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Questions of Proof

A Miscellany of Answers

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Burden of Proof – First Principles

1. It is trite but fundamental that the burden of proof rests firmly with the Claimant in all cases of personal injury. Although the maximum "*res ipsa loquitur*" is not infrequently pleaded, the reality is that the number of cases in which the events themselves prove negligence is very small.

2. The principal exceptions to that general rule are where there is a plea of reasonable practicability and contributory negligence – the basis for which must of course be pleaded. As to the former, post-section 69 of EERA 2013, the question of "reasonable practicability" is not necessarily considered against the background of a statutory duty. Indeed, the question of what a defendant could, and should, have done, should be pleaded specifically: *Walsh -v- CP Hart & Sons Ltd* [2020] EWHC 37 (QB). As to the latter, it is not enough to plead contributory negligence in the abstract – the Court cannot find contributory negligence on a basis that has not been pleaded: *Dziennik -v- GTO Gesellschaft Fur Containertransport MBH & Co* [2006] EWCA Civ 1456.

Proving Breach of Duty – What are the Limits of Drawing of Adverse Inferences

3. Adverse inferences are means by which at least an evidential burden can be placed on the Defendant's side of the litigation fence. They can be drawn where there is a failure to call witnesses that are available or to adduce documents that should be available. In the personal injury arena, including but not limited to disease claims, there have been efforts to enlarge the scope to which such inferences can and should be drawn.

4. The limits of such arguments reached the Court of Appeal last November being tested in *Mackenzie -v- Alcoa Manufacturing (GB) Limited* [2019] EWCA Civ 2110, a deafness action. The Claimant's arguments on breach followed these steps:

    i. First, the Claimant invited the Court to draw an adverse inference against the Defendants amounting to a finding of breach of duty for them not having undertaken noise surveys during the Claimant's period of employment at Alcoa's premises. The Claimant cited the decisions in *British Railways Board -v- Herrington* [1972] AC 877 and *Keefe -v- Isle of Man Steam Packet Company Limited* [2010] EWCA Civ 683 in support and pointed to the absence of noise surveys as the evidential basis from which that breach could be inferred.

ii. Next, it was submitted that the effect of that inference was that the Claimant's evidence ought to be treated benevolently and that as a consequence of the operation of *Keefe*, the engineering evidence of the single joint expert should be ignored

iii. Having taken steps (i) and (ii), the same should be a basis for further finding a breach of duty that the Defendants exposed the Claimant to excessive levels of noise in excess of the threshold of 90 dB(A) Lep'd

5. The judgment of Lord Justice Dingemans (now Vice-President of the Queen's Bench Division) contains a detailed review of the law relating to the inferences a court can properly draw in the absence of evidence. Here's a chronological digest of it.

6. In *BRB -v- Herrington* [1972] AC 877 the House of Lords confronted a situation where the defendant did not call any evidence about a fence separating the railway from the meadow which had been in a poor state of repair for several months. Noting that not calling evidence was a legitimate tactical move in the adversarial system of litigation, Lord Diplock nonetheless said:

> "*but a defendant who adopts it cannot complaint if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold*".

7. In *Wiszniewski -v- Central Manchester Health Authority* [1998] PIQR P324 the Court of Appeal held that the silence or absence of a witness might justify drawing an inference adverse to the party, but there must be some evidence which raised a case to answer before an inference could be drawn, and if an explanation for the absence was given, even if it was not wholly satisfactory, the potentially detrimental inference may be reduced or nullified.

8. In *Keefe -v- Isle of Man Steam Packet Company Limited*, a deafness case, the Court found that in terms that there had been no measurements of noise; and found that that the employers were aware of the noise problem for they had in fact provided ear protection for their employees in the engine room - where the claimant in that case worked. The Court of Appeal endorsed the view that where a defendant, by reason of a breach of duty, makes it difficult or impossible for a claimant to adduce relevant evidence, the defendant risks adverse findings of fact against them.

