

# The Key

# Kennedys

Legal advice in black and white

March 2006

## Going alternative

### Is alternative dispute resolution (ADR) an option for personal injury claims?

**ADR in personal injury claims? Everybody knows it's a non-starter, don't they? After all, ADR is likely to be ineffective in large claims and uneconomical in small ones. And, in any event, the defendant can pay into court; or one side or the other feels that their case is so strong that a compromise is just not necessary. So why should the parties think about ADR? The answer is: because the Court of Appeal tells them to.**

#### Pressure to mediate

In *Halsey v Milton Keynes General NHS Trust*, the court laid down guidelines for costs where one party has refused to entertain mediation. Essentially, even successful parties may be penalised if it is shown that their objections to

mediation have been unreasonable. Costs are in issue unless, among other considerations, the expense of



mediation is too high, the mediation process would have delayed justice, or there was no reasonable chance that a settlement could have been reached in this way.

Claimants' solicitors ignore invitations to ADR at their peril.

There is clear pressure on the parties to resort to ADR whenever possible. Courts will always encourage it. Recent pilot schemes in London and Manchester have insisted that the parties consider ADR before allowing a case to go to trial.

#### Advantages of ADR

Studies suggest that 80% of all attempts at a mediated settlement are

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successful; but can that rate be transferred into the personal injury arena?

The first point is, of course, that ADR does not always mean mediation. It includes the sort of settlement conferences that personal injury practitioners have been utilising for years. But why is this something to expand and develop? Why should it become a prominent disposal tactic?

The short answer is because a settlement conference can do many things that a trial cannot. The defendant's lawyer makes it plain that informality is the order of the day. First names are used. The claimant understands that, when they talk to the lawyer, they are speaking directly to the defendant. This is important because a claimant always feels a sense of grievance as a result of the injury and is also often immensely resentful about their subsequent treatment by an apparently indifferent employer, callous motorist or faceless insurer. In the atmosphere of the conference, they can air these grievances in a way which would be impossible in a courtroom.

And this process gives the claimant ownership of any settlement. While a day in court may be lost, with responsibility for decisions in the hands of a judge, the claimant will feel that they have direct control of these negotiations.

### Insurer's viewpoint

What are the practical benefits to an insurer? The first and most obvious is early settlement, which must result in a significant saving in legal costs. ADR almost always takes place after a solicitor has finished the investigative and preparatory work for a claim;

it avoids the next layer of fees which would be incurred by preparation for trial, involving a considerable amount of work, including the instruction of counsel.

The second benefit is the possibility of fine-tuning: when faced with conflicting evidence or opinions, a judge usually has to prefer one to the other, while a settlement conference can settle on a point somewhere between the two.

Thirdly, even if the conference does not succeed, invariably the issues will have been narrowed and distilled. The defendant's lawyer will also have been able to take the measure of the claimant as a witness.

Finally, now that a court may impose periodic payments, even though neither party wants them, the parties may be persuaded that their needs will be better suited by a binding agreement reached through ADR, followed by discontinuance of proceedings.

### How to do it

So how difficult is all this? The parties can simply write to the court, explaining that they intend to try ADR and asking for a stay. The court will always encourage them.

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# But which doctor?

As recent litigation demonstrates, making the right choice between having a psychiatrist or a psychologist as your expert witness is central to success in court.

**The tricky question of who knows best has recently been revisited by the Court of Appeal in *Wilson v Clements* [2005] EWCA Civ 1424. In that case, the court had to decide whether the trial judge had made a mistake in preferring the opinion of the defendant's psychiatric expert to that of the claimant's psychologist.**

### The background

In April 1996, the claimant was involved in a road traffic accident, sustaining whiplash injuries which, she alleged, triggered chronic pain disorder. In December 1997, she was certified as being incapable of work and her employment was terminated. She subsequently claimed for past and future earnings. The orthopaedic evidence was not disputed. The real issue was the psychological consequences of the accident.

