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Personal injury: Left to sink or swim on the piste

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Brent McDonald *provides some clarity to the correct approach in cases involving trips abroad*

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In Brief

· *Gouldbourn v Balkan Holidays Ltd and Anr:* Court of Appeal clarifies the test to be applied in claims relating to accidents suffered during holidays abroad.

· *Clarke v Maltby*: further guidance on the way in which future loss of earnings claims should be calculated.

· Comments on the impact on costs and quantum of the above cases.

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This month many personal injury practitioners will be nervously waiting for the Court of Appeal's decision in *Dixie v British Polythene Ltd.* In *Dixie* it will be remembered that the Court of Appeal is being asked to determine whether the judge was right to hold that a strike out for a failure to serve proceedings in time precludes a second action started outside the primary limitation period being saved by a s 33 application. This practitioner knows of a number of cases that depend on the outcome.

In the meantime, two recent cases are worthy of mention. In the first, the Court of Appeal clarified to test to be applied in claims relating to accidents suffered during holidays abroad; and the second provides the latest guidance as to the preferred way to assess claims for future loss of earnings by disabled claimants.

In *Gouldbourn v Balkan Holidays Ltd and Anr* [2010] EWCA Civ 372, [2010] All ER (D) 135 (Mar) Mrs Gouldburn sought damages arising out of an injury sustained on 17 February 2004 when she fell on a ski slope during the course of a six-day package holiday to Bulgaria.

Her case was that the accident was due to the negligence of the ski instructor provided as part of the package holiday. She alleged he had failed to correctly assess her abilities beforeletting her ski down a red run after just a day and a half's skiing, despite the fact that she had been struggling on the nursery slopes earlier that day.

The Court of Appeal was asked whether or not recognised international standards could be applied rather than local standards in claims brought under reg 15 of the Package Travel, Package Holidays and Package Tour Regulations 1992 (SI 1992/3288). Under the regulations, the defendant remained liable for the proper performance of the contact.

On behalf of Mrs Gouldburn, it was argued that the judge had been wrong to hold that the proper test was whether the ski instructor exercised reasonable care and skill as measured against local Bulgarian standards.

The court heard evidence that in contrast to the more client-centred Western European approach, the Eastern European approach could be better described as "sink or swim", meaning that students were simply expected to keep up with the class and follow the instructor or sit exercises out.

Safety standards

In the court below, the judge had concluded that, applying Western European standards, the instructor had failed to assess the claimant's ability properly. This followed from analysis of the handbook issued by the Federation Internationale de Ski (FIS), the international body for enabling competition rules, safety standards and other matters within the sport of skiing. At the time of the accident, the Bulgarian Ski Federation was affiliated with the FIS.

The claimant also relied on the judgment of Phillips J as he then was in *Wilson v Best Travel* [1993] 1 All ER 353 where he held that checking for compliance with local safety regulations by a tour operator would suffice "save where uniform international regulations apply", such as (the claimant submitted) the FIS rules and guidelines.

The claimant also pointed to two first instance decisions: *Lyon v Maidment* [2003] EWHC 1227 in which a concession was made that the FIS rules governed the conduct of skiers in *Andorra and Anderson v Lyotier* [2008] EWHC 2790 where it was implicitly accepted that FIS rules (or equivalent) applied in the French Alps.

Leveson LJ (with whom Jacob LJ and Briggs J agreed) said he was not helped by these first instance decisions: the issue had been conceded in the first case, and the second was determined by English law standards as there was no difference between French and English law on any material points.

In contrast, the Court of Appeal noted that in *Codd v Thompson Tour Operators* [2000] CA B2/2199/1321 and *Holden v First Choice & Flights Limited* (22 May 2006, unreported) the use of British standards in preference to local ones had been rejected. Goldring J had found in *Holden* that the use of inferences by a Judge at first instance were "no substitute for evidence for what is local custom and what may be the local regulation". As there was no evidence of local customs or regulations produced in *Holden,* Goldring J dismissed her case.

Leveson LJ observed that it is a mistake to seek to construe the judgment of Phillips J in Wilson as if it was a statute, but nevertheless it served to identify a very important signpost to the correct approach in cases involving trips abroad. Standards of care were not necessarily to be judged by UK criteria or even western European criteria. Phillips J's reference to uniform international regulations "is intended to do no more than include into any assessment of the standard of care those standards which the relevant country has accepted and adopted".

Therefore Leveson LJ held that the judge was entitled to reject any case based on the FIS rules, and to find that the claimant had not established a breach of Bulgarian standards. The appeal was dismissed.

