Butterworths Personal Injury Litigation Service

Bulletin Editor
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MOD RULING RESULTS IN PARTIAL LOSS OF IMMUNITY

Smith & Ors v Ministry of Defence [2013] UKSC 1

Supreme Court rules that the article 2 right to life applies to members of the armed forces serving overseas and declines to uphold combat immunity without a full hearing

(Lord Hope, Deputy President. Walker, Hale, Mance, Kerr, Wilson, Carnwath LLJ)

The facts: The claims arose out of three separate incidents spanning the initial Iraq conflict and its subsequent occupation. In the first, a Challenger tank fired on another by mistake in the dark during the initial combat operations. The other two claims featured military patrol vehicles, known as 'Snatch Land Rovers' that were hit by improvised explosive devices during what has become known as 'The Insurgency'. The Challenger claims are founded on common law negligence, on the basis that the Ministry of Defence failed to provide suitable identification and recognition equipment and that it failed to provide adequate pre-deployment training. All but one of the Snatch Land Rover claims were based on the contention that the Ministry of Defence had failed to take suitable measures to protect the lives of its servicemen, in circumstances where it ought reasonably to have done so, in the light of the real and immediate risk to life of soldiers required to undertake patrols in these lightly armoured vehicles, in breach of article 2 European Convention on Human Rights. One of these claims also included similar allegations founded in negligence. The MoD applied to strike out the claims. The Defence was based on a number of technical and public policy grounds including: (i) that the article 2 of the ECHR right to life did not apply to members of the armed forces serving abroad, (ii) that all the claims

were barred by combat immunity and (iii) that in all the circumstances it was neither fair, just nor reasonable for the MoD to owe a common law duty of care.

The decision: The Supreme Court was unanimous in ruling, for the first time, that the jurisdiction of the ECHR is capable of extending to cover a contracting state's treatment of its own armed forces serving abroad. This ruling is subject to the caveat that the article 2 right to life must take into account the relevant context of the complaint and it cannot impose an impossible or disproportionate burden on the contracting state.

However, the Supreme Court was divided on whether to strike out the claims on the basis of combat immunity or whether, given the operational circumstances, it was fair, just or reasonable to impose a duty of care on the MoD.

A majority took the view that all these matters were highly fact specific issues which could not be disposed of at a preliminary hearing without consideration of the evidence. Consequently, the Defendant's strike out application was dismissed.

Comment: It seems that much will turn on the chronology of events and when, precisely, each act of negligence or breach of duty is alleged to have occurred. Lord Hope put it this way: '*It will be easier to find that the duty of care has been breached where the failure can be attributed to decisions about training or equipment that were taken before deployment, when there was time to assess the risks to life that had to be planned for, than it will be where they are attributable to what was taking place in theatre*.' [99]. In his dissenting judgment, Lord Mance identified a number of problems with this approach. These issues will no doubt be considered at length when the claims proceed to the main trial on liability.

EX TURPI CAUSA

Joyce v O'Brien and Tradex 2013 EWCA Civ

Thief not liable for injury to his accomplice

(Cooke J)

The facts: C was standing on the back step of a van being driven carelessly by his uncle as they made their escape with some stolen ladders. The ladders were protruding from the back of the van and C was trying to prevent them from slipping out with one hand whilst holding on to the back of the van with his other hand. The uncle took a corner at speed and C was flung off, sustaining a severe head injury. He sued his uncle and joined in the third party motor insurers. The insurers defended the claim contending that it had no liability to indemnify C's claim as the uncle owed no duty of care by virtue of the *ex turpi causa non oratur* action rule.

At first instance, Cooke J held that the insurer's defence was upheld. The driver owed no duty of care to his nephew as he was participating in a criminal joint enterprise at the time. The injury was caused whilst they were

attempting to steal the ladders and thus the crime was directly causative of the injuries. Public policy precluded a duty of care being owed to a fellow conspirator of a criminal enterprise.

C appealed against the dismissal of his claim.

The decision: C's appeal was dismissed.

