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NEWS UPDATE FOR PERSONAL INJURY PROFESSIONALS

Work place fatality rate on the rise

The country's workplace fatality rate increased by more than 16% in the past year, according to the latest figures.

In the year to March 2011, 171 workplace deaths were recorded by the Health and Safety Executive (HSE). This compares with 147 during the same period of the previous year and corresponds to a rate of fatal injury of 0.6 per 100 000 workers.

The figure of 171 worker deaths in 2010/11, however, is 17% lower than the average for the past five years (205).

The watchdog also noted that the number of major workplace injuries has fallen, dropping from 26,268 in 2009/10 to around 24,700. Amputations, fractures and burns are among the injuries which fall into this category.

Meanwhile, the number of injuries deemed severe enough to cause an absence of at least four days dropped to 90,653 – down from 96,427 the previous year.

Commenting on the research, Malcolm Underhill, personal injury specialist at IBB Solicitors, said that the latest statistics confirm that Britain continues to have the lowest rate of fatal occupational injuries in Europe as well as one of the lowest levels of work-related ill health.

"This is good news but there is still room for improvement in some sectors where the number of accidents appear disproportionately high, such as construction and agriculture.

"Perhaps the only way to improve health and safety in these industries is for the HSE to use the full force of their enforcement powers."

Truncated debate on no win, no fee plans attacked by lawyers

The lack of parliamentary time allowed to discuss no win, no fee proposals in the Legal Aid, Sentencing and Punishment of Offenders Bill during report stage has been branded "an utter disgrace" by the Association of Personal Injury Lawyers (APIL).

The APIL's chief executive, Deborah Evans said: "Is 20 minutes of discussion all injured people are worth? These proposals risk cutting off genuine claimants from their right to full and fair redress. It is an utter disgrace that only around 2% of parliamentary time during this report stage has been devoted to examining the very serious impact these proposals will have on people whose lives have been shattered at the hands of others."

She said the proposals will change no win, no fee cases in such a way that the damages of many innocent injury victims will be unfairly reduced and that many serious and complex cases will not be brought at all.

"There are widespread ... concerns about this Bill and I am extremely worried that proposals are being railroaded through parliament without proper consideration about the consequences for vulnerable people."

She added: "The government must stop this runaway juggernaut now, and start to take these concerns seriously."

Lawyers fly in for seminar on injuries abroad

Top lawyers from the UK, US and Europe gathered in Manchester last month (November) to tackle the latest challenges facing people who suffer injuries overseas, ahead of the winter holiday season.

Organised by Gerard McDermott QC of Outer Temple Chambers and chaired by aviation lawyer Geraldine McCool of MPH Solicitors,the seminar – *Cross border personal injury: handling claims for those injured abroad* – looked at the hurdles faced by those who have been seriously injured while overseas.

McDermott said that with many Europeans travelling to the US and vice versa, particularly over the winter months, the contribution to the seminar of Chicago personal injury lawyers Bob Clifford and Michael Krzak of Clifford Law Offices, was "invaluable".

McDermott said: "An understanding of how catastrophic personal injury claims can be made in other jurisdictions has to be a vital element of any lawyer's remit when working in this field.

"At what can be the most difficult time in a person's life and their family's life, when they have suffered a life-changing injury, it is essential the legalities are not slowed down or hindered simply because there is a cross-border element to the claim.

"We have pulled together leaders in their fields, covering spinal injuries, aviation and medical malpractice as well as road traffic accidents, all of whom have vast experience of cross-border claims."

PI witnesses in contempt

Two witnesses who lied about the extent of a claimant's injuries in a £1.5 million personal injury claim have been convicted of contempt of court.

Thereza Daoud sued Brighton and Hove Bus Company after she was hit by a bus in 2005. Subsequent investigation showed she had exaggerated her injuries

In *Brighton & Hove Bus and Coach Co v Brooks and Ors,* Daoud's husband and daughter were found to have presented a false picture to medical experts and to be in contempt of court.

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Occupiers liability: duty of care to unauthorised visitors

What duty do occupiers owe to unauthorised visitors?

