



Fatal Accidents: Suicide, Causation and Remoteness

Eileen Corr (Administratrix of the estate of Thomas Corr (Deceased)) v IBC Vehicles Ltd [2006] EWCA Civ 331;

John Foy, Q.C. and **Andrew Ritchie** for the appellant.
Instructed by Messrs Rowley Ashworth, London.

Al Hogarth summarises a tragic case but one which clearly defined the law surrounding suicide in personal injury and fatal accident claims. It also once again confirmed both John Foy Q.C. and Andrew Ritchie as being at the forefront of personal injury litigation, breaking new ground on foreseeability and causation.

The claim arose out of a serious injury Mr. Corr sustained at work when a malfunctioning machine picked up a panel which struck him in the head, severing his ear. Had he not instinctively moved he would have been decapitated. Liability was admitted. Tragically, Mr. Corr suffered severe PTSD, descended in to depression and finally committed suicide some six years after the accident leaving behind the appellant and their two children.

At first instance Nigel Baker Q.C. held the employer had been in breach of its duty of care. However, that duty did not extend to a duty to take care to prevent Mr. Corr's suicide and his suicide was not reasonably foreseeable. On appeal it was contended on behalf of the appellant that the only requirement was foreseeability of some injury and that depression and consequent suicide lay within the scope of the

In this Issue

May 2006

Fatal Accidents: **1**
Suicide, Causation and Remoteness

Considering **2**
"maintenance in an efficient state"
Esther Pounder

Will you still need me when I'm 64? **4**
Laura Elfield

The Changing Landscape of Fraud **5**
Adrian Maxwell

DNA and police **6**
Vince Williams

employer's duty. In the alternative it was contended that on the evidence suicide was foreseeable because the expert evidence showed that between 10 and 17% of those with severe depression commit suicide.

HELD: Ward, Sedly & Wilson LJ: Appeal allowed Majority decision Ward LJ dissenting). (1) On the evidence of Mr. Corr's state of mind, his suicide did not break the chain of causation between the negligence and the consequences of the suicide. (2) It did not have to be shown that at the time of the accident, suicide was reasonably foreseeable as a kind of damage separate from psychiatric and personal injury. (3) Responsibility for the effects of suicide depended on whether it flowed from a condition for which the employer was responsible. In the instant case the claim was founded on depression, which was a foreseeable consequence of the employer's negligence. Suicide is not an uncommon consequence of depression and thus the compensable consequences of the depression included the eventual suicide. ♦ **Al Hogarth**

Considering "maintenance in an efficient state"

Wendy Susan Lewis v. Avidan Ltd (t/a High Meadow Nursing Home) [2005] EWCA Civ 670

The question of whether certain of the Regulations in the six pack impose strict liability upon employers has been considered by the Court of Appeal in a number of well known cases. In *Lewis v. Avidan* their Lordships turned their attention to regulation 5 of the Workplace (Health Safety & Welfare) Regulations 1992 ('the Workplace Regulations'), with somewhat controversial results reports Esther Pounder..

FACTS

The Claimant, Ms Lewis, was a care assistant who worked at a nursing home owned and run by the Defendant. On 17th October 2000, during a night shift, Ms Lewis slipped and fell on a patch of water in a hallway. The water had leaked onto the floor from a concealed pipe which had burst shortly before the accident. Nobody was aware of the leak and Ms Lewis's claim in negligence and under the Occupiers' Liability Act failed on the basis that the Defendant was not at fault either as to the wet state of the floor or as to the bursting of the pipe. Ms Lewis did not dispute those findings but focussed her appeal on the Judge's finding that there was no breach of regulation 5 of the Workplace Regulations.

