

Welcome to the Summer 2008 edition of Injury Times, the journal of the Common Law Group at 2 Temple Gardens.

Since the last edition of Injury Times, 2 Temple Gardens has continued to thrive. Sarah Vaughan Jones QC took silk this year, and I am very pleased to welcome Jack Harris to the common law group on the successful completion of his pupillage.

Members of the team have, over the years, appeared in many of the leading personal injury or property damage cases. As you will see from the articles in this edition, we continue to be busy on many fronts. Just by way of example, in recent weeks, Dermod O'Brien QC appeared in the Court of Appeal in *Byrne v. MIB*, Michael de Navarro QC, Roger Harris and Michael Harrison all appeared in *Knight v. East of England SHA*, Christopher Russell appeared in the Court of Appeal in *Mason v. Satelcom* and I appeared in *Williams v. Johnstone*.

Members of Chambers have been very active giving seminars on a wide range of topics, in London, Birmingham, Manchester, Cardiff, Bristol and elsewhere. If you would like further details of our extensive seminar programme, please contact Deborah Francis on **020 7822 1287** or email seminars@2tg.co.uk. We look forward to meeting you at one of them soon.

My thanks go to John McDonald and Brent McDonald for editing this issue of Injury Times. I very much hope you enjoy reading it.



Ben Browne QC

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Edited by *John McDonald* and *Brent McDonald*

If you have any queries or require further information on any topic in *Injury Times*, please contact the author of the relevant article or Lee Tyler, Senior Clerk, lt Tyler@2tg.co.uk

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2 Temple Gardens, 2 Temple Gardens, London EC4Y 9AY

Telephone 020 7822 1200 Fax 020 7822 1300 www.2tg.co.uk

Butterfingers and the Bolam test.

Can Bolam apply to simple clumsiness by the doctor?

Introduction

In a recent decision by the Court of Appeal in a clinical negligence case, *Smith v. Southampton University Hospital NHS Trust*¹, the Court appears to have applied the Bolam test to the issue of whether or not a surgeon was sufficiently adroit in the execution of a physical task (suturing a punctured vein).

Hitherto, the application of the Bolam test appears to have been consistently understood to apply to the diagnostic decisions and/or the election to follow some particular procedure or form of treatment – typically for example the timing of an election to perform a Caesarean operation in a neonatal case.

The extension of the Bolam test to cases where the allegation is simply that the surgeon has been clumsy in the execution of a physical task therefore seems novel. It is suggested that where there is a conflict of expert medical evidence on the issue of whether or not the physical performance of the surgery is to an appropriate standard, the Court ought to resolve the issue by deciding which of the two experts is to be preferred.

The mere fact of disagreement between the experts (which will be a very common feature of such cases) should not suffice to ground a decision in favour of a defendant, because the level of physical competence to be expected of a surgeon is a matter of fact to be decided by the Court.

The facts

Mrs Smith was admitted to the Defendant's hospital in 2001 for a radical hysterectomy. In the course of surgery one of the two surgeons involved, Mr Nieto, inadvertently cut through the obturator nerve, a substantial structure controlling the adductor muscle of the right leg. An attempted repair was unsuccessful. Subsequently, and separately, the other surgeon in attendance, Mr Boyd, inadvertently punctured the left external iliac vein.

In several attempts at repair Mr Boyd sewed up the vein (which had the approximate dimensions and consistency of the ring finger of a rubber glove) in such a way as virtually entirely to occlude the blood supply through it. A specialist vascular surgeon was summoned, the quality of whose eventual repair was critically compromised by Mr Boyd's earlier unsuccessful attempts. Mrs Smith was left with permanent venous insufficiency in her left leg, giving rise to extremely uncomfortable and disabling symptoms.

The Decision at First Instance

The trial Judge (Ms Angela Davies QC sitting as a Deputy Judge of the High Court) acquitted both surgeons of negligence. In the case of Mr Nieto, she referred to a conflict of expert evidence; recorded that the Defendant's expert, Mr Monaghan, represented the views of a reputable body of gyn-oncological surgeons; and on that basis purported to apply the Bolam test to Mr Nieto's performance.

In relation to Mr Boyd, the Judge was addressed on the basis that the evidence of the Claimant's expert, Mr Soutter, that Mr Boyd had been guilty of substandard surgery in his attempts to repair the punctured vein, had not been contradicted by the Defendant's expert. The Judge found that in fact there was a conflict of medical evidence, and preferred the Defendant's expert.

The Appeal

On appeal to the Court of Appeal, Wall LJ, delivering the judgment of the Court, appeared to have little difficulty in finding that Mr Nieto (who had admitted making a mistake) had been negligent, and that the Judge had fallen into error in failing to perform the essential task of weighing the evidence of the two experts.

He said (at paragraph 44):

"The Deputy Judge simply does not address Mr Soutter's evidence on the [way in which the nerve was damaged]. She makes it clear that she prefers the evidence of Mr Monaghan, but she does not explain why. She appears to rely exclusively on the Bolam test. Thus she merely says that Mr Monaghan is highly reputable, and that it had not been suggested that he did not represent the views of a responsible body of gyn-oncological surgeons. With great respect to the deputy judge, I do not think this is good enough. When there is a clear conflict of medical opinion, the court's duty is not merely to say which view it prefers, but to explain why it prefers one to the other. This in my judgment is all the more so when the expert whose view it preferred accepts a substantial element of what the less favoured expert describes as basic good practice – in this case keeping your scissors shut unless you can see what you are doing. In such circumstances, it is not sufficient in my view simply to say that Mr Monaghan is representative of a responsible body of medical opinion. ..."

Given this trenchantly expressed exposition of the importance of weighing and deciding upon the cogency of expert evidence, Wall LJ's approach to the question of Mr Boyd's performance in relation to the attempted repair of the vein he had punctured may appear surprising.

The Appellant's basic submission was that in the course of the trial, Mr Soutter's clear evidence that Mr Boyd's suturing was sub-standard had not been contradicted by Mr Monaghan. Wall LJ rejected this submission, finding at paragraph 60:

¹ [2007] EWCA Civ 387

“there was material on which the Judge could properly find a difference of opinion between Mr Soutter and Mr Monaghan.”

Wall LJ continued (at paragraph 62):

“In contrast to the absence of reasoning in relation to her rejection of Mr Soutter’s evidence in relation to Mr Nieto, the deputy judge was in my judgment entitled to rely on the fact that Mr Monaghan (1) as a respected gyn-oncological surgeon regarded what Mr Boyd had done as reasonable; and (2) that since he plainly represented the views of a responsible body of gyn-oncological opinion, the application of the test meant that Mr Boyd could properly be absolved of negligence.”

Later (at paragraph 63) Wall LJ said:

“Was Mr Boyd’s performance in occluding the external iliac vein and then calling for a vascular surgeon compatible with ordinary competent surgery? Mr Monaghan thought it was. There was plainly a legitimate foundation for Mr Monaghan to take that view, and since he did so, that was, in effect sufficient for the judge’s purposes when applying the Bolam test.”

