Butterworths Personal Injury Litigation Service

Bulletin Editor

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MESOTHELIOMA AND EMPLOYERS LIABILITY INSURANCE

Zurich Insurance plc UK v International Energy Group Ltd [2015] UKSC 33

- *The House of Lord's ruling in Barker v Corus remains good law for non-mesothelioma claims and in Guernsey it also applies mesothelioma claims as the Compensation Act 2006 does not apply there.*
- *Apportionment of loss is part and parcel of the House of Lords modification to the normal common law 'but for' causation test in Fairchild, save to the extent abrogated by the 2006 Act.*
- *An employers' liability insurer on risk in any one year is contractually liable to indemnify in full a victim who has been culpably exposed to asbestos – but this is subject to a proportionate right of contribution from* (*i*) *any other insurer and* (*ii*) *the policyholder pro rata for any period of uninsured exposure.*

(Lord Neuberger P, Lord Mance, Lord Clarke, Lord Sumption, Lord Reed, Lord Carnwath and Lord Hodge)

The facts:

This case concerns the liability of an insurer to its insured where it provided employers' liability cover for only a fraction of the total period of an employee's exposure to asbestos dust. For the majority of the period, the policyholder was either uninsured or was covered by an insurer who is now insolvent or who cannot now be traced.

The appellant, International Energy Group acquired a gas and power provider based in Guernsey, called the Guernsey Gas Light Co Ltd. It

accepted that GGL had culpably exposed its employee, a Mr Carré, to asbestos during the course of his employment with GGL for a 27-year period that ran from 1961 to 1988.

Unlike many historical employers, the insured was solvent and trading, albeit now as part of IEG's enterprise. IEG had recently settled Mr Carré's claim in full for £278,451.60 including the defence legal costs. It sought to recover the full amount of its outlay from Zurich.

Compulsory EL insurance was not introduced in Guernsey until 1993 and IEG was unable to trace any cover for the majority the relevant 27-year period. It was only able to identify two insurers: Excess (on risk for two years) and Zurich (the respondent in this appeal whose predecessor, Midland Assurance Ltd, had been on risk for the last six years of the culpable exposure; approximately 22.8% of the 27-year period).

Zurich accepted that, if as a result of being exposed to asbestos dust during the six years for which its predecessor had insured GGL, Mr Carré was entitled to the full compensation payment that he had received from IEG, then the policy wording on its face requires Zurich to answer in full notwithstanding that the insured had exposed its employee to asbestos dust for an additional 21 years before it assume the risk. This was because its policy included a commonly employed term that provided indemnity against '*all sums for which the Insured shall be liable*'. This also accorded with the Association of British Insurers' voluntary code of 2003 that many insurers have signed up to.

It has been a well established common law tort rule, since *Dingle v Associated Newspapers Ltd* [1961] 2 QB 162, that where a number of defendants separately contribute to the same indivisible damage, each of them is jointly and severally liable for the whole. This principle extends to mesothelioma claims which, unlike asbestosis or industrial deafness or any of the other dose-related cumulative diseases, is thought to be capable of being caused a single episode of low level of exposure to asbestos fibres. The limited extent of our current scientific knowledge of the aetiology of this fatal disease makes it impossible to differentiate between the different episodes of exposure and to identify which was causative. This is why mesothelioma is often described as an 'indivisible' disease.

However, Zurich contended that it should only be liable for its proportionate share of the IEG's outlay calculated by reference to the time it was on risk as a proportion of the whole period. This would have left the employer exposed to funding the vast majority of the employee's claim as it was unable to trace any cover for over 70% of the 27-year period.

Zurich grounded its case on the fact that although s 3 of the Compensation Act 2006 had reversed the House of Lords ruling in *Barker v Corus UK Ltd* [2006] 3 All ER 785, to the effect that mesothelioma claims are capable of being apportioned, this legislation did not apply in Guernsey.

Although Guernsey generally applies our common law it remains an independent jurisdiction; one that has not adopted s 3 of the Compensation

Act 2006. So Zurich argued that the House of Lords *ratio* in *Barker v Corus UK Ltd* [2006] 3 All ER 785 still had a residual effect in Guernsey, so that the damages resulting from this indivisible disease claim were subject to apportionment; under the *Barker* principle.

At first instance

The first instance decision of Cook J found that the Zurich was only liable for its 22.8% aliquot share of IEG's total outlay.

The judge's analysis of *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, *Barker v Corus UK Ltd* [2006] UKHL 20, and *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10, was that these cases established that the essence of an employer's liability in a mesothelioma claim is not the negligent causing of harm *per se*, (as this is not something that is capable of being proved) '*but the negligent exposure of an employee to the risk of harm from asbestos fibres or dust which amount to a material increase in the risk*'. He held that this allowed for an apportionment of the damages in proportion to the share of risk involved: 22.8% in what is otherwise an indivisible disease claim. This reflected some of the reasoning in the *Barker* judgment which Cook J felt constrained to apply.

His judgment predated the benchmark '*Trigger Litigation*' ruling in *Durham v BAI (Run Off) Ltd (in scheme of arrangement)* [2012] 2 All ER (Comm) 1187 which disapproved of some of the reasoning in *Barker*.

IEG appealed.

