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September 2020
An Update from Complete Counsel

Claire Labio Practice Director

In the July issue you may recall I explained July and August are classically our quiet periods. I wondered how lockdown would affect that - would our clients still take holidays and would I see a downturn in work. Well folks, thank you for the busiest August on record! Whilst that may mean many of you have postponed holidays and worked through, there is definitely a sense of work getting back to normal.

What has been interesting for me to see over this period is the fact that it has acted as a catalyst for Barristers, some of whom are now considering how they can work smarter, more efficiently and at lower cost.

After several requests over lockdown I now assist groups or individuals in deciding which route is best for them, help to implement the changes and build the new vision they see for their practice and working life.

I work in collaboration with O'Connors Legal Services to advise and deliver these projects. O'Connors bring their wealth of experience and legal expertise to the table. They assist with defining the vision, company structure, shareholding agreements, employment contracts and regulatory aspects whilst I work to identify the correct case management system for your needs, recruit the clerking team and ensure they know the correct process and procedures to follow together with website and social media profiling. I am also busy updating our current website which I feel needs freshening up.

Please contact me directly if you wish to discuss any of the above. Sometimes it only takes a discussion to give you the confidence you need to change how you work forever.

Claire Labio
Practice Director

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Ogden 8:
Who knows what the future holds?

Charles Feeny Barrister

The publication of the Ogden Tables (8th edition) in July and the fiasco over the Alevel results in August do not immediately seem to have much in common. However, on analysis, they both demonstrate the problematical issue of how you apply statistics to an individual case.

Statistics can only tell us the mean position in a group, and there is evident difficulty in applying the mean position to an individual case. Within the group there will inevitably be considerable variation around the mean.

Lord Rodger in Sienkiewicz explained the problems in applying statistical evidence to an individual case ; in particular, he drew a distinction between proving a probability and proving a fact. This distinction appears elusive to many. Certainly it didn't occur to the Department of Education and Ofqual when they decided to use an algorithm based on statistical evidence to adjust predicted grades for Alevel students and then award grades on the basis of the adjustments made by the algorithm.

An A-level grade is a fact evidenced by a certificate. The undignified dispute that has arisen as to why the algorithm was not robust and who noticed this in the first place, is irrelevant. It was never appropriate to use an algorithm in this context. Individuals whose grades had been marked down as a result of the algorithm could legitimately complain that in their specific case there was no reasonable basis for believing that the adjusted grades were accurate. This has been highlighted by the undoubtedly exceptional student at a school in a disadvantaged area who was predicted 'A' grades, but marked down because the student was at a school in such an area. However, this obviously unacceptable outcome just emphasises why it was inappropriate to use the algorithm at all, in terms of awarding individual grades.

The Ogden Tables (8th edition) demonstrates a continuing attempt to base the assessment of damages for future loss of earnings on statistical evidence as opposed to judicial impression. Reading the introductory notes, you have a sense that the working party have a degree of frustration that old habits die hard. If this is the case, then this frustration is justified.

The apparent contradiction between the criticism of the use of the algorithm in Alevel results, but acceptance of statistical evidence in relation to future loss of earnings, can be explained initially by quoting Frank Sinatra:

"Who knows what the future holds? Only a fool would say."

The future can never be a fact; it is inevitably a matter of speculation. In this respect, in assessing future loss, a Judge has to adopt the mantle of a fool. Statistical evidence would appear to be the best way of minimising the comparison. The statistical evidence is telling us what is known of what happened to persons who were, as far as can be ascertained, in a similar situation at the time of assessment. A comparison can be drawn with the assessment of life expectation. In *Royal Victoria Infirmary & Associated Hospitals NHS Foundation Trust v. B (a child) [2002] EWCA Civ 248*, the Court of Appeal held that medical statistics were admissible in the assessment of life expectation and should be used as the starting point.

In *Billett v. the MOD* [2015] EWCA Civ 773, the Court of Appeal accepted the validity of the data in the Ogden Tables and stated that the same should be applied except where they produced "an obviously unreal result". This was the case in *Billett* since a reasonable assessment of the evidence showed that the Claimant would likely not suffer any loss of earnings at all, whereas the tables would have

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indicated a significant loss. The most that the Claimant was likely to suffer was some disadvantage on the open labour market, and damages were assessed on this basis. Conversely, the approach in the Tables would predict an earning capacity for a person in a persistent vegetative state.

