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When you arrange a Personal Injury Trust for your vulnerable client, are you doing it the right way? In the case of *OH v Craven* the court looked at the situation of two people. One of these vulnerable people had a Deputy but then regained capacity and wanted to put a Personal Injury Trust in place. The other was a minor who was expected to have mental capacity at eighteen but needed a Trust.

In the judgment, the court made it clear that they would not simply rubber stamp the appointment of the litigation solicitor's firm as Trustee. The court was concerned about a one stop shop which "only stocked one product".

Concerns were raised that the litigation solicitor would be seen to have undue influence over the client in this situation and the client should have independent advice and a genuine choice about who to appoint.

Alan Eccles, the recently retired Public Guardian, has said that the Office of the Public Guardian will be looking closely at cases where litigation firms apply to have themselves appointed as Deputy – families need to be aware of choices.

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OPINION

'When the news did break, it was certainly worth the wait. A figure of -0.75%'

Last month, I had hoped to write about the announcement of the Scottish discount rate. Deadline dates managed to thwart that ambition, but when the news did break, it was certainly worth the wait. A figure of -0.75%.

A rate fixed by statute with reference to a defined methodology. Less flexibility than the system in England and Wales, but a more cautious investment portfolio together with prescribed adjustment factors, as well as a lack of direct political influence, could be said to better reflect how best to deal with the needs of the injured person.

Perhaps the more significant part of the Government Actuary's report, which set out the decision and rationale for it, was the assertion that, had the traditional *Wells v Wells* approach been adopted, we would have had a rate of between -1.5 and -2.0%.

It is imperative that we are alert to how the new rates progress, as there may yet be shortfalls in damages. We must gather data, details of client investment behaviour, and case studies to inform our contributions to the review process in around four years' time. We will soon be in touch to ask you for a point of contact within your firms who can help us with this crucial work, by co-ordinating the ongoing capture of information we are going to need.

And of course, we continue to press for the rate in Northern Ireland to be changed as soon as possible. This is part of our commitment to campaign consistently across the UK, recognising that we face very similar challenges in each part of the country.

The recent FCA report on insurer practices has exposed the highly prejudicial way in which insurance companies treat their customers, especially the most vulnerable. We need to work together, and with others, to highlight these injustices, and do what we can to ensure that those engaging in bad behaviour are brought to account.

Gordon Dalyell

Gordon Dalyell
President

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APIL NEWS

APIL publishes its 'manifesto'

At the time of writing, the country is still waiting for the next development in the ongoing Brexit saga, with a pre-Christmas election looking ever more likely. It is anyone's guess as to what will happen next. But, even though political discourse is dominated by Brexit, when a general election is on the cards, it is incredibly important that prospective MPs are reminded about the very real needs of injured people.

Manifestos are a traditional feature of any election, but their use is not limited to political parties. In an effort to generate early support for issues which matter to injured people, APIL will publish its own manifesto for prospective MPs, based on the principles of injury prevention and fairness for injured people.

The APIL manifesto points out to candidates that the lives of people who suffer serious and needless injuries can be changed forever. These are vulnerable people who will need compensation to help them pay for the care they need. They should not have to take financial risks to try to make ends meet, or live in the constant fear of their money running out. The manifesto asks candidates to commit to the principle of ensuring injured people receive full and fair redress.

The core principle outlined in the manifesto is that of preventing needless injury from happening in the first place. While everyone has their own part to play in this, the government has to take a lead, and so candidates are asked to become champions for the prevention of needless injuries so they can put pressure on the government to do just that.

Of course, the point is also made that when the worst does happen, too many people are let down by the justice system. Candidates will be asked to support calls for a modern law on bereavement damages, and a fund of last resort for sufferers of asbestos-related diseases who cannot trace any or all of their former employers' insurers. Funding of the NHS is always hotly debated during a general election, and the manifesto makes the point that if the NHS could only learn from its mistakes and avoid causing needless harm to patients, it would have more money to spend on frontline care.

This manifesto needs to reach as many candidates as possible, and this cannot be achieved without the help of APIL members. We will tell you how you can get involved in the coming weeks, so please look out for further details.

See Mike Benner's column, page 31

APIL NEWS

Concerns over fixed costs for clinical negligence

It remains to be seen whether proposed levels of fixed recoverable costs (FRC) for low-value clinical negligence claims will be workable, APIL said following publication of the Civil Justice Council working group's report.

'At this stage, it is impossible to say how workable fixed costs will be in allowing cases to continue to be brought by specialists, given that law firms operate under a wide range of different models,' said APIL executive committee member Suzanne Trask.

Under the group's recommendations, FRC in the standard track for claimant representatives would stand at £6,000 plus 40% of the damages agreed at stage one, with a further £2,000 at stage two. In the light track FRC would be £4,500 plus 25% of damages at stage one and 5% at stage 2a. The group has handed the issue back to the government for consultation.

'In any discussion about fixing costs of clinical negligence claims, the emphasis should not simply be on cutting lawyers' costs, but about streamlining the process and making it more efficient to the ultimate benefit of injured patients,' said Trask.

'APIL has some concerns that the fees proposed are based on data from cases run under the current system, which is different. A big change is that defendants and claimants will have to put their cards on the table early on in the process of a claim, which requires a shift in behaviour and a greater level of trust on both sides.

'There are other major issues outstanding which need to be considered further, such as after-the-event insurance, sanctions, and experts' and counsels' fees. Also, there needs to be clarity on the types of cases to be excluded from the scheme.

'We have maintained for many years that making the process more

efficient relies upon co-operation on all sides, between claimant lawyers, defendant lawyers, and NHS Resolution,' Trask continued.

'Let's not forget though, that this report does not do anything about the principal driver of clinical negligence claims costs, which are the needless injuries to patients. It is disappointing that more could not be achieved to ensure that vital learning from cases of negligence could be integrated into this process.'

NHS 'culture of secrecy' risk

Legislation that could undermine the government's commitment to openness and transparency in the NHS has been introduced into the House of Lords.

The Health Service Safety Investigations Bill will establish an independent body to investigate patient safety incidents, but risks the creation of a culture of secrecy.

In a briefing sent to peers ahead of the first debate on the Bill (which at the time of writing was scheduled for 29 October) APIL supports the principle behind the new Health Service Safety Investigations Body (HSSIB).

But peers have been warned that while the aims of the HSSIB are laudable, a culture of secrecy is inevitable if proposals to allow the body to withhold information are implemented.

The warning comes as the government presses ahead with proposals to place a prohibition on the disclosure of information gathered by HSSIB as part of its investigations, which would be known as 'safe space' investigations. This undermines the government's previously stated commitment to openness and transparency, and contradicts the professional duty of candour previously introduced by the government.

If a solicitor were to need access to information from the HSSIB to assist in the preparation of a legal claim, a court order would need to be obtained from the High Court. This could lead to increased costs and delays.

The Bill comes more than two years after the proposals were published in draft by the government.

Changes from the draft proposals include the removal of provisions which would have allowed NHS trusts to conduct their own 'safe space' investigations. APIL had criticised those provisions, as it questioned how patients would have the confidence in an NHS Trust to investigate itself.

The remit of the HSSIB will not cover private healthcare, despite a recommendation from a parliamentary committee. APIL supported an extension of its remit, and argued that any patient, regardless of whether his treatment is funded privately or by the NHS, deserves to be treated in a safe environment.

If something does go wrong, a patient deserves to know the incident will be investigated, and receive an apology and a full explanation of what happened.

RECIPE FOR TROUBLE

Michelle Victor and Jennifer Ellis ask if reform of the law relating to allergies goes far enough

Provision of allergen information is governed by the European Food Information to Consumers Regulation No 1169/2011 (FIC).

This Regulation was intended to improve food safety for allergy sufferers when eating outside of the home, and was incorporated into UK law as the Food Information Regulations (FIR) in December 2014 to enable enforcement of FIC in the UK.

There are three main categories of foods to consider as follows:

1. Prepacked foods;
2. Foods prepacked for direct sale; and
3. Non-prepacked foods.

Annex II of FIC identifies 14 of the most common allergens comprising eggs, milk, fish, crustaceans, molluscs, peanuts, tree nuts, sesame seeds, cereals containing gluten, soya, celery and celeriac, mustard, lupus, sulphur dioxide, and sulphates.

Article 9 (1) (c) of FIC dictates that where a product contains any of the 14 allergens listed at Annex II, an indication of this information must be made available to any given customer. The FIR therefore places a legal obligation on all food business operators to notify consumers if their food contains any one of these 14 allergens.

The Regulation is evidently a mechanism to enhance food safety for allergy sufferers. However, the way in which this information is communicated to the consumer depends on the category from which it derives.

Prepacked foods (PP):

This category encompasses all foods packaged off-site before being sold. A typical example would be foods produced in a factory setting, such as canned produce / packets of crisps and so forth.

In respect of this food category, the Regulations are stringent and *full* ingredient labelling is mandatory on all packaging. Further, in accordance with Article 21 of FIC, where PP foods contain any of the 14 allergens listed at

Annex II, such ingredients must be emphasised on the label, for example, in bold text.

Foods prepacked for direct sale (PPDS):

At present, businesses selling foods prepared and packaged in an on-site kitchen do not need to adhere to the same law as businesses selling prepacked foods.

The FIC Regulations allow Member States to adopt national measures concerning the means through which the particulars at Article 9 (1) (c) are made available to the customer.

Accordingly, Regulation 5 of the FIR stipulates that the provision of allergen information in writing is *not mandatory*. Instead, food business operators selling foods PPDS are afforded discretion as to how they communicate allergen information to customers, and this can be done either in writing *or* orally.

If the food business chooses to communicate allergen information orally, Regulation 5 requires that the business must indicate to customers that allergen information can be obtained by asking a member of staff. Such information may be provided either:

a. On an 'ask the staff' label attached to the food; or

b. On a 'readily discernible' notice, menu, ticket or label 'at the place where the intending purchaser chooses that food'.

The customer is then required to enquire as to what is in the food, and food business operators must provide information about the existence of any of the 14 allergens listed at Annex II. Responsibility for obtaining information about allergens is effectively shifted from the food business operator to the consumer.

