr Barber was no more overworked than anyone else. He complained about the overload in October 1995 and was given advice. He developed depressive symptoms in Autumn 1995 but told no one at school. After a period off with depression in May 1996 he had a meeting with the head, he did not divulge the extent of his symptoms. In the autumn the head asked for an eye to be kept on Mr Barber but Mr Barber had not seen his doctor about ongoing symptoms until October 1996, and did not tell anyone at school. He had a breakdown in November 1996. The question was when, if at all, the school's duty to take action was triggered. The Court of Appeal found that it was not. It would be too much to expect the school to know that the problems mentioned the previous term were continuing without any indication from Mr Barber. In the House of Lords it was acknowledged that this was a borderline case,

but it was held that the Court of Appeal had insufficient reason to set aside the findings of the trial judge. Lord Walker considered that the school's duty arose at the end of the 1995/96 school year when he met with the head as he had been certified as off sick with stress and depression at that stage. The management should have enquired further as to his difficulties and taken steps to reduce or better manage his workload at that stage.

Lessons to be learned: What should an employer do?

- 1) A system such as a confidential forum or conduit for reluctant employees to discuss their difficulties such as that mentioned in Hatton would ensure that stress was always detected, but of course this makes sure the school are on notice and therefore they have to have a comprehensive system to react to any concerns raised. One could argue that this would encourage those who would otherwise muddle through unscathed by psychiatric illness to raise concerns about workload, thereby placing a great burden on the school to react to all intimations of stress.
- 2) If an employee comes back from a period of absence, note the reason for absence. If there is mention of stress, then the school will need to meet with the employee and discuss steps to assist him/her and then implement them.
- 3) Where there have been changes to the structure and workload within the school, ensure that there are regular meetings with management to discuss the implications and a forum for concerns to be raised.
- 4) Provided the school has done all it can to support, if the changes in structure/working methods are imposed by government policies so that there is nothing that the school can do about the changes then the employer should be able to escape liability (a good example of the claimant's job altering beyond all recognition as a result of legislative changes within the general

employment context is found in the Bishop case with the Hatton v Sutherland group of cases and the case of Vahidi above).

### Final thoughts

It is worth remembering that an employer's duty is to exercise reasonable care to ensure that the employee is reasonably safe at work. It is not to guarantee the employee's safety. The employer must protect its employees from risks that it knows or ought to have known about. An employer is extremely unlikely to be liable for freak accidents or random attacks. Too many employees (and sometimes their lawyers) forget about foreseeability of harm.

Teachers have a right to be safe at work but equally children with behavioural difficulties or special educational needs have a right to an education. The law has to strike the difficult balance between the two.

Angela Frost

12 King's Bench Walk

July 2008



Annual Personal Injury Conference  
Thursday 17<sup>th</sup> July 2008

## **Employers' liability – an update**

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# **EMPLOYERS' LIABILITY UPDATE**

## **PROVISION AND USE OF WORK EQUIPMENT REGULATIONS 1998**

### **("PUWER")**

1. It is in some respects remarkable that the interpretation of basic concepts within these Regulations continues to exercise the courts to the extent that it does, some 16 years after the "six pack" was first implemented. Over the last few months we have seen the appellate courts grapple with how to define "work equipment" and the extent to which liability can be imposed on non-employers by virtue of regulation 3(3)(b).
2. The following roughly chronological survey of the key cases illustrates how the law has shifted from a purposive and contextual approach in the Court of Appeal to a more literalist analysis in the House of Lords in the recent case of Spencer-Franks.<sup>1</sup>
3. This shift in emphasis has ultimately swung the interpretation of the Regulations in favour of Claimants.

### **Regulation 9**

#### **Allison v London Underground Ltd**<sup>2</sup>

4. The Claimant had been employed by the Defendant as a tube driver. She had developed tenosynovitis due the prolonged use of a brake

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<sup>1</sup> Spencer-Franks v Kellogg Brown & Root Ltd & ors [2008] UKHL 46

<sup>2</sup> [2008] EWCA Civ 71, [2008] IRLR 440

traction controller<sup>3</sup>. This had been introduced by the Defendant at the suggestion of two experienced train drivers. However, crucially:

- (a) no expert advice had been taken as to its introduction, either at the design stage or when it had been put into use;
- (b) there was no dispute as to causation, the Claimant's condition having been caused by the position in which she held her thumb;
- (c) there was no dispute but that the controller was work equipment.

5. Regulation 9(1) of PUWER provides as follows:

“Every employer shall ensure that all persons who use work equipment have received adequate training for purposes of health and safety, including training in the methods which may be adopted when using the work equipment, any risks which such use may entail and precautions to be taken.”

#### *Strict/no-fault liability*

- 6. The Court of Appeal considered firstly whether regulation 9 imposed “strict” or “no fault” liability.
- 7. The first instance judge had fallen into the trap of importing common law test of foreseeability into his considerations. He had held that the training had been adequate because it had covered the foreseen risks.
- 8. That might be fine for regulation 4, as “suitability” is expressly defined with reference to whether it is reasonably foreseeable that the health and

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<sup>3</sup> Better known as the “dead man’s handle”.

safety of any persons might be affected.<sup>4</sup> However regulation 9 turns on the criterion of “adequate”.

9. The Claimant’s initial argument was that “adequate” effectively imposed “no-fault” liability:

“If the correct test had been applied, the appellant would have succeeded. She had not been trained not to put her thumb on the chamfered end of the handle. She suffered an injury as the result of putting her thumb there. If she had been trained not to, she would not have suffered the injury. Therefore her training had been inadequate for health and safety purposes”.

10. A seductively simple argument. However the Court of Appeal stated, rightly, that such a construction would amount to the imposition of “no fault” liability, for which clear statutory wording was required. The language of regulation 9 was “strict” in that the words “to ensure” indicated that the provision of training was mandatory. However the sanction of the regulation went no further than that.

10. The Claimant relied in part on the well-known case of Stark v Post Office<sup>5</sup>, stating that since regulation 5 imposes “no-fault” liability, why should regulation 9 not do so. The Court of Appeal were not impressed by that – different wording in the two regulations, and Stark does not help in defining “adequate”.

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<sup>4</sup> Although it is interesting to note that Smith LJ observed “in passing” that regulation 4 was probably not compliant with article 3 of the Work Equipment Directive, which contains no notions of foreseeability. Arriva Trains Northern Ltd v Eaglen [2008] EWCA Civ 352 is a recent example of a case that failed on appeal on the basis that the seat that did for the Claimant’s back did not pose a foreseeable risk of injury.

<sup>5</sup> [2000] ICR 1013

### *Adequate – the risk assessment*

11. Smith LJ held that the definition of adequacy was based upon the duty of the employer to investigate the risks of the work that the employee was doing:

“In my judgment, the test for the adequacy of training for the purposes of health and safety is what training was needed in the light of what the employer ought to have known about the risks arising from the activities of his business. To say that the training is adequate if it deals with the risks which the employer knows about is to impose no greater a duty than exists at common law. In my view the statutory duty is higher and imposes on the employer a duty to investigate the risks inherent in his operations, taking professional advice where necessary”.

12. This brings into play that often overlooked aspect of employers' liability – the risk assessment. PI lawyers have traditionally overlooked the risk assessment, essentially on causation grounds. People do not get injured because regulation 3 of the Management of Health Safety and Welfare Regulation 1999 or regulation 4 of the Manual Handling Operations Regulations 1992 is not complied with.

13. This was explicitly recognised by the Court of Appeal:

“I do not think that Judge Cowell<sup>6</sup> was alone in underestimating the importance of risk assessment. It seems to me that insufficient judicial attention has been given to risk assessments in the years since the duty to conduct them was first introduced. I think this is because judges recognise that a failure to carry out a sufficient and suitable risk assessment is never the direct cause of an injury. The inadequacy of a risk assessment can only ever

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<sup>6</sup> The first instance judge

be an indirect cause. Understandably judicial decisions have tended to focus on the breach of duty which has lead [sic] directly to the injury”.

14. As Smith LJ put it:

“What the employer *ought* to have known will be what he *would* have known if he had carried out a suitable and sufficient risk assessment. Plainly, a suitable and sufficient risk assessment will identify those risks in respect of which the employee needs training. Such a risk assessment will provide the basis not only for the training which the employer must give but also for other aspects of his duty, such as, for example, whether the place of work is safe or whether work equipment is suitable”.

15. So the determinant of what is adequate appears to be what would or should have been in the suitable and sufficient risk assessment.

16. The assessment of compliance in this respect is almost always going to depend on expert evidence. In Allison the Court of Appeal stated that if proper advice had been taken from the ergonomist the Defendant would have concluded that advice needed to be given to drivers as to how to hold the handle.

## **“Work equipment” – regulations 2 and 3**

17. The relevant parts of regulations 2 and 3 of PUWER are as follows:

reg. 2(1):-“ ‘use’ in relation to work equipment means any activity involving work equipment and includes starting, stopping, programming, setting, transporting, repairing, modifying, maintaining, servicing and cleaning;

‘work equipment’ means any machinery, appliance, apparatus, tool or installation for use at work (whether exclusively or not);”

reg. 3:-

“(2) The requirements imposed by these Regulations on an employer in respect of work equipment shall apply to such equipment provided for use or used by an employee of his at work.

(3) The requirements imposed by these Regulations on an employer shall also apply –

(a) to a self-employed person, in respect of work equipment he uses at work;

(b) subject to paragraph (5), to a person who has control to any extent of –

(i) work equipment;

(ii) a person a work who uses or supervises or manages the use of work equipment; or

(iii) the way in which work equipment is used at work, and to the extent of his control.”

Smith v Northamptonshire CC<sup>7</sup>

17. In this case the Claimant worked as a carer/driver for the Defendants. She was collecting a client from her home to take her to a day centre. As she pushed the client in a wheelchair down a wooden ramp between the living room and patio the ramp collapsed and the Claimant injured herself.
18. The ramp had originally been installed by the NHS but had been inspected by the council. Part of the side of the ramp had been rotten and this could have been discovered on inspection.
19. Was the ramp “work equipment” being used “at work”?
20. The Court of Appeal distinguished two examples: a ramp placed by the Defendants for the specific purpose of enabling the Claimant to wheel the client to the minibus and one not installed for that particular purpose and used most of the time by others.
21. The first scenario gave rise to no difficulty – it was clearly work equipment for use at work. The second was more difficult.
22. A slightly differing approach was adopted by the members of the Court.
23. Waller LJ, delivering the leading judgment, said that there was a danger in defining work equipment by taking the question out of context. The first instance judge had said that if this ramp had been installed at a factory it clearly would have been work equipment. However (said Waller LJ), this did not mean it was work equipment at the client’s house.

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<sup>7</sup> [2008] EWCA Civ 181

24. If the employer had allowed the use of work equipment supplied by a third party, then that may have been sufficient “selection” by the employer for liability to attach.
25. However it was being alleged that the Defendant was liable for failing to maintain the ramp:

“In this case, what is being alleged is that the employer, the Council, is strictly liable for failing to maintain this ramp in an efficient state or in good repair (or possibly for failing to ensure construction suitable for the purpose). Strict liability should only be imposed by clear language. For someone to have the obligation to maintain something, it would normally have to be within their power to be able to do so without obtaining some one else’s consent. The duty to maintain could not normally apply to something which was part of someone else’s property. It could furthermore not normally apply to something in relation to which access was limited, and indeed in relation to which, if some maintenance was necessary, consent to carry out the work was necessary. It would not normally apply in a situation in which, if the employer had turned up at the premises to say “I have come to maintain your ramp”, they might have got a look of some surprise from the owner who, if anybody, would have expected that person to be the NHS”.