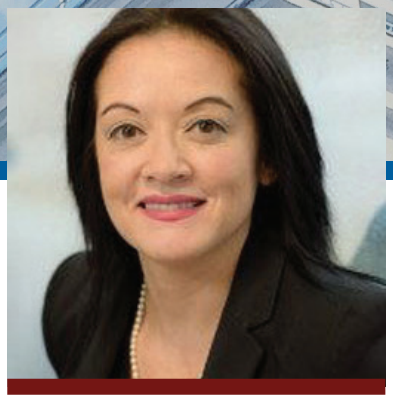
If, however, the threshold condition for application is overcome, it is difficult to see what reasonable evidential basis would produce a significant discount from the figures obtained from the Tables. The Working Party believe that there has been a tendency to make significant adjustments based on a misconception that the data relating to persons with disability is predominantly based on persons with severe disability. They indicate that the data is really to contrary effect, that most of the persons defined as disabled for the purposes of the statistics were at the mild end of "mild to moderate". They conclude at paragraph 91 that if there is to be any departure on the basis of the assessment of disability, such departure would "normally be expected to be modest". They believe that "interpolation between a midpoint between the disabled and non-disabled reduction factors is not advised".

Again in this context there is clear comparison of the use of statistics in relation to life expectation. Whilst clinicians giving evidence on life expectation would not be expected to follow the outcome predicted in a slavish way, nonetheless any adjustment is likely to be marginal and within the framework of the statistics.

It would be helpful if the discussion of disability in the Working Party's Introduction could be translated into a more refined version of the data, in particular in terms of giving brackets of disability, which would enable a more confident comparison to be made with an individual case.

The discussions of the Working Party and the A-level results fiasco emphasise the importance of identifying the precise nature of the issue to be addressed before any attempt is made to apply a statistical model.

We are continuing to discuss the application of statistical evidence as to causation through Pro-VIDE-Law. We have held two conferences on this subject over the course of the last year and details of the same can be found on the website. Some of the speakers at the conference are now preparing a written piece discussing the issues in more detail. It is hoped that this will be published as an article later this year.



European settlement: December 2020 deadline is looming

Lorraine Mensah Barrister

EU withdrawal: EEA Regs or EUSS: making the right choice to settle.

Although the United Kingdom left the European Union [EU] on the 31 January 2020, European Union law will continue until the 31 December 2020, which marks the end of the transitional period. This means those EU citizens that have not yet regularised their status or have not secured permanent status in the United Kingdom have a small window of opportunity left if they wish to take advantage of the current system.

Under The Immigration (European Economic Area) Regulations 2016, as amended [EEA Regs], an EEA nationals who met the criteria as a Qualified person (job seeker, worker, self-employed, self-sufficient or student) could apply under Regulation 15 for permanent residence if they had resided in the UK continuously as a Qualified person for 5 years. The ability to apply for permanent residence ends on the 31 December 2020.

Under the European Union (Withdrawal Agreement) Act 2020 the UK government has sought to offer EU citizens residence similar rights. The new European Settlement Scheme known as EUSS, grants eligible applicants with either Pre-settled status of 5 years or Settled Status of Indefinite Leave to Remain (akin to permanent residence as it has no end date).

The Home office most recent statistics as of March 2020 stated:

"The number of applications concluded in March 2020 was 148,800. Of these, 52% were granted settled status and 42% were granted pre-settled status. Of the remaining applications, 4,800 received a withdrawn or void outcome, 3,300 were invalid, and 300 were refused. Of the refusals, the vast majority (more than 99%) were refused on eligibility grounds, and the remainder (less than 1%) were refused on suitability grounds. Overall, as of 31 March 2020, the total number of applications that have been concluded was more than 3.1 million (3,147,000."