Under the Occupiers' Liability Act 1984 (OLA 1984), s 1(3) an occupier of premises owes a duty to another (not being its visitor) in respect of any danger due to the state of the premises, or to things done or omitted to be done on them, if:

- it is aware of the danger or has reasonable grounds to believe that it exists;
- it knows or has reasonable grounds to believe that the other is in the vicinity of the danger concerned, or that they may come into the vicinity of the danger (in either case, whether they have lawful authority for being in that vicinity or not);
- the risk is one against which, in all the circumstances of the case, it may reasonably be expected to offer some protection.

Who is an occupier?

The control test

An occupier is any legal entity with a sufficient degree of control over premises such that it can properly be considered to be an occupier. (*Wheat v E Lacon* [1966] 1 All ER 582). The key to the test is effective control. An occupier need not have a legal interest in the land. Where a claimant has come to harm at or in someone else's premises as a result of the state of the premises, the question is: did the proposed defendant have such control over those premises that it would have been in a position to correct whatever defect or danger caused the injury? An objective test should be applied when considering whether an occupier has taken such steps as are reasonable to see that visitors are reasonably safe. (*Esdale v Dover District Council* [2010] All ER (D) 73 (Oct)).

Parties who qualify as an occupier

When determining who the occupiers are for the purposes of an occupiers' liability claim, you should be aware of the following:

- **Multiple occupiers**
  There can be multiple occupiers of premises at any given time, eg, on a construction site where the main contractor has responsibility for on-site safety and for supervising various subcontractors, and a degree of control over how work is carried out. But where those subcontractors execute the actual work in question, they might be occupiers of those areas on which they are working and temporary structures (such as scaffolding) they erect and use in the performance of their work.
- **Differing duties**
  Where there is more than one occupier, the duties owed by each occupier will not necessarily be identical.
- **Co-existing duties**
  A defendant can have co-existing legal duties under, eg, the OLA 1957, relevant health and safety regulations, and at common law (ie, in negligence).
- **Short-term occupiers**
  A person can be the occupier of premises in a relatively transient sense, in that they might have effective control of premises only for a short period of time.
- **Occupying only part of premises**
  A person can be the occupier of a discrete part of the premises; eg, glaziers installing a new front window in a high street solicitors' office might be occupiers of the area in which they are working.

Who is an unauthorised visitor?

An unauthorised visitor is anyone who does not have actual or implied permission to be on the premises.

What is covered under the duty?

The Occupiers' Liability Act 1984 imposes a duty on occupiers in respect of "any risk of suffering injury on the premises by reason of any danger due to the state of the premises or to things done or omitted to be done on them" (OLA 1984, s1(1)).

This means that OLA 1984 applies only to dangers due to, or relating to, the state of the premises.

When does the duty arise?

As set out above, the duty arises where all three of the following criteria are fulfilled:

- the occupier is aware of something that creates a risk of injury on the premises, or it has reasonable grounds to believe that such a danger exists;
- the occupier knows or has reasonable grounds to believe that the claimant is in the vicinity of that danger, or might come within its vicinity;
- the risk is such that the occupier can reasonably be expected to offer the claimant some protection against it.

The onus is on the claimant to prove that the occupier had actual knowledge that the claimant was in the vicinity of the danger and the test is whether a reasonable person would have come to those conclusions (see *Swain v Puri* [1996] PIQR P442).

What is the scope of the duty?

The duty is "to take such care as is reasonable in all the circumstances of the case to see that [the claimant] does not suffer injury on the premises by reason of the danger concerned"(OLA 1984, s 1(4)).

It must be a danger against which the occupier can reasonably be expected to offer the claimant some protection. This means that in practice the court will have to consider (OLA 1984, s 1(3)):

- who the claimant is;
- how they came to be on the premises;
- their intentions while they were there;
- the nature of the danger itself.

The duty itself is to "take such care as in all the circumstances of the case is reasonable to ensure that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there" (OLA 1984, s 2(2)).

OLA 1984 s 2(3) provides that in considering all the circumstances of the case the court should have regard to the degree of care that would ordinarily be looked for in a visitor. This means that an occupier:

- must be prepared for children to be less careful than adults; and
- may expect that a person, in the exercise of their calling, will appreciate

and guard against any special risk ordinarily incident to it, so far as the occupier leaves them free to do so.

The net result of this, of course, is that in practice the occupier's duty differs depending on the character of the visitor.