It seems tolerably clear that Wall LJ appreciated that the Claimant’s relevant complaint related to the standard of Mr Boyd’s surgical performance in carrying out the stitching to the vein (i.e. the level of physical adroitness he brought to the task) rather than to his election to carry out the repair himself (which was not the subject of challenge in the Court of Appeal).

Wall LJ also evidently appreciated that the evidence of Mr Monaghan in support of Mr Boyd amounted to no more than *“material on which the deputy judge could properly find a difference of opinion (with) Mr Soutter”*; and that no reasons were given for preferring this *“material”* to the unequivocal evidence of Mr Monaghan that Mr Boyd’s surgery had been substandard.

To excuse the failure to give reasons for preferring one expert to another on the grounds that the *Bolam* test applied appears to contradict what Wall LJ had so clearly stated earlier in his judgment, and to apply the test at all to a simple question about whether or not the standard of Mr Boyd’s handiwork was acceptable, is, it is respectfully suggested, wrong in principle.

Comment

*Bolam v. Friern Hospital Management Committee*² was a first instance decision of McNair J where he said:

*“(The doctor) is not guilty of negligence if he has acted in accordance with a **practice** accepted as proper by a responsible body of medical men skilled in that particular act”* (emphasis added)

The test thus stated (which has been cited many times in cases of high authority) has nothing to do with clashes of expert opinion about whether or not a surgeon’s physical performance has been adequate.

This distinction was implicitly recognised by the House of Lords in *Maynard v. West Midlands Regional Health Authority*³, where the test was cited with approval: see at 639:

*“In the realms of **diagnosis and treatment** negligence is not established by preferring one body of respectable opinion to another. Failure to exercise the ordinary skill of a doctor (in the appropriate speciality, if he is a specialist) is necessary”* (emphasis added)

Bolam and other cases in which the test has been applied were given further consideration by the House of Lords in *Bolitho*⁴. This was a case about a doctor’s failure to elect the intubation of a child with respiratory failure, the main point at issue being whether the Court is entitled to reject a received body of medical opinion on the grounds that although respectable, it is in fact irrational.

However it is implicit in the language used throughout, that the House of Lords assumed that the *Bolam* test only applied to the election or adoption of a *“course of treatment or diagnosis”* (see especially per Lord Browne-Wilkinson at 242 et seq and the citation from *Hucks v. Cole*⁵, a case about a failure to elect a course of treatment in a case where infection led to perperal fever).

It is suggested that the *Bolam* test has in practice always been applied to cases of diagnosis, and to the election of a medical practice, course of treatment or course of action, and that to extend the application to cases where there is a difference of expert opinion about the standard of physical execution of a medical task in the course of treatment (such as the placing of stitches) is not justified by authority or by principle.

In principle, it is the task of the Court in professional negligence cases to weigh the opinion evidence of relevant experts and to make a decision as to which is to be preferred, giving reasons. The importance of giving reasons for the acceptance of one expert’s evidence in preference to another has been stressed by the Court of Appeal on several recent occasions, for example by Philips MR in *Withers v. Ambic*⁶.

An extension of the test to cases where the allegation is one of simple physical carelessness would mean that such cases could be decided without any real examination of the strength of the expert evidence on either side, or the rigour which the necessity to give reasons imposes.

The proper ambit of the *Bolam* test is of general practical importance, involving as it does issues about how the Court should decide cases involving disputes between experts as to standard to be expected of their professional peers. The Court of Appeal’s decision

² [1957] 1 WLR 583

³ [1984] 1 WLR 634

⁴ [1998] AC 232

⁵ 5 (1993) 4 Med LR 393

⁶ [2002] EWCA Civ 605

in the instant case appears to point to an extension of the test as it has been generally understood, and would if followed have substantial effects on the way cases involving allegations against professional men are decided. Although *Bolam* itself arose in a medical context, the test has been widely applied in cases involving allegations of negligence against professional men in other disciplines, and the ramifications of the decision are therefore potentially far-reaching.

An application for leave to appeal the Court of Appeal's decision in Mrs Smith's case to the House of Lords was refused by the Court of Appeal. The application was renewed before the House of Lords and was again refused.



Bob Moxon Browne QC

Bob Moxon Browne QC appeared for the Appellant in Smith v. Southampton University Hospital NHS Trust, instructed by Pardoos. Martin Porter QC appeared for the NHS Trust, instructed by Beachcrofts LLP.

Mason v. Satelcom

An Outbreak Of Common Sense?

In judgments handed down recently in *Mason v Satelcom* [2008] EWCA Civ 494, the Court of Appeal has taken a fresh look at the nature and extent of statutory duties owed by non-employers to workers injured while working on their premises. In particular, a Court comprising LJJ's Ward, Longmore and May has shed much light upon the concept of **control** sufficient to found liability when the use of a piece of work equipment for unsuitable purposes has led to an injurious fall from height. It is a decision which will bring joy to public liability insurers resigned to a perception of near absolute duties imposed by the "six-pack" regulations. In what many will see as an outbreak of common sense, use of work equipment in a silly way will not, on facts comparable to the instant case, give rise to liability upon a non employer even though that person had control of it and use of it was foreseeable.

The facts giving rise to the claim were far from the extraordinary. M is sent by his employer, S, to maintain some IT equipment installed in a server room owned and occupied by East. The equipment is in a cabinet 8 feet from the floor and belongs to a tenant of East. A 5 foot ladder rests invitingly against the wall below it. M considers the ladder to be there for the purpose of getting up to the cabinet and, leaning back from it to work in the cabinet, overbalances and steps awkwardly down, sustaining a significant back injury.

The trial judge, HHJ Reddihough, sitting in the QBD, was no stranger, when in practice, to the highways and byways of the statutory regulation of workplace health and safety. He found S liable to M in negligence and for breach of statutory duty but adjudged M to have been contributorily negligent to the extent of 1/3. He also found East liable for breach of statutory duty under the Provision and Use of Work Equipment Regulations 1998 as a person (not being an employer) who had control of work equipment which is used in a foreseeably unsuitable way, and obliged to contribute 25% to such compensation as M had proved himself entitled.

The members of the Court acknowledged some challenge in negotiating the language and intention of the Regulations as they apply to, and impose duties upon, non-employers. Ward LJ professed he found the Equipment Regulations to be "not easy to construe"; while May LJ began his judgment:

"There is a risk that lawyers, including judges, being obsessed with the meaning of abstruse secondary legislation, may lose sight of the real world."

The appeal (together with a cross appeal relating to the construction of the Workplace (Health Safety and Welfare) Regulations 1992) was considered against a backdrop of facts found and unchallenged. East kept the server room locked; its employee gave M access to it; East knew it had a ladder in there which anyone

might use to gain access to the cabinet; the ladder was sturdy and steady and was able to be used by M without being moved; the cabinet was sited high to serve East's convenience; East had control of the ladder (in the sense that it could have removed it at any time) but it did not control the way in which M used the ladder nor did it have an interest in the work being done on the tenant's equipment.