Although the uncle's driving was also causative, C was injured whilst stealing some ladders and in riding on the back of the van he was also careless for his own safety. The trial judge was entitled to hold that the claimant's own criminality was causative of his injury.

Comment: The leading authority on *ex turpi causa* defences is the House of Lords ruling in *Gray v Thames Trains Ltd* [2009] UKHL 33; [2009] 1 AC 1319, where Lord Hoffmann restated the broad rule: that you cannot recover for damages which is the consequence of your own criminal act. He acknowledged that 'The maxim *ex turpi causa* expresses not so much a principle as a policy. Furthermore that policy is not based upon a single justification but on a group of reasons, which vary in different situations.' A distinction is to be drawn between causing something and merely providing the occasion for someone else to cause something, such as in *Delaney v Pickett* 2011 EWCA Civ 1532 where a passenger's engagement in drug dealing did not defeat his negligence claim against the driver of the car in which he was riding because the illegal objective was only incidental to the driver's negligence.

There has been a recent trend by insurers of pleading *ex turpi causa* wherever a claimant's actions are associated with some criminal activity. Such an approach is mistaken where the criminal act is minor. *Ex turpi causa* will only be effective where the criminal activity is inextricably bound up with the cause of the injury and where the wrong doing is sufficiently serious to warrant such a draconian sanction. In *Saunders v Edwards* [1987] 1 WLR 116, 1134 Lord Bingham made the following observation: '… I think that on the whole the courts have tended to adopt a pragmatic approach to these problems, seeking where possible to see that genuine wrongs are righted so long as the court does not thereby promote or countenance a nefarious object or bargain which it is bound to condemn.' Accordingly, there is a balance to be struck between a consistent application of the rule and providing a remedy. Although the legality of this policy in this context was not considered by the Court of Appeal here or elsewhere, there is a strong argument that an *ex turpi causa* conflicts with European Motor Insurance Directives. Whilst these do not seek to alter our criminal or civil law as such, the European Court of Justice has ruled that whilst Member States are free to determine the rules of civil liability applicable to road traffic accidents, they must ensure that the civil liability arising under their domestic law is covered by insurance which complies with the provisions of the three directives in question (Case C-348/98 *Mendes Ferreira and Delgado Correia Ferreira* [2000] ECR I-6711, paragraphs 23 and 29; Case C-537/03 *Candolin and Others* [2005] ECR I-5745, paragraph 24 and *Elaine Farrell v Alan Whitty and Others* ECJ 2007 Case C-356/05 paragraph 34). In other words, national civil law provisions, governing civil liability in road traffic accidents, cannot not

detract from the effectiveness of the Directive's objective of providing a compensatory guarantee to victims of the use of motor vehicles. More recently yet, in *Churchill v Benjamin Wilkinson and Tracy Evans* 2011 Case C-442/10 the ECJ ruled:

> '49. Accordingly, national rules, formulated in terms of general and abstract criteria, may not refuse or restrict to a disproportionate extent the compensation to be made available to a passenger by compulsory insurance against civil liability in respect of the use of motor vehicles solely on the basis of his contribution to the occurrence of the loss which arises. It is only in exceptional circumstances that the amount of compensation may be limited on the basis of an assessment of that particular case (*Candolin and Others* , paragraphs 29, 30 and 35; Farrell , paragraph 35; *Carvalho Ferreira Santos* , paragraph 38; and *Ambrósio Lavrador and Olival Ferreira Bonifácio* , paragraph 29).'

If the author is correct in this view, then the *Joyce* decision adds to a growing tally of rulings where our national law provisions have not been properly construed in accordance with Community law by the Court of Appeal. See our early critiques of *Delaney v Pickett* [2011] EWCA Civ 1532 and *EUI Ltd v Bristol Alliance Ltd Partnership* [2012] EWCA Civ 1267.