General principles

Although this is a very fact-sensitive area of law, certain general principles emerge from the decided cases:

- Where the danger in question is very serious (and particularly where it is potentially fatal), it is much more likely that it is the type of danger against which the occupier will be expected to offer some protection.
- Generally there is no obligation to warn adult claimants of the risk of injury from any dangerous activities that they choose to undertake on the premises (and that should be patently obvious to them) (*Tomlinson v Congleton BC* [2003] 3 All ER 1122).
- An occupier will probably be able to avoid liability (as against adult claimants at least) if it puts up clear signs warning of the danger in question and telling the trespasser to keep away from it.
- Occupiers must bear in mind the possibility that children will come onto the premises, and take into account the likelihood that they will take less care for their safety than adults (see above, *Tomlinson*, which may have been decided differently had the claimant been a child).
- Where an occupier is aware of some type of behaviour (even if it is something that it attempts to prevent) that brings a claimant or a class of claimant into contact with a known risk or danger, it may well be under an obligation to take further steps to remove the risk (see, eg, *Harris v Birkenhead Corporation* [1976] 1 All ER 341, where the local authority had failed to block out the doors and windows of a property it had earmarked for demolition and a young child entered the premises and fell from a window).
- An occupier can take reasonable defensive measures to deter trespassers: where the deterrent is obvious or the occupier gives clear warning of it (eg barbed wire on top of walls), it will not be liable under OLA 1984 if such deterrents injures a would-be intruder, but the position is different regarding hidden dangers or booby traps intended to catch someone who has secured entry to the premises (*Cummings v Grainger* [1977] 1 All ER 104).

The duty under the OLA 1984 concerns personal injury only, and does not extend to a claimant's property. The claimant may still have a claim in negligence in respect of property damage.

Giving credit where credit is due

OuterTemple Chambers

Should credit be given in accommodation claims where family members live with a claimant at no cost to themselves? Jonathan Hand reports

After care costs, the claim for purchasing and adapting a suitable property is very often the next largest head of loss in catastrophic personal injury cases. Although the basis of the assessment of damages for accommodation claims was ruled upon by the Court of Appeal more than 20 years ago, in *Roberts v Johnstone* [1989] QB 878, various aspects of these claims remain controversial.

One issue that frequently arises concerns family members (commonly parents of a child claimant) who intend to live with the claimant in the new property which he or she buys with the damages recovered from the defendant. Faced with this situation, the defendant may be expected to object to the claimant's family living at no cost to themselves in the new property, and to argue that credit should be given by the claimant in some way to reflect this.

Whiten v St George's Healthcare NHS Trust

The issue arose again most recently in *Whiten v St George's Healthcare NHS Trust* [2011] EWHC 2066. The judgment contains a helpful review of earlier cases in which the issue had been considered by the courts, followed by a careful analysis of the competing arguments. The trial Judge, Swift J, summed up the problem in this way:

> *"This is a difficult issue. If no allowance at all is made for the claimant's parents' accommodation costs, the effect will be that they (and, while they are living at home, their other children) will be provided with a home, free of charge, for as long as the claimant lives. Meanwhile, the defendant will be required to compensate the claimant for the whole of the annual interest on the capital value of the property. On the face of it, that result does not seem fair."*

A lot can turn on this issue. In *Whiten* the defendant argued for a reduction in the annual sum claimed which would have left the claimant with less than 30% of the gross figure, after giving credit for his parents' saved accommodation costs. It is hardly surprising, therefore, that the courts, while recognising the force of the defendants' arguments, have been concerned not to deprive claimants of a large part of the capital needed to re-house themselves.

The main objection raised by claimants against giving credit is that making such a deduction would also be unfair to them. After all, it is not the claimant who has been relieved of the expense of purchasing a home, it is the parents. Yet the loss would fall on the claimant. This argument found favour with the trial judge in *Whiten*. The defendant had argued that credit should be given by taking into account the capital cost of the family home which the claimant's parents would have bought in any event. However, Swift J agreed with the claimant that it was wrong in principle for the value of the

property that would have been bought by the claimant's parents to be deducted from the value of the new property to be owned by him.

Anticipating this objection, defendants have sometimes argued that the parents should pay rent to the claimant for living in the property, or alternatively that any claim for gratuitous care provided by the parents in the future should be reduced to reflect their saving in accommodation costs.

