St John's Buildings

PICN NEWSLETTER

Welcome to the second issue of the St John's Buildings Personal Injury and Clinical Negligence Newsletter.

In this edition we have articles from four experienced members of the St John's Buildings team, tackling subjects including disadvantage on the labour market claims, police errors of judgment and negligence, and the assessment of expert's fees in composite agency invoices.

For those of you who are less familiar with the SJB Personal Injury and Clinical Negligence team, we are a team of 38 expert barristers, ranging in experience from two KCs, right through to our pupil barristers. Our work includes the full range of personal injury and clinical negligence. SJB has four chambers from which our team primarily operates, covering cases all over the country and beyond. We are clerked by an exceptional team of clerks, led by Senior Clerk, Chris Shaw.

I hope that you enjoy the content of this Newsletter and invite you to submit any ideas you have for topics you would particularly like us to address in our next edition. Contact details are available on the back page.

Best regards,

Daniel Frieze
Head of Personal Injury and Clinical Negligence

THE CONTINUING ISSUES RELATING TO THE ASSESSMENT OF EXPERT'S FEES IN COMPOSITE INVOICES – AND THE DISTINCTION BETWEEN DETAILED ASSESSMENT AND THE ASSESSMENT OF EXPERT'S FEES IN FIXED COSTS REGIMES

BY DAVID TAYLOR

YEAR OF CALL 1998

Whilst it is likely seen as trite that the costs of "obtaining a medical report" includes the costs of the agency fees (in place of Solicitor's profit costs) and not simply the charge made by the expert to produce the report, the extent of such agency costs that are recoverable, contained within a composite invoice, remains a challenge for the Court on assessment. A review of some recent cases and the distinction drawn between detailed assessment and the assessment of expert fees in fixed costs cases.

Background

For many years it has been commonplace that litigants use medical agencies to procure medical reports in PI and clinical negligence cases and that the costs of so doing are prima facie recoverable. Such costs are in place of the costs historically allowed on assessment for Solicitors' profit costs if they were to instruct an expert directly.

In Stringer v Copley (2002) unreported – HHJ Cooke – it was held that there is no principle which precludes the fees of a medical agency being recoverable, provided that those fees do not exceed the reasonable and proportionate cost of the Solicitors doing the work.

Judge Cooke went on to say, *"It is important that their invoices or fee notes should distinguish between the medical fee and their own charges, the latter being sufficiently particularised to enable the costs officer to be satisfied that they do not exceed the reasonable and proportionate cost of the Solicitors doing the work."*

The issue arose in an appeal before HHJ Bird in Manchester in the case of Northampton General Hospital NHS Trust v Luke Hoskin (1st tier appeal) 22nd May 2023. The main issue before the Court was whether a breakdown of the medical agency fee was required to be served by the receiving party (in the detailed assessment). Deputy District Judge Harris, sitting as a regional costs judge, had refused the Defendant's application for such a breakdown at the initial assessment. Premex who had produced the invoice had refused to provide a breakdown and simply asserted that the amounts were reasonable and proportionate.

Allowing the Appeal by the Defendant, HHJ Bird found that pursuant to PD47 5.2 (c) 'On commencement of detailed assessment proceedings, the receiving party must serve on the paying party the following documents, 'Copies of the fee notes of Counsel and of any expert in respect of fees claimed in the bill.'

HHJ Bird found that the wording of this was "very clear and admits of no doubt". He concluded "I am satisfied that it is clear that PD 47 imposes a duty on the receiving party to provide the fee note of any expert instructed and, where such costs are claimed details of the costs of any MRO. Premex is not an expert. Its invoice cannot be described in any sensible way as a fee note and is in any event not the fee note of the expert."

Having allowed the appeal, he required the receiving party to provide a breakdown between the Premex costs and the expert costs and to provide copies of the experts' fee notes. "I propose to order in addition, given what in my view is a clear failure to comply with PD 47, that in default of compliance with the order that items 53 and 58 each be assessed at zero."

The receiving party did not provide the breakdown but instead lodged an appeal to the Court of Appeal, that was eventually abandoned without being determined.

Do the obligations differ in the case of an assessment of an expert's fee in a fixed costs case and in a detailed assessment?

In *CXR v Dome Holdings Limited (unreported)* 14th August 2023, Senior Costs Judge Gordon-Saker (SCCO) considered competing persuasive but not binding authorities as to the extent of disclosure required in order for the Court to perform its assessment function. This was a detailed assessment case.