The Court of Appeal

The Court of Appeal was unanimous in the view that the *Trigger Litigation* ruling, that postdated Cooke J's judgment by two months, provided the answer. The majority decision there had been that where an employee contracts mesothelioma as a result of culpable exposure to asbestos dust, his cause of action rests on the fact that he has actually contracted the disease; as opposed to being exposed to an increased risk. It considered the rationale within the *Barker* decision as not only overturned by the 2006 Act but disapproved of by the Supreme Court's reappraisal of *Fairchild* in the *Trigger Litigation*.

It found that because Zurich's policy wording stipulated that it would be liable for 'all sums', then once causation had been established (applying the 'weak' or 'broad' modified causation test considered in the *Trigger Litigation*) Zurich became liable to indemnify IEG for the full amount of the claim.

The employer's appeal was allowed and Zurich was held liable to indemnify its policyholder for the full amount of the loss, including the legal costs of the employee's claim, notwithstanding that it has only been on risk for a proportion of the total exposure.

As to Zurich's claim for a contribution, the court held that it had no equitable power to override the policies. Lord Toulson put it this way: '*to*

withhold part of that indemnity from the employer on account of its conduct in other years would be to deprive the employer of insurance coverage for which it paid'.

Zurich appealed.

The Supreme Court

As though to emphasise the importance of this issue, a full quorum of seven Justices presided, and Lord Mance delivered the leading judgment of the majority.

The Court was unanimous in ruling:

- That the *Barker* ratio remained good law. Section 3 of the Compensation Act 2006 had only overridden it only to the extent that it applies to the joint and several liability of mesothelioma claims in the United Kingdom.
- That Zurich was contractually liable to indemnify the full legal costs of IEG defending the employee's claim.

However it was divided on the central issue, namely the extent of an insurer's liability when it has insured an employer for part only of the period of the victim's wrongful exposure to asbestos. Uppermost in the Justices' minds was the appreciation of the injustice occasioned to an insurer, if it were to carry the financial cost of the entire claim where it has only provided cover for a small proportion of the total period of culpable exposure, without any further recourse. It was also just as clear that the Court was mindful of the fact that Parliament had intervened in the recent past to ensure that mesothelioma victims' entitlement to compensatory recovery was not frustrated by a doctrinaire adherence to common law principles and that it might intervene again.

Three of the Justices were of the view that Zurich's liability should be limited in proportion to its period on risk relative to the total period of wrongful exposure: ie 6/27th.

A majority supported Lord Mance's policy driven approach. This involved a primary finding that Zurich was liable to fully indemnify 100% of the employee's claim. However this was tempered by a secondary finding that that Zurich has a right to seek proportionate contributions from any other insurers over the relevant period and also from its policyholder in respect of any periods for which there was no cover. This approach effectively treats the employer as a self-insured entity when it has no insurance in place.

Comment

It will be recalled that under the modified rule in *Fairchild*, if a claimant could show that he or she had been culpably exposed to asbestos and that this had materially increased the risk that mesothelioma would occur, then that would be sufficient for the courts to find that that particular exposure had caused the disease. This removed the injustice caused by the '*rock of*

uncertainty' presented by the scientific impossibility of proving which particular wrongful exposure to asbestos dust was causative of the disease, because of our present limited understanding of the aetiology of this disease.

Now, only one orthodox interpretation of *Fairchild* exists, at least as it applies to mesothelioma cases, and this Lord Mance summarised in the *Trigger Litigation*:

> 'the rule can now be stated as being that when a victim contracts mesothelioma each person who has, in breach of duty, been responsible for exposing the victim to a significant quantity of asbestos dust and thus creating a "material increase in risk" of the victim contracting the disease will be held to be jointly and severally liable in respect of the disease.'

Unfortunately, by conceding this exception to the normal 'but for' causation rule the House of Lords had opened up a veritable Pandora's box of future legal challenges as the extent of this exception was tested in different scenarios. As Lord Neuberger so aptly put it when dissenting from the majority in the *Zurich* appeal, '*the effect of what was a well-intentioned, and may seem a relatively small, departure from a basic common law principle by a court, however understandable, can lead to increasingly difficult legal problems – a sort of juridical version of chaos theory*'.

The *Barker* ruling can be viewed as an attempt to redress some of the injustice to employers and their insurers caused by the *Fairchild* exception that imposes liability on persons for a disease that they may not have caused, purely because the normal 'but for' test of causation has been relaxed, allowing the claim to proceed on the slender evidential ground that the employer materially contributed to the risk of that the damage might result.

The *Trigger Litigation* and *Zurich* decisions have consigned to obsolescence any notion that *Fairchild* coined a new tort of wrongfully exposing someone to an increased risk of mesothelioma. To that extent, the opinions expressed in *Barker* to that effect are disapproved. The orthodox view is that *Fairchild* adapted the modification of the 'but for' test of causation from *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 and *McGhee v National Coal Board* [1973] 1 WLR 1. Even so, the *Barker* legacy subsists in England and Wales in the way it has imposed apportionability of loss in an indivisible claim (which hitherto attracted joint and several liability); it is to be viewed as a concomitant of the *Fairchild* exception, save where abrogated by the 2006 Act.

From a claimant's perspective this is very good news. The practical implication of the *Fairchild* rule, as reappraised in the *Barker*, *Sienkiewcz*, *Trigger Litigation* and *Zurich* decisions, is that provided an employer can trace at least one valid EL insurer on risk during a period (however short) which it can be established that the employer culpably exposed its employee to a materially increased risk of mesothelioma, then it should be fully covered by that policy.