A two judge tribunal of the Court of Appeal, comprising May LJ and Rix LJ, rejected the Claimant's appeal. May LJ giving the single judgment held that there was no breach of regulation 5 based on the state of the floor alone, which was found to have been efficiently maintained and in good repair. Nor did his Lordship consider that there could be a breach as a consequence of the defective nature of the pipe, as the pipe was not part of the workplace. He focussed his attention, therefore, upon the question of whether the pipe was equipment, a device or system to which regulation 5(1) applied, apparently pursuant to regulation 5(3). May LJ said that he was '*prepared for a moment to assume*' that the pipe that burst was such '*equipment, a device or system*' and that unknown to the Defendants the pipe was not in good repair. He considered that: '*the*

single question then is whether a fault in the pipe would be liable to result in failure to comply with any of the regulations. A fault in the pipe would be liable to produce a flood, which might make the floor wet and slippery, but that alone would not result in a failure to comply with regulation 12(3). Breach of regulation 12(3) occurs not simply because the floor is slippery but when the employer has failed to take reasonable steps to prevent the floor being slippery or to mop it up. It would be that failure, not the bursting pipe which would result in a failure to comply with the regulation.



THE REGULATIONS

Regulation 5(1) provides that:

- '(1) The workplace and the equipment, devices and systems to which this regulation applies shall be maintained (including cleaned as appropriate) in an efficient state, in efficient working order and in good repair.
- (2) Where appropriate, the equipment, devices and systems to which this regulation applies shall be subject to a suitable system of maintenance.
- (3) The equipment, devices and systems to which this regulation applies are -
- equipment and devices a fault in which is liable to result in a failure to comply with any of these Regulations; and
 - mechanical ventilation systems provided pursuant to regulation 6 (whether or not they include equipment or devices within sub-paragraph (a) of this paragraph).'

COMMENT

There are a number of difficulties with the approach taken by the Court of Appeal. Firstly, the analysis of the flood as a potential breach of regulation 12(3) by reason of the operation of regulation 5(3) would appear to be a strained construction. It is accepted by May LJ early in his judgment that the regulation '*so far as it goes and if it applies is absolute*'. Reference is made to the cases of *Stark v. The Post Office [2000] EWCA Civ 64* and *Galashiels Gas Co Ltd v. Millar [1949] AC 275*. If the provision is absolute, there should be no need to consider whether a defect in some other equipment, device or system, not itself part of the workplace, might nonetheless result in a breach in any of the other workplace regulations. Potentially, of course, all the construction may do is allow a further means of establishing a breach. There is the danger, however, that interpreting regulation 5(1) as bound by 5(3) may mean, as in the case of *Lewis* that a requirement of '*reasonable practicability*' is able to get in by the back door.

The second issue relates to the interpretation of maintenance by their Lordships. May LJ stated that: *'The word "maintained" imports the concept of doing something to the floor itself, such as cleaning or repairing it. The mere fact of a flood does not mean that the floor is not maintained in an efficient state.'* Such an interpretation would again, potentially allow a defence akin to reasonable practicability to be raised. On May LJ's construction, an employer who regularly cleaned and repaired the workplace might, by so doing, be able to escape the supposedly strict liability provisions of regulation 5(1), as indeed did Ms Lewis's employer in the present case.

The interpretation preferred by May LJ would appear to run contrary to that propounded in the well known case of *Stark v. The Post Office*. That case concerned a potential breach of regulation 6(1) of the Provision and Use of Work Equipment Regulations 1992 ('PUWER 1992'). Both regulation 6(1), and its replacement regulation 5(1) of the PUWER 1998, are drafted in almost identical terms to regulation 5(1) of the Workplace Regulations.

In *Stark* it was held that there was imposed upon employers an absolute obligation to ensure that work equipment was maintained in an efficient state, in efficient working order and good repair. This meant that the bicycle Mr Stark was riding had to be kept in a state such that it worked efficiently at all times. Given that the stirrup broke, the bicycle could not be said to have been working efficiently and, accordingly, the Post Office was in breach of the regulation. In reaching that conclusion, the Court of Appeal, made reference to the old authorities of *Hamilton v. National Coal Board (1960) AC 633* and *Galashiels Gas Co Ltd v. Millar*.

