Personal Injury Update March 2016

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Farrar's Building News

Huw Davies Editor

It is a busy PI newsletter this month.

Andrew Wille provides a short analysis of **Knauer v MoJ**, a judgment that will lead claimant practitioners to rapidly amend schedules of losses in fatal accident claims. It was probably one of the most one sided arguments that the Supreme Court is ever likely to hear.

James Rozier considers a recent High Court appeal in relation to moss and a Highway's Authority statutory duties under s41 of the Highways Act in the case of **Rollinson v Dudley MBC**: the High Court judgment provides interesting reading for its last paragraph alone in which the trial judge had his knuckles well and truly rapped: "The Judge published three articles about this case in the July, August and September 2015 editions of the New Law Journal entitled "Mind the Slips and Trips (Pt 1-3)". In my view, it is inappropriate for a

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judge to publish articles in relation to his or her own judgments whilst they are under appeal."

James Plant comments upon the recent Privy Council decision in **Williams v Bermuda Hospitals Board** concerning the forever vexing issue of the application of the 'but for' and 'material contribution' test in relation to medical causation.

Hannah Saxena reviews the principle of Ex-Turpi Causa with a review of recent case law, criminality in personal injury always provide interesting reading.

Finally Jake Rowley provides a summary of recent case law. It has been an unusually busy period for the Supreme Court in the field of personal injury.

On a side note, Chambers has produced an inaugural insurance newsletter. If anyone would like to receive a copy and be on the mailing list for future copies, please contact Sehrish Javid at Sehrish@farrarsbuilding.co.uk.

Knauer v MoJ (24th Feb 2016): It is time to recalculate your schedules of loss in fatal accident claims

By **Andrew Wille**

The Supreme Court has now confirmed what many had been arguing for years, namely that compensation under the Fatal Accidents Act 1976 should be calculated from the date of trial and not from the date of death.

In **Knauer (Widower and Administrator of the Estate of Sally Ann Knauer)** v Ministry of Justice [2016] UKSC 9 the Supreme Court refused to follow the House of Lords decisions in **Cookson v Knowles** [1979] AC 556 and **Graham v Dodds** [1983] 1 WLR 808 that had bound (indeed thoroughly tangled up) lower courts for decades.

This decision will require the amendment and recalculation of the schedules of loss in almost all ongoing fatal accident claims. Previously multipliers had to be calculated from the date of death even when the trial was not until several years later. This had the paradoxical effect of reducing claims for past loss by applying a discount for accelerated receipt, and reducing or even extinguishing claims for post-trial loss.

The longer the gap between death and trial, the more unfair the effect would become. To take an extreme example (where evidence has been concealed or, perhaps, case management has been decidedly lacking), if the trial takes place 20 years after the fatal accident, and the victim would otherwise have survived for 25 years had it not been for the tort, instead of a post-trial multiplier a little under 5, the dependent would in practice have recovered no post-trial loss at all.

Now such claims will be calculated in much the same way as a conventional personal injury claim, i.e. with multipliers being calculated from the date of trial. The effect will be to increase the quantum of most fatal accident schedules.

This was a one-sided leap frog appeal, where little resistance was mounted. As the Supreme Court asked itself: "If this is now so obvious, why did the House of Lords reach a difference conclusion? The short answer is that both cases were decided in a different era, when the calculation of damages for personal injury and death was nothing like as sophisticated as it now is."
In that era the courts discouraged the use of actuarial tables to calculate multipliers. Both leading counsel to the appeal concurred that when they had started at the Bar, the conventional approach to the calculation of a multiplier was to halve the victim's life expectancy and then add one. No formal discount rate entered into the thinking at that time.

In **Cookson** it was Lord Fraser who originally justified the adoption of the date of death as the relevant reference point in fatal accident claims. His reasoning was as follows: "In a personal injury case, if the injured person has survived until the date of trial, that is a known fact and the multiplier appropriate to the length of his future working life has to be ascertained as at the date of trial. But in a fatal accident case the multiplier must be selected once and for all as at the date of death, because everything that might have happened to the deceased after that date remains uncertain."

In other words the multiplier was a tool to take account of the vicissitudes of life, rather than a means of reducing future loss to account for accelerated receipt. In practice that particular vicissitude, the prospect of the deceased not having survived to trial in any event, can now conveniently be taken into account by discounting past loss by reference to the factors set out in Table E of the Explanatory Notes to the Ogden Tables (7th ed.), leaving the multiplier to fulfil its now primary role, namely as a tool for discounting post-trial loss to mitigate the effects of accelerated receipt (the discount rate).

The Supreme Court had "no hesitation" in concluding that it should depart from the established law:

> "At least in the current legal climate, the application of the reasoning in the two House of Lords decisions on the point at issue is illogical and their application also results in unfair outcomes. Further, this has encouraged "courts… to distinguish them on inadequate grounds" (to quote Lord Hoffmann in A v Hoare [2008] AC 844, para 25), which means that certainty and consistency are being undermined. Above all, the fact that there has been a material change in the relevant legal landscape since the earlier decisions, namely the decision in Wells v Wells and the adoption of the Ogden Tables, when taken with the other factors just mentioned, gives rise to an overwhelming case for changing the law."

In future practitioners will not need to wrestle with Section D of the Explanatory Notes to the Ogden Tables in deciding whether to draft the schedule in accordance with the "Current Approach" or the "Actuarially Recommended Approach" or the "Alternative Approach" or a combination. Now there is just one approach, and it is the correct one.

The Organic Matter: A review of the scope of S.41 of the Highways Act 1980 in light of Rollinson v Dudley MBC

By James Rozier

In the recent decision in **Rollinson v Dudley MBC** [2015] EWHC 3330 (QB) Dudley Metropolitan Borough Council appealed the first instance decision of HHJ Simon Brown QC in which he held that the Council owed a duty under s.41(1) of the Highways Act 1980 ("the Act") to remove moss which constituted a danger from pathways. The first appeal of that decision, discussed below, hence raised an important question as to whether local authorities are under a duty to keep the surfaces of roads, pavements and footpaths free from plant life such as moss, lichen and algae. In this article I will review a number of authorities which have either extended or defined the limits of the s.41 duty and consider how it can presently be defined in light of the decision in **Rollinson**.