### The cause of the injury

Liability was admitted but the defendant made several important points about the cause and extent of the injuries:

- The claimant had significant pre-existing back and neck problems.
- Taking this pre-existing vulnerability into

- account, the orthopaedic effects of the accident did not justify the claimant being away from work for more than six months.
- In any event, there were no organic orthopaedic effects that prevented the claimant being away from work.
  - The psychological effects of the accident would have prevented the claimant from working for no more than four weeks.

It was also noted that the claimant had been involved in four accidents between 1993 and 1997, all of which resulted in soft tissue and whiplash type injuries. The particular accident at the heart of the present case was the second one in this series. Furthermore, the claimant consulted her GP frequently. Therefore the issue for the court was whether her history represented a somatoform disorder, which is an extreme version of somatisation. (Somatisation is a condition where physical symptoms are caused by mental or emotional factors, such as stress.)

### The experts

Professor Beaumont, a consultant neuropsychologist and chartered clinical psychologist, gave evidence on behalf of the

claimant. He said that she was suffering from chronic pain disorder. In contrast, Dr Cooling, a consultant psychiatrist who gave evidence on behalf of the defendant, concluded that the claimant was suffering from a somatoform disorder.

The trial focused particularly on the meaning and diagnostic coding (the diagnostic condition for this condition is F45, according to the ICD-10 classification) of somatoform and somatisation. The main features of a somatoform disorder are multiple, recurrent and frequently changing physical symptoms of at least two years duration. The disorder is chronic – that is to say, its onset is often gradual but it lasts a long time and involves very slow changes – and is often associated with the disruption of interpersonal and family behaviour.

The question for the trial judge was whether the somatoform complaints of pain suffered by the claimant, which could not be explained in terms of her physical pathology, were attributable in any way to the accident, or whether her condition had been established before then.

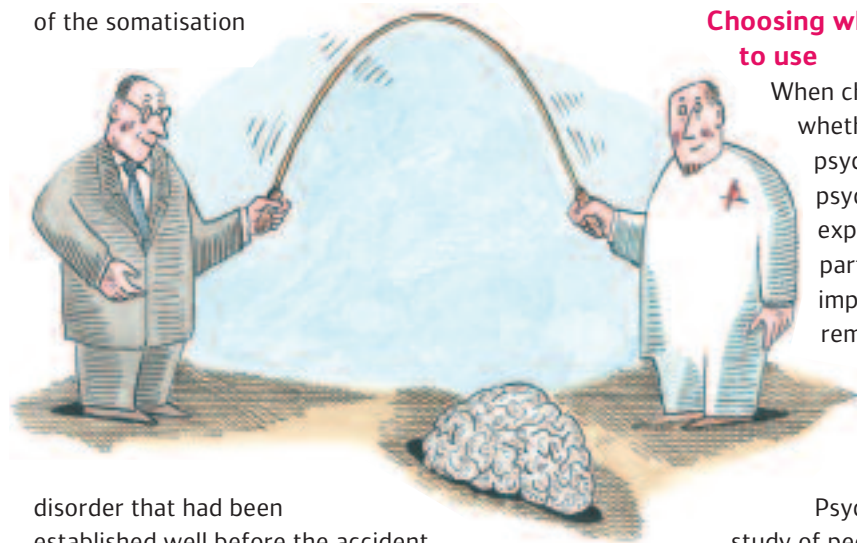
### The trial court's conclusions

At trial, the judge gave three reasons for preferring the expert evidence of the defendant:

- (1) Somatisation was accepted by the claimant's expert as being outside his field of expertise.
- (2) Professor Beaumont had made a mistake about the diagnostic criteria and accordingly applied them incorrectly.
- (3) The claimant said her frequent visits to her GP were due to medical problems

associated with her being a single parent living in unsuitable social and housing conditions. Her expert accepted this explanation. In fact, there was evidence of a high frequency of attendance at her GP's surgery predating the birth of her children.

The trial judge took the view that the accident was relatively minor in nature, producing physical and psychological injuries from which the claimant had recovered within six months. Any continuing symptoms were a manifestation of the somatisation



disorder that had been established well before the accident.

