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NEWS UPDATE FOR PERSONAL INJURY PROFESSIONALS

Brits injured abroad could get less damages

Britons who hurt themselves while holidaying abroad could be entitled to less compensation following a decision by the European Court of Justice (ECJ).

In *Homawoo v GMF Assurances SA*, C-412/10 (2010/C 301/12), the ECJ clarified which jurisdiction's law should apply when assessing entitlement to damages – home or the place where the accident happened.

It held that, if the accident occurred after 11 January 2009, then the law of the country where the incident took place will apply. Where the accident happened before then, the laws of the claimant's home country will apply when working out entitlement to damages.

Christopher Deacon, solicitor in Blake Lapthorn's holiday claims team, said the decision offers useful clarification as to how Rome II should be applied.

He said: "The decision is significant because the amount of damages payable can vary substantially following an accident – the same claim if assessed in England could be worth £4m, and in Spain €750,000."

The ruling, he said, may leave some insurers in difficulty where they may not have underwritten claims properly and have to pay out higher damages in their own jurisdiction for accidents up to 11 January 2009.

"However, the same insurers have the protection of having damages assessed in accordance with the location of the accident in the majority of cases where the accident happened after 11 January 2009," he added.

Government's legal aid reforms put on hold for six months

Controversial reforms – which will remove legal aid from clinical negligence – have been delayed for six months.

In a written ministerial statement the justice secretary, Kenneth Clarke, said the government intends, subject to parliamentary approval of the Legal Aid, Punishment and Sentencing of Offenders Bill, to implement all the legal aid reforms in April 2013 instead of October 2012.

The Ministry of Justice said the delay is to allow time for the Legal Services Commission to tender under the new rules.

Law Society chief executive, Des Hudson said that October 2012 was "impractical" and that the new timetable is "still challenging, given the work required to implement changes of this magnitude."

"Like other small businesses, law firms need reasonable notice of changes affecting them," he said. "But even given a more workable implementation timetable, solicitors and their clients who rely upon legal aid to secure justice are not well served by the poorly evidenced and ill-conceived measures in the Bill.

"The Bill will not deliver the claimed financial savings and risks denying access to justice to all but the well-off. This delay to the implementation schedule offers a window of opportunity to work with stakeholders in improving the Bill," he added.

APIL warns over "ominous formula" of legal reforms

Unqualified marketing men could be left in charge of running complex personal injury (PI) cases thanks to the government's plans for the future of PI claims, the Association of Personal Injury Lawyers (APIL) has warned.

APIL president, David Bott, said proposed reforms to the way people can fund legal cases plus a ban on referral fees is an "ominous formula which could lead to marketing men at claims management companies actually running PI cases".

"If proposals going through Parliament come into force, new options for funding legal cases will be available and will allow inexperienced and unqualified people to start running cases until the point they go to court. Claims management companies are good at advertising legal services, but they're not lawyers. These businesses won't be making money from referral fees after they are banned, so will need to do something else to survive.

"Changes in the Legal Aid, Sentencing and Punishment of Offenders Bill will open the door for them to start handling cases themselves," he added.

APIL is calling for PI to be made a "reserved activity".

Bott said: "A claims management company would need to settle a case to recover the costs and stay in business. The case would have to be taken over by a solicitor when it gets as far as court, so they will want to settle before it gets that far. This could mean cases are under-settled and injured people don't receive all the damages they need for their future care."

Hairdressing Bill blown away

A bid to impose strict regulation on the hairdressing industry has failed. A Bill from Morecambe MP David Morris was defeated 67-63 in the commons.

Deborah Evans, chief executive of the Association of Personal Injury Lawyers, said Parliament's failure to act means that hairdressing accidents will continue in their hundreds .

"Terrible injuries, including chemical burns, anaphylactic reactions, scarring and blood poisoning are too frequent for the hairdressing industry to continue to be left to its own devices," she said.

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The distortion of responsibility?

Patrick Sadd *analyses the courts' approach to vicarious liability in cases which involve abuse*

Viewed dispassionately, the rationale for vicarious liability is well established. As Rix LJ put it in *Viasystems (Tyneside) Ltd v Thermal Transfer Ltd* [2005] EWCA Civ 1151 (paras 55, 79):

> *"The concept of vicarious liability does not depend on the employer's fault but on his role. Liability is imposed by a policy of the law upon an employer even though he is not personally at fault, on the basis, generally speaking, that those who set in motion and profit from the activities of their employees should compensate those who are injured by such activities even when performed negligently…What has to be remembered is that the vicarious liability in question is one which involves no fault on the part of the employer. It is a doctrine designed for the sake of the claimant imposing a liability incurred without fault because the employer is treated by the law as picking up the burden of an organisational or business relationship which he has undertaken for his own benefit."*

A contrivance too far?