Such practice exposes consumers to unnecessary danger, as demonstrated in the tragic case of Natasha Ednan-Laperouse.

In July 2016, Natasha (aged 15) consumed a baguette from Pret-a-Manger. She was reassured by the fact that the packaging of the baguette contained no warning that there were allergens to which she was allergic.

Unbeknown to her, sesame seeds were baked into the baguette dough. Natasha was severely allergic to sesame, and she tragically died from fatal food anaphylaxis.

The product label did contain a list of ingredients; however, sesame was omitted as an ingredient.

Sesame is one of 14 allergens listed at Annex II of FIC, and therefore, had the baguette Natasha purchased been produced in an off-site factory, it would have emphasised the sesame ingredient, alerting her to the risk.

Since the product was produced in Pret-a-Manger's on-site kitchen, sesame did not need to be declared on the label in writing, provided that readily discernible signage was present at the place the food was chosen, encouraging the customer to enquire about allergens in the product.

At the inquest into Natasha's death, it was found that the signage Pret-a-Manger had used to notify customers to ask staff for allergen information was difficult to see.

Their allergen notice was a sticker made of transparent plastic with white lettering, stuck on to a stainless steel background. This called into question whether such signage was 'readily discernible' as required by the Regulations.

Following the inquest, the Coroner, Dr Sean Cummings, published a Prevention of Future Deaths (PFD) report (see *www.judiciary.uk/wp-content/uploads/2018/10/Natasha-LAPEROUSE-2018-0279.pdf*).

The report was addressed to the Secretary of State Department for the Environment, Food and Rural Affairs at the time, Michael Gove (among others), and identified his concerns that Regulation 5 of FIR enables food outlets to 'avoid full food labelling requirements' by preparing items for sale in 'local kitchens'.

The Coroner stipulated that he was 'left with the impression that the "local kitchens" were in fact a device to evade the spirit of the regulation'.

Natasha's family have championed a tireless campaign for change to existing Regulations in their daughter's name.

Natasha's law

In January 2019, The Department for Environment, Food and Rural Affairs (DEFRA) commissioned a public consultation to gage public attitudes relating to existing food labelling provisions for foods PPDS.

Without consistency, the allergy sufferer is always actively hunting for the allergen notices

A total of four options were proposed to consumers, as follows:

1. Promoting best practice to businesses;
2. 'Ask the staff' labels on products;
3. Allergen-only labelling; and
4. Full ingredient list labelling.

More than 70% of respondents supported the full ingredient option, with proponents of this option including the Food Standards Agency themselves.

'Natasha's Law' will therefore replace the existing law relating to foods PPDS, and will require all food businesses operators to list full ingredient labelling on all foods PPDS.

The legislative change will come into force in 2021. But does this go far enough?

Non-prepacked foods (NPP)

NPP foods are best described as foods sold loose, or foods packed at the consumer's request. They can encompass:

1. Foods sold loose in a retail environment such as at a delicatessen counter (for example, cheeses / cold meats) or in a bakery (croissants / muffins); and
2. Foods sold in a catering environment such as meals served in a restaurant, or foods purchased from a takeaway outlet packed at the consumer's request.

As with foods PPDS, Regulation 5 of FIR governs this category of foods and enables flexibility for provision of allergen information when selling NPP foods.

Food business operators remain able to choose whether to communicate their allergen information to consumers in writing *or* orally.

In the catering environment, it seems logical to include a notice on the menu.

However, this is not compulsory, and industry practice dictates that an allergen information notice can be communicated through a variety of means to suit the business, for instance a notice on a wall or by the till.

As identified above, if the 'ask the staff' notice is not on the food label, it must be 'readily discernible' and should be situated 'at the place where the intending purchaser chooses that food'.

Without consistency, the allergy sufferer is always actively hunting for the allergen notices, which differ greatly in location, size, font type and so forth, depending on the individual businesses' choice.

There is therefore a lack of clarity as to what constitutes 'readily discernible', and once again, allergy sufferers carry the burden of ensuring the safety of their food - even though, as a customer, the allergy sufferer can never be 100% certain of the ingredients it contains.

Given that Natasha's Law will come into force in 2021 and eradicate the option of communicating allergen information orally with regards to the sale of foods PPDS, establishments selling foods in the category of NPP - such as delicatessen counters, bakeries, takeaway and restaurant settings - are likely to be the most hazardous environments for allergy sufferers.

Taking the example of a restaurant setting, it is apparent that those with food allergies are presented with a plethora of life-threatening dangers and 'what if' worries about potential cross contamination, miscommunications and / or misunderstanding of the severity of the customer's allergies.

Placing the onus on the allergy sufferer to communicate their allergies exposes a particularly vulnerable group of young allergy sufferers, who may still be building confidence in communicating their allergies.

Further, even if the allergy sufferer communicates their allergies to waiting staff, they are still highly dependent on the efficiency of in-house operations of a given restaurant.

Businesses selling foods prepared and packaged in an on-site kitchen do not need to adhere to the same law as those selling prepacked foods

A failure to understand the severity of allergen management via insufficient training of food handling staff - or by simple human error - could also result in tragedy, as we have seen in the recent case of Owen Carey.

Owen Carey

Like many, Owen Carey suffered from a number of allergies including dairy, which he managed well.

He was celebrating his eighteenth birthday with his family and girlfriend when he suffered a fatal anaphylactic reaction after eating a meal at Byron, which unbeknown to him contained milk.

The inquest into Owen's death heard that after communicating his allergies to staff members, Owen proceeded to order the 'grilled chicken breast' without the bun and fries.

The menu made no reference to the 'grilled chicken breast' containing any marinade, or indeed any of the allergens to which Owen was allergic.

Notifying staff members of his allergy should have triggered Byron's allergy protocol, which directs that Owen should then have been provided with an allergy matrix highlighting allergens present in each menu item he selected. The allergy matrix was not provided to Owen.

Safe in the knowledge that the grilled chicken breast was free from any allergens to which he was allergic, Owen consumed the burger.

Sadly, the burger had been coated in buttermilk. Within 30 minutes, Owen collapsed and despite their best efforts, medics were unable to resuscitate him.

Owen's death occurred *despite* him communicating his allergies to staff members.

The Coroner, Ms Briony Ballard, found that Byron's system had broken down at the point of communication.

During the inquest, she identified the possibility that both Owen and the serving staff at Byron were likely misled into thinking the order was safe by the product description on the menu as being a 'grilled chicken burger' with no reference to any allergens.

In addition, it was noteworthy that Byron's burger did list 'N' where a dish contained peanuts, potentially reassuring dinners into believing that *all allergens* were being identified on the face of the menu - which was not the case.

The Coroner's Prevention of Future Deaths Report has yet to be issued, but will identify any areas of concern that arose from the Inquest.

Owen's death was clearly preventable. Had he been provided with the allergy matrix, he would have seen that the chicken burger contained milk, and he would not have chosen this option.

Furthermore, had the menu specified that the burger contained milk / was coated in 'buttermilk', Owen would not have ordered this meal.

Owen's family are subsequently calling for further changes to be made to the provision of allergen information for NPP foods to better safeguard allergy sufferers:

1. Improved transparency in relation to what is in the food we purchase;
2. More prominent signage of allergen information on the menu;
3. Mandatory communication by all waiting staff to ask all customers whether they have allergies when ordering their food; and
4. Assurance that food businesses are carrying out rigorous allergy training for all their members of staff.

Time for further reform?

It is apparent that the existing law in this area is not providing adequate protection to allergy sufferers.

From 2021, further protection will be afforded to allergy sufferers purchasing foods PPFD, yet conversely, food business operators continue to enjoy a wide discretion as to how they communicate allergen information to consumers purchasing NPP foods.

This approach is inconsistent and differs across establishments.

An argument often advanced by food business industry is that the implementation of full ingredient labelling is too burdensome and onerous.

However, many suggest the UK is experiencing an 'allergy epidemic', and with no known cure for food allergies, it is vital that food providers adopt an integrative approach to developing and implementing consistent and effective allergen protocols.

The standard of service delivered by the food industry therefore needs to adapt and advance; and with more than two million allergy sufferers in the UK alone, increased bureaucracy may now be necessary.

Michelle Victor leads the allergy team at Leigh Day, and Jennifer Ellis is a paralegal assisting Michelle. The team acted for the families of Natasha Ednan-Laperouse and Owen Carey above

FAMILY VALUE

Richard Kayser and Rob Hunter on a case highlighting the difficulty in valuing a mother's care

Damages after a death have been available for more than 150 years, but the law of fatal accidents continues to occupy the courts.

In the last few years, the courts have grappled with (among other issues): calculation of the multiplier; eligibility of dependants; and financial dependency of adult children (see *Knauer v Ministry of Justice* [2016] UKSC 9; *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2017] EWCA Civ 1916; and *AB v KL* [2019] EWHC 611 (QB)).

This article is concerned with two aspects of fatal accident claims that have received less attention in reported cases, but are often encountered in practice: damages for services dependency and management of children's shares. These were both considered in *OB (Administrator of the Estate of AB, Deceased) v King's College Hospital NHS Foundation Trust*.

Background facts

The claimant's case arose from treatment that the deceased ('AB') received during the birth of her third child.

AB had a known medical history of sickle cell disease. As a result, her pregnancy was considered high risk and she was referred for care under the Obstetric and Haematology Team.

A caesarean section was scheduled for 16 July 2015, but on 5 July 2015 AB was admitted to hospital. Her oxygen levels raised concern that she had developed a pulmonary embolism, and so AB was started on blood thinning medication as a precaution.

AB was transferred to Kings College Hospital on 7 July 2015. The plan for delivery was to withhold blood thinning medication for 24 hours prior to the caesarean section, and transfuse three units of blood in advance and a unit of blood postnatally.

On 11 July 2015, AB went into labour and a caesarean section was undertaken under general anaesthetic. Tragically, AB developed serious complications associated with post-partum haemorrhage and sickle cell disease.