CAMPAIGN TO REFORM PART VI ROAD TRAFFIC ACT 1988 AND THE MIB AGREEMENTS

The Department for Transport (DfT) published its Review of the Uninsured and Untraced Drivers' Agreements on 27 February this year. The timing was at best inept and at worst, cynically mischievous. Having ignored calls for major reform in this area for many years, the DfT's short consultative process just happened to straddle the implementation date set for the most far reaching reforms to the civil justice system ever seen under the Legal Aid Sentencing and Punishment of Offenders Act 2012. This was a time when most legal practitioners were predictably stretched to capacity: crisis managing the rushed implementation of those reforms.

Even so, the DfT's proposals do include some constructive and helpful suggestions for removing or mitigating a number of egregious injustices under both MIB Agreements. However, these are largely superficial in their nature, in that they fail to address a number of major substantive law defects in the UK's implementation of the compensatory safeguards for victims of motor vehicle use under Community law. A full critique of our national law provision in this area can be accessed, free of charge, from the New Law Journal: http://www.newlawjournal.co.uk/nlj/biographies/nicholas-bevan. A number of detailed responses were submitted calling for far reaching reform to Part VI of the Road Traffic Act 1988 and both of the DfT's arrangements with the Motor Insurance Bureau, to deliver a better deal for the motor insurance premium paying public. These included the writer's own detailed paper that identified and explained over thirty substantive defects, citing the relevant UK and Community law provisions they offend and, more to the point, which offered a simple and easily achievable solution to resolve these

failings; one that is consistent with the Government's own Good Law policies. Calls for an urgent dialogue have been ignored. The Minister's final proposals were due to be published in August but have been deferred to the autumn.

INFRINGEMENT COMPLAINT TO THE EUROPEAN COMMISSION

Nicholas v Ministry of Defence [2013] EWHC 2351 (QB)

Court disapplies limitation period for an asbestos disease suffer after more than 7 years' delay

(Judge Burrell QC)

The facts: A claim was issued under the Law Reform (Miscellaneous Provisions) Act 1934 by the deceased victim's daughter, Ms Nicholas, against the MoD for her mother's war time exposure to asbestos. The MoD admitted that the exposure had been culpable but pleaded that the claim was statute barred under s 11 of the Limitation Act 1980: the three year limitation period having expired over a year before her death in November 2008. It contended that for over four years prior to her death the victim had the requisite knowledge under s 14 Limitation Act, following a meeting with her doctor where these matters were explained (viz, that her asbestosis was an occupational illness, (ii) that it was significant, (iii) that it was attributable to some culpable act or omission during her war time work and, (iv) the identity of the defendant) but that she had done nothing about it. Furthermore, an additional three and a half years elapsed after her death before proceedings were issued.

The MoD argued that it would be inequitable for the court to apply its discretion to disapply the statutory time limit under s 33 of the 1980 Act where a conscious decision had been made by the victim not to pursue the claim and on account of the extensive delay.

The decision: After considering the criteria set out in s 33, the court decided to exercise its discretion in the claimant's favour.

Its reasoning was as follows. Firstly, it was noted that the MoD could establish no prejudice caused to it by the loss of the statutory limitation period defence nor to the cogency of the evidence. Secondly, the victim had not been well enough to contemplate taking legal advice or issuing proceedings due to the effects of the asbestosis for which the MoD were responsible. Thirdly, following her death, the MoD were informed relatively promptly of the prospective claim; a moratorium had been agreed between the solicitors within a year and this was in place up to the date proceedings were issued, and finally no prejudice occurred by reason of this additional delay.

CONTRIBUTORY NEGLIGENCE

Starks v Chief Constable of Hertfordshire [2013] EWCA Civ 782

Mini-roundabouts require the same road behaviour as those with traffic islands

(Moore-Bick, Patten and Underhill LJJ)

The facts: A collision occurred between two vehicles at a T junction controlled by a mini-roundabout. S emerged into the mini-roundabout momentarily before the police car that was also approaching fast from his right hand side. The police car crashed into the side of S's car as he was turning right, injuring S.