Lewis v Royal Shrewsbury Hospital NHS Trust

The attraction of these arguments is that the court is, in effect, allowed to take away with one hand but to give back with the other – and thereby avoid any, or any substantial, reduction in the capital sum which the claimant has available to buy a suitable property. These arguments have met with some success: see *Lewis v Royal Shrewsbury Hospital NHS Trust* (29 January 2007, QB: unreported).

The decision in *Lewis* was relied on by the defendant in *Whiten* (albeit that, unlike in *Lewis*, the claimants' parents in *Whiten* were going to sell the previous family home – which had little equity remaining – and so would not themselves have the benefit of any rental income from another property in the future). However, Swift J made the point that she could not require the claimant's parents to pay him rent. The only way that she could achieve the same result would be to characterise the claimant's failure to demand rent from his parents as a failure to mitigate. But she considered that, given the circumstances of this case (which, she observed, were likely to apply in most if not all similar cases), a failure to demand rent could not be regarded as unreasonable.

Conclusion

The decision in *Whiten* will strengthen the hands of claimants who are going to live in their new home with other family members. But given the variety of factual situations in individual cases, as well as the absence of any appellate authority on the point, this is likely to remain a contentious issue in the future.

Jonathan Hand
Barrister
Outer Temple Chambers

Clutching at straws

Simon Allen reviews recent attempts by employers to wriggle out of liability for the increasingly outrageous wrongs of their employees

The recent decision of the High Court in *JGE v English Province of Our Lady of Charity and Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2011] EWHC 2871 QB has provided further proof that distressingly, in recent years, those cases involving vicarious liability which have reached the higher courts have had a sinister aspect to them. The oft-cited examples of employees throwing snowballs or taking part in pranks, which ultimately injure one of their colleagues, have been replaced by shootings, significant fraud and, most recently, child abuse.

In *Lister v Hesley Hall Limited* [2002] 1 AC 215, a warden sexually assaulted those in his care at a school boarding house. The House of Lords (Lord Steyne giving the lead judgment) held the school vicariously liable for the warden's actions. The foundation on which the decision was based was the "relative closeness of the connection between the nature of the employment and the particular tort". In relation to the specific facts, Lord Millet stated that the employee "did not merely take advantage of the opportunity which his employment gave him, but he abused the special position". Without the job title and the role that went with it the warden would not have had the opportunity to abuse the children.

The same approach applied in the decision of their Lordships in *Dubai Aluminium Company Limited v Salaam* [2003] 2 AC 366 in which a partner in a law firm defrauded the claimant company. He would not have been able to do so without the responsibility given to him as their solicitor to act on their case.

Most bizarrely, but no less serious, was the case of *Barnard v the Attorney General of Jamaica* [2004] UKPC 47 in which the Privy Council heard a case in which a member of the public was using a public phone when a police officer, employed by the defendant, asked to use the phone. There was nothing about him which identified him as a police officer other than his statement "police". When Mr Barnard didn't hand over the phone the officer slapped him on the hand and shoved him in the chest. Unfortunately for Mr Barnard, he still didn't let the officer have the phone so he stepped back two steps, drew his service revolver, pointed it at the claimant and shot him in the head. Fortuitously for Mr Barnard, he didn't die. If the facts aren't strange enough the officer then proceeded to attempt to arrest Mr Barnard when he was in hospital being treated for the gun shot wound. The Privy Council held that the defendants were responsible because the claimant was shot with a revolver provided by them and the attempt to arrest simply underlined the fact that the officer viewed the action within the context of his employment.

The senior judiciary had, therefore, on a number of occasions made it clear that it would be extremely difficult for an employer to avoid vicarious liability for the actions of an employee if those actions were closely linked to the nature of the employment. It is, therefore, with some astonishment and derision that one reads of the defence by the Roman Catholic Church in *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church* 2010 [EWCA] Civ 256.

Maga

The claimant was sexually abused by the defendants' agent, Father Clonan, who, between 1972 and 1992, was not only a priest but an active and promiscuous sexual abuser of boys.

The claimant himself had learning difficulties (an IQ of around 70) and suffered from epilepsy. He was not a Roman Catholic or connected with the church. The abuse commenced after a conversation when the claimant was admiring the priest's motor car, a Triumph Stag. The priest invited the claimant to attend a church disco. The relationship developed to the extent that he paid the claimant for cleaning his

car, doing small jobs in the presbytery and ironing his clothes. The priest did not attempt to engage with the claimant on any religious level, but this, of course, was not his real purpose in the association. Most of the abuse seems to have occurred within the presbytery in which the priest resided.