9. In *Shawe-Lincoln -v- Dr Arul Chezhayan Neelakandan* [2012] EWHC 1150 Lloyd Jones J. distinguished *Keefe* and said at paragraphs 81-82 that:

> *"Keefe is concerned with the weight which is to be attached to evidence and the circumstances in which the court may draw inferences. This is how Longmore LJ explained it… Whether it is appropriate to draw an inference at all and, if so, the precise nature and extent of such an inference will depend on the particular circumstances of each case. Relevant considerations will include the proximity between a breach of duty and the non-available evidence, the effect of the other evidence before the court and what other evidence might have been available but which is not before the court."*

10. In *Garner -v- Salford City Council* [2013] EWHC 1573 (QB) Keith J stated at paragraph 28:

> *"The case is unlike Keefe v The Isle of Man Steam Packet Co Ltd [2010] EWCA 683 (Civ), in which the Court of Appeal held that the defendant could not assert that it had not been proved that the noise levels on its boats were excessive when in breach of duty it had failed to measure those levels. There was no duty on the company in 1978 to check the lagging for asbestos, only guidance …"*

11. In *Petrodel Resources Limited -v- Prest* [2013] UKSC 34; [2013] 2 AC 415 Lord Sumption commented on *BRB -v- Herrington* at paragraph 44 noting that the Courts had recoiled from parts of the statement in *Herrington* recording they might "convert open-ended speculation into fact". He noted that there must be a reasonable basis for some hypothesis in the evidence or the inherent probabilities, before a court can draw useful inferences from a party's failure to rebut it. He allowed that silence of one party in the face of the other party's evidence may convert that evidence into proof in relation to matters likely to be within the knowledge of the silent party.

12. Having carried out this digest, Dingemans LJ derived two key propositions:

> *"First whether it is appropriate to draw an inference, and if it is appropriate to draw an inference the nature and extent of the inference, will depend on the facts of the particular case, see Shawe-Lincoln at paragraphs 81-82.*
>
> *Secondly silence or a failure to adduce relevant documents may convert evidence on the other side into proof, but that may depend on the explanation given for the absence of the witness or document, see Herrington at page 970G, Keefe at paragraph 19 and Petrodel at paragraph 44"*

In the light of those propositions, the Defendant succeeded in the appeal because the trial judge had found that he could not conclude no noise surveys had been taken.

13. What are the practitioner points to take home from *Mackenzie -v- Alcooa*?

    i. The Court of Appeal was clear that there should be no risk that the adverse inference being drawn in *Keefe* should be elevated to a rule of law to be applied; rather, *Keefe* should stand simply as an example of a proper approach to finding facts in a particular case.

    ii. In the future, it was recommended that in cases where it is relevant to determine whether a survey was undertaken, both parties should address the existence of documents in either questions pre-trial or in the evidence at trial to avoid the trial judge having to make a factual finding based solely on submissions

    iii. Of itself, absence of evidence cannot be interpreted as evidence of its absence. In *Mackenzie*, the determination made by trial judge, HHJ Vosper QC was that whilst there were no documents showing that a noise survey had been carried out and Mr Mackenzie had not seen a noise survey carried out, he was not prepared to find that no noise survey had in fact been carried out stating "*I conclude that it is not possible to make a finding that the Second Defendant is in breach of duty in failing to carry out noise surveys*". On that basis, the defendant Appellant – whom Gareth McAloon and I represented – succeeded on the appeal.

Proving Causation

14. The word "causation" needs a careful degree of unpacking. There is *medical* causation: what injury does the Claimant prove he or she has been caused. There is *legal* causation: is it proved that such injury would not have been caused but for the breach or breaches of duty established. Allied to the latter, there is *factual* causation: what on the balance of probabilities would in fact have happened had it not been for the omission (to act) complained of. Such distinctions need to be borne in mind in the context of considering burden of proof.