26. The point was that regulations 4 and 5 contemplated some sort of relationship leading to a responsibility to maintain, or at least a right to do so. That was absent here.
27. Richards LJ and Rimer LJ were more taken by the concept of “control”. Simply put, there was no control by the council over the ramp, thus they could not have been responsible for its construction and maintenance. If an accountant visiting a client is scalded by hot water from a defective

coffee machine, it would be “absurd” to suggest that the accountant has a right of action under PUWER against his employer.

28. The difficulty with this approach is that while control is crucial for the purposes of regulation 3, it is not necessary to fix liability on an employer.
29. Furthermore, this common sense analysis rooted in context may not survive Spencer-Franks (see below), albeit that the right result was probably reached in this case.

#### Jennings v Forestry Commission<sup>8</sup>

30. This case, on the other hand, concerned the operation of regulation 3(3)(b), and therefore, without a shadow of a doubt, the notion of “control”.
31. The Claimant had entered into a service contract with the Defendants to build a fence, part of which was on very steep slopes. The contract placed the responsibility for taking the materials to the fence line on the Defendants, but<sup>9</sup> this was varied by consent such that the Claimant was going to use his own Land Rover to deliver the materials. He lost control on the slope and sustained injuries.
32. It was agreed that the Land Rover was unsuitable and that it was work equipment.

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<sup>8</sup> [2008] EWCA Civ 581

<sup>9</sup> So found the Court of Appeal

33. The matter came before the Court of Appeal on the preliminary issue of whether the Defendants had control of the Land Rover for the purposes of the Regulations.
34. The first instance judge had found that there was an employment relationship between the Claimant and Defendants. The Court of Appeal had no hesitation in deciding that that was wrong:
- (a) the provision of a client specification was to be expected in most contracts for services;
  - (b) more importantly, the Claimant had been in *control* of when to do the work and how to do it – he was not subject to any supervision;
  - (c) he had quoted a price and used his own Land Rover.
35. Therefore the Claimant could not bring himself within regulation 2.
36. It is interesting to see how the notion of control carried through to the application of regulation 3(3). Relying in part on the case of McCook v Lobo<sup>10</sup>, the Court of Appeal stated that:
- “the ultimate question is one of factual control”,
- albeit that the question of contractual apportionment of responsibility might well help answer that question.
37. The upshot is that (say) a plant hire company is unlikely to be able to divest itself of responsibility through a contractual clause if in fact the owner/operator of the equipment takes a hands-on approach to its use.

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<sup>10</sup> [2002] EWCA Civ 1760

38. In this case however the Defendant had no factual control:

“Irrespective of whether there was a contractual right of control, I think it clear that the Forestry Commission did not have control as a matter of fact...In my judgment, this was not a situation in which Mr Smith had factual control but failed to exercise it, “allowing” the claimant to use the Land Rover when he could have stopped him. The relevant control lay in practice with the claimant” (Richards LJ);

“What matters is that the appellants left it to the respondent to decide whether he could safely move materials to the fence line with his Land Rover, and he was a very experienced fencer, plainly capable of making such a judgment. So, when the accident happened about three quarters of an hour later, the appellants had no control over the respondent’s actions, and cannot therefore be said to have been in breach of regulation 3(3)” (Sir Paul Kennedy).

39. For good measure it was also held that there had been no assumption of responsibility by the Defendants as a result of previous dealings.

40. It will therefore always be necessary for control to be shown to a sufficient *extent* for liability to attach under the Regulations. It may well be that there is some control but that it does not extend as far is necessary.

Mason v Satelcom Ltd & East Potential Ltd<sup>11</sup>

41. But how is the extent of that control to be determined?

42. In the case of Mason the Court of Appeal suggested that the answer might lie in the assessment of the context of the Regulations as a whole.

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<sup>11</sup> [2008] EWCA Civ 494

43. The facts were simple. The Claimant was employed by Satelcom. He was replacing a computer card in an installation. The cabinet was 8 feet from the ground in an awkward position. The Claimant decided to use a ladder that was in the room. This ladder was 5 feet high. The unsuitability is obvious.
44. Satelcom had not provided him with a ladder. It was just there in the room. The room happened to be owned by East under an informal agreement with the local authority whose computer installation this was.
45. There was no doubt that Satelcom were liable to the Claimant and that the Claimant was guilty of some contributory negligence. The issue was whether Satelcom could seek a contribution from East.
46. May LJ started his judgment with words that sound a note of caution to over zealous Claimant lawyers:

“There is a risk that lawyers, including judges, being obsessed with the meaning of abstruse secondary legislation, may lose sight of the real world. In this case, the claimant was injured by falling off a short, well constructed and well maintained ladder, because he foolishly chose to use the ladder in circumstances for which, and in a way in which, it was unsuitable. His employers rightly bore a major responsibility for the accident, because they had not provided him with, or insisted that he acquired, a suitable free-standing aluminium step ladder to take around to his work in his car. He himself rightly bore a significant degree of responsibility, because his use of the ladder was foolish. The proposition that East should also be partly responsible for the accident, by strict application of a regulation mainly about employers, whose meaning took more than a day of the court’s time to try to understand, is in the real world close to being absurd. East were not Mr

Mason's employer; were not at fault; and had nothing to do with the accident, or the task which the claimant was performing, or the computer equipment on which he was working, beyond the facts that the equipment was, by agreement with Redbridge, on their premises and that the ladder happened to be in the room where the equipment was".

47. The mere fact that the ladder was in East's room, and that therefore they may have had control of it, did not mean that they had control of the way in which it was used at work. Their control did not extend this far.
48. If they cannot get in under regulation 3(3)(b)(iii) then East cannot somehow be liable under regulation 4. As expressed by Ward LJ:

"In my judgment Regulation 3(3)(b) (iii) is critical to the correct solution in this case. East had no control over the unsuitable way this ladder was used. They do not fall within 3(3)(b) (iii) at all. So why should they creep into Regulation 4 for essentially the very same use-related reason, namely the failure to ensure that the ladder was suitable for the purpose *for which it was used*. It simply does not make sense to exclude them from the front door but bring them in through the back door...

In my judgment one must look at the wider purpose of these Regulations. In essence they are directed at the true employer/employee relationship where the employer has control over the work equipment itself, over the workers who are to use it, and over the way it is to be used. The quasi employer's responsibility should be seen in the same way. In other words if the equipment itself poses a threat to the health and safety of those who use it, those who control the equipment can expect to be responsible for the safe working of the equipment."

49. If Ward LJ was motivated by the “wider purpose of the Regulations”, Longmore LJ looked specifically at the other provisions of the Regulations:

“In my judgment one has to ascertain in relation to a non-employer, whether there was a purpose for which he has such control as he has...

It is this concept of the “extent of control” that makes it necessary to ascertain whether there was a purpose for which the control was exercised. If East had owned the ladder it might be possible to say (as the court was able to say in *Ball v Street* [2005] EWCA Civ 76 para 69) that control existed (*inter alia*) for the purpose of maintaining the ladder in the state in which it needed to be in order to be an effective ladder. But in the absence of a finding that East owned the ladder, it is difficult to say what the purpose of East’s control was beyond the purpose of ensuring that it did not get in anyone’s way...

It is important in this context to be aware that the Equipment Regulations impose a large number of obligations both on those who are employers in law and on persons having control of equipment to any extent to the extent of that control. Those obligations include the obligations of suitability and maintenance in Regulations 4 and 5 as set out above, but extend considerably further to obligations of inspection, imparting health and safety information and instructions and training of those who will use the work equipment in Regulations 6, 8 and 9 respectively. It would border on the absurd to say that East had all these obligations as well as obligations in relation to the suitability of equipment in respect of a ladder which just happened to be on their premises...

If it is right that one should try to discover the purpose for which East had such control of this ladder as they had, one can at least say negatively that it was not for the purpose of inspecting this ladder or training users (who were not their employees) in relation to its use, nor for the purpose of imparting information and instructions in relation to it. Likewise it was not for the purpose of ensuring that the ladder was constructed or adapted (within

Regulation 4(1)) so as to be suitable for the purpose for which it was used. East could not know or reasonably anticipate that Mr Mason would use a perfectly ordinary ladder for a purpose for which it was never designed”.

50. Either there was no relevant control, or that control did not extend to suitability.
51. The possible criticism of this approach is that it puts the cart before the horse – you determine whether regulation 3 applies by looking at whether the other obligations under PUWER could be said to be applicable.
52. That might work for regulation 3 because of the bizarre wording of the end of the Regulation: “and to the extent of his control”.

Spencer-Franks v Kellogg Brown & Root Ltd & ors<sup>12</sup>

53. But what about employers? They are caught by the very wide wording of regulation 2 and<sup>13</sup> cannot rely simply on the extent of their control. They owe duties to their employees if they provide work equipment either for use at work or that is used by an employee at his work.
54. In this Scottish case the Claimant<sup>14</sup> was supplied by his employers to operate a North Sea oil platform<sup>15</sup>. He had been asked to inspect and repair a door closer consisting of a central spring mechanism connecting the door the frame by a linkage arm. As he was repairing it a screw came out and struck him in the face.

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<sup>12</sup> [2008] UKHL 46

<sup>13</sup> Despite the analysis to that effect in Smith – see above

<sup>14</sup> Scottish terminology is avoided throughout

<sup>15</sup> There was an indemnity as between the employers and the operators of the platform, so that the difficult question of differing liability as against them, whilst of concern to their Lordships (in particular Lord Mance), was not ultimately relevant

55. The Inner House of the Court of Session took the view that the door closer was not “work equipment” or alternatively was not being used at work. The Claimant appealed.

56. The House of Lords allowed the appeal, finding that the door closer mechanism was work equipment.

57. Lord Hoffman took what he termed a ‘simple approach’:

“If one takes this simple approach, then the answer seems to me to be clear. Everyone using the control room was using it for the purposes of their work. They used the door to enter or leave the control room. And in doing so, they used the closer. Its purpose was for use at work. Giving the definition its ordinary meaning, the closer was work equipment...

The question is whether it can be excluded by some implied qualification. One possibility is that the equipment regulations impliedly exclude apparatus which forms part of the premises upon which the work takes place. The state of premises is treated separately from equipment by the Workplace (Health, Safety and Welfare) Regulations 1992 (SI 1992/3004). In the case of ordinary work premises on land, this might be a good argument. But I do not think it applies to equipment which is attached to an offshore platform”.

58. His Lordship then went on to discuss the various regulations that applied to offshore platforms. It should be noted that none of the other members of the House of Lords were as persuaded by the existence of the WHSWR<sup>16</sup>.

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<sup>16</sup> Most of them thought that the distinction was not easy to draw and should be left to a future case

59. Of perhaps more importance is the overruling of the Court of Appeal decision in Hammond v Commissioner of Police for the Metropolis<sup>17</sup>, where the Court of Appeal had found that the police dog van that the mechanic had been working on had not been work equipment for that mechanic, even though it would have been for a policeman driving it<sup>18</sup>.