### The Court of Appeal's decision

During cross-examination at the trial, the defendant's expert said:

"The jury is still out on the precise causation for somatisation disorder....I think it is a cultural phenomenon and ... much more understandable in terms of cultural and social expectations and meanings for patients. And I think the meanings you attribute to symptoms are terribly important when you are looking at this area."

The Court of Appeal concluded that there was no evidence about the causation of somatoform disorder and it was consequently not justifiable simply to merge one type of pain – organic pain – into another type endured by the claimant. To borrow from the argument put forward by the defendant's legal advisers, it is dangerously easy to treat a subsequent event as the inevitable result of a former incident, even when there is nothing to prove the connection between the two occurrences. The appeal was therefore dismissed.

### Choosing which expert to use

When choosing between whether to use a psychologist or psychiatrist as an expert witness in a particular case, it is important to remember the key differences between the two disciplines.

Psychology is the study of people – how they think, act, react and interact. It is concerned with all aspects of behaviour, thoughts, feelings and underlying motivation. Psychologists are not usually medically qualified and therefore are unable to diagnose medical conditions: their job is mainly concerned with the normal functioning of the mind, including learning, remembering and development.

In contrast, psychiatry is the study of mental disorders – their diagnosis, management and

prevention. And, unlike their near-namesakes, psychiatrists are qualified medical specialists.

### Key points when choosing your expert

When considering possible claims for mental injury, it is important to take the following into account:

- Is it a claim for a recognised psychiatric injury?
- Who has provided the diagnosis?
- If a further diagnosis is required, *only* instruct a psychiatrist.
- Would the case be assisted by having a psychologist – for example, in obtaining information relating to the claimant's pre-accident cognitive functioning?
- Has the expert witness making the report had access to all the claimant's up-to-date medical records?
- Are the instructions to the expert appropriate? Do they go into detail and ask the expert to support their findings with evidence?
- Bearing in mind the size of claim, is it proportionate to instruct a psychiatrist whose fees will be significantly more expensive?
- Is your expert's evidence vulnerable to attack during cross-examination?

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# A question of height

New rules are helping to tackle the main cause of death at work.

**The Work at Height Regulations 2005 (WAHR) came into force on 6 April last year. Falls from height are the main cause of death at work and the introduction of WAHR is an important milestone in the Health and Safety Executive's continuing focus on this major workplace risk.**

## A new emphasis

Not only do WAHR implement the Temporary Work at Height Directive but they also consolidate and amend all other existing regulations dealing with work at height.

There is nothing wildly new in WAHR: it is the emphasis that has changed, and the fact that all the rules on the subject can now be found in one place. Granted, the old "2m rule" has now bitten the dust, and WAHR enshrine a new hierarchical approach to height risks: (1) avoid work at height; (2) prevent falls; and (3) minimise the consequences of any fall. But these were all requirements that existed previously, even though they were never expressly set out in any regulations.

## Getting tough

The HSE's increasing emphasis on this area of workplace risk – and its desire to ensure that employers keep it firmly in mind – is sharply illustrated by the recent conviction of MB Mills General Contractors. On 13 April last

year, with the ink on WAHR hardly dry, three Mills employees were spotted removing tiles from a roof before the building was demolished. There had been no risk assessment; there were no roof ladders, scaffolding or other basic safety measures; and the employees were using holes in the roof as footholds. Interestingly, there was no accident or injury either. Criminal proceedings were started shortly afterwards, resulting five months later in a guilty plea and a fine.