The defendants, despite accepting that the priest had abused a number of young boys, defended this particular case on the basis that the claimant was not a Catholic, he was not an altar boy and he had nothing to do with the church. If ever there was an artificially constructed defence to a legal claim, one suspects this is it. Fortunately, the Court of Appeal did not accept the defence, noting the following:

1) When the priest met the boy he was normally dressed as a priest.
2) The role of a priest involves "trust and responsibility". Indeed.
3) In a sense, a priest is never "off duty".
4) A priest is obligated to try to also communicate with non-Roman Catholics.
5) The priest had special responsibility for youth work at the church which gave him the opportunity of inviting the claimant to a disco on church premises.
6) The incidents of abuse largely took place on church premises and, in particular, in rooms in the presbytery.

While the appeal court accepted that the claimant's case was weaker than that in *Lister* for the reasons stated within the defence, they still found in his favour. In making their decision, the court considered the *Lister* case, but also *Jacobi* [1999] 174 DLR, a decision of the Canadian Supreme Court, which stated that to establish vicarious liability, a claimant must show that there was "a material increase in the risk of harm occurring in the sense that the employment significantly contributed to the occurrence of the harm".

The court there identified five key factors, namely:

1) The "opportunity afforded" to abuse power.
2) The "extent to which" the abuse of the claimant may have furthered the defendant's aims.
3) "The extent to which the sexual abuse was related to … intimacy inherent" in the functions of the church.
4) "The extent of the power conferred on the priest in relation to the claimant."
5) The vulnerability of potential victims to the wrongful exercise of power.

The appeal court found all but b) firmly applied in this case and these factors built on the "power or dependency relationship" referred to by McLachlin J in *Bazley v Curry* 174 DLR 45, another Canadian case.

Smith LJ stated that all cases of this type will be "fact sensitive", but "if those legitimate purposes clothe the priest or pastor with the ostensible authority to create situations which the priest or pastor can and does then subvert for the purposes of abuse, I see no reason why that church should not be vicariously liable for the abuse".

The decision simply follows that of the House of Lords in *Lister* and other cases heard by the higher courts since 2002. While cases may be "fact sensitive", the manner in which a church organisation sought to defend the abuse of a youngster by one of its employees is unpalatable. One would have thought it was perfectly clear that an employee who dresses as a priest, who has a link with a child because of that position and who invites that child to church discos and to perform work within the priest's accommodation, could not in any way be disguised as anything other than "closely connected" to his employment.

JGE

In *JGE* the above cases were considered by MacDuff J in deciding whether the nature of the relationship between a priest and a bishop was one to which vicarious liability applied.

The priest had allegedly abused and raped the claimant while she was attending a children's home in the 1970s, operated and managed by the first defendant; a religious order of nuns. The second defendant contended that the priest was not its employee and, therefore, they were not vicariously liable for his actions.

In this case, the judge sought guidance from previous authorities of the higher courts including the House of Lords in *Lister* and authorities from the Canadian Supreme Court including *Bazley* and *Doe v Bennett & Others* [2004] IFCR 436.

In *Doe*, the court decided that a bishop was vicariously liable for the actions of a priest who had sexually abused boys within his parish, holding that the relationship was "…akin to employment. The priest is reasonably perceived as an agent of the diocesan enterprise. The relationship between the bishop and the priest is sufficiently close. Applying the relevant test to the facts, it is also clear that the necessary connection between the employer created or enhanced risk and the wrong complained of is established."

In *JGE*, the defendants argued that there was no relationship akin to employment because there was a lack of a right to dismiss (by the bishop), no wages paid to the priest by the diocese, no formal contract and little control or supervision of his activities. However, countering these arguments, were the facts that the priest was appointed by the second defendants, he was given full authority to fulfil that role by them, he was provided with premises and clerical robes, and had free rein to act as a representative of the church.

His Lordship's conclusion was that, in short, the defendants created a risk of harm to others, namely that the priest could abuse or misuse those powers given to him for his own purposes or otherwise. He found, therefore, that the nature and closeness of the relationship satisfied the test at stage one.

Conclusion

These cases are becoming more and more common. In the past few days an enquiry lead by Lord Carlile of Berriew found a shocking level of abuse at Ealing Abbey and Saint Benedict's School in West London. Lord Carlile was severely critical of the monastic community as a result of "its lengthy and culpable failure to deal with what, at times, must have been evident behaviour placing children at risk".

