[2017 Gib LR 117]

CASSIDY v. GIBRALTAR HEALTH AUTHORITY

SUPREME COURT (Jack, J.): May 23rd, 2017

Limitation of Actions—extension of time—acquiring material facts—claimant granted leave to issue proceedings out of time for damages for personal injury sustained in 2010 as raised prima facie case to answer and prima facie case that, acting with reasonable diligence, did not acquire material facts relevant to claim until 2014

The claimant sought leave under s.5(1) of the Limitation Act 1960 to bring proceedings against the defendant.

The claimant, who had suffered neurological problems since she was a teenager, had been diagnosed in 2008 by a doctor employed by the Gibraltar Health Authority as suffering from multiple sclerosis. She claimed that she was advised that her condition could worsen if she were to become pregnant and that she should not have more children. In consequence, she was sterilized in 2010.

In June 2014, the claimant had further tests at a hospital in England and was diagnosed as suffering not from multiple sclerosis but from a somatization and conversion disorder. She thereafter discovered that her sterilization had been unnecessary.

In December 2016, the claimant issued proceedings against the Authority for damages for personal injury. In March 2017, the Authority argued that the conditions for granting retrospective leave to bring the proceedings were not satisfied. In April 2017, the claimant issued the present application for leave to issue fresh proceedings.

Under s.4(1) of the Limitation Act 1960, the general limitation period for most causes of action in Gibraltar was six years, which was reduced to three years for actions for damages for personal injuries. The claimant sought leave to issue the proceedings under s.5(1) of the Act.

Held, granting leave:

(1) The claimant had demonstrated a *prima facie* case for the Authority to answer that the sterilization advice she had received had been given negligently. As regards the date of her knowledge of the cause of action, she had established a *prima facie* case that it was only in June 2014 that she had learnt that she was not suffering from multiple sclerosis. That discovery put her on enquiry as to why she had been sterilized. *Prima facie*, that was the earliest that she could have found out, exercising reasonable diligence as required by s.10(5). She would therefore be

granted permission to issue the proceedings outside the usual three-year limitation period (para. 12).

(2) The court brought to the parties' attention a recent decision (*Bernal* v. *Riley*, 2016 Gib LR 314) in which the present judge had decided that the Supreme Court should no longer follow the *Guidelines for the Assessment of General Damages in Personal Injury Cases* issued by the Judicial College of England and Wales, but instead, as an interim measure, followed the guidelines applicable in Northern Ireland. The court would not be bound by the doctrine of *stare decisis* to apply that earlier decision. Judges of the Supreme Court were not bound to follow their own and fellow judges' decisions but should do so unless there were good reasons not to. It would be open to the parties to persuade the court that its previous decision not to follow the English Guidelines had been wrong (paras. 15–17; paras. 26–28).

Cases cited:

(1) *AB* v. *Att. Gen. (St. Helena)*, Supreme Ct. (St. Helena), Case Nos. 551/2015 and 511/2016, unreported, considered.
(2) *Att.-Gen*. v. *Mottershead*, 1997–98 Gib LR 282; on appeal, 1999–00 Gib LR 17, referred to.
(3) *Balensi*, *Re*, 1812–1977 Gib LR 112, referred to.
(4) *Bernal* v. *Riley*, 2016 Gib LR 314, not followed.
(5) *Church Lane Trustees Ltd.* v. *Bunyan*, Supreme Ct., April 25th, 2017, unreported; on appeal, 2017 Gib LR 293, followed.
(6) *Clark* v. *Forbes Stuart (Thames Street) Ltd.*, *In re*, [1964] 1 W.L.R. 836; [1964] 2 All E.R. 282, applied.
(7) *Dobson* v. *Att.-Gen*., 1980–1987 Gib LR 297, referred to.
(8) *Huddersfield Police Auth.* v. *Watson*, [1947] K.B. 842; [1947] 2 All E.R. 193; (1947), 111 J.P. 463; 177 L.T. 114; 63 T.L.R. 415; [1948] L.J.R. 182, *dictum* of Lord Goddard, C.J. applied.
(9) *Kray*, *In re*, *sub nom*. *In re Smith*, [1965] Ch. 736; [1965] 2 W.L.R. 626; [1965] 1 All E.R. 710; (1965), 49 Cr. App. R. 164, referred to.
(10) *Larios* v. *Bonany y Gurety*, 1812–1977 Gib LR 7, referred to.
(11) *MG Engr. & Consultancy Ltd.*, *In re*, 2015 Gib LR 354; further proceedings, 2016 Gib LR 113, referred to.
(12) *Mitchell* v. *Traverso*, 2016 Gib LR 205, followed.
(13) *R*. v. *Greater Manchester Coroner*, *ex p. Tal*, [1985] Q.B. 67; [1984] 3 W.L.R. 643; [1984] 3 All E.R. 240, referred to.
(14) *Saunders (A Bankrupt)*, *Re*, *sub nom*. *Re Bearman (A Bankrupt)*, [1997] Ch. 60; [1996] 3 W.L.R. 473; [1997] 3 All E.R. 992; [1996] BPIR 355, referred to.
(15) *Scott* v. *Att.-Gen*. *(Bahamas)*, [2017] UKPC 15; [2017] 3 LRC 704, considered.