The trial judge made the following factual findings (i) that the police car had been travelling within the 40 mph speed limit for the road on the approach to the roundabout, (ii) that its speed at the time of impact was 30 mph and (iii) that the collision occurred at the centre of the roundabout. Emphasis was placed on the fact that Paragraph 185 of the Highway Code provides: 'When reaching a roundabout you should give priority to traffic approaching from your right …'

The trial judge reduced S's award by 55% under the Law Reform (Contributory Negligence) Act 1945. That attribution was based on the judge's finding that S should have seen the police car's approach and that by attempting to cross onto the roundabout when it was clear that a police car was approaching the junction at speed was a major cause of the accident. S appealed.

In the only reasoned judgment, Underhill LJ noted that Paragraph 188 of the Highway Code provides that the same rules apply to mini-roundabouts as to normal roundabouts. In particular, the Code states that vehicles 'MUST pass round the central markings'. He deduced that paragraph 188 requires (i) drivers to go round not only the solid roundel but the circles around it and (ii) that driving over the markings is clearly a breach of the Code. The judge also observed that a roundabout 'has a traffic management function, the requirement for such vehicles to go round the roundel also has a safety consequence, since it means that if they are travelling at or near the permitted limit they will have to significantly moderate their speed'.

The expert evidence, which was agreed, indicated that the police car would have had to reduce speed to 15–20 mph to have circumnavigated the roundel in accordance with the Code. Paragraph 27 of the Code requires a driver approaching a roundabout to do so at a moderate speed that enables him to stop if necessary. At 15 mph, this would have avoided any collision completely; at 20 mph it might have avoided the collision but had it not, it would have been to the rear of S's vehicle and at a much lower velocity with less impact and damage. The policewoman was treating the roundabout as though it were a traditional T junction and had done nothing to reduce her speed. These factors made the policewoman's actions more culpable than S's.

The decision: In the circumstances, the initial allocation of 45/55% against the claimant would be substituted by a 65/35% attribution against the police officer.

Comment: Practitioners will be aware of the two stage process imposed by section 1(1) of the Law Reform (Contributory Negligence) Act 1945 that requires the court to first assess the causative potency of the respective parties' acts or omissions and then to determine what reduction is 'just and equitable' having regard to the claimant's responsibility for his or her own damage. However it should also be noted that in this case Underhill LJ held that there was no need to undertake this exercise here as 'this is not a case where any distinction can be made between the parties' relative culpability and their relative responsibility for the damage'. This must be true for many road traffic accident claims involving motor vehicles. Different considerations apply where there is a disparity in the causative potency of the participants, such as occurs in pedestrian running down accidents: see *Lunt v Khelifa* [2002] EWCA Civ 801 where at paragraph 20 Latham LJ observed that the Court of Appeal 'has consistently imposed upon the drivers of cars a high burden to reflect the fact that the car is potentially a dangerous weapon'.

EMPLOYERS' LIABILITY

Taylor v Chief Constable of Hampshire Police [2013] EWCA Civ 496

Police liable for failing to provide suitable protective gloves to dismantle a cannabis factory

(Elias and Patten LJJ)

The facts: T was a woman police officer who was assigned to dismantle a cannabis factory. She was provided with thin gloves that were suitable to protect her from skin irritation from prolonged contact with the cannabis plants. The heat and aroma inside the premises made her feel nauseous. She attempted to open a window and cut her hand on some broken glass. She sued her employers for the injury and alleged that her gloves were not suitable contrary to Regulation 4 Provision and Use of Work Equipment Regulations 1992.

4(1) of the PUWER 1992 provides:

> Every employer shall ensure that suitable personal protective equipment is provided to his employees who may be exposed to a risk to their health or safety while at work except where and to the extent that such risk has been adequately controlled by other means which are equally or more effective.

D argued that the gloves were suitable for protecting her skin from being irritated from the cannabis and that this was the purpose for which they had been issued, per *Fytche v Wincanton Logistics* [2004] UKHL. D argued that an injury from broken glass was not reasonably foreseeable.