The principal issue on the appeal was the application of the Equipment Regulations and their causative breach by East. There is, of course, no problem with the imposition of duties upon an employer:

"The requirements imposed by these regulations on an employer shall apply to such equipment provided for use or used by an employee of his at work" [Reg 3(2)]

The more tortuous language relates to the duties by others; for relevant purposes:

"The requirements imposed by these regulations on an employer shall also apply... to a person who has control to any extent of work equipment... to the extent of that control" [Reg 3 (3)(b)(i)]

For the trial judge, having a ladder locked up in your server room was sufficient control for the Regulations to bite and for East to be in breach of regulation 4(1) and (4). On his analysis, the ladder was too short and demonstrably unsuitable for the task for which M used it.

The view of May LJ was that such a proposition *"that East should be partly responsible for the accident, by strict application of a regulation mainly about employers... is in the real world close to being absurd."* The Court of Appeal took a more sophisticated approach to the Regulations' application, paying close heed to the near juxtaposition of *"control to any extent"* and *"to the extent of that control"*. The Court concluded that control was not total – since East did not control the way in which the ladder was used by M. For Longmore LJ, the purpose of control is determinative:

"In my judgement, one has to ascertain in relation to a non-employer, whether there was a purpose for which he has such control as he has" [para 13].

Longmore LJ agreed with the trial judge that there was physical control over the ladder but such control was insufficient to import obligations under the Equipment Regulations. There was no evidence that East actually owned the ladder and, in those circumstances,

"..it is difficult to say what the purpose of East's control was beyond the purpose of ensuring it did not get in anyone's way" [para 13]

The approach of the Court was informed by concern as to the scope of obligations imposed by regulations 4 onwards of the Equipment Regulations –

including criminal sanction for their breach of such matters as not only suitability and maintenance (regs 4 and 5) but also imparting health and safety information, instructions and training (regs 6, 8 and 9). Whatever was the purpose of East's control, it was not, in Longmore LJ's judgment, for the purpose of ensuring that it was constructed or adapted so as to be suitable for the purpose for which it was foreseeably used.

May LJ considered that regulation 3(3)(b)(i) applied only to the physical state of the relevant work equipment, continuing:

"... but it is certainly limited to the extent to which the person has control of the equipment itself as distinct from the way in which it is used."

He felt fortified by the alternative types of control that can trip application of the Equipment Regulations – control over the person using or managing or supervising the use of work equipment [reg 3(3)(b)(ii)] and control over the way work equipment is used [reg 3(3)(b)(iii)]: happy to conclude the Regulations do not apply to East *"and good sense prevails"*.

Ward LJ railed against a construction of regulation 3(3)(b) which imposes the entire raft of obligations in regulations 4 to 33 on someone having control of work equipment which is used by a worker who is not their employee. The argument being, in East's case, that since they had physical control of the ladder by keeping it locked in their server room, they were deemed to be an employer with all the obligations that follow in regulations 4 to 33. This result would be, in his view, absurd.

Ward LJ acknowledges that "employer" has a limited meaning in the Framework Directive [89/391/EEC], and its relevant daughter, the Workplace Equipment Directive [89/655/EEC]. There, "employer" and "worker" are limited to the parties to employment relationship in the strict sense. On the face of those Directives, East would not fall within their purview at all. The fact that regulation 3 of the Equipment Regulations imposes obligation upon persons additional to employers (ie the self employed and those persons with requisite control) by regulation 3(3)(a) and (b) is both relevant and critical. It should inform construction of regulation 3 in resolving any ambiguity by limiting the ambit to regulation 3(3) to those who are as close to the real employer as can be contrived.

In Ward LJ's judgment, it is vital to look at the wider purpose of the Equipment Regulations. He continues:

"In essence they are directed at the true employer/employee relationship where the employer has control over the work equipment itself, over the workers who are to use it and over the way it is to be used. The quasi employer's responsibility should be seen in the same way. In other words, if the equipment itself poses a threat to the health and safety of those who use it, those

who control the equipment can expect to be responsible for the safe working of the equipment.” (para 51)

A solution whereby the words in regulation 3(3)(b) “to the extent of his control” would be transposed into each of the duty sections he rejected since the language would not support it. As he recognised:

“He either is or is not an employer as defined in 3(3)(b). If he is, the duties are owed and there is no room for qualification.” (para 46)

His preferred solution was to read words into regulation 3(3)(b) to enable a construction to be given which make sense to those in the trade while giving protection to the safety of workers. The relevant part of regulation 3(3) thus extended would read:

*“The requirements imposed by these regulations on an employer shall also apply... to a person who has control to any extent of work equipment... to the extent of that control **insofar as the particular matters hereinafter set out relate to and are with his control**”*

Although it was Ward LJ who dictated this effective extension of regulation 3(3)(b), May LJ expressly adopts his reasoning.

This device enables focus to be given to the scope of a person’s control for the purpose for which he has to exercise that control. The relevant question then becomes:

“Did East have control of the ladder so as to be able to control whether it would be used in a particular way?”

Answer “No”. Ward LJ concluded:

“East’s control of the equipment posed no risk because the ladder qua ladder was a perfectly good ladder. It only became unsuitable because the claimant used it in a silly way.”

The case of Mason is a good example of the Court having to go to some lengths to construe a piece of secondary legislation whose language might, at first blush, produce a result that is thought to be absurd. The Court’s extension of regulation 3(3) is significant, bold and, arising as it does in relatively commonplace circumstances, sweet music to insurers of public liability risks.



Christopher Russell

Christopher Russell appeared for the Respondents in Mason v. Satelcom, instructed by Bond Pearce.

(Over)Turning the Page

In May 1995⁷, the House of Lords held in *Page v Smith* by a three to two majority that, provided physical injury was reasonably foreseeable, a tortfeasor would be liable for any psychiatric injury a claimant developed, even if psychiatric injury would not have been a reasonably foreseeable consequence of the defendant’s tort.

This article looks at the critical reception that the case has received and the House of Lords’ reaction to a recent invitation to overturn it, thereby restoring the requirement for psychiatric injury on the part of the claimant to have been a reasonably foreseen consequence of a defendant’s tort.

Facts

The facts of *Page* were relatively simple. On 24 July 1987 Mr Page was driving his Volvo when Mr Smith drove his car across his path. Their cars collided. Mr Page was 46. He suffered no physical injury whatsoever and drove home. Three hours later he found himself exhausted and the exhaustion continued. He was a school teacher and had not worked since the accident.

He suffered from ME, which he had previously experienced only occasionally and in a mild form. After the accident his case was that his ME had returned in a chronic and permanent state.

The decision

The trial judge awarded the claimant £162,153 on the grounds that it was established that ME was a recognised disease and that a relapse could be triggered by trauma, even of moderate severity. Otton J found that the aggravation was a foreseeable consequence of the accident and that the defendant was liable. In March 1994 the matter came before a strong Court of Appeal⁸.

The defendant’s appeal was allowed on two grounds. First, the claimant had not sufficiently made out causation. There was no clear evidence that the physical injury had been responsible for the onset or permanent worsening of symptoms of ME. When the matter was remitted, this was in fact proven – see *Page v Smith* (No 2) [1996].