It remains to be seen how the Court of Appeal, and possibly the Supreme Court, will react to Mr Justice Jay's strident judgment in *Henegham v*

Manchester Dry Docks Ltd [2014] EWHC 4190 (QB), reported in BPILS Bulletin issue no 117, where the *Fairchild* rule was applied to a lung cancer case. It is clear that the judiciary are keen to constrain this exception to the normal common law rules, where it can. Against this, it must be recognised that what originated in a divisible industrial disease claim in *Bonnington* against a single employer has been extended to a clinical negligence in *Bailey v Ministry of Defence* [2008] EWCA Civ 883. The Court of Appeal may find it difficult to close the lid on the further evolution of the modified causation rule. Returning to the Pandora legend, after unwittingly releasing many evils into the world, it should be remembered that the last phenomenon to emerge was Hope itself.

MOTOR LIABILITY

EX TURPI CAUSA NON ORATUR ACTIO

Flint v Tittensor and MIB [2015] EWHC 466 (*QB*)

Just how egregious does a claimant's behaviour need to be to trigger the policy defence of ex turpi

(Andrew Edis J)

The facts: The defendant, Mr Tittensor, was accused of deliberately assaulting Mr Flint by driving his car at him and causing the very serious injury that resulted.

Immediately prior to the incident, T had been in the act of dropping off his girlfriend at McDonald's in Kentish Town Road, London in the very early hours of the morning when they were approached by a stranger, the claimant who recognised T's passenger as Ms Kaya Scodelario, the actress who plays Effy in the TV drama Skins. As it happens, Mr Tittensor, is also a minor soap star, known for his role in the TV series Shameless. He was driving a flashy new BMW.

The claimant, Mr Flint, importuned himself on Ms Scodelario and was behaving in a drunk and confrontational manner to which T reacted aggressively. A loutish shouting match ensured in which both men exchanged insults. F then struck and damaged T's expensive new car. T overreacted again by deliberately driving forward towards F, forcing him onto the bonnet. F held on as well as he could as T reversed and then accelerated hard forwards along Kentish Town Road before deliberately veering the car to tip him off. Fell off violently and heavily onto the road. F's action was based solely in trespass to the person as the assault had been deliberate.

The MIB intervened as T's brand new BMW was uninsured.

T argued that he had been acting in self-defence, in the belief that F had a knife and was intent on murdering him. He also argued for good measure that F's claim was barred by virtue of his illegal conduct under the *ex turpi causa* rule and that *volenti non fit injuria* applied. The judge was not having any of this. He rejected T's assertion that he was acting out of an imminent fear for his life. Both T and F had proved to be very unreliable witnesses.

The decision: Edis J held that by driving his car at F in such a way that he landed up on his bonnet, T had committed an act of battery. Since he had at all times been safe and secure inside his locked car (albeit slightly dented), and because as he could easily have reversed away from F; self-defence would not avail him.

As to T's culpability the judge noted that victim's behaviour had been only a relatively minor type of criminality that the judge said was not uncommon in cities in the evenings.

The judge reviewed the case law on *ex turpi causa*, including the *Gray* and *Vellino* cases from which he extracted the following propositions.

> *'(1)The operation of the principle arises where the claimant's claim is founded upon his own criminal or immoral act. The facts which give rise to the claim must be inextricably linked with the criminal activity. It is not sufficient if the criminal activity merely gives occasion for tortious conduct of the defendant.*
>
> *(2)The principle is one of public policy; it is not for the benefit of the defendant. Since if the principle applies, the cause of action does not arise, the defendant's conduct is irrelevant. There is no question of proportionality between the conduct of the claimant and defendant.*
>
> *(3)In the case of criminal conduct this has to be sufficiently serious to merit the application of the principle. Generally speaking a crime punishable with imprisonment could be expected to qualify. If the offence is criminal but relatively trivial, it is in any event difficult to see how it could be integral to the claim.*
>
> *(4)The Law Reform (Contributory Negligence) Act 1945 is not applicable where the claimant's action amounts to a common law crime which does not give rise to liability in tort.'*

The judge held that it was necessary to establish what the claimant did wrong, and what it caused the defendant to do in response. It is necessary to do this in order to decide whether, for the purposes of the causation rule applicable to this public policy defence, the one caused the other. He found that T's response to F's provocation exceeded what was reasonable in the circumstances and so was disproportionate (which remained relevant to the issue of self-defence). What T did was analogous to pulling out a knife and threatening an unarmed opponent.

There was no policy justification for barring the claim under the *ex turpi causa* principle; F's criminality was not sufficiently grave to engage the doctrine. Accordingly judgment was awarded against T.

F's claim was very sensibly founded on trespass to the person; not negligence; so no reduction could be made under the 1945 Act.

McCracken v Smith, Bell & MIB [2015] EWCA Civ 380

Ex turpi did not apply to bar a claim against a third party who contributed to the injury

(Lord Justice Richards, Lord Justice Underhill and Lord Justice Christopher Clarke)

The facts: Damian Smith (DS) and Daniel McCracken (DM) were close friends. They were both 16 years old and they were joy-riders. At the time of the accident, they were riding an off-road scrambler motor bike fast along a cycle lane in Carlisle. Not only was the bike was uninsured and unfit for road use but it was not even designed to carry a passenger. Neither boys were wearing a helmet.

The accident happened when the bike which DS was riding, with DM as his pillion passenger, collided with the minibus driven by Mr Bell. The minibus had been travelling towards the city centre and was turning right into a community centre when the bike collided with the offside of the minibus near the driver's door.