At first instance the trial judge found: that in removing the plants and equipment it was foreseeable that she would come into contact with sharp ducting and so needed thicker gloves. It was probable that she would be required to remove such equipment and therefore D was liable. D appealed.

The decision: The appeal was dismissed.

Under PUWER once a risk is more than *de minimis* D must eliminate it or provide suitable PPE. The risk of being cut by sharp edges was more than *de minimis*. Once D is shown to have failed to provide suitable PPE, it creates a rebuttable presumption that it would have been used.

Comment: Now that s 69 of the Enterprise and Regulatory Reform Act 2013 is in effect it is interesting to wonder whether a different outcome would have resulted, if the same claim were brought under the new regime. Although the case was not argued on conventional common law principles, it seems likely that the claim would have succeeded in any event, subject of course to T successfully defeating the same kind of arguments based on the breach of duty not being causative.

Hide v The Steeplechase Company (Cheltenham) Ltd and others [2013] EWCA Civ 496

(Longmore, McFarlane and Davis LJJ)

The facts: C was a professional jockey who sustained pelvic and head injuries when his horse stumbled just as it landed after jumping a hurdle in a steeplechase at Cheltenham. The nature of the accident was unexpected, when C was thrown off he hit an upright post to a barrier that delineated the course. The course was managed by D. The course laid out in accordance with British Horseracing Authority specifications and the rails and posts were padded for some distance from the hurdles. The course had passed a BHA inspection.

C alleged that the rails were positioned too close to the hurdles. He contended that this infringed Regulation 4 of the Provision and Use of Work Equipment Regulations 1998.

Regulation 4 provides:

(1) Every employer shall ensure that work equipment is so constructed or adapted as to be suitable for the purpose for which it is used or provided.

(3) Every employer shall ensure that work equipment is used only for operations for which, and under conditions for which, it is suitable.

(4) In this regulation "suitable"—(a) subject to sub-paragraph (b), means suitable in any respect which it is reasonably foreseeable will affect the health or safety of any person.

At first instance the claim was dismissed. The judge held that the hurdle and the railing were suitable equipment and that they complied with BHA

standards. C had not established that the padding was not suitable. Because the accident was unusual it was not reasonably foreseeable. C appealed

The decision: C's appeal was upheld. This was as a result of a purposive construction of Regulation 4 in the light of Framework Directive (89/391/EEC) and the Use of Work Equipment Directive (89/655/EEC).

Article 5 of the Framework Directive provides

1. The employer shall have a duty to ensure the safety and health of workers in every aspect related to the work ….

4. This Directive shall not restrict the option of Member States to provide for the exclusion or the limitation of employers' responsibility where occurrences are due to unusual and unforeseeable circumstances, beyond the employers' control, or to exceptional events, the consequences of which could not have been avoided despite the exercise of all due care.

Article 3 of the Use of Work Equipment Directive

Requires that the employer shall take measures necessary to ensure that the work equipment made available to workers …

… is suitable for the work to be carried out.

Interpreting PUWER in the light of this Community law, it was for D to prove that any relevant accident was due either to unforeseeable occurrences beyond the defendant's control or to exceptional events the consequences of which could not be avoided in spite of the exercise of all due care. It was not enough to prove that the accident was unforeseeable, as at common law.

Comment: It seems fairly clear that this would be one of those cases caught by s 69 Enterprise and Regulatory Reform Act 2013 where it would probably not be possible to establish a breach of the common law duty of care.

OCCUPIERS' LIABILITY / NEGLIGENCE

Cockbill v Riley [2013] EWHC 656 (QB)

Parents not liable for a misjudgement by a 16 year old in diving into a paddle pool

The facts: C, who was 16, suffered a catastrophic spinal injury when he attempted a belly flop into a paddling pool at a party hosted by the parents of a friend to celebrate the end of the GCSE examinations.