Secondly, the Court of Appeal held that a claimant who claimed damages for mental trauma resulting from an accident in which they had suffered no physical injury had to show that the psychiatric injury was foreseeable and that it was of a kind that would be suffered by a person of ‘normal fortitude’ and ‘ordinary phlegm’, irrespective of whether they had been directly involved in the accident or were a mere bystander. It was only when dealing with the assessment of damages for which the tortfeasor was liable that the latter ‘had to take his victim as he found him’.

⁷ [1996] AC 155

⁸ reported at [1994] 4 All ER 522

Therefore, once the claimant established liability for mental trauma, the defendant would be liable for all the consequential injury, even though it was unforeseen and of a kind that would only be suffered by someone who was particularly vulnerable.

Hoffmann LJ (as he then was) summarised the law as follows⁹:

- 1) Damage caused by mental trauma is a separate head of damage in the law of negligence, with its own conditions of liability.
- 2) The conditions of liability are foreseeability, proximity and causation.
- 3) Foreseeability means foreseeability of damage caused by mental trauma. Foreseeability of physical injury is neither necessary nor sufficient.
- 4) The question of whether damage caused by mental trauma was foreseeable is asked with hindsight, in the light of the accident as it actually happened.
- 5) For the purposes of foreseeability, the plaintiff must be assumed to be a person of normal fortitude.
- 6) Normal fortitude is a matter of judicial notice and does not require medical evidence or statistical inquiry.
- 7) If some damage caused by mental trauma was foreseeable and the other conditions of liability are satisfied, the plaintiff is entitled to be compensated for all damage caused by mental trauma, whether its precise nature and extent were foreseeable or not.

The Court of Appeal decided that Mr Page's psychiatric injury had not been foreseeable and so dismissed the claim.

In May 1995 the claimant's appeal came before the House of Lords. Although their Lordships found that both Mr Page's physical and psychiatric injuries were, in fact, foreseeable as a result of the collision, the majority went further and took the opportunity to radically alter the test that applied to determine the duty owed by tortfeasors to primary victims.

In his speech Lord Lloyd of Berwick, affirmed that:

"Foreseeability of psychiatric injury remains a crucial ingredient when the plaintiff is the secondary victim, for the very reason that the secondary victim is almost always outside the area of physical impact, and therefore outside the range of foreseeable physical injury."

However, a different approach could be adopted with respect to primary victims: Since the defendant was admittedly under a duty of care not to cause the plaintiff foreseeable physical injury, it was unnecessary to ask whether he was under a separate duty of care not to cause foreseeable psychiatric injury.

Deciding that it was no longer sensible to commit the law to any distinction between physical damage and psychiatric damage, Lord Lloyd instead referred to the concept of personal injury in setting out the new test:

"The test in every case ought to be whether the defendant can reasonably foresee that his conduct will expose the plaintiff to risk of personal injury. If so, then he comes under a duty of care to that plaintiff..."

Applying that test in the present case, it was enough to ask whether the defendant should have reasonably foreseen that the plaintiff might suffer physical injury as a result of the defendant's negligence, so as to bring him within the range of the defendant's duty of care. It was unnecessary to ask, as a separate question, whether the defendant should reasonably have foreseen injury by shock; and it is irrelevant that the plaintiff did not, in fact, suffer any external physical injury.

England and Wales had taken the first step on a new path which appeared to mark a reconciliation between recovery for physical injury and psychiatric injury, at least so far as primary victims were concerned.

Reaction to Page

In some ways the principle in Page has been developed and, it might be said, expanded upon. For example, in *Simmons v British Steel plc*¹⁰ the claimant suffered a blow to the head at work, which, apart from inflicting direct physical injuries, led him to a sequence of experiences, namely anger, revival of his psoriasis, further anger and the onset of severe depression. Lord Rodger of Earlsferry observed¹¹ that:

Regret, fear for the future, frustration at the slow pace of recovery and anger are all emotions that are likely to arise, unbidden, in the minds of those who suffer injuries in an accident such as befell the pursuer. If, alone or in combination with other factors, any of these emotions results in stress so intense that the victim develops a recognised mental illness, there is no reason in principle why he should not recover damages for that illness.

Accordingly, as his claim for personal injury was reasonably foreseeable, the defendant was liable for the psoriasis and for the depressive illness 'even if those developments were not reasonably foreseeable'.

However, Page has nonetheless proved highly controversial. Foremost among the judicial critics was Lord Goff of Chieveley who delivered a withering dissenting opinion in *Frost v Chief Constable of South Yorkshire Police*¹². Like *Alcock v Chief Constable of South Yorkshire Police*¹³, *Frost* arose out of the Hillsborough Football Stadium disaster, and was largely concerned with 'secondary victims', though this time the claims were brought by police officers. However, as police officers, the claims were also advanced on the basis that the claimants' position could be distinguished

¹⁰ [2004] ICR 585

¹¹ *Ibid* at 604, para 55

¹² [1999] ICR 216

¹³ [1992] 1 AC 310

from the norm because they were owed a duty as both employees and as the rescuers of the primary victims of the disaster. Lord Goff criticised *Page* on a number of grounds:

- 1) It was inconsistent with the earlier authorities culminating in *The Wagon Mound*¹⁴ and with the understanding of the legal position as expressed by the Law Commission in its 1995 'Consultation Paper on Liability for Psychiatric Illness' (Law Com 137).
- 2) The decision resulted in English law being out of step with that in other common law jurisdictions. Lord Goff observed that:

"... we should be wise to heed the words of Windeyer J spoken nearly 30 years ago in Mount Isa Mines Ltd v Pusey (1970) 125 C.L.R. 383, 396...: The field is one in which the common law is still in course of development. Courts must therefore act in company and not alone. Analogies in other courts, and persuasive precedents as well as authoritative pronouncements, must be regarded."

- 3) Lord Goff considered that Lord Lloyd had been wrong to find that hindsight was not a relevant factor where the claimant was a primary victim.
- 4) Perhaps most persuasively, Lord Goff said that the majority had erred in omitting from the test, in the case of a primary victim, the requirement that the defendant ought reasonably to have foreseen that the plaintiff would have suffered a particular psychiatric reaction that would not have followed in the case of a person endowed with 'normal fortitude' or 'ordinary phlegm'. No reason had been given for this step, which should logically arise when dealing with primary or secondary victims. The effect was to take an exceptional rule – the '*talem qualem*' or '*eggshell skull*' rule – relating to compensation, and treat it as being of general application in establishing the scope of the duty owed, thereby 'creating a wider principle of liability'.

In the same case Lord Steyn, while affirming *Page*, recognised '*a patchwork quilt of distinctions which are difficult to justify*' in this area. He remarked that, faced with either the unattractive alternatives of wiping out recovery for psychiatric injury or removing all control mechanisms, the only solution was for the courts to say, '*thus far and no further*'.

The majority decision in *Page v Smith* has also been severely criticised by academic commentators as being in conflict with a significant body of existing case law in the United Kingdom and Australia and as also drawing distinctions between primary and secondary victims, in terms of the foreseeability of psychiatric damage, the implications of which for a wide range of cases had not been sufficiently considered.