Essential starting point

It seems that an essential starting point for claimants is now (if it were not already) to seek out firm evidence of the applicable local standards or firm evidence of acceptance of international standards in the jurisdiction where the accident happened. Relying on a case based on matters such as inference is now a perilous (if not doomed) tactic.

In these post-Jackson times, when the issue of costs have assumed a renewed significance, the effect of *Gouldbourn* will inevitably be to increase the front-loading of costs in holiday claims. This in turn may mean that in lower value claims some litigants will find practitioners unwilling to invest the required time and money to establish liability, unless the breach of duty is patently gross.

Assessing quantum of damages

In *Clarke v Maltby* [2010] EWHC 1201 (QB) Owen J was asked to assess the quantum of damages for personal injury. On 25 September 2004 Mrs Clarke was a front seat passenger in a car being driven by Mr Maltby. She sustained multiple and life-threatening injuries in a road traffic accident. Mrs Clarke suffered a brain injury in the accident, as well as an acute psychiatric reaction (depression and PTSD). The central issue for Owen J to determine was the degree to which the brain injury affected Mrs Clarke's functional capacity as a solicitor, and then to assess special damages for loss of earnings and general damages pain, suffering and loss of amenity.

While the claimant had made a substantial recovery from her physical injuries, her case was that she had become increasingly aware of a range of problems. These included mental fatigue, cognitive dysfunction, disinhibition, temper, impaired memory, concentration and processing as well as compromised and inappropriate speech and word finding. By the time of the hearing her ongoing symptoms were all said to be due to brain injury, and therefore unlikely to resolve.

As a result, the claimant said that a career as a solicitor in the field of banking transactions was no longer possible. The defendant disputed this. Although it was accepted that she suffered from some ongoing fatigue and weakness in memory and executive function, the defendant submitted that the claimant retained an earning capacity of about £120,000 to £130,000 gross (salary and bonus) a year as a future as a fixed-share equity partner of a regional firm of solicitors.

After reviewing the claimant's career and the expert reports, Owen J "emphatically" rejected any suggestion of exaggeration. He went so far as to observe in strong terms that such an "allegation, plainly distressing to a solicitor, an officer of the court, ought never to have been made".

In preferring the evidence of the claimant's experts, he dismissed as "unimpressive" Drs Gill (a psychiatrist) and Skelton-Robinson (a psychologist), both called by the defendant.

As a result, he found that "the claimant will not be able to sustain the required level of performance as a solicitor" in her specialist field. He adopted the assessment of the claimant's prospects put forward by the claimant's employment expert, and found that but for the accident she would have moved to a medium sized central London or city law to pursue her ambitions.

Applying *Langford v Hebran and Nynex Cable Communications* [2001] PIQR Q13, Owen J decided to award damages for future loss of earnings based on the claimant's expected basic income plus the lost chance of higher earnings calculated by reference to the chance of attaining the higher levels of success. This should be done on a percentage basis, using the mid point of the range put forward by the claimant's expert. A standard discount factor for other contingencies than mortality, take from Table C of the 6th edition *Ogden Tables*, was applied to a multiplier reflecting retirement at age 65.

However, notwithstanding his complete acceptance of the claimant's medical evidence, in calculating the claimant's residual earning capacity Owen J declined to use the discount factors set out in Table D. The Explanatory Notes to the 6th edition suggest that Table D be used for those who are defined as disabled under the Disability Discrimination Act. The Judge instead opted to use the same discount factor drawn from Table C (nondisabled) that he applied to earnings but for the accident.

Owen J held that no further reduction was needed. The impact of the claimant's disability had already been taken into account, as the "degree of disability has been fully reflected in the difference between her lost and residual earning capacity [of £40,000]".

This is a claim where the case put forward by the defendant met a very hostile reception. Yet, interestingly, the judge accepted an argument commonly used by defendants to minimise future loss of earnings claims, which up to now has met with only mixed success.

It is submitted that the most significant change (in terms of quantum) that the 6th edition introduced was the markedly lower residual earning capacity figures it produced. Tables B and D, it will be recalled, often use as a starting point significant discounts to allow for contingencies other than mortality, even in claims involving employed claimants educated to degree level (or equivalent).

If it were generally accepted that there was no need to reduce the multiplier (merely the multiplicand) where a claimant has been rendered disabled, this would undermine much of the approach set out in the 6th edition. If, as in *Clarke*, a discount in the order of 0.87 were applied to pre- and post-accident multipliers, any award would in fact be somewhat *lower* than those normally seen under previous editions of the Ogden Tables.

The 6th edition of the Ogden Tables was published in 2007. How much longer will personal injury practitioners need to wait before a uniform approach to using the new Ogden tables emerges?