But that an employer can be responsible for non-negligent *assaults* by its employee may feel like a legally contrived means to a just end; that an employer could be responsible for the sexual assaults and abuse perpetrated by its employee may seem a contrivance too far.

Certainly that was the view of the appeal court in *Trotman v North Yorkshire County Council* [1999] LGR 584, dismissing a claim by a former pupil alleging sexual abuse by a teacher. The teacher was acting outside the scope of his employment; what he had done could not even be categorised as an unlawful way of discharging his duties as a teacher.

All changed with *Lister v Hesley Hall* [2001] UKHL 22, where the House of Lords concluded that the employers of the manager of a children's care home could be vicariously liable for his sexual assaults on three boys in the home (for which he had been convicted). In reviewing the case law and academic analysis of the concept, Lord Steyn caustically remarked:

> *"A preoccupation with conceptualistic reasoning may lead to the absurd conclusion that there can only be vicarious liability if the bank carries on business in defrauding its customers. Ideas divorced from reality have never held much attraction for judges steeped in the tradition that their task is to deliver principled but practical justice."*

Hailed as a breakthrough leading in part to the House of Lords' landmark decision in *A v Hoare* [2008] UKHL 6, subsequent courts have struggled to extrapolate from the five separate decisions in *Lister* a common consensus of approach to vicarious liability. What emerged as the test for whether an employer could be vicarious liability for its employee's actions, even where those actions amounted to sexual abuse, was whether the acts were closely connected with the duties which the employee was employed to perform. The test assumed that the relationship of employer/employee was already established.

The combined decisions of *Lister* and *Hoare* meant that claimants alleging abuse could now sue directly the employers of their abusers under a more generous limitation regime (until *Hoare* the decision in *Lister* was viewed by some as pyrrhic, given that claims alleging assaults were subject to a non-extendable six-year limitation period, bound by the House of Lords' decision in *Stubbings v Webb* [1993] AC 498).

Akin to employment

But what of the situation where the conventional employer/employee model does not fit the facts? The recent decision of Macduff J in *JEG v The English Province of Our Lady of Charity and the Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2011] EWHC 2871 (QB) establishes what until now had always been conceded but never adjudicated: the relationship between a priest and his diocese is "akin to employment" (*JEG*, para 40) .

Until *JEG* the courts had yet to rule on the legal basis for finding a diocese vicariously responsible for the actions of a priest; the issue had always been conceded for the purposes of that case often because the priest had subsequently been convicted (see eg, *MAGA v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256). The court was left to determine whether the sexual assaults fell within the scope of employment.

In *JEG* the court was invited to adjudicate on a preliminary issue, namely whether the nature of the relationship between priest and diocese was such that the diocese could be legally responsible for the priest's acts. The decision matters because MacDuff J undertook a review of the concept of vicarious liability and sought to find a common thread to the decisions: why should a blameless employer be responsible for his negligent, violent or predatory employee? Why should an employer stand in the shoes of its abusing employee?

The facts in *JEG* are unhappily familiar: a claim for damages from a 47-year-old woman alleging that between 1970 and 1972 she was sexually abused and raped by a priest, Father Baldwin (who had since died), while she was resident in a children's home run by an order of nuns. She alleged that Father Baldwin's diocese, D2 – his bishop – was vicariously responsible for his assaults.

Two-stage test

In deciding whether A should be responsible for the acts of B, MacDuff J posits a "two-stage test" (both stages being fact-sensitive):

1. whether the relationship between A and B ("classically employment") is one to which vicarious liability could attach; and
2. "whether the act was within the scope of the employment (or other relationship)".

While *JEG* is only concerned with stage one, Macduff J analysed stage two cases such as *MAGA* in determining whether vicarious liability is confined to the employment relationship "and to no other relationship". The two stages are interdependent: the position or role in which B is "placed" by A (the *Lister* "close connection") informs the identification of the relationship between A and B. In deciding stage two, the "close connection" test, that is, "whether the (employee's) torts were so closely connected with his employment that it would be fair and just to hold the employer responsible" has been commonly adopted.

In *MAGA* it was conceded at trial that the priest should be treated as an employee of the diocese. Having failed at first instance to persuade the court that the priest's acts were closely connected with his pastoral role as priest, the claimant appealed.