15. In terms of **medical causation**, the personal injury lawyer needs to have in mind 'Occam's Razor'. Among competing hypotheses, the one with the fewest assumptions should be selected. Other, more complicated solutions or explanations might be correct but - in the absence of certainty - the fewer the assumptions that are made the better. As it is has been pithily put: "*if your hear hooves, look for horses, not zebras*" Unless of

course, that is, you are in the Serengeti! There is also the fundamental distinction to be drawn between correlation and causation. Only the latter suffices.

16. As regards **legal causation**, in a case where the Court considers there are a number of possible causes of damage, some negligent and some non-negligent, the Claimant must still establish that the negligent cause he puts forward was not just the most likely of several causes but was more likely than not to have been the cause of damage: *Rhesa Shipping* [1985] 1WLR 948.

17. At the level of principle, this was endorsed by the Court of Appeal as applicable in a personal injuries/clinical negligence context, in the authority *O'Connor -v- Pennine Acute Hospitals NHS Trust* [2015] EWCA Civ 1244 where Jackson LJ summarised the position as follows:

> "*It is not an uncommon feature of litigation that several possible causes are suggested for the mishap which the Court is investigating. If the Court is able, for good reason, to dismiss causes A, B and C, it may be able to reach the conclusion that D was the effective cause, but the mere elimination of A, B and C is not of itself sufficient. The Court must step back and, looking at all the evidence, consider whether on the balance of probabilities D is proved to be the cause.*"

In this connection, see also *Milton Keynes Borough Council -v- Nulty* [2013] 1 WLR 1183 per Toulson LJ at [34]-[37] and *Graves -v- Brouwer* [2015] EWCA Civ 595 per Tomlinson LJ at [24]-[30]. Where the causes are not improbable, it is a permissible exercise for a judge to analyse each cause in turn, adopting a process of elimination, so long as the Judge does not merely arrive at the least improbable cause: *Ide -v- ATB Sales Ltd* [2008] PIQR P13 per Thomas LJ at [4]-[6]. To find the "*least improbable*" cause proved would be to commit the *Rhesa Shipping* "*heresy*" (per Jackson LJ in *O'Connor* at [56]). It is always open to the Court to find that a party has not discharged the burden of proof; indeed, sometimes it is the only course open to the Judge: *Rhesa Shipping Co SA -v- Edmunds (The Popi M)* [1985] 1 WLR 948, 951D, 956A per Lord Brandon of Oakbrook.

18. By way of a recent application of the 'Rhesa/O'Coonor' principle, there is the High Court decision of HHJ Coe QC in *Collyer -v- Mid Essex Hospital Services NHS Trust* [2019] EWHC 3577 - once more in a clinical negligence context. In that case, the unfortunate Claimant had recurrent laryngeal cancer and required surgery. However, the Claimant ended up after the surgery with significant and permanent damage rendering him unable to speak and restricting him to mouthing and signing, the result of catastrophic nerve damage. It was agreed between the experts that this outcome was not a reported, let alone a well-recognised, complication of the operation and that the literature in this field did not disclose a single reported cases of this type of nerve palsy. Equally, there were no reports of this type of damage being caused negligently.

19. The Claimant appears to have approached the case on the basis that the total absence of reports of such damage in the literature established that this was not a potential non-negligent complication and, therefore, gave rise to a presumption of negligence. The Defendant denied any such negligence.

20. In this case there were four hypotheses under consideration at trial as to how the damage had been caused. The Judge considered each of these mechanisms individually and rejected them one by one. In other words, in a case where the Court could not find a non-negligent explanation for the severe injury which the Claimant suffered, the effect of the burden of proof was such that it was not incumbent on the Defendant to prove one. The burden of proof was on the Claimant and each of the hypotheses that had been advanced for damage was rejected by the Court as not being more likely than not to have happened and so the claim failed.