C alleged that D was liable for (i) permitting the pool to be used at the party in the first place, as this had created a foreseeable risk of injury; and (ii) not intervening earlier when a number of boys had ran and jumped into the pool feet first. C argued that this presented an obvious risk of serious injury that D should have foreseen.

The decision: D was not liable and so the claim was dismissed.

The accident was caused by C misjudging a flying leap that caused him to land head first in the pool, with tragic results. D and his wife were teachers who had four children of their own. They had provided food for a barbecue and a small amount of alcohol. There was no evidence that anyone drank alcohol to the point where they were misbehaving, rude or aggressive, or unsteady on their feet. Neither was there any evidence that C slipped, tripped or bumped into anyone as he ran up to the pool. The pool in which the C was injured had been brought by one of the guests and filled by D. The party was boisterous but not rowdy.

In *Caparo Industries v Dickman* [1990] 2 AC 605, the House of Lords ruled that a duty of care only arises in circumstances where there is sufficient proximity and foreseeability of damage and it is fair, just and reasonable that a duty should be imposed. Furthermore, in *Tomlinson v Congleton BC* [2003] UKHL 47 the Defendant council were not liable to the Claimant either at common law or under the Occupiers' Liability Acts, when an 18 year old youth ran out from a sandy beach at the side of a lake, created by the Defendant council from an old sand quarry, and dived into the water. He struck his head hard on the sandy bottom of the lake and broke his neck. Whilst that case is usually remembered for the dictum that there is no duty to warn of obvious dangers it is also relevant to the issue of foreseeability, in that it held that an occupier of land is not under a duty to prevent people from taking risks which are inherent in the activities they freely choose to undertake upon his land.

Bean J observed that C's submission that allowing the use of a paddling pool at a party attended by 16-year-old friends of the occupier's children *of itself* creates a foreseeable risk of significant injury or justifies a formal risk assessment is in my view quite unrealistic. It was reasonably foreseeable that someone would lose his footing and suffer minor injury. Even after a number of boys had jumped into the pool feet first, it was not reasonably foreseeable that someone would attempt to carry out a dive or a belly-flop (which can very easily turn into a dive) and thus suffer grave injury.

NERVOUS SHOCK

Taylor v A Novo (UK) Ltd [2013] EWCA Civ 194

PTSD caused by a daughter witnessing the death of her mother was too remote in law

(Lord Dyson MR, Moore-Bick and Kitchin LJJ)

The facts: D admitted liability for a head and foot injury sustained by a female employee at work. About three weeks later, and whilst apparently recovering at home, she suffered deep vein thrombosis which in turn produced a pulmonary emboli that killed her. Her daughter, C, witnessed her mother's death although not the accident itself. The death post-dated the accident by several weeks. C sought damages from her mother's employers on the ground that her post traumatic stress was a consequence of her mother's work place accident. C's claim succeeded at first instance. D appealed.

The decision: The appeal was upheld.

C's claim for her PTSD was dismissed. It was common ground that C was a secondary victim. This presented the question whether the mother's death was a relevant incident for the purposes of bringing a claim on behalf of such a victim. Unfortunately for C she had failed to establish that there was sufficient proximity between D and herself. Proximity being used both in the sense of Lord Atkins dictum, in *Donoghue v Stevenson* [1932] AC 562 at 580, of encompassing 'persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question' as well as in terms of physical proximity in time and space to the accident.

The reasonably forseeability test is demonstrably too wide in scope and the law has to draw a line somewhere and it achieves this policy aim through the remoteness principle. The three week interval between the original injury and its fatal sequelae broke the continuity necessary to establish legal proximity. Ms Taylor would have been able to recover damages as a secondary victim if she had suffered shock and psychiatric illness as a result of seeing her mother's accident. She could not recover damages for the shock and illness that she suffered as a result of seeing her mother's death three weeks later.