It remains disturbing to the writer that defendant organisations in these cases seek to find loopholes in the law into which they can leap to avoid responsibility for the actions of their clergy. One would have thought that a degree of compassion would have resulted in an assessment of the morality of exposing those who have been abused to the additional and daunting mental challenge of litigation.

Simon Allen
Joint head of personal injury
Russell Jones & Walker

Case digests

JGE v English Province of Our Lady of Charity and another
[2011] All ER (D) 50 (Nov); [2011] EWHC 2871 (QB)
8 November 20111

Vicarious liability – Roman Catholic Church – Liability for tortious acts of priest – Claimant allegedly sexually abused and raped by Roman Catholic priest – Whether diocesan bishop responsible for wrongful acts of priest.

The claimant alleged that she was sexually abused and raped by a Roman Catholic priest, B, at a time when she was resident at a children's home between May 1970 and May 1972. The home was operated and managed by the first defendants, a religious order of nuns. The second defendant stood in the place of the diocesan bishop at the material time. The claimant claimed damages for personal injury. An issue arose as to whether the nature of the relationship was one to which vicarious liability might attach. The second defendant contended that B was not its employee and that vicarious liability could not attach to the relationship which existed between them.

The court ruled:

In examining whether party A was vicariously responsible for the acts of party B, there was a two-stage test. The first stage involved an inquiry into the relationship between A and B; whether it was a relationship to which the principles of vicarious liability might attach. The second involved an inquiry into the act or omission of B which was in question; whether the act was within the scope of employment or other relationship. It was the nature and closeness of the relationship which was the test at stage one. That close connection might be easier to recognise than to define. The court would look carefully at the full nature of the relationship. All the surrounding facts and circumstances were to be considered. Those would include many of the matters which were of relevance also at stage two. Of particular relevance to stage one would be the nature and purpose of the relationship: whether tools, equipment, uniform or premises were provided to assist the performance of the role; the extent to which the tortfeasor might reasonably be perceived as acting on behalf of the authoriser. That was not an exhaustive list. Every case would be fact specific and other factors would become apparent as and when they occurred. The extent to which there was control, supervision, advice and support would be of relevance but not determinative. Where the tortfeasors actions were within the control and supervision of the third party, the relationship would be close. Control was just one of the many factors which would assist a judge to the just determination of the question. That question would be whether on the facts before the court, it was just and fair for the defendant to be responsible for the acts of the tortfeasor, not in some abstract sense, but following a close scrutiny of the connection and relationship between the parties and the connection between the tortious act and the purpose of the relationship/employment/appointment.

The relationship between B and the defendants was significantly different from a contract of employment. There was no real element of control or supervision, no wages and no formal contracts. However, B was appointed by and on behalf of the defendants. He was appointed in order to do their work, to undertake the ministry on behalf of the defendants for the benefit of the church. He had been trained and ordained for that purpose. He had immense power handed to him by the defendants. It was they who appointed him to the position of trust which he so abused. The nature of the relationship was one to which vicarious liability might attach. The activities of B had been set in motion by the defendants in pursuance of a relationship into which the defendants had entered for their own benefit. It was their empowerment of B which materially increased the risk of sexual assault, the granting of the power to exploit and misuse the trust which the defendants had granted to him. It was the defendants who had introduced the risk of wrongdoing. By appointing B as a priest, and thus clothing him with all the powers involved, the defendant created a risk of harm to others. The empowerment and the granting of authority to B to pursue the activity on behalf of the enterprise were major factors. Whether or not the relationship might be regarded as "akin to employment" the principal features of the relationship dictated that the defendants should be held responsible for the actions which they initiated by the appointment and all that went with it.

Adopted*: Doe v Bennett and others* [2004] ISCR 436; considered: *Trotman v North Yorkshire County Council* [1999] LGR 584; *Lister v Hesley Hall Ltd* [2001] All ER (D) 37 (May); *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] All ER (D) 93 (Oct); *Maga v Roman Catholic Archdiocese of Birmingham* [2010] All ER (D) 141 (Mar); *Various claimants v Catholic Child Welfare Society*[2010] All ER (D) 241 (Oct).