Further examples of the HSE's tough approach to this issue are the recent successful prosecutions of Dudson Ltd, Lorimer Electrical, Primex Plastics, Next Distribution Ltd, Optima (Cambridge) Ltd, Iron Mountain (UK) Ltd, Stagecoach plc, SELKENT, DW Tilley, John M Walker (Farm Buildings) Ltd and Allen & Hunt Construction Engineers Ltd, all for work at height incidents predating WAHR. Then there was the HSE's surprise visit to the site of

the Edinburgh Military Tattoo and its subsequent crisis meeting with the organisers and contractors, whom it reprimanded severely for failing to manage adequately the risks to workers erecting seating stands. On a more industry-specific note, last October the HSE Construction Division carried out targeted national inspections as

part of the HSE's Fit Out Campaign. The inspectors looked at WAHR (as well as general good order) issues on construction projects nearing completion. In total, 1,379 contractors were visited, with 134 prohibition notices – and 36 improvement notices – on work at height being issued. The HSE concluded that "work at height was a significant problem for approximately 10% of contractors visited". While this figure was "still too high", the HSE was clearly pleased to report that "good practices and adequate control measures were being implemented by approximately 90% of contractors visited".

## Civil action

It is not only criminal proceedings, of course, that may be brought on the back of WAHR. Under section 47 of the Health and Safety at Work etc Act 1974, breaches of WAHR that result in injury or death can, subject to the usual requirements, also ground successful civil claims for breach of statutory duty.



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# Ask to avoid trouble

Claimant lawyers acting under a conditional fee agreement must have investigated their client's costs insurance.

**In the recent unreported decision of *Newby-Grossett v Arriva London South*, Costs Officer Edwards dismissed a claimant's claim for payment of costs because their lawyers had made insufficient inquiries into whether the claimant was in fact protected by any Before the Event (BTE) insurance. That failure constituted a significant breach of regulation 4(2)(c) of the Conditional Fee Agreements Regulations 2000.**

The regulations have now been abolished but they still matter because they remain in effect for conditional fee agreements concluded before 1 November 2005. Under regulation 4(2)(c), before a conditional fee agreement (CFA) was made, the lawyer had to tell the client whether he or she "considered" that the client's risk of incurring liability for costs was covered by an existing contract of insurance.

## Background to the case

In *Newby-Grossett*, the claimants were passengers in their mother's car, which was struck by the defendant's bus. As minors, the claimants sued via their mother. She brought her own legal action under a BTE policy. When asked, the claimant's motor insurers

said that BTE cover was available both to the mother and her passengers. However, the children's claims were brought under a CFA.

Subsequent questioning of the claimants' solicitors revealed that they had not made any inquiries about possible BTE cover. The claimants' lawyers responded by saying that this did not matter, and certainly did not amount to a material breach of regulation 4(2)(c).

## Legal authority

The issue was examined at a detailed assessment hearing. The court was asked to consider a number of previous judicial decisions. These included *Sarwar v Alam*, which said that it was not good enough for a solicitor simply to ask the client whether they had any available existing insurance: it was necessary to ask the client to bring into the solicitors' office any relevant motor insurance policies, household insurance policies or standalone BTE policies. In *Culshaw v Goodliffe*, an unreported decision of the Liverpool County Court of 24 November 2003, the judge had ruled that it was also insufficient for the solicitors simply to ask the

client whether he or she had any policies and then to respond to any inquiry by a third party that the client had said in terms that they had no relevant insurance cover. The judge had then gone to hold that the word "consider" in regulation 4(2)(c) required something more than asking the question and getting the answer "no" in circumstances where there was no reasonable expectation that the client would

appreciate that they might in fact have BTE insurance. This approach was subsequently followed in both

*Adair v Cullen* and *Samonini v London General*. In the *Newby-Grossett* case, there was evidence that the claimants did indeed have the benefit of BTE insurance and that their lawyers had made inadequate inquiries about the existence of such cover. The court decided that, consequently, there was a material breach of regulation 4(2)(c). So the claimants' entitlement to costs was dismissed and the claimant was ordered to pay for the detailed assessment process.

## Looking forward

The two clear messages from all these court decisions are that:

- a claimant's solicitors must investigate the insurance documentation available in order to satisfy regulation 4(2)(c); and
- insurers and their advisers must ask the claimant's solicitors exactly what steps they have actually taken to satisfy that regulation.