The issue he was to determine seems to have mirrored that in Northampton v Hoskins, and he followed the decision of HHJ Bird. He concluded that the PD requires the fee notes of the expert and in the absence of a breakdown of the fees of the expert and the agency, it is impossible to perform the exercise in *Stringer v Copley*, being the task of deciding whether those fees are more or less than the Solicitor would have charged for doing the same work.

In hearing argument however, he went on to add to the jurisprudence of the alternative approach (assessing a reasonable and proportionate fee without a breakdown) adopted by District Judge Jenkinson in the case of *Sephton v Anchor Hanover Group (unreported)* 20th April 2023.

In *Sephton*, the issue arose, but in the context of the case being a fixed costs case under the EL/PL protocol and was in fact an application for non-party disclosure against the medical agency for a breakdown of the agency invoice. This related to expert's fees and also the cost of an MRI scan. The fact of the application being brought as a non-party disclosure application does not seem to have affected the rulings made as to the entitlement to disclosure of such a breakdown.

Judge Jenkinson followed a decision in *Beardmore v Lancashire County Council* (HHJ Wood KC) Feb 2019 in finding that the agency fees were recoverable as a disbursement under the fixed costs regime, but went on to find that the breakdown was not required as the Court was only required to ensure that the total cost of obtaining the report (or scan) is reasonable and proportionate and the apportionment between the provider and the agency is of limited relevance.

This seems to have been a common approach (sometimes referred to as not being proportionate to order the breakdown) in fixed costs cases.

Senior Costs Judge Gordon-Saker adds one comment to this jurisprudence in CXR, that the invoices do not contain an hourly rate as to the cost of obtaining the report or the amount of time spent, and that this information would be of great assistance in deciding whether the fees are reasonable and proportionate. Absent this, the Court simply has the product of the work done (the report) etc… to go on. It seemed therefore that there are good reasons as to why, although not required by the practice direction, experts fee notes should set out the work that was done with sufficient clarity, including the amount of time spent, to enable the Court to form a view as to the reasonableness of the fee.

Whilst he ultimately (in CXR) decided that a breakdown of the fees between the agency and the expert are required to comply with PD 47 (as it was a detailed assessment) he comments as to the assistance that would be gleaned by time spent and hourly rate charged, which might assist in those cases where the PD does not compel the breakdown (non-detailed assessment cases). It would allow the Court to be best able to perform the function of assessing a reasonable and proportionate fee if it had such additional information, although slightly differing perhaps to the full breakdown. It seems that this will be taken rather more as an obiter comment but perhaps illustrates the SCCO's view of the evidence required to assess the level of a reasonable and proportionate fee.

In *Ena Amina-Edu v Esure Insurance Company Limited* 8th March 2024 (unreported), HHJ Saggerson took a different approach to DJ Jenkinson, whilst determining an application for Part 18 responses to a request for information as to the breakdown of the medical agency invoice, and the assessment of costs in a case settled by part 36, and under the fixed costs regime.

He concluded amongst other things, that

- agency fees are recoverable within the fixed costs regime,
- if amounts are not agreed it is necessary to make a Part 23 application,
- on such a determination, proportionality is engaged,
- in considering proportionality the Court is entitled to consider what fees are attributable to the medical referral agency,
- that the Court is unlikely to be able to (or it is more difficult to) adjudicate on proportionality without being able to determine whether the relevant fee is in proportion to that which would have been charged by a solicitor carrying out the same work
- the court is entitled to transparency from those whose fees form part of claimed and potentially recoverable costs

- providers (despite commercial sensitivity) should be able to able to provide at least sufficient information as to the proportion of the medical invoice that reflects the true value of their commission
- commercial sensitivity does not override these considerations
- transparency is no more likely to impede the brisk application of fixed costs than obfuscation.

In short, he encouraged parties to use agencies that are prepared to be transparent, Part 18 can be used as a last resort if necessary, an unless order could be used to compel disclosure, or the fee would be assessed at NIL or as a percentage of the invoice, as something is likely to be recoverable, (as opposed to NIL), in default of disclosure.

In this case, as HHJ Saggerson did not have a breakdown, and did not find that the fee £2916 was prima facie reasonable, despite a £40,000 settlement pre allocation, and so found that in default of the breakdown, £750+VAT would be allowed. I tis understood that the breakdown was never provided and nor was the case appealed.

This is in contrast to the findings of DJ Jenkinson, albeit HHJ Saggerson did conclude that there may be cases where the fee claimed is prima facie reasonable. In Sephton, the paying party seemed not to persist with the breakdown of the experts' invoices, but rather only in respect of the MRI scan, which may have made the case more likely to be able to be assessed as the total invoice was prima facie reasonable.