The Australian courts have preferred Hoffmann LJ's formulation of the law cited above, he in turn having been influenced by the decision of the Australian courts in *Jaensch v Coffey*¹⁵. Accordingly, in *Morgan v Tame*¹⁶ the Supreme Court of New South Wales declined to follow *Page*, considering that causes of action for pure psychiatric illness should be treated as distinct from claims based upon physical injury.

Spigelman CJ rejected the notion that this offended the '*eggshell skull*' rule, as this applies after a determination has been made that a person of normal fortitude would suffer some injury.

Although *Page* has been accepted as stating the legal position in Scots law, the Scottish Law Commissioners commented in their 'Report on Damages for Psychiatric Injury' that:

"it can be argued that there is and should be a difference between physical harm and mental harm. People are expected to put up with some degree of mental harm in the form of stress and anxiety as part of everyday life, but this is not so for physical injuries."

The Commissioners proposed the abolition of the rule in *Page* to provide that there would be no liability for unintentionally inflicted mental harm that was not a reasonably foreseeable consequence of a wrongdoer's action, unless (as under existing law) the mental harm resulted from another type of harm from which there was tortious liability, i.e. a physical injury, and the mental harm was not too remote.

This was part of a framework of recommendations, among which, notably, was the suggestion that there should be no liability for mental harm if a person could reasonably be expected to endure it without seeking damages.

Recent views

In part of the pleural plaques test case, titled variously *Rothwell v Chemical & Insulating Co Ltd & anor or Johnston v NEI International Combustion Ltd*¹⁷, Mr Grieves brought a separate appeal against the dismissal of his claim by the Court of Appeal. Mr Grieves sought damages for a recognised psychiatric illness and irritable bowel syndrome, which he suffered as a result of his diagnosis that he was suffering from pleural plaques and the resulting increased risk of developing mesothelioma. He relied, inter alia, on *Page* in arguing that this meant that his case could succeed. As physical injury from the exposure to asbestos was foreseeable, he argued that he could recover damages for the psychiatric harm that he had in fact suffered even if the development of pleural plaques in itself was not capable of amounting to actionable damage. In response, while the defendants sought to distinguish *Page* on the facts, they went further and invited the House to overturn *Page*. The effect of this would be to restore the principle that the essential factor in determining liability for the consequences of an act of negligence

¹⁴ [1961] AC 388, 426

¹⁵ (1984) 155 CLR 549.

¹⁶ [2000] NSWCA

¹⁷ [2007] UKHL 39

is foreseeability of the damage that is complained of, established by the Privy Council in *The Wagon Mound (No 1)*. In *Wagon Mound*, Viscount Simonds had accepted the principle formulated by Denning LJ in *King v Phillips*¹⁸:

"... there can be no doubt since Bourhill v Young [1943]... that the test of liability for shock is foreseeability of injury by shock.

Noting that the decision had given rise to 'much controversy', Lord Hope said:

"Attractive though [the defendants'] argument is, I would prefer to leave it for another day."

Similarly, Lord Mance said that:

"... like Lord Hope, I would leave open the correctness of Page v Smith for another day. I see some force in the criticisms that have been levied against it, and I am not confident that it does not cause uncertainty and argument.

Lord Rodger held that the claimant's case had amounted to an expansion of the rule in *Page*, which would be contrary to the 'thus far and no further guidance' of Lord Steyn in *Frost*. Perhaps most interestingly, given that his judgment was overturned by the Lords originally in *Page*, Lord Hoffmann appeared the most positive about *Page*, commenting that although the case:

"... certainly had no shortage of critics...I do not think it would be right to depart from Page."

However, such acceptance was not unqualified. Lord Hoffmann went on to say that *Page* would be unlikely to cause any practical difficulties provided that it was:

"... confined to the kind of situation which the majority in that case had in mind."

*Corr v IBC Vehicles Ltd*¹⁹ was a case arising out of an accident at work that nearly decapitated Mr Corr and led to him developing PTSD and severe depression. He killed himself in 2002. The defendant employers denied that they were liable to compensate for the consequences of Mr Corr's suicide, since his decision to kill himself broke the chain of causation. Alternatively, they argued that his suicide was not reasonably foreseeable.

Lord Scott and Lord Bingham both noted that neither party directly criticised or asked the House to review *Page*, whereas Lord Walker expressed his support for the simplicity of the test set out in *Page*, even if it meant that on occasion employers could be liable for unforeseeable injuries.

However, Lord Mance, supported by Lord Neuberger made it clear that support for *Page* before the House could not be assumed. Describing *Page* as a "somewhat controversial decision of this House" Lord Mance stated that:

"not least in the light of the trenchant observations of Lord Goff of Chieveley in Frost v Chief Constable of South Yorkshire Police [1999] 2 AC 455 at 473D to 480F, I would not want to appear to prejudge any decision as to the correctness of the majority view in Page, if it comes to be challenged before your Lordships' House on another occasion."

Conclusion

Page amounts to an unsatisfactory attempt to grapple with two separate principles:

- 1) providing a clear, principled and easily applied test for recovery, which avoids artificial and subjective distinctions between different kinds of personal injury and victims; and
- 2) the fear of opening the floodgates to claims for mental suffering, which are commonplace.

Dispensing with the requirement for ordinary fortitude as regards primary victims only is difficult to justify on any rational basis save for simplicity. This is overwhelmingly a matter of policy.

The government has recently consulted on the matter and, disappointingly, has decided to leave it to the courts, notwithstanding that the courts, on a number of occasions, have suggested that the area of psychiatric injury is an area for government intervention. See, for example, the speech of Lord Steyn in *Frost*.

Recent speeches in the Lords have expressly referred to *Page* in terms which suggest that it is unlikely to escape direct challenge much longer. In both *Rothwell* and *Corr* the House of Lords has invited further challenge by defendants. Parties appearing before it cannot assume that there will be any great desire for *Page* should remain unmodified.

With the Appellate Committee's membership changing, it is hard to know the outcome of that challenge, but it is fairly certain that Lord Goff's objections will be central in determining the result.



Brent McDonald

Brent McDonald specialises in personal injury and is regularly instructed in cases arising out and concerning psychiatric injury by claimants and defendants.

¹⁸ [1953] 1 QB 429, 441

¹⁹ [2008] UKHL 13

Liability for Sporting Injuries

This article considers those potentially liable for sporting injuries, and the circumstances in which liability may be found.

(1) Competitors

Most obviously, competitors may be liable to other competitors for the manner in which they play the game. In *Condon v Basi*²⁰ (football) Sir John Donaldson MR considered that in a contact sport each participant owes the others a duty to take reasonable care in all the circumstances “which, in a game of football, are quite different from those which affect you when you are going for a walk in the countryside.” Basi had breached that duty in his reckless tackle on Condon, and so was liable for the resulting injury.

In *Caldwell v Maguire and Others*²¹ (horseracing) the Court of Appeal considered the threshold for liability between jockeys. In practice it was inevitably high – mere proof of a momentary lapse of skill in the stresses of a race would not suffice. Liability will generally be avoided “absent proof of conduct that in point of fact amounts to reckless disregard for the fellow contestant’s safety.” The claim failed because the cause of the claimant’s fall was no more than momentary carelessness by another jockey.