60. Lord Hoffman thought otherwise:

“I must respectfully differ. Regulation 2 defines work equipment. Regulation 4(1) tells you which work equipment the regulations apply to. The requirements imposed by the regulations do not apply to all work equipment but only in respect of work equipment "provided for use or used by any of his employees who is at work". But that does not mean that "the ambit of the expression 'work equipment' in these regulations is determined by regulation 4.<sup>19</sup>" The effect of reg 4 is that the regulations apply only to a subset of the category work equipment as defined in reg 2. You first decide whether some apparatus is work equipment or not and then you decide whether the regulations apply in respect of it...

It follows that I cannot accept that something can be work equipment in relation to one person but not to another.”

61. This is a crucial change in the reasoning which appears to have lay behind some of the Court of Appeal’s earlier decisions, and which may well have been itself derived largely from the “tools of the trade” approach in Hammond. You do not define work equipment by reference to the other regulations, but rather, having established that something is work equipment, you then assess whether the regulations apply.

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<sup>17</sup> [2004] ICR 1467

<sup>18</sup> On the basis that it was the “tools of his trade”

<sup>19</sup> i.e. as per Hammond

62. Lord Rodger was more explicitly critical of the contextual approach to whether something is work equipment or not:

“The 1998 Regulations are framed much more generally and work by requiring employers and others to apply their minds to the health and safety risks relating to work equipment. So, in order to think constructively about what goes on, or will go on, in their undertaking and to assess the risks, those who are potentially subject to the requirements must be able to determine what items constitute work equipment and what reg 4, for instance, requires them to do. It would be difficult to carry out that kind of exercise if items could slip in and out of being work equipment, depending on what was being done with them at any given moment.”

63. Therefore if a drill was work equipment (which it clearly was), it did not cease being so when it had broken down and was being repaired. Similarly the Claimant in this case was repairing the door rather than simply the closer. The issue was whether the door was “work equipment”, on which Lord Rodger agreed with Lord Hoffman.

64. Lord Mance delivered a nuanced speech which recognised the difficulties inherent in the provision of equipment by third parties to an employer e.g. a straightforward car repair garage. Ultimately that is a difficult question, resolvable either by reference to the lack of selection on the part of the employer or perhaps<sup>20</sup> by a concentration on the word “use”. It is however notable that by either test it is difficult to get away from the context in which the work equipment was provided.

65. The overall effect of Spencer-Franks is nonetheless to widen the definition of work equipment to bring in almost everything used at work,

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<sup>20</sup> Arguably more helpfully

and , more importantly, to highlight the principle that “once work equipment, always work equipment”.

## **OTHER REGULATIONS AND GENERAL PRINCIPLES**

### **Gravatom Engineering v Raymond Parr**

**Court of Appeal, 16/10/07**

**[2007] EWCA Civ 967**

*Manual Handling Operation Regulations 1992*

P and his colleagues had been involved in moving some very large machines from a delivery bay to the factory where P worked. The first three machines were very heavy, weighing 2,800 to 3,100kg. The fourth was less heavy. The machines were moved on 'skates' by groups of three or four workers. P was one of two men pushing from the back, and there was generally also one man steering at the front and one man keeping look out at the side. P claimed that he injured his back in the course of the operation. Agreed expert evidence was that it would require 140kg of force to start the heaviest machines moving, and about 90kg of force to maintain it in motion, and more going around corners.<sup>21</sup>

P relied upon Regulation 4 of the Manual Handling Operation Regulations 1992, which provide:

“(1) Each employer shall

- (a) so far as is reasonably practicable, avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured; or
- (b) where it is not reasonably practicable to avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured
  - (i) make a suitable and sufficient assessment of all such manual handling operations to be undertaken by them, having regard to the factors which are specified in column 1 of Schedule 1 to these Regulations and considering the questions which are specified in the corresponding entry in column 2 of that Schedule;
  - (ii) take appropriate steps to reduce the risk of injury to those employees arising out of their undertaking any such manual handling operations to the lowest level reasonably practicable...”

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<sup>21</sup> The guidance provided by the HSE for pushing and pulling operations suggest guidelines of 25kg for starting and stopping a load, and 10kg for keeping it in motion.

The trial judge's findings that the two men at the back of the skate provided most of the force, and that P was applying force of upwards of 45kg for some time, were upheld. It was difficult to challenge his finding that there was a considerable risk of serious injury to P. The finding that a risk assessment had not been made was also challenged. Keene LJ accepted that, in any event, it was not enough for P to show that a suitable and sufficient risk assessment had not been carried out, if D had in any event reduced the risk of injury to the lowest level practicable.

However, the fact that the machines had previously been pushed on skates by three or four men without injury did not show that the risk of injury had been reduced to the minimum reasonably practicable. This was firstly because this very general evidence did not deal with the particular factual circumstances of other such operations. Schedule 1 to the Regulations made it clear that the degree of risk will vary depending upon, for example, the capabilities of the workers involved, and the distance or time over which the physical effort was required. This is why the Regulations required a detailed assessment of risk to be carried out in many situations.

"It would be remarkable if no such steps were reasonably practicable in a situation where a considerable risk of serious injury has been established in the absence of such other steps. It would mean that nothing further that was reasonably practicable could have been done to avoid that risk and that the employee simply had to accept the risk of serious injury. One only has to state the proposition to see how difficult the defendant's position becomes when properly analysed." (Para 28)

The finding that the Defendant could have further reduced the risk by e.g. using mechanical methods, using specialist contractors, or using more personnel, was upheld.

This case underlines that simply stating that a method is a normal practice, or that it had previously been done without incident, will not suffice, particularly in cases where a risk of serious injury has been established.

**Hughes v Grampian Country Food Group Ltd**

**Inner House, 18/05/2007**

**[2007] CSIH 32; Times, June 4, 2007**

*Manual Handling Operations Regulations 1992*

H was a process worker who sought damages in respect of carpal tunnel syndrome in her left wrist which she claimed was aggravated by her working conditions. Her work consisted of the trussing of wings and legs of chicken carcasses. It was accepted that this was an operation which gave rise to a risk of injury. H alleged that this was a manual handling operation within the meaning of Reg 2(1) of the Regulations:

“ ‘manual handling operations’ means any transporting or supporting of a load (including the lifting, putting down, pushing, pulling, carrying or moving thereof) by hand or by bodily force.”

H argued that the Regulations should be given a broad and purposive construction, in accordance with Council Directive 89/291, and that the moving of any object manually by an employee involved a manual handling operation. It was held, after viewing a video recording of the operation, that it did not constitute a manual handling operation:

“The language used, if considered in isolation, is open to more than one interpretation but an interpretation which leads to absurd results is to be avoided. The wide construction urged by Mr Campbell does, in my view, lead to absurd results. It would offend against commonsense to suppose that the framers of the Regulations intended to bring within its scope the activities of the seamstress lifting and replacing her needle, the librarian turning the pages of a book or the employee throwing an electrical switch... Accordingly, unless compelled by the absence of any tenable alternative, I am disposed to reject Mr Campbell’s construction, which would appear to make virtually every human activity, other than the purely cerebral, one of manual handling.”  
(Para 15)

This case provides some fairly robust guidance on the meaning of ‘manual handling’, considered within the framework of European legislation.

**Jones v BBC & Others**

**QBD (Cardiff), 22/06/07**

## **Lawtel LTL 28/8/2007**

### *Apportionment of liability; vicarious liability*

During the recording of the lowering of a windmill mast, J passed under the inclined mast and the windmill rotor fell onto his back, rendering him paraplegic. J was working at the time of the accident as a freelance sound recordist for D1. Recording took place on a farm owned and occupied by Second Defendant, and the lowering of the mast was carried out by B, their agent. D3 supplied the windmill, and also supplied a winch for the lowering operation. At the time of the accident, J's sound mixer had been attached by a lead to a camera operated by D4, a freelance cameraman. It had been D4 who first started to walk under the windmill mast. Also present was T, a member of the BBC film crew, who was also a freelancer, and was responsible for health and safety onsite. T had not given instruction to J and D4 not to pass under the inclined mast, considering it to be common safety procedure.

J sued D2 as owners and occupiers of the farm, and D3 on the basis that he was the person who had repaired and maintained the turbine. J alleged that D1 owed him a duty as his employer, and that it was vicariously liable for D3 and T. J's case was brought in negligence rather than under any of the 'six pack' regulations.

D1 submitted that its health and safety obligations towards a freelance worker were restricted. In short, the Defendants all blamed each other and/or J for the accident.

As regards D1, HHJ Hickinbottom considered the authorities of Market Investigations v Minister of Social Security [1969] 2 QB 173 and Lane v Shire Roofing Co Ltd [1995] IRLR 493, and found the latter particularly helpful. It was held that J was effectively a direct employee of D1 for health and safety purposes on the shoot in question, and the duty of care owed to employees and freelance workers was in substance the same. The BBC had control of the shoot via T, it was BBC business and T was responsible for health and safety on their behalf (it

was admitted during the trial that D1 were vicariously liable for T). T and D4 were also employees for the purposes of health and safety. There should have been a talk between T, J and D4 in which the risk of the mast falling would have been identified, and J and D4 warned not to do beneath it. An area around the mast could have been cordoned off. D1, via T, had been negligent.

As regards D4, it was held that, in light of the close working relationship between two men who were effectively employees of the BBC, D4 owed J a duty of care. J had no choice but to follow D4 when he passed under the mast, as he his equipment was joined to the camera by a cable which could not be quickly disconnected. D4 ought to have been aware of the hazard of passing under the mast, and was negligent in doing so.

As between D1 and D4, they were joint tortfeasors. Following Lister v Romford Ice and Cold Storage Co Ltd [1957] AC 555, D1 was entitled to an indemnity from D4.

As regards D2, they owed a duty as occupiers towards J as a visitor. They were in breach of that duty, in failing to instruct J and D4 not to pass under the mast, and in failing to discuss with the BBC crew the exclusion of the crew from the hazardous area.

As regards D3, there was insufficient proximity to impose a duty of care to J, and D3 could not be made liable for an omission, namely failing to warn of the hazard or mark an exclusion zone.

The judge declined to make a finding of contributory negligence. This was a moment of blameless inadvertence. Unlike D4, J did not know that he was passing under the inclined mast.

In terms of apportionment, the judge held that this was essentially a case of an accident at work, in which responsibility should rest primarily with D1, as employer. D4's fault was relatively small. With D2, it was taken into account that they were working in a "domestic" context, but B had a responsibility for ensuring the safety of the visitors from the BBC. Liability was apportioned 65% to D1, 25% to D2, and 10% to D4. D1 were vicariously liable for D4's proportion, but entitled to an indemnity from him.