Finally, and more recently, the case of *Susan Smith v Portsmouth Hospital NHS Foundation Trust* (2nd October 2024) (unreported) DJ Morris Wrexham, shows there is good reason for the Court to have a breakdown of the composite invoice. The Court had made a decision on a provisional assessment (paper) with only a summary of how the agency fee is calculated. Upon review with the full breakdown, it was apparent that the method of calculating the agency fee as summarised, (including referral commission, finance fee, waive fee, fixed operational fee and profit costs) did not reflect the cumulative total on the composite invoice when added to the fee charged by the Doctor. The Court had already disallowed the referral commission, the finance fee and the waive fee, but went on to disallow all elements of the agencies profit costs for lack of clarity or certainty.

So, in conclusion, whilst there is no binding authority, in detailed assessment proceedings, there is persuasive case law at DCJ level and Senior Costs Judge level to say that PD 47 is likely to compel a breakdown.

That hourly rates and time spent would be of significant use to the assessing Judge (albeit not compelled by a PD) and this might assist in terms of those cases that are not subject to PD 47, where the Judge is seeking to perform an assessment of that which is reasonable and proportionate.

EXPERT'S FEES IN COMPOSITE INVOICES

That in the views of HHJ Saggerson, despite being an assessment out with the Detailed Assessment procedure (part 44.6 makes it clear that the detailed assessment procedure does not apply to the fixed costs regime under CPR 45), therefore not being subject to PD 47, that as proportionality is for the receiving party to show, that orders can be made for disclosure of the breakdown of the composite agency invoices, failing which, percentage deductions would be made (largely likely in favour of the paying party), if not awards of NIL.

Please feel free to get in touch if I can assist with matters arising from this article. Cases of course turn on their own facts and there is an abundance of opinion as to the most appropriate way for the Court to deal with these matters. It seems the advent of the fixed costs regime and its limitations as to costs assessment procedure have led to issues in this area that are more prevalent. To quote DJ Jenkinson in *Sephton*, "this is an argument that is vogue at the moment", although there seems to be little signs of it settling any time soon!

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POLICE ERRORS OF JUDGMENT AND NEGLIGENCE – IS THERE A DISTINCTION?

W v Chief Constable of Nottinghamshire Police - A closer look

BY CATHERINE DENT

YEAR OF CALL 2011

Last month, I represented the Claimant in an appeal to the High Court before Mr Justice Bourne. The issues, or rather "issue" could not have been more straightforward - did the failure of a police officer to put his vehicle in neutral amount to negligence or was it simply an error of Judgment - which having regard to the factual circumstances at the time, did not amount to negligence?
A precis of the decision was reported on our website. This article explores the issues in greater depth.

The facts
The Claimant was injured on 15th April 2020, when attempted to evade the police. He was part of a group of men who were being observed by a serious organised crime police unit. The Claimant was part of a group of young men who were observed passing items between them. The group, upon seeing a police vehicle, dispersed in various directions. The Claimant left the scene on his bicycle and proceeded to cycle on the pavement, alongside a row of terraced houses.

The police officer drove alongside the Claimant and repeatedly asked him to stop, but he did not. The police officer pulled ahead of the Claimant in front of an end terrace house which had a concreted over front garden area with a low brick wall. In the heat of the moment, the police officer forgot to put his automatic vehicle into park or neutral and as he attempted to exit the car, it rolled into the brick wall striking the Claimant obliquely.

The Claimant, although knocked over by the impact, managed to make good his escape by a nearby street. The Claimant returned to the scene of the accident and admitted to the police officer that he had in his possession at the time a small quantity of cannabis.

First instance decision
In the first instance the trial judge found that the police officer owed the Claimant a duty of care however, he considered that the failure to place the vehicle in park or neutral did not constitute negligence. From the police officer's perspective the prevailing set of circumstances were *"not trivial"*.

Case law

The relevant case law that fell to be considered was Robinson v Chief Constable of West Yorkshire [2018] UKSC4.

The circumstances in Robinson involved a suspect who was dealing drugs outside a shopping centre. Police officers made a plan to apprehend him whilst two or more other officers would wait outside. As the first two officers took hold of the suspect, the suspect resisted arrest and there was a tussle. They collided with Mrs Robinson causing her injury. The lead officer accepted that it was necessary to consider the risk to bystanders and, that if he had walked past someone who was in harm's way, he would not have attempted the arrest. He simply failed to see Mrs Robinson.