In *Hamilton* the provision under consideration was section 81(1) of the Mines and Quarries Act 1964. That section was concerned with the proper maintenance of *'all parts and working gear, whether fixed or moveable, including the anchoring and fixing appliances, of all machinery and apparatus used as, or forming, part of the equipment of a mine'*. In *Galashiels* the Court considered section 22(1) of the Factories Act 1937 which provided that *'Every hoist or list shall be of good mechanical construction, sound material and adequate strength, and be properly maintained'*. In both cases it was held that *'maintained'* denoted a continuous state of affairs. Lord MacDermott in *Galashiels* put the point most forcefully when he stated that: *'The words of the sub-section are imperative "shall be properly maintained" and I can find nothing in the context or in the general intention of the Act, read as a whole, which should lead your Lordships to infer any qualification upon that absolute obligation'* and *'..when the terms of the definition are regarded...they indicate conclusively that in s.22, sub-s 1, "maintained" is employed to denote the continuance of a state of working efficiency. In the ordinary use of language one cannot be said to maintain a piece of machinery in efficient working order over a given period if, on occasion within that period, the machinery, whatever the reason, is not in efficient working order. In short the definition describes a result to be achieved rather than the means of achieving it.'*

The position in relation to workplace equipment has been recently revisited in the case of *Ball v. Street [2005] EWCA Civ 76*. In that case a farmer was injured when the mechanism in a hay turning machine failed causing a spring to fly out and strike him in the eye. His claim was brought pursuant to regulation 5(1) of the PUWER 1998. The Court of Appeal found that given the accident occurred there was obviously a defect and the machine cannot be said to have been maintained in good repair nor was it in an efficient state. Longmore LJ commented that: *'The obligation to maintain equipment at work is only partly to maintain it in the state in which it was "suitably" provided in the first instance but must also extend to*

maintaining it in a state in which the worker is not, in fact, to be injured...Ever since Galashiels the employer has been held responsible, pursuant to his maintenance obligations, for the unexplained (and indeed inexplicable) accident.' [my emphasis].

In all of the above cases *'maintained'* was interpreted not as denoting action to be taken but as indicating the status quo to be maintained. Logically Lewis should have followed the above cases. Had the same definition been applied Ms Lewis would have won her case as the fact of the flood would have been sufficient to amount to a breach of regulation 5(1).

The fact that the above cases were concerned with different legislative provisions should not have caused any difficulty in allowing the same interpretation of the word maintained. This issue was addressed in *Stark* with reference to the speech of Lord Jenkins in *Hamilton*. Lord Jenkins stated that: *'in the present case the language, the subject*



matter and the intent...are so closely allied that...it would to my mind, be clearly wrong to give the words "properly maintained" in section 81(1) a different meaning from that which has been authoritatively assigned to precisely the same words in comparable provisions of the Act of 1937'. He continued: 'It would, as I think, be manifestly absurd if the same statutory language applied to two precisely similar machines with precisely similar defects contracted in precisely similar circumstances should give rise to a breach of statutory duty with respect to one of them, but not with respect to the other, merely because the locus in quo was in one case a mine and the other a factory'. This reasoning was taken on board in Stark, but not, it would seem in Lewis.



Will you still need me when I'm 64?

The Employment Equality (Age) Regulations 2006.

Protection from discrimination on grounds of age comes ever closer: a welcome relief for those of us who can no longer remember the day they found their first grey hair! Laura Elfield outlines the final draft of the Employment Equality Age Regulations 2006 ("the Regulations") that were placed before Parliament in March 2006 and, subject to approval, will come into force on the 1st October 2006, although there will be transitional provisions in place until April 2007.

In general, the Regulations follow the style of drafting of the other Regulations implementing the EU's Equal Treatment Framework Directive of November 2000, namely those outlawing discrimination on grounds of religion and belief and sexual orientation. The usual classes of workers are covered – namely job applicants, employees, former employees, contract workers, members of occupational pension schemes, office-holders, the police, barristers and advocates and partners.