This was relatively complex case in terms of the numerous parties involved and their relationships with each other, and in many ways is a classic case of Defendant's pointing the finger at each other. As such, it provides some useful guidance as to the way courts will approach this sort of apportionment question. Perhaps the most interesting aspect is the way in which it represents both good and bad news for freelance workers. On the one hand, it makes clear that moving a large proportion of your workforce from employees to freelance contractors (as the BBC and other organisations have done) does not mean an employer can insist it owes no duty to those workers for the purposes of health and safety, or that it is not vicariously liable for those workers. On the other hand, despite quoting in his judgment from *Clerk & Lindsell on Torts* to the following effect:

"The implications of Lister for industrial relations led, ultimately, to employers' liability insurers entering into an agreement whereby they would not institute claims against employees of insured companies in respect of death or injury of fellow employees unless the weight of evidence indicated either collusion or wilful misconduct. The agreement seems to have operated satisfactorily... in practice, Lister is virtually a dead letter as a result of the agreement between insurers and, in refusing to extend that case to a situation not actually covered by the agreement [in Morris v Ford Motor Co Ltd [1973] QB 792], the Court of Appeal has done little more than recognise the realities of accident litigation in an industrial setting." (Para 139)

HHJ Hickinbottom nevertheless found that the BBC were entitled to an indemnity from D4. He noted,

"Given the clarity and firmness of the BBC's approach to liability for the negligent acts and omissions of Mr Rees [D4] in this case, one can only assume that before adopting this approach the BBC very carefully considered these issues and the potential consequences of the stance they have taken." (Para 141)

**Ellis v Bristol City Council**

**Court of Appeal, 05/07/2007**

**[2007] EWCA Civ 685**

*Workplace (Health, Safety and Welfare) Regulations 1992*

E was employed as a care assistant in a home for the elderly run by BCC. E slipped in a pool of urine left by one of the residents on the floor of a corridor. The surface of the corridor was smooth vinyl. Many of the residents were incontinent and the evidence was that urine was found on the surface of the corridor floor regularly. Non-slip mats had been placed in one corner of the corridor where urine was often found, following a risk assessment around one month before the accident. A report from the National Care Standards Commission had recommended the installation of a non-slip floor, and this was later carried out. E relied upon Regulation 12(1) and (2) of the Workplace (Health, Safety and Welfare) Regulations 1992, which provide:

“(1) Every floor in a workplace and the surface of every traffic route in a workplace shall be of a construction such that the floor or surface of the traffic route is suitable for the purpose for which it is used.

(2) Without prejudice to the generality of paragraph (1), the requirements in that paragraph shall include requirements that

(a) The floor, or surface of the traffic route, shall have no hole or slop, or be uneven or slippery so as, in each case, to expose any person to a risk to his health or safety; and

(b) every such floor shall have effective means of drainage where necessary.”

or, alternatively, Regulation 12(3):

“So far as is reasonably practicable, every floor in a workplace and the surface of every traffic route in a workplace shall be kept free from obstructions and from any article or substance which may cause a person to slip, trip or fall.”

In Smith LJ’s leading judgment, it was held that Regulation 12(1) and (2) required the court to consider the suitability of the floor in the context of the circumstances of its use, including circumstances which were temporary in nature providing they arose with a sufficient degree of frequency and regularity:

“If a smooth floor is frequently and regularly slippery, because of a substance which lies upon it, albeit only temporarily, the surface of the floor may properly be said to be unsuitable, if the slipperiness is such as to give rise to a risk to the health and safety of those employees using it.” Regulation 12(3) was there to cover transitory conditions which occur less frequently, and a judgment would have to be made as to whether the hazardous condition arise with such frequency as to fall under 12(1) and 12(2). The Court of Appeal adopted the approach taken in Marks & Spencer v Palmer [2001] EWCA Civ 1528 in assessing a floor’s suitability, but added that the court should also consider the frequency and regularity with which intermittent conditions occurred.

Clearly there is a significant advantage to a claimant if such circumstances fall under 12(1) and (2), which impose strict liability, as opposed to 12(3) which imposes a condition of reasonable practicability. In the case of the area around a swimming pool, for example, it would obviously be fair to say that the construction of the floor should take account of the very frequent presence of water. But a finding that that a transitory condition requires a change to the construction of a floor or traffic route, rather than simply taking reasonably practicable steps to keep it clear, potentially imposes a rather onerous obligation on a defendant. The question is where the line should be drawn. We can probably expect to see increased litigation on the question of whether the occurrence of a particular condition is frequent enough to make it a 12(1) case rather than a 12(3) case.

JOEL KENDALL  
MARY NEWNHAM

17 July 2008

Annual Personal Injury Conference  
Thursday 17<sup>th</sup> July 2008

## **Intentional Torts – Where are we now?**

**Andrew Roy and Patrick Kerr**

**Paper 1: Personal injury limitation for intentional torts  
– The New Landscape**

**Paper 2: Vicarious liability, protection from  
harassment & intentional torts**

**Paper 3: Self-defence to civil battery – What needs to  
be proved?**

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## Personal injury limitation for intentional torts – The New Landscape

12KBW Annual Personal Injury Conference  
Thursday 17<sup>th</sup> July 2008  
Speaker: Andrew Roy

## Personal Injury Limitation for Intentional Torts - The New Landscape.

### Introduction

1. Under **s.11** and **s.33 Limitation Act 1980**, personal injury claims are in general governed by a 3 year limitation period running from when a Claimant has knowledge of certain matters, with a discretion to extend this period indefinitely if it is equitable to do so.
2. In *Stubbings v Webb* [1993] AC 498, however, the House of Lords held that for claims for personal injury arising from deliberate acts (including assault, sexual abuse and rape) the limitation period was a flat 6 years from date of breach under **s.2 Limitation Act 1980** and not the extendable (by **s.11** and/or **s.33**) 3 year period.
3. This distinction led to numerous hardships and bizarre results. In particular, Claimants in sexual abuse cases could avoid the effects of *Stubbings* if they could establish a collateral claim based upon negligence.
4. This anomaly was exemplified in *Seymour v Williams* [1995] 1 FLR 862 where a child's claim against an abusive father was held statute barred under **s.2** but the common law claim against the mother for failing to protect her child from the father's abuse was held to be governed by **s.11** and **s.33**.
5. This rule was abolished by the House of Lords in *A v Hoare, C v Middlesborough Council, X v Wandsworth LBC, H v Suffolk CC, Young v Catholic Care (Diocese of Leeds)* [2008] UKHL 6, [2008] 2 W.L.R. 311:

*A was sexually assaulted by D in 1988. He was convicted and imprisoned in 1989. In 2004 he won £7 million on the national lottery and was released from prison on licence. C then commenced proceedings. Before*

*the lottery win D would have been unable to satisfy a judgment. The master struck the claim out on the basis that, as a claim for assault it was subject to a strict 6 year time limit under s.2 of the 1980 Act, which had passed by some 10 years. C appealed unsuccessfully to the High Court and then renewed her appeal to the Court of Appeal.*

*H, X and Y appealed against orders striking out as statute barred their claims for psychiatric harm suffered as a result of sexual abuse suffered in their schooldays whilst in the care of the respective Defendants.*

*The Court of Appeal felt bound by Stubbings to dismiss the appeals. The Claimants renewed their appeals to the House of Lords*

***Held***

- (i) Stubbings had caused uncertainty because lower courts tended to distinguish them on inadequate grounds as victims of sexual abuse seeking the discretion of the court under s.33 were driven to alleging that abuse was the result of some other breach of duty.*
- (ii) Reviewing the statutory history and case law Stubbings was wrongly decided and should be overruled.*
- (iii) Intentional injury claims therefore fell to be considered under the same regime as other injury claims.*
- (iv) The test in s.14(2) was an entirely impersonal standard: not whether the claimant himself would have considered the injury sufficiently serious to justify proceedings, but whether he would "reasonably" have done so.*
- (v) The correct approach was to ask what the Claimant knew about his injury, add any "objective" knowledge which might be imputed to him under s.14(3) and then ask whether a reasonable person with that knowledge would have considered the injury sufficiently serious to justify his instituting proceedings for damages.*

- (vi) *Having ascertained what the claimant knew and what he should be treated as having known, the actual Claimant dropped out of the picture, and judges should not have to consider the Claimant's intelligence. Standards were, in their nature, impersonal and did not vary with the person to whom they were applied.*
- (vii) *Section 14 made time run from when the claimant had knowledge of certain facts, not from when he could have been expected to take certain steps and s.14(2) merely defined one of those facts by reference to a standard of seriousness, Adams v Bracknell Forest BC [2004] UKHL 29, [2005] 1 AC 76 distinguished and KR v Bryn Alyn Community (Holdings) Ltd (In Liquidation) [2003] EWCA Civ 85, [2003] QB 1441 disapproved. The effect of the claimant's injuries upon what he could reasonably have been expected to do was irrelevant.*
- (viii) *In Y's case, if the Court of Appeal had not been bound by Bryn Alyn, the date of knowledge would have been 1977; the later date determined by the court below could not be justified. That did not mean that the law regarded as irrelevant the question whether the actual Claimant, taking into account his psychological state in consequence of the injury, could reasonably have been expected to start proceedings, but it dealt with that question under s.33 of the Act and that was the right place to consider it until Parliament decided whether to give effect to the Law Commission's recommendation of a more precise definition of psychological incapacity suffered by victims of sexual abuse.*
- (ix) *The approach to the exercise of discretion remained as described in Horton v Sadler [2006] UKHL 27, (2007) 1 AC 307, but the Court commented on the sort of considerations which ought clearly to be in mind in sexual abuse cases.*
- (x) *A more liberal approach to s.33 was required to reflect the stricter approach to s.11. Matters which previously went to knowledge*

*were instead to be considered as relevant to the exercise of discretion.*

- (xi) Thus the inhibiting effects of sexual abuse and the insidious nature of its effects were matters that could properly be said to be in a Claimant's favour.*
- (xii) As Claimants were no longer required to frame their cases in terms of systemic negligence but rather could establish liability by proving the trespass itself, the evidential prejudice arising from delay might often be less.*
- (xiii) The existence or absence of strong evidence of abuse, especially convictions or contemporaneous complaints, was likely to be important.*
- (xiv) Although each case would turn on its own facts, it was possible to have a fair trial in cases of historic sexual abuse even after a long delay. In many cases, however, a fair trial might prove impossible and Claimants should not assume that stale claims would be allowed to proceed.*
- (xv) Similarly, a Claimant should not presume that s.33 would replicate the previous entitlement under s.11 to bring proceedings long out of time.*
- (xvi) A's case remitted to the Queen's Bench Division to decide whether the discretion under s.33 should be exercised in her favour; orders that the trial judge said he would have made in C's case had he been free to decide that the action came within s.11 of the Act were made; H's appeal allowed on the issue of limitation only and case remitted for decision whether to exercise discretion under s.33 of the Act; damages awarded to X and Y as if the previous limitation defence had failed; Y's case remitted.*

*Appeals allowed*

6. This abolition of the *Stubbings* anomaly was in my view entirely merited and long overdue.

### ***Hoare* – The Direct Effects**

7. The direct effects of *Hoare* are self evident:
  - (a) Intentional injury claims are, like other injury claims, subject to a 3 year primary limitation period running from the date of knowledge rather than 6 years from the date of the damage.
  - (b) A s.33 discretion is potentially available.
  - (c) There is no longer any need to prove systemic negligence for the purposes of limitation.
8. This is generally much better news for Claimants than for Defendants, although Claimant advisers obviously need to be aware of the foreshortened primary period.
9. A further consequence is that, whilst previously a service failure towards the end of the limitation period would almost certainly have proved fatal to a claim for intentionally inflicted injury, that is now unlikely to be the case. In light of *Horton v Sadler* [2006] UKHL 27, a personal injury Claimant can issue fresh proceedings and seek to rely upon s.33. In many such cases the claim would be allowed to continue (*Richardson v Watson* [2006] EWCA Civ 1662, although compare with *Williams v Johnstone* [2008] EWHC 1334 (QB)).

### ***Hoare* – The Wider Effects**

10. *Hoare* went further than merely bringing claims for intentionally inflicted injury in line with other personal injury claims. The House took the opportunity to review the correct approach to knowledge under s.11 and discretion under s.33.

11. These wider effects profoundly change the manner in which these fall to be decided, most pertinently in the context of abuse claims but also in personal injury actions generally. They therefore merit detailed consideration.