The new Home Office Guidance for EUSS seems to stir away from the environment felt by those in the Points Based system. Paragraph 1.15 of the Statement of Intent on the EU Settlement Scheme published on 21 June 2018 states:

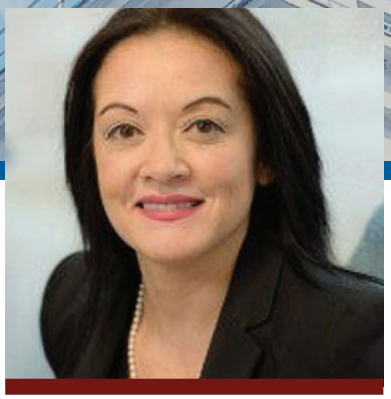
"The Home Office will work with applicants to help them avoid any errors or omissions that may impact on the application decision. Caseworkers will have scope to engage with applicants and give them a reasonable opportunity to submit supplementary evidence or remedy any deficiencies where it appears a simple omission has taken place. A principle of evidential flexibility will apply, enabling caseworkers to exercise discretion in favour of the applicant where appropriate, to minimise administrative burdens. User-friendly guidance will be available online to guide applicants through each stage of the application process."

At first blush one might be forgiven for thinking the new scheme is great progress and a very positive step, and for many it is. However, it does not provide the same rights as the old Regulations. The EUSS scheme requires applicants to meet fairly straightforward eligibility criteria for Settled status; effectively evidence of identity and a continuous period of 5 years residence; their immigration status being effectively immaterial.

So far so good.

There is a fly in the ointment! For EU citizens who apply and get Settled Status their ability to apply for British citizenship later may be adversely affected. This is because Settled status is not retrospective and so the clock starts when the grant is made. If an EU citizen does in fact meet the criteria for permanent residence under the EEA Regs the 5 years period can be retrospectively applied and therefore they will have already clocked up the 5 years on grant. Therefore, two individuals in exactly the same position could find themselves on different tracks. One having to wait potentially years longer before they become eligible for British citizenship.

The impact of the above is that it is crucial representatives



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and applicants carefully consider their position before making a EUSS application. If permanent residence is viable then it provides an easier path to becoming a British citizen.

The criteria for permanent residence under the EEA Regs is that the individual has resided as a Qualified person for the full 5 years. There is also the requirement the individual have in place comprehensive medical insurance or a European Health Insurance Card. In May this year the Home office have updated their guidance,
"the Comprehensive Sickness Insurance requirement will be applied in the citizenship context. As a result, EU citizens who have not worked in the UK continuously for five years need to have held private health insurance or a European Health Insurance Card issued by their country of nationality during the three/five year qualifying period. If they do not, they are likely to be refused citizenship."

You have been warned.

View Lorraine's profile on our website here.

Would Rabone be decided the same way after Fernandes De Oliveira v Portugal [2019] ECHR 106?

Samuel Irving Paralegal

Are voluntary psychiatric patients treated as 'ordinary' hospital patients or akin to detained psychiatric patients, for the purposes of Article 2? In the recent ECHR case of Fernandes De Oliveira v Portugal [2019] ECHR 106, the Court has affirmed the position adopted by the Supreme Court in Rabone v Pennine Care NHS Trust [2012] UKSC 2; namely the latter. Fernandes concerned the suicide of A.J., a 36 year old male with a history of alcohol and drug addiction. The finding of the Court that his suicide in principle engaged his Article 2 rights as akin to a detained psychiatric patient was expected and relatively uncontroversial, but in the same (proverbial) breath the Court also made the following interesting observation:

"… the Court considers that in the case of patients who are hospitalised following a judicial order, and therefore involuntarily, the Court, in its own assessment, may apply a stricter standard of scrutiny."

By implication, the Court suggests that a less strict approach might be taken in the alternative case, namely where a patient is in hospital voluntarily (as was the case in Fernandes and Rabone). It is therefore instructive to compare the approach the Court did in fact take, to the approach of the Supreme Court in Rabone.

By way of reminder, the key question for the Court to answer is whether "the authorities knew or ought to have known at the time, of the existence of a real and immediate risk to the life of an identified individual…" (before latterly deciding whether the authorities did enough to prevent this risk from eventuating). The Court in Fernandes had available to it a set of criteria for assessing 'real and immediate risk' in 'suicide' cases which was not, or at least not in its entirety and form, available at the time Rabone was decided:

"i) a history of mental health problems;
ii) the gravity of the mental condition;
iii) previous attempts to commit suicide or self-harm;
iv) suicidal thoughts or threats;
v) signs of physical or mental distress."