Snow and Ice

It has been some time since there has been a notable attempt to extend the scope of the statutory duty imposed upon highways authorities by s.41 to keep the fabric of highways maintainable at public expense in repair. In **Goodes v East Sussex CC** [2000] 1 W.L.R. 1356 the then House of Lords gave mature consideration to the scope of s.41. The case centred on whether the duty to maintain included maintenance such as salting, gritting and the removal of accumulations of ice and snow in order to prevent the formation of ice. This was not a new issue, in **Haydon v Kent CC** [1978] Q.B. 343 the Court of Appeal had, by majority, held that the Highways Act 1959 'included removing snow and ice or taking such protective measures as would render highways and paths safe for vehicles and pedestrians in bad weather conditions'.

In **Goodes** their Lordships held that, whilst there was under s.41 an absolute statutory duty to ensure that the fabric of the road was in a good state of repair, that duty did not extend to preventing or removing snow accumulations in order to prohibit the formation of ice and, in doing so, referenced Lord Denning's dissenting judgment in **Haydon,** Lord Hoffman describing it as 'completely convincing'. However, as of October 2003, as a result of amendment by s.111 of the Railways and Transport Safety Act 2003, the absolute duty to maintain pursuant so s.41 was thereafter accompanied by a qualified duty under s.41(1A) 'to ensure, so far as is reasonably practicable, that safe passage along a highway is not endangered by snow or ice' (it is of note that, as per **Sandhar v Department of Transport, Environment & The Regions** [2004] EWHC 28 (QB), a number of cases were left without a viable cause of action, caught within the effective no-mans-land created between the decisions in Goodes and s.41(1A) coming into force).

Standing Water

In **Mott MacDonald Ltd v Department of Transport** [2006] EWCA Civ 1089 the Court of Appeal considered three consolidated cases, each brought under s.41, in which the claimants had been injured as a result of the presence of standing water on the surface of the highway which was as a consequence of, on the claimants' cases, the drains which served the relevant sections of highway having been blocked as a result of a failure in their maintenance.

Liability had been admitted in each case and the matters settled pre-action. The highway authority subsequently brought Part 20 proceedings against its maintenance contractors in order to recoup its outlay and the contractors denied liability on the basis that: they considered the authority's s.41 duty to have been limited to the surface of the highway; and, correspondingly, that it did not extend to the drains which serve it. At first instance the matter was determined as a preliminary issue by Judge Richard Seymour QC who, in dismissing the claims, held that it was: 'clear that the duties of a highway authority in respect of the roads for which it is responsible are confined to the repair and the keeping in repair of the surface of those roads' and that the duty did 'not extend to

dealing with obstructions which render the highway less commodious, but do not damage the surface'.

As with ice and snow in Goodes, highway drainage within the context of highways legislation had also been before the Court of Appeal previously. In **Burnside v Emerson** [1968] 1 W.L.R. 1490 the claimant had at first instance established liability on the basis of standing water having been found to be the result of a failure to maintain the highway's drainage system under the Highways (Miscellaneous Provisions) Act 1961. The Court of Appeal, with another a leading judgment by Lord Denning, had upheld that decision.

However, at first instance in **Mott Macdonald**, Seymour QC had accepted the argument advanced by the maintenance contractors that Burnside had been surpassed by a number of subsequent Court of Appeal and House of Lords authorities including Haydon and Goodes. The Court of Appeal formulated the issue as: 'Whether the highway authority would have been liable in law to the original claimants in their actions upon the following assumption… that the accidents were caused by a dangerous accumulation of water on the surface of the highway, caused by the longstanding blockage of the highway drainage system by silt, debris or vegetation'. In dismissing the contactors' appeals in his leading Judgment, Carnwath L.J. (noting Lord Denning's dissenting judgment in Haydon) held that 'the cases relied on by the Part 20 defendants, properly understood, [do] not support the proposition that the duty is confined to the traffic surface of the road. Burnside's case […] is not inconsistent with those authorities, and we remain bound by it'.

Gravel and Loose Debris

In **Valentine v Transport for London** [2010] EWCA Civ 1358 the Court of Appeal considered a claim which had been brought by the widow of a motorcyclist who had skidded on loose gravel which had accumulated on the surface of the highway, been thrown from his motorcycle and suffered injuries from which he subsequently died. The claimant had brought actions against both: Transport for London, on the basis that it had breached its s.41 duty in allowing the gravel to accumulate; and the London Borough of Hounslow, under common law negligence, on the basis

that it was 'the agent of TfL and as such charged with the responsibility for "maintaining, inspecting and cleaning" the road'. At first instance, before, Judge Knight QC, the claimant's claims against both defendants had been struck out. It was held that the highway authority's s.41 duty did not extend to the removal of materials lying on its surface, obstructions or spillages, whether or not they presented a danger.

In upholding the first instance decision, the Court of Appeal applied the decision in **Goodes**. At 13 of his Judgment Hughes L.J. noted the addition of s.41(1A) to the Act in 2003, subsequent to the **Goodes** decision and stated:

> '[…] this court is bound by Goodes to hold that the removal of surface-lying material is not required by s.41. That the surface-lying material in Goodes was snow and ice, and that therefore there were references in the speeches in the House of Lords to the particular difficulties presented by such emanations of weather conditions, does not mean that the rule is confined to snow and ice, and it is plain from the decision that it is not. There is no doubt some force in the argument that blockage of drains by debris is in some respects not unlike a surface danger caused by an accumulation of debris, but that is simply an example of the inevitable difficulties which will arise at the margins of any legal rule. If the duty to maintain applied to the removal of grit on the road, it would also have to apply to oil spillage, landslip, mud, trees etc, and to rural footpaths as to motorways'.

At 14 of the Judgment he continued:

> 'There may be a policy case for saying that history should not prevail in changed modern conditions and thus for altering the duty to maintain to a qualified, rather than an absolute one, and then extending it to surface material. That, however, is the kind of reorganisation of the structure of highways provision in this country which has to be a matter for Parliament and not for the courts'.