Allowing the appeal, the Court of Appeal identified those aspects of the priest's role that afforded him the opportunity to abuse, all of which also characterised his "position" as a priest in his diocese: what he wore gave him the authority of trust and responsibility, as the local priest he was involved in the youth club, he organised church-sponsored events including a disco, he sought volunteers to help clean the church and presbytery. The fact of being a parish priest within the diocese meant that the diocese afforded the priest the opportunity to exploit his role by abuse.

Had the point not been conceded in *MAGA*, the Court of Appeal would have been confronted with expert evidence on the actual nature of the relationship between priest and diocese given by canon lawyers in *JEG*.

Important concession

The important concession that the diocese *did* make in *JEG* was that vicarious liability could be established on a relationship other than employment: the paradigm of the employer/employee relationship was not a necessary predicate in establishing vicarious liability. In effect, the questions MacDuff J posed were whether the relationship between Father Baldwin and the diocese was "akin" to employment and the extent to which the diocese was able to exercise control over its priest.

The expert evidence – which was agreed – is surprising: although the diocese had authority to direct the appointment of a priest to a parish, there were no terms or conditions or written agreement governing the appointment. Once appointed, the diocese had no control over the priest: the bishop could advise but did not supervise and had no power to dismiss. Only the church in Rome could do so. A bishop could only redeploy a priest if the priest consented. The priest was an office holder – not an employee. MacDuff J concluded:

> *"I am satisfied that the relationship between Father Baldwin and the [diocese] was significantly different from a contract of employment; no real element of control or supervision, no wages, no formal contract and so on."*

But in MacDuff J's view this was to ignore the fact that a priest having been appointed by the diocese "was appointed to do their work; to undertake the ministry on behalf of the [diocese] for the benefit of the church. He was directed into the community with that full authority and was given free rein to act as representative of the church." What mattered ultimately was the authority that was vested in Father Baldwin by his appointment as a priest.

That authority, on Macduff J's analysis, was provided by the diocese.

Macduff J borrows on the profit/business model set out in *Viasystems* to establish a relationship between the priest and the diocese in which the appointment of the priest serves to further the "ends" of the Roman Catholic Church. That those ends may be religious or moral rather than profit or business is not necessarily the determining factor – rather it is the means by which those ends are achieved that appears to be the critical factor:

> *"…the activities of Father Baldwin had been set in motion by the [diocese] in pursuance of a relationship into which the [diocese] had entered for their own benefit. It was their empowerment of the priest which materially increased the risk of sexual assault, the granting of power to exploit and misuse the trust which [the diocese] had granted him. It was [the diocese] that had introduced the risk of wrong doing…By appointing Father Baldwin as a priest and thus clothing him with the powers involved, [the diocese] created the risk of harm to others viz the risk that he could abuse or misuse those powers for his own purposes or otherwise."*

As Macduff J acknowledges, analysing what Father Baldwin was able to do and what he in fact is alleged to have done (stage two) provides a means of arriving at stage one:

> *"It is the nature and closeness of the relationship which is the test at stage one. This closeness may be easier to recognise than to define The court will look carefully at the full nature of the relationship. All the surrounding facts and circumstances are to be considered. These will include many of the matters which are of relevance also at stage two. There is obvious overlapping."*

For the judge, "the empowerment and the granting of authority to Father Baldwin to pursue the activity on behalf of the enterprise are the major factors" in establishing a relationship in which the diocese takes responsibility for the priest's conduct.

Conclusion

Does the analysis work? At the heart of the decision is the judge's finding that to carry out his ministry Father Baldwin had had to be appointed by the diocese – without that appointment and the authority it then gave him, Father Baldwin could not have gone on to abuse the claimant. What is more controversial is whether in fact Father Baldwin's appointment was made on behalf of the diocese, or that he acted on behalf of the diocese once appointed to his parish. The limits of the bishop's power over Father Baldwin (and hence the ease in documented historical abuse cases with which priests would move from parish to parish) appears to be odds with the notion of acting with the authority of the church.

Does this make any appreciable difference? Not in this case: however apparently elusive the "authority" of Father Baldwin's church might be to identify, once you identify the body that provides that elusive authority (whether controlling or supervisory), you have identified the entity which is vicariously responsible for how that authority is then exercised. To borrow from *Viasystems,* the true nature of the relationship is organisational: as a priest, Father Baldwin furthered the ends of the Church as a religious body.

At the time of writing it is not known whether the diocese will appeal.

Patrick Sadd
Barrister, Outer Temple Chambers

Accidents caused by the workplace environment

What is a workplace?