Age discrimination takes the form of the now well-established categories of direct and indirect discrimination, victimisation and harassment.

While the focus of most publicity has been about the default retirement age of 65, the potential impact of the Regulations is far wider. Discrimination can be against anyone of any age. There is as yet no guidance as to who would be an appropriate comparator ... is that the gravy train approaching or just the whistle of my hearing aid?

There are some interesting peculiarities in the Regulations. Discrimination on the grounds of apparent age is outlawed (so let that be a warning to all of you who think I'm only 29). Most unfamiliar is that direct discrimination can be justified, if the employer can show that it is a proportionate means of achieving a legitimate aim. The Regulations set out examples of what might be legitimate aims including health, safety and welfare, encouraging and rewarding loyalty and recruiting or retaining older people.

An important exception is contained in Regulation 7(4): It is not unlawful to refuse to offer employment to someone over the age of 65 or to discriminate against someone of that age in the arrangements made for determining to whom employment should be offered. Age 65 is also of course the default retirement age, with review of the need for such a default age to be undertaken in 2011. Once an employee reaches the age of 65, nothing in the Regulations renders a retirement dismissal unlawful on grounds of discrimination. The other side of that coin is that compulsory retirement before the age of 65 will have to be objectively justified in order to be lawful.

Compulsory retirements at 65 and over will also be subject to unfair dismissal legislation for the first time. In particular, all employees are given the right to request working beyond retirement age. The requirements of fairness include the duty to consider such requests. Schedule 7 of the Regulations sets out the steps to be taken by the employer to comply with the duty to consider working beyond retirement. The first step is the one of which employers need now to be conscious. An employer who is intending to dismiss an employee on the ground of retirement is obliged to give written notification of not more than one year but less than six months before dismissal of the retirement date and of the employee's right to request not to retire on that date. The duty to notify, if not complied with, continues to the 14th day before dismissal. If six months notice is not given, an employment tribunal can award compensation up to a maximum of 8 week's pay.

There are complex transitional provisions in place dealing with cases where an employer has already given notice of dismissal to an employee before 1st October 2006 and which expires before the 1st April 2007. Employers will want to acquaint themselves with the Regulations, including the transitional provisions, sooner rather than later. Review of advertising, recruitment, promotion and training practices as well as pay scales, benefits and pension schemes will be required. Useful guidance can be found on the DTI and Age Positive web-sites at www.dti.gov.uk/er/equality/age.htm and www.agepositive.gov.uk.

Interesting times are ahead. Just try to imagine assembling an interview panel, from your colleagues, which does not offend against any of the six heads of outlawed discrimination (for those with fading memories that's race, sex, disability, sexuality, religion and age ... in no particular order of course!). Or you could start by deleting those parts of this article which will be unlawful come October 2006.

Laura Elfield has a mixed civil practice focusing on personal injury and employment law. She is co-ordinator of Chambers' Employment Team.

The Changing Landscape of Fraud

Fraud is no longer a traditional police function. In 2002 ACPO had 8 Memos of Understanding with fraud investigative bodies. Now, only the City of London Police has fraud as a Home Office objective. The ACPO [Blueprint for Policing in the 21st Century](#)¹ makes no mention of 'fraud'. Fraud is now 'financial regulation', what Phillip Wood calls the 'creeping criminalisation of fiduciary duties in financial services'². Adrian Maxwell outlines the new landscape.

MAJOR FRAUD REVIEW

On 27/10/05 a major review of the investigation and prosecution of fraud was announced. On 15/11/05 at the Annual Financial Crime Conference the AG explained that the government was looking at the 'American experience'. There was the possibility of a national fraud squad but in 'regulatory form'. We can expect an SEC. The FSA implements the National Fraud Strategy but in a non-criminal environment. Margaret COLE, FSA Director of Enforcement, is opposed to the 'judicialisation' of FSA enforcement³. She dismisses '*lengthy legal submissions, however eloquently delivered*'. She will seek to impose higher financial penalties. It is worth reading the speech in full.