Concrete - Spillages Which Adhere to the Highway Surface

In **Thomas v Warwickshire CC** [2011] EWHC 772 (QB) the Queens Bench Division District Registry (Birmingham) considered whether a concrete spillage which had hardened and, as a result, become part of the surface or fabric of the road's surface, had caused the highway to fall into disrepair pursuant to s.41. On 4 April 2006 the claimant had been riding his bicycle and fallen as a result of hitting a spillage of concrete between 20 and 24mm high which had adhered to the road. The highway authority's inspector had carried out a scheduled inspection of the road in December 2005 but had recorded no defect. I note that the inspector's evidence included that such a spill's position within the highway may have been taken into account, given that it was within the centre of the lane and not within the usual wheel tracks for four wheeled vehicles, a rather dangerous assertion given the case's context.

The defendant argued that such concrete spills should be considered in the same category as oil or mud and the fact that it had solidified with a mechanical bond to the highway's surface did not alter that position. Mr Justice Wilkie, in finding for the Claimant, stated:

> 'In my judgment there is a difference in kind between, on the one hand, concrete which has hardened and bonded permanently to the surface of the road, unless and until removed by the action of a road mending gang, and, on the other, contamination of the road surface by surface lying contaminants such as ice, or oil, or mud or snow. In the former case the concrete has become part of the fabric of the road whereas in the latter it is merely lying on top of the surface of the road. The fact that the accretion to the fabric of the road surface was accidental rather than deliberate is irrelevant. The fact that, in the absence of specific intervention by a road mending gang, the change in the fabric caused by the bonding of the concrete to the previous road surface will be permanent, or at least long lasting, is, in my judgment, sufficient to bring it within s.41'.

Dense Vegetation

In **Hereford and Worcester County Council v Newman** [1975] 1 W.L.R. 901 the Claimant relied on three rural footpaths having been "out of repair" pursuant to s.44 of the Highways Act 1959. One path had become obstructed due to a barbed wire fence and the remaining two had become obstructed and, on the Claimant's case, rendered "out of repair", due to what was described as 'dense vegetation growing on their surfaces […]'.

In Lord Justice Cairns stated:

> "I consider that a highway can only be said to be out of repair if the surface of it is defective or disturbed in some way […] the two other paths have a substantial growth of vegetation [on] them. That vegetation no doubt constitutes an obstruction but it must also interfere with the surface of the paths […]I understand that a hawthorn hedge in one case and thick undergrowth in the other is actually rooted in the surface of the paths. With some hesitation I am of the opinion that this did cause the paths to be out of repair […]'.

Rollinson V Dudley MBC [2015] EWHC 3330 (QB)

As set out above, snow, ice and standing water (resulting from deficiencies in a highway's drainage per se or the maintenance thereof) have remained legally distinct from other types of matter on the highway's surface. The addition of s.41(1A) has, in and of itself, simply due to its specific reference to snow and ice, prohibited further expansion of the s.41 duty to include other material on the highway's surface on the basis of the argument that, should Parliament have wished to have broadened the s.41 definition further, it would have done so by further amendment.

Claims based on plant life having caused a section of the highway to have fallen out of repair are not new or uncommon. Defects caused to the surface of highways by tree roots are commonplace, however, very often the disturbance they create would be considered an actionable defect in any event, irrespective of its cause.

On 26th November 2012 Mr Rollinson left his property 42 Lormond Road Dudley, which was one of four bungalows which had been specially adapted for the elderly and infirm, and proceeded down a bitumen footpath. Mr Rollinson suffered from a back condition which, amongst other health problems, had resulted in him being registered as disabled. Adjacent to his property were a number of footpaths upon which not only residents but also members of the public could lawfully pass. As he proceeded along the footpath he slipped on a patch of moss and fell. Mr Rollinson brought a claim for personal injury against Dudley Metropolitan Borough Council on the basis that they had breached their s.41 duty in failing to keep the footpath free from moss and algae. The case was heard by HHJ Simon Brown QC and, by his Judgment dated 21 May 2015, he held that the Council was liable.

In his judgment, HHJ Brown QC cited **Thomas v Warwickshire** (above) and stated (sic):
'In my judgment, where there is moss, a green plant with roots, albeit not true roots as in other plants […] It puts down roots into the surface beneath it and adheres to it; it thus becomes part of the surface. Therefore, it became part of this particular roadway. It is in that category which has bonded with the road that Wilkie J was referring to [in Thomas]. Therefore s.421 is engaged and the highway is to be maintained to keep the surface in repair'.

The Council appealed to the High Court on three grounds: firstly, that s.41 did not extend to removing moss and algae from the highway; secondly, that there was no evidence in the case that the material moss had actually rooted itself to the surface of the highway; and, thirdly, that the Judge had illegitimately used his own personal knowledge in respect of moss to reach his conclusion.

The appeal was heard by Mr Justice Haddon-Cave on 17 November 2015. The Council's first determinative ground of appeal was upheld. Mr Justice Haddon-Cave considered authorities including Goodes, Newnam and Valentine, and found that HHJ Brown QC had erred in four ways:

> 'First, he was wrong to find that because moss "puts down roots" it therefore "becomes part of the surface" or roadway;
> Second, he was wrong to find that there was any relevant comparison between concrete bonded to the highway and moss;
> Third, he was wrong to assume there was anything permanent about moss;
> Fourth, he was wrong to regard the fact that the Council had take[n] steps to remove moss was relevant to the question of statutory construction'.

However, thereafter, Mr Justice Haddon-Cave went further and, echoing the reasoning in Lord Denning's dissenting judgment in Haydon as echoed and endorsed in Goodes, stated:

> 'Further, in my judgment, the Judge's conclusion that the scope of a highway authority's absolute duty under s.41 extended to the removal of "moss" is with respect absurd. The Judge failed to give any consideration to the question whether the imposition of a duty to prevent or remove moss from every highway and byway of the United Kingdom was something which Parliament could sensibly have had in mind. It rationally could not. The absolute nature of the s.41(1) duty plainly militates against such any conclusion. The performance of such a duty would be impossible. As Mr McCracken points out, moss is ubiquitous in this country. The Judge's decision, if allowed to stand, would lead to the absurd situation whereby a highway authority would be obliged to consider removing or preventing the propagation of every patch of moss or algae on every road, pavement and pathway in the country in order to avoid being in breach of its duty to "repair". This would not be practical or sensible, let alone affordable'.