The Workplace (Health, Safety and Welfare) Regulations 1992 (SI 1992/3004) impose duties regarding how buildings and their facilities affect employees. They apply to all workplaces, – any premises (or part thereof) that are not domestic premises and are made available to any person as a place of work. This includes any room within the place of work as well as any room, lobby, corridor, staircase, road or other place used as a means of access to and egress from it (reg 2(1)).

Under SI 1992/3004, reg 3, the workplace does not include:

- any area in or on a ship;
- a place where the only activity being undertaken is construction work;
- a mine below ground;
- any area on an aircraft or locomotive or rolling stock trailer.

On whom are the duties imposed?

The duties are imposed upon (SI 1992/3004, reg 4):

- an employer in control of the workplace, modification, extension or conversion where any of its employees work;
- any person who has, to any extent, control of a workplace, modification, extension or conversion;
- any person who occupies factory premises.

The duties owed by a person who is deemed to have control of the workplace is limited only to those "matters within that person's control" The duties do not extend to the self-employed in respect of their own work or over a business partner.

To whom are the duties owed?

The duties are owed to any worker in the workplace, regardless of whether or not they are employed by the person in control. Such a person may bring a claim against the person in control if they are injured as a result of that breach.

It is a question of fact as to whether non-employees who are working as contractors at a workplace are protected under SI 1992/3004. The workplace owner or occupier is responsible for matters in respect of which it is or should be able and competent to give instructions to visiting contractors and their employees (*Lynch v Ceva Logistics Ltd and another* [2011] All ER (D) 291 (Feb)).

While there is no specific authority in the UK, it appears that the regulations would not cover a visitor to the workplace (see *Donaldson v Hays Distribution Services* [2005] Rep LR 92). In this instance, the visitor would need to look for a claim under occupier's liability.

Maintenance of equipment

An employer is under a duty to ensure that the workplace, and certain equipment devices and systems, are maintained in an efficient state, in efficient working order and in good repair (SI 1992/3004, reg 5).

When assessing maintenance, consideration should be given to what maintenance was provided rather than what ought to have been provided (*Coates v Jaguar Cars* [2004] All ER (D) 87 (Mar)).

Parties should find out whether there was a system of maintenance and inspection in place and review any maintenance and repair records. If the workplace is found to have not been in an efficient state, the duty is strict and it will be irrelevant how good any maintenance system in place was (see, for example, *Malcolm v Metropolitan Police* [1999] CLY 2880).

When assessing whether the workplace has been maintained to an efficient state, the test is whether it is safe rather than whether it is efficient from a productivity perspective.

When assessing good repair, examination should be made of the repair records and the effect of the state of the work equipment on the safety of the workplace.

Floors and traffic routes

Every floor or traffic route must be suitable for the purpose for which it is used. In particular, the floor or traffic route must (SI 1992/3004, reg 12):

- have no hole or slope;
- not be uneven or slippery;
- be kept free of obstructions or articles that may cause a person to trip or fall.

Lay evidence as to the state of the floor or traffic route at the time of the incident is crucial to ascertaining whether it was suitable for the purpose for which it was used. Evidence from other employees as to, for example, build-ups of water or the accumulation of obstacles or obstructions (such as an unnecessary step) will be vital in assessing the claim. It is also important to review the contemporaneous evidence, such as the accident report form.

The existence of a small risk will not necessarily render a floor unsuitable for the purpose for which it is being used, the Regulations should be interpreted in the context of each workplace, taking into account the nature of the risk and the nature of the persons exposed to the risk. There are no absolute rules and a lot will depend upon the trial judge's interpretation as to whether the floor was suitable (*Palmer v Marks & Spencer* [2001] All ER (D) 123 (Oct)).

Floors that become regularly slippery due to substances on them, however temporary, are likely to be held unsuitable (*Ellis v Bristol County Council* [2007] EWCA Civ 685).

Floors that are likely to become wet on a regular basis should be constructed of a material that ensures they do not become slippery in such a state.

Falls and falling objects

Employers must ensure that suitable and effective measures are put in place to prevent any person falling a distance likely to cause them an injury (other than the provision of personal protective equipment, training, instruction or supervision).

For accidents occurring after 6 April 2005, reference should be made to the Work at Height Regulations 2005 (SI 1992/3004, reg 13).

Workstations and seating

Every workstation should be arranged so that it is suitable for any person likely to work there. This can include indoor and outdoor workstations (SI 1992/3004, reg 11).