However, in appropriate circumstances there will be a finding of liability. For instance in *Jarrold McCracken v Melbourne Storm Rugby League Club & Others*²² (rugby league) the claimant had, when tackled, been lifted and allowed to fall headfirst into the ground. Finding for him, the judge considered that the pair tackling had been aware of what the other was doing and had lifted and upended the claimant intending that he should fall heavily onto the ground.

One issue which remains unclear is whether a professional experienced player may owe a higher standard of care than an amateur less experienced player. On this point, different opinions have been expressed (contrast obiter comments in *Condon v Basi* (supra) (Sir John Donaldson MR) with *Vowles v Evans*²³ (Lord Phillips MR). This issue may be relevant where there is a claim arising out injuries suffered in an early round of the FA Cup between a Premiership side and lower league or nonleague opposition.

Even informal horseplay is subject to the same approach as well established sports. In *Blake v Galloway*²⁴ the claimant’s eye had been injured by a piece of bark chipping whilst youths were throwing the chippings at each other to let off steam. His claim failed because the bark chipping had been thrown in accordance with the tacit conventions of the game and had not been deliberately aimed at his head. The claim in battery also failed - by participating in the game, the claimant had to be taken to have impliedly consented to the risk of a blow from chippings on any part of his body.

It is arguably even more difficult for a spectator to sue a competitor for injuries caused as a result of an incident in the normal course of the sporting event. A spectator took the risk of injury unless the “participant’s conduct was such as to evince a reckless disregard of the spectator’s safety” (*Wooldridge v Sumner*²⁵ (showjumping)). A sporting competitor was entitled to be all but oblivious of spectators (*Smolden v Whitworth*²⁶ (rugby)).

(2) The referee

The leading case on the liability of referees for sporting injuries is *Vowles v Evans*. In that case the claimant was badly injured during a rugby match when the scrum collapsed, and sued the referee. In breach of the rules the referee had permitted a flanker to play in the front row of the scrum without enquiring as to his previous experience of playing prop. On the facts he was held liable because “players are dependent for their safety on the due enforcement of the rules and this was the referee’s role”.

However, the standard of care to be expected of the referee depends on all the circumstances, including the nature of the game. In *Vowles* the Court of Appeal upheld the approach taken in the earlier rugby case of *Smolden* that the referee of a fast moving game cannot reasonably be expected to avoid errors of judgment, oversights or lapses.

(3) The event organiser

It may be that an injury sustained by a participant or a spectator could have been avoided if some precaution had been taken by the organiser of the event. Given the high hurdle of suing the competitor or the referee, this may be a more successful route in a particular case.

Event organisers obviously owe duties of care to participants and spectators, both at common law, and to some extent under the Occupiers’ Liability Act 1957 because of the control exercised over the activities carried out on the land.

(4) The occupier

In assessing whether there is a breach of duty under the 1957 Act, there must (as in negligence) be an assessment not only of the likelihood that someone may be injured and the severity of the injury which may occur, but also the social value of the activity which gives rise to the risk and the cost of preventative measures (*Tomlinson v Congleton BC*²⁷ at para 34). These factors have to be balanced against each other. Occupiers would generally not be liable for inherently risks present in activities carried out on their land (*Tomlinson* at para 45). The importance of safeguarding the social value of the activity has now been recognised in section 1 of the Compensation Act 2006. This obliges a court considering a claim in negligence or in breach of statutory duty to consider whether a finding of liability may prevent a desirable activity from being undertaken at all, or to a particular extent or in a particular way. Most well recognised sports are likely to qualify as desirable activities.

²⁰ [1985] 1 WLR 866

²¹ [2001] EWCA Civ 1054

²² [2005] NSWSC 107

²³ [2003] 1 WLR 1607

²⁴ [2004] 3 All ER 315

²⁵ [1963] 2 QB 43

²⁶ [1997] ELR 249

²⁷ [2003] 3 WLR 705

However in appropriate cases liability will be found. In *Slack v Glenie*²⁸ the owner of a motorcycle circuit being used for sidecar racing was held liable for serious injuries sustained when the motorcycle and sidecar collided with a chain fence on the inside of the track, which was found to be an unacceptable hazard.

*Poppleton v Portsmouth Youth Activities*²⁹ is a recent first instance example of a finding of liability against an occupier. The claimant had fallen from a climbing wall whilst undertaking a dangerous manoeuvre he was not sufficiently experienced to perform. The activity centre was not obliged to check his experience or provide supervision whilst he was climbing, but it was liable for failing to warn him of the latent danger that the floor matting would not cushion him from injury in the event of a fall. Had he been so warned, he would not have attempted the manoeuvre.

*Gwilliam v West Herts Hospitals NHS Trust*³⁰ provides an interesting illustration of the extent of the duty owed by an occupier when engaging independent contractors. The claimant had been injured whilst participating in a “splat wall” event, when her velcro suit did not adhere to the wall and she fell to the ground. The organiser of “the splat wall” did not have public liability insurance, and so the claimant sued the NHS Trust as well as the event organiser, arguing that the duty under the Occupiers’ Liability Act 1957 or in common law negligence extended to inquiring whether the organiser had public liability insurance. By different legal routes the Court of Appeal held that there was a duty here to enquire into the independent contractor’s ability to meet the claim, but was at pains to emphasise that it was not saying that there was always a duty to check every independent contractor’s viability or insurance position.

In *Wattleworth v Goodwood*³¹ the Claimant had sued Goodwood Road Racing Company, the occupier of the circuit where her husband’s fatal motor racing accident took place. In issue was the safety of the particular barrier with which the car had collided. The judge found that the circuit had discharged its duty as occupier by engaging experts to advise on the safe design of the barrier and building the barrier in accordance with that design. The defence provided by section 2(4) OLA 1957 applied.

(5) Regulatory bodies

In order for a regulatory body to be liable for a sporting accident, that body will need to have some essential element of control over the situation giving rise to the injury, or to have assumed a responsibility for safe practice in relation to that situation. The leading case remains *Watson v British Boxing Board of Control*³², where the extent of control exercised by the Boxing Board made it fair just and reasonable for the Board to owe a duty to boxers to make boxing regulations ensuring that personal injuries already sustained were properly treated. Therefore the Board was liable to Michael Watson for the increased head injuries he sustained because resuscitation equipment was not available at ringside. Lord Phillips

MR had regard to the earlier case of *Perrett v Collins*³³, where the Court of Appeal had held that an aircraft inspector certifying that a Kit Fox aircraft was airworthy owed a duty to those flying in the aircraft to take reasonable care in the manner in which the inspection was carried out.

That general principle stated in *Watson* was applied in *Wattleworth v Goodwood* (see above) to find that a duty of care was owed by the Motor Sports Association (MSA), the governing body of motor sport, to a participant killed whilst participating a track day. It had advised Goodwood on the suitability of a particular trackside barrier at the accident location so that the circuit could be granted an MSA licence to hold MSA events. Although *Wattleworth* was not participating in an MSA event it was reasonably foreseeable that an unsuitable barrier would cause injury to those using the circuit at any event, including a track day. It was irrelevant whether *Wattleworth* had specifically relied on the fact that the circuit had an MSA track licence before participating in the event.