During and after the operation, AB's heart rate and blood pressure were raised, but she did not receive blood. Her symptoms deteriorated in recovery, but this was not recognised and subsequently AB suffered a cardiac arrest.

Radiological investigations indicated catastrophic hypoxic brain injury and on 31 July 2015 death followed a further cardiac arrest.

Dependency

At her death, AB was 39 years old and lived with her husband and three young children. AB had played a large part in her elder children's lives, having not returned to work in order to care for them. She also undertook the majority of the household chores.

AB's youngest child was born just 18 days before AB's untimely death. It follows that AB would have provided a significant amount of care.

Since the death, the family had coped by relying on the claimant, extended family, au pairs and nursery. Cover at night had been required because from time to time the claimant's profession required him to work night shifts.

AB had planned to return to her profession once her children were old enough. However, the likely pay disparity with her husband was such that there was no dependency on earnings. There was also no claim for dependency in retirement given AB's reduced life expectancy on account of sickle cell disease.

The claim

Both parties were represented at an inquest in August 2016 touching AB's death, when the coroner concluded that the cause of death was:

'Natural causes contributed to by a failure to escalate her deteriorating condition post operatively in the recovery ward to senior staff and by a failure to transfuse blood in recovery, both of which amounted to neglect.'

Thereafter, a letter of claim, informed by the Inquest, was sent to the defendant and prompted a full admission of liability.

In practice, eligible dependants are entitled to claim for income or services that the deceased would have provided but for the death

Attention turned to quantum. Due to the amount of support that AB provided to her husband and children, an expert was instructed to consider the replacement value of her services.

In view of the number of hours of childcare that AB would have provided, the expert concluded that two nannies would be required. A live-in nanny was not feasible because the family home was too small. Appropriate childcare arrangements were necessary to allow the claimant to continue to provide for his family.

Principles of assessment

As is well known, certain categories of dependants are entitled to damages if their relative is killed by the defendant's tortious conduct. Their claim arises from a statutory cause of action governed by the Fatal Accidents Act 1976, which provides as follows:

'3 Assessment of Damages

'In the action such damages... may be awarded as are proportioned to the injury resulting from the death to the dependants respectively...'

In practice, eligible dependants are entitled to claim for income or services that the deceased would have provided but for the death. This requires the court to undertake what has been described as an 'artificial and conjectural exercise' (*Cookson v Knowles* [1979] AC 556 per Diplock LJ at 568). It may involve damages for the chance of dependency if that would have been a substantial possibility (*Davies v Taylor* [1974] AC 207, 220).

Where the deceased was employed or receiving a pension, the family is likely to be dependent on their income. This is often the largest part of the claim.

But what if the deceased contributed to the family in other ways? For example, if (as here) one partner is primarily responsible for bringing up children, their efforts may have been essential to the welfare of the family and their finances.

At the turn of the century, in the context of ancillary relief, the House of Lords cautioned against a 'bias in favour of the money-earner and against the home-maker and the child-carer' (*White v White* [2001] UKHL 54, 1 AC 596 per Nicholls LJ at 605E).

Valuing childcare

The words of the Fatal Accidents Act offer little assistance to judges, and so it is necessary to look to case law.

The older authorities liken the judge's role to that of a jury, and emphasise the need to find the sum which appears as reasonable compensation, looked at overall as a lump sum (see, for example, *Spittle v Bunney* [1988] 1 W.L.R. 847 and *Stanley v Saddique* [1992] Q.B. 1).

The modern approach is more methodical (*Bordin v St Mary's NHS Trust* [2000] Lloyd's Rep. Med. 287 per Crane J):

'In so far as there is a reasoned basis which can be found for the assessment, it seems to me appropriate for the judge to use that basis, checking at each stage the reasonableness of the claim and standing back at the end of the calculation to check that there has been no over-compensation. It would be inappropriate to use a "broad brush" artificially to the total, or to do so arbitrarily...'

The first stage of the enquiry is therefore to consider the commercial cost of replacing the deceased's services. This is so, whether or not commercial providers have been engaged.

Although the incurred costs are relevant, the award is not capped by what has been spent. This is because the Court must assess what has been lost, not what has

been provided or purchased (*Hay v Hughes* [1975] QC 790 per Lord Edmund-Davies at 809B).

Where the services have or will be replaced gratuitously, hourly rates are sometimes discounted to the net 'in hand' figure. For example, in *Corbett v Barking Havering & Brentwood Health Authority* ([1991] 2 QB 408; [1990] 3 WLR 1037) the carer's rate was discounted, and the Court excluded the on-costs of four weeks' annual paid holiday and sick leave.

However, other judges have awarded the commercial replacement cost. For example, in *Knauer v Ministry of Justice* at first instance ([2014] EWHC 2553) Bean J allowed agency care at £16,640 p.a. together with a further award of £1,500 for gardening and decorating.

The received wisdom is that as children age, the value of the services dependency falls, and the yardstick of a nanny's wage becomes less appropriate (*Spittle v Bunney* [1988] 1 WLR 847, [1988] 3 All ER 1031).

It is arguable, however, that the cost of a nanny remains more appropriate than spinal point 8 of the NJC pay scales, at least as a starting point.

Outcome

The claimant's case was that care after the death fell short of that which AB would have provided.

The actual costs that had been incurred were therefore not an appropriate measure of damages.

Our view was that the cost of an experienced nanny better reflected the quality of care the children would have received from their mother, not least because au pairs tend to possess little experience and training.

Further, given the claimant's working hours, it was soundly arguable that a nanny's rate of pay would remain the appropriate yardstick for a long period.

A claim for additional accommodation was considered but not pursued at the mediation for various reasons. One of the considerations was the argument that with sufficient accommodation a single live-in nanny, as opposed to two live-out nannies, could provide the night care that was needed.

Damages were agreed on a global basis at a successful mediation in the sum of £735,000.

Settlement was reached when the prevailing discount rate was -0.75%, albeit that a change in the discount rate was anticipated.

Overall, the size of the award was unusual for a fatal accident claim, particularly in the absence of income dependency.

The assumptions underpinning the settlement must remain confidential, but the size of the award was obviously a reflection of the contribution that AB would have made to her family.

Suffice to say that damages assumed the commercial cost of childcare, including associated costs and without gratuitous discount, throughout childhood.

Brexit

At an approval hearing in December 2018, Master Yoxall approved the proposed compromise and directed that the damages awarded to the claimant's two eldest children be placed into a designated commercial cash account.

The main features of the account were that it did not permit withdrawal until the age of 18, but offered a far more attractive rate of interest than the Court Funds Office (CFO) Special Account.

It became clear that the funds were likely to remain in the special account for longer than was desirable

Management of the youngest dependant's award was more difficult because the investment horizon was longer, which favoured some stock market exposure, but the Litigation Friend was understandably wary of capital risk.

With the uncertainties of Brexit, the claimant sought the advice of the asset management team at Irwin Mitchell. The conventional option for a child of the dependant's age is to invest 70% in an Equity Index Tracker Fund (offered by the CFO) with the remaining 30% being placed in the Special Account.

The tracker fund invests directly in Legal & General unit trusts which track each of the world's major markets with 55% held in the UK, 35% held overseas and 10% held in emerging markets.

The concerns were that investing money into the index tracker could be severely affected if Brexit were to have a negative impact

(especially given that the damages are not invested over a phased period) and that the Special Account offered an uncompetitive rate of interest.

Management of awards

CPR r 21.11 gives the court control of money recovered by or on behalf of a child or protected party, and requires that the Court give directions for management. The directions may provide that the money shall be wholly or partly paid into court and invested or otherwise dealt with.

Paragraph 8.1 of Practice Direction 21 records some of the management powers that are available, including payment into Court for investment or payment directly to the child or litigation friend.

Paragraph 8.2 emphasises the broad nature of the discretion: the Court will consider 'the general aims to be achieved for the money in court (the fund) by investment'.

The judge's discretion is, however, fettered if the child is 13 or older at the date of the investment directions and / or the fund is less than £10,000; then any damages held in Court must be held in the Special Account (section 14(2) The Court Funds Rules 2011).

Provided the child is under 13 and has been awarded more than £10,000, there is no restriction on the court's power to direct that money managed by the Court be proportioned in any particular share between the Special Account and the Equity Index Tracker fund or anywhere else.

This is reflected in 'A Guide to Court Funds Office practices' with regard to children's and protected beneficiaries' accounts:

'...The CFO will however accept a direction by the Judge or Master, if given, as to the particular percentages of investment to be made in the EITF, so long as the criteria for investment set out in Section 5(i) above are met in each individual case.

'The Judge or Master will wish to pay special attention to Section 4 of Form CFO 320 and to enter a special direction in that Section as to the percentages if he decides that those laid down in the frameworks should be varied. Any such special direction is then repeated at Box 9a of Form CFO 212.

'There may be cases however where investment in special account should not in any circumstances be permitted, e.g. where the parents of a Muslim child request investment that does not earn interest... Where the criteria for investment in the EITF are met, a special direction could be given for 100% investment in that fund.

'A special direction by the Judge or Master may... for example require that the percentage of investment in the EITF is maintained at its original level.'

The duty of the Court and practitioners to consider the best investment for the child was emphasised by HHJ Platt in *GW v BW* (LTL 22.7.11).

In his view, the Special Account should be treated as the 'place of last resort' for investment of children's damages.

Judges who simply ordered damages to be placed in the Special Account without considering alternatives were condemning children to lose considerable sums, which was an 'abrogation of judicial responsibility'.

Outcome

The award to the youngest minor was temporarily held by the CFO pending a further investment hearing in the hope that Brexit's impact and investment options would be better understood.

It became clear, however, that the funds were likely to remain in the special account for longer than was desirable.

At the claimant's invitation, Master Yoxall exercised his discretion to move away from the conventional approach and instead directed that 50% would be invested in the Equity Index Tracker Fund (managed on behalf of the Court Funds Office) and the remaining 50% would be held in a designated commercial cash account that restricted withdrawals until the age of 18.

Master Yoxall's approach was a welcome departure from the standard approach to investment of minor dependants' damages.

