Personal Injuries Bar Association – Richard Davies Lecture 2022

Lincolns Inn, 20 October 2022

The Rt Hon Lord Justice Bean

It is an honour to be asked to deliver the third Richard Davies lecture to this Association. The first was on damages for loss of a chance and the second was on liability in tort for the criminal acts of third parties. When Steven Snowden and Stephen Cottrell invited me to speak to the Association I said that if you wanted a learned lecture on aspects of the law of tort you would have to go elsewhere. Others are far better qualified than I am.

In any event I have become sceptical about the utility of lectures by serving judges about substantive law. This is because of the application of three rules. Rule one is that we are not supposed to discuss our own judgments. A judgment must, in the traditional phrase, speak for itself. Rule two is that we are not supposed to discuss, except in the most flattering terms, each other's judgments (even those from which we dissented). Rule three is that we should not express an opinion on any issue of law which might come before our court in a future case for fear of being conflicted out of sitting. The result of applying these three rules is that, with some exceptions (such as last year's talk by Dingemans LJ) ,

judicial lectures can be pitched at such a level of generality that the discussion is rather insipid, and you would get better value from a trenchant academic.

So what I decided to do is to offer a look back to my early years at the Bar in 1 Temple Gardens, now Temple Gardens Chambers. My practice there was largely (though not entirely) personal injury work and I thought that the current generation of PI lawyers might find it of at least historical interest.

1 Temple Gardens was a very old-fashioned set of chambers. It was run on the system of "one member, one vote", but only in the sense that the one member who had a vote was the head of chambers, Colin Fawcett QC. He deserves at least a footnote in the history books because he introduced a young law student called Tony Blair to Derry Irvine, who in turn introduced Mr Blair to John Smith. This was ironic, since Colin was a lifelong Conservative. He had never been to university, and was quite suspicious of anyone with academic credentials: he regarded a first class degree as a sign of a misspent youth.

His practice was entirely personal injury, usually but not always for plaintiffs (as they were then called) He had some notable cases in the law reports. One example was Berry v Stone Manganese Marine, the first reported claim for noise induced deafness. Another, which I observed, was MacShannon v Rockware Glass, a group of four appeals in which James Mackay and Colin Fawcett, silks for the defendants, persuaded the House of Lords to end the practice of forum

shopping by victims of factory accidents in Scotland bringing their claims in Newcastle or Carlisle. The future Lord Chancellor addressed their Lordships on private international law, but as I recall they seemed at least equally interested in Colin's submissions about the cost of travel between Edinburgh and Newcastle and the menus in the respective court canteens.

Colin was also the lead performer in a band and wrote the songs himself. One of these was called "The Lads of the PI Brigade". There were no lasses mentioned in the song, and no women at 1 TG until 1984.

Other members of chambers included the MPs Patrick Mayhew and Norman Miscampbell. When Sir Patrick became a law officer this conferred considerable powers of patronage on the senior clerk in the allocation of Treasury Solicitor work, including PI cases and inquests. One of the young tenants who did a great deal of this work was called Ian Burnett. You probably know what happened to him.

So much has changed in personal injury litigation since I was called to the Bar that it is hard to know where to start. The first area of great change is where cases are tried and before what level of judge. My first High Court trial was a late return from my former pupil master John Cherry. It was a quantum only case where the insurers had paid £2,000 into court. I was for the plaintiff and we got general damages of £2,250. Adjusting for inflation, in today's money the

payment in was £10,000 and the award of damages £11,000. As the Duke of Wellington said after Waterloo, it was a damned close run thing. But what may be remarkable to the younger members of this audience is that the case was heard by a real High Court Judge – Mr Justice Stuart-Smith, the father of my present colleague Lord Justice Stuart-Smith. These days I imagine it would have been heard in the county court before a Deputy District Judge.

Sir Murray Stuart-Smith was one of a number of High Court Judges who had been personal injury specialists. The High Court non-jury list was dominated by PI cases. In the late 1970s there were well-known plaintiffs' judges such as Bristow and O'Connor JJ and well-known defendants' judges such as Thompson J. Sometimes cases at the RCJ were listed as "floating" and the actuarial value of the claim to the parties waiting in the corridor to be allocated to a judge might vary sharply upwards or downwards in a matter of minutes depending on which judge was about to finish his listed case.