12. However the bottom line to these deliberations can summarised shortly:

(a) **s.11** is to be interpreted more restrictively;

BUT

(b) **s.33** is to be approached more liberally.

### *Knowledge*

13. *KR v Bryn Alyn* the Court of Appeal adopted a broad and highly purposive approach to the question of knowledge:

*This was a consolidated action brought by fourteen Cs. They had been physically and/or sexually abused in the defendant's children's homes in 1973-1991. The abuse ranged from beatings to buggery. They were all adults when they issued proceedings, primarily for psychiatric injury, with between eight and twenty-four years having passed since the abuses ended. All consulted psychiatrists less than three years before the issue of proceedings. D pleaded limitation and required Cs to prove liability. All the issues were heard together. The judge found that the defendant had been negligent in respect of all but one claimant, the last having a cause of action in trespass to the person only and thus barred by the flat six year limit in s.2. He found that all the claimants had the requisite knowledge for s.14 at the time of the abuse and that the claims were therefore all statute-barred. However, he exercised his s.33 discretion in favour of the Claimants in all the negligence claims and awarded damages accordingly. D appealed and the claimants cross-appealed.*

**Held** (In relation to knowledge)

- (i) *The Judge had erred on s.14 significance, which was a pragmatic, fact-sensitive question requiring the Court to decide when a particular claimant would reasonably turn his mind to litigation as a remedy. The judge was therefore wrong to decide the knowledge of all fourteen claimants together without considering them discretely.*
- (ii) *The word significant in s.14 had a special and partly subjective meaning (McCafferty v Metropolitan Police [1977] 1 W.L.R. 1073 applied). Cases of child abuse required the court, on a case by case basis, to ask when an already damaged child would reasonably turn his mind to litigation as a solution to his problems. A psychiatrist's intervention could be the trigger to knowledge. Such injuries should be treated, in terms of latency and knowledge of significance, like industrial diseases (Nash v Eli Lilly (supra) and Stubbings v Webb [1992] QB 197 (part of the Court of Appeal judgment not disturbed by the House of Lords) followed, dicta in Stubbings v Webb (House of Lords, supra) not followed).*
- (iii) *The judge therefore erred by focusing knowledge of the immediate impact rather than knowledge of the long term psychiatric harm. The immediate impact was not the injury for which damages was sought ("the injury in question").*
- (iv) *The socio-historical context was important in judging whether a Claimant would be likely to resort to litigation. Previously, ill-treatment in children's homes was little discussed, its effects little understood, and it would have been accepted by the victims, the idea of claiming would not have occurred to them. Conversely, the*

*increased awareness of abuse and society's increasingly litigious nature means that injuries will likely to become "significant" at increasingly shorter intervals from the original torts.*

- (v) *Damages can be claimed from injuries present before the Claimant knew his injury was significant if they arise from the same cause of action, the otherwise barred claim "piggy-backing" the valid claim.*
- (vi) *Conversely, if a claim is made for the initial injury, any subsequent claim for aggravation or development of the initial injury is likely to be statute barred in the normal way (Bristow v Grout, The Times, November 3, 1986 affirmed).*

14. This decision was revisited by the Court of Appeal in *Catholic Care (Diocese of Leeds) and another v Young* [2006] EWCA Civ 1534:

*C (date of birth 18 June 1959) alleged that as a teenager whilst under D's care he had been subject to physical and sexual abuse by staff. During the first 3 years after leaving care in 1977 on his 18<sup>th</sup> birthday C suffered post-traumatic stress disorder but did not seek help and was able to suppress his memories. Thereafter from 1980-1996 he led a happy life until a chance encounter with one of the alleged abusers in January of 1996 triggered a recurrence of his psychiatric problems but in a more serious form. In December 2000 the police contacted C for assistance with criminal investigations of his alleged abusers, some of whom were subsequently convicted.*

*Proceedings were issued on 11 April 2003 following a letter of claim on 6 March 2003. Limitation was heard as a preliminary issue. The judge found that C, as was often the case with child sexual abuse victims, was understandably reluctant to turn his mind to litigation and that his curiosity had not been stimulated until the police investigation. Therefore,*

*applying Byrn Alyn, C had not had knowledge of a significant injury under s.14(2) until less than 3 years before the issue of proceedings. The judge indicated that, if he had to consider s.33, he would not have exercised his discretion in C's favour.*

*D appealed.*

***Held***

- (i) The test for reasonableness under s.14(3) was objective. As the concept of reasonableness was common to both s.14(3) and s.14(2), an objective test applied equally to the latter (Adams v Bracknell Forest BC [2004] UKHL 29, [2005] 1 A.C. 76 applied, Byrn Alyn not followed in part). In view of the wide discretionary power conferred by s.33 there was no need to construe s.14 narrowly in favour of Claimants.*
- (ii) If a person who suffered a particular type of injury would reasonably be inhibited by the injury itself from instituting proceedings, this was a factor to be taken into account. The standard to be applied was that of the reasonable behaviour of a victim of child abuse who had suffered the degree of injury suffered by the Claimant in question and of which he had knowledge.*
- (iii) This was a question of fact in each case as whether, having regard to (a) the Claimant's knowledge of the seriousness of the injury and (b) the inhibiting or other consequences of the injury for the Claimant, he would reasonably have considered the injury sufficiently serious to justify instituting proceedings. Quantum was important but not necessarily determinative.*

- (iv) *The more serious the Claimant knew the injury to be, the less likely it would be that the Court would regard inhibiting and other factors as justifying not instituting proceedings.*
- (v) *The evidence in the instant case demonstrated that C had been aware from 1977-1980 that he was suffering a serious injury as a result of the abuse. However, the judge was entitled to hold that the as a result of suppressing his memories C did not know that the injury was significant within the meaning of s.14(2) (Buxton LJ doubting that Bryn Alyn was correctly decided on this point but holding himself bound by it).*
- (vi) *The judge had wrongly applied the test of “reasonable curiosity” in Adams, which related solely to s.14(3) and not s.14(2). It related to curiosity about the origins of the injury, which C already knew. Once such knowledge was satisfied, curiosity was irrelevant.*
- (vii) *The judge also erred by allowing the issue of the inhibiting effect of the injury to be determinative on s.14(2).*
- (viii) *C was aware that he was suffering a significant psychiatric injury as a result of the abuse within a short time of the chance encounter with the alleged abuser. The judge should have considered whether a reasonable person in C’s position would have turned his mind to litigation.*
- (ix) *Applying an objective test C had the requisite knowledge more than 3 years before the issue of proceedings.*
- (x) *However, there was no basis for impugning the judge’s decision on s.33.*

*Appeal allowed in part.*

15. This decision mitigated the effects of *Bryn Alyn*, but, as indicated by Buxton LJ, the position remained highly unsatisfactory.

16. Although, the ratio of *Bryn Alyn* was not directly under appeal in *Hoare*, it appeared highly unlikely that the former could survive the reasoning in the latter.
17. This was confirmed this month the Court of Appeal in *Albonetti v Wirral MBC* [2008] EWCA Civ 783:

*The Defendant local authority appealed against a decision that a claim for damages for personal injury by the respondent (X) was not barred by the Limitation Act 1980 s.11 and s.14.*

*X, who was born in 1955, had suffered sexual abuse, including anal rape, at the age of 15 while living in a children's home operated by the local authority. X was admitted to a psychiatric hospital in 1986 following the breakdown of his marriage. In 1996 he told his partner about the abuse he suffered as a child, and in 1999 he contacted the police. He issued proceedings in 2001, and shortly after that a psychiatrist provided an expert opinion to the effect that X was suffering from post-traumatic stress disorder caused by the abuse and that that condition accounted substantially for his previous psychiatric symptoms. It was X's case that, at the time of the abuse, he did not know that he had suffered a significant injury. The judge, directing himself by reference to *Bryn Alyn*, held that X had not known that the injury was significant and attributable to the abuse until he saw the psychiatrist in 2001.*

*The Defendant argued that the "injury in question" for the purposes of s.14 was the whole injury which X had suffered, including any psychiatric harm which later manifested itself. It further argued that X had knowledge that he had a significant injury at the time it was happening, and he had to bring his claim by 1976, namely three years after he attained his majority. It submitted that the acts of anal intercourse in particular must have been so painful and humiliating that X must have*

*known that he had suffered a significant injury, not merely a significant wrong.*

*X contended that, in 1976, he did not know that he had suffered a significant injury in the sense required by s.14(2), namely that it would have been worth bringing an action for damages against a defendant who would admit liability and could pay the damages; in 1976 damages were not available for humiliation or distress. X argued that it would only have been in about 1989 or 1990 that he could have known he had suffered a significant injury, since at that time if he had consulted a solicitor he would have been advised that he had suffered a significant injury.*

***Held***

- (i) The instant appeal had been delayed until the outcome of Hoare, in which the House of Lords had disapproved the partly subjective test applied in Bryn Alyn. It was now clear that the test of whether a claimant knew at any particular date that he had suffered a significant injury was an objective one, Hoare followed, Bryn Alyn disapproved.*
- (ii) In the light of that, the approach of the judge below to s.14(2) had been wrong.*
- (iii) The "injury in question" for the purposes of s.14 must be the injury which the claimant knew about at the material time. In the instant case, the injury to be considered was the immediate effect of the abuse, namely the pain, distress and humiliation which X experienced at the time.*
- (iv) A person who had been raped whether vaginally or anally must know that she or he had suffered not only a grave wrong but also a significant injury, Stubbings v Webb considered.*
- (v) It could not be accepted that if X had consulted a solicitor in the mid-1970s, shortly before the primary limitation period ran out, he*

*would have been advised that he had not suffered a significant injury and that the damages at common law would be so small as not to be worth pursuing. X's argument that damages were not awarded for distress and humiliation was misconceived: in a case of rape or buggery there was a sufficient physical injury on which to found a claim for distress and humiliation, even where no actual psychiatric harm had been caused. X knew at all times after it had occurred that the abuse amounted to a significant injury. He would not know of his own knowledge whether it was worth bringing an action, but would at least know enough to make it reasonable to expect him to consult a solicitor. Had he done so, he would have discovered that substantial damages could in theory be awarded for such abuse. Although he might well have been advised not to proceed, that would have been for other reasons, not because he had not suffered a significant injury.*

- (vi) Thus time began to run from the date of X's majority and ran out in 1976.*
- (vii) The issue of whether the court should exercise its discretion under s.33 to disapply the limitation provisions was remitted for determination by the judge.*

*Appeal allowed*

18. It is therefore clear that serious physical abuse will initiate the primary limitation period.
19. There was an explicitly recognised possibility that less invasive abuse might not, and that the primary limitation period could be delayed by perhaps many years until a psychiatric injury developed.

20. However, it is suggested that such cases will be relatively rare. Even in cases of minimal physical invasion it might often be possible to show that the initial psychological effects were sufficiently significant so as to start time running.