It facilitated cautious stock market exposure in an uncertain climate, while at the same time freeing half the dependant's fund to be held securely at a competitive rate of interest.

Richard Kayser is a senior associate solicitor at Irwin Mitchell and Rob Hunter is a barrister at Devereux Chambers. Both acted for the claimant in the above case

PARTY LINES

Matthew White examines the vicarious liability issues following injury at an office party

In *Shelbourne v Cancer Research UK* the claimant (C) was physically lifted up, and dropped, when on the dance floor at the Christmas party at her workplace. She sustained spinal injury.

She claimed against her employer (D) alleging (a) inadequate organisation / supervision of the party; and (b) that the employer was vicariously liable for the actions of the individual (B) who lifted the claimant.

She lost at first instance and on first appeal. The Court of Appeal have now refused her permission for a second appeal.

This article considers both the allegations against D as organiser of the party, and the allegation that D was vicariously liable for B.

Factual background

The defendant (D) is a well known charity. It had a research institute in Cambridge.

A Christmas party was organised by a team of volunteers to be held in the lobby / canteen of the research institute building.

A volunteer organiser had risk assessed the party, and had noted the risk of partygoers returning to labs after the consumption of alcohol.

Guests were required to sign a 'disclaimer' confirming that they would not attempt to work in the labs after consuming alcohol.

Security guards were present, in particular to stop people going back to the labs. Alcohol was available. There was food, a ceilidh, giant games and a disco.

There had been no issues arising from the consumption of alcohol at similar events (over at least five years).

There was some dispute about B's behaviour leading up to the incident. The trial judge found that he appeared to be 'drunk, but not very drunk'. He was acting in a disinhibited manner.

He had lifted other women, including one of the organisers (who had earlier allowed him to bring his own small bottle of vodka into the party), before attempting to lift C.

After the incident, there was an investigation which led to recommendations: (1) amend the declaration signed by guests to include saying that they would act responsibly; (2) send an email in advance of the event encouraging responsible behaviour; (3) ask anyone behaving inappropriately to leave immediately (which was said to be 'unwritten policy' in any event).

Spot the difference

To illustrate the dispute here, I am going to put the facts in two different ways. Every one of the facts set out below is accurate. Spot the difference.

1) The risk from drinking at the party had been identified, but the only *written* concern was to stop people returning to the labs.

   Indeed, the risk assessment used was one suitable for lab work, because that was the only

type of risk assessment that the assessor had any training in. He had no training in how to run or risk assess a party.

B, who had been allowed to bring his own alcohol into the party, got drunk and lifted other women, including one of the party organisers, who had done nothing about it.

Tickets could be sold to anyone. The organisers were not trained to organise or risk assess this sort of event.

The security guards were not trained how to look after an event like this. After the incident, an internal investigation found that steps should be taken to ensure that guests behave responsibly.

2) The party was not paid for by the employer. It was organised by volunteers from within the workforce in their own time.

It was not compulsory (or expected) that people would attend. Attendees could be expected to be connected to the research institute (working there or guests of those who work there).

There had never been a problem with alcohol consumption at this party before. The volunteers had risk assessed the party (how often do you see that?), had arranged security guards to be present, and attendees were expected to sign a declaration confirming that they would not attempt to do lab work after drinking.

The claim in negligence

The allegations of negligence were wide-ranging, but cut down to their essence were:

1) There ought to have been warnings or advice to attendees about their behaviour;
2) There ought to have been a policy about alcohol consumption;
3) There ought to have been a policy to intervene if any attendee(s) became intoxicated;
4) The party should have been more closely monitored / supervised to spot and deal with intoxicated guests;
5) B ought to have been spotted and thrown out.

Some of these allegations were plainly based on the post-incident report.

The judge at first instance (Recorder Catford) found that there was a foreseeable risk of harm such that D owed a duty of care in negligence, and that that duty could in certain circumstances extend to the actions of a third party.

However, he also found that there was no breach of the duty.

The judge was influenced by *Everett & Another v Comojo (UK) Ltd (t/a Metropolitan) & Others* [2012] 1 WLR 150.

Factors of particular influence were that attendees were limited to those connected with the research institute, and there had been no incidents over previous years.

The judge regarded the steps taken to prevent access to the labs by people who had been drinking as a reasonable response to risks arising from alcohol consumption in the circumstances.

He was also satisfied that nothing was seen or reported about B's behaviour on the night which ought to have required him being spoken to or asked to leave.

Overall the judge was satisfied that D had taken reasonable care. On appeal, Lane J agreed.

Vicarious liability

So far, so good. But B was obviously in breach of duty to C; if D were vicariously liable for that, then C's claim would succeed.

Vicarious liability has had a lot of attention in recent years.

The modern starting point has to be the twin cases of *Cox v Ministry of Justice* [2016] AC 660 and *Mohamud v. WM Morrison Supermarkets PLC* [2016] AC 677 in which the Supreme Court set out the current approach: (1) consider whether the relationship between wrongdoer and defendant is such that defendant can be made vicariously liable; and (2) consider whether or not the conduct of the wrongdoer relates to the relationship sufficiently that vicarious liability is imposed.

The first instance decision

The judge found that while B was not employed by D, his role as a visiting scientist meant that he was sufficiently integral to the business of D for D to be at least *potentially* vicariously liable. That is, the first of the above two questions (the 'Cox' question) was answered against D.

However, the judge also found that C could not get past the second of the issues identified by the Supreme Court.

The judge referred to Lord Reed in *Cox* (para 30) and the requirement that assigned activities must have created the risk of the wrongdoer committing a tort. Providing mere opportunity is not enough (*Lister v Hesley Hall* [2002] 1 AC 215).

The judge expressed the test (quoting Lord Toulson in *Mohamud*) as 'whether there is sufficient connection between the wrongdoer's employment and his conduct towards the claimant to make the defendants legally responsible', or alternatively (quoting Lord Steyn in *Lister*) as whether the conduct was 'so closely connected to his employment that it would be fair and just to hold the employers vicariously liable'.

The judge said: 'It is a matter of judgment to decide on which side of the line any case lies, in terms of being sufficiently closely connected with assigned activities.

'The cases involving assault by employees of members of the public where they are employed to engage with the public will often fall on the side of liability. The acts often take place during or immediately following on from their employed duties.

'In those cases, it may be said to be artificial to divorce the wrongful act from what the assailant was employed to do.

'In my judgment, the present case falls on the other side of the line, where there is insufficient connection. In my judgment, his role with [D] did nothing more than provide an opportunity for this unfortunate accident.'

The judge said the case was akin to *Graham v Commercial Bodyworks*

[2015] ICR 665 (in which the claimant's overalls were deliberately sprinkled with highly flammable thinning agent in a workshop, and a lighter then used near him); and that rather than the dance floor lift being connected with his duties, B was engaged on a 'frolic' of his own.

This, of course, is not the only Christmas party case to be heard recently. Readers will be aware of *Bellman v Northampton Recruitment*. That case had been decided at first instance ([2017] IRLR 2124, HHJ Cotter QC sitting as a High Court Judge) before the first instance judgment in *Shelbourne* was given. It is the first instance decision that is mentioned in Recorder Catford's judgment.

The facts of *Bellman* were that staff were expected to attend the Christmas Party. At an after-party at a hotel later that evening, the managing director punched a sales manager in a dispute about work. HHJ Cotter QC found that the employer was not vicariously liable for the punch.

That decision was overturned by the Court of Appeal ([2018] EWCA Civ 2214). The essential part of the Court of Appeal decision is that the 'field of activity' of the managing director was almost unrestricted, and the punch was an assertion of his authority, thus sufficiently connected with the field of activity entrusted to him.

The appeal

On appeal it was argued that B's field of activity should be cast wide.

It was contended by C that the relevant field of activities on the night in question was 'to interact with fellow partygoers in alcohol-infused revelry, leading to the setting aside of the ordinary boundaries of social interaction; all of which was authorised by [D] since it stood to gain from the enhancement of its employee's morale.'

Lane J observed that 'In this scenario, it is the employer's self-interest in organising the office or works Christmas party that is key. In it, the employees are invited by the employer into an environment where alcohol will encourage them to greater intimacy, with resulting risk of injury, for which the employer will be liable.'

Lane J considered that this was going too far: 'I do not consider that this description of the average office or works Christmas party is one that the archetypal reasonable person would recognise as representing reality.'

The party was voluntary and was in no real sense connected with the work that B was engaged to do.

It was noted that in *Bellman*, the Court of Appeal had not considered that the fact that the employer put on a Christmas party that led to a (voluntary) late-night drinking session was sufficient to impose vicarious liability. Rather, it was the managing director's control of proceedings in relation to what he perceived to be a challenge to his authority as managing director which made the company vicariously liable for his actions.

The attempted second appeal

The Court of Appeal (Leggatt LJ) rejected C's application for permission for a second appeal to the Court of Appeal.

By combination of CPR 52.5 and s.54(4) of the Access to Justice Act 1999, that on paper decision is the end of the line for C. The days of an oral permission hearing in the Court of Appeal following rejection of permission on paper are gone.

Leggatt's LJ's refusal of permission on the claim in negligence was based on the simple observation that this was a fact specific evaluation by the trial judge.

His refusal of permission on the vicarious liability claim observes that C's case that B's conduct was sufficiently connected with his work as a visiting scientist was founded on the suggestion that B's attendance at the party was an activity entrusted to him as part of his role.

His view was 'In circumstances where, on the facts found, attendance at the party, which was organised by volunteers, was entirely voluntary and open to those workers who chose to buy tickets and their invited guests, this suggestion is unreal.'

That is a refreshingly blunt observation. It is hard to see how voluntarily attending a party, even one held at the workplace and organised under the banner of the employer's name, is a part of the job that a scientist is employed to do.

It seems that the court will continue to limit the scope of vicarious liability.

Where next?

In *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1, Lord Phillips said at [19] that 'The law of vicarious liability is on the move'. In *Cox* (above) at [1]

Lord Reed said that 'It has not yet come to a stop', but in *Mohamud* (above) at [56] Lord Dyson said that 'there is no need for the law governing the circumstances in which an employer should be held vicariously liable for a tort committed by his employee to be on the move'.