Some High Court judges considered personal injury cases beneath them. I was once a junior in a large five-claimant PI trial with liability and quantum in issue listed before Hobhouse J, to start at 1030. At 10am on the morning of the hearing the insurers doubled their previous offer. I was sent to find the judge's clerk and to ask for time for negotiation. The reply came back that the judge would give us until 10:45 but no longer, so the five gravely injured claimants had

half an hour to make this vitally important decision which would affect the rest of their lives. They agreed to accept the offer. At 10:45 my leader informed the judge of the outcome. He simply said “Very well, I give judgment for the agreed amount. It is unfortunate that the court was kept waiting in this way”. On that note he got up and left. I formed the view then that Hobhouse was a desiccated calculating machine, unsuited to trying cases involving human beings. Our subsequent encounters, which were happily infrequent, did nothing to alter that first impression.

Hobhouse may be contrasted with Comyn J. In those days judges of the Family Division heard PI cases from time to time. I had a case listed before him, which we settled. My opponent and I informed him of the agreement. Although the judge would not have known me from a bar of soap, he smiled benevolently and said to me and my opponent that it seemed to him that both parties had been very well advised, as indeed he would expect. It costs nothing to be civil.

Appeals were different too. Whether from the High Court or the county court, any appeal from a decision at a trial was straight to the Court of Appeal and did not require permission. There were considerable delays, often of a year or so, in appeals being heard. It was not unknown for defendants who had lost at trial to enter a notice of appeal, obtain a stay on payment of the damages and then offer the plaintiff a discount for prompt payment in order to avoid the year’s

delay before the appeal. All that the Court of Appeal had in advance was a shorthand transcript of the judgment below, the notice of appeal, the pleadings, and any expert's reports. The skeleton argument had not yet been invented. Nor had the lever-arch file. Judgments in the Court of Appeal were very often given extempore. This does of course require some skill, as any judge sitting in the county court will tell you, but my predecessors as LJs probably had a pace of working life which was slow by modern standards.

However, that is jumping ahead. I will return to my life as a baby barrister. My first year was spent in magistrates' courts with a large number of motoring cases, especially driving without due care and attention, a charge on which it was almost impossible to secure an acquittal. After that I graduated to county court trials; coroner's inquests; applications to the judge in charge of the lists to vacate a fixture; and High Court Master's summonses, say for further and better particulars or interrogatories, or to consider whether a PI case issued in the High Court – as every claim over £5,000 had to be until 1991 - should be transferred to the county court. The Bear Garden at the RCJ would be buzzing with junior counsel every day for 12.00 summonses, mainly in PI cases.

In the 1980s the Senior Master was John Bickford Smith. After dealing with the summons he liked to give his view of the case: for example: "I won't be trying the case, but you might like to know that I think that damages on full liability

would be around £15,000, and the plaintiff will go down for one-third contributory negligence. I hope that is helpful. Good morning." I suppose you could say he was a pioneer of Early Neutral Evaluation.

Another aspect of the work, and by far the dullest, was pleadings. These were highly formalistic and designed to reveal as little as possible about the case. In the case of the defence the pleading would commonly deny everything and perhaps plead contributory negligence at the end, saying something like: the plaintiff failed to heed that of which he now complains. There was, of course, an obligation to disclose contemporaneous documents relevant to liability. My first case for a particular firm of defendants' solicitors was a factory accident. On the morning of the trial my solicitor showed me a statutory form – I think it was called an F43 – which had not been disclosed, and which contained a full and frank confession by the foreman that the accident was all his fault. I said that we either had to hand over the document or admit liability. The insurance rep was furious and asked whose side I was on. I never heard from that firm again.