When assessing a breach of this regulation, "suitable" will most likely be assessed as meaning free from risk of injury.

When assessing the workstation, particular assessment should be made of any suitable seating that has been required, and in particular the seat's ergonomic design and whether it was provided with any footrest (if required).

Lighting

Every workplace should have suitable and sufficient lighting, and where possible this should be by natural light (SI 1992/3004, reg 8).

Additional duties regarding emergency lighting arise where the employee is required to work in an environment with no natural light and where they could be exposed to danger if the artificial lighting fails.

Ventilation and windows

Every enclosed workplace should be provided with a sufficient quantity of fresh or purified air (SI 1992/3004, reg 6).

All windows should be constructed of a safety material that is protected against breakage and marked accordingly (SI 1992/3004, reg 14).

In addition, measures should be put in place to prevent people opening windows and potentially being exposed to danger (for example, if windows are at height).

Cleanliness and facilities

All workplaces should be kept sufficiently clean, and waste materials and refuse should not be allowed to accumulate. Examination should be made of any cleaning regime in place over furniture, fittings, floors, walls and ceilings when assessing a breach of this regulation (SI 1992/3004, reg 9)

Employees should also be provided with suitable and sufficient washing facilities (which should include showers if it is reasonable given the nature of the work being undertaken).

Room dimensions and space

Every room in which persons are required to work must have sufficient floor area, height and unoccupied space (SI 1992/3004, reg 10).

When assessing a potential failure to provide sufficient space for employees, consideration should also be given to the Confined Spaces Regulations 1997 (SI 1997/1713).

Doors and gates

All doors and gates must be suitably constructed and fitted with all necessary safety devices (SI 1992/3004, reg 18).

In particular, safety precautions should be put in place on doors that run on tracks or are automatic. A system of maintenance and inspection should also be implemented.

Drinking water and food

An adequate supply of wholesome drinking water should be available for all persons in the workplace (SI 1992/3004, reg 22).

Where meals are regularly eaten in the workplace, a suitable restroom should also be provided (SI 1992/3004, reg 25).

Dubious conduct

***Danny Fulton** analyses a case that will be of particular interest to costs practitioners and those who deal with ever challenging issues of credit hire.*

In *Abbott v Long* [2011] EWCA Civ 87, following a motor collision on 3 October 2008, the claimant, Abbott decided to use the services of a credit hire company, Direct Accident Management Limited. After receiving no offers on liability or quantum, he issued proceedings against the defendant, Long. At trial, liability was established 75/25 favouring the defendant, and it would seem that Abbott was for all intents the successful party. However, that position changed on the matter of causation and quantum.

In common with many credit hire claims where liability is disputed, the claimant took no action to mitigate the loss, and the hire company simply allowed hire to continue on what appeared to be an indefinite basis.

Abbott was given a replacement vehicle for 401 days at a total cost of £47,814.62, at which point he was able to purchase a replacement at a cost of £3,200 after struggling to save £250 per month.

Unsurprisingly, the trial judge took a dim view of the credit hire company's conduct, describing this as "an exaggerated and chancer approach" to the way the credit hire charges had been pursued. It was evident that, irrespective of fault, Abbott would have needed to purchase a replacement vehicle and, once he realised Long's insurance company was not going to pay, he ought to have mitigated his loss and purchased this by using his credit card.

Duty to mitigate loss

It was Abbot's case that Long's motor insurers needed only to make a without-prejudice payment to bring a halt to the hire, but that submission was firmly rejected by the judge, who believed Long's insurers were not obliged to take the risk of not recovering their money in the event the claimant's case failed and their refusal to make such payment should not affect Abbot's duty to mitigate his loss.

The judge calculated that by using his credit card, Abbott would have incurred £700 in interest on borrowings over 21 months as opposed to the monthly costs of the credit hire scheme. She also suggested that Abbott might have secured better finance terms than his credit card by obtaining a bank loan or a lease purchase agreement; however, she was unable to make any findings on that point without the evidence.

Abbott was allowed two months' hire as a generous period in which to replace his vehicle, starting from the date he knew his own vehicle was a total loss, with hire awarded at £7,984.88 before taking into account the liability split.

The judge found that in reality Abbot had little to do with the decisions made regarding the continuing hire. That was the commercial practice of the hire company to maximise its profits. It was a practice that should be heavily discouraged as it "can only tend to increase litigation and puts unfair and unreasonable pressure on opposing litigants".