21. As to **factual causation**, this is an area where there is scope for, so-called "*judicial benevolence*". When the Court is investigating and seeking to reach findings as to what would have happened if a particular step had been performed at a particular time, it is becoming well established that the Court will apply a degree of "*judicial benevolence*" which can help the Claimant to establish the necessary chains of causation.

22. A recent decision which shows the extent to which judicial benevolence can assist a Claimant in establishing the necessary chain of causation is *Younis -v- Dr Okeahialam* [2019] EWHC 2502 a decision of Rowena Collins-Rice sitting as a Deputy High Court Judge. In that case, the Claimant's GP had failed to refer the Claimant urgently for cardiological investigation following an abnormal ECG. 3 months later he collapsed in the street due to a cardiac event and suffered a spinal cord injury.

23. The causation questions for the Judge concerned a quite complex chain of events and the Judge had to decide; when the Claimant would have been seen in outpatients; what the presentation would have been at that time; what investigations would have been performed and when; what they would have revealed and; if they had revealed an intermittent AV block what would have been done about it and when. In particular, if a pacemaker had been fitted, would this have been completed before the Claimant had his collapse and spinal cord injury 3 months later?

24. The Claimant was able to persuade the Court that all the links in a chain were solid with the Judge expressly adopting the principle of judicial benevolence. The judgment includes the following discussion, noting that *Keefe* established the principle ;

> *"that 'a Defendant who has in breach of duty made it difficult or impossible for the Claimant to adduce relevant evidence must run the risk of adverse factual findings'. In these circumstances 'the Court*

should Judge a Claimant's evidence benevolently and the Defendant's evidence critically'. It is clear and Mr Bradley very fairly accepted that this does not amount to a reversal of the burden of proof. It is also clear that Keefe was a case in which the breach of duty specifically related to a failure to make measurements of noise levels. The Claimant was directly and wrongly deprived of the very records which would have been the best or only evidence of the precise levels to which he had been exposed. The Court of Appeal in these circumstances took a benevolent approach to such positive, if second best, evidence as there was that it had been excessive and found the Claimant's burden of proof discharged on that evidence."

25. The approach which the Judge then took was to apply proper Claimant benevolence without reversing the burden of proof and she stated at paragraph 46 that;

"*I must also bear in mind that it is the fault of the Defendant that we are having to undertake this exercise at all, and it would be very unfair for the Defendant to seek to capitalise on the absence of the very evidential audit trail of which the Claimant has been wrongly deprived. The Claimant starts at a disadvantage inflicted by the Defendant; it is right that the disadvantage should not be unfairly exacerbated and also that a degree of minimisation of the disadvantage should be looked for, to level things up as fairly as possible. This is what 'Claimant benevolence tries to achieve'. I cannot however simply assume that the diagnostic process, or any part of it, would have happened as quickly as the Claimant needs in order to win his case..... Where I am satisfied that the evidence points to a decision within a range, but cannot otherwise discriminate within that range, then I should incline to the perimeter in the range favouring the Claimant. But it is the Claimant's obligation to satisfy me as to that range. I must give him the benefit of the doubt, but he must persuade me to doubt it in the first place. These are fine distinctions but real ones, in conducting a difficult exercise fairly*."

26. This case is a difficult one for Defendants. In the appropriate case, it could lead to greater investigation of factual issues to avoid benevolent speculation as to the likely range of timings for a particular investigation. For example, defendants may now seek specific evidence on this issue from witnesses of fact, or a documentary audit trail from the local Trust concerning average waiting times to be seen within the relevant Trust, and then for various investigations. Without favourable evidence from a defendant on such issues, the Claimant's ability to prove a chain of causation will be enhanced.