Lord Reed considered that this was not a situation where the suspect had to be detained at that moment. It was therefore held that the trial judge was entitled to find negligence. The following paragraphs of the Judgment were particularly relevant:-

75. The Court of Appeal was correct to emphasise the importance of not imposing unrealistically demanding standards of care on police officers acting in the course of their operational duties. That is most obviously the case where critical decisions have to be made in stressful circumstances with little or no time for considered thought. This point has long been recognised. For example, in Marshall v Osmond, concerned with a police driver engaged in the pursuit of a suspect, Sir John Donaldson MR stated, as noted at para 47 above, that the officer's duty was to exercise "such care and skill as is reasonable in all the circumstances". He went on to state that those "were no doubt stressful circumstances", and that although there was no doubt that the officer made an error of judgment, he was far from satisfied that the officer had been negligent (p 1038). The same point was made, in a context closer to that of the present case, by May LJ in Costello v Chief Constable of Northumbria [1999] ICR 752, 767, where he remarked that "liability should not turn on … shades of personal judgment and courage in the heat of the potentially dangerous moment".

76. It is also necessary to remember that a duty to take reasonable care can in some circumstances be consistent with exposing individuals to a significant degree of risk. That is most obviously the case in relation to the police themselves. There are many circumstances in which police officers are exposed to a risk of injury, but in which such exposure is consistent with the taking of reasonable care for their safety. Equally, there may be circumstances which justify the taking of risks to the safety of members of the public which would not otherwise be justified. A duty of care is always a duty to take such care as is reasonable in the circumstances.

A case going the other way was Marshall v Osmond CA 1983. The Claimant was driving a stolen car. The suspect vehicle pulled up and the occupants fled on foot. The police car skidded and collided with the Claimant. The Judge found that the police did not owe the same duty of care. The Court of Appeal would disagree, however it dismissed the appeal on the facts as summarised by Lord Robertson MR. On the facts, the police officer had made an error of judgment, but the evidence did not show that he had been negligent.

POLICE ERRORS OF JUDGMENT

Discussion

The key principle that can be summarised is, that a police car driver owes the same duty, such as to take such care as is reasonable. However, the nature of police work is such that circumstances may be significantly different. For that reason, unrealistically demanding standards of care should not be imposed on officers with little or no time for considered thought.

The cases show that although there is no presumption in favour of either party, if the police driver makes an error of Judgment, for which any other driver is liable, it is necessary to determine what caused the error to be made, and only in those circumstances can the Court decide.

At the appeal, Mr Justice Bourne considered that the relevant act or omission of failing to place the vehicle into park/neutral was not an error of judgment. The officer's error did not involve anything in the nature of decision making, it was a pure omission that any driver would be bound to make. If the same accident happened in ordinary circumstances. i.e taking a phone call and rolling into a pedestrian, this would plainly be negligent.

Whilst the first instance Judge was right to describe the circumstances as "non trivial", they were far from extreme. Whilst the Judge's reference to "difficult circumstances" and the "heat of the moment" were a factually correct explanation as to how the very basic error came about, it was not a significant legal reason to deny liability. If it were, it would suggest that officers attempting an arrest in relatively mundane circumstances could be excused from taking precaution.

In the writer's view, whether an act or omission constitutes negligence or is simply an "error of judgment" is entirely dependant on the prevailing circumstances of the time. The more mundane the circumstances, the greater the likelihood of negligence. Conversely, as in Marshall, the circumstances may be such that what would otherwise be considered a negligent act, can be excused as an error of judgment.

These types of cases are highly fact sensitive and careful consideration should be given to all the circumstances. What is negligent in one set of circumstances might be considered to simply be an "error of Judgment" in another.

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DISADVANTAGE ON THE LABOUR MARKET CLAIMS:

BEYOND *SMITH v MANCHESTER*

BY JESSICA DENTON

YEAR OF CALL 2012

INTRODUCTION

Disadvantage on the labour market claims should be carefully considered and scrutinised in every case involving an injury with permanent consequences. The label *Smith v Manchester is*, often incorrectly, attached to these claims to the extent that they are now, at least presented, as almost synonymous with one another. This article sets out the different ways in which claims for disadvantage on the labour market can be advanced for claimants and reflects on how challenges may be advanced by defendants.

What is a disadvantage on the labour market claim??

Claims for disadvantage on the labour market can be advanced if a claimant is injured and, because of those injuries, they are at risk of suffering a loss in the labour market. The measure of loss may be obvious or extremely complex and the claims are highly variable. Regrettably, and all too often, Schedules of Loss will simply plead a claim for a year's net earnings for disadvantage on the labour market under the banner of *Smith v Manchester* without further explanation. However, disadvantage claims may be advanced in one (or more) of three ways:

- A "real" *Smith v Manchester* award.
- A *Blamire* award.
- A claim calculated using the Ogden tables.