Smith v Kempson
[2011] All ER (D) 187 (Oct); [2011] EWHC 2680 (QB)
21 October 2011

Negligence – Contributory negligence – Road accident – Court finding claimant negligent – Defendant appealing – Whether trial judge applying wrong test of liability – Whether judge's findings of fact appropriate – Whether judge failing to apply correct legal standard in finding negligence.

In December 2007, the defendant's car collided with the claimant's motorbike as the defendant was pulling out of a road, in circumstances where her vision had been obscured. At a hearing of July 2010, the trial judge directed herself that the burden of proof was the balance of probabilities and, if she concluded that the chances were below 51% that the accident occurred as a result of the defendant falling below the standard of a reasonable driver that would be sufficient to prove the case. The court found for the claimant, and held that the defendant had been negligent. The judge found that on the balance of probabilities, the defendant's standard of driving had fallen below that expected of a reasonable driver. She held that on the balance of probabilities the accident had been caused by the negligent driving of the defendant in pulling out from a minor junction onto a major road in circumstances where it was not safe to do so. In reaching that conclusion, she found that the claimant had not fallen below the reasonable standard of a motorcyclist. The defendant appealed.

It was common ground between the parties that the claimant's driving had not fallen below the standard of care required for a motorcyclist in his position. The defendant submitted that the judge had directed herself wrongly as to the test of liability required. She further contended that the judge had made no findings as to what it was specifically that the defendant had failed to do, or what she had done, which had constituted a breach of the duty of care, and that the judge had either failed to apply the correct legal standard, or had failed to make a finding of primary fact that would support her conclusion that the defendant had been negligent.

The appeal would be dismissed.

It was open to a judge to conclude that a person had acted in breach of standard of care even where the judge was unable to say, or did not say, precisely what action or omission had constituted the fault.

On the evidence, the judge had not directed herself wrongly. She had been entitled to reach, and had reached, the clear conclusion that the claimant had not driven below the reasonable standard required of a motorcyclist in the circumstances. Although the judge had not made a specific finding of what it was that the defendant ought to have done and had not done, that would not preclude the judge from reaching the conclusion that the defendant had not acted to the high standard of care required.

The judge had directed herself correctly.

Cox v Ergo Versicherung AG
[2011] All ER (D) 07 (Nov); [2011] EWHC 2806 (QB)
28 October 2011

Conflict of laws – Applicable law – Tort – Personal injury – Assessment of damages – Claimant and deceased being married couple – Deceased killed as result of road accident in Germany – Claimant claiming damages from defendant insurance company – Whether applicable law being law of England and Wales – Fatal Accidents Act 1976.

The claimant was a Czech national. The deceased was a serving officer in the British army. In June 2003, the claimant and deceased married in the UK. In August 2003, the deceased was posted to Germany. There he and the claimant took up residence in the army married quarters. In May 2004, he was riding a bicycle along a street adjacent to the barracks when he was struck by a car driven by a German civilian. He was killed instantly. The accident was wholly the fault of the car driver. The defendants were the relevant motor insurers. The claimant issued proceedings claiming damages from the defendants.

Issues arose as to whether: (i) applying conflict of laws principles, the claimant could rely on the Fatal Accidents Act 1976 (FAA 1976); and (ii) German law applied to limit the defendants' liability by reference to German principles of mitigation.

The court ruled:

(1) The claimant could not rely on FAA 1976. Part III of FAA 1976 was the source of the material provisions of English conflict of laws. Section 11 of FAA 1976 clearly made selection of German law as the unsurprising starting point. With German law thus identified, its application had to follow, propounding a package of provisions to address the question of whether an actionable tort had occurred, whether there was liability and, if so, for what by way of heads of damage. The applicable German law did not include resort to FAA 1976.

(2) Had the court upheld the claimant's contention that her claim could be advanced as a claim under FAA 1976, then the answer would have been "No". As it was, the applicable German law provided as a matter of substantive law a duty to mitigate. Thus following on from the first issue, the answer was "Yes".

Mustafa v Kashi (t/a Tantalizing Face and Body Clinic)
[2011] All ER (D) 186 (Oct); [2011] EWHC 2701 (QB)
21 October 2011

Negligence – Duty to take care – Breach of duty – Burden of proof – Claimant suffering burns to neck and face during provision of laser hair removal at defendant's clinic – Judge finding defendant liable – Whether judge erring.