'Gestmin Principles' – The Limits of Human Memory (And The Limits of the Principles)

27. The "Gestmin" principles were articulated by Leggatt J (as he then was) in *Gestmin SGPS S.A. -v- Credit Suisse (UK) Limited and others* [2013] EWHC 3560 (Comm). The case concerned what instructions Gestmin had given Credit Suisse in respect of banking and investment objectives; Gestmin's case about this issue was undermined by forms signed by its director which set out investment objectives. When seeking to resolve the dispute, Leggatt J said this:

> *15. An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.*
>
> *16. While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.*
>
> *17. Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).*
>
> *18. Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented*

with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

19. *The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.*

20. *Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.*

21. *It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth.*

> *In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth*

28. How have these 'principles' played out fared in a personal injury context? In *CXB -v- North West Anglia NHS Foundation Trust* [2019] EWHC 2053, His Honour Judge Gore QC offered a somewhat different slant on the same territory in a case which concerned whether the Claimant's mother had in fact elected to undergo a caesarean section. At the centre of the case was a clinical note from 12 days prior to delivery in which it was recorded by the Senior Registrar that the mode of delivery had been discussed at length and that the patient was keen for induction of labour (as opposed to caesarean). The Claimant's mother and her husband denied that this discussion took place and gave a fundamentally different account of their discussions with a Registrar, who essentially asserted that at this consultation the Claimant's mother indicated that she would like a caesarean section. In his judgment, the Judge preferred the record to the recollection but before doing so he offered some acerbic comment on the Trust's approach to the case.

29. Judge Gore QC noted that there was a "*modern fashion*" for courts to be invited in clinical negligence cases to prefer the reliability and veracity of assertions contained in clinical notes and records to contrary factual accounts contained in witness statements and oral testimony to the contrary. He noted that the "*twin foundation of the submissions is said to be the unreliability or fallibility of witness recollection of events, as compared to the reliability of contemporaneous records made by practitioners in the course of discharging their clear professional duty to inform the care and treatment of the patient moving forward, and not simply provide historical record of what occurred*".

30. He also noted that the submissions repeat what he described as "*intrusions into this difficult area by various Judges so as to give the appearance of authoritative statements of principle*". He observed that the greater number of cases and the Judges who rely on the originators of these arguments the more authoritative it appears to become, and he considered that such an approach was "*fraught with danger*". Having quoted the

"*Gestmin* principles" in full (see appendix) he then provided the following counter point to the *Gestmin* approach.

31. His view was that dicta in *Gestmin* should be treated with caution for a number of reasons;

    1) In so far as it is suggested that these remarks are statements of legal principle that either are of have become invested with the status of authority, no authority or legal analysis of them is provided or relied upon either in the Judgment or in the arguments before later Judges.

    2) In so far as the remarks are based upon the nature of memory, no expert evidence and no relevant professional literature informed or were evaluated in expressing the remarks recorded. His Honour Judge Gore QC did not accept that professionals learned in the understanding of memory will accept these remarks without qualifications.

    3) The context of these comments is highly material; namely commercial cases about whether a relevant witness should be regarded as bound by his signed statement of investment objectives at the time as opposed to what he subsequently stated those objectives to have been. That is a very different type of issue from that which falls to be decided in clinical negligence cases. Documents said to be more reliable in that case had been signed by the person who then sought to persuade the Court that it did not represent his thinking at the time.

    4) The argument is based on the presumption that the writing in question is accurate and reliable but that was the very issue in dispute in this case since the accuracy and correctness of the writing relied upon is disputed. It is accepted that a record was made in relevant terms, but it is disputed that it records accurately the events it purports to be recording.

    5) The remarks of Leggatt LJ have been relied upon in subsequent cases which concerned allegations of rape and historical sexual abuse and in another case concerning acrimonious matrimonial proceedings. His Honour Judge Gore QC did not consider that these cases were good examples of the sort of challenge presented by clinical negligence cases.

32. The Judge's assertion that *Gestmin* is not based on expert evidence and the different context of disputed records in clinical negligence cases, seem to me to be valid comments. To my mind, they may level the playing field away from any concept of records having, so to speak, special "sanctity".