What is a Smith v Manchester award?

It is helpful to re-examine the facts of *Smith* in the first instance. S was a 51-year-old (at the time of trial) cleaner who suffered a serious injury to her elbow and shoulder in an accident at work. Despite her injuries, she had returned to work but there were a number of cleaning tasks that she was unable to do. The medical evidence supported a disadvantage on the labour market if S was to lose her job with M. The court found that there was a real risk that S would become unemployed at some point in the remaining 14 years of her working life, notwithstanding that S had given an undertaking that they would continue to employ her. At first instance a sum equivalent to four month's wages was awarded to S but this was substituted with a sum equivalent to a year's earnings on appeal.

In order to recover damages on a *Smith v Manchester* basis, the injured claimant must be employed/engaged in work activity or will be immanently employed/engaged in work activity at the time of the resolution of their claim.

They must prove, on the balance of probabilities, that there is a "real" (i.e. non-trivial) risk that if they were to lose their employment and enter the open labour market then they would find it harder to obtain new work. The very nature of Smith v Manchester claims is, to borrow a phrase from *Kemp & Kemp*, predictable but speculative.

Quantifying a *Smith v Manchester* award appropriately can be nuanced and complex. If the risk of longer periods of unemployment in the future is relatively modest because the permanent effects of an injury are minor, then a lesser sum than one year's annual earnings could be reasonably expected or contended for. Further, these claims are vulnerable to challenge in their entirety if the underlying factual basis of the claim has not properly identified and/or where the medical evidence supports a disadvantage but only in limited circumstances. For example, where medical evidence supports a disadvantage for any occupation involving repeated heavy lifting, there is no "real" risk that the disadvantage will arise for a claimant who has a career in accountancy and would never work in anything other than desk-based role. In this example, the disadvantage would never arise and, applying *Smith*, no separate award should be made, and the claimant is, arguably, appropriately compensated for the theoretical disadvantage on the labour market caused by the injury by a modest uplift to the PSLA award. In each case, it is important to consider all relevant circumstances including, but not limited to, a) the Claimant's occupation, b) the nature of the disadvantage, c) the security of the Claimant's employment/work activity d) age, e) qualifications and f) work history.

In summary, before claiming damages on a *Smith v Manchester* basis, it is important to consider whether the claim truly is a *Smith* claim or whether the claim should be advanced on different basis; this can have a significant impact on the claim's value. It is also important to examine whether the medical evidence has adequately dealt with the disadvantage and if not, how this ought to be remedied or gaps in the evidence exploited if considering the claim from a defendant perspective.

Blamire awards

Blamire awards are also broad-brush awards for damages for disadvantage on the labour market but are used where there are simply too many variables for the Court to accurately assess damages on a multiplier/multiplicand basis and the evidence does not support a *Smith v Manchester* award. *Blamire* awards have been suggested to be a "last resort" ([2008] EWCA Civ 194) and should not be used to circumvent the traditional multiplier/multiplicand approach because there are some uncertainties or the assessment is complex.

Blamire awards will typically arise where the injured claimant's future working pattern was unpredictable for a variety of reasons, the most common factor being age. Younger claimants may have considerable difficulty in evidencing what their future working pattern and earnings would have been but for the accident, particularly if they choose to follow a career path where earnings levels are uncertain or highly variable, such as performing arts. Further, Blamire awards can be very useful where non-accident-related factors, for example, a lengthy criminal record, already caused the injured claimant to suffer some disadvantage on the labour market and it is not possible to quantify the value of accident-related factors with any accuracy.

Quantification of *Blamire* awards is even more difficult than *Smith* awards, particularly if the Claimant has no or very limited earnings history to draw upon. The level of *Blamire* award will be influenced by the degree of the disadvantage – the more significant the potential disadvantage, the greater level of damages in the pleading. In the writer's experience, the highest value *Blamire* award seen in a Schedule of Loss was £50,000 and the lowest value *Blamire* (albeit wrongly pleaded as a *Smith* claim) was £3,000. It is also possible to advance the claim by reference to a specific period of earnings e.g. the value of six months wages from the Claimant's last role before the index accident.

The Ogden tables and multiplier/multiplicand approach

This article is only intended to address claims where the claimant is disabled but has a residual earning capacity. All other types of claims are beyond the scope of the article and give rise to entirely different principles.