If there is no positive response from the claimant's solicitors, the insurers can then ask the claimant's insurers about the extent of any policy issued and whether it includes BTE cover. An affirmative answer to the last question can then be used (as in the *Newby-Grossett* case) to argue that, irrespective of what the claimant says, their lawyers did not dig deep enough into the question of existing insurance protection.

All of which leaves one big question: how many claims advanced for payment of costs under a CFA are, in fact, currently being challenged in accordance with the principles discussed above?

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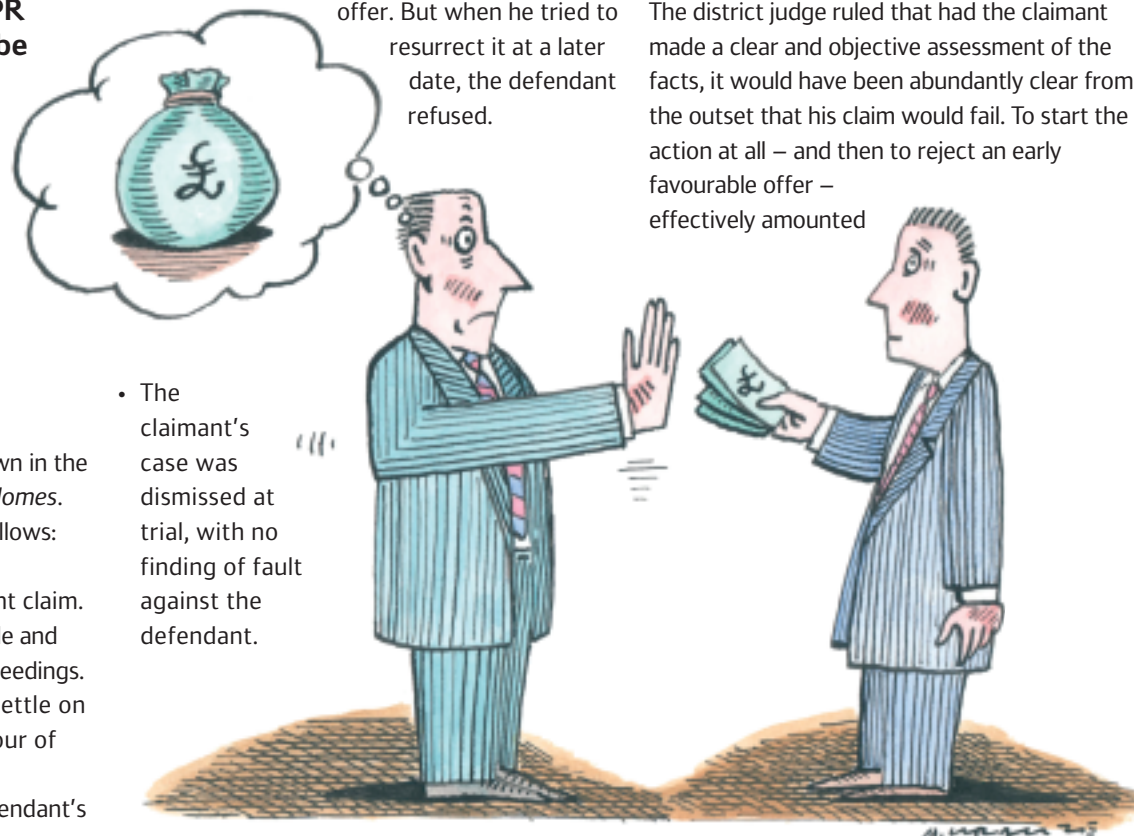
# Behaving unreasonably will cost you

Generally speaking, under Part 27 of the Civil Procedure Rules, only fixed costs will be awarded in small claims track cases.

**But there is one exception: CPR 27.14 (2) (d) says there may be an order for "such further costs as the court may assess [by the summary procedure and orders] to be paid by a party who has behaved unreasonably". Regrettably, there is very little guidance about what constitutes unreasonable behaviour.**

Some help on the issue comes from the judgment of District Judge Stewart-Brown in the Bristol County Court case of *Cloessy v Homes*. The key elements in the case were as follows:

- It was a straightforward road accident claim.
- The facts of the accident were available and consistent from the outset of the proceedings.
- Early on, the defendant offered to settle on a 75%/25% apportionment in favour of the claimant.
- The claimant initially rejected the defendant's



- The claimant's case was dismissed at trial, with no finding of fault against the defendant.

offer. But when he tried to resurrect it at a later date, the defendant refused.