The claimant brought proceedings against the defendant. It was alleged that the claimant had suffered personal injuries as a result of an incident which occurred at the defendant's clinic on or about 3 May 2007. The judge held the defendant liable for burns caused to the claimant's neck and face, during what she found to be the negligent provision of laser hair removal treatment.

The judge ordered the defendant to pay damages in the sum of £2,653, including interest, together with costs, which were summarily assessed at £22,653. The defendant appealed.

He contended that the judge: (i) had erred in law in relation to both the burden and the standard of proof; and (ii) had erred in fact in determining the date of the treatment to have been 5 May 2007.

The appeal would be dismissed.

(1) In the circumstances, the judge had not misunderstood the burden of proof. In relation to the standard of proof, the judge had directed herself that she had to apply the civil standard of proof and observed that the standard was "the balance of probabilities". She was not sitting an exam paper nor was she required to set out an academic dissertation on the legal concepts of burden and standard of proof. She was required to direct herself correctly as to those concepts having regard to the issues of the case before her. That was precisely what she did and there was no basis for interfering with the judgment in that respect.

(2) On the basis of established authority, a Court of Appeal should attach the greatest weight to the opinion of the judge who saw the witnesses and heard their evidence and consequently should not disturb a judgment of fact unless they were satisfied that it was unsound.

It was impossible to interfere with the judge's findings of fact in relation to the date on which the incident occurred.

There was evidence to support that finding, as the judge summarised in her judgment. It might be that there was evidence which tended to point in another direction but that would often be the case where there was a factual dispute. That was precisely the kind of factual dispute which it was the function of first instance courts and tribunals to resolve, with the advantage they had of seeing the witnesses and hearing their evidence. The judge was entitled to make the finding of fact that she did as to the date of the incident on the evidence before her.

Legislation update

Motor Vehicles (Driving Licences) (Amendment) Regulations 2011	**Enactment citation** SI 2011/2516 **Commencement date** 15 November 2011 **Legislation affected** SI 1999/2864 amended **Enabling power** Road Traffic Act 1988, ss 92(2), (4), 105(1), (2)(a), (3), 108(1)	Amend the Motor Vehicles (Driving Licences) Regulations 1999 (SI 1999/2864). Implement the 2009 medical Directives, ie Commission Directives 2009/112/EC and 2009/113/EC of 25 August 2009, which amend respectively Dir 91/439/EEC of the European Parliament and of the Council on driving licences and Dir 2006/126/EC of the European Parliament and of the Council on driving licences. The 2009 medical directives amend the minimum medical standards required for driving licensing, in respect of eyesight, epilepsy and diabetes mellitus (diabetes). Implement changes to driving licence medical standards in respect of diabetes.
Armed Forces and Reserve Forces (Compensation Scheme) (Amendment) Order 2011	**Enactment citation** SI 2011/2552 **Commencement date** 17 November 2011 **Legislation affected** SI 2011/517 amended **Enabling power** Armed Forces (Pensions and Compensation) Act 2004, s 1(2)	Makes a number of amendments to the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011, SI 2011/517. Ensures benefit is payable for injury or death by reason of a person being called out to an emergency, covers travel both to and from the emergency. Includes provision to pay lump sum benefits to eligible children where there is no eligible partner. Revokes the provision that if a potential claimant requests from the secretary of state information relating to making a claim and then makes a claim within three months, the date of the claim is the date of the request. The effect of the revocation of this provision is that the date of claim will be the date it is made. Inserts a new provision that where a claim is made in respect of a person who dies after leaving service, an award of survivor's guaranteed income payment and an award of child payment is backdated to the day following the date of death, providing the claim is made within three months of the date of death. Corrects a number of other small errors in the original order.
Health and Social Care Act 2008 (Regulated Activities) (Amendment) Regulations 2011	**Enactment citation** SI 2011/Draft **Commencement date** 30 November 2011 **Legislation affected** SI 2010/781 amended **Enabling power** Health and Social Care Act 2008, ss 8(1), 161(3), (4)	Amend the Health and Social Care Act 2008 (Regulated Activities) Regulations 2010 (SI 2010/781). Amend the date on which the carrying on of primary medical services becomes a regulated activity from 1 April 2012 to 1 April 2013 for non-out-of-hours providers of primary medical services. Revoke a number of spent provisions.

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