The situations in **Newman** and **Rollinson** can clearly be distinguished. At the very heart of the decision in **Newman** was dense vegetation which had grown roots that interfered with the very fabric of a path's surface. Further, **Thomas v Warwickshire** and **Rollinson** can also be clearly distinguished because concrete spillages are not "ubiquitous" to "every highway and byway" and, therefore, are not potentially subject to economic policy decisions.

The High Court's decision in **Rollinson** is, of course, only binding on the County Courts and, at the time of writing, there has been no mention of a further appeal to the Court of Appeal. Given the contents of Mr Justice Haddon-Cave's Judgment perhaps we should not hold our breath.

Rollinson will allow those advising potential claimants to advise that claims under s.41 on similar facts will not succeed. In respect of those defending such claims, especially in the post April 2013 environment with Qualified One-Way Costs Shifting operating, **Rollinson** could potentially assist in achieving the strike out of such claims brought under s.41 with the associated costs consequences. Beyond that I consider that **Rollinson** also serves to underline the limited opportunity for Claimants to broaden the present the scope of s.41.

'But For', 'Material Contribution' and successive events- not as complicated as it may appear?

By James Plant

I am presently acting for a claimant who is suing his former employer. He suffered severe damage to the tendons of the ring and little fingers of his hand in an accident at work. He then received allegedly negligent hand surgery and faces amputation of his little finger. He made a separate claim against the relevant hospital (instructing separate solicitors) that was settled for a sum somewhat short of the full value of his total damages and losses. The upcoming liability trial in the claim against his employer primarily turns on issues of fact surrounding the accident itself. However the defendant also argues that the allegedly negligent hospital treatment constitutes a novus actus interveniens i.e. it breaks the chain of causation. We rely, inter alia, on **Webb v Barclays Bank plc and Portsmouth Hospitals NHS Trust** [2001] EWCA Civ 1141 where the Court of Appeal held that only conduct amounting to gross negligence is sufficient to break the chain of causation.

It is against that background (and with one eye on my skeleton argument!) that my ear is planted firmly to the ground in respect of all matters causation. I therefore read with interest the Judicial Committee of the Privy Council's judgment in **Williams v Bermuda Hospitals Board** [2016] UKPC 4 (a Bermudan case in which the NHSLA were minded to intervene).

This judgment from a strongly constituted Privy Council is persuasive rather than binding but should be of interest to all PI practitioners and is essential reading for anyone handling Clinical Negligence matters.

Facts

At 11:17 on 30.05.11 Mr Williams attended hospital with abdominal pain. He was examined at 11:40, a CT scan was ordered at 13:10 and performed at 17:27. The CT scan report was considered by the relevant doctor at 19:30. She recommended surgery for suspected acute appendicitis. Mr Williams was taken to the operating theatre at around 21:30. Mr Williams suffered injury to his heart and lungs as a result of sepsis caused by rupture of the appendix. That sepsis had developed incrementally over a period of approximately six hours, progressively causing myocardial ischaemia. Mr Williams alleged that proper treatment was negligently delayed and that this caused the sepsis.

At first instance Hellman J held that there had been negligence in the form of culpable delay but that it was not proven that the culpable delay caused the complications. He found that had the CT scan been obtained and interpreted promptly, the complications might have been avoided, but he was not satisfied that they probably would have been avoided. He therefore awarded Mr Williams $2,000 in damages for his extra suffering during the period of culpable delay prior to the operation.

The Court of Appeal of Bermuda reversed the judge's decision stating that the question was not whether the negligent delay caused the injury to Mr Williams but rather whether it contributed materially to the injury. The matter was remitted back to Hellman J who increased the award to $60,000.

The hospital board appealed to the Privy Council.

Arguments

The case was argued before the Privy Council on the following bases:

The appellant hospital board
The judge at first instance applied trite law on causation;

The Court of Appeal, perhaps induced by Bailey v MOD [2008] Civ 883, misinterpreted the concept of "material contribution";

The House of Lords case of **Bonnington Castings Ltd v Wardlaw** [1956] AC 613 (see summary below) was only authority for a claimant recovering damages where: there was a single causative agent and the defendant contributed to that process in a material (i.e. not insignificant) way; the defendant's contribution was concurrent with a non-negligent cause and the defendants contribution increased the magnitude (not merely the risk) of harm;

The Court of Appeal wrongly substituted its own findings of fact (noting delays between arrival and admission as well as between admission and examination not advanced at first instance);
The Court of Appeal did not identify when surgery should have begun.

<u>The respondent Mr Williams</u>

Although the Court of Appeal did not specify when surgery ought to have begun it concluded that, on the facts found at first instance, the time was too long. It was entitled to do so;
Surgery ought to have commenced by 17:15 or at the very latest by 18:10. In the above instances the sepsis would have been developing for approximately 2 or 3 hours (the rupture having begun at 15:19). As the surgery started at 21:30 the sepsis had been developing for over 6 hours. On these facts the Court of Appeal were entitled to take a "robust approach" to causation and infer that the extended development of sepsis materially contributed to the injury;

The principle in **Bonnington** was manifestly broader than the interpretation sought by the appellant: where there is a probability that there are multiple causes it is sufficient that the defendant's negligence contributed to the claimant's injury. It does not apply where there are several possible causes any of which may have been entirely responsible;

The Court of Appeal had strong grounds to find that the injury was caused by the sepsis worsening over several hours and that was caused, in part, by the negligent delay.

Decision

The judgment sets out a helpful summary of both the relevant facts and the decision in **Bonnington**.

The claimant contracted pneumoconiosis from the inhalation of silica dust. Most originated from the use of pneumatic hammers (which involved no breach on the part of the defendant) but some came from the use of swing grinders (which was a breach of statutory duty). The Inner House held that the burden fell on the defendant to disprove that the dust from the swing grinders contributed to the disease. Lord President Clyde dissented holding that the burden fell on the claimant to prove that the inhalation of dust from the swing grinders made a material contribution to the development of pneumoconiosis but also held that the available evidence pointed to the pneumatic hammers (i.e. the 'innocent' dust).

The House of Lords agreed with the first of those findings but not the second. The evidence (as before the court at the material time) was that the whole of the dust caused the disease and it could not be attributed to one source or another. There was no suggestion that the disease was divisible (i.e. in this context that the severity of the disease depended on the quantity of the dust). It could be inferred that the 'guilty' dust was a partial cause of the entire injury. It has, latterly, become the accepted view that pneumoconiosis is divisible – the severity does depend on the amount of dust inhaled.