The district judge ruled that had the claimant made a clear and objective assessment of the facts, it would have been abundantly clear from the outset that his claim would fail. To start the action at all – and then to reject an early favourable offer – effectively amounted

to unreasonable behaviour under CPR 27.14 (2) (d). Consequently, the defendant was awarded costs.

In future, therefore, claimants should think carefully before rejecting any reasonable compromise. However, defendants have no cause to feel smug here: if they insist on fighting cases where they have no realistic defence, then they too risk sharing Mr Cloessy's fate over costs.

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# The Spanish Construction Planning Act

Insurers can no longer count on the protection of joint liability when things go wrong.

**The role of insurers in the Spanish construction sector is undergoing a fundamental change as a result of the courts' interpretation of the 1999 Construction Planning Act (Ley de Ordenación de la Edificación). Although the Act is six years old, it is only recently that its new principles have really been tested by the courts.**

The Act is concerned with the safety and quality of new buildings and sets out, for the first time in Spain, the responsibilities of the different operators in the construction process: the developer, contractor, designer, project director and executive project director. The last three may be architects or engineers, as required by the particular project.

But the 1999 legislation is also concerned with the insurance cover that has to be arranged for the benefit of the end owner – the consumer. Under the Act, the developer must arrange for latent defects insurance (responsabilidad decenal) to be in place for at least 10 years. This is aside from any public liability cover that the contractor may have arranged. Without such responsabilidad

decenal insurance cover, the building project will not be given official permission to start.

## Joint liability – in principle

Of particular interest to insurers is the fact that recent case law seems to have abandoned the rule that all operators should be held jointly liable in the event of a loss. This matters to insurers because if the general principle of joint liability is upheld, then all the insurers will chip in. However, if the courts take the view that liability should be a matter for the

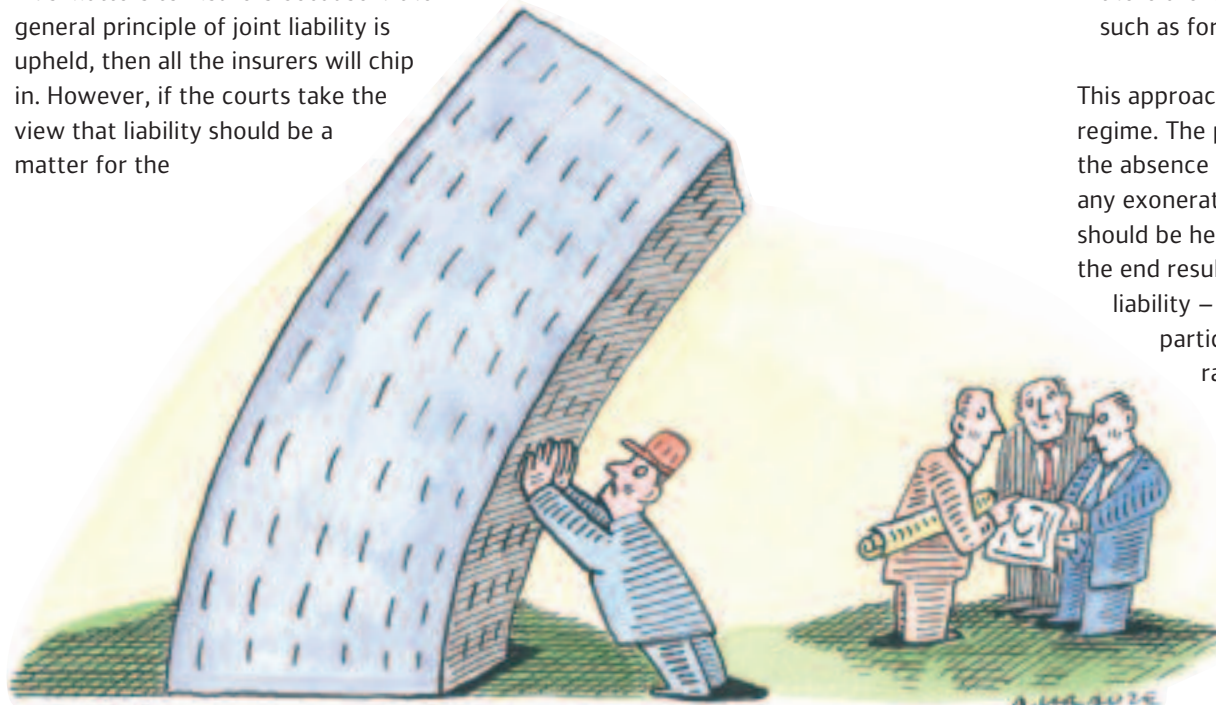
individual operator (the contractor or architect, for example) who was liable for the loss, then only the insurer of that particular operator will end up paying the bill.