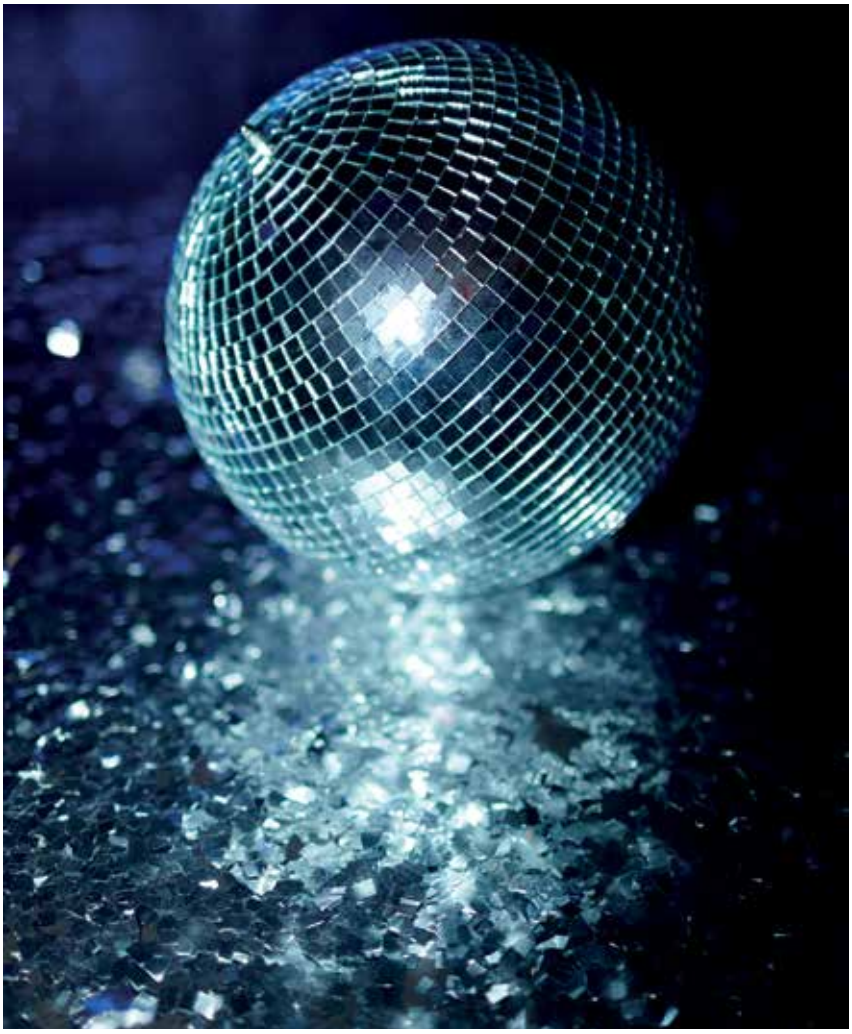
Shelbourne is a case of a tort committed by a quasi-employee. According to Lord Dyson, there is no need for the law of vicarious liability in such context to change.

Shelbourne shows that there *is* (as there always was) a line. For an employer to be vicariously liable for a wrong, it will not suffice for a claimant merely to show some connection between the wrongdoer / wrong and work or the workplace, no matter how tenuous.

'Field of activities' can cover a wider range of conduct than acts done in furtherance of employment, but attention must be focussed on what the 'field of activities' entrusted to the employee really were.

Perhaps the enquiry can be put no better than it was put by Diplock LJ in *Ilkiw v Samuels* [1963] 1 WLR 991 (quoted in *Mohamud* at [38]): 'the matter must be looked at broadly, not dissecting the servant's task into its component activities – such as driving, loading, sheeting and the like – by asking: what was the job on which he was engaged for his employer? And answering that question as a jury would'.

Of course, 'answering the question as a jury would' is not something that gives rise to only one possible answer in every case. More litigation in which the boundaries of an employer's vicarious liability are tested can be expected.



Concluding note

One can only feel sympathy for C here. She did nothing wrong, yet was assaulted at a Christmas party.

It is not known to the author why she did not pursue B. Perhaps it was thought that he had no money and no insurance (although as a visiting scientist at a lab of this nature, it might be expected that one day he would have been good for the money).

It is also not known whether or not C had her own insurance to cover her for unsatisfied judgments. Such clauses in household policies are relatively common, and always worth looking for if a defendant appears to be a man of straw.

Matthew White is a barrister at St John's Chambers and acted for Cancer Research in the above case

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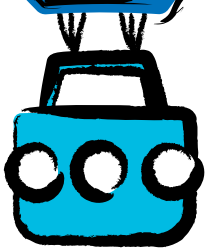

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CONSTRUCTIVE RELATIONSHIPS

Tracy Norris-Evans on creating a professional team to support brain injured clients and their families

In September, the Ahead Together conference at Rhodes House, Oxford brought together family members of brain injury survivors with recognised experts in the field, to share their deeply emotional stories, learning and wisdom on understanding family needs after this most catastrophic of injuries.

With the latest clinical and academic research, and the personal accounts of relatives, the conference provided a unique perspective on how professionals and families can work more effectively together towards improved outcomes.

Common themes running through the family stories included the anguish of the early days, of thoughts about whether it might have been better if their relative had not survived and the consequential feelings of guilt and shame; speakers also alluded to damaging interactions with professionals - particularly referencing careless language which had a powerful and enduring emotional impact.

The motivation behind the conference was to inspire activists for change, to generate new ways of families and professionals moving forward, ahead together.

Lawyers, whether it be litigators or professional deputies / trustees, typically engaged in the early years following the injury, have a responsibility to influence the landscape for people with acquired brain injury by giving them a voice and championing their rights, and those of their families.

Incapacity

In terms of the legal journey, the first matter to determine is whether the injured person has the capacity to litigate.

If incapacitous, then the first decision the family needs to make is who should be appointed the Litigation Friend to stand in the shoes of the client.

This comes with a deep responsibility in terms of decision making, particularly with regards to risk, costs and acceptance of the final award: this can be daunting for the family member.

It often comes at a time when the family is coming to terms with the extent of the injury and absorbing the long-term impact of the disability.

There is an imperative for the litigator to work promptly in accordance with the 2015 Rehabilitation Code, which promotes collaborative use of rehabilitation and early intervention to promote the best possible outcome for the client.

Co-ordination of medical and therapeutic input can be reassuring for the client and family at a time when overstretched state services struggle to provide optimum support.

Where liability is undisputed, the lawyer should seek an early (large) interim payment to fund case management, a care regime, to review accommodation, to challenge the Education Health Care Plan if the client is a child, or, if appropriate, activate vocational rehabilitation, and therapeutic intervention to include, where appropriate, therapy for the family or therapeutic couples intervention (which should be included as a head of loss).

An application to the Court of Protection to appoint a professional deputy should be made when it is evident that an interim payment will be agreed or approved by the Court.

Certainly where settlement is likely to be more than £500,000, a professional deputy should be appointed, as the Court of Protection requires a professional appointment where the compensation is significant.

If the interim payment is less than £500,000, it is important to do a costs / benefit analysis as to whether a professional deputy is affordable, and if not, a lay deputy should be appointed.

The application to the Court of Protection to appoint a deputy can take up to six months, so plan this well in advance: in the meantime, the litigator can make decisions about spending from the interim payment.

Capacity

If the client has capacity, then they can litigate themselves, but caution needs to be exercised if the client has borderline or fluctuating capacity.

The same approach should be taken with a capacitous client, with early rehabilitation, seeking a significant interim payment and applying the interim payment to meet the client's needs.

In this scenario, if a significant interim payment has been agreed / approved by the Court, it is essential to advise the client of the merits of setting up a personal injury trust (bare trust) as discussed below.

The client will need support and advice to identify appropriate lay trustees (preferably family members) and - if the compensation is going to be significant - a professional trustee, working alongside joint lay trustees.

There are a number of essential differences between deputyships and PI trusts, set out briefly below.

In deputyships:

- Lifetime costs of a professional deputy are recoverable in the injury claim
- Deputy is responsible for all the client's assets, income and benefits
- A financial deputy cannot make true health and welfare decisions – but does in reality if it has a financial implication
- May need a health and welfare deputy if required
- No testamentary capacity, so application for a statutory will may be needed; only if varies from Intestacy Rules
- Marriage/divorce: can client consent? Consider a pre / post nuptial agreement if the client can make the decision

In contrast, in PI trusts:

- Lifetime costs of a professional trustee are *not* recoverable in the injury claim – no precedent, but there is case law to support recovery of the cost of setting up the trust

  Except the costs of a professional trustee acting for a minor, which are recoverable up to 18
- Trustee is responsible solely for the damages settled in the PI trust; so no control over earnings or benefits. Ensure there is an appointee for benefits
- Trustee cannot make health and welfare decisions – consider Lasting Powers of Attorney for

  1) Property and financial affairs

  2) Health and welfare
- Testamentary capacity – make a will
- Marriage – client can enter into a pre/post nuptial agreement

Incapacity test

The test for incapacity appears at section 2 of the Mental Capacity Act 2005 (MCA).

A person lacks capacity in relation to a matter if, at the material time, they are unable to make a decision about it for themselves because of an *impairment or disturbance in the functioning of the mind or brain*.

Section 1 of the MCA identifies five main principles in determining capacity:

- A person must be assumed to have capacity unless it is established that he lacks capacity.
- A person is not to be treated as unable to make that decision unless all practicable steps to help him to do so have been taken without success.
- A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
- An act done, or decision made, under the Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
- Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

The test for establishing whether a client lacks capacity is based on the balance of probabilities and not beyond all reasonable doubt.

There is a presumption of capacity in all areas of life, until the Court determines otherwise.

Capacity is time and function specific: a person can have capacity to marry and gamble, but for example not to litigate and manage their own affairs.

The intention behind the MCA is to empower and protect incapacitated persons. The 'best interests' test must be at the forefront of the deputy's mind, and the deputy must not trespass into decision making that the client can make themselves – such a decision would be invalid.