The Privy Council rejected the appellant's submission that **Bonnington** was distinguishable – the parallel is "obvious".

The court cited (by way of comparison) a further House of Lords case – **Hotson v East Berkshire Health Authority** [1987] AC 750. In that case the claimant teenage boy fell from a tree fracturing the head of his femur (which was not properly diagnosed or treated). He developed avascular necrosis leaving him permanently disabled. The avascular necrosis was caused either by

irreparable damage sustained in the fall or by pressure in the joint from bruising or bleeding (there could not be a combination of factors). The trial judge found that the former was more likely on the balance of probabilities. The House of Lords observed that the judge's findings of fact were, essentially, that the fall caused the avascular necrosis. In **Hotson** Lord Bridge noted that if the claimant proved that the negligent treatment materially contributed to the development of avascular necrosis he knew of "no principle of English law which would have entitled the authority to a discount from the full measure of damage to reflect the chance that, even given prompt treatment, avascular necrosis might well still have developed".

Further the Privy Council also cited **McGhee v National Coal Board** [1973] 1 WLR 1, 8 and noted Lord Simon of Glaisdale referring to both **Bonnington** and **Nicholson v Atlas Steel Foundry and Engineering Co Ltd** [1957] 1 WLR 613 who stated that where an injury is caused by two or more cumulative factors and one (or more) is a breach of duty it is "immaterial whether the cumulative factors operate concurrently or successively".

These observations rather holed below the water line the appellant's submission that the ratio of **Bonnington** is confined to cases where contributory causes are simultaneous.

The Privy Council spelled out that "successive events are capable of each making a material contribution to the subsequent outcome" whereas where "the most that can be said is that the claimant's injury is likely to have been caused by one or more of a number of disparate factors, one of which was attributable to a wrongful act or omission of the defendant" the claim will fail per **Wilsher v Essex Area Health Authority** [1988] AC 1074.

Applying the above to the instant case the Privy Council stated that the judge found that the injury was caused by sepsis that developed incrementally and progressively caused myocardial ischaemia. It continued for at least 2 hours and 20 minutes longer than it should have done. Therefore it is correct to infer that, on the balance of probabilities, the hospital board's negligence materially contributed to the injury.

Obiter Comment

The Privy Council made two obiter observations.

Bailey v MOD

The appellant had criticised the reasoning of the Court of Appeal in Bailey v MOD [2008] Civ 883 in the course of submissions. In Bailey the claimant required an operation to remove a gallstone and she underwent an endoscopic procedure called an ERCP. Her treatment after this was negligent leading to extra major procedures which weakened her. She also developed (non-negligently) pancreatitis. She vomited and aspirated the vomit leading to a cardiac arrest and hypoxic brain damage.

The trial judge found that the claimant's weakened state meant that she could not respond to her vomiting and she aspirated it. Her weakened state was caused by both the pancreatitis and as a result of the (negligently caused) procedures.

The Privy Council observed that, on the above findings, the trial judge was right to hold the defendant liable. It disagreed with the Court of Appeal however that the judge had departed from the "but for" test – her vulnerability being heightened by the pancreatitis was akin to an eggshell skull.

The "doubling of risk" test

The Privy Council addressed this briefly saying it would "counsel caution in its use". This view was reinforced by the observation that while it might at times be helpful to weigh in the balance "inferring causation from proof of heightened risk is never an exercise to apply mechanistically. A doubled tiny risk will still be very small".

Conclusion

A quick review of blogs, articles and newsletters confirms that claimant lawyers are heralding **Williams** as helpful clarification while defendant lawyers are lamenting a missed opportunity to provide definitive guidance.

Without wanting to sit on the fence I would suggest that both have a point. Clearly this is a setback for those that hoped that the Privy Council would undermine the Court of Appeal's reasoning in **Bailey**. It received trenchant criticism (not least by Professor Sarah Green in Causation in Negligence, Hart 2014 at page 109 where she called it "confused, confusing, and ultimately unhelpful").

While the Privy Council has perhaps sidestepped critical analysis it is not without significance that "but for" causation was met in Bailey without the need to consider material contribution.

It remains to be seen whether the assurance that five Supreme Court Justices believe that things are rather more simple than have been hitherto made out will have any effect on the way cases are run.

Illegality and PI claims

By Hannah Saxena

Over the past few years there have been a number of reported personal injury claims made by Claimants who have been injured in the course of allegedly criminal behaviour. In December 2015 the Court of Appeal revisited this issue in **Smith v Stratton & Anor** [2015] EWCA Civ 1413. This article provides a recap of the scope of the maxim ex turpi causa non oritur actio and looks at the recent cases that have been determined on the issue.

Background

The principle of ex turpi causa is a long established one and a much quoted and helpful articulation of the principle was given by Lord Mansfield CJ in **Holman v Johnson** (1775) 1 Cowp. 341 at 343:

> "No court will lend its aid to a man who founds his cause of action on an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says that he has no right to be assisted."

In **Joyce v O'Brien & Another** [2013] EWCA Civ 546 Lord Justice Elias considered the principles that had been developed in both English and Australian authorities on ex turpi causa at length and gave guidance on how it should apply to cases where there has been joint criminal enterprise. He set down the following principle at §29:

> "where the character of the joint criminal enterprise is such that it is foreseeable that a party or parties may be subject to unusual or increased risks of harm as a consequence of the activities of the parties in pursuance of their criminal objectives, and the risk materialises, the injury can properly be said to be caused by the criminal act of the claimant even if it results from the negligent or intentional act of another party to the illegal enterprise."

In that case the claimant had fallen out of the back of a van which was making a speedy getaway after ladders had been stolen by the claimant and his uncle. The claim was dismissed at first instance on the basis that no duty of care arose in the circumstances as no standard of care could be adduced. Lord Justice Elias applied his principle and found that the injury was caused by the criminal conduct of the claimant. He rejected submissions that the reckless driving of the claimant's uncle fell outside the joint enterprise and commented that the accident was precisely the kind of accident which might have been foreseen even if there had not been reckless driving.