By contrast, the international motor sport governing body, the FIA, who also inspected and approved the track did not owe a duty of care on the facts of the particular case. Their involvement was far more peripheral and their knowledge of the particular activities at the track was far more limited. The implication is that governing bodies may escape liability where their involvement is peripheral, and some other entity has effectively taken the lead in specifying the necessary precautions.

However, it may be difficult to find a sports governing body liable for the inadequacy of its in-game safety rules. In *Agar v Hyde*³⁴ the High Court of Australia held that it was not fair just and reasonable for the International Rugby Football Board to owe a duty of care to all rugby players to frame the rules of rugby union football in a way so as to minimise the risk of injury. On a practical level, it may be difficult to find expert evidence to persuade a court that the rules themselves are unsafe if those rules are formulated and approved by the leading experts in the sport.

(6) Employers

Where the sporting event has some connection with the claimant’s employment or with the tortfeasor’s employment, it may be possible to argue that the relevant employer is liable for the injury.

Where there is some doubt as to whether an activity was in the course of employment, it “all depends on the closeness of the connection between the duties which, in broad terms, the employee was engaged to perform and his wrongdoing” (*Dubai Aluminium v Salaam*³⁵ per Lord Millett). It will not be sufficient for vicarious liability if employment merely provides the opportunity for committing the tort. If it is established that the accident took place in the course of the claimant’s employment, then the employer owes a non-delegable duty to take reasonable care for his employee’s safety.

²⁸ Court of Appeal 19.4.00, unreported

²⁹ [2007] EWHC 1567

³⁰ [2002] 3 WLR 1425

³¹ [2004] PIQR P24

³² [2001] 2 WLR 1256

³³ [1998] 2 Lloyd’s Rep 255

³⁴ [2001] 201 CLR 552

(7) Schools

Many sports are organised by schools, and this raises the possibility that a pupil can sue the school for injuries sustained whilst participating in games organised by the school. In *Woodbridge School v Chittock*³⁶, a case involving a skiing accident during a school trip, the Court of Appeal examined the extent of the duty owed by teachers to pupils. Teachers owed a duty to the claimant to show the same care in relation to him as would have been exercised by a reasonably careful parent in all the surrounding circumstances including the teachers' responsibilities for the school group as a whole. It was not a duty to ensure his safety against injury from skiing mishaps such as those that might result from his own misjudgement or inadvertence when skiing unsupervised on piste. A range of reasonable responses applies to teachers' decisions in relation to their pupils' safety.

(8) Contractors

It should not be forgotten that others may owe relevant duties and so be potentially liable for injuries caused. For example, a television production company placing a camera close to the field of play may owe a duty of care to participants to ensure that the camera is not posing a danger.

(9) Carriers

Where the accident occurs aboard a ship or an aircraft, the sea or air carrier is strictly liable for all injuries or death caused, although there is a cap on the amount of compensation which can be recovered. For these purposes a paraglider is not an aircraft (*Disley v Levine*³⁷) but, applying the analysis in that case, a microlight probably would be. In *R v Goodwin*³⁸, the Court of Appeal decided that a jet ski was not a ship, because it was used only for fun and not for the purpose of travelling anywhere.

It is worth noting that such carrier claims are subject to a two year non extendable limitation period (Merchant Shipping Act 1995, Article 16; Carriage by Air Acts (Application of Provisions) Order 2004 Schedule 1 Article 35). As a result, accidents aboard yachts or collisions between speedboats may need to be brought promptly.

Conclusion

So, when will courts award damages for sporting injuries? In short, where the injury is the result of an avoidable risk, rather than a risk inherent in the sporting activity. The key to success is to identify an avoidable risk and a solvent culprit who has generated it.



Bruce Gardiner

Bruce Gardiner appeared in Wattleworth v. Goodwood instructed by Edwards Davies, and has been instructed in a number of other sporting injury cases.

³⁶ (2002) ELR 735

³⁷ [2002] 1 WLR 785

³⁸ [2006] 1 WLR 546

Harassment: how bad does it have to be?

In *Majrowski v. Guy's and St. Thomas's NHS Trust*³⁹, the House of Lords held that an employer would be vicariously liable in damages under section 3 of the Protection from Harassment Act 1997 for harassment committed by an employee in the course of his employment. Since then, concern has been expressed by employers and insurers that they will have to meet claims for vicarious liability under the Act in circumstances far wider than if conventional principles alone applied. In *Hatton v. Sutherland*⁴⁰, the Court of Appeal had laid down guidelines which severely limited the scope of claims at common law for stress and bullying at work.

In an attempt to meet this concern (which he described as “real and understandable”) Lord Nicholls emphasised in *Majrowski*⁴¹ that the gravity of the misconduct must be of an order which would sustain criminal liability under section 2 of the 1997 Act. But how grave is that? This article explores this question by reference to the criminal, as well as civil, cases on the subject.

The starting point is the 1997 Act itself. That provides in section 1 that a person must not pursue a course of conduct which amounts to harassment of another and which he knows or ought to know amounts to harassment of the other. Section 2(2) provides that an objective test of deemed knowledge is to be applied: would a reasonable person in possession of the same information think that the course of conduct amounted to harassment? An exhaustive definition of harassment is not attempted in the Act: section 7 merely states that references to harassing a person *include* alarming the person or causing the person distress. By section 8, conduct includes speech. And section 3 provides that an actual or *apprehended* breach of section 1 may be the subject of a claim in civil proceedings.

Having regard to these requirements, in *Majrowski* Lord Nicholls drew a distinction between “conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable.” The former may result in “irritations, annoyances, even a measure of upset”, but if the conduct is not serious enough to constitute a criminal offence, the employer will not be vicariously liable for it. Lady Hale distinguished between “the ordinary banter and badinage of life and genuinely offensive and unacceptable behaviour”⁴². Their Lordships were not able to flesh out their views by reference to the facts of the case itself: although there is a description in the speech of Lord Nicholls of the behaviour complained of by Mr. Majrowski⁴³, the case came before the House as an appeal from an order summarily striking it out as disclosing no cause of action.

The task of giving some flesh to the bare bones of the 1997 Act starts with *Cozens v. Brutus*⁴⁴. The issue in that case was whether certain conduct of a person

attending a tennis match at Wimbledon was “insulting behaviour” contrary to the Public Order Act 1936. In a famous passage, Lord Reid said “The meaning of an ordinary word of the English language is not a question of law. The proper construction of a statute is a question of law. If the context shows that the word is used in an unusual sense the court will determine in other words what that unusual sense is.” While this dictum has been described as “well-known but ineffectual”⁴⁵, all Lord Reid was really saying was that it is a feature of language that many words or phrases are linguistically irreducible in the sense that any attempt to elucidate a sentence by replacing them with synonyms will change rather than explain its meaning.⁴⁶ Thus in *R v. Evans*⁴⁷, the Court of Appeal held that the criminal context is not a reason for giving a narrow or strained meaning to words which bear their ordinary meaning, and that the application of that meaning to the facts should be left to the fact-finding tribunal.

