[2017 Gib LR 131]

C. SULLIVAN (acting by his litigation friend V.M. SULLIVAN) v. CARE AGENCY and ATTORNEY-GENERAL

SUPREME COURT (Jack, J.): June 2nd, 2017

Civil Procedure—service of process—service on Attorney-General—service to be in accordance with rules on service on Crown—service on Attorney-General includes service on officers working for Attorney-General

Tort—personal injuries—damages—guidelines—quantification of damages in state of flux—consideration to be given to appropriate guidelines to be applied

The claimant sought damages for personal injuries.

The claimant had suffered severe brain injuries at the time of his birth in 1987. In December 2013, he had been receiving care at a care home run by the Care Agency. A risk assessment, which had been updated shortly before the incident, required the floor to be kept clear of debris. The claimant had, however, stepped on one of his shoes and fallen over, sustaining serious injuries including incomplete tetraplegia. It was claimed that the care assistant who had removed the claimant's shoes for him had left them in a place where they caused a risk of an accident, and that the accident had therefore been caused by negligence.

In December 2016, the claimant commenced proceedings against the defendants. The Care Agency was served at the address of its Human Resources Department. The Attorney-General was purportedly served at the Office of Criminal Prosecutions and Litigation. The defendants

acknowledged service but indicated that they intended to contest the jurisdiction. They applied for the service of the claim form and particulars to be set aside on the basis that service was not in accordance with r.3 of the Supreme Court Rules. As the period for service had expired it was said that the claim form could no longer be served.

The judge informed the parties that as the claimant was under a disability any proceedings brought by him would not be time-barred under the ordinary three-year limitation period for personal injuries. He queried whether it would be in accordance with the overriding objective to set aside service and strike out the claim if the claimant could simply re-issue it.

Held, ruling accordingly:

(1) The court approved the parties' agreement that the defendants' application be withdrawn. Dates were set for acknowledgements of service and defences (para. 10).

(2) Service on the Attorney-General had to be in accordance with the rules on service on the Crown. Section 12 of the Crown Proceedings Act 1951 provided that all actions against the Crown (by which the Queen in right of Gibraltar was meant) should be brought against the Attorney-General. Section 13 in turn provided that service on the Crown must be effected by service on the Attorney-General. Service on the Attorney-General appeared to include service on officers working at the direction of the Attorney-General; it was unlikely that the legislature had envisaged personal service on the office-holder himself. Whether service on the reception of the Office of Criminal Prosecutions and Litigation (rather than on Crown Counsel personally) and service on the Office of *Criminal* Prosecution and Litigation (rather than the civil litigation section) sufficed as service on the Attorney-General would need to be the subject of argument (para. 8).

(3) Consideration would need to be given at an early stage as to whether there should be a split trial of liability and quantum. Although in general this was undesirable, in the present case the issues on liability were likely to be short, whereas the quantum of both special and general damages was likely to be complicated (para. 11).

(4) The quantification of general damages was in a state of flux in Gibraltar. In a recent decision (*Bernal* v. *Riley*, 2016 Gib LR 314), 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. It was open to the court to reconsider whether that case had been rightly decided. Another issue was the fact that neither set of Guidelines took into account the effect of the substantial drop in real returns on capital which had occurred since the global financial crisis of 2008. Whether (assuming the refusal to follow the English Guidelines was

correct) it was appropriate to apply a system based on daily rates or some other system of guidelines was a matter to be determined at trial. Whether or not it was appropriate to apply a system based on daily rates, consideration of the income that a lump sum for general damages would produce might nevertheless be a useful cross-check. As the claimant was under a disability, the court would need to consider these matters if it were asked to approve a settlement (paras. 13–16; paras. 30–32).

Cases cited:

(1) *AB* v. *Att. Gen. (St. Helena)*, Supreme Ct. (St. Helena), Case No. 551/2015, unreported, referred to.
(2) *Bernal* v. *Riley*, 2016 Gib LR 314, considered.
(3) *Cassidy* v. *Gibraltar Health Auth.*, 2017 Gib LR 117, referred to.
(4) *Doe* v. *Roe* (1804), 4 East 585; 102 E.R. 955, referred to.
(5) *Mallett* v. *McMonagle*, [1970] A.C. 166; [1969] 2 W.L.R. 767; [1969] 2 All E.R. 178; [1969] NI 91; [1969] 1 Lloyd's Rep. 127; (1970), 6 K.I.R. 322, considered.
(6) *Povey* v. *Governors of Rydal School*, [1970] 1 All E.R. 841, considered.
(7) *R. (Association of British Insurers)* v. *Lord Chancellor*, [2017] EWHC 106 (Admin), referred to.
(8) *Scott* v. *Att. Gen. (Bahamas)*, [2017] UKPC 15; [2017] 3 LRC 704, referred to.
(9) *Simmons* v. *Castle*, [2012] EWCA Civ 1039; [2013] 1 W.L.R. 1239; [2013] 1 All E.R. 334; [2012] C.P. Rep. 43; [2012] 5 Costs L.R. 931; [2013] E.M.L.R. 3; [2012] P.I.Q.R. P22; [2013] Med. L.R. 1, considered.

Legislation construed:

Crown Proceedings Act 1951, s.12:

> "Civil proceedings by or against the Crown shall be instituted by or against the Attorney-General."

s.13: "All documents required to be served on the Crown for the purpose of or in connection with any civil proceedings by or against the Crown shall be served on the Attorney-General."

T. Christodoulides for the claimant;
K. Drago for H.M. Attorney-General and the Care Agency.

1 **JACK, J.:** Curtis Sullivan ("Curtis") was born on October 8th, 1987. At birth he suffered severe brain injuries in addition to other physical afflictions. At all times he has lacked capacity to conduct litigation. His next friend is Violet Sullivan, who is his biological grandmother but also his adoptive mother. She was appointed Curtis's deputy by an order of the English Court of Protection on October 19th, 2010 and acts as his litigation friend.

2 On December 30th, 2013, Curtis was receiving care at Dr. Giraldi Home, which is run by the Care Agency. The particulars of claim allege that when Curtis stood up from the toilet to get into the bath he stepped on one of his shoes, causing him to lose his balance and fall over. Because of Curtis's disabilities, the particulars say, he required a carer to take off his shoes. A risk assessment updated on September 30th, 2013 required the floor to be kept "free from debris." The particulars go on to allege that the care assistant who took off Curtis's shoes left them in a place where they caused a risk of the type which eventuated. The accident was therefore, it is alleged, caused by negligence.

3 Mr. Naveen Kumar, a consultant in spinal injuries and rehabilitation medicine, has made a very full medical report on Curtis's behalf. He says that the consequences of the accident have been severe. The most serious is that Curtis suffered incomplete tetraplegia. This is said to have left him—

> "with impairment of muscle strength and power and sensations below C2, impaired respiratory ability and impairment of bladder and bowel sensation and function. He is at risk of autonomic dysreflexia and syringomyelia . . ."

In addition, he has only 5 per cent movement in his neck, scarring on his neck, ongoing muscular and neuropathic pain and generalized moderate to severe spasticity in all four limbs with reduced balance. According to Mr. Kumar his life expectancy is reduced from just under 90 years of age at death to 80 years at death (just over 50 years of future loss).

Procedural

4 The claim form was issued on December 22nd, 2016, shortly before the third anniversary of the date of the accident. It names five defendants. The particulars of claim dated April 20th, 2017, however, names only the Care Agency and H.M. Attorney-General for Gibraltar as defendants in that order. The claim against the other three defendants is not being pursued. I therefore order, pursuant to CPR, r.19.2, that the Care Agency be substituted as the first defendant and that the Gibraltar Health Authority, Dr. Giraldi Home and St. Bernard's Hospital cease to be parties to this action. The short title of the action should therefore be: "Curtis Sullivan (acting by his litigation friend, Violet Mary Sullivan), claimant and (1) The Care Agency and (2) Her Majesty's Attorney-General for Gibraltar, defendants."

5 The claim form, the particulars of claim and a response pack were purportedly served on the Care Agency at 1–2 Johnston's Passage, Gibraltar on April 20th, 2017. This is the address of the Human Resources Department of the Care Agency. The certificate of service lodged on the claimant's behalf says that the Attorney-General was served at the same

address, but this seems to be in error. Curtis's advisers purported to serve the documents by delivering them to the reception at Sir Joshua Hassan House in Secretary's Lane. This is the address of the Office of Criminal Prosecutions and Litigation, which is a department of the Gibraltar Law Offices for which the Attorney-General is responsible. The offices of the Attorney-General, however, are in fact at 40 Town Range.

6 On May 4th, 2017, both the Care Agency and the Attorney-General acknowledged service but indicated that they intended to contest the jurisdiction. On May 17th, 2017, they applied for an order under CPR, r.11(1)(b) setting aside service of the claim form and the particulars of claim. This was on the basis that service was not in accordance with r.3 of the Supreme Court Rules 2000. Because the four-month period for service had expired, the claim form, it was said, was no longer capable of being served.

7 The defendants have not lodged a skeleton argument and indeed Curtis's counsel complains that he has not been formally served with the application. There are a number of arguments which the defendants might potentially have run. One might be that the Care Agency is a government department and that therefore service must be on the solicitor acting for the Care Agency: see CPR, r.6.10(b). This argument seems doubtful, since the Care Agency is a body corporate with perpetual succession: see Care Agency Act 2009, s.4(1). This would potentially be inconsistent with the Care Agency being a government department. Alternatively, it may be said that personal service has not been effected, because service at 1–2 Johnstone's Passage was not on a "person holding a senior position within the . . . corporation": CPR, r.6.5(3)(b). Nor has service been effected under CPR, r.6.9 (service on a place shown in the table to the rule), because 1–2 Johnstone's Passage is neither the "Principal Office" of the Care Agency, nor "the place within the jurisdiction where the corporation carries on its activities and which has a real connection with the claim." In the absence of argument on these points I make no determination of them.

8 Service on the Attorney-General must be in accordance with the rules on service on the Crown. Section 12 of the Crown Proceedings Act 1951 provides that all actions against the Crown (by which the Queen in right of Gibraltar is meant) shall be brought against the Attorney-General. Section 13 in turn provides that service on the Crown must be effected by service on the Attorney-General. (CPR, r.6.10(a) provides that service on the (UK) Attorney General must be by service on the Treasury Solicitor. Schedule 1 to the Supreme Court Rules 2000 (interpretation of English rules) provides that references to the Treasury Solicitor in the CPR shall be to the (Gibraltarian) Attorney-General. Thus, the combined effect of the CPR and the 2000 Rules leads to the same result as is provided for in s.13.) Service on the Attorney-General would appear to include service on officers working at the direction of the Attorney-General. (It is unlikely

the legislator envisaged personal service having to be effected on the office-holder himself.) Whether service on the *reception* of the Office of Criminal Prosecution and Litigation (rather than on Crown Counsel personally) and whether service at the Office of *Criminal* Prosecution and Litigation (rather than the civil litigation section) would suffice as service on the Attorney-General would need to be the subject of argument.

9 To shorten matters, the following day I caused an email to be sent to the parties which pointed out that Curtis was under a disability. Any proceedings brought by him would therefore not be time-barred under the ordinary three-year limitation period for personal injuries: see Limitation Act 1960, s.28(1) and (2). I queried whether it would be in accordance with the overriding objective, CPR, r.1.1(2), to set aside service and strike the claim out if Curtis could just re-issue. (The sole advantage to the defendants might be that Curtis could only proceed with the second action if he paid the costs of the first action, a principle going back at least as far as *Doe* v. *Roe* (4).) There is in any event a power to dispense with service: see r.3(3) of the 2000 Rules.

10 In the event, the parties have agreed that the application contesting the jurisdiction be withdrawn. Acknowledgements of service and defences would be served by June 6th, 2017 and June 20th, 2017, respectively. I am happy to approve that outcome, which seems a sensible means of resolving the rather arid issues of the validity of service.

Split trial

11 Although this case is at an early stage, consideration will need to be given at an early stage as to whether there should be a split trial of liability and quantum. Although in general this is undesirable, in the current case the issues on liability are likely to be short, whereas the quantum of both special and general damages is likely to be complicated.

12 There are complications concerning the claim for special damages. A large number of heads of damage are claimed. The care provided by Mrs. Sullivan up to May 1st, 2016 is claimed at £86,822.42. However, no other head of damage is quantified at all. In due course, there may be a need for expert evidence on some of the heads.

General damages

13 The claim for general damages is also complicated. The quantification of such damages is in a state of flux in Gibraltar. In *Bernal* v. *Riley* (2), I decided that the Supreme Court should no longer follow the English Judicial College Guidelines but instead, as an interim measure, that the court should follow 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).

14 In *Cassidy* v. *Gibraltar Health Auth.* (3), I held that it was open to the court to reconsider whether *Bernal* v. *Riley* was rightly decided. I pointed to the recent Privy Council case of *Scott* v. *Att. Gen. (Bahamas)* (8) and the very recent decision of the Supreme Court of St. Helena in *AB* v. *Att. Gen. (St. Helena)* (1) as the latest thinking on the applicability of the English Guidelines.

15 *Bernal* (2) was a case of comparatively modest (although long-lasting) whiplash injuries. In the current case (assuming the court accepts the seriousness of the injuries alleged), Curtis will experience pain, suffering and loss of amenity for the next 50 years. The English Guidelines, 13th ed. (2015) give a range (with the 10 per cent uplift given by *Simmons* v. *Castle* (9)) of £271,430–£337,700. The Northern Irish Guidelines give a range of £400,000–£575,000.

16 Neither the English nor the Northern Irish Guidelines (nor *Scott* or *AB*) take into account the effect of the substantial drop in real returns on capital which has occurred since the global financial crises of 2008. As I commented in *Bernal* (2016 Gib LR 314, at paras. 52–54):

> "52 It follows that, if the discount rate drops, the capital sum required to compensate for future pain, suffering and loss of amenity must rise commensurately. It is true of course that damages for pain, suffering and loss of amenity have traditionally been given on a global basis. However, even if only as a cross-check, consideration needs to be given to the amount which a lump sum can produce as income for what may be a lifetime's suffering.
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> 53 . . . A man of 36 (based on 2008 mortality tables) or 34 (based on 2004 mortality tables) has a life expectancy of about 50 years. If one assumed that he was permanently disabled with no prospect of recovery, then it would be necessary to consider the real income he would receive from the lump sum to compensate him for the pain *etc.* which he would suffer for the five decades to come. If one took a discount rate of 4.5%, then the number of years' purchase to produce a capital sum would be 19.52. If the court awarded him £100,000, that would give a lifetime annuity of £5,531 per annum (£100,000 divided by 19.52). If the discount rate were 2.5%, then the years' purchase becomes 27.84. The £100,000 lump sum would produce an annuity of £3,592 per annum (or 65% of £5,531). At 0.5%, the years' purchase is 43.82 and the annuity £2,282 per annum (or 41% of £5,531).
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> 54 It follows that, if the discount rate drops, the capital to produce a given annuity must increase. Thus with a 2.5% discount rate, a claimant would need £153,981 in capital to produce an annuity of £5,531 per annum. With a 0.5% rate, the sum needed becomes £242,375."

17 In England, the Lord Chancellor fixes the discount rate in respect of future loss: Damages Act 1996 (UK), s.1(1). Since the judgment in *Bernal*, she has made a new order reducing the discount rate from 2.5 per cent to minus 0.75 per cent per annum: Damages (Personal Injury) Order 2017 (UK). (An application for judicial review to delay the pronouncement of the Order failed: *R. (Association of British Insurers)* v. *Lord Chancellor* (7).) According to the March 2017 Supplementary Tables to the *Ogden Tables*,[1] a 36-year-old man has a life expectancy of 49.98 years (equivalent to Mr. Kumar's assessment of Curtis's life expectancy). At a discount rate of minus 0.75 per cent that gives 61.80 years' purchase. A £100,000 lump sum would thus give a lifetime annuity of £1,618 per annum. This stands to be contrasted with the annuity of £5,531 per annum at a discount rate of 4.5 per cent.

18 The practical effect of this drop in the discount rate into negative territory can be seen in the case of *Povey* v. *Governors of Rydal School* (6). The 19-year-old plaintiff had been injured three years before in an accident at the school gymnasium. He was a tetraplegic, albeit with some use of his arms, but suffered complete loss of feeling from his neck down. Crichton, J. at the Manchester Winter Assizes assessed damages with the benefit of actuarial advice. The plaintiff had an agreed life expectancy of 25 years.

19 Future nursing care was assessed at £20 per week. Without a discount for acceleration this gives a figure of £26,000 (£20 × 52 weeks × 25 years). The actuarial figure for future loss was £19,400, which was the sum fixed by the judge. Although not stated in the judgment, this reflects mathematically a discount rate of 2.5 per cent per annum.

20 The judge awarded £25,000 for pain suffering and loss of amenity. The trial was three years after the accident, so this was to cover 28 years of pain, *etc*., which can be divided into £2,679 past loss (£25,000 × 3 ÷ 28). (A modest award for the shock of the accident can probably be ignored.) Future loss was therefore £22,321. Using the 2.5 per cent discount rate, this converts into a weekly rate of £23.0s.2½d. or a daily rate of £3.5s.9d. Applying a 4.5 per cent discount rates gives a weekly rate of £28.19s.0d. or a daily rate of £4.2s.8½d.

21 The total award including special damages was £78,398.

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1 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/599837/Actuarial_tables_for_use_in_personal_injury_and_fatal_accident_cases_7th_edition_Supplementary_Tables. Pdf accessed May 31st, 2017.

22 The judgment in *Povey* was handed down on March 12th, 1969. This was after the House of Lords decision in *Mallett* v. *McMonagle* (5), on February 11th, 1969, which approved a discount rate of 4–5 per cent, but (unusually) the case was not reported in *The Times*, so it is unlikely counsel knew of the decision when *Povey* was argued. An appeal against Crichton, J.'s decision was settled at a total of £62,500. It is unclear what the reason for this was. The defendants appealed against liability as well as quantum, so the reduction in the award may reflect the risk as regards losing on liability rather than the increase in the discount rate approved in *Mallett*. (Because the plaintiff was under 21 years old and therefore still a minor at common law, the settlement had to be approved by the Court of Appeal, which for that purpose consisted of Harman, Edmund Davies and Widgery, L.JJ., hence our knowledge of the settlement: see [1970] 1 All E.R. at 847.)

23 The UK retail price index (rebased with 2000 = 100) was 17.22 in March 1969 and 264.9 in October 2016[2]; an increase of 15.38-fold. £3.5s.9d. is thus on this basis worth £50.56 in October 2016. £4.2s.8½d. is £63.61.

24 The Office for National Statistics table for average weekly earnings, whole economy, shows wages increasing from £16.8s.0d. in March 1969 to £317.50 in December 1999.[3] From January 2000 to July 2016, wages increased from £311 to £505 per week (£72.14 per day).[4] (There are differences in the methodology used for calculating average earnings before and after 2000, but nothing greatly turns on this for current purposes.) The increase in weekly earnings from £16.8s.0d. to £505 is a 30.79-fold increase. £3.5s.9d. would be £101.31 per day, if the sum were increased in line with UK earnings. £4.2s.8½d. would be £127.34.

25 £101.31 is 140 per cent of daily average earnings (£101.31/£72.14). £127.34 is 176 per cent of daily earnings. Neither of these figures seems on its face too high as compensation for a day living as a tetraplegic.

26 Using the figures for 50 years' expectation of life, a tetraplegic entitled to a daily rate of £101.31 would receive:

(a) a lump sum of £1,029,500 in general damages using a 2.5 per cent discount rate (£101.31 × 365 × 27.84 years' purchase);

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2 http://www.wolfbane.com/rpi.htm. Accessed October 28th, 2016.

3 https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/timeseries/md9m/emp. Accessed November 4th, 2016.

4 https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/datasets/averageweeklyearningsearn01. Accessed November 4th, 2016.

(b) £1,620,400 at a 0.5 per cent discount rate (£101.31 × 365 × 42.82); or

(c) £2,285,250 at a minus 0.75 per cent discount rate (£101.31 × 365 × 61.80).

27 Using the same figures for 50 years of life, a tetraplegic awarded the English maximum of £337,700 would receive:

(a) a daily rate of £33.23 using a 2.5 per cent discount rate (£337,700 ÷ [27.84 years' purchase × 365]);

(b) a daily rate of £21.61 at a 0.5 per cent discount rate (£337,700 ÷ [42.82 years' purchase × 365]); or

(c) a daily rate of £14.97 at a minus 0.75 per cent discount rate (£337,700 ÷ [61.80 years' purchase × 365]).

It can be seen that all these figures are very much lower than Crichton, J.'s daily rate of £3.5s.9d., which, even if this figure is only increased in accordance with the UK Retail Price Index, is £50.56 in October 2016 money. Indeed, the daily rate of £14.97 at the current statutory UK discount rate is less than 30 per cent of the figure Crichton, J. awarded in 1969.

28 The position is even starker if figures for gross domestic product ("GDP") are taken. GDP per capita per annum in the first quarter of 1969 was £828 (£207 × 4) in the United Kingdom.[5] As I noted in *Bernal* v. *Riley* (2), the most recent figure for GDP in Gibraltar is £53,361 per capita per annum. This is an increase of 64.4 times over the UK GDP per capita figure since *Povey* (6) was decided. It would give a daily rate of £211.88 based on £3.5s.9d. or £266.32 based on £4.2s.8½d.

29 These figures for daily rates of £101.31 (£3.5s.9d. UK earnings inflated), £127.34 (£4.2s.8½d. UK earnings inflated), £211.88 (£3.5s.9d. Gibraltar GDP inflated), and £266.32 (£4.2s.8½d. Gibraltar GDP inflated) tie in reasonably well with the figures I quoted in *Bernal* v. *Riley* for wrongful imprisonment (2016 Gib LR 314, at para. 58 *et seq*.).

30 Whether (assuming the refusal to follow the English Guidelines in *Bernal* was correct) it is appropriate to go over to a system based on daily

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5 https://www.theguardian.com/news/datablog/2009/nov/25/gdp-uk-1948-growth-economy#data. (The figure for the whole of 1969 in Table 1.5 of "National accounts at a glance" is £896, but this was at a time of great inflation: http://www.ons.gov.uk/economy/grossdomesticproductgdp/compendium/unitedkingdomnationalaccountsthebluebook/2016edition/unitedkingdomnationalaccountsthebluebook2015edition. Both sites accessed November 29th, 2016.

rates or some other system of guidelines is a matter which stands to be determined at trial. I emphasize that I have made no decision whatsoever as to whether or what system should be adopted. Indeed, if *Bernal* v. *Riley* took a wrong turning, then the English Guidelines would continue to apply. (Whether this should be with or without the *Simmons* v. *Castle* (9) 10 per cent uplift would also need to be determined.)

31 Whether or not it is appropriate to move to a system based on daily rates, consideration of what income a lump sum for general damages will produce may still be useful as a cross-check. The main reason for the increase in quantum which results from the calculation of a daily figure is the astonishing drop in the real return on investments. A subsidiary reason is the greater longevity of the population (particularly in Gibraltar, where I am told life expectation is two years more than in the United Kingdom). These are precisely the two problems which currently afflict defined benefit (otherwise known as final salary) pension schemes: the capital amount required to generate a lifetime's income has increased very dramatically.

32 Since Curtis is under a disability, the court will need to consider these points if it is asked at any point to approve a settlement.

Ruling accordingly.