Lord Justice Elias accepted that the doctrine was one of public policy and there should be some flexibility in its operation, commenting that it would not apply to minor traffic offences. However, he held that in this case the offence was serious and the doctrine would apply. Therefore the claimant's appeal was dismissed.

Recent Cases

Beaumont & Another v Ferrer [2014] EWHC 2398

The claimants, B and O, were teenagers who had booked F, a taxi driver, to take them to Manchester City Centre in his taxi along with four of their friends. The group had planned to jump out of the taxi without paying when they got close to their destination but the claimants were in the rear seats of the people carrier and were unable to jump out easily like most of the group. F started to drive off when B and O were still in the taxi and then B and O re-opened the door and jumped from the taxi whilst it was still moving sustaining serious injuries.

It was held by Mr Justice Parker that F did nothing to put B or O in the position where they were poised to exit the taxi and he did nothing to lead to their decisions to leave the moving taxi. It was found that even if F should have allowed B and O to leave the taxi successfully, that failure followed from the criminal intentions of the youths and any fault was overwhelmed by those intentions. Even if there was a breach of duty that breach did not cause the injuries and that the claimants broke the causal connection.

Considering ex turpi causa Mr Justice Parker found that its application "in this case tends strongly to promote the public policy that underpins the doctrine" - §37 and that the claimants should be precluded by public policy from succeeding in their claims.

Les Laboratoires Servier & Another v Apotex Inc & Others [2014] UKSC 55, [2014] 3 WLR 1257

This case involved a patent dispute where a defence of ex turpi causa was raised. Although the facts are not pertinent Lord Sumption's judgment provides a framework for such defences.

It was held that ex turpi causa was a rule of law and not a mere discretionary power and the Court of Appeal's application of a discretionary approach was contrary to established legal principle.

He went on to comment at §22 that the "principle commonly raises three questions: (i) what acts constitute turpitude for the purpose of the defence? (ii) what relationship must the turpitude have to the claim? (iii) on what principles should the turpitude of an agent be attributed to his principal, especially when the principal is a corporation?".

In relation to what acts constitute turpitude it was commented at §25 that the defence:

"…was concerned with claims founded on acts which are contrary to the public law of the state and engage the public interest. The paradigm case is, as I have said, a criminal act. In addition, it is concerned with a limited category of acts which, while not necessarily criminal, can conveniently be described as "quasi-criminal" because they engage the public interest in the same way".

McCracken v Smith & Others [2015] EWCA Civ 380

M was a passenger on a trials bike that had been stolen and was being ridden by S very fast. S was riding the bike without a licence or insurance, the bike was not meant to have a pillion passenger, it was not legal to ride on the roads and neither M or S had helmets on. The bike was ridden along a cycle track and as it went to cross an entrance to a community centre collided with a minibus which was turning into the entrance.

At first instance it was held that M was just going for a ride and had not encouraged S to ride the way he had. The Court of Appeal overturned this finding of fact and found that he knew that the ride would entail the kind of dangerous riding that took place on that occasion and M and S were parties to a joint enterprise that the bike was to be ridden dangerously.

The Court of Appeal applied **Les Laboratoires Servier** and found that M's conduct did constitute turpitude. It was further found that, applying the principle set out in **Joyce v O'Brien**, M's injury could be said to have been caused by his own criminal conduct and therefore the judge at first instance was wrong to reject the ex turpi causa defence in relation to the claim against S and the MIB.

In respect of M's claim against the minibus driver, B, it was held that the dangerous driving of the bike had no effect on B's duty or the standard of care expected of him. The accident had two causes the dangerous driving of the bike and the negligent driving of the minibus. Therefore the defence of ex turpi causa would not succeed in the claim against B. M's claim was reduced for contributory negligence and the Court of Appeal increased this from 45% to 65% which accounted for 50% plus 15% for failure to wear a helmet.

Smith v Stratton & Another [2015] EWCA Civ 1413

S, who was 20 at the date of the accident, was a rear seat passenger of a Vauxhall Astra that was driven by the first defendant into a parked car causing S to sustain a severe brain injury. It was alleged that the occupants of the Astra were in a joint enterprise of dealing cannabis from the car and made off in the car when spotted by the Police which led directly to the collision.

The MIB argued that the claim should fail on the basis of ex turpi causa and/or an exception provided at clause 6.1(e)(iii) of the Motor Insurers' Bureau (Compensation of Victims of Uninsured Drivers) Agreement 1999 which provides that:

> "Clause 5 does not apply in the case of an application made in respect of a claim of any of the following descriptions…
> (e) a claim which is made in respect of a relevant liability described in paragraph (2) by a claimant who, at the time of the use giving rise to the relevant liability was voluntarily allowing himself to be carried in the vehicle and, either before the commencement of his journey in the vehicle or after such commencement if he could reasonably be expected to have alighted from it, knew or ought to have known that…
> (iii) the vehicle was being used in the course or furtherance of a crime, or
> (iv) the vehicle was being used as a means of escape from, or avoidance of, lawful apprehension."

It was not admitted that S was part of a joint criminal enterprise and there was no direct evidence of this. The trial judge found that the MIB had proved that S was involved in joint criminal enterprise on the basis of the cumulative effect of the following factors:

All four occupants of the car had convictions for drug offences, although no drug related prosecutions arose from the accident in questions.

Two small bags of cannabis were found immediately outside the Astra and in the rear passenger foot well.

All four occupants were unemployed but they had a total cash of £355 on them.

The first defendant had driven off at speed when a Police car was seen.

When a solicitor for the MIB interviewed the first defendant in prison he told him a number of things that he was not prepared to put in writing including that all of the occupants were dropping off drugs and that he had just done a deal.

S had not given evidence and no account was given to contradict what was alleged by the MIB.

The trial judge concluded that the use of the car was integral to the supply of drugs as it facilities the sale of drugs and provides a rapid means of escape. He found that it was foreseeable that if a Police car was seen then an effort will be made to lose that car that was likely to involve making off at speed which carries an increased risk of injury. Applying the principle in Joyce v O'Brien it was found that the injury was caused by the criminal act rather than incidental to it. The MIB's defence was established and the claim failed.

Lord Justice Laws accepted that the judge's factual conclusion was not only open to him but was the conclusion he would have reached himself.