Where a claimant is disabled, the risks to the injured claimant who is disadvantaged on the labour market are inbuilt in the adjustment factors for contingencies other than mortality which are themselves incorporated into the earnings multipliers. This means that a *Smith* or *Blamire* award will not be made separately in most cases. The adjustment factors incorporate three criteria: (1) employment status (2) disability and (3) the highest level of educational attainment. Employment status has a different meaning in this context to that Employment Law and means simply whether the injured claimant was in work at the time of their injury, thus "employed" incorporates self-employment and those on a government training scheme. Not employed is anyone not in work at the time of the accident, including full-time students. Disability is assessed by reference to the DDA 1995 not section 6 EqA 2010. The claimant must also show that the impairment limits the kind or amount of paid work that they can do. Educational attainment is, in the words of the editors of the current edition of *Facts & Figures*, *"a proxy for human capital/skill level"* and is broken down into three levels, one being the lowest and three being the highest. *Facts & Figures* contains a comprehensive but non-exhaustive list of qualifications organised into their respective levels, which is a helpful point of reference.

To value the claim using the *Ogden* tables, the Claimant's pre-accident earnings must be established. In traditional salaried employment this is easier, but self-employment can present real challenges and obtaining and collating reliable earnings' information (such as tax returns and accounts) at an early stage is vital. The next stage is to work out the Claimant's residual earning capacity, this may also be straightforward or very complex depending on the circumstances. The most difficult claims are those involving young claimants or those with a very limited earnings history. In such cases, expert evidence may be required together with evidence of the Claimant's family members' earnings where appropriate. Once the pre-accident and retained earning capacity figures are available, the appropriate multipliers can be ascertained by reference to the correct table which will be determined by the three factors outlined above and the injured claimant's biological sex, age and retirement age.

A worked example:
30-year-old male, not disabled with level 3 educational attainment earning a net annual salary of £40,000. Following the accident, he is rendered disabled, remains employed but is only able to manage part-time work and has a residual earning capacity of £20,000 net per annum. His intended retirement age of 65 is unaffected by his injury. All multipliers are calculated at a discount rate of +0.5%. The Claimant's earnings multiplier is 31.26, the reduction factor for contingencies other than mortality is 0.9 for a non-disabled 30-year-old male and 0.57 for a disabled 30-year-old male. The Claimant's pre-accident earning capacity is calculated as follows: (31.26 x 0.9) x £40,000 = £1,235,360. The Claimant's post-accident earning capacity is calculated as follows (31.26 x 0.57) x £20,000 = £356,364. The value of the Claimant's claim is therefore **£878,996**.

Adjustment to the reduction factors can be made in appropriate circumstances but examples of those circumstances are beyond the scope of this article. Further, the tables have a significant limitation in that they are limited to a maximum age of 54 at trial, which will only become more problematic in the future as average retirement age increases. However, the tables should be used in any case where it is possible, even if difficult, to calculate a claimant's residual earning capacity.

Conclusion
Disadvantage on the labour market claims can be difficult and nuanced to advance. Early investigation of such claims and clarity in the medical evidence is essential to avoid claims being over or under-pleaded. For defendants, it is important to maintain challenges to wrongly pleaded and poorly founded disadvantage claims and they should not just be accepted if medical evidence supports some disadvantage. By properly considering and scrutinising these claims, parties should be able to reach agreement on quantum at an earlier stage of litigation.

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LIMITATION PERIOD FOR CHILD SEXUAL ABUSE TO BE LIFTED

BY JAMES ELLIS

YEAR OF CALL 2017

On 20 October 2022 the Independent Inquiry into Child Sexual Abuse (IICSA) published its final report. Among the many recommendations, the 15th recommendation was that the 3-year limitation period for bringing a personal injury claim be removed for historic sexual abuse claims. This was with the caveat that if there is a concern over whether there can be a fair trial due to the passage of time, the burden is on defendants to show that a fair trial is not possible.

The government published its response on 5 February 2025 announcing that recommendation 15 is to be acted on. A date for implementation is not yet set, however this is likely to have wide reaching effects for the victims of historic sexual abuse.

Personal injury claims for historic sexual abuse, and abuse more generally, are brought in a number of ways. Some of the more common are given a brief overview below.

Local Authorities: Failure to Act & the Assumption of Responsibility
Much of the recent authority involving local authorities allegedly failing in their common law duty of care towards children, centres on whether there has been an assumption of responsibility.