DAMAGES

West Midlands Travel Ltd v Aviva Insurance UK Ltd [2013] EWCA Civ

Lord Justice Moore-Bick, Lord Justice Rimer and Lord Justice Underhill

The facts: C's was a bus company that owned a fleet of 228 vehicles. At the time of the accident, it had 200 buses in service at any one time, the remainder were out of service, being allocated for routine maintenance on a rota basis. Liability for the damage caused to C's bus was not at issue. However, C's assessment of its entitlement to general damages claim for 31 days' loss of use, valued at £3,310.80, was disputed.

C's valuation was based on the 'standing charge' approach to quantifying general damages for the loss of use of a commercial vehicle where there is no evidence to substantiate a loss of profit claim; it is one based on a pro rata share of the overhead charges for the whole fleet, which included the business' general operating costs. The standing charge was the conventional approach usually adopted in this kind of claim since *Birmingham Corporation v Sowsbery* [1970] RTR 84.

At first instance, the conventional approach was applied and judgment given accordingly for £3,317. D's insurers appealed.

D argued for a different approach to quantification: one based on interest on the notional capital value of the vehicle plus an allowance for depreciation. Such an approach would reduce C's valuation by about 2/3rds.

The decision: Moore-Bick LJ allowed D's appeal.

After referring to a number of Admiralty authorities on the proper quantification of general damages for loss of use of vessels, he ruled that 'since no loss of revenue can be attributed to the unavailability of the damaged vehicle, the operator's loss can in my view best be assessed by reference to the capital tied up in it, wasted expenses and depreciation.'

Comment: This new approach to quantifying loss of use for commercial vehicles is restricted to businesses running fleets of vehicles with a reserve capacity. It would not be appropriate for small operators such as a self employed mini-cab driver where the proper approach would be to claim the spot hire rate for an alternative equivalent vehicle or the loss of profit.

A POST APOCALYPSE WORLD?

The raft of civil justice reforms eponymously dubbed the Jackson reforms (but which go further than he recommended), are now mostly in place. If we apply the literal meaning to the ancient greek term ἀποκάλυψις , it has more to do with revelation than disaster, despite its biblical association with the end of times. Arguably it is apposite in both senses. As every practitioner knows to his or her cost, April 1 and July 31 witnessed a double serving of the most draconian reforms inyears, including:

- ending the recovery of success fee uplifts ATE insurance premiums for most claims
- relaxing the prohibition on contingency fees with damages based agreements
- bestowing a 10% per cent increase in general damages for non-pecuniary loss
- the introduction of Qualified One-Way Costs Shifting
- Adding additional sanctions that potentially benefit a claimant's Part 36 offer
- Introducing a harsher proportionality test
- a new approach to costs management and cost budgeting
- extending the scope of the Portal scheme vertically (in value) and laterally (in the claims types it covers)
- abolishing (ineffectively and unequally) the payment or receipt of referral fees
- abolishing public funding of claims
- imposing a fiscal hair-cut to recoverable legal costs in most claims

The full effect of these reforms will take time to manifest. They are likely to reduce access to justice, diminish consumer choice as the tourniquet effect from these savage fee cuts and anti-competitive measures come into effect. There are genuine concerns that the ultimate legacy of these rushed and ill conceived policies with be a reduction in the quality and choice of the legal

service available to members of the public; the diametrically opposite outcome to that intended by the deregulation of legal services under the Legal Services Act 2007. Detailed coverage on these matters can be found in Kerry Underwood's masterful commentary in the Stop Press section of BPILS. This prefaces volume 1 of BPILS and it is updated in every release.

ENDING ON A BRIGHTER NOTE – S 69

Section 69 of the Enterprise and Regulatory Reform Act 2003, abolishes civil liability for breaches of statutory health and safety regulations conferred under section 47 of the Health and Safety at Work Act 1974. This will deny many injured victims the compensatory redress they are currently entitled to if they cannot establish and prove their claims under ordinary common law negligence principles.

Some have argued that the effect of section 69 is to '*put the health and safety clock back to Victorian times*'. Fortunately, the reality is not nearly so bad and I have four main reasons for thinking so.