The Court of Appeal upheld the first instance decision completely and found that the maxim of ex turpi causa was correctly applied and that the claim was correctly dismissed. The exception provided at clause 6.1(e)(iii) was also found to have been correctly applied.

Summary

If you are involved in a claim where there are allegations that the claimant has been involved in a criminal or immoral activity then you should be asking the following questions:
Would the activity constitute turpitude?

Is there enough evidence to establish on the balance of probabilities that the claimant was involved in such activity?

Was it foreseeable that the claimant was subject to unusual or increased risks of harm as a result of their participation in the activity?

Did that risk materialise?

If the answer to these questions is yes then it is likely that a defence of ex turpi causa would be established in a claim against another party to the criminal or immoral activity. It then needs to be considered whether the claimant has a claim against anyone else who was not a party to the activity, for example another road user.

By way of example if in **Smith** the Astra had collided with a car that had turned across its path negligently instead of a parked car the claimant might have been able to bring a claim against that driver subject to a deduction for contributory negligence, as was the case in **McCracken**.

CASE LAW UPDATE

By Jake Rowley

KNAUER (WIDOWER & ADMINISTRATROR OF THE ESTATE OF SALLY ANN KNAUER, DECEASED) v MINISTRY OF JUSTICE (2016)

[2016] UKSC 9

(Lord Neuberger PSC, Lady Hale DPSC, Lord Mance JSC, Lord Clarke JSC, Lord Reed JSC, Lord Toulson JSC, Lord Hodge JSC)

Significance: In claims brought pursuant to the Fatal Accidents Act 1976 the correct date as at which to assess the multiplier for future loss was the date of trial, not the date of death. It was right to invoke the Practice Statement (HL: Judicial Precedent) [1966] 1 W.L.R. 1234 in order to depart from the previously established methodology of fixing the multiplier as at the date of death, as had been the approach set out in the House of Lords' cases of Cookson v Knowles [1979] A.C. 556 and Graham v Dodds [1983] 1 W.L.R. 808.

Facts: A widower, whose wife had died from mesothelioma aged 46, appealed against a decision as to the damages he had been awarded for future loss of income and services as a result of his wife's death. The Judge had held that the multiplier was to be calculated from the date of her death rather than the date of trial.

Held: Calculating damages for loss of dependency from the date of death, rather than the date of trial, meant the Claimant suffered a discount for early receipt of the money when it would not in fact be received until after the trial; in most cases that resulted in under-compensation. The Law Commission had recommended that multipliers should be used from the date of trial. Cookson and Graham had been decided in a different era when the calculation of damages for personal injury was not as sophisticated as it now is; they had been decided when the Ogden Tables had not

existed. Wells v Wells [1999] 1 A.C. 345 had laid to rest any doubt about using the Tables in Court. The Ogden Tables included fatal accident calculations, although they could not yet be used.

The Court had no hesitation in invoking the Practice Statement; the application of the principle in Cookson and Graham was illogical and produced unfairness. That had encouraged the courts to distinguish them on unfair grounds meaning that certainty and consistency were being undermined. The change in the law brought about by Wells in conjunction with the other factors gave rise for an overwhelming case for a change in the law. The Act provided for overcompensation in some cases but that was legislative choice, not judicial decision. The instant Claimant should not be deprived of the compensation to which he would be entitled on ordinary principles because some other Claimants would receive more as a result of understandable legislative choices. The law on this issue had been made by Judges therefore it was appropriate it be corrected by Judges. The Court declined to follow Cookson and Graham; the correct date for fixing multipliers for future losses was the date of trial.

(1) BROADHURST (2) TAYLOR v (1) TAN (2) SMITH (2016)
[2016] EWCA Civ 94
(Lord Dyson MR, McCombe LJ, David Richards LJ)

Significance: In personal injury cases to which CPR Part 45 s.IIIA costs applied, where a Claimant obtained judgment more advantageous than his own Part 36 offer, he was entitled to fixed costs up to the date of the expiry of the offer and thereafter to costs assessed on the indemnity basis under CPR r.36.14.

Facts: Two Claimants brought actions in different courts for low value personal injury claims. Both Claimants succeeded with their claims and in doing so obtained judgment more advantageous than their own respective Part 36 offers. The appeals concerned the costs arising from their claims.

In both cases, the trial judge held that CPR r.36.14(3) applied. In the first appellant's case, HHJ Robinson sitting in Sheffield indicated that there was no difference between profit costs assessed on the indemnity basis and the fixed costs prescribed by CPR Part 45. However, in the second case, HHJ Freedman sitting in Newcastle-Upon-Tyne agreed that r.36.14(3) applied, but held that indemnity costs should not be equated with fixed costs.

The claimants argued that fixed costs and assessed costs were conceptually distinct. There was, they said, a tension between r. 45.29B and r. 36.14A because the former said that the only costs to be awarded in s.IIIA cases were fixed costs, whereas the latter said that in such cases r.36.14 would apply subject to the modifications stated in r.36.14A. As none of the modifications in r. 36.14A affected r. 36.14(3) it was argued that Claimants who successfully beat their own Part 36 offer were entitled to costs on the indemnity basis.

Held: r. 45.29B did not stand alone and the need to take account of Part 36 offers in s. IIIA cases had been taken into consideration by the draftsmen.

The effect of r.36.14 and r.36.14A when read together was that where a Claimant made a successful Part 36 offer, he was entitled to costs assessed on the indemnity basis. As r.36.14(3) had not been modified by r.36.14A, it continued to have full force and effect. The tension between r.45.29B and r.36.14A therefore had to be resolved in favour of r.36.14A.

Fixed costs and assessed costs were conceptually different. Fixed costs were awarded whether or not they were incurred, and whether or not they represented reasonable or proportionate compensation for the effort expended. Assessed costs, on the other hand, reflected the work actually done.

Where a claimant made a successful Part 36 offer in a s.IIIA case, he would be awarded fixed costs to the last staging point provided by r.45.29C and Table 6B. He would then be awarded costs to be assessed on the indemnity basis from the date when the offer became effective. The fact that

this would lead to a generous outcome for the claimant was not so surprising or so unfair to the Defendant that it required the court to equate fixed costs with indemnity costs.