The judge made no order for costs, reflecting her disapproval of the hire company's "blameworthy" conduct of grossly exaggerating the claim by allowing Abbott to incur continuing credit hire charges "without having any proper regard for his duty to seek to mitigate his loss or keep his expenses to an appropriate level for someone spending his own money rather than someone else's".

At first sight this sanction may seem harsh as the hire company's conduct was not causative of all of Abbott's costs given that some related to the unavoidable trial on liability.

Appeal

The claimant appealed but limited the appeal to the matter of costs. This went before the Court of Appeal, which dismissed the appellant's case.

The Court of Appeal (Arden LJ with whom Patten and Sullivan LJJ agreed) said that if the conduct of a claimant is found to be reprehensible, then they are at risk of recovering no costs at all even if the conduct is not causative of any or any significant costs, providing the sanction imposed is proportionate to the conduct in question (*Wildlake v BAA Ltd* [2009] EWCA Civ 1256 followed and *Walsh v Singh* [2011] EWCQ Civ 80 considered).

In this case the Court of Appeal found the trial judge had given a carefully reasoned judgment and her strongly worded criticism of the hire company's conduct for grossly inflating the claim was a finding of reprehensible conduct. She was entitled to reach the conclusion she did and the order was not outside her jurisdiction nor a disproportionate sanction.

Conclusion

As to whether this case will serve as a deterrent to over-optimistic hire companies in the future we will have to wait and see, but if a judge calls into question the conduct of any party, be prepared to face severe costs sanctions as seen in the recent RSA ARL repair case *Fallows v Harkers Transport* (Romford CC 02/09/11), where Judge Platt ordered RSA to pay the defendant's costs believing the matter fell on all fours with the Court of Appeal in *Abbott*.

[Plexus Law acted for the defendant in *Abbott v Long* [2011] EWCA Civ 874].

Danny Fulton
Head of credit hire strategy, Plexus Law

Case digests

Milton Keynes Borough Council v Nulty (deceased) and other companies and another case
[2011] All ER (D) 194 (Nov); [2011] EWHC 2847 (TCC)
3 November 2011

Negligence – Causation – Loss of chance – Cause of Fire – Two fires occurring in recycling plant owned by local authority claimant – Claimant contending that fire caused by first defendant engineer working at plant – First defendant's insurers seeking to avoid policy on grounds of delay of notification by first defendant – Whether first defendant causing fire – Whether delay of notification by first defendant causing insurers detriment – Whether "loss of chance" correct basis on which to assess detriment of insurers.

Two fires occurred on 2 and 3 April 2005 at a recycling centre, the second of which caused damage amounting to about £4.5m. A further small fire broke out on 8 April 2005. The claimant local authority owned the centre but sub-contracted its operation. There were two parallel actions. In the first, the claimant brought an action against the first defendant, a self-employed electrical engineer who worked at the centre part time and who was present at the time of the first fire. The claimant's case in the first action was that the first fire was caused by a cigarette end, carelessly discarded by the first defendant. However, that submission was contested by the first defendant's liability insurers, NIG. The cause of the second fire was also an issue in the first action. The second action was brought by NIG against the first defendant. In the second action, NIG contended that the first defendant was in breach of the requirement of his insurance policy to give prompt notice of any circumstance likely to give rise to a claim (there had been an 18-month delay in giving notice of the fire) and that, as a result, it had been seriously prejudiced in its ability to contest the first defendant's alleged liability for causing the first fire. The first defendant died in December 2010 and was unable to defend himself. Instead, the defence on his behalf was effectively conducted by NIG even though it had its own separate claim against him. In the first action, it was common ground that there were only three candidates for the cause of the first fire. First, a cigarette end discarded by someone smoking in the area where the fire started. Second, arcing from a live electric cable. Third, arson by an intruder. NIG's primary case was that the fire was caused by electrical arcing or, alternatively, by an intruder. NIG contended that the second fire had nothing to do with the first fire, but was probably caused by an intruder. Following the second fire, the fire experts agreed that the second fire was either started by a reignition of the first fire or deliberately by an intruder. The burden of proving the cause of the fire was on the claimant.

The issues were: (i) what principles should be applied so far as causation was concerned in relation to the fire and what had caused the first fire; (ii) what had caused the second fire; (iii) whether the first defendant was in breach of the requirement of his policy to give prompt notice of any circumstance likely to give rise to a claim and that, if so, whether as a result, NIG had been seriously prejudiced in its ability to contest the first defendant's alleged liability for causing the first fire; and (iv) whether loss of a chance was the correct basis on which to assess any prejudice suffered by NIG and how this should be assessed.