The judge found that DS had been driving dangerously and that Mr Bell had been negligent in failing to observe the bike or to react to its presence.

Both the MIB and Mr Bell argued that DM's claims were barred by the *ex turpi causa non oritur actio* doctrine. It is worth noting that the MIB did not seek to argue that the off-road bike was not a 'relevant liability'.

At first instance:

Keith J held that although DS was liable to DM in negligence. The defence of *ex turpi causa non oritur actio* could not succeed in respect of the claim against DS (and by corollary, against MIB who were potentially liable to meet any unsatisfied judgment against an uninsured driver) because DM was not part of a joint criminal enterprise but simply 'going along for the ride'. As it was, the MIB's liability was excluded by c 6.1(e)(ii) of the Uninsured Drivers' Agreement 1999 because he found that DM knew that the bike was being used without insurance.

He also ruled that DM's award should be reduced on account of his contributory negligence by 45% (which included a 15% reduction for his failing to wear a helmet). Unfortunately DS had no means with which to satisfy the claim.

After the hearing and following an exchange of notes, liability was subsequently apportioned between the two drivers (DS and Mr Bell), in the ratio of 80% to 20%[1]. It was ordered that the 90% of the MIB's costs were ordered to be paid by Mr Bell, rather than by the DS.

[1] It is unclear what practical effect this apportionment would have had for the claimant, DM, as it would appear that the liability of both drivers, DS and Mr Bell, to DM would have been joint and several.

Only Mr Bell appealed.

The decision:

The unanimous decision of the Court of Appeal was that DM had been guilty of sufficient turpitude to expose him to the potential application of the *ex turpi* policy. Had the appeal extended to DM's claim against DS, it opined that the *ex turpi causa* defence would have succeeded as there was a joint enterprise between DM and DS to ride the bike dangerously, and the increased risk of harm as a consequence of such riding was plainly foreseeable and causative. The Court of Appeal's ratio in *Joyce v O'Brien and Tradex* [2013] EWCA Civ 546 applied (see below) as DM's injury could properly be said to have been caused by his own criminal conduct even though it resulted from the negligent act of DS.

Where *ex turpi causa* applied to a claim by a third party such as Mr Bell, *Pitts v Hunt* [1991] 1 Q.B. 24 and *Joyce v O'Brien* were of less assistance – as those cases featured claims between parties engaged in a joint criminal endeavour. The fact that DM's was jointly participating in DS's dangerous driving had no effect on the duty of care owed by Mr Bell nor on the standard of care reasonably to be expected of him. The Court of Appeal was influenced by its earlier decision in *Revill v Newbery* [1996] QB 567 which was a claim by a trespasser who was shot and injured by the occupier of land in the course of an attempted burglary on the property. The Court of Appeal held that the liability of the occupier depended on ordinary principles of negligence at common law and that he had been negligent in firing the shot. The court had rejected the occupier's defence of *ex turpi causa* based on general public policy considerations that extended the remit of the common duty of care even towards trespassers engaged in criminal activities.

One aspect of the *Joyce v O'Brien* decision was considered relevant. Elias LJ's states at para 28 of his judgment that for *ex turpi causa* to apply: '*the injury will be caused by, rather than occasioned by, the criminal activity of the claimant where the joint criminal illegality affects the standard of care which the claimant is reasonably entitled to expect from his partner in crime*'. In other words the criminal activity must be directly causative. This same principle influenced the Court of Appeal to overturn the first instance decision in *Delaney v Pickett* so that Delaney's claim against his driver was not debarred by the *ex turpi causa* rule. That was because their joint criminal enterprise (of trafficking drugs) was merely the context to and not the cause of Pickett's dangerous driving.

In the *McCraken's* case, Richards LJ who presented the unanimous decision of the court, held that the accident had two distinct causes: (i) the dangerous driving of the bike and (ii) the negligent driving of the minibus. As with the *Revill* case, the causal contribution of the dangerous riding of the bike for which DM was responsible can and should be taken into account in the assessment of his contributory negligence pursuant to s 1 of the Law Reform (Contributory Negligence) Act 1945.

In consequence, the court allowed Mr Bent's appeal on liability to the extent of increasing the total deduction for DM's contributory negligence from 45% to 65%. The court considered this a fair reflection of that greater degree of

blameworthiness and causative potency of DM's conduct (ie 50%, plus the agreed deduction of 15% for failure to wear a helmet).

The other aspects of Mr Bent's appeal, including the costs appeal, were dismissed.

CONTRIBUTORY NEGLIGENCE OF A CHILD PEDESTRIAN

Jackson v Murray and another* (*Scotland*) *[2015] UKSC 5

Supreme Court offers guidance on when an appellate court should interfere with a lower court's apportionment of blame

(Lady Hale DP, Lord Wilson, Lord Reed, Lord Carnwath, Lord Hodge)

The Facts: In a Scottish case a 13-year old schoolgirl was seriously injured, over 11 years ago, when she was knocked down by a car on 12 January 2004.

The accident occurred at dusk on the A98 road between Banff and Fraserburgh, near its junction with a private road leading to the farm where the she lived. There was a 60mph speed limit, and no street lighting.

Miss Jackson had just left her school minibus, which was parked on the opposite side of the road from the entrance to the road to her farm. She had passed between the rear of the minibus, which was still stationary, and the car behind it. The school bus sign on the front of the vehicle was not illuminated but its hazard lights were blinking.