21. In my view the *Bryn Alyn* decision was a flawed one which the law is well rid off. In addition to the obvious difficulties in the practical application of the test, there were serious conceptual defects. The main such defect was that it allowed a Claimant to pick and chose his injuries that arose from the same tort, disregarding the earlier ones for the purposes of limitation. The *Bryn Alyn* reasoning was thus:

- (a) Difficult to reconcile with the language of the Act.
- (b) Lacking internal logic; if the earlier injury is not the injury in question, how can it attract damages?
- (c) Difficult to reconcile with common sense. The suggestion that serious sexual assault does not qualify as the significant injury in question was, I think, highly counterintuitive. The logic of Lord Griffiths dictum “*I have the greatest difficulty in accepting that a woman who knows that she has been raped does not know that she has suffered a significant injury*” (*Stubbings v Webb* at 506) is brutal but unimpeachable, as was held in *Albonetti*.
- (d) Contrary to the purpose of the Act, which is to require Claimants to embark on the legal process expeditiously and to protect Defendants from stale claims.
- (e) Impossible to reconcile with the firmly established principle of the unitary cause of action: a Claimant in English law only has one suit arising out of a given wrong and must bring his claim for all the consequences of that wrong at once. This is illustrated – as the statutory exception made necessary by the common law rule - in the provisional damages scheme. The Defendants in the pleural plaques cases (*Grievs v FT Everard & Sons Ltd* [2007] UKHL 39; [2007] 3 W.L.R. 876) unsuccessfully argued

in the Court of Appeal ([2006] EWCA Civ 27; [2006] 4 All E.R. 1161) that there could be multiple causes of action arising from the same wrong.

(f) Contrary to and/or based upon a misreading of *Bristow v Grout* (supra):

*In 1982 C suffered facial injuries in a car crash. D settled the claim for these injuries. In 1985 C discovered that he had sustained a far more serious hip injury as a result of the same accident. He issued proceedings in 1986. It was held that the reference in s.14(1) to when C first knew, inter alia, that the injury in question was significant referred to the first of the injuries known to be significant. Time therefore began to run when C knew of the facial injuries. The claim was therefore statute barred.*

22. This has potential repercussion beyond the ambit of abuse claims. For essentially the same reasons as above in my view the authority of *McManus v Mannings Marine Ltd & anor* [2001] EWCA Civ 1668 is open to considerable doubt. This was another case in which the Court of Appeal took a novel approach to when time starts to run on a personal injury action, one which is akin a *Bryn Alyn* in that it effectively allowed a Claimant to pick which injury would start the clock running:

*C worked from 1968 onwards in the ship-building industry. He worked for D for twelve days in June 1989 and for a further fourteen days in January 1990. In September 1992 he submitted a claim for Vibration White Finger (“VWF”) to the Department of Social Security, naming the defendant as his employer in the application form. At this time he suffered from VWF in two fingers in his left hand. He claimed for this injury through an agreed trade union/insurers scheme, but this was rejected. In pursuit of the scheme claim he attended a consultant in May 1993, who informed him that his condition would deteriorate significantly if he suffered further exposure. He resumed employment with the defendant*

*from August 1993 to November 1999. His condition worsened to the point that it affected all his fingers and thumbs. He issued proceedings on 2 December 1999. Limitation was heard as a preliminary issue. The recorder found that the claimant had knowledge for limitation purposes by September 1992, and declined to exercise his discretion under s.33. C appealed.*

***Held***

- (i) Considering s.14 in conjunction with s.11, “injury in question” in s.14 meant the injury for which the action was brought.*
- (ii) The claimant’s claim was not for the VWF before 1993 but rather for its exacerbation since then. If the claimant had been claiming only in respect of damages to the right hand the defendant would have had no argument.*
- (iii) The Recorder erred in his approach. He should have asked himself when the exacerbation was significant.*

*Appeal allowed. Limitation remitted below to be heard at the trial of the substantive issues.*

*Discretion*

23. As indicated in *Hoare*, the Courts should now take a broader and more liberal approach to s.33 in abuse claims. Previous reported s.33 cases in abuse claims must therefore be approached with caution.

24. Although guidance has been given, *Hoare* will in many cases raise more questions than it answers.

25. There is in my view a potential tension as in many cases:

- (a) The Claimant will be able to rely upon the insidious nature of the injury;  
but,
- (b) The Defendant will be able to point to long delay and consequential evidential degradation.

Both these are *prima facie* very strong arguments. It is by no means clear which should prevail.

26. It may well be that the key question is the possibility of otherwise of a fair trial.

27. The s.33 decision in *Hoare* itself (i.e. the claim against the “lotto rapist”) was given by Coulson J last week who held in the Claimant’s favour ([2008] EWHC1573 (QB)):

- i. *The main reason for the delay was the Defendant’s impecuniosity. This was entirely understandable. The Claimant would have had great difficulties obtaining funding for an earlier claim. Any such claim would have been futile to the Claimant and a waste of the Court’s resources. The Claimant’s conduct was reasonable.*
- ii. *Another understandable reason for the delay was her unconscious desire to put the matter behind her. She had to a large degree successfully done so after the Defendant’s conviction. However, news of the Defendant’s release and lottery win had triggered a serious relapse in her psychiatric condition.*
- iii. *The grave nature of the Defendant’s wrong was a factor in favour of granting discretion.*
- iv. *In particular, part of the reason for the Claimant’s previous inability to recover substantial damages was the Defendant’s wrong itself, as it had led to his imprisonment and thus inability to earn. It would be inequitable for the Defendant to thus benefit from his own crime, and similarly inequitable for the Claimant to*

*suffer a disadvantage because of the very gravity of the wrong inflicted upon her.*

- v. *Liability was indisputable. This was itself a factor in favour of the Claimant. It also mitigated against the Defendant's complaints of evidential prejudice arising from the delay.*
- vi. *Although there was some possible prejudice to the Defendant in contesting causation, this was not substantial.*
- vii. *The Claimant had acted very promptly once the Defendant's ability to satisfy a judgment became known. She consulted solicitors within weeks and proceedings were issued within 4 months.*
- viii. *Although the Claimant's award of £5,000 from the CICB was in the Defendant's favour, it was not a weighty factor. It did not represent the full value of the Claimant's claim. The Claimant would be obliged to repay the award from any damages obtained from the Defendant.*
- ix. *There was some prejudice to the Defendant in that he faced a liability for a CFA success fee which he probably would not have in earlier proceedings. However, this was of little weight.*
- x. *It was not vexatious to require the Defendant to face this litigation. He did not have a clean slate and an entitlement to put the past behind him. He was under a life sentence and only at liberty on terms of his license.*
- xi. *The exceptional nature of the case put paid to any potential "floodgates" arguments.*

28. It should be noted however that the facts of this case were singular. It is therefore unlikely to be a reliable guide to the exercise of discretion in intentional injury claims more generally.

## Conclusions

29. *Hoare* represents a sensible rationalisation of personal injury limitation law.
30. The issue of limitation in abuse claim is now likely to focus on **s.33**.
31. Notwithstanding the fact sensitive and discretionary nature of **s.33** decisions, experience suggests that they are likely to be hotly contested at both first instance and appellate level.

## Postscript - Costs

32. Not a recent development, but a point worth emphasising.
33. It is often assumed, by advisers acting for both Claimants and Defendants, that a Claimant winning by virtue of **s.33**, is analogous to obtaining relief from sanctions. A Defendant in these circumstances often seeks an order for their costs (or costs in the case, or no order as to costs), and often such orders are granted by judges or conceded by Claimants.
34. This is a misconception. There is clear Court of Appeal authority (*Eastman v London Country Bus Services Ltd* (1985) Times, 23 November; *Kew v Bettamix* [2006] EWCA Civ 1535; [2007] P.I.Q.R. P16) that a win under **s.33** is a win for the purposes of costs, which should normally follow the event.
35. In *Kew*, however, the Claimant was awarded only 65% of his costs on the basis that he had lost on issue of the primary limitation period, an issue which had taken up large part the hearing.
36. It follows that:

- (a) Claimants should not be daunted by costs consequences if they have a strong case under **s.33**.
- (b) Defendants should not take limitation points simply because the primary limitation period expired.
- (c) Both Defendants and Claimants should be wary of running all limitation points irrespective of their merits. Claimants especially might be well advised to concentrate on strong arguments on discretion whilst conceding weak ones on knowledge.

ANDREW ROY

July 2008



Vicarious liability, protection from harassment & intentional torts

**12KBW Annual Personal Injury Conference**  
**Thursday 17<sup>th</sup> July 2008**  
**Speaker: Patrick Kerr**

### Vicarious liability, protection from harassment & intentional torts

1. The case of *Lister v. Hesley Hall Ltd* [2002] 1 AC 215<sup>1</sup> broadened the scope for vicarious liability of an employer for the intentional (and even criminal) acts of employees. Lord Millett at paragraph 79:

*“...it is no answer to say that the employee was guilty of intentional wrong doing, or that his act was not merely tortious but criminal or that he was acting exclusively for his own benefit, or that he was acting contrary to express instructions, or that his conduct was the very negation of his employer’s duty”.*

2. The case has been widely cited and relied upon in a number of decisions subsequent, the most noted probably being *Mattis v. Pollock* [2003] 1 WLR 2158<sup>2</sup>.
3. However, the principle is not one that is infinitely extendable. The parameters emerge from the case of *Lister* itself. Lord Steyn emphasized the need for proximity between the particular tort and the nature of the employment. Lord Clyde agreed. There had to be some greater connection between the tortious act of the employee and the circumstances of employment than the mere opportunity to commit the act which has been provided by the nature of the employment. As always, whether such proximity is established is a matter for the individual case having regard ‘to all the circumstances’.

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<sup>1</sup> Where a warden of a boarding house at a school owned and managed by his employer systematically sexually abused two of the boys under his care.

<sup>2</sup> In that case, a doorman, who had ejected various people from the club where he was employed, was struck several times and hit with a bottle in the process. He went back to his flat, reappeared armed with a knife and stabbed the claimant – who was in a different nightclub – rendering him paraplegic. Vicarious liability was established by the Court of Appeal on the basis that his employer had encouraged and expected his doorman to perform his duties aggressively, including the physical manhandling of customers. Approaching the matter broadly, at the moment of the stabbing the responsibility of the employer for the acts of his aggressive doorman was not extinguished.

4. The test is perhaps most usefully defined as whether the employer has *introduced* the risk of the wrong - and thereby is fairly and usefully charged with its management and minimization<sup>3</sup> - rather than merely *provided the opportunity* to conduct a tortious act.
5. *N v. Chief Constable of Merseyside* [2006] EWHC 3041 is a recent case in point. A police officer had come off duty at 2 a.m. At 4 a.m. he was sitting outside a nightclub (in an area he would not cover had he been in duty) in his own car, wearing his police uniform. Nelson J found as a fact that he was “on the prowl” for an intoxicated woman. One exited from the night club and he used his warrant card and uniform (including a police radio) to intimate to the first aider engaged by the club that he would take her to a police station and generally care for her. However, he drove passed at least three police stations, took her home and whilst she was comatose, committed, *inter alia*, a prolonged sexual attack upon her.
6. It was submitted on behalf of the Claimant that a police officer can place himself on duty at any time. Indeed, he would be expected to do so in the face of some criminal activity. As such, once a police officer purports to be on duty and acts as a police officer, his consequent actions should render his employer liable if those actions are tortious. Put bluntly, there is no difference in principle between a police officer who rapes someone in a police station whilst on duty, and the police officer who puts himself on duty and then rapes someone elsewhere.
7. The Defendant submitted that the police officer was at all times merely using his uniform and position as a police officer as a “camouflage” in order to achieve his desire to assault a

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<sup>3</sup> Summarized from the Canadian case of *Bazley v. Curry* [1999] 174 DLR (4<sup>th</sup>)

vulnerable woman. The uniform and position merely gave him the opportunity to commit an act, off duty, entirely for his own purposes<sup>4</sup>.