The first has to do with the very essence of the common law as a flexible and living concept. It has evolved considerably since the nineteenth century. It took three giant strides beginning with Lord Atkins 'neighbour' principle from *Donoghue v Stevenson* [1931] UKHL 100. Next came Mr Justice Swanwick's test for determining the standard of foresight expected of a '*reasonable and prudent employer'* in *Stokes v Guest* [1968] 1 WLR 1776:

> "… the overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know; where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad; but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions".

Then, for those unusual cases where no obvious precedent exists for a duty of care, there is the tripartite test set out in *Caparo Industries v Dickman* [1990] UKHL 2.

Another reason for optimism has to do with the fact that the concept of reasonableness, which lies at the heart of common law tort of negligence, is a contextual phenomenon. What is 'safe' or 'reasonable' is to be judged by the standards of the time. Consequently, as our understanding of the causes of industrial disease and accidents increase, so too does the generally acceptable tolerance of justifiable risk diminish. These factors influence the evolution of the common law standard of care to be expected by the reasonable and prudent employer. Equally relevant are the improved standards of health and safety imposed on the United Kingdom by the European Community. An obvious example is the European Framework Directive (89/391/EEC) and the plethora of Regulations that transpose this and other European Directives,

starting with what became known as the 'Six Pack' but including much later initiatives such as the Work at High Regulations or the Construction (Design and Managements) Regulations 2007. Although the vast majority of these regulations will not attract civil liability where they are breached, thanks to section 69 of the Enterprise and Regulatory Reform Act 2013, they set new and often heightened standards. Similarly, the Health and Safety Executive's Guidance (now freely downloadable online) imposes a high standard of care that any court applying a common law test can hardly ignore. So with the loss of strict and absolute liability for breaches of statutory health and safety regulations, we may yet see a new emphasis given to Mr Justice Swanwick's test so it remains as relevant to a post s 69 Enterprise and Regulatory Reform Act employer as is does now.

A third reason for cautious optimism is that whilst s 69 does do away with the statutorily imposed reversal of the burden of proof, there will nevertheless be occasions when a claimant will be able to establish on common law principles a prima facie case against an employer and thereby to effectively impose a reversal of the burden of proof that way. Practitioners are well used to working with this concept, in its statutory manifestation such as in the oft cited precedent of *Larner v British Steel Plc* [1993] IRLR 278. They will now be encouraged to explore the full extent to which *res ipsa loquitur*, its common law cousin, can be applied to a work place accident claim. Take for example, a case where an employer has a long history of similar incidents or injuries that were reasonably preventable. If a claimant is injured in almost identical circumstances that were (i) under the employer's effective control and (ii) where the claimant is not in a position to know precisely what act or omission the employer is responsible for and for which no other plausible explanation exists, then where a court concludes that what happened is more consistent with negligence than not, it may well find that the circumstances raise a rebuttable presumption of negligence against the employer. There may also be occasions where, even absent a culpable track record, the circumstances of the accident are such that in the absence of any alternative explanation the circumstances are more consistent with an employer's negligence than not so as to raise an inference of negligence. Every law student will remember the barrel of flour case: *Byrne v Boadle* [1861–73] All ER Rep Ext 1528. However, it will readily be seen that the scope of this common law evidential rule has a narrower application than the statutory imposed alternative.

Finally, there is the hope that the judiciary, who will be sensitive to the new balance of advantage introduced by s 69 will develop the common law where it can. After all it was the judiciary that coined the equitable maxim: *where there is a right there must be a remedy*. Perhaps this is not too fanciful a hope. One need only recall to mind the extraordinary development of the doctrine of vicarious liability in recent years; to cover sexual abuse by priests.

Furthermore, for those practitioners who are ready and prepared to fully utilise the extensive armoury of tactical weapons contained within the Civil Procedure Rules and Pre action protocols, as well the new opportunity presented by qualified one way cost shifting, there is every chance that a great

deal of profitable work will be gained. It seems almost inevitable that even more employers' liability claims will be contested and fall out of the extended portal. It is just conceivable that by 2014 some will think that they have never had it so good!

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