Miss Jackson was found to have paused briefly at the offside rear of the bus, before taking one or two steps into the road into the path of the defender's oncoming car, and then breaking into a run.

The defendant was driving home in the opposite direction, travelling at about 50mph. His lights were on. His car struck the girl, while still travelling at about 50mph. She was projected into the air, the car passed completely beneath her so she landed back on the road.

At first instance before the Lord Ordinary court:

Although the court found that the defendant had failed to keep a proper look out and had failed to recognise the bus as a school bus and was driving too fast, it found Ms Jackson 90% contributorily negligent for having committed an act of reckless folly.

On appeal to the Extra Division:

The court reduced finding of contributory negligence to 70%.

On re-appeal to the Supreme Court:

The victim's contributory negligence was reduced to 50% by a majority ruling (3:2) of the Supreme Court.

As Lord Reed explained: a 13-year old will not necessarily have the same level of judgment and self-control as an adult. She had to take account of the car

approaching at speed, in very poor light conditions, with its headlights on. The assessment of speed in those circumstances is far from easy, even for an adult, and even more so for a 13-year old. This would not have been a straightforward matter even for an adult. Furthermore, the danger posed by the stationary minibus with its hazard lights on as he approached would have been obvious but he continued driving at 50mph. The Highway Code advises that even at 40mph a vehicle will probably kill any pedestrians it hits.

He was negligent in not reducing his speed by at least 10mph and not keeping a proper lookout because there was a danger, that he ought to have foreseen, of a child emerging from behind the bus.

In short the majority view was that the Extra Division has failed to give any satisfactory explanation for its finding that the child bore the major share of responsibility for the accident.

Comment:

What is of particular interest about this case is the Supreme Court's comments on the approach to taken by an appellate court when reviewing an apportionment under the 1945 Act. It quoted Lord Denning MR's comments which were agreed by the other members of the Court of Appeal in *Kerry v Carter* [1969] 1 WLR 1372 as follows:

> *'We have been referred to cases on this subject, particularly the recent case of Brown v Thompson [1968] 1 WLR 1003. Since that case it seems to have been assumed in some quarters that this court will rarely, if ever, alter an apportionment made by the judge. Such is a misreading of that case. I think that the attitude of this court was correctly stated in that case, at p 1012, by Edmund Davies LJ when he quoted from the judgment of Sellers LJ in Quintas v National Smelting Board [1961] 1 WLR 401, 409. This court adopts in regard to apportionment the same attitude as it does to damages.*
>
> *We will interfere if the judge has:*
>
> - *gone wrong in principle or*
> - *is shown to have misapprehended the facts:*
> - *but, even if neither of these is shown, we will interfere if we are of opinion that the judge was clearly wrong.*
>
> *After all, the function of this court is to be a Court of Appeal. We are here to put right that which has gone wrong. If we think that the judge below was wrong, then we ought to say so, and alter the apportionment accordingly*.' (p 1376) [NB bullet points added for emphasis]

In *Jackson*, the Court agreed unanimously with Lord Reed's statement that:

> *'The question, therefore, is whether the court below went wrong. In the absence of an identifiable error, such as an error of law, or the taking into account of an irrelevant matter, or the failure to take account of a relevant matter, it is only a difference of view as to the apportionment of*

responsibility which exceeds the ambit of reasonable disagreement that warrants the conclusion that the court below has gone wrong. In other words, in the absence of an identifiable error, the appellate court must be satisfied that the apportionment made by the court below was not one which was reasonably open to it.'

Lords Hodge and Wilson were of the view that while the first instance finding of 90% responsibility was wrong, the Extra Division's assessment did not fall outside what Lord Hodge described as the generous limits of reasonable disagreement.

UNLAWFUL IMPRISONMENT

Hicks (*protected party*) *v Young* (*2015*) *EWHC 1144* (*QB*)

A passenger's rash decision to escape from a moving taxi where he was being unlawfully detained did not break the chain of causation

The facts: In November 2010 the claimant sustained a severe brain injury when he rashly attempted an escape from a moving taxi that was travelling at 20mph.

The context in which this occurred resulted from a misunderstanding. The defendant taxi driver mistakenly believed that the claimant was about to make off without paying as he got out of his seat and began to follow his girlfriend as she alighted from the taxi. The driver seeing this, accelerated off, intending to return to the point of embarkation. The taxi did not have any locks.

The claimant sued in negligence and for false imprisonment.

The decision: The court accepted the claimant's assurance that he fully intended to pay. The defendant's actions were unjustified and amounted to an abduction and thus constituted the tort of unlawful imprisonment. Furthermore, his actions, in driving off while his passenger was standing up and lawfully attempting to leave the taxi and then continuing on without sufficient means of safely securing the passenger (who by now was a prisoner), was a breach of his common law duty of care to the claimant.

It was reasonably foreseeable, if unadvisable, that someone wrongfully abducted might seek to escape and so the claimant's actions did not constitute a novus actus interveniens.

The driver was liable in negligence and for the tort of unlawful imprisonment.

However as the claimant's actions, while not illegal, were certainly careless in that they involved a serious misjudgement of the level of risk involved. His misguided attempt to escape when and where he did had great causative potency to the severity of the injuries that he sustained.

The judge found the claimant contributorily negligent and reduced his damages for personal injury by 50%.

The Law Reform Contributory Negligence Act 1945 does not apply to the other tort claim and so the judge's assessment of damages for unlawful imprisonment, in the sum of £250, was not reduced.