8. Nelson J found (at paragraphs 34 and 35):

*“No one single factor is in itself decisive...None of what followed after the Claimant entered his vehicle could be regarded as in any sense being within the scope of his employment, though that is not decisive in itself... When all the facts are taken into account it is my judgment that PC Tomaer was merely using his uniform and position as a police officer as the opportunity to commit the assaults on the Claimant. That in truth is the nature of the connection between his employment and what he did.”*

9. He went on to distinguish *Lister* on the basis that unlike the warden in that case, he did not have a specific duty of care for the victim entrusted to him by an employer who had such a duty<sup>5</sup>. It was, in his words, “a ‘mere opportunity’ case”. The misuse of a warrant card by a rogue police constable, whenever he formed the intention to assault, was not sufficient to impose vicarious liability in itself.
10. The case of *Lambert & Lambert v Cardiff County Council* [2007] EWHC 869 (QB) is not a straightforward application of vicarious liability, but it is of interest. Hickinbottom J, in his comprehensive and detailed judgment, held that the County Council did not owe Mr and Mrs Lambert, two foster carers, a duty of care to control the behaviour of one of the children the Council had placed with them. Again, although the placement gave rise to an opportunity for a child – who had suffered “a high level of emotional abuse” prior to the

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<sup>4</sup> Thereby distinguishing itself from the cases of *Bernard v. Attorney General of Jamaica* [2005] IRLR 23 and *Weir v. Chief Constable of Merseyside Police* [2003] ICR 708, and aligning itself with the case of *Attorney General of British Virgin Islands v. Hartwell* [2004] 1 WLR 1273

<sup>5</sup> *Brooks v. Commissioner of Police of the Metropolis* [2005] 1 WLR 1495

placement – to behave in a way that would be extremely challenging<sup>6</sup>, there was not such proximity between that behaviour and the Council as to merit the imposition of vicarious liability. At paragraph 157 of his Judgment, Hickinbottom J stated:

*“I am unconvinced that the Council owed Mr and Mrs Lambert any duty to take reasonable care to control A... In particular:*

*(i) Such a duty would starkly conflict with the duty owed by the Council to foster children.*

*(ii) Even without such a duty, the carers would not be without a remedy. They could for example apply to obtain an injunction against the foster child to prevent further harassment: or obtain police assistance to stop further criminal activity.*

*(iii) Foster children are not in the de facto day-to-day control of the authority. Except when absconding, they are under the effective control of carers.”*

11. Hickinbottom J went on to state that the psychological damage caused to the Lamberts was not, in any event, foreseeable.
12. There was no mention as to whether a potential (although, no doubt a financially fruitless) claim would have succeeded in negligence against the foster parents to whom A went after staying with the Lamberts.
13. In short then, after the high watermark case of *Mattis*, it appears the courts are less willing to explore the potential ramifications of a broad application of *Lister*<sup>7</sup> than some commentators predicted.

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<sup>6</sup> Which included making an unfounded allegation of sexual abuse by Mr Lambert and telephoning unsolicited on a vast number occasions over a prolonged period.

*Defendant or insurer*

14. The case of *KR & Ors v. Bryn Alyn Community (Holdings) Ltd & Another* [2003] QB 1441 is even more tragic than that of *Lister*, in that the campaign of abuse of children was more widespread and prolonged. Like in *Lister*, the acts of abuse by the individuals employed by the Defendants were clearly acts for which the company should be vicariously liable, but (due to limitation concerns which are no longer an issue<sup>8</sup>), Connell J's finding against the company was not one of vicarious liability but one of systematic negligence in the operation of the care homes over a number of years.
15. As the company went into voluntary liquidation in 1997 the case was followed by *KR & Ors v. Royal & Sun Alliance* [2006] EWCA Civ 1454, which sought to force the insurers of Bryn Alyn to meet the damages awarded.
16. The case boiled down to one of contractual construction. As mentioned, the finding was not one of deliberate acts by employees for which the company was vicariously liable. If it had been, there would have been no issue as the insurance policy had expressly excluded paying out for such acts. However, the finding was one of systematic negligence by the Company over a number of years and as such the policy was arguably operative.
17. The answer was this<sup>9</sup>:

*“What then is the true intention of the exclusion clause? In our judgment it is to exclude liability for damage or injury caused by deliberate acts of the person who is to be regarded as, in effect the Company, as opposed to the acts of those who are mere employees. The undisputed evidence...makes it clear that the deliberate acts of abuse*

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<sup>7</sup> Although, see the case of *Gravil v Carroll & Redruth Rugby Football Club* [2008] EWCA Civ 689

<sup>8</sup> See *A v Hoare, C v Middlesborough Council, X v Wandsworth LBC, H v Suffolk CC, Young v Catholic Care (Diocese of Leeds)* [2008] UKHL 6, [2008] 2 W.L.R. 311

<sup>9</sup> The single judgment of the court was one to which each member contributed.

*by John Allen fall to be attributed to the Company. It is not just the case that he was managing director and majority shareholder; he was Bryn Alan...*

*Suppose Allen had deliberately burnt down one of the homes; we cannot see that the Company could recover under the Policy. It does not seem to us to make any difference that the victims in the present case are third parties rather than, in the example we have given, the insured itself. Suppose in contra-distinction to the present case, the Company was solvent. Most right thinking people would regard it as abhorrent for the Company to be indemnified by the Insurer against liability created by the criminal acts of John Allen, when he, as the majority shareholder, stood to benefit. In the days before incorporation there could have been no question of Allen himself being indemnified by the Insurer.*

18. Essentially then, the thrust of this case is not concerned with vicarious liability, but of lifting the corporate veil to expose the individual to the consequences of his actions (whether that is beneficial to the victims of those actions or not). However, as with the cases dealing directly with vicarious liability, it does show that the correct approach to intentional torts is to examine the actions of an individual closely within the factual matrix of the case, rather than start with the consequences of such action and divine who is best able to meet any compensation that should be awarded.

#### *Protection from harassment*

19. The case of *Majrowski v. Guy's & St. Thomas NHS Trust* [2006] UKHL 34<sup>10</sup> relied heavily on the foundation of *Lister* to find that the same test for vicarious liability applied not just to common law torts, but also to breaches of statutory obligation and equitable wrongs.

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<sup>10</sup> In which the NHS Trust was found liable to pay damages awarded to their employee, Mr Majrowski for the harassment he suffered at the hands of his homophobic departmental manager.

20. The fear for most employers following the judgment was of having to deal with a multiplicity of unfounded, speculative claims by disgruntled employees and bitter ex-employees exploiting the Protection from Harassment Act 1997.
21. The Court of Appeal, however, has been firm in its approach.
22. In the case of *Conn v. Sunderland City Council* [2007] EWCA Civ 1492, Gage, Buxton and Ward LLJ were swift to overturn Mr Recorder Kearsley QC's finding at first instance that two incidents at work between Mr Conn and his site foreman Mr Dryden constituted harassment for the purposes of the Act.
23. The second (more personal) incident probably was harassment<sup>11</sup> in the Court of Appeal's view. The first incident however, plainly was not an act of harassment; Mr Dryden had threatened to punch the windows out of the cabin he was in, if Mr Conn would not tell him who was leaving the site early. There was no direct threat to Mr Conn and the other two workmen in the cabin did not feel threatened. As Gage LJ stated, "what might not be harassment on the factory floor or in the barrack room might well be harassment in the hospital ward and vice versa". However, in his judgment, he stated:

*"The touchstone for recognizing what is not harassment for the purposes of sections 1 and 3 [of the Act] will be whether the conduct is of such gravity as to justify the sanctions of the criminal law."*

24. In this instance, he was of the opinion that the threat was unpleasant but was well below the line which would justify a criminal sanction.
25. Ward LJ was his usual pithy self:

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<sup>11</sup> Defined in section 7 of the Act to include "alarming the person or causing the person distress".

*“What on earth is the world coming to if conduct of the kind that occurred in the [first] incident can be thought to be an act of harassment, potentially liable to giving rise to criminal proceedings punishable with imprisonment for a term not exceeding six months, and to a claim for damages for anxiety and financial loss?... The conduct here does not come close to harassment.”*

26. The thread linking these cases is that context is everything. That an employer (and potentially an insurer) may be liable for the intentional common law torts or breaches of a statutory regime made by an employee is beyond doubt. However, this does not give unqualified and infinitely expandable rights to claimants to compensation and the landmark cases of *Lister* and *Majrowski* should not be read as such.

*Modern application of the rule in Wilkinson v Downton*

27. The case of *Wilkinson v. Downton* (1897) 2 QB 57, arose after Mr Downton told Mrs Wilkinson – as a “practical joke” - that her husband had broken both his legs and she was required urgently to help him. This resulted in Mrs Wilkinson suffering a serious psychiatric injury.
28. It is a famous case, but one that has attracted very little case law. Furthermore, it has been rendered almost entirely obsolete by the scarce modern case law that has considered it and from the Protection from Harassment Act 1997.
29. The claimants in the case of *Wainwright v. Home Office* [2003] UKHL 53 were mother and son. The son was remanded in custody and the mother was visiting him. They were stripped-searched for drugs in a manner that contravened the defendant’s own rules.
30. As a result, the son suffered post-traumatic stress disorder and the mother suffered emotional distress but no recognised psychiatric injury.

31. The judge at first instance held that requiring the claimants to take of their clothes constituted trespass despite the lack of physical contact. His reasoning was that:
- a. In respect of the son, *Wilkinson* had extended the definition of trespass to include words, such as those uttered here, that were “calculated” to cause physical or psychiatric harm.
  - b. In respect of the mother, tort law should give a remedy because of the infringement of her right to privacy under Article 8 ECHR.
32. The Court of Appeal allowed the appeal in respect of the mother’s claim, holding that the trial judge had been wrong to thus extend the law of trespass. However, it declined to set aside the son’s recovery as he had in fact suffered a battery.
33. The House of Lord’s dismissed the claimants’ appeal. Lord Hoffman gave the main speech with which the other Law Lords agreed. The main points were:
- a. In cases of actual psychiatric injury, there is little point arguing about whether or not the operative act was intentional if negligence will do just as well<sup>12</sup>.
  - b. Although the Protection from Harassment Act put the law of harassment on a statutory basis, the policy considerations that bar recovery for mere distress, discomfort or inconvenience as result of negligence were different from those stemming from an intentional tort<sup>13</sup>.
  - c. The criteria for such an intentional tort were:

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<sup>12</sup> This is undoubtedly the reason for *Wilkinson’s* lack of reported application: negligently caused psychiatric damage became recoverable a few years later following the decision *Dulieu v White & Sons* [1901] 2 KB 669.

<sup>13</sup> *Hunter v Canary Wharf* [1997] AC 655 at 707

- i. The defendant must have acted in a way which he knew to be unjustifiable; and
    - ii. The defendant must either have intended to cause harm or acted without caring whether or not he caused harm.
  - d. The facts in this case did not meet these criteria. The trial judge had found that “*The deviations from the procedure ... were .... not intended to increase the humiliation necessarily involved but merely sloppiness*”.
  - e. The House reserved its position as to whether damages for sub-clinical distress should be recoverable if there was a genuine intention to cause harm, although it expressed scepticism as to the proposition.
34. In *C v. D and SBA* [2006] EWHC 166 (QB), C was abused by the headmaster (D) of the school (SBA). There were three main complaints. Firstly, D had deliberately touched C’s genitals. Secondly, he had videoed C in the shower. Thirdly, that he had pulled down his trousers and pants to stare at C’s genitals. All three complaints were made out on the facts.
35. Presumably believing that a claim for negligence was superfluous, C only put forward his case on the alternative bases of (a) trespass to the person, (b) “breach of the duties owed by the Defendants to the Claimant in respect of the Claimant’s care, safety and welfare” and (c) the rule in *Wilkinson*.
36. Field J held as follows:
- a. It was accepted that the first complaint constituted trespass to the person in the form of battery.