COMPANY LAW REVIEW

The [Company Law Reform Bill](#)⁴ started its 2nd reading in the HOL in January 2006. There is focus on the criminal liability of the 'officer in default' i.e. directors, de facto directors, company secretaries, managers and new categories of (1) '*senior executives*' i.e. relatively senior employees involved in policy and decision making, and (2) '*delegates*' i.e. individuals to whom a particular function has been delegated by or with a director's authority.

NEW FRAUD BILL

The new fraud act becomes law in April 2006. The focus is on intent, not effect. The Ghosh test⁵ still operates. Conspiracy to defraud remains. The new offences are (1) **False representation**. There need not be reliance. (2) **Failing to disclose information**. The new concept of 'legal duty' to disclose e.g. a statutory, fiduciary or contractual duty. (3) **Abusing a position of trust**. Dependant on a relationship between a victim and D. 'Abuse' covers a wide range of conduct e.g. an employee cloning software would be covered. There are new offences of (1) obtaining services dishonestly, (2) possessing articles for fraud, and (3) participating in a fraudulent business.

SERIOUS ORGANISED CRIME AGENCY

The White Paper One Step Ahead: A 21st Century Strategy to Defeat Organised Crime⁶ was published in March 2004. The [Serious Organised Crime and Police Act 2005](#)⁷ created SOCA, operational in April 2006. The Directors of HRMC, DPP or SFO can take over, direct or prosecute 'designated offences' being investigated by SOCA (s.38). Those Directors can 'direct' SOCA as to what is a 'designated offence' (s.39). SOCA staff can compel cooperation in interview or document production (s.60-75). The sentencing innovation of a Financial Reporting Order (FRO) allows the court to monitor the financial affairs of a defendant over a defined period (s.76-81). There is no reason why a convicted corporate body could not be subject of an FRO.

EURO DIRECTIVES

In the fight against organised crime and global terrorism UK criminal legislation is

now driven by the EU Harmonisation Programme. Powers of investigators are increased across the board. In 2003 the EU enacted [8th Company Law Directorate on Statutory Company Audit](#) a reaction to Enron and Parmalat. The [Company \(Audit, Investigations and Community Enterprise\) Act 2004](#)⁸ provides for the independence of auditors. Investigators have wide powers (s.21-24). The [Electronic Commerce \(EC Directive\) Regulations 2002 \(SI 2002 No. 2013\)](#) allows customers and investigators to follow an electronic audit trail in business conducted through email.

In 2004 the UK implemented the [EU Market Abuse Directive 2003/6/EC](#) - a framework for insider dealing. In 2006⁹ the UK implemented the [EU Public Sector and Utilities Sector Directives 2004/17/EC and 2004/18/EC](#) which prevent a company bidding for a public sector contract if the company or a director has been convicted of fraud. The [EU Transparency Directive 2004/109/EC](#) requires that ownership of companies trading in EU markets are transparent. These provisions are in the Company Reform Bill. In 2006 there will be EU Directives on an EU Criminal Records database, data protection in police and criminal matters, asset freezing orders, exchanging electronic evidence, charities involved



with terrorism, protecting public bodies and private companies from organised crime etc. In 2007 there will Directives on the freezing of assets on a 'preventative basis', the 'approximation' of member state legislation re tax fraud and ID theft, an Evidence Warrant, the wilful destruction of evidence and documents. The 3rd Directive will be UK law in 2007 (see below).f documentary evidence etc. etc. UK legislation will cover all these areas.

MONEY LAUNDERING

The [3rd EU Money Laundering Directive](#)¹⁰ was in force on 15/12/05. Member states must adopt it by

DNA and police

Can the Family Court compel the police to disclose samples obtained in the investigation of crime?

Police forces around the country are increasingly finding themselves entangled in family proceedings. Parties to such proceedings frequently apply for disclosure of evidence obtained by the police in the course of their criminal investigations.