A PI trust is a formal structure to hold and manage damages from a personal injury which requires a formal trust deed, typically a bare trust (although with particularly vulnerable clients, it can be a Section 89 discretionary trust; but this has tax implications) with two or more trustees or a trust corporation. Trustees have a fiduciary duty to the (beneficiary) client.

The government recognises the special situation of individuals who have suffered a personal injury, such that damages settled into a PI trust or subject to a deputyship are disregarded (capital and income) in the assessment of eligibility for state benefits or statutory funding.

Clients have variable life expectancies dependent on the extent of the brain injury.

Thus, it is encumbent on the professional to ensure that damages are structured in a way that access to means tested benefits and statutory funding is preserved, as they may become a necessary source of income to supplement depleting resources.

The purpose of damages is to put the client back in the position they would have been in without the injury (per Lord Hope in *Wells v Wells* [1999] 1AC 34).

The compensation is intended to last the client's lifetime and, as such, the last pound of compensation is to be expended as the client draws their final breath.

Accordingly, inheritance tax planning is not appropriate (per *KGS v JDS* [2012] EWGC 302(COP)). While it would be impossible for the professional deputy / trustee to administer the funds to last until the final day of life, with collective experience and by working closely with an expert independent financial advisor undertaking modelling and financial surveillance, it is possible to adjust spending and to identify other income streams to prolong the funds.

Typically, awards are structured by a hybrid of lump sum and periodical payments: it can be particularly difficult for relatives to grasp that each year, the lawyer has to prove that their loved one is still alive!

It is the right of all individuals to have their established family life respected, and to maintain family relationships (according to Article 8 of the European Convention on Human Rights).

For a litigator / professional trustee / deputy to work effectively, communication with the client and their family should be regular and collaborative. Indeed, where a deputy is appointed, the Deputy Standards 2015 require the deputy to liaise with the extended family, case manager and support worker(s) to record the client's feelings, wishes, beliefs and interests, both past and present.

The deputy must take all practical steps to enable the client to make their own decisions.

This is all the more important, as clients who have a trustee / deputy will potentially have a lifelong relationship with a professional. Even if the client regains capacity such that the deputyship is discharged, they should be advised to settle what is left of the compensation award into a personal injury trust.

Empathy and trust are pivotal to a long-term (life-long) relationship with clients and their families.

The appointment of a professional deputy / trustee enables family members to be parents / partners / siblings by removing the burden for financial management and decision making.

Tracy Norris-Evans is head of the personal injury team at Royds Withy King, is a director of Withy King Trustees Limited, and also heads the dedicated compensation protection team.

CAUSE AND EFFECT

Sarabjit Singh on a recent case confirming the scope of conventional causation principles

The decision of HHJ Cotter QC in *Pomphrey v Secretary of State for Health* [2019] Med LR 424 is the latest example of the courts grappling with the effects of the decision of the House of Lords in *Chester v Afshar* [2005] 1 AC 134.

Pomphrey is best understood when considered along with *Chester* and the decision of HHJ Peter Hughes QC in *Crossman v St George's Healthcare NHS Trust* [2016] EWHC 2878 (QB).

In *Chester*, the defendant neurosurgeon failed to warn the claimant that surgery to her spine carried a 1-2% risk of her developing cauda equina syndrome (which she subsequently developed).

Had she been warned of this risk, she would have sought advice on alternatives to surgery and the operation would not have taken place when it did, although there was no finding by the trial judge that the operation, which itself was performed non-negligently, would not have taken place at all.

The House of Lords agreed that the claimant could not satisfy 'conventional' principles of causation, because the risk of cauda equina syndrome was liable to eventuate at random, regardless of the skill and care with which the operation might be performed, and because the defendant's failure to warn was not the effective cause of the injury.

Nevertheless, by a 3-2 majority, it decided that the claimant still succeeded because her injury was to be regarded as having been caused by the failure to warn, which would vindicate her right to exercise an informed choice as to whether and when to have treatment and provide a remedy for the breach of that right.

Unsurprisingly, the courts have not known what to do with the *Chester* decision since, at least in the sense that they have not been able to apply it in any kind of consistent way. This can be seen by contrasting *Pomphrey* with *Crossman*.

In *Crossman*, the judge distinguished *Chester* on the basis that in *Chester*, there was a failure to properly warn of the risks of surgery; whereas, in the case before the judge, the claimant had been properly warned.

Nevertheless, the judge decided that the claimant succeeded on 'conventional' causation principles. His reasoning was as follows: (i) the negligent failure to implement a plan for the claimant's conservative management had led to an operation (non-negligent) taking place earlier than would otherwise have been the case, (ii) as a result of that operation, the claimant had developed a nerve root injury, which had a 1% chance of occurring regardless of when the operation took place, and (iii) but for the negligent failure, the operation would have taken place at a later date, and on the balance of probabilities the nerve root injury would not have occurred, given that there was only a 1% chance of it occurring.

It is possible to see the flaw in this reasoning by reference to *Chester* itself. On the application of 'conventional' principles of causation, the claimant in *Crossman* should have failed, for the same reason that the application of those principles did not assist the claimant in *Chester*.

The risk of developing the nerve root injury, just like the risk of developing the cauda equina syndrome in *Chester*, was not increased by the operation taking place at the time it in fact did.

When a small risk of an injury occurring would not have been lessened had the operation taken place at a different time, the claim fails on 'conventional' causation principles- see not only *Chester* but also *Barry v Cardiff & Vale University Local Health Board* [2019] Med LR 191, in which the judge suggested that *Crossman* had been wrongly decided.

That was also essentially the view of the judge in *Pomphrey*. In that case, non-negligent spinal surgery led to a dural tear, which itself led to revision surgery, infection, chronic pain and significant disability.

The judge found that there was a breach of duty in that surgery should have been performed 10 days earlier.

The claimant argued, in reliance on *Crossman*, that because the chances of sustaining a dural tear were statistically very unlikely, on the balance of probabilities the dural tear would not have occurred had the surgery occurred ten days earlier.

The judge rejected this analysis and declined to follow the reasoning in *Crossman*. He relied instead on the conventional causation principles described in *Chester*, and he held that to accept the claimant's case would have involved driving '*a coach and horses*' through such principles.

While *Pomphrey* does nothing to resolve the difficulty in reconciling a patient's right to autonomy as described in *Chester* with the conventional principles of causation as also described in *Chester*, it does at least confirm what the scope of those conventional principles is; and puts to rest the uncertainty as to their scope generated by *Crossman*.

Following *Pomphrey*, it is clear that on conventional principles of causation, if there is a small risk of an injury, a negligent delay in or negligent expedition of surgery cannot itself be treated as causative of that injury - unless it has increased the risk of that injury occurring.

Sarabjit Singh QC is a barrister at 1 Crown Office Row

BUILDING BRIDGES

Peter Causton on mediation of clinical negligence disputes

As the NHSR mediation scheme goes out for tender again, after three years of operation, this is an ideal time to look at whether it has been successful, and general developments in the mediation world.

Developments in the mediation world

The main recent development, apart from Brexit and its impact on ADR providers under the ADR Regulations, has been the publication of the Civil Mediation Council report on mediation in December 2018.

The report recommended setting up a Judicial Liaison Committee, and I attended the first meeting in October.

The committee will be considering the report's proposals and taking them forward.

At present, personal injury and clinical negligence cases are excluded from the mediation pilots in Manchester, London and Exeter, but it appears unlikely that these areas will be able to avoid being included in future. There is no logical reason why they should not be included.

Personal injury cases are suitable for mediation, the main question being at what stage should mediation take place? There is some force in the argument that expert reports and schedules of loss need to be produced before mediation can take place, but to save costs, why not agree a limitation standstill agreement, and then obtain the necessary information? Then the issue fee, other court costs as well as legal fees could be avoided.

It has also been suggested that arbitration has a role to play, but no one has come up with a cost effective alternative, and arbitration has the same flaws as litigation. Only mediation represents a distinct alternative.

The Civil Justice Council's Report stops short of recommending compulsory mediation, but does make some sensible recommendations designed to increase the use of mediation.

Among its 24 recommendations, the Notice to Mediate procedure is potentially the most significant: Originally developed in 1998 to deal with personal injury cases, the procedure has been extended to a range of other cases in British Columbia.

A Notice to Mediate compels the other party to participate in mediation, unless they can rely on an exemption by court order, so it is an 'opt out' process.

Without an exemption, parties must agree on a mutually acceptable mediator within ten days, or apply to a designated provider to nominate a mediator.

Specific circumstances are identified where mediation may not be required or appropriate.

Reasons include where there is already agreement to mediate, when all parties have already participated in mediation in the same dispute, where it is recognised that mediation is unlikely to result in a settlement, or where the extent of damage is not yet known.

It is difficult to establish how successful this model has been. The figures show that of the 37,000 motor vehicle claims that were mediated between 2002 and 2012, an average of 78% of these mediations resolved each year.

This model 'received widespread support' during the CJC's consultation exercise.

The 'opt-out' requirement of the procedure, and burden on a recipient to formally justify their refusal to participate, would help to meet concerns that the courts have been too generous to date towards those who ignore invitations to mediate.

Referring a dispute automatically to a default system of ADR, with the

court supervising, is considered preferable, and the Notice procedure may be a way of achieving this. This would be a significant change to the court process.

However, the introduction of a formal structure that supports the existing powers the courts have to sanction parties who unreasonably refuse to engage in mediation would strike a workable balance between voluntary and mandatory participation in ADR.

The report also proposes the following:

- Revisiting and tightening up the common law rules (established in the case of *Halsey*) on unreasonable refusal to mediate, which is seen as too unpredictable and ineffective as an encouragement to mediate.
- Improving Court forms;
- Tackling mediation earlier in Court proceedings
- Improving compliance with the ADR Regulations in consumer cases
- Increasing Judicial Early neutral evaluation.
- Creating a new website ('Alternatives') and encouraging more education about ADR.