33. The Judge's comments have recently received support in the Court of Appeal's unanimous judgment in *Kogan -v- Martin and Ors* [2019] EWCA Civ 1645. In particular, Floyd LJ noted that:

> ""*Gestmin* is not to be taken as laying down any general principle for the assessment of evidence. It is one of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed. Earlier statements of this kind are discussed by Lord Bingham in his well-known essay The Judge as Juror: The Judicial Determination of Factual Issues (from The Business of Judging, Oxford 2000). But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all of the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence."

The approach of the Court of Appeal leaves it to the trial judge to decide these matters on a case-by-case basis and *Kogan* may be better understood narrowly as a rejection of the bald proposition that records trump recollection.

Standard of Proof - Fraud and Witness Statements

34. The principles relating to evidence and the proof of facts were concisely set out by Peter Jackson J (as he then was) in *Re BR (Proof of Facts)* [2015] EWFC 41 at [4]-[10] (in particular at [7]). These were children proceedings, but it seems to me that the observations are of general relevance.

> *[4] The court acts on evidence, not speculation or assumption. It acts on facts, not worries or concerns.*
>
> *[5] Evidence comes in many forms. It can be live, written, direct, hearsay, electronic, photographic, circumstantial, factual, or by way of expert opinion. It can concern major topics and small details, things that are important and things that are trivial.*
>
> *[6] The burden of proving a fact rests on the person who asserts it.*
>
> *[7] The standard of proof is the balance of probabilities: Is it more likely than not that the event occurred? Neither the seriousness of the allegation, nor the seriousness of the consequences, nor the inherent probabilities alters this.*
>
> > *(i) Where an allegation is a serious one, there is no requirement that the evidence must be of a special quality. The court will consider grave allegations with proper care, but evidence is evidence and the approach to analysing it remains the same in every case. In my view, statements of principle (some relied on in this case) that suggest that an enhanced level of evidential cogency or clarity is required in order to prove a very serious allegation do not assist and may lead a fact-*

finder into error. Despite all disclaimers, reference to qualitative concepts such as cogency and clarity may wrongly be taken to imply that some elevated standard of proof is called for.

(ii) Nor does the seriousness of the consequences of a finding of fact affect the standard to which it must be proved. Whether a man was in a London street at a particular time might be of no great consequence if the issue is whether he was rightly issued with a parking ticket, but it might be of huge consequence if he has been charged with a murder that occurred that day in Paris. The evidential standard to which his presence in the street must be proved is nonetheless the same.

(iii) The court takes account of any inherent probability or improbability of an event having occurred as part of a natural process of reasoning. But the fact that an event is a very common one does not lower the standard of probability to which it must be proved. Nor does the fact that an event is very uncommon raise the standard of proof that must be satisfied before it can be said to have occurred.

(iv) Similarly, the frequency or infrequency with which an event generally occurs cannot divert attention from the question of whether it actually occurred. As Mr Rowley QC and Ms Bannon felicitously observe:

> *"Improbable events occur all the time. Probability itself is a weak prognosticator of occurrence in any given case. Unlikely, even highly unlikely things, do happen. Somebody wins the lottery most weeks; children are struck by lightning. The individual probability of any given person enjoying or suffering either fate is extremely low."*

I agree. It is exceptionally unusual for a baby to sustain so many fractures, but this baby did. The inherent improbability of a devoted parent inflicting such widespread, serious injuries is high, but then so is the inherent improbability of this being the first example of an as yet undiscovered medical condition. Clearly, in this and every case, the answer is not to be found in the inherent probabilities but in the evidence, and it is when analysing the evidence that the court takes account of the probabilities.

[8] Each piece of evidence must be considered in the context of the whole. The medical evidence is important, and the court must assess it carefully, but it is not the only evidence. The evidence of the parents is of the utmost importance and the court must form a clear view of their reliability and credibility.