Vince Williams reports on the situation that arose in *London Borough of Lambeth v. S, C, V & J (Respondents) and the Commissioner of Police of the Metropolis & the Secretary of State for the Home Department. (Intervenors)* [2006] EWHC 326 (Fam). The material sought was not, as is so often the case, documentary evidence. Rather, the application related to a DNA sample and/or profile derived therefrom. Both the Commissioner, and the Home Office opposed the application.

Background

The family proceedings concerned a number of issues, one of which was the parentage of a seven year old boy, J. The identity of his mother was known. However, there was a question as to whether his father was Mr. D or Mr. O'N. The situation was complicated by the fact that O'N had stabbed D. The badly injured D was taken to hospital where he subsequently died. O'N was eventually convicted of manslaughter.

Whilst at hospital, a pre-transfusion blood sample was taken from D. The police used that sample in the course of their investigations in order to establish whether there had been physical contact between D and O'N. D's sample was analysed and a DNA profile was obtained from it. The sample was destroyed. All that remained was a case record of the DNA profile and a 'blood stain card'. The profile and the blood stain card were held by the Forensic Science Service Laboratory - effectively to the order of the Metropolitan Police Commissioner.

Statutory Framework

The taking and retention of samples from persons during the investigation of an offence is governed by s 64(1A) of the *Police and Criminal Evidence Act 1984*, which provides:

"Where-

- a) samples are taken from a person in connection with the investigation of an offence, and
- b) subsection (3) below does not require them to be destroyed,

the samples may be retained after they have fulfilled the purposes for which they were taken but shall not be

used by any person except for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution."

Was the sample a retained sample under the Act?

The Local Authority argued that because the sample was taken by the hospital as a matter of medical necessity, there was no consent to the sample being given to or retained by the police for their forensic investigations and, accordingly, the sample was not a retained sample under the Act and that therefore the strictures imposed by s. 64(1A) did not apply.

Ryder J disagreed. He noted that there was a common law power available to the police to seize evidence that was not revoked by the 1984 Act: *Regina (Rottman) v. Commissioner of the Police of the Metropolis* [2002] 2 AC 692. Provided the power was used for the legitimate aim of preventing crime and its use was proportionate to that aim, it would be human rights compliant.

Furthermore, there was a general statutory power of seizure under s 19(2)(b) PACE 1984.

Thus, Ryder J concluded that D's samples were lawfully seized and retained by the police for forensic examination and investigation in connection with an offence.

Sample not taken from a suspect

It was also argued that even if lawfully seized and retained, the samples were not taken from a suspect and accordingly, the provisions of the 1984 Act did not apply.

Ryder J again disagreed. The phrase '*taken from a person in connection with the investigation of an offence*' does not necessarily connote from a suspect. The phrase had to be given a purposive construction. The Act was directed towards the police and provided for the situation that the police may not themselves have taken the sample but have possession and the use of it and also that they may have come upon a sample otherwise than it being taken from a person e.g. blood that is found on an inanimate object.

Furthermore to limit or exclude volunteers and victims would discourage the comparative taking of samples from volunteers which is a valuable part of investigative processes. Were volunteers to be excluded, their samples would not be regulated under the statutory code and would be subject to the whim of those in whose possession they end up. They could be used in parallel non criminal proceedings to assist in the determination of parentage. That could not be in the public interest. The statutory code was there to protect against the misuse of samples by strictly limiting the purposes to which a retained sample could be used.

Ryder J added that, by virtue of s 64(1B)(b), the 1984 Act also regulated the use of information derived from the sample, i.e. the DNA profile.

Can a family court order that D's blood sample or the DNA profile derived from it be used for a purpose not within the meaning of s 64(1A)?

The purposes to which samples may be put were considered by the House of Lords in *R v. Chief Constable of Yorkshire Police ex p LS (by his mother and litigation friend, JB)*; *R v. Chief Constable of South Yorkshire Police ex p Marper* [2004] 1 WLR 2196.