The NHSR Mediation Scheme

Practitioners will be aware of the benefits of mediation, in certain cases and at the appropriate time. The benefits of mediation are well known.

With a sensible and open dialogue between the parties in a voluntary and confidential environment, claimants feel fairly treated, while defendants can work actively with the other party to limit their liabilities. Mediation can be an effective way of resolving clinical negligence disputes, reducing cost and resolving claims more quickly than the Court system.

There is resistance, though, to obligatory referral to mediation, and a feeling that lawyers do not need any independent third party intervening when a joint settlement meeting can do the job.

I think this underestimates the advantages a mediator and the process can bring.

No one can deny that any reduction in legal spend benefits the NHS, and early resolution is good news for claimants affected by their treatment. Litigation merely prolongs the agony.

Having mediated several clinical negligence matters, including private treatment cases, I have witnessed first hand the relief expressed by claimants who have resolved long running disputes so that they can move on with their lives, and satisfied defendants who have saved thousands of pounds in costs and resolved worrying claims.

It is difficult to gauge how successful NHSR panel mediations are. We do find that we are receiving enquiries about mediating clinical negligence claims, but generally in NHSR cases, a panel mediator is selected. The feedback we receive afterwards is that practitioners would like to use us in future. Practitioners are aware that they do not have to accept the mediator proposed by NHSR from its mediation panel. They are always free to choose a mediator off panel.

What we can see is that NHSR is seeing costs going down and mediation increasing.

There has been a 5% drop in legal costs of clinical negligence claims over the past year, according to the NHSR annual report. This may be partly the result of increased mediation.

Damages payments to claimants went up 14% to £1.4bn, with a further £385m attributable to the higher discount rate.

It is fair to say that in order to increase early settlement rates, damages will increase, but costs will decrease. This is because it is better to pay off some claims that might otherwise have failed on technical grounds, such as when causation is in issue, rather than fighting them at vast cost.

NHS Resolution paid out £442m in claimant legal costs, down from £467m, following last year's £32m fall. Its own spending on defence legal costs went up 8% to £140m 'as we have focused our activity on early investigation...'.

The annual report said NHS Resolution's research said factors that went into people bringing a claim included a failure to provide an explanation for the incident, the lack of a meaningful apology, and the absence of a proper investigation or action to prevent a repetition.

The report said there has been a 'noticeable culture shift' towards mediation; the number of mediations more than doubled from 173 to 397, compared to 62 trials. Three-quarters of cases settled within 28 days of the mediation.

The report said that 'There is more to do, but the benefits of mediation and other forms of ADR are clear: reducing the stress and burden on patients, NHS staff and their families and giving them the time and space to explore what happened.'

'Customer satisfaction levels continue to rise, our Early Notification scheme is beginning to deliver faster support and resolution to those impacted by serious incidents at childbirth, our maternity incentive scheme is improving adherence to recognised best practice in maternity safety, and we are resolving record numbers of claims though alternative means such as mediation.'

NHSR is taking a similar approach towards birth injury cases by trying to admit liability at an early stage. NHSR has said it is making 'unprecedented' steps towards early resolution of complex birth injury cases, including making early admissions of legal liability. It reports that the previous average length of time between an incident occurring and an award for compensation was 11.5 years.

A report on the scheme's first year states that in the 24 cases subject to early resolution, admissions were made from three months to two years from the incidents. It is hoped time elapsed for compensation payments will come down as a result.

NHSR is finding that litigation can be a bar to openness about what has happened in clinical negligence cases. Mediation is an ideal forum in which to make admissions and resolve matters, while minimising legal costs if it is conducted early.

If liability is admitted early in appropriate cases, it can also save costs, for example in relation to instructing causation experts. The NHS can then focus on reducing mistakes being made.

In difficult economic times, its use is only likely to increase.

Peter Causton is director of ProMediate (UK) Limited

Celebrating 30 years!

APIL's 30th anniversary conference

Celtic Manor Resort, Newport, South Wales
Wednesday, 13 - Friday, 15 May 2020

Special early bird notification

Residential event incorporating the APIL annual conference and advanced brain and spinal cord injury conference

Principal sponsor: E-Medicals Limited

We have taken on board the feedback from our conference attendees and for APIL's special 30th anniversary year, we are very excited to bring you something a bit different!

This coming spring, APIL will be returning to the five star Celtic Manor Resort with just the one residential conference, which will incorporate both the **APIL annual conference** AND the **advanced brain and spinal cord injury conference.**

The conference programme is currently under development but at this stage, we can confirm that there will be a number of highly topical plenary sessions throughout the two day event, which will be relevant to all personal injury lawyers. In addition, there will be at least four different seminar streams throughout the conference, based on the following key topics:

- **Brain injury**
- **Spinal cord injury**
- **Business and management**
- **Junior litigators and lower value claims**

All in all, we will have at least 6 hours of seminars throughout the two days, which will provide you with valuable CPD hours in your particular field of work. Adding this to around 4 hours of plenary sessions, you will be able to obtain approximately **10 CPD hours** over the two days.

This special anniversary event will bring APIL members together - new and old - and our popular evening events are guaranteed to provide valuable networking opportunities for you and your practice.

BRAND NEW PARALEGAL RATE FOR 2019

Supporting activities...

Informal welcome reception
Exhibition
Black tie gala dinner

EARLY BIRD DISCOUNTED PRICES

Paralegal package: £375 + VAT*

APIL member early bird residential package: £595 + VAT*

For further details, please contact the APIL training team on 0115 943 5400 or visit: www.apil.org.uk/personal-injury-legal-training

*The residential and paralegal packages include attendance at both days at the conference, plus accommodation at the Celtic Manor Resort and a ticket to the black tie gala dinner on Thursday, 14 May. The early bird rate is only valid for the first 100 bookings and expires on Friday, 10 January 2020.

CASE NOTES

Full reports of all cases listed are available on APIL's website at www.apil.org.uk/legal-information-search

S (by Litigation Friend) v U

Approval hearing on 20 May 2019

The claimant (aged 17 at the time) suffered catastrophic injuries in a road traffic accident.

He was a front seat passenger in a car driven by his friend, the defendant.

The claimant suffered life changing injuries including a severe traumatic brain injury, serious orthopaedic injuries and psychological injury.

At the time of the accident, the claimant was studying at college and working part time.

Liability

The claimant was a passenger in the defendant's vehicle. The defendant lost control of his car going downhill as he approached a bend, and veered into the path of an oncoming vehicle.

The claimant took the full brunt of the impact, to the nearside of the vehicle. He was taken to hospital and put into an induced coma and had to undergo an emergency craniotomy.

The defendant was found guilty of driving a motor vehicle under the influence of drugs.

Primary liability was admitted.

The defendant alleged contributory negligence based on 1) the claimant's alleged failure to wear a seatbelt and 2) for travelling in the defendant's car while he was under the influence of drugs.

The allegations were denied, and the defendant conceded the seatbelt point. Subsequently a 5% contributory negligence was agreed between the parties.

Injuries and quantum

As a result of the accident, the claimant suffered a severe traumatic brain injury. In addition, he suffered a left elbow fracture which required open reduction and internal fixation.

He has since gone on to develop post traumatic osteoarthritis in his elbow.

He also sustained fractured ribs, a ruptured spleen, torn liver, punctured lungs and a shattered pelvis requiring titanium bolts.

The claimant suffered a rupture of the urethra and developed urethral stricture. A suprapubic catheter was in situ for 12 months before he had to undergo a bulboprostatic anastomotic urethroplasty in March 2015.

The claimant received pain management treatment with

Celebrating 30 years!

The annual APIL residential clinical negligence conference 2020

Thursday, 8 - Friday, 9 October

The Celtic Manor Resort, Newport, South Wales

"Cancer"

Early bird notification

Objectives:

- To provide an overview of key medical and legal issues in clinical negligence
- To provide an opportunity to listen to medical experts and learn about cases dealing with cancer
- To give the chance to meet and network with relevant clinical negligence practitioners of varying experiences

**SPECIAL EARLY BIRD OFFER*
STARTING FROM ONLY £595 + VAT**

Accredited by: APIL: all levels
Approx. 10 CPD hours

*Early bird package includes attendance at both days of the conference, one ticket to the black tie gala dinner and single occupancy accommodation on Thursday, 8 October; plus refreshments throughout the conference and a conference pack.

Celtic Manor Resort, Newport, South Wales

For further details, please contact the APIL training team on 0115 943 5400 or visit: www.apil.org.uk/personal-injury-legal-training

***The early bird package is strictly limited to the first 80 bookings and the offer expires on Friday, 10 January 2020**

minimal success, and in October 2018 he commenced a trial of CBD Oil which showed some success in that he reported a reduction in pain and stiffness. Expert evidence confirms his ongoing pain will remain permanent.

The claimant suffered psychological injury in the form of PTSD and depression.

As a result of his brain injury, he suffered problems with his memory and concentration, headaches, lack of motivation, fatigue, mood swings, anger and change in personality.

He required a great deal of care from his parents following the accident, and despite many attempts, struggled to complete a full day of work in any capacity.

The effect of the injuries means the claimant is unable to work in a conventional employment setting, live independently or socialise as he had done previously.

The claimant's expert evidence suggested that the claimant lacked litigation and financial capacity, hence a litigation friend and deputy were appointed. The defendant disputed the need for a deputy.

An initial trial of independent living was set up with the help of a case manager, but failed. Subsequently, a second trial was successful, with increased help of a support worker.

The claimant had always wanted a career in agriculture work, agricultural engineering or construction.

Following the accident, he attempted a number of casual employment positions, but was unsuccessful, due to a combination of his memory, fatigue and pain problems.

He also started an apprenticeship, but this ended because of interpersonal issues between the claimant and employer.

The claimant was very keen to find consistent work and struggled to accept being severely compromised on the open labour market, and being most likely limited to working within a protected environment because of his brain injury.

At the time of the settlement, the claimant continued to live independently, with regular visits from his support worker. He had not successfully found any gainful or regular employment.

The case was settled as a provisional damages award of a lump sum of £3.5m gross. The reserved conditions for the purposes of the provisional damages award were for the development of post traumatic epilepsy and the development of dementia.