[9] *When assessing alternative possible explanations for a medical finding, the court will consider each possibility on its merits. There is no hierarchy of possibilities to be taken in sequence as part of a process of elimination. If there are three possibilities, possibility C is not proved merely because possibilities A*

and B are unlikely, nor because C is less unlikely than A and/or B. Possibility C is only proved if, on consideration of all the evidence, it is more likely than not to be the true explanation for the medical findings. So, in a case of this kind, the court will not conclude that an injury has been inflicted merely because known or unknown medical conditions are improbable: that conclusion will only be reached if the entire evidence shows that inflicted injury is more likely than not to be the explanation for the medical findings.

[*10*] *Lastly, where there is a genuine dispute about the origin of a medical finding, the court should not assume that it is always possible to know the answer. It should give due consideration to the possibility that the cause is unknown or that the doctors have missed something or that the medical finding is the result of a condition that has not yet been discovered. These possibilities must be held in mind to whatever extent is appropriate in the individual case."*

35. This approach is consistent with that of HHJ Butler (sitting as a judge of the High Court) in *GB -v- Stoke City Football Club Ltd* [2015] EWHC 2862 (QB) at [17]-[18]:

[17] The standard of proof is the balance of probabilities. It may be unnecessary to say more than that but I will do so simply because there appeared to be a conflict or at least a difference of emphasis between the submissions of Ms Weereratne QC and Mr Mulderig in their respective skeleton openings. Mr Mulderig, referring to Re H *[1996] AC 563, cited part of Lord Nicholls' opinion at page 586 where he said that "the more serious the allegation the less likely it is that the event occurred and hence the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability" and went on to say that "deliberate physical injury is usually less likely than accidental physical injury" and "that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether on balance the event occurred".*

[18] Ms Weereratne QC made clear that she relied on the more recent case of Re B *[2009] 1 AC 11 and submitted that there is no heightened standard of proof in such a case as this. In my judgment, the submissions of Ms Weereratne QC are correct and I think it fair to say that Mr Mulderig did on reflection concede the point. For the avoidance of doubt, there is in my judgment a single civil standard of proof on the balance of probabilities, that is to say proof that the facts in issue more probably occurred than not. It is the simple balance of probabilities, neither more nor less, and the inherent probabilities are simply something to be taken into account where relevant in deciding where the truth lies. There is no sliding scale requiring stronger evidence the more serious the allegation or the more serious the consequences. Those points were clarified by the House of Lords in* Re B, *when explaining the earlier*

decision in Re H. *It follows that "serious cases" do not require a different standard of proof, a heightened standard of proof or a specially cogent standard of evidence. The court must of course give appropriately careful consideration to the evidence before being satisfied of the matter which has to be established and must look with care at accusations which potentially give rise to serious consequences but nevertheless, in determining whether or not they occurred, the court must apply a single unvarying standard, that is to say the balance of probabilities.*

36. There is/was perhaps a tension between the above approaches and that of Males J (as he then was) in *NA -v- Nottinghamshire County Council* [2014] EWHC 4005 (QB) at [158]:

> "*Accordingly I find the allegation of sexual abuse against Mr B proved. I should make clear that in considering this allegation, and indeed the allegation of physical abuse against Mrs A, I have applied the civil standard of proof, that is to say the balance of probabilities, but I have done so bearing in mind the seriousness of the allegations and have therefore applied the approach described by Lord Nicholls in* In re H (Minors) (Sexual Abuse: Standard of Proof) *[1996] AC 563 at 586, as endorsed by the House of Lords in* In re B (Children) *[2008] UKHL 35, [2009] 1 AC 11:*
>
> > *'The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence.'"*

37. This latter approach finds more recent support from Spencer J in *Brighthouse Ltd -v- Tazegul* [2016] EWHC 2277 (QB) at [29], from Julian Knowles J in *London Organising Committee of the Olympic and Paralympic Games -v- Sinfield* [2018] PIQR P8 at [71], and from Teare J in *UK Insurance Ltd -v- Gentry* [2018] EWHC 37 (QB) at [19]-[22]. From the last of those three cases:

> *[19] The Claimant has brought this claim for damages for deceit and therefore bears the burden of proving that Mr. Gentry dishonestly represented to the Claimant that his car had been struck by Mr. Miller's car on 17 March 2013 in a genuine collision at the junction between Folly Farm and the A399. That burden must be discharged on the balance of probabilities but since the allegation against Mr. Gentry is of criminal behaviour, which is inherently unlikely, particularly cogent evidence is required*

before the court can properly be satisfied on the balance of probabilities that he acted in the manner alleged. The need for cogent evidence in this context is apparent from other cases where a party alleges criminal conduct in a civil case; see for example Parker v National Farmers Union Mutual Insurance Society *[2012] EWHC Comm at paragraph 6 and 103 (where an insurance company alleged arson by its assured) and* The Atlantik Confidence *[2016] 2 Lloyd's Reports 525 at paragraphs 6-7 and 9 (where a cargo owner alleged that a shipowner had scuttled his ship in order to make an insurance claim for the loss of the ship).*

[20] The standard of proof required in care proceedings (where a parent is alleged to have assaulted his or her child) has been considered by the House of Lords. Lord Hoffman and Lady Hale have observed that the probabilities must be borne in mind "to whatever extent is appropriate in the particular case" and that where it is clear that a child has been assaulted and that one of the two parents looking after the child must have been responsible the improbability that a parent had assaulted his or her child ceases to be of relevance; see In re B *[2009] 1 AC 11 at paragraphs 14-14 per Lord Hoffman and at paragraphs 62 and 68-73 per Lady Hale.*

[21] By contrast the present case is one where there is a dispute as to whether a fraudulent misrepresentation was made. It is therefore appropriate to bear in mind the improbability of a person acting fraudulently in the manner alleged of Mr. Gentry. It follows that particularly cogent evidence is required in order to discharge the burden of proof. In short the nature of the allegation makes it appropriate to apply a standard not far short of the criminal standard. In In Re B *Lord Hoffman accepted that that can be so in some circumstances (see paragraph 13), as did Lady Hale (see paragraph 69). Thus, in order to discharge the burden of proof the Claimant must be able to exclude any substantial, as opposed to fanciful or remote, possibility that the collision was genuine. The court must have a very high level of confidence that the Claimant's allegation is true; see* The Atlantik Confidence *at paragraph 9.*

[22] There is rarely direct evidence of fraud. Where there is no direct evidence of fraud it can only be inferred from circumstantial evidence. Thus it is necessary for the court to have regard to all the relevant evidence and to the story as a whole. Having considered the evidence it is necessary to stand back and consider whether the alleged fraud has been made out to the required standard.

38. Finally, I draw attention to one aspect of the changes to the rules relating to coming into force in April (the 113th update to Practice Direction Amendments refers). It relates to witness statements and gives rise to the *mandatory* obligation in every witness statement to set out the process by which the statement is obtained – face-to-face, by telephone or through an interpreter. The full text is found at paragraph 18 (5) – a new section to CPR PD 32 – and below here:

18.1 The witness statement must, if practicable, be in the intended witness's own words, the statement should be expressed in the first person and should also state:

(1) the full name of the witness,

(2) his place of residence or, if he is making the statement in his professional, business or other occupational capacity, the address at which he works, the position he holds and the name of his firm or employer,

(3) his occupation, or if he has none, his description, and

(4) the fact that he is a party to the proceedings or is the employee of such a party if it be the case.

(5) the process by which it has been prepared, for example, face-to-face, over the telephone, and/or through an interpreter.".

One can see this as a proper reaction to the 'factory-framing' 'process-driven' approach taken by some litigators, but one can also foresee that it is going to add 5 minutes to many a cross-examination!

Patrick Limb QC
May 2020

To view Patrick's profile, please click here.