It is worth backtracking to see how things have reached this point. The traditional view

in Spanish law has been that the developer and architect (or engineer, in some instances) are jointly liable for the loss in a case where:

- buildings have collapsed or suffered structural damage; and
- it is impossible to ascertain the extent to which each defendant is liable; and
- there are no exonerating circumstances, such as force majeure.

This approach is respected by the new regime. The position under the Act is that, in the absence of evidence to the contrary and any exonerating circumstances, all operators should be held jointly liable. At first glance, the end result is much the same – joint liability – although extended to all parties participating in the building process, rather than just the developer and architect. However, there are dissenting voices which advocate the following argument: if the Act clearly sets out the activities and responsibilities of those involved in a building exercise, surely it must be possible to attribute liabilities



individually so that those who have nothing to do with the loss are not caught by the joint liability trap.

### Changing attitude of the courts

The courts are beginning to recognise the logic of this argument. There are reported Court of Appeal decisions in which the designer, project director and executive project director – effectively, the entire technical team – have been exempted from liability since the developer delivered the building without having obtained the relevant completion certificates from them. The court has taken the view that the technical team could not be liable for the defects of a building they had not certified as complete. The developer and its insurers were alone held responsible for the full claim.

In a recent Supreme Court decision, developers were exempted from liability for injuries sustained by a bystander who was hit

by parts of a building that detached from the main structure and fell on him. The court argued that, although developers are strictly liable for latent defects, it is a different matter when the loss is caused by construction or design defects. In such a case, factual evidence should be taken into consideration in order to establish which parties are actually responsible for the loss. The same reasoning has been followed in a subsequent Supreme Court decision. As two Supreme Court rulings constitute precedent in Spanish law, first instance judges can now adopt the same line without being criticised by their senior colleagues.

All this is good news for the building sector and those providing quality services, since each operator will be held accountable for its own actions. On the other hand, insurers will need to assess each prospective insured carefully, and attempt to keep a quality-conscious portfolio. Otherwise, if things go

wrong, the joint liability umbrella may no longer be there to help spread the loss.

However, the question is not settled finally: one can see from other judgments that the Supreme Court is still debating which way to go. While recognising that each operator should only have to answer for its contractual or statutory responsibilities, in some instances the court has justified holding operators jointly liable so as to ensure that the end owner is adequately protected.

### An uncertain ending

It is not at all clear how this whole story will end. This is largely due to the role of precedent in Spanish law, which is a curious one. It can be argued that Supreme Court decisions are only as binding as those of, say, the Judicial Committee of the Privy Council in the UK, which have merely authoritative force. In Spain, while lower courts are

encouraged to follow Supreme Court decisions, they are not compelled to do so, provided they give reasons for taking their own line. As a result, insurers cannot be entirely sure whether – as a matter of law – they will be footing all or only part of the bill when their insured is found liable. Careful assessment of each individual insured is therefore more important than ever before.

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