Settlement on this basis allows for the claimant to return to Court to seek a further award of damages should either of these conditions arise during the rest of his life.

Total gross settlement

Provisional damages award of a lump sum of £3.5m (gross), with a reduction of 5% contributory negligence, interim payments and CRU giving a total (net) settlement of £2.95m.

Richard Hartley QC and Michael Jones, Cobden House Chambers instructed by Helen Reynolds, Spencers Solicitors for the claimant

Jonathan Watt-Pringle QC, Temple Garden Chambers instructed by Simon Curtis, Horwich Farrelly Solicitors for the defendant

ASSISTANCE

Collis Heating Limited and Joseph Collis

We are seeking to speak to anyone who may know the identity of the Employers' Liability Insurers for Joseph Collis (Company No: 93320) and Collis Heating Limited (Company No: 01039732) for the period of 1962-1970.

Our client was employed as a heating engineer. The company were a jack of all trades, but specialised in plumbing and fitting boilers. Our client believes the company changed from Joseph Collis to Collis Heating, although these seem to be two separate companies on Companies House. We are particularly interested in Joseph Collis who were based in Knight Road, Strood underneath the railway bridge.

We have identified the insurers from 2 December 1976 to 1 December 1982, but have been unable to verify the insurers for the preceding period of employment.

If you able to assist regarding the above named company, please contact:

Mr Jeremy Horton / BRACHERS LLP / Somerfield House / 59 London Road / Maidstone / Kent / ME16 8JH / DX: 4806 Maidstone 1 / 01622 690691 / 01622 681430 / jeremyhorton@brachers.co.uk

Harry Kindred (Newcastle) Limited

We are looking for any information in relation to the below company, including the Employer's Liability Insurers. This request is in relation to:

Harry Kindred (Newcastle) Limited between the period of 1964/65 to 1967/68.

Harry Kindred (Newcastle) Limited was a building / construction company based in Newcastle upon Tyne and was based on West Road. Our client was employed as an apprentice joiner.

Unfortunately, we have not been able to ascertain any information in relation to Harry Kindred (Newcastle) Limited and despite various attempts, we have been unable to locate the Employers' Liability Insurers for the periods of our client's employment. Our client sadly has the asbestos-related condition of mesothelioma.

Miss Stephanie Wilson / IRWIN MITCHELL LLP / Wellbar Central / 36 Gallowgate / Newcastle-upon-Tyne / Tyne & Wear / NE1 4TD / DX: 317201 Newcastle-upon-Tyne 51 / 0191 434 0731 / 0191 230 2478 / stephanie.wilson2@irwinmitchell.com

Local hotel standards expert – Jamaica

We are currently investigating a claim for compensation following an accident leading to serious injuries on behalf of our client who was on holiday in Jamaica.

We require urgently a report on local Occupiers Liability standards in hotels in Jamaica from an expert who is able to comment on whether the hotel breached safety standards as laid down under local byelaws / statute. An analysis of the Risk Assessments undertaken will be required.

Any recommendations with contact details would be very much appreciated. Please contact: Mrs Jane Brooker ref JB/42841/1 / BATES WELLS & BRAITHWAITE / 27-29 Lower Brook Street / Ipswich / Suffolk / IP4 1AQ / DX: 3204 Ipswich / 01473 219282 / 01473 230804 / jane.brooker@bates-wells.co.uk

HEADLINE NEWS

Highlights from the sector press

The Guardian

21 October 2019

Landmark study reveals link between football and dementia

The Guardian reports on a 'landmark study' that has found that former professional footballers are three and a half times more likely to suffer from dementia and other serious neurological diseases.

The research confirms a long-suspected link between the sport and brain damage.

A 22-month research project by the University of Glasgow's Brain Injury Group also discovered there was a five-fold increase in the risk of Alzheimer's, a four-fold increase in motor neurone disease and a two-fold increase in Parkinson's, the newspaper said.

The report was unable to establish whether the cause of the higher levels of brain disease was due to repeated concussions, heading leather footballs, or some other factor.

However, the Football Association, which helped fund the research, said it would be setting up a task force to examine the potential causes more deeply.

The Guardian said the FA had confirmed that despite the study, which used recently digitised NHS Scotland data to compare the causes of death of 7,676 former male professional players who were born between 1900 and 1976 against those of more than 23,000 people from the general population, there was not yet enough evidence to change any aspect of the game.

'Our research shows the number of aerial challenges has already been reduced significantly over the years as we have changed to smaller pitches and possession-based football,' the FA chief executive, Marc Bullingham, said.

'However, as new evidence comes to light, we will continue to monitor and reassess all aspects of the game.'

BBC

4 October

Paralysed man moves in mind-reading exoskeleton

The BBC news website reports that a man has been able to move all four of his paralysed limbs with a 'mind-controlled exoskeleton suit', according to French researchers.

Thibault, 30, who did not want his surname revealed, said taking his first steps in the suit felt like being the 'first man on the Moon'. He had not walked since falling 15m in an incident at a night club four years ago.

The injury to his spinal cord left him paralysed and he spent the next two years in hospital; but in 2017, he took part in the exoskeleton trial with Clinatec and the University of Grenoble, according to the BBC.

Initially he practised using the brain implants to control an avatar in a computer game, then he moved on to walking in the 'robo-suit', which is attached to the laboratory ceiling to avoid the risk of falling over. The BBC reports that his movements, particularly walking, are 'far from perfect' and the robo-suit is being used only in the lab. But researchers say the approach could one day improve patients' quality of life.

Thibault had surgery to place two implants on the surface of the brain, covering the parts that control movement. Sixty-four electrodes on each implant read the brain activity and beam the instructions to a nearby computer. Sophisticated computer software reads the brainwaves and turns them into instructions for controlling the exoskeleton, which Thibault is strapped into.

'This is far from autonomous walking,' Prof Alim-Louis Benabid, the president of the Clinatec executive board, told BBC News. 'He does not have the quick and precise movements not to fall, nobody on earth does this.'

In tasks where Thibault had to touch specific targets by using the exoskeleton to move his upper and lower arms and rotate his wrists, he was successful 71% of the time.

Prof Benabid, who developed deep brain stimulation for Parkinson's disease, told the BBC: 'We have solved the problem and shown the principle is correct. This is proof we can extend the mobility of patients in an exoskeleton.

'This is in [the] direction of giving better quality of life.'

Litigation Funding

October 2019

Storm Ahead

In October's *Litigation Funding*, costs barrister Andrew Hogan outlines the 'Storm Ahead' for the personal injury sector, thanks to reforms due next year. However, Hogan points to a number of things that can be done to mitigate the effects.

On the issue of cashflow, he writes that following the Court of Appeal's decision in S/S *for the Department of Energy and Climate Change and Coal Products Limited v Jeffrey Jones* [2014] EWCA Civ 363, 'any firm that routinely finances the client's disbursements on credit should review its funding arrangements to ensure that in successful cases, a useful 4.5% of interest on disbursements is recovered [from the paying party], from the point when the liability is incurred.'

Hogan adds that there are 'potential mechanisms' in the current CPR that are 'not being used often enough', such as Part 36.

'The utility of a Part 36 offer is not in the discretionary benefits which flow, such as indemnity costs, the additional amount, enhanced interest and so forth, but the deterrent effect that it exerts on a defendant's thinking, that these things might come to pass, so that a case is settled at a far earlier stage.

'Yet routinely, in cases where there is a liability dispute, there is no 95% to 5% offer on liability put forward, which instantly makes liability disputed cases very difficult to defend.'

Hogan adds: 'A further lost opportunity relates to the terms and conditions of conditional fee agreements, which often do not allow solicitors to take not only disbursements and expenses from interim payments of damages made to clients, but also reasonable amounts in respect of past and future profit costs incurred.'

The barrister adds: 'What has astonished me in recent years, is the lack of analysis by [PI lawyers] as to how much of their work is in fact profitable - not only on the conventional management accounts basis, but by factoring in costs budgeting and management?... if a solicitor is routinely writing off (or having written off) 20%-30% of time by reason of failing to manage the budget constraints with the case requirements, that needs to be the subject of scrutiny and revision as to how a firm does its work.'

www.lawgazette.co.uk/law/litigation-funding

THE LAST WORD

As a nation we face an uncertain future, and the last couple of years have reduced public trust in politicians and in the ability of Parliament to function as most people would expect. The post-Brexit challenge, climate change and an uncertain economic outlook are major issues that people will have to grapple with as a general election edges ever closer.

'The election presents a big opportunity for us all to champion PI lawyers'

As a sector, we face our own issues with public trust and APIL, due to its genuine and demonstrable commitment to injured people, is the right organisation to lead the sector towards rebuilding trust in dedicated expert PI lawyers, who are the hub in rebuilding the lives of injured people when the worst happens.

The election presents a big opportunity for us all to champion PI lawyers. The APIL Manifesto will call on parliamentary candidates to back our campaign to prevent needless injury. Some 1.6 million people are needlessly injured every year, and this makes ours a compelling case worth backing for those hoping to win a seat in Westminster.

This is a simple and straightforward proposition for candidates, and an opportunity for them to pledge their support for a national strategy to prevent needless injury.

Parliamentary candidates care about what local voters think, and therefore we need you, as an APIL member, to engage with us and lobby your local candidates.

Building a relationship with candidates before they become MPs works, and makes it much easier to turn their words of support into action as they progress through their parliamentary careers.

As APIL heads towards an exciting new strategy for the future, don't miss this opportunity to take an active role in helping to build a foundation of support which will help us lead the sector towards a brighter future for the needlessly injured.

Mike Benner
Chief executive

New Areas of Work in Sight?

We can develop an ATE policy for you.

In the last 18 months we have worked with firms to develop new policies for financial mis-selling claims and many other types of compensation.

We pride ourselves on our innovation, competitive premiums, minimal administration and speedy claim payments.

If you're looking to diversify, let's do it together!

For further enquiries please contact Kirsten Roberts on **0870 766 9997** or email **kirsten@boxlegal.co.uk**

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