The court ruled:

(1) Causation was a matter of fact. The courts had not laid down any strict rule of causation as to how damages or loss or an event had to be proved. It was not false logic to reason that where only two possibilities were under consideration both of which seemed unlikely, if one seemed much less likely than the other, the less likely could be discounted, thus making the first likely to have happened on the balance of probabilities. In this case, there had been three possible candidates for the first fire. On the evidence, none of those three, if taken on its own, was one that was inherently likely: a cigarette end carelessly discarded by the first defendant was the most probable cause. The other causes of the fire were much less likely. Accordingly, in law, the discarded cigarette had become the probable cause of the first fire. The claimant had proved that the first fire had been caused by the negligence of the first defendant.
(2) On the evidence, it was more likely that the second fire had been caused by a continuation of the first fire, than by an intruder. The first defendant was therefore liable for the damage caused in the second fire as well as for the damage caused in the first fire.
(3) A person in the position of the first

defendant should have appreciated that an incident had occurred which could result in a claim against him in respect of which he was covered by the policy and that in consequence he was under an obligation to notify his insurers immediately. However, he could not have been reasonably expected to have done so until it had become reasonably clear that there was no obvious alternative cause of the fire. The delay in notification of the occurrence of the fires had impaired NIG's opportunity to investigate the claim thoroughly at a much earlier stage than it had been able to in the event, and perhaps to demonstrate that one of the other possible causes of the fire that had been identified had a higher probability of being the true cause of the first fire. Further, there was room for a more thorough investigation of the cause of the second fire. There had been a loss of chance that was more than nominal.

(4) In the context of a claim by insurers for damages for breach of a claims notification clause, if they could prove serious consequences, then those would often be capable of quantification, even if only as losses of chance or opportunity, and could be set off against the claim. Sometimes the consequences were too intangible to measure in precise financial terms, although, where an insured's breach had caused that difficulty, courts should incline to a quantification favourable to insurers. Further, where a solicitor failed to put in a defence or to take some other procedural step, with the result that his client lost the opportunity to contest the claim against him, the court had to consider the merits of the proposed defence. The damages should represent the value of the opportunity that had been lost. The position of an insurer who asserted that as a result of late notification he had been deprived of the opportunity to contest the claim against his insured, or at least that his opportunity to do so had been impaired, was in a similar position to the client of the negligent solicitor who had been deprived of the opportunity of defending a claim against him. In this case, the correct approach was to assess NIG's claim for damages against the first defendant on the basis of a loss of a chance or opportunity. The prejudice to NIG, in the form of its loss of opportunity to secure a different result, would be put at 15%.

Smithurst v Sealant Construction Services Ltd
[2011] All ER (D) 128 (Nov); [2011] EWCA Civ 1277
3 November 2011

Negligence – Causation – Breach of duty causing or contributing to damage – Defendant in personal injury claim admitting negligence – Defendant contending claimant likely to have suffered similar injury in any event – Judge assessing causation as a preliminary issue – Judge resolving issues on basis of "but for" test – Whether judge erring in law.

The claimant was employed by the defendant as a concrete diamond core driller. His work involved the handling of heavy equipment and inevitably put some strain on his back. He was provided with a van in which to move equipment. The rear doors were defective and could only be opened from the inside. To do that, the claimant had to climb over obstacles in the back of the van. In March 2006, the claimant opened the doors in the accustomed way. He felt pain which at first he thought was cramp. It eventually transpired that he had suffered a massive prolapse of the disc between the fifth lumbar vertebra and the first sacral vertebra. He underwent surgery, which failed to improve his symptoms. He was consequently unable to work. He issued proceedings against the defendant for damages for personal injury. The defendant admitted liability, subject to a small reduction for contributory negligence. The defendant admitted that had been negligent in providing him with a defective van. There was a dispute about whether he would have suffered a similar injury in the future. The claimant's expert contended that there had been no reason to expect that he would have suffered a similar injury at any time in the future. The defendant's expert thought that he had been likely to suffer a similar injury within two years. That issue was tried as a preliminary issue, and resolved in favour of the defendant. In doing so, the judge stated that he was dealing with issues of causation, and that the "but for" test was applicable. The claimant appealed.

The claimant submitted that the judge had applied the incorrect test for causation.

The appeal would be dismissed.

It was clear that the judge had wrongly treated the question that he had to decide as one of causation in the sense of proof that the defendant's breach of duty had caused the injury. However, the evidence supported the conclusion that the chances of the claimant suffering a very similar injury in the future existed as from the moment of the accident and rose progressively to a near certainty by the end of the two years. It was, accordingly, permissible nonetheless to adopt an "acceleration" approach to the assessment of damages. The judge's finding had fairly reflected the opinion of the expert witness whose evidence he preferred.