The Court first accepted 'it is clear, that A.J. had suffered from serious mental health problems over a long period' before turning their attention to the period shortly before his death. The Court accepted the domestic court's finding that, notwithstanding an attempted suicide on 1 April 2000, 'A.J. had not displayed signs of suicidal thoughts throughout his stay at the HSC from 2 April 2000 onwards'. More particularly, 'the clinical records for 27 April 2000 [the date of his death] note that A.J. was calm, had been walking around the building in which he was hospitalised, had eaten well during lunch and had been present for his afternoon snack.' Perhaps straying into consideration of the properly latter question of the reasonableness of the authority's actions, the Court noted that A.J's treatment varied in its restrictiveness (as those treating him deemed appropriate) and that it 'had no reason to question' the assessment of his treating psychiatric doctor that his overall treatment plan was 'appropriate and proportionate in the circumstances'. Finally, the Court relied on the assessment of a psychiatrist that for inpatients 'such as' (though not specifically) A.J., the immediacy of risk may vary. Taken together the Court therefore concluded that the risk was not real and immediate.

By comparison, the approach of the Supreme Court in Rabone was much simpler. First it rehearsed the fact that breach of the duty in question had a higher threshold then 'mere' negligence, before addressing in turn whether the risk was 'real' and 'immediate'. As to the former it was sufficient that the (claimant's) experts agreed 'that all ordinarily competent and responsible psychiatrists would have regarded Melanie as being in need of protection against the risk of suicide'. As to the latter, Lord Dyson drew on ECHR authority to support the use of 'present and continuing' as a phrase which captured the essence of the meaning of 'immediate'.

Melanie, whose suicide was the subject of Rabone died whilst on a two day period of home leave, and Lord Dyson's view was that the risk of suicide existed and continued throughout that period of leave, which was sufficient to satisfy the second element. It was noted by Lord Dyson in his recitation of the facts that Mrs Rabone,

Samuel Irving Paralegal

Melanie's mother, was 'concerned' about Melanie coming home. It is therefore notable that the Court in Fernandes specifically noted that "There is no evidence to suggest that the family objected to A.J.'s weekends at home" (his suicide did not occur on the occasion of such a weekend, as Melanie's did).

Notwithstanding that, following Fernandes, we would now expect the Supreme Court to take a more structured approach to a case like Rabone, would doing so have changed the outcome?

Reflecting on the criteria used by the Court in Rabone: Melanie had a clear history of mental illness and suicide attempts, including what appears to have been a suicide attempt 8 days before her fateful home leave (she agreed to an informal admission on that same day). The day before her leave, her father noted to the ward that he did not see improvement and that she had expressed fleeting suicidal thoughts during her admission.

These facts make sense of the brevity with which Lord Dyson concluded that Melanie's risk of suicide was 'real' and it is difficult to see how anything in Fernandes would change that assessment. Similarly, they sit in stark contrast to the contented and compliant picture that A.J. presented on the days before and day of his death. Whilst Melanie was capable of requesting (and enthusiastically so) home leave, she did so following a clear and protracted period of (likely) depression and suicidal thoughts. It seems likely therefore that the Supreme Court would have arrived at much the same conclusion following Fernandes, whether by adopting the newer criteria or the simpler, earlier 'real and immediate risk' model.

What then of the 'stricter [and correlative lax?] standard of scrutiny'? It remains to be seen if there is any substance to this distinction drawn by the ECHR. Perhaps the answer lies in the fact that, despite its recitation of the apparent difference between a breach of the Article 2 obligation and 'mere' negligence, once a 'real and immediate risk' was established, the Supreme Court in Rabone went on to state that: "The standard demanded for the performance of the operational duty is one of reasonableness." Rather than weakening the protections for voluntary patients, the Court in Fernandes may have been suggesting a stricter approach to involuntary/detained patients which might go beyond 'reasonableness'. As 'it was common ground that the decision to allow Melanie two days home leave was one that no reasonable psychiatric practitioner would have made', it remains most unlikely that, on its facts, Rabone is likely to change. But perhaps there is a hint that the ECHR will come down all the harder on authorities who fail to take extra care of those it has compelled into its care. Time will tell.

Sam is now leaving us after 2 years as a paralegal helping with research, case preparation, and training. He has secured a pupillage. We wish him success in his pupillage and in his future career at the Bar. We now have a vacancy for a paralegal. The work is freelance but regular. We are looking for someone with a strong academic record and a genuine interest in the law. The role involves interesting work and contact with accomplished lawyers. It will be an instructive learning curve and hopefully stepping stone for a young lawyer. If you are interested please email Claire Labio.


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