The textbook Tofaris and Steel in "Negligence Liability for Omissions and the Police" 2016 CLJ 128 has been cited in a number of authorities (including *K v Birmingham* [2024] EWHC 431 (KB) and *DFX & others v Coventry City Council* [2021] EWHC 1382 (QB)) when expressing the four ways that public authorities, in the same way as private individuals, may come under a duty of care to prevent the occurrence of harm. These are:

- When there has been an assumption of responsibility by the public body to protect someone from that harm;
- Where the public body has done something which prevents another from protecting someone from that danger;
- Where the public body has a special level of control over the source of the danger; and
- The public body's status creates an obligation to protect someone from danger.

It is the first of those 4 options that is frequently raised in historic abuse claims.

LIMITATION PERIOD FOR CHILD SEXUAL ABUSE TO BE LIFTED

Poole BC v GN [2019] UKSC 25 concerned a family that was targeted by neighbours, with the children being on the receiving end of harassment and physical abuse for several years. The steps taken by the local authority included investigating the issue and putting the children under a child protection plan before eventually moving them to other accommodation.

A claim was brought by the children on the basis that the defendant had failed in its obligations under s. 17 & s. 47 Children Act 1989 to protect them from harm and had assumed responsibility due to the level of investigation and involvement.

The Supreme court, as had been the case in previous claims against the police, found that public authorities did not owe a duty at common law merely because they had statutory powers or duties. This included where they could prevent someone suffering harm. Or, in other words, public bodies did not generally owe a duty to confer a benefit, including the protection of harm [28]. The investigation and monitoring of the claimants did not involve the provision of a service which the claimants could rely on to create an assumption of responsibility, nor had the local authority taken the children into care and so assumed responsibility for their welfare [81] & [82]. They were merely statutory functions, and so the claim failed.

The assumption of responsibility was considered further in *HXA v Surrey CC and YXA v Wolverhampton CC* [2023] UKSC 52.

In *HXA*, the claimant claimed to have suffered physical and emotional abuse by her mother and sexual abuse by her mother's partner and his father. Allegations of sexual abuse were made whilst in her mother's care, but she was not removed from the family home until 5 years later. The steps the local authority took included the initial stages of preparing an application for a care order and carrying out a keep safe workshop. This was found to be insufficient for the local authority to have assumed responsibility.

In *YXA*, the claimant was put into partial s. 20 accommodation under the Children Act 1989. YXA spent 1 night per week and 1 weekend per month in local authority accommodation. When not in local authority accommodation, YXA continued to live with family where hewas over medicated and neglected. However, as this occurred when not in the local authorities' care, there was found to be no assumption of responsibility at the time the harm occurred.

The difficulty with pleading an assumption of responsibility was highlighted in *K v Birmingham City Council* [2024] EWHC 431 (KB). This claim concerned the defendant's application to strike out various parts of a Particulars of Claim. The underlying claim concerned a child who was accommodated by the defendant with her mother's consent under s.20 Children Act 1989. When in local authority accommodation she was sexually abused by third parties over a 2.5-year period.

As part of her judgment, HHJ Kelly considered much of the relevant case law in reaching her decision to strike out certain paragraphs that lacked specificity and allowing amendments to others. In particular, simply referencing s.20 without specifically including what the assumed responsibilities were was insufficient as this was merely pleading the statutory duty. However, permission was given to amend the particulars to include what specific responsibilities the defendant was said to have assumed over the claimant.

In matters involving local authorities and a failure to remove or protect children from harm, whilst each case turns on its own facts, claims which are more likely to have some success are ones in which the Claimant was accommodated by a local authority when the abuse took place or was otherwise in their care.

Human Rights Act 1998 (HRA) claims

Claims under the Human Rights Act 1998 are frequently brought alongside claims for breach of duty against local authorities. These are normally for a breach of Article 3 ECHR (freedom from inhuman and degrading treatment). Section 6 HRA includes that it is unlawful for a public authority to act in a way which is incompatible with a convention right, and that "an act" includes a failure to act.

Unfortunately, the updates on limitation only apply to the Limitation Act 1980. As it stands, s. 7(5) HRA limitation is for a period of 1 year from the date in which the act complained of took place or such longer period as the court or tribunal considers equitable having regard to all the circumstances. It is expected that the lift on the limitation for common law claims will have an impact on the circumstances the court takes into account when consider the HRA limitation period.

Claims against organisations

For a claim against an organisation or institution, a claimant will have to prove on balance, that the abuse occurred, that the defendant is vicariously liable for the actions of the tortfeasor, and what injury was caused.

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Lord Burrows gives a very helpful overview of vicarious liability in *BXB v Trustees of the Barry Congregation of Jehovah's Witnesses* [2023] UKSC 15 at [58] and goes through the modern law on vicarious liability at [30] to [57]. *BXB*, and in particular those paragraphs, are recommended reading.