TTT v Kingston Hospital NHS Trust
[2011] All ER (D) 190 (Nov)
25 November 2011

Damages – Personal injury – Interim award – Relevant considerations – Whether interim award ought to be made in sum sought.

These proceedings concerned a claim for damages for clinical negligence. It was a very substantial claim and as a consequence of the defendant's negligence the claimant had been diagnosed with spastic quadriplegia and associated behavioural problems. The defendant had already made interim payments of £1.1m so that the claimant could purchase suitable accommodation. The claimant's parents had since purchased suitable accommodation and sought a further interim payment of £400,000 in order to make alterations.

The defendant contended that the sum sought was disproportionate.

The application would be granted.

The court should not order an interim payment of more than a reasonable proportion of the final amount of the judgment. The judge's first task was to assess the likely amount of the final judgment. That assessment should have been carried out on a conservative basis. The interim payment would be a reasonable proportion of that assessment. A reasonable proportion might be a large proportion so long as the assessment had been conservative.

In this case, it would have been inappropriate to order a payment exceeding 90% of the likely amount of the final judgment. Including the sum applied for, the total amount of interim payments would be £1.5m. Therefore it was necessary to be sure that the claimant would recover more than £1.66m as a capital sum. On the evidence, a conservative valuation of the final judgment would be £2m. Accordingly, the claimant's application for an interim payment of £400,000 would be granted.

Legislation update

Mental Capacity Act 2005 (Appropriate Body) (England) Amendment Regulations 2011	**Enactment citation** SI 2011/2645 **Commencement date** 1 December 2011 **Legislation affected** SI 2006/2810 amended **Enabling power** Mental Capacity Act 2005, s 30(4), (6)(a)	Amend the definition of "appropriate body" in the Mental Capacity Act 2005 (Appropriate Bodies) (England) Regulations 2006, SI 2006/2810. Clarify that the secretary of state's function of recognising "appropriate bodies" to review research ethics relating to people who lack capacity to consent to that research derives from the National Health Service Act 2006 and not from the Mental Capacity Act 2005. As a result, this function can be conferred on the special health authority established by the Health Research Authority (Establishment and Constitution) Order 2011, SI 2011/2323
National Health Service Pension Scheme, Injury Benefits and Additional Voluntary Contributions (Amendment) Regulations 2011	**Enactment citation** SI 2011/2586 **Commencement date** 28 November 2011 **Legislation affected** SI 1995/300, SI 2008/653, SI 1995/866, SI 2000/619 amended **Enabling power** Superannuation Act 1972, ss 10(1), (2), 12(1), (2), (4), Sch 3	Amends four statutory instruments relating to pensions and benefits provided for National Health Service staff. Seeks to improve the governance and record-keeping arrangements relating to the pensions of NHS dentists through: ■ the introduction of a revised "annual reconciliation notice" and a new "performer's notice"; ■ the clarification of items of dental practitioner income which are, and are not, pensionable; and ■ the confirmation of existing administrative arrangements.
NHS Bodies (Transfer of Trust Property) Order 2011	**Enactment citation** SI 2011/2748 **Commencement date** 22 December 2011 **Enabling power** National Health Service Act 2006, ss 213, 217(2), 272(7), (8)	Transfer property held on trust (in these cases charitable property) between NHS bodies, in particular from the bodies listed as relevant old trusts in column 1 of the Schedule to the bodies listed as relevant new trusts in column 2 of the Schedule.
Disabled Persons (Badges for Motor Vehicles) (Scotland) Amendment (No 2) Regulations 2011	**Enactment citation** SSI 2011/410 **Commencement date** 1 January 2012 **Legislation affected** SSI 2000/59 amended **Enabling power** Chronically Sick and Disabled Persons Act 1970, s 21	Amend the Disabled Persons (Badges for Motor Vehicles) (Scotland) Regulations 2000, SSI 2000/59. Extend the eligibility to severely disabled service personnel and war veterans who have been certified as having a permanent and substantial disability which causes inability to walk or considerable difficulty in walking. Provide that a local authority should carry out an independent mobility assessment when an applicant's eligibility is in doubt. Amend the grounds on which a local authority may refuse to issue, or may withdraw, a disabled person's badge. Amend details relating to appeals to Scottish ministers for the withdrawal or refusal to issue a badge due to a relevant conviction. Prescribe the new form of a badge.