QUANTIFYING CREDIT HIRE

Stevens v Equity Syndicate Management Limited [2015] EWCA Civ 93

Clarification on stripping out additional benefits in credit hire in a much ado about nothing case

(Lord Justice Jackson, Lord Justice Kitchin and Lord Justice Floyd)

Context: When a claimant uses credit hire (when their own financial resources would have enabled them to pay up front) he is entitled to recover the full enhanced credit hire rate.

The court will take into account difference between the basic hire rate (BHR) and the credit hire rate. The latter rate includes the additional services that a credit hire company provides to the hirer. These collateral services often include: the provision of credit, handling the claim and affecting the recovery from the negligent driver, taking the risk of not recovering from the defendant, vetting the claimant, together with an element of profit.

The difficulty arises because credit hire companies do not routinely disclose the cost of these additional benefits. They are hidden away in a single credit hire rate. It follows that any attempt to value the benefits at a later stage in a proportionate way must necessarily involve a degree of imprecision. The Court of Appeal has repeatedly indicated the need for pragmatism: the best that can be hoped for, without incurring a very expensive exercise of disclosure and analysis, is a reasonable approximation.

The preferred approach to arriving at the net recoverable loss, was set by the Court of Appeal in the *Burdis v Livsey* case, heard together in the *Clarke v Ardington* [2002] EWCA Civ 510 as conjoined appeals. This involves ascertaining the actual available rates (ie the BHR) in the claimant's locality. This approach was approved in *Pattni v First Leicester Buses Ltd; Bent v Highways and Utilities Construction Ltd* [2011] EWCA Civ 1384 and in *Stevens v Equity Syndicate Management Ltd* [2015] EWCA Civ 93.

So once it is established that the claimant needed to hire a car but where the need for credit hire is not established, the court will be guided by the BHR.

However in *Clarke* the Court of Appeal then qualified this by stating:

> '[The Claimant] can go round to the nearest hire company and is prima facie entitled to recover the amount charged whether or not the charge is at the top of the range of car hire rates. However, the basic principle is qualified by the duty to take reasonable steps to mitigate the loss. What is reasonable will depend on the particular circumstances'.

So in practical terms what the court will do is to compare the actual credit hire tariff with the BHR for the locality and arrive at a figure that, in its

discretion, arrive at a sum that on the balance of probabilities represents at the measure of damages recoverable. This is an objective inquiry to determine what the BHR would have been for a reasonable person in the position of the claimant to hire a car of the kind actually hired on credit.

The facts: In *Stevens*, a further gloss has been provided by the Court of Appeal in a case where there was a wide range of potential BHR in the claimants' locality (these extended from £33.83 with a non-waivable £1,000 excess to £136.76 with a non-waivable £500 excess).

The court acknowledged that judges are still experiencing real practical difficulties in carrying out the exercise of stripping out the additional benefits and calculating the BHR in a way that does not involve disproportionate costs.

The decision: The trial judge in the court below had fallen into error in selecting an average, as it had already established in *Burdis v Livsey* [2002] EWCA Civ 510 that this was not the correct approach.

So if not the average, was it the higher or the lower of the two extremes? Little surprise then that the court would opt for the lower of the two – in the words of Kitchen LJ who gave the only reasoned judgment:

> *'… it seems to me reasonable to suppose that the lowest reasonable rate quoted by a mainstream supplier for the hire of such a vehicle to a person such as the claimant is a reasonable approximation to the BHR'.*

The irony in *Stevens* was that when the correct approach was applied to the case facts, it produced an outcome that was only slightly lower – because the trial judge had sensibly disregarded the higher quotes and only selected the four mainstream providers to arrive at the average.

The claimant's appeal against the reduction was dismissed.

Summary of approach

- did the claimant need to hire a replacement car at all; if so,
- was it reasonable, in all the circumstances, to hire the particular type of car actually hired at the rate agreed; if it was,
- was the duration of hire reasonable?
- was the claimant 'impecunious'; if not
- has the defendant proved a difference between the credit hire rate actually paid for the car hired and what, in the same broad geographical area, would have been lowest reasonable rate quoted by a mainstream supplier as BHR for the model of car actually hired and if so what is it; if so,
- what is the difference between the credit hire rate and the BHR?

VICARIOUS LIABLITY

Graham v Commercial Bodyworks Ltd [2015] EWCA Civ 47

Employer not vicariously liable for a reckless and asinine prank

(Lord Justice Longmore, Lord Justice Underhill and Lady Justice Sharp)

The facts: The defendant operated a bodywork repair shop. This work involved the use of a highly flammable thinning agent. No smoking was permitted on the premises and various precautions were implemented to ensure that the risk of fire was minimised.

The claimant sustained a serious burn injury caused when a fellow worker, who was his friend, sprayed thinner onto the back of his overalls and then lit it while he was preoccupied. The flames were quickly extinguished by his colleagues and an ambulance called. The perpetrator left hurriedly and cannot be traced. The claimant alleged that his employer was vicariously liable.

At first instance, although the judge dismissed the defendant's description of the event as 'horseplay' and categorised the incident as a serious and deliberate assault, he found that the employer was not vicariously liable. The claimant appealed.

The decision: The Court of Appeal was unanimous in dismissing the appeal. Although the employer's use of highly inflammable paint thinner created a risk of injury, it was another thing entirely to hold that the employee's reckless acts were sufficiently closely connected to the assault to impose vicarious liability. The individuals concerned were known to be friends, there was no friction or conflict between them that might have alerted the employer to the risk that one might assault the other. They were both co-employees of long standing on the same grade of employment and rate of pay.