Negotiation in advance of a trial played very little part in my working life. It was almost always done by solicitors. There was no exchange of lay witness statements. When Ackner J, in a reported case in 1978 (*Ollett v Bristol Aerojet)* laid down that expert engineers' reports should be exchanged in full in advance of the trial that was considered innovative, indeed frightfully daring. So life was

full of surprises. I recall a trial before Woolf J, the future Lord Chief Justice, where the plaintiff, my client, was claiming damages for a back injury. Early in his cross-examination counsel for the defendant announced with a flourish, “My Lord, there is a film”. We trooped down to what was called “the jury room” in the bowels of the RCJ where a private investigator was there with video footage of the plaintiff servicing his own car. It showed that he had been making heavy weather of his injuries, but it was well short of showing fraud. Harry Woolf watched the film thoughtfully and asked to see it a second time. We then returned to court. At the end of the trial he awarded my client more damages than we had ever dreamed of. There is a moral in that tale which I leave you to work out for yourselves.

I have already mentioned that there were no skeleton arguments in those days. If you cited law you had to supply your opponent and the court usher with a list of authorities. The usher would then assemble a row or stack of leather-bound volumes of law reports for the judge. Some cases really involved no law at all, but there were exceptions and there was the occasional judge who revelled in points of law. A case in which I appeared before McCullough J involved a plaintiff who slipped on a pool of water in a washroom at work. The statement of claim said that the Defendants had caused or permitted the pool of water to be on the floor and that they had done so negligently and/or contrary

to section 16 of the Offices, Shops and Railway Premises Act 1963 which provided that floors should be kept free from any substance likely to cause persons to slip. His Lordship took the view that "likely" must mean "more likely than not". He asked to be addressed on the difference between the judgments of the Privy Council in *The Wagon Mound No. 1* 1961 AC*; The Wagon Mound No.2* 1967 AC and the then recent decision of the Court of Appeal in *Bailey v Rolls Royce.* He then required statistics of the number of employees using the washroom each day and the likelihood of any of them taking a path to the washbasins which would involve slipping on the pool of water. At the end of two and a half rather exhausting days he gave judgment for the plaintiff on the simple basis that whoever carelessly spilt the water should have mopped it up before anyone got hurt. Bristow J or O'Connor J would have disposed of the case well inside a morning and without resort to any law reports. Section 69 of the Enterprise and Regulatory Reform Act 2013 would have stopped us from relying on the statute, and shortened the hearing, but would not, I think, have altered the result.

The JSB/Judicial College Guidelines on quantum did not exist; nor, of course, did the internet. Instead there was Kemp and Kemp; and the quantum section of the monthly publication Current Law, which included numerous decisions from county courts.

Expert evidence was a prominent feature of PI litigation. The partisan expert was not universal, but was an all-too-familiar phenomenon. In many cases you only had to see the name at the top of the notepaper on which the report was written to know what the particular expert would say. Dr Hack for the plaintiff would say that the prognosis was extremely guarded, if not dismal, and the injury would have severe and long-lasting effects. Dr Quack, who had taken care to observe the plaintiff walking up Harley Street on his way to the medical examination, would opine that he was likely to make a full recovery in next to no time. Some of the expert engineers were just as bad, if not worse. I should add that in the days before advance disclosure of non-medical expert's reports, cross-examining an expert on the hoof was about as difficult an advocacy task as could be found. There were no mandatory meetings of experts to resolve their differences although once experts' reports were disclosed it was usual for each to comment on the other's views in writing.

Some of the medical experts had not actually operated on anyone for a long time but instead spent all their time doing medico-legal reports and occasionally attending court to be cross-examined. Often the greatest obstacle to listing (in the days before video conferencing) was the difficulty of booking Dr Hack and Dr Quack for the same court on the same day.

From 2003 to 2005 I was a member of the Civil Justice Council, and at the request of Lord Phillips MR co-authored a Protocol for Experts in civil litigation. This led to my serving for some time on the Judicial Committee of the Academy of Experts. My impression is that, a generation after Lord Woolf's Report and the power to appoint a single joint expert, partisans such as Dr Hack and Dr Quack are less commonly employed nowadays than they used to be, but you will know better than I do whether they have entirely passed into history.