CARL HENEGHAN (SON & EXECUTOR OF JAMES LEO HENEGHAN, DECEASED) v MANCHESTER DRY DOCKS LTD & 5 ORS (2016)

[2016] EWCA Civ 86

(Lord Dyson MR, Tomlinson LJ, Sales LJ)

Significance: The causation test set out in Fairchild v Glenhaven Funeral Services Ltd [2002] UKHL 22 applied where a Claimant had contracted lung cancer after being exposed to asbestos by successive employers. As with mesothelioma cases, it was not possible to establish which if any of the exposures caused the disease. It was therefore appropriate to apportion liability on the basis that each employer had materially increased the risk of harm.

Facts: During the Claimant's deceased father's working life he had been exposed to asbestos fibres and dust. Each of the six respondents had employed him successively however prior to such employment he had been employed by others, during which employment he had also been exposed to asbestos. On balance, the experts concluded that he would not have developed lung cancer had it not been for the asbestos exposure. The respondents were responsible for 32.5% of his total exposure. At first instance, the Judge awarded damages against each respondent in proportion to the increase in risk for which it was responsible, applying the Fairchild principle. On that basis, the appellant was awarded £61,600, rather than the full damages of £175,000.

The Claimant argued that the Fairchild principle should not be applied, and the Judge should have held that each respondent materially contributed to the cancer and was therefore liable in full.

Held: To apply the Wardlaw [1956] A.C. 613 test in the instant case would be to ignore the fact that there was a fundamental difference between making a material contribution to an injury and materially increasing the risk of injury. The Wardlaw test applied in cases where the court was

satisfied on scientific evidence that the exposure for which the Defendant was responsible had contributed to the injury. That was readily demonstrated in the case of divisible injuries, the severity of which was proportionate to the amount of exposure. Where the scientific evidence did not permit a finding that the exposure attributable to a particular Defendant contributed to the injury, the law's response was to apply the Fairchild exception.

The factors in Fairchild which needed to be satisfied before the exception could be applied were satisfied in the instant case (all respondents conceded a breach of duty; all had increased the risk of contracting lung cancer; all had exposed the deceased to the same agency that was implicated in causation; medical science could not determine to which respondent there should be attributed the exposure which caused the cell changed initiating the cancer). The Judge had been right to apply the Fairchild exception and the appeal was dismissed.

THEVARAJAH v RIORDAN & ORS (2015)

[2015] UKSC 78

(Lord Neuberger PSC, Lord Mance JSC, Lord Clarke JSC, Lord Sumption JSC, Lord Hodge JSC)

Significance: CPR r. 3.1(7) applies to a second application for relief from sanctions and the Court has to be satisfied there is a "material change in circumstances" before considering the application on its merits. The fact the defaulting party subsequently complied with the unless order could not amount to a material change of circumstances for the purposes of a second application,

Facts: The appellants appealed against a refusal to grant them relief from sanctions in relation to breach of an unless order requiring them to provide disclosure of assets failing which they would be debarred from defending the claim made against them. The Judge dismissed their application for relief and the appellant made a second application for relief shortly before the trial was due to start which was accompanied by a lengthy affidavit providing full disclosure. The Deputy Judge hearing the second relief application discharged the debarring order. The Court of Appeal restored the debarring order holding that as the first application for relief had been refused, r. 3.1(7) applied

to a second application and therefore the Deputy Judge could not have acceded to the application without there having been a "material change of circumstances".

Held: Appeal dismissed. The Court of Appeal was right to hold that r. 3.1(7) applied to a second application for relief from sanctions requiring an applicant to show a material change in circumstances since the first application for relief. A material change had to be established before the application could be properly considered on its merits.

The compliance with the unless order after the debarring order had been made was not a material change of circumstances. The fact that a party belatedly complied with the order could not amount to a material change entitling him to make a second application for relief. That was not to say that late compliance would never be capable of giving rise to a successful second application, but in the instant case the subsequent compliance with the unless order was not accompanied with any explanation which could have justified a court concluding there had been a material change since the first hearing.

A M MOHAMUD v WM MORRISON SUPERMARKETS PLC (2016)

[2016] UKSC 11

(Lord Neuberger PSC, Lady Hale DPSC, Lord Dyson JSC, Lord Reed JSC, Lord Toulson JSC)

Significance: The Supreme Court considered the application of the "close connection" test as set out in Lister v Hesley Hall Ltd [2001] UKHL 22 in an employer's liability case, concluding that there was nothing wrong with that test and a change in vocabulary would not improve the law. Whether there was a "close connection" depended on what functions the employer had entrusted to the employee and that needed to be considered broadly.

Facts: A customer had attended a petrol station kiosk run by the Defendant and had made an enquiry of one of its members of staff ("S"). S's job was to serve staff and ensure petrol pumps were in good working order. S was verbally abusive to the customer and ordered him to leave the petrol station. S followed the customer onto the petrol station forecourt where he assaulted him.

The customer brought a claim against the Defendant on the basis they were vicariously liable for the acts of S.

At first instance the claim failed with the Judge finding there was not a sufficiently close connection between the assault and what S was employed to do. The Court of Appeal upheld that decision finding that although S's role included interaction with customers that was insufficient; his duties did not place him in situations where there was a clear possibility of confrontation.

The customer's family (the customer having died during the course of the litigation for unrelated reasons) appealed arguing there should be a test of "representative capacity" rather than "close connection".

Held: Appeal allowed.

The "close connection" test had been widely followed up to the highest level. The Court expressed the view that a simplification of the essence of what it was to be a "close connection" was more desirable than laying down criteria for the same. Two matters had to be considered: (a) what functions the employer had entrusted to the employee, which had to be addressed broadly; and (b) whether there was a sufficient connection between the employee's wrongful conduct and his position, to fix the employer with vicarious liability. There was nothing wrong with the "close connection" test and a change in vocabulary would not improve the law. The proposed "representative capacity" test was hopelessly vague.

In this case, it had been S's job to attend to customers and respond to their enquiries, his conduct in verbally abusing the customer and ordering him to leave were inexcusable but were within the scope of his employment. What happened thereafter was an unbroken sequence of events. In following the customer to the forecourt and demanding he leave, S was in fact ordering him to keep away from his employer's premises, which he reinforced with violence. In doing so he was purporting to act in furtherance of his employer's business. It was a gross abuse, but it was connected with his employment.

FARRAR'S BUILDING

Personal Injury Update March 2016

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