Having said that, it is legitimate for the tribunal to consider the Parliamentary record as an aid to construction. This exercise was attempted in *Tuppen & Singh v. Microsoft Corporation Limited*⁴⁸. That case concerned an application by Microsoft to strike out claims by the claimants that it had harassed them within the meaning of the 1997 Act. Counsel for Microsoft submitted that the policy behind the Act limited the offences created by it to those in the stalking, neighbours’ disputes and racial context. However, the learned judge (while in fact striking out the claims) held that the fact that the nature of the conduct was undefined was a deliberate decision by the Government and by Parliament. This, he said, was “because of the ingenuity of stalkers, for example, who would find methods of harassment not covered by specific prohibited behaviour.”

What is more, a judge should be very slow to refuse on policy grounds to grant a statutory remedy under the 1997 Act if the provisions of that statute applied to the facts of the case. Thus in *Singh v. Bhakar*⁴⁹, the claimant, a Sikh woman, sought damages from her mother-in-law who following an arranged marriage to her son conducted a campaign of harassment against her, including forcing her to have her hair cut, to do excessive and pointless housework, and isolating her generally.

The question of whether it is necessary to prove intent on the part of the person whose conduct is in question is unclear: In *Thomas v. News Group Newspapers Ltd.*⁵⁰, Lord Phillips MR stated “The Act does not attempt to define the type of conduct that is capable of constituting harassment. ‘Harassment’ is, however, a word which has a meaning which is generally understood. It describes conduct targeted at an individual which is calculated to produce the consequences described in section 7 and which is oppressive and unreasonable. The practice of stalking is a prime example of such conduct.”

In *Banks v. Ablex*⁵¹, it was submitted that the conduct did not have to be “calculated to produce the

³⁹ [2006] UKHL 34

⁴⁰ [2002] EWCA Civ 76

⁴¹ paragraph 30

⁴² paragraph 66

⁴³ paragraph 2

⁴⁴ [1973] AC 854

⁴⁵ D.W. Elliott [1989] Crim LR 323

⁴⁶ *Moyna v. Secretary of State* [2003] UKHL 44

⁴⁷ [2005] 1 WLR 1435

⁴⁸ Douglas Brown J, 14.7.00, Lawtel

⁴⁹ Nottingham CC, 24.7.06, Lawtel

⁵⁰ [2110] EWCA Civ 1233, para 30

⁵¹ [2005] ICR 819 at para 20

consequences" if that is understood to mean that the alleged offender must be shown to have intended to achieve the consequences. The Court of Appeal agreed and sought to explain Lord Phillips' words as meaning no more than that the conduct must be such as is liable to produce those consequences. But this seems to be inconsistent with a decision of an earlier Master of the Rolls, Lord Donaldson, who in *Johnson v. Walton*⁵² held that harassment includes within it an element of intent, intent to cause distress or harm. While that observation preceded the 1997 Act, its application to that Act was accepted in *Tafurelli v. DPP*⁵³, in which Leveson J held that a deliberate failure to control dogs so that they barked excessively for many nights in succession constituted harassment.

The correct approach to the 1997 Act had in fact already been considered by the Court of Appeal before *Thomas v. News Group Newspapers*. In *R v. Sean Peter C*⁵⁴, the defendant, a schizophrenic, had written letters to his MP which contained abuse and threats, and demonstrated an obsessive concern about a number or real or imaginary local issues. There was expert evidence at his trial that the letters were a product of his illness and that he would have believed the things he had said. On this basis, it was argued that (1) the course of conduct must be one which the defendant knew or ought to have known amounted to harassment, (2) the reasonable person referred to in the statutory test must be endowed with the relevant characteristics of the accused, including his mental disorder, and (3) that therefore the defendant should have been judged by the standards of the hypothetical reasonable schizophrenic. The Court of Appeal disagreed, holding that the Act posed an objective test as to whether the conduct was reasonable, and that no characteristics of the accused could be attached to the word "reasonable".

To be actionable under the 1997 Act, the conduct in question will be criminal and must be such as potentially to attract a custodial sentence. It must therefore have an element of real seriousness. This was emphasised in the civil context by *Hammond v. International Network Services UK*⁵⁵. In that case, Coulson J drew attention to *Singh v. Bhakar* and pointed out that harassment had been found not to arise in *Banks v. Ablex*, a case which involved a supervisor ranting and swearing on the factory floor. Thus in *Hammond* itself, the learned judge held that while evidence that a course of conduct which was designed to humiliate the claimant over his lateness at work, such as shouting, swearing and threatening behaviour, might constitute harassment, it will not always do so. A graphic example of the seriousness of conduct required is provided by *Oxford University v. Broughton*⁵⁶. As part of an animal rights campaign against the University, activists had interrupted degree ceremonies by shouting and chanting, which witnesses found upsetting and irritating, and which ruined their day. Nonetheless, Treacy J held that since nowhere in the University's evidence did any witness speak of feeling harassed, alarmed or threatened, that conduct did not amount to harassment.

The difficulties for claimants in proving harassment within the meaning of the 1997 Act are well demonstrated by the recent case of *Conn v. Sunderland*⁵⁷. In that case, it was found at first instance that two out of five incidents complained of were sufficient to constitute harassment, so that there was an actionable course of conduct. The claimant, a paver, complained that on one occasion his site foreman became angry and threatened to punch out the windows of the cabin and have him and others up before the personnel department, and that on the other the foreman, who was so angry that he was shaking with rage, had said that he would give him a good hiding and didn't care if he lost his job over it.

The Court of Appeal held that while the second incident was sufficient to constitute harassment, the first was not, so that there was no course of conduct and thus no breach of the Act. In addition to reiterating the requirement for the conduct to have been sufficient to constitute a crime, they gave two useful further indications. First, whether behaviour does or does not cross the boundary may well depend on the context in which it occurs: "what might not be harassment on the factory floor or in the barrack room might well be harassment in the hospital ward and vice versa."⁵⁸ And second, any particular sensibility on the part of the victim, at least where it was not known to the perpetrator, is irrelevant, since an objective test of harassment is to be applied under the Act⁵⁹.

The 1997 Act has been in force for only 10 years and its applicability to employers has been established for less than 2 years, so its ambit in that context is as yet relatively unexplored. But Majrowski itself was – as noted above – an application to strike out a statement of case as showing no cause of action, rather than a decision as to whether the facts did constitute harassment. And decisions both before and after that case have clearly indicated that the courts are careful to limit the scope for claims for vicarious liability for harassment. The floodgates are not yet open.



John McDonald

John McDonald has been instructed by defendants in many stress bullying and harassment cases.

Martin Porter QC appeared for the appellants in Conn v. Sunderland instructed by Crutes LLP.

⁵² [1990] 1 FLR 350 at 352H

⁵³ [2004] EWHC 2791 (Admin)

⁵⁴ [2001] Crim LR 845

⁵⁵ [2007] EWHC 2604 (QB)

⁵⁶ [2008] EWHC 75 (QB)