Another enormous change has been the fee regime. In my days at the PI Bar there was legal aid available to claimants (and not just in medical negligence litigation). If counsel's opinion persuaded the legal aid committee that the case had a reasonable prospect of success, legal aid would be forthcoming subject to means. In workplace accident cases an injured plaintiff who was a member of a trade union would get support from the trade union.

Conditional fee agreements were not introduced until long after I gave up PI work – indeed, in my PI days it would have been professional misconduct for a barrister to agree to act on a conditional fee basis. There was no costs budgeting either. And Sir Rupert Jackson's epic report on costs lay far in the future.

This is not to say that the late 1970s and early 1980s were a golden age. The fees were quite modest and although we were paid whatever the outcome of the case there were sometimes serious delays, especially in legal aid cases. An

entry from my first fee book illustrates the point. On 28 March 1979 I went to Uxbridge County Court to do a damage-only runner. The case was adjourned, presumably because it was crowded out of the list. The brief fee was £37.50, say £200 in today's money. The good news is that the fee was paid. The bad news is that it was paid more than four years later, on 19 April 1983. £37.50 would have been much more useful to me in 1979 than it was in 1983.

As for the case not being reached, that was a common experience in county courts, particularly those which heard family cases as well as civil ones. I was glad to read as recently as last month a joint statement by the Master of the Rolls (as Head of Civil Justice) and the President of the Family Division that they had agreed that "civil cases listed to be heard in the county court should not be adjourned in order to accommodate urgent family cases without the express approval of either the relevant civil presiding judge or the relevant designated civil judge". The joint statement was "intended to clarify, not change the current position". It seems that some of the problems which affected PI practitioners in the late 1970s have not gone away. Another perennial issue is the difficulty of obtaining references for a silk application if you do not do many trials, and every trial in which you do appear is before a different judge.

In the mid-1990s I was a member of Lord Woolf's Fast Track Working Party. We designed rules applicable to this middle tier of county court cases. The upper

limit for cases on the fast track was, I think, £1,000 for PI and housing cases and £15,000 for anything else. How times have changed.

After 7 ½ years as a tenant at One Temple Gardens I moved at the end of 1985 to Devereux Chambers and became an employment practitioner. I did not return to PI work until I was appointed a judge and even then only rarely by comparison with the High Court judges of 40 years ago. I did hear two cases which leapfrogged their way from me to the Supreme Court: *Dunhill v Burgin*, about settlements by claimants under a disability; and *Knauer v Ministry of Justice*, about the calculation of damages in Fatal Accidents Act claims. In the Court of Appeal I have sat on only a few appeals in the last four years, though they have been very interesting ones. They included *Barlow v Wigan MBC*, a case of a lady who tripped over a tree root on a path in a municipal park. The law was about as complicated as in any case in which I have ever been involved. We had cited to us statutes from 1835 onwards and five reported cases from the 19th century; and decided the case on the basis of the retrospective presumption of dedication of a highway at common law. Since you are all familiar with that I will say no more about it; and I did promise not to venture into issues of substantive law (see Rules One and Three above). But no one should think that every slipping and tripping case is straightforward.

Looking back on the changes in the last 45 years I think some have been for the better and some not. The change, following the Woolf Report, to proper disclosure of each side's evidence in advance of the trial has surely furthered the interests of justice, even if it has sadly resulted in fewer trials for members of this Association to conduct. Video conferencing will help the careers of practitioners with young children or those with mobility difficulties, as the Master of the Rolls has recently observed. The move towards serious negotiation and sometimes mediation in advance of major trials is similarly to be welcomed.

On the other hand, I wonder whether the abolition of legal aid for PI cases other than medical negligence and its replacement by conditional fee agreements has really been of benefit to anyone. But that is a topic on which serving judges are not allowed to say much; and in any event your first-hand evidence would count for a great deal more than my sketchy impressions based on hearsay.

Despite all the changes personal injury work remains, as it always has been, one of the most significant areas of the work of the English Bar. Long may it remain so. May I conclude by thanking you for your attention and wishing continued success and contentment to the lads - and lasses - of the PI Brigade.