After reviewing the extensive corpus of case law on vicarious liability, Longmore LJ, who provided the only reasoned judgment, explained the decision (differentiating the case facts from those in *Mattis v Pollock* [2003] EWCA Civ 887 or *Weddell v Barchester Health Care and Wallbank v Wallbank Fox Designs Ltd* [2012] EWCA Civ 25, in these words: '*The real cause of Mr Graham's injuries was the no doubt frolicsome but reckless conduct of Mr Wilkinson which cannot be said to have occurred in the course of his employment*'.

Comment: It is interesting that Longmore LJ made reference to two Canadian authorities, as did in Lord Steyn 14 years before in *Lister v Hesley Hall* [2001] UKHL 22 in the leading authority on vicarious liability for sexual abuse. He quotes extensively from McLachlin's seminal judgment in *Bazley v Curry* 174 DLR (4th) 45 on the test for determining vicarious liability where the scenario has no obvious legal precedent or where the cases are inconclusive. This is recited at para 13 of his judgment and rewards study.

CLINICAL NEGLIGENCE

Montgomery v Lanarkshire Health Board [2015] UKSC 11

Hospital liable for obstetrician's failure to properly advise about the option of surgery

(Lord Neuberger P, Lady Hale DP, Lord Kerr, Lord Clarke, Lord Wilson, Lord Reed and Lord Hodge)

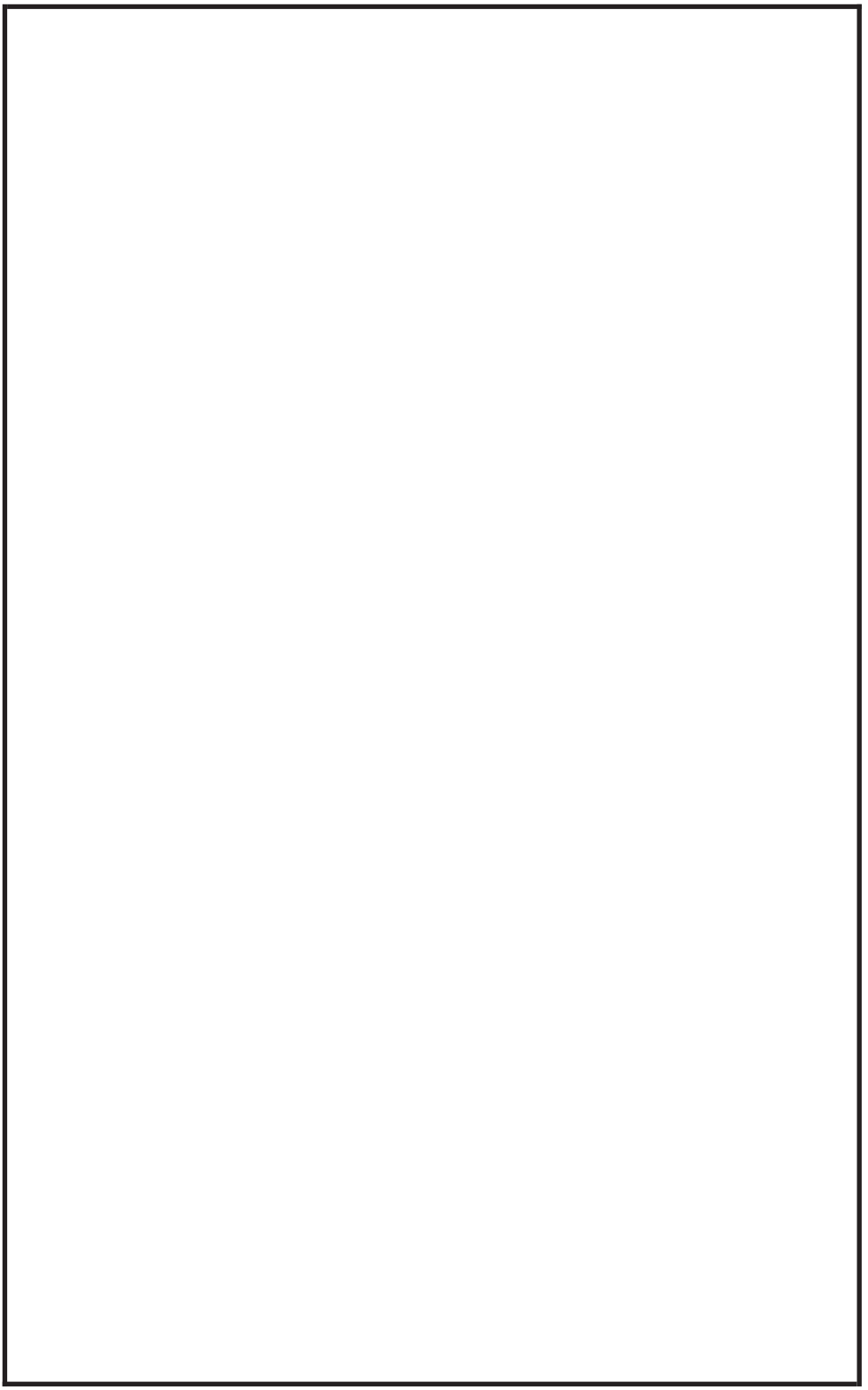
The facts: The claimant, who was pregnant, was also petite and suffered from diabetes. She was at risk of suffering complications on giving birth that could cause serious harm to her baby, as diabetics are known to be likely to have large babies. Complications ensured during the delivery and the infant suffered oxygen deprivation resulting in cerebral palsy and it also sustained paralysis in the arm from shoulder dystocia.