Legislation construed:

Limitation Act 1960, s.4(1):

". . . [T]he following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued . . .

Provided that, in the case of actions for damages for negligence . . . where the damages claimed by the claimant for the negligence . . . consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years."

s.5: The relevant terms of this section are set out at para. 10.
s.6: The relevant terms of this section are set out at para. 10.
s.10: The relevant terms of this section are set out at para. 10.

J. Phillips for the claimant;
J. Corbett for the defendant.

1 **JACK, J.:** In this matter the claimant ("Ms. Cassidy") seeks permission under s.5(1) of the Limitation Act 1960 to bring proceedings against the defendant ("the GHA"). Pursuant to the Act, this application is made *ex parte* but in fact the GHA was given very short notice of it and appeared. The parties asked orally that the current application be adjourned since they had agreed a stand-still agreement on limitation so that a form of alternative dispute resolution might be pursued. However, since the matter has been fully prepared and I have read all the papers, it was a more efficient use of court time to determine whether to grant permission under s.5(1).

2 Further, there have been recent developments touching on *Bernal* v. *Riley* (4) where I held that general damages for personal injury stood to be increased. These need to be brought to the parties' attention.

The facts

3 Ms. Cassidy was born on October 28th, 1985. From her teenage years she suffered neurological problems. On July 7th, 2008, Dr. Damian, a neurological specialist employed by the GHA, diagnosed her as suffering from multiple sclerosis. Recent medical investigations say that this diagnosis was incorrect; however it is not suggested that Dr. Damian was negligent in his diagnosis.

4 Ms. Cassidy's case is that, on January 14th, 2009, Dr. Damian—

"advised her that her condition could worsen if she were to become pregnant and as such she should not . . . have any more children. Additionally or in the alternative, it is [Ms. Cassidy's] case that the effect of what was discussed with Dr. Damian left her with the firm impression that she should not have any more children because to do so while suffering from multiple sclerosis could worsen her condition significantly leading to paralysis or even death in childbirth."

5 In consequence, she says, on January 6th, 2010, she underwent sterilization by laparoscopic tubal ligation.

6 Subsequently, her attending physicians started to entertain doubts as to whether she was in fact suffering from multiple sclerosis. This culminated in her, in June 2014, undergoing further tests at a hospital in Leicester, where she was admitted from June 9th to 20th, 2014. Their diagnosis was that she was not suffering from multiple sclerosis but rather "somatisation and conversion disorder with diffuse whole body pain, spasms, tremors, convulsive attacks (non-epileptic seizures), limb weakness and visual disturbance."

7 This in turn led, she avers, to her discovery that her sterilization was unnecessary, even if she had been suffering from multiple sclerosis.

8 On December 20th, 2016, she issued proceedings against the GHA for personal injury, limited to £50,000. On March 21st, 2017, she filed particulars of claim with the court. These documents appear to have been informally served on the GHA, together with an application also dated March 21st, 2017, purporting to obtain leave (whether prospectively or retrospectively is unclear). The application dated March 21st, 2017 does not appear on the court file and appears therefore not to have been issued.

9 On March 31st, 2017, the GHA's counsel filed with the court a skeleton argument making the point that the conditions for granting retrospective leave to bring the proceedings were not satisfied. Subsequently, on April 3rd, 2017, Ms. Cassidy issued the current application for leave to issue fresh proceedings. It is this application which I am considering.

The Limitation Act 1960

10 The general limitation period for most causes of action in Gibraltar is six years: Limitation Act 1960, s.4(1). However, the proviso to s.4(1) reduces the limitation period for actions claiming damages for personal injury to three years. The three-year limitation period can in turn, in certain circumstances, be extended. Sections 5, 6 and 10 of the 1960 Act provide:

> "5.(1) Section 4(1) (which, in the case of certain actions, imposes a time-limit of three years for bringing the action) shall not afford any defence to an action to which this section applies, in so far as the action relates to any cause of action in respect of which—
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> (a) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and
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> (b) the requirements of subsection (3) of this section are fulfilled.

(2) This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the claimant for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the claimant or any other person.

(3) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that the material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the claimant until a date which was not earlier than three years before the date on which the action was brought.

(4) Nothing in this section shall be construed as excluding or otherwise affecting—

(a) any defence which, in any action to which this section applies, may be available by virtue of any enactment other than section 4(1) (whether it is an enactment imposing a period of limitation or not) or by virtue of any rule of law or equity; or

(b) the operation of any enactment or rule of law or equity which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.

Application for leave of court.

6.(1) Any application for the leave of the court for the purposes of section 5 shall be made ex parte, except in so far as rules of court may otherwise provide in relation to applications which are made after the commencement of a relevant action.

(2) Where such an application is made before the commencement of any relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the claimant, it appears to the court that, if such an action were brought forthwith and the like evidence were adduced in that action, that evidence would, in the absence of any evidence to the contrary, be sufficient—

(a) to establish that cause of action, apart from any defence under section 4(1); and

(b) to fulfil the requirements of section 5(3) in relation to that cause of action.

(3) Where such an application is made after the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the claimant, it appears to the court that, if the like evidence were adduced in that action, that evidence would, in the absence of any evidence to the contrary, be sufficient—

(a) to establish that cause of action, apart from any defence under section 4(1); and

(b) to fulfil the requirements of section 5(3) in relation to that cause of action,

and it also appears to the court that, until after the commencement of that action, it was outside the knowledge (actual or constructive) of the claimant that the matters constituting that cause of action had occurred on such a date as (apart from section 5) to afford a defence under section 4(1).

(4) In this section 'relevant action', in relation to an application for the leave of the court, means any action in connection with which the leave sought by the application is required.

. . .

10.(1) In sections 5 to 9 'the court', in relation to an action, means the court in which the action has been, or is intended to be, brought.

(2) [*Repealed.*]

(3) In sections 5 to 9 reference to the material facts relating to a cause of action is a reference to any one or more of the following that is to say—

(a) the fact that personal injuries resulted from the negligence, nuisance or breach of duty constituting that cause of action;

(b) the nature or extent of the personal injuries resulting from that negligence, nuisance or breach of duty;

(c) the fact that the personal injuries so resulting were attributable to that negligence, nuisance or breach of duty, or the extent to which any of those personal injuries were so attributable.

(4) For the purposes of sections 5 to 9 any of the material facts relating to a cause of action shall be taken, at any particular time, to have been facts of a decisive character if they were facts which a reasonable person, knowing those facts and having obtained appropriate advice with respect to them, would have regarded at that time as determining, in relation to that cause of action, that (apart from

any defence under section 4(1) or so much of section 7 of the Contract and Tort Act as requires actions under Part IV thereof to be commenced within three years after the death of the deceased) an action would have a reasonable prospect of succeeding and of resulting in the award of damages sufficient to justify the bringing of the action.

(5) Subject to subsection (6) of this section, for the purposes of sections 5 to 9 a fact shall, at any time, be taken to have been outside the knowledge (actual or constructive) of a person if, but only if—

(a) he did not then know that fact;

(b) in so far as that fact was capable of being ascertained by him, he had taken all such action, if any, as it was reasonable for him to have taken before that time for the purpose of ascertaining it; and

(c) in so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such action, if any, as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances . . .”

11 These sections of the 1960 Act are taken word for word from the Limitation Act 1963 (UK) (which has since been replaced by a different scheme for extending time in the Limitation Act 1980 (UK)). The 1963 Act was the subject of comment in *In re Clark* v. *Forbes Stuart (Thames Street) Ltd.* (6). In that case, the plaintiff had issued proceedings against Forbes Stuart (Billingsgate) Ltd. for injuries sustained on a slippery floor at Billingsgate fish market. After the three-year limitation period expired, it transpired that the occupier of the premises was Forbes Stuart (Thames Street) Ltd. The plaintiff applied *ex parte* for leave to issue against this different company out of time. He was refused leave at first instance and appealed. The Court of Appeal unanimously held that the plaintiff had shown a *prima facie* case against the Thames Street company and (Salmon, L.J. *dubitante*) a *prima facie* case that he could not with reasonable diligence have discovered that the Thames Street company was the occupier any earlier than he had done.

12 In my judgment, Ms. Cassidy, on the evidence of her particulars of claim she adduces, has shown a *prima facie* case that the advice to be sterilized was given negligently. Naturally there may be issues as to precisely what was said back in 2009 and what interpretation she put on what Dr. Damian advised. I have not seen or heard any evidence from the GHA (only submissions), so I am in no position to assess the likelihood of success. However, her statement of case has established a case for the

GHA to answer as to negligence. As regards the date of knowledge, again in my judgment she has established a *prima facie* case that it was only in June 2014 that she learnt that she was not suffering from multiple sclerosis. It was this discovery which put her on enquiry as to why she had been sterilized. *Prima facie* that is the earliest she could have found out, exercising reasonable diligence as required by s.10(5). Accordingly I shall grant permission to issue proceedings. Under the scheme of the 1963 Act this grant of permission is entirely without prejudice to the GHA's right in due course to argue that there was no negligence and that the limitation period has expired.

Retrospective permission

13 Mr. Phillips, appearing for Ms. Cassidy, has not pursued the application initially envisaged whereby retrospective permission to bring the 2016-Ord-095 action was sought, and instead is seeking prospective permission to bring a fresh action. If he had pursued the initial application, there would have been a number of questions: (a) when is an action "commenced" for the purposes of s.6(3)? (b) Is it on issue by the court, or on service on a defendant? (c) If an action is "commenced" on a claim form being sealed by the court, is there nonetheless a power to give retrospective permission to allow a claimant to escape the s.4(1) three-year limitation period?

14 I heard no argument on (a) and (b). As regards (c), there is a lot of case law on the subject: see, for example, *Re Saunders* (14) and *In re MG Engr. & Consultancy Ltd.* (11) (appeal allowed on other grounds, 2016 Gib LR 113). Whether it would be legitimate to grant retrospective permission is a potentially difficult question. Section 6(3) adds an additional requirement for giving permission after the commencement of an action. That arguably excludes any possibility of an extension for an action once the claim form has been sealed. (This assumes of course that an action has been "commenced" for the purposes of s.6(3) on issue by the Court Registry of the claim form).

Bernal* v. *Riley

15 In *Bernal* v. *Riley* (4), the claimant, Mr. Bernal, was in a car being driven by his wife when it was struck from the rear by Mr. Riley. He claimed damages for shock and for whiplash. The claim for negligence went undefended and I had to assess general damages for Mr. Bernal. Unusually in a whiplash case, Mr. Bernal, some three years after the accident, continued to suffer intermittent pain and this appeared likely to be permanent.

16 In my judgment I noted (2016 Gib LR 314, at para. 10):

> "It has hitherto been usual in Gibraltar to follow the *Guidelines* . . . issued by the (English and Welsh) Judicial College. The current edition is the 13th, published in 2015. The current case raises the question as to whether this is still appropriate. This is for four reasons:
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> (a) First, the economy and standard of living of Gibraltar are now very different from that of England and Wales.
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> (b) Secondly, general damages in England and Wales (but not in Scotland or Northern Ireland) were increased by 10% in *Simmons* v. *Castle* . . . as part of the Jackson reforms to the recovery of legal costs in civil proceedings. Yet these reforms may not apply, at least to their full extent, in Gibraltar.
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> (c) Thirdly, the impact of the reduction in the discount rate for future losses has not yet been taken into account in England in assessing general damages in respect of future pain, suffering and loss of amenity.
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> (d) Fourthly, in serious cases, where there are long-term sequelae, there needs to be some reasonable comparison with the general damages given for other torts, such as wrongful imprisonment. The English Guidelines on catastrophic injuries seem out of line with these."

17 I concluded that these considerations warranted a reconsideration of the use of the English Guidelines. Indeed, as long ago as 1985, Pizzarello, A.J. took the view that Gibraltarian decisions on quantum of general damages should be preferred to English precedents: *Dobson* v. *Att.-Gen.* (7) (1980–1987 Gib LR 297, at para. 16). In the absence of any other suggestion, I applied the Judicial Studies Board for Northern Ireland's *Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland*, 4th. ed. (2013), which were about 50 per cent higher than the corresponding English Guidelines. However, I said (2016 Gib LR 314, at para. 74) this should merely be "pending more detailed evidence and submissions."

18 Very recently in *Scott* v. *Att.-Gen. (Bahamas)* (15), the Privy Council has examined the applicability of the English Judicial College Guidelines in the Bahamas. (At the time of the trial and intermediate appeal in the Bahamas, the Guidelines were still issued by the Judicial Studies Board ("JSB"), which has since been replaced by the Judicial College.) Lord Kerr delivered the judgment. He asked ([2017] UKPC 15, at para. 16):

> "Is there a principle that guideline figures, suggested by the JSB for particular types of injury, should be routinely increased to reflect

different levels of the cost of living between England and the Bahamas? The Board has concluded that there is no such principle. There are three reasons for this. The first, and most important one, is that a prescriptive approach to the assessment of damages whereby they are determined by the rigid application of a scale which is then increased at a preordained rate is incompatible with the proper evaluation of general damages. The second reason is that, on a proper understanding of the relevant case law, it is clear that no such principle has been pronounced by the Bahamian courts. Finally, it would be wrong to apply an unchanging uplift without evidence of an actual, as opposed to a presumed, difference in the cost of living between England and the Bahamas."

19 After consideration of the case law, he concluded (*ibid.*, at paras. 25–26):

"25. The Bahamas must likewise be responsive to the enhanced expectations of its citizens as economic conditions, cultural values and societal standards in that country change. Guidelines from England may form part of the backdrop to the examination of how those changes can be accommodated but they cannot, of themselves, provide the complete answer. What those guidelines can provide, of course, is an insight into the relationship between, and the comparative levels of compensation appropriate to different types of injury. Subject to that local courts remain best placed to judge how changes in society can be properly catered for. Guidelines from different jurisdictions can provide insight but they cannot substitute for the Bahamian courts' own estimation of what levels of compensation are appropriate for their own jurisdiction. It need hardly be said, therefore, that a slavish adherence to the JSB guidelines, without regard to the requirements of Bahamian society, is not appropriate. But this does not mean that coincidence between awards made in England and Wales and those made in the Bahamas must necessarily be condemned. If the JSB guidelines are found to be consonant with the reasonable requirements and expectations of Bahamians, so be it. In such circumstances, there would be no question of the English JSB guidelines imposing an alien standard on awards in the Bahamas. On the contrary, an award of damages on that basis which happened to be in line with English guidelines would do no more than reflect the alignment of the aspirations and demands of both countries at the time that awards were made for specific types of injury.

26. Cost of living indices are not a reliable means of comparing the two jurisdictions even if one is attempting to achieve approximate parity of value in both. Cost of living varies geographically and may well do so between various sectors of the population. The incidence

of tax, social benefits and health provision (among others) would be relevant to such a comparison."

Precedent

20 In the current case in due course the application of *Bernal* (4) to Ms. Cassidy's claim will need to be considered. The first question is the status of the decision as authority. Is the court at trial bound by the doctrine of *stare decisis* to apply *Bernal*?

21 The modern position in relation to decisions of single judges of the English High Court is stated by Lord Goddard, C.J. in *Huddersfield Police Auth.* v. *Watson* (8) ([1947] K.B. at 848):

". . . I think the modern practice, and the modern view of the subject, is that a judge of first instance, though he would always follow the decision of another judge of first instance, unless he is convinced the judgment is wrong, would follow it as a matter of judicial comity. He certainly is not bound to follow the decision of a judge of equal jurisdiction. He is only bound to follow the decisions which are binding on him, which, in the case of a judge of first instance, are the decisions of the Court of Appeal, the House of Lords and the Divisional Court."

22 Divisional Courts in England will also generally follow decisions of other Divisional Courts but are not bound to do so: see *R.* v. *Greater Manchester Coroner*, *ex p. Tal* (13) (reversing the earlier view, expressed in the *Huddersfield* case, that Divisional Courts, in contrast to single judges, were bound by their own decisions).

23 It is doubtful that this approach applied to decisions of the Lord Chancellor when he sat in the Court of Chancery. They appear to have considered themselves generally bound by their own and their predecessors' *rationes decidendi*. However, it is worth noting that the Lord Chancellor sitting in the Court of Chancery became increasingly to have a mainly appellate function. As the judges of the court were expanded from solely the Master of Rolls to first one and then ultimately in 1841 to three Vice-Chancellors, it became rare for the Lord Chancellor to sit at first instance: see Sir Robert Megarry, *The Vice-Chancellors* (1982), 98 L.Q.R. 370. After the creation of the Court of Appeal in Chancery in 1851, the Lord Chancellor sat almost exclusively on appeals, either in the new Court of Appeal in Chancery or in the House of Lords. Decisions of appellate judges are more likely to be subject to the strict rules on *stare decisis.* (The Lord Chancellor's last obligation to sit at first instance was his duty to hear, and power to grant, an application for a writ of habeas corpus in vacation. This power was abolished by s.14(2) of the Administration of Justice Act 1960 (UK): see *In re Kray* (9), where Lord Gardiner, L.C. held

he had no jurisdiction—even if he had wanted to—to grant bail to the Kray twins and their henchman, Smith.)

24 The relevance of this to Gibraltar is that the Chief Justice—who until the appointment of Alcantara, A.J. in 1983 was the only Supreme Court judge in Gibraltar—from the earliest days exercised both a common law and an equity jurisdiction conjointly. In *Larios* v. *Bonany y Gurety* (10), the Privy Council noted that the fusion of law and equity then pending in England following the enactment of the Judicature Act 1873 (UK) had already been introduced in Gibraltar as part of Barron Field, J.'s 1832 Procedural Rules. It may accordingly be arguable that, at least in the 19th century, the court was bound by its own decisions.

25 However, in modern times this has not been the view of the Supreme Court of Gibraltar. Bacon, C.J. in *Re Balensi* (3) (1812–1977 Gib LR at 116) held that he was "not bound by the decision of another judge of co-ordinate jurisdiction." Pizzarello, A.J. held that he was not bound even by his own decisions (and proceeded to hold that he should not follow his first decision): *Att.-Gen.* v. *Mottershead* (2) (1997–98 Gib LR at 285). (An appeal was allowed: 1999–00 Gib LR 17. The Court of Appeal held that the judge had got it right the first time. However, it did not doubt that Pizzarello, A.J. was able to refuse to follow his own decisions.) This view is reinforced by s.15 of the Supreme Court Act 1960, which applies the practice and procedure of the English High Court in default of local rules.

26 In my judgment, judges of the Supreme Court are not bound to, but should unless there are good reasons not to, follow our own and our fellow judges' holdings.

27 I note that this was the approach taken by Dudley, C.J. in *Church Lane Trustees Ltd.* v. *Bunyan* (5). In that case, Mr. Registrar Yeats had held that interest under the Judgment Act 1838 did not run on a judgment debt, because the Judgments Act (Rates of Interest) Order 2000 made by the then Chief Justice ceased to have effect on the coming into force of the Supreme Court (Amendment) Act 2007, which gave the rule-making power instead to the Minister for Justice: see s.5. Between the hearing before the Registrar and the appeal before the Chief Justice, the point came before me in *Mitchell* v. *Traverso* (12). I held that the learned Registrar had erred and that the 2000 Order remained in force. Both parties, however, appeared in person, so I did not have the advantage of adversarial argument. On appeal in *Bunyan*, both sides were represented and the Chief Justice considered further arguments. In the event, he agreed with my conclusion, but that was his independent judgment, not a matter where he held that he was bound to follow the *ratio decidendi* of my judgment regardless of his own view.

28 It follows that it is, in my judgment, open to the parties to persuade the court that my decision in *Bernal* (4) was wrong. This is particularly so

since I made the decision again without the benefit of adversarial argument and the refusal to follow the English Guidelines is a change in practice in Gibraltar.

The impact of *Scott* and *AB*

29 The impact of *Scott* (15) also needs to be considered. Although this was not a decision on appeal from Gibraltar and is thus not strictly binding, nonetheless any decision of the Privy Council is highly persuasive in this jurisdiction. Whilst the decision appears broadly supportive of the approach taken in *Bernal* v. *Riley*, it is more critical of the approach of the Bahamian courts to the taking of judicial knowledge of living conditions in the Bahamas and the United Kingdom (see [2017] UKPC 15, at paras. 39–42). Consideration as to expert evidence of living conditions in Gibraltar and the United Kingdom may need to be given.

30 The decision of the Supreme Court of St. Helena in *AB* v. *Att. Gen. (St. Helena)* (1) is also relevant. This predates *Scott* by a short period. Ekins, C.J., granting permission to appeal, advanced a new consideration relevant to the assessment of general damages in the British Overseas Territories (at paras. 12–14):

> "12. . . . [T]he earnings of any given individual on St Helena will be of relevance to any claim for future loss of earnings. How or why it could conceivably be of relevance to pain, suffering and loss of amenity is difficult to comprehend. I cannot believe that this Court was suggesting that people on St Helena in some way suffer less than those in the UK where similar or identical injuries have been suffered. Furthermore, and as a method of assessing general damages I do not consider it to be a satisfactory one. No claimant or defendant could identify the likely level of damages appropriate without first undertaking a statistical comparison of the sort undertaken here. Additionally, and what seems not to have been explored in the two cases previously decided by this Court is the cost of living on St Helena. Dr McLeod was able to assist me in this respect. The cost of living on St Helena is 25% higher than the cost of living in the UK. That statistic excludes the cost of internet access which on St Helena is so expensive that for statistical purposes it is regarded as a luxury item whereas in the UK it is a necessity.
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> 13. In fairness to the Learned Chief Justice who decided the cases of Henry and Lawrence he no doubt regarded himself as bound—as indeed he was and as am I—by the Privy Council decisions in Jag Singh v Toong Fong Omnibus Co. Ltd. [1964] 1 WLR 1382 and Chan Wai Tong v Li Ping Sum [1985] AC 446. Those cases established that damages need to be appropriate for local conditions and have been followed not only by the decisions of this Court but

also by the Supreme Courts of Gibraltar and the Cayman Islands where the principle was applied to increase the Judicial College Guidelines. In the Cayman case, Archer v UBS [2009 CILR 531], the award was increased because the *cost* of living was higher that [*sic*] the UK. In Gibraltar—Bernal v Riley [2016 Gib LR 314]—Jack J undertook a comprehensive review of the role that economics perform in the assessment of general damages. He considered GDP data for the purposes of his assessment and took judicial notice of the fact that the *standard* of living in Gibraltar is higher than the UK to justify awards higher than Judicial College guidelines. The approaches adopted demonstrate the dichotomy in assessing damages on St Helena if the approach remains a valid one. The cost of living on St Helena is substantially higher than in the UK. Wages are lower, although I accept the submission made by Mr Willems that the factor by which they are lower will depend on the methodology used in arriving at the relevant statistic. (For the statistics she prepared Dr McLeod extracted the wages of Technical Cooperation Officers whose wages are substantially higher than the norm but also ignored those on declared incomes falling below the poverty level. It may be that the standard of living on St Helena measured by GDP per capita is also lower on St Helena.)

14. The answer to the dichotomy, in my view, lies in a proper analysis of developments since the decision in Jag Singh, Chan Wai Tong and the decisions of Martin CJ in Henry and Lawrence. Since the decisions in Henry and Lawrence St Helena and the status of St Helenians has radically changed. Prior to the 21st century, citizens of British Dependant Territories were not full British citizens. That changed in 2002. In 2009, St Helena adopted a new Constitution. One of the rights under the Constitution is protection from discrimination. If the proper method of assessing general damages remains as indicated by Martin CJ, then by logical extension it ought to be the proper method of assessing damages for the residents of deprived northern inner city residents in the UK because every available statistic would show, I am satisfied, that by whatever measure, their standards of living, wages and cost of living would be appreciably lower that [*sic*] the residents of, for example, Belgravia. I am not aware that any such approach has been adopted in the UK and there would rightly be outrage if such a measure was adopted. The overwhelming majority of those living on St Helena are full British citizens. I ask the rhetorical question: why should they be judged differently from other British citizens of comparable economic status in the UK? Were I to perpetuate the approach previously adopted then it seems to me that it would be discriminatory. I am satisfied, therefore, that circumstances have now changed so as to render the ratios of Jag Singh and Chan Wai Tong obsolete insofar as a proper

measure for assessing damages on St Helena which for the future should be assessed solely in accordance with Judicial College Guidelines without discount."

31 In due course, this court will need to consider this argument. A difficulty with it is that general damages for personal injury are higher in Northern Ireland than in England and Wales. On Ekins, C.J.'s view, the English and Welsh would be suffering discrimination *vis-à-vis* their Northern Irish cousins.

Ruling accordingly.