In *Marper* it was argued that the words "*for purposes relating to*" in s.64(1A) were capable of permitting uses other than those stated. The appellants appealed against a decision refusing an application for a declaration that s64 PACE 1984 as amended was incompatible with Articles 8 and 14. Lord Steyn rejected the argument and construed the words in issue as relating solely to each of the three defined uses in s 64(1A) rather than as an invitation to construct other uses not defined by Parliament. Either Art 8 was

not engaged where a sample is retained for one or more of the three purposes set out in s 64(1A) or if it was, the three purposes fall within the qualifications permitted by Art 8(2). The House held that the Act's provisions were human rights compliant precisely because the purposes were strictly limited and in that context Lord Steyn emphasised that the purposes were to be strictly construed. It therefore followed that the use of retained DNA samples for any purpose other than that related to the specified uses in the Act would be contrary to the clear wording of the Act and inconsistent with the public policy underpinning the Act.

Ryder J observed that if, as *Marper* clearly indicated, the Act was human rights compliant and the purposes were to be strictly construed, then the use of retained samples in family proceedings must fall outside the three permitted purposes set out in s 64(1A). Accordingly, there was no power to order disclosure of the sample.

Vincent Williams was Counsel for the Commissioner. He advises on police civil actions and is listed as a 'Leader at the Bar' in the area Police Law by Chambers UK, A Client's Guide to the Profession.

...Continued from page 2

It is also worth looking at the approach taken by the Court of Appeal in *Lewis* in considering regulation 5 in the context of the various European directives in force. May LJ addressed the impact of the directives as follows: *'The [Workplace] Regulations were made to implement a European Framework Directive (Council Directive 89/391/EEC) of 12 June 1989 and a Workplace Directive (Council Directive 89/654/EEC) of 30 November 1989. There is, I think, nothing relevant to be derived from those directives except that they contain minimum requirements.'*

It is certainly the case that the directives contain minimum requirements, however that is not to say that a Member State cannot impose stricter requirements if they so choose, see the comments of Waller LJ in *Stark*. In *Gallacher v. Kleinwort Benson (TRS) Ltd [2003] S.C.L.R 384* Lord Reid stated that *'It is necessary to take account of the European law dimension in the interpretation and application of such regulations; and that it should not be assumed that any approach under the Factories Act continues to apply'*. In the light of such comments, is interesting to note that May LJ in defining *'maintained in an efficient state'* sought assistance not from the post-directive cases of *Stark* or *Ball* but referred instead to the comments of Lord Oaksey in *Latimer v. AEC Limited [1953] AC 643 at 656*, a case concerned with the definition of *'maintained'* pursuant to section 25(1) of the Factories Act 1937.

CONCLUSIONS

The law has been left in an unfortunate state following *Lewis*. It would seem to be the position that a statutory provision, namely regulation 5 of the Workplace Regulations, drafted in almost identical terms to regulation 5 of the PUWER 1998, is to be construed in a completely different way, giving rise to an unhelpful and artificial distinction between efficiency in the context of the workplace and work equipment. Given the similarity between the legislative provisions the effect is unfair on employees injured as a consequence of the state of the workplace rather than work equipment. Unless and until the House of Lords remedies the situation many more employees will undoubtedly fall foul of a distinction that to them will seem nonsensical; a view likely to be shared by many practitioners.

Esther Pounder joined Chambers last year after pupillage. She is able to undertake a variety of work including personal injury, crime, family, landlord and tenant; and has a particular interest in professional negligence and personal injury.