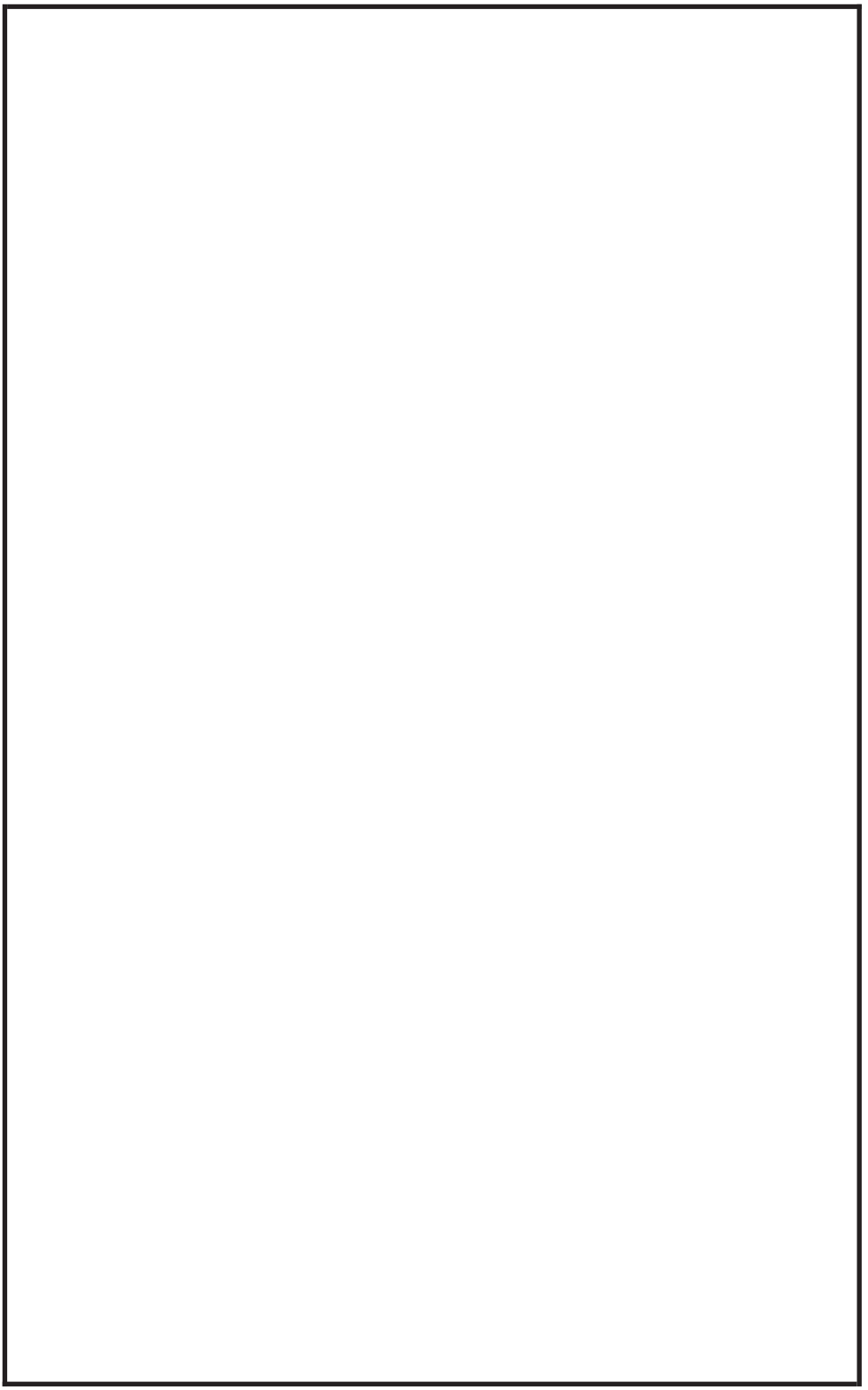
The claimant's case was that she should have the option of undergoing a Caesarean section explained to her. Her claim was dismissed in the Court of Session which had been influence by the majority decision of the House of Lords in the case of *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871 where it had found that even if the patient had been advised properly about the risks she would not have chosen to undergo a Caesarean section and so the failure to advice was not causative. The claimant appealed.

The decision: The Supreme Court came to the unanimous view that there had been a breach of duty and one that was causative. The appeal was allowed.

There was a clear duty on doctors to take reasonable care to ensure that a patient is aware of material risks inherent in treatment and of the alternative options available. The fact that many patients might simply accept the clinical judgment of the treating physician did not excuse the doctor from this task. It would be a mistake to view patients as uninformed, incapable of understanding medical matters, or wholly dependent on information from doctors. The Justices found that had the doctor explained dispassionately the risk of shoulder dystocia, the potential consequences, and the alternatives, the claimant probably would have elected for a Caesarean section.

Paras 87–91 are particularly worthwhile reading. Here Lords Kerr and Reed explain that an adult of sound mind is entitled to decide which, if any, of the available treatments to undergo, and her consent must be obtained before treatment is undertaken which interferes with her bodily integrity. They set out of the approach to take in discharging that duty.





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