In essence, and as set out in *BXB*, the test for vicarious liability comes in two stages:

1. Whether the relationship between the defendant and the tortfeasor was one of employment or akin to employment.
2. Whether the wrongful conduct was so closely connected with acts that the tortfeasor was authorised to do, that it can fairly and properly be regarded as done by the tortfeasor while acting in the defendant's employment or quasi-employment.

These cases are highly fact sensitive, and some examples are considered below.

In *Armes v Nottinghamshire CC* [2017] UKSC 60, the defendant was found vicariously liable for the physical and sexual abuse committed by foster parents. It was accepted that the local authority had not been negligent in their selection process or supervision. However, the relationship between the defendant and the foster parents was akin to employment. The reasons given included the foster parents were not undertaking an independent business of their own, the service provided by the foster parents was an integral part of the defendant's childcare services for the benefit of the local authority, and the placement of a child in care created the inherent risk of abuse as close control cannot be exercised by the local authority. The 2nd stage was not contested by the defendant on appeal.

This was later followed in *DJ v Barnsley MBC* [2024] EWCA Civ 841, where the local authority had placed a child in an informal arrangement with his aunt and uncle for 7 months before taking the child into care with the aunt and uncle acting as foster parents. The child suffered sexual abuse for several years, with the local authority not found vicariously liable for the first 7 months as the child was not in care, but liable thereafter when he was in care and the aunt and uncle recognised as foster parents. The court was quick to note that this was not a general rule regarding foster parents and each case was fact specific, especially as some historic cases, as it was on those facts, were based on the previous legislation at the time of the abuse, not the Children Act 1989 [69].

In *MXX v A Secondary School* [2023] EWCA Civ 996 a school was found not to be vicariously liable for the sexual abuse of a child. The abuser had one week of work experience at the school, which was sufficient to satisfy the 1st stage. However, the grooming had started after the week had finished, he had no caring or pastoral responsibilities for the pupils and had no position of authority over the pupils. At [88] Lady Justice Davies found that these facts did not satisfy the 2nd stage of the wrongful act being closely connected to what the tortfeasor was authorised to do.

From the above, claims in vicarious liability can be clearer cut, such as abuse by foster parents or by teachers with clear pastoral responsibilities, but the courts have been understandably reluctant to lay down general rules.

Tortfeasor

If a claim cannot be brought via vicarious liability or a local authority generally in those circumstances, a civil claim can be brought directly against the tortfeasor such as in *BRS v Gadd* [2024] EWHC 1403 (KB).

LIMITATION PERIOD FOR CHILD SEXUAL ABUSE TO BE LIFTED

However, this is often the least desirable approach due to the tortfeasor's lack of assets, and with many cases being historic, the abuser may be deceased at the point a claim is brought.

Criminal Injuries Compensation Authority (CICA)
For many, an application with the CICA may be the most likely option to receive an award in damages.

The CICA is an agency of the Ministry of Justice responsible for compensating victims of violent crime within the tariffs set out in the Criminal Injuries Compensation Scheme (CICS). It is important to note that a conviction for the crime is not necessary for an award to be made and decisions on injuries, including whether the injuries were directly caused by the violent crime, are made to the civil standard.

The limitation period of two years may at first may seem unfair when compared to the current 3-year limitation period, however for historical sexual abuse cases it is 2 years from the date the matter is first reported to the police. This can be at any time after the child turns 18, so if a victim reported their historic sexual abuse to the police on their 36th birthday, they would have until the day prior to their 38th birthday to make an application. If the incident is reported to the police when the victim is still a child, they would have until the day before their 20th birthday to make an application.

The main drawback of the CICA, particularly in cases of historical sexual abuse, is the tariffs within the CICS are significantly less than the comparable brackets in the 17th edition of the JC Guidelines.

For example, where the victim of a sexual offence is a child the maximum total for injuries for a permanent disabling mental illness along with serious internal injuries is £44,000 with the possibility of an additional amount in cases of pregnancy and/or sexually transmitted infections. Compared to the current JC Guidelines, the most severe cases can be up to £183,050.

Whilst this remains a less desirable option due to the lower tariff amounts, it often has less litigation risk than proving breach of duty or vicarious liability and often has a greater chance of receiving an award than pursuing the abuser directly.

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James was called to the Bar in 2017 and, after a period as a court advocate with an international law firm specialising in personal injury, property and credit hire, completed his pupillage under personal injury specialist barrister Gareth Thompson. If you would like to discuss James' practice or the content of this article, please see the contact details at the end of the newsletter.

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