...Continued from page 5

15/12/07. UK legislation is likely in November 2007. All businesses will have to have 'risk based' KYC procedures. The Directive enlarges the 'regulated sector' to include life and investment insurance intermediaries and trust and company services. The Directive imposes onerous duties of due diligence and introduces the new concept of the 'Politically Exposed Person' (an FATF term). A10 defines PEPs as - *Natural persons who are or have been entrusted with prominent public functions, and whose substantial or complex financial or business transactions may represent an enhanced money laundering risk and close family members or close associates of such persons.* The JMLSG suggests institutions use the Transparency International Corruption Perceptions Index¹¹ to identify potential risk countries and PEPs. UK legislation does not yet address PEPs but rigorous KYC policies are well established. With a PEP, 'senior management' must approve the relationship and the source of funds and wealth must be verified and continued to be monitored. A32 of directive mandates that trusts, company service providers and casinos must be licensed or registered. 'Criminals or their associates' will be banned from owning or managing these bodies. It is difficult to see how the 'associate' test will be applied. It's going to be interesting!

Adrian Maxwell defends and prosecutes in heavy crime on all circuits. He specialises in fraud and money laundering and is on the SFO's list of prosecuting counsel.

1 http://www.acpo.police.uk/news/2001/q3/R_ADD-1.html

2 Journal of International Banking and Financial Law. (2006) JIBFL 3.

3 18/01/06 speech to the SII Compliance Forum Enforcement Process Review Implementation

4 <http://www.publications.parliament.uk/pa/ld200506/ldbills/034/2006034.htm>

5 R v Ghosh [1982] Q.B.1053.

6 CM 6167. <http://www.homeoffice.gov.uk>

7 In force 01/08/05.

8 Explanatory notes - <http://www.opsi.gov.uk/acts/en2004/2004en27.htm>. In force 06/04/05.

9 Regulations (Public Contracts Regulations 2006 - SI 2006/5 and Utilities Contracts Regulations 2006 - SI 2006/6

10 Full title - The Third Money Laundering Directive on the Prevention of the use of the Financial System for the Purpose of Money Laundering and Terrorist Financing.

11 Para 2.30 JMLSG Guidance Notes and see <http://www.infoplease.com/ipa/A0781359.html>

Mediation Research by 9 Gough Square

The Mediation Team at 9 Gough Square is carrying out research into the use of mediation so that Chambers can put together a programme of in house training on mediations skills for our clients. If you have not received a questionnaire and would like to participate in this research please visit our mediation practice area at www.9goughsquare.co.uk.

Using an independent person to facilitate the process of resolving a dispute quickly, confidentially and cost effectively without trial, can apply to many situations. The imperative to use mediation has been well established by the courts (*Halsey v Milton Keynes General Health Trust et al*), signifying greater opportunities to make more use of the process.

For details of Chambers Mediation Team contact John Kerr on jkerr@9goughsquare.co.uk or telephone 020 7832 0501 for our *Immediate Solutions* information pack.

Escaping the dock

R v Russell Court of Appeal 14/12/06.
Case No. 200407117/B3

In the Court of Appeal, 9 Gough Square Barrister, Adrian Maxwell, established the proposition that a trial judge had been entitled to continue with his summing up after an attempt by the defendant to disrupt it, by escaping the dock and attacking the judge, since no fair-minded observer would conclude that continuing with the trial was unfair or perceived to be unfair.

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London

▶ 8th June, 2006

at The Law Society, Chancery Lane

Guest speakers:

Southampton

- **Richard Cross, Accident**
Investigation Expert

London

- **Ronan Dardis, Consultant**
Neurological & Spinal Surgeon

Topics:

- ◆ Six Pack Update
- ◆ Practice & Procedure Update
- ◆ Admissions
- ◆ Vicarious Liability
- ◆ Damages Update including Periodical Payments Orders
- ◆ Part 36 Offers & Costs
- ◆ Hand Arm Vibration Syndrome Law & Practice
- ◆ Asbestos Update
- ◆ Care Claims
- ◆ Restoration of Companies to the Register
- ◆ Low Impact Injuries

Cost £155.00 + VAT per delegate or 3 for 2

Detailed course notes

5 hours Law Society or ILEX CPD

see www.9goughsquare.co.uk for full details

9 Gough Square's Annual Clinical and Legal Update Seminar

London Venue

▶ **Tuesday**
14th November 2006