- b. In regard to the second and third complaints, there would have been an action in negligence if a negligent breach of duty had caused a recognisable psychiatric illness. However, no claim in negligence was being pursued.
- c. This being so, D owed no enforceable legal duty beyond the common law duties to take reasonable care and not to commit an assault or battery. There was no contract and no statutory duty had been identified. It was conceded that the second and third complaints did not constitute assault or battery. C's primary and secondary cases in respect of the second and third complaints failed.
- d. The rule in *Wilkinson* only applied where the act in question caused a recognised psychiatric injury (*Wainwright* applied).
- e. The second complaint had caused only emotional distress. It was therefore not actionable under the rule.
- f. The third complaint was a gross invasion to C's personal integrity and had materially contributed to a mental abnormality. It was thus potentially actionable under the rule if intention was proved.
- g. There were three bases under which intention could be imputed for *Wilkinson* to apply:
  - i. The defendant's acts were calculated to cause psychiatric harm and were done with the knowledge that they were likely to do so.
  - ii. Psychiatric injury was sufficiently likely to result from the defendant's acts that the defendant could not say that he did not mean it.

- iii. The defendant was reckless as to whether or not he caused psychiatric injury (*Wainright* at paras 31-33).
  - h. In the context of the third complaint, D did not subjectively intend for claimant to suffer psychiatric injury. Nor was psychiatric injury sufficiently likely a result from this conduct that intention could be imputed on the second basis, notwithstanding that psychiatric injury was a foreseeable result of such conduct. However, D was reckless as to whether or not he caused psychiatric injury. Intention was therefore made out.
  - i. C's mental abnormality was multi-factoral. The award was therefore reduced to reflect a "commonsense" apportionment between the damage caused by the actionable abuse and that caused by other phenomena.
  - j. As SDA was vicariously liable for D's actions (no argument to the contrary was raised) judgment would be entered against both defendants.
37. The upshot of this case is that *C* would have succeeded to the same extent but with less difficulty by pleading negligence. Probably the only scenario in which this would not be the case is where the operative act and its consequences were so consciously deliberate that it could not properly be described as "negligent", a problem which was neatly sidestepped by Connell J's finding in *KR v. Bryn Alyn* (above)<sup>14</sup>.
38. In addition, the cases will be few and far between in which defendants will admit to intending to cause injury, and/or the claimant seeking to establish negligence would not accept that the harm was to an extent "inadvertent".

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<sup>14</sup> Which held the company liable, not vicariously for the acts of the abusers, but primarily, on the basis of being systematic negligent in the operation of its care homes over a number of years.

39. Furthermore, except in cases of “one-off” actions, the Protection from Harassment Act is easier to prove<sup>15</sup> and under it damages are available for sub-clinical anxiety. So it is difficult to see when a case’s strongest point would be to argue the application of *Wilkinson*.

PATRICK KERR

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<sup>15</sup> Of course, the threshold is not so low that any claim can be successful – *Conn v. Sunderland CC* (above).



Self-defence to civil battery – What needs to be proved?

**12KBW Annual Personal Injury Conference**  
**Thursday 17<sup>th</sup> July 2008**  
**Speaker: Andrew Roy**

## Self-Defence to Civil Battery -What Needs To Be Proved?

### Introduction

1. The test for self-defence in civil battery has been recently considered in *Ashley and anor v Chief Constable of Sussex* [2008] UKHL 25
2. The Claimants in this case are the father and brother of James Ashley, who was shot by a police officer during a raid on his home.
3. The Claimants brought Fatal Accident Act proceedings for negligence and battery.
4. The Defendant admitted negligence and liability for damages arising out of the incident. However, it denied battery and applied to strike this aspect of the claim out.
5. There were two issues arising out of the strike out action and subsequent appeals:
  - (a) The criteria for self-defence in respect of a civil claim for battery.
  - (b) Whether, negligence and liability for damages having been admitted, the claim was an abuse of process.

6. On the second issue the Court of Appeal and the House of Lords held that the claim should be allowed to proceed.
  
7. The first issue is of more interest to personal injury practitioners and will be the focus of this talk.

### **Decision at First Instance**

8. Dobbs J struck the battery claim out on the basis that the burden was on the Claimants to disprove self-defence and that they had no real prospect of doing so.
  
9. The Claimants appealed.

### **Decision of the Court of Appeal**

10. The Court of Appeal held ([2006] EWCA Civ 1085) that the burden was on the Defendant's prove self-defence.
  
11. A more vexed issue was what precisely had to be proved. The requirement that the force used had to be reasonable was accepted. However, there were three

possible answers to the question of what had first to be established to justify the use of force:

- (a) Solution (1), advocated by the Defendant. A Defendant merely had to prove an honest belief that he was under imminent or actual attack.
- (b) Solution (2). A Defendant had to prove that he acted under an honest if mistaken belief of imminent or actual attack and that the belief was reasonably held.
- (c) Solution (3), advocated by the Claimants. A Defendant had to prove both an honest belief of imminent or actual attack and that he was *in fact* under such attack, mistaken belief being insufficient even if reasonably held.

12. Following a fairly exhaustive review of authority, the Court ruled in favour of solution (2).

13. Notwithstanding its detail, there were two apparent lacunae in this review.

14. Firstly, neither the Court nor any party apparently referred to arguably the most relevant House of Lords decision, *R. v Governor of Brockhill Prison Ex p. Evans (No.2)* [2001] 2 A.C. 19.

15. The Defendant in *Evans* falsely imprisoned the Claimant on the basis of a mistake, namely the miscalculation of the release date.

16. There was no suggestion that the miscalculation was unreasonable. Indeed it was accepted that at the time the Defendant could not have acted differently.
  
17. The House of Lords nevertheless held that the Defendant was liable as a mistaken belief in a non-existent state of affairs could not render lawful what was otherwise unlawful and thus could not provide a defence to false imprisonment.
  
18. False imprisonment is of course a species of trespass to the person.
  
19. Secondly, there was the cursory consideration given by the Court to *Hepburn v Chief Constable of Thames Valley* [2002] EWCA Civ 1841.
  
20. In *Hepburn*, another police case, it was specifically decided that belief in a non-existent state of affairs cannot found a defence to battery. It appears very difficult to read this as being other than binding ratio.
  
21. The Court of Appeal in *Ashley* briefly referred to *Hepburn* and expressed the view that it was wrongly decided. There was no indication, however, as to how it was not binding.
  
22. The Defendant appealed, contending for solution (1). Perhaps surprisingly, the Claimants did not cross-appeal in support of solution (3).

## Decision of the House of Lords

23. The Defendant's arguments in support of solution (1) were firmly and unanimously rejected.

24. However, there was obiter consideration as to whether solution (3) rather than (2) might be the correct test.

25. Lord Scott indicated that solution (3) appeared preferable, and that the point remained open.

26. Lord Rodger reserved his opinion, but appeared attracted to solution (3).

27. Lord Carswell indicated that solution (2) was to be preferred.

28. Lord Neuberger indicated a preference for solution (2), but agreed that there were powerful arguments either way and that the point was plainly open for reconsideration by the House of Lords.

29. Lord Bingham declined to comment, opining that the current test was well established, well understood, applied without dissatisfaction and did not require changing. He therefore did not wish to inject any note of uncertainty. It might

be suggested that this description of the current position is blithe and contradicted by the very fact of the appeals in *Ashley*.

30. Again, *Evans* does not appear to have been cited in argument.

## **Discussion**

31. These decisions leave the law in a muddle.

32. There remains an issue as to whether solution (2) or (3) is correct.

33. The simplest response is that until the Court of Appeal decision in *Ashley* is overruled by the House of Lords it is authoritative. This is probably the interpretation most likely to be adopted.

34. Wyn Williams J in *Parmar v Big Security Company Ltd* [2008] EWHC 1414 (QB), an assault case involving a nightclub doorman, adopted solution (2) as laid down by the Court of Appeal decision in *Ashley* (this was in fact shortly before the House of Lords judgment in *Ashley* was handed down). He did so despite the suggestion that solution (3) was correct. However, he did so without the benefit of oral argument and gave no reasons. As the Claimant in *Parmar* succeeded, the Judge finding that the Defendant did not believe he was under attack and

therefore could not establish self-defence on any test, the point was in the end a moot one.

35. However, it is suggested that there are two viable arguments that solution (2) is not a correct statement of the current law.

36. Firstly, it could be said that the Court of Appeal decision in *Ashley* is per incuriam to *Evans*, in which case *Evans* would have to be followed.

37. This would appear to be the case unless false imprisonment can be distinguished for these purposes from battery. The distinction could arise out the fact that a person's right to use reasonable force in self-defence is an important one and arguably no equivalent right on the part of a Defendant arises in respect of false imprisonment.

38. However, there are good grounds for not distinguishing:

(a) There appears to be no authority for such a distinction, and copious authority, cited by the Court of Appeal in *Ashley*, to the contrary.

(b) By the same token, self-defence would almost certainly be an available justification for imprisonment.

(c) Logically, for such a distinction to apply, a lower threshold would be required to justify assault than false imprisonment. The validity of such an approach appears difficult to support. Whilst the right not to be

unlawfully imprisoned is undoubtedly an important one, could it be said to demand higher protection than the right (as in the case of *James Ashley*) not to be fatally attacked?

- (d) The justification relied upon in support of solution (2), that it would be unfair to find liability on the basis of a reasonable misjudgment made in the heat of the moment, does not seem to be a full answer to *Evans*. The Defendant in *Evans* was entirely blameless and could not have been more so even if required to react instantly.

39. Alternatively, it could be said that, as *Hepburn* and *Ashley* are both ratio, any Court below the House of Lords is entitled to decide which is preferable.

40. Whilst *Ashley* might ostensibly be the better authority, there are arguments as to why *Hepburn* could be preferred:

- (a) Even if *Ashley* was not strictly per incuriam with regard to *Evans*, *Evans* arguably remains persuasive authority of the highest order. It could be seen as a “tie-breaker”.
- (b) It is notable in this regard that both the Court of Appeal and House of Lords in *Ashley*, even without the benefit of having been referred to *Evans*, observed that there was undoubted force in the proposition that only actual attack or imminent risk of attack would suffice.
- (c) It could be said that test focusing on the perception of the assailant, which is thus partially subjective, does not afford sufficient protection of a person’s civil right not to have violence blamelessly inflicted upon them. In practical terms an assertion of reasonable belief of imminent attack might be a difficult one for a Claimant to rebut.

(d) The *Ashley* test is arguably more difficult to apply in practice than the *Evans/Hepburn* test. There remains with the *Ashley* test uncertainty as to whether or not matters going to a Defendant's belief not based upon a Claimant's actions can be taken into account.

41. It is unfortunate that solution (3) was not argued before the House of Lords. It is my view that, if and when the House does reconsider the point, that solution should be and would be preferred. Pending such a decision, however, there remains much scope for argument.

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