The Neill Law Lecture 2024

"The Sordid Controversies of Litigants"? Why and When Facts Matter

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All Souls College Library 23 February 2024[1]

1. The idea for this lecture arose out of a discussion my fellow Justices and I were having at lunch in the Supreme Court a couple of weeks ago. We were discussing *Donoghue v Stevenson* and a Scottish lawyer who was joining us for lunch dropped this little bombshell into the conversation. He said: "Although it is always said that the bottle in which the snail was allegedly found was a bottle of ginger beer, in fact the word "ginger" in the West of Scotland is just another word for a fizzy drink. So it could just as well have been lemonade as ginger beer". Well, we all rocked back in our chairs. Could it really be true that the iconic snail in the bottle of ginger beer might have been no such thing? One of my colleagues said, "Just think how the course of the law would have been different if the House of Lords had known that!" But once we had taken a moment to recover our composure, we reconsidered and decided that actually it doesn't make any difference to the legal principle involved whether as a matter of fact it was ginger beer or lemonade, the case would have been exactly the same.

2. Then we turned to consider whether it would have made any difference if the contaminant had been half a decomposed cockroach or worm rather than a snail. That difference of fact would not have been relevant to the legal issues raised. Miss Donoghue would still have got her compensation. One can contrast that with the case of *Smedleys Ltd v Breed*,[2] another invertebrates case which reached the House of Lords in 1974, Lord Hailsham presiding. There the contaminant was a caterpillar found in a tin of peas. The issue in *Smedleys* was whether the offence of providing any food which was not of the substance demanded by the purchaser was a strict liability offence or whether the manufacturer could rely on the statutory defence that the presence of the caterpillar was an unavoidable consequence of the way the food was prepared in the factory. The process in the Smedleys canning factory included the visual scanning of the peas as they moved along the conveyor belt being checked,

[1] I am very grateful to my judicial assistant Sam Dayan for his invaluable assistance in preparing this lecture.
[2] *Smedleys Ltd v Breed* [1974] AC 839.

Lord Hailsham tells us, by a team of women. Even women would surely have noticed a snail amongst the peas. Or if they had not, Smedleys could hardly have argued that it had taken all reasonable measures to exclude extraneous matter from the cans. But a frightened little caterpillar curled up into a ball is the same density, diameter, weight and colour as a pea. Smedleys could at least mount the defence of inevitability, though ultimately it failed before their Lordships. So the fact of it being a caterpillar rather than a snail was a highly relevant fact in *Smedleys* but the fact of it being snail rather than a caterpillar was not relevant in *Donoghue*.

3. But then one of my colleagues said: "Of course it mattered in *Donoghue* whether it was ginger beer or lemonade. That's because ginger beer is always sold in dark brown opaque bottles and lemonade is sold in clear bottles." And although the fact of it being ginger beer was not relevant, the fact that the bottle had been dark brown rather than clear glass was critical to the imposition of the duty of care on the manufacturer. The manufacturer should have realised that there would be no inspection of the contents by the retail shop which buys the bottle and no reasonable preliminary inspection by the consumer. And the other critical fact without which the case would certainly not have happened was that Miss Donoghue had not bought the bottle of ginger beer herself – her friend had bought it. If she had bought the bottle or if her friend had drunk the contaminated ginger beer, they would have had a simple claim in contract against the café. It was because she did not have a contractual relationship with the shop that meant she had to try her luck by suing the manufacturer and so the iconic case came to hold its place in every lawyer's heart.

4. I hope that introduction is enough to convince you not only about the calibre of legal discussion that takes place at lunch at the Supreme Court but also that facts matter.

What counts legally as a fact?

5. A helpful starting point is to consider what is a fact. I am not posing a philosophical question but rather asking: what is a fact for the purposes of the law? At first glance that may appear straightforward; most people take facts to refer to accurate statements about events that have happened or circumstances which exist now or existed in the past. This ties in with the popular idea that the judge's job is to discover 'what really happened' and then apply the law to the facts as found.

6. A paradigm example of a factual dispute of the conventional kind is whether someone said something in a meeting or not. