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of the crimes, the original headline sentence was considered “unduly lenient”.³⁶ As can be seen from these two cases, the court will only exercise its power in exceptional circumstances and this makes its existence far less problematic.

C. CONCLUSION

The Scottish appellate court’s ability to increase the sentence of an offender *ex proprio motu* raises important questions of fairness. The contention that the power may dissuade an offender with arguable grounds of appeal from challenging his or her sentence is, however, questionable: a prospective appellant is less likely to be deterred in the knowledge of the high standard of review adopted by the courts, as further clarified by *Murray*. Claims of unfairness in terms of comparative justice are outweighed by public interest considerations in seeing the court respond to unduly lenient sentences when it has the chance to do so, be it to protect the public from potentially dangerous offenders or to affirm public confidence in the criminal justice system. And in the absence of persuasive arguments as to why a Crown appeal against sentence should be the only instance whereby an unduly lenient sentence can be remedied, the court’s *ex proprio motu* power remains legitimate.

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The Transmission of Liability for Exposure to Asbestos: *Bavaird v Sir Robert McAlpine Ltd* in the Inner House

The Inner House of the Court of Session has given its judgment in the case of *Bavaird v Sir Robert McAlpine Ltd and others*,¹ and has held that liability for the exposure to asbestos of a council worker, and his subsequent death from mesothelioma, by the now defunct East Kilbride Development Corporation (EKDC) passed to its successor, South Lanarkshire Council (SLC). In so holding it overturned the decision at first instance that liability did not transmit. The result is good news for employees of statutory bodies, like local authorities, who are negligently exposed to asbestos but who do not go on to develop symptoms of disease, as is common, for many years afterwards: the Inner House’s decision means that their right to claim damages will

³⁶ Para 27.

¹ [2013] CSIH 98.

be exercisable against any statutory successor of the body which exposed them to the danger.

A. *BAVAIRD AT FIRST INSTANCE*

I have argued elsewhere² that the decision at first instance was an unfortunate one. It seemed perverse that someone's right to claim damages for an asbestos-related injury should be dependent upon whether or not his employer was still in existence (in which case recovery would be undoubted), or whether its rights and liabilities had been taken over by a successor (in which case, according to the first instance judgment, there would be no transmission of liability). Holding that liabilities do not transmit to successor authorities thwarts the underlying purpose of the very legislation (the "transfer order") transferring rights and liabilities in such cases, and it is therefore heartening to see a purposive approach to interpreting such legislation being approved of in both of the substantive judgments in the Inner House (those of Lady Paton and Lord Drummond Young).

The outcome at first instance was reached on a judicial assessment of the transfer order as not applying to contingent liability which had not yet matured at the date of the transfer into actual liability to pay compensation to injured parties, and which, looked at on that date, might never so mature. This meant that those who had been exposed negligently to asbestos (this constituting the *injuria* element of a delict) but who did not begin to manifest any ill effects of the exposure (the *damnum* element of a delict) until after the transfer of liabilities to the successor body were unable to claim. The judge at first instance held that no "liability" (the term used in the relevant legislative provision) to compensate such people had existed when EKDC ceased to exist, nor indeed could there even be said to be a "contingent liability" in existence at the time, as for a liability or an obligation to be "contingent" there had first to be some obligation in existence, and a delictual obligation required the presence of both *injuria* and *damnum* before it could be said to exist. In my earlier comments (referred to above), I criticised this approach, both as misunderstanding the point that liabilities can be contingent in a sense other than that described by the judge at first instance, but also because such an interpretative approach thwarted the purpose of the legislative provisions.

B. *BAVAIRD ON APPEAL*

On appeal, Lady Paton, in the leading judgment, made two important arguments justifying the decision to overturn the judgment at first instance:

- (1) Construing the order as a whole, and adopting a purposive construction, it was clear that the word "liabilities" in article 2 of the transfer order included "contingent liabilities and potential liabilities", such as liabilities which emerged after the date of transfer (these including liabilities to pay damages which arose only on the manifestation of physical symptoms); and

2 M Hogg, "Liabilities and obligations: two different concepts?" (2013) J of Professional Negligence 186.

- (2) Quite apart from article 2, there was a further provision of the order (article 3) stating that “anything done” before the date of transfer by EKDC “for the purposes of or in connection with the property, rights and liabilities transferred by article 2” was, after the date of transfer, to be treated as having been done by SLC. This meant that the exposure of the deceased employee to asbestos by EKDC was to be treated as something done by SLC, so that in effect both the *injuria* and the *damnum* in the case were to be imputed to EKDC.

The purposive approach adopted in this first argument is to be approved of, as is the result reached, but two aspects of Lady Paton’s approach are worth exploring further:

- (a) what is the difference, if any, between “contingent liabilities” and “potential liabilities”?; and
 (b) was article 3 supportive of the conclusion reached by the court?

These issues are considered in turn.

C. WHAT IS THE DIFFERENCE, IF ANY, BETWEEN “CONTINGENT LIABILITIES” AND “POTENTIAL LIABILITIES”?

The appearance of the idea of a “potential liability”, and the suggestion that it may be something different to a “contingent liability”, was a development in the Inner House. At first instance there was reference only to “contingent” liability. The change in terminology may reflect usage of the phrase “potential liability” in the recent Supreme Court case of *In Re Nortel Group of Companies*³ (though this case is not mentioned in the judgments of the Inner House) and in previous English cases concerning the transfer of statutory liabilities (such as *Walters v Babergh DC*⁴), but if that is so it would seem odd to suggest that potential and contingent liability might mean something different, as the judgments in these previous cases switch between the language of potential and contingent without seeming to suggest any difference in meaning.⁵

So do the two terms indicate different concepts? The fact that Lady Paton appeared to distinguish the two suggests that she thought so:

The pursuers’ argument had changed and developed since the debate in the Outer House. In the Outer House, the pursuers periled their case on contingent liability, whereas in the Inner House they relied primarily upon the concept of potential liability, failing which contingent liability.⁶

3 [2013] UKSC 52.

4 (1983) 82 LGR 234.

5 So, for instance, a portion of Lord Neuberger’s judgment in *In Re Nortel* is entitled “Does the *potential* liability fall within Rule 13.12(1)(b)?”, that statutory insolvency rule narrating that it encompasses both “certain” and “contingent” liabilities (emphases added).

6 Para 36.

This remark suggests that counsel also clearly thought that contingent and potential liabilities were different. Frustratingly, what the difference might be between the two is not explained.

One suspects that, because of the strong judicial view expressed at first instance that, for a contingent liability to exist, there must be a completed obligation (i.e. *injuria plus damnum*) to begin with, the reclaimer's counsel in the case were wary of using the idea of contingent liability again on appeal. I believe (as noted earlier) that the view taken at first instance was a mistake, and there is authority to suggest that an obligation (/liability) may be contingent in the sense of *either* an obligation which has been formed, but under which performance will only become due in the event of some uncertain future event (contracts may be contingent in this sense), or an obligation which has not yet been formed but which might be, i.e. one whose very existence is contingent upon an uncertain future event (contract and delict can both be contingent in this sense). Be that as it may, if the tactic to use "potential liability" was adopted in order to avoid first instance disapproval of "contingent liability", then what perhaps may have been meant by "potential liability" is something which is not yet a completed obligation, i.e. (in a delictual context) it is just the presence of *injuria* without *damnum*, thus a state of affairs which has the "potential" to become a completed obligation but only on the occurrence of *damnum*. If that was the intended meaning, however, it would be inconsistent with the apparent synonymous use of "potential" and "contingent" liability in previous cases such as *In Re Nortel*.⁷

Judicial exposition in the Inner House of the meanings intended in the use of these two different terms would have been of great assistance.

D. WAS ARTICLE 3 SUPPORTIVE OF THE CONCLUSION REACHED?

As to this second part of Lady Paton's justification for overturning the decision at first instance, there are perhaps some doubts that this was relevant to the question at hand. Her Ladyship says that article 3 of the transfer order had the effect that the "negligent exposure to asbestos" of the deceased, which occurred during the existence of EKDC, was "something done . . . by, or on behalf of, or in relation to, EKDC for the purposes of its property, rights and liabilities", and hence to be imputed to SLC under article 3.⁸ The concern is that this is arguably stretching the semantics of the phrase "something done" beyond the purpose the phrase was employed to serve.

How were EKDC, in exposing an employee to asbestos, "doing something" for the purposes of, or in connection with, their property, rights or liabilities? Lady Paton, in describing the effect of article 3, gives the example of "general maintenance work on housing stock, including roof repairs" as being something done for such purposes, and one can see why this example makes sense: repairing the roofs of a council's housing stock is something done to maintain its property and thus preserve the value of an

⁷ In one Canadian judgment, however, contingent liability was distinguished from the "potential for liability", the latter being considered to be the mere possibility that liability might arise: see *West Bay SonShip Yachts Ltd v Esau* 2009 BCCR 31.

⁸ Para 30.

existing right of ownership in the property. Similarly, an example of something done to preserve a claim in contract might be a notification to a debtor that EKDC considered a contractual debt as still outstanding – such a notification would reset the prescriptive clock, and thus preserve its right to enforce the contractual debt (the same might be said of a right to claim damages in delict from a party which had negligently damaged council property). Such an act would quite properly be classed as something done “for the purposes of or in connection with” a contractual (or delictual) right (in a claim sense), given that it would preserve the very existence of the claim. Similarly, the act of EKDC in tendering payment under a debt owed by it, or of entering a defence in an action raised against it, would be something done “for the purposes of or in connection with” a liability, and would properly fall, under article 3, to be considered as having been done by its successor authority.

But negligently exposing a person to asbestos is not done for “the purposes of” a right or liability, as it is neither done purposely nor, until the exposure occurs, is there any liability; on the contrary, it is something which *creates* the liability in the first place. Exposure to asbestos could only be done for the “purposes of or in connection with” the liability ensuing if (perversely) it was done with the intention that the council, in exposing the employee to asbestos, would be creating such liability (a fanciful scenario).

It might be countered that this argument adopts too strict an interpretation of the phrase “for the purpose of or in connection with”, but it is suggested that the application of this provision in relation to negligent (i.e. non-purposeful) exposure to a harmful agent is stretching the meaning of the phrase too far, especially given the context of the article in which it appears, an article designed (so it appears) to ensure that actions taken in relation to *existing* property, rights and liabilities of the dissolved entity are to be deemed to be actions of its successor.

It should be added, however, that these doubts relating to the article 3 point do not undermine the decision of the Inner House: the result reached is perfectly able to stand by reference simply to the interpretation adopted of the meaning of “liabilities” as used in article 2.

E. CONCLUSION

Neither of the above two observations on aspects of the generally commendable judgment of Lady Paton in any way undermines the welcome good sense which the decision of the Inner House brings. Had the decision gone the other way, there would doubtless have been mounting pressure for a legislative change to ensure that the unjust deprivation of delictual claims in cases of this sort was rectified. It is understood that the Inner House’s decision may be being appealed to the Supreme Court. If so, it is to be hoped that the outcome provided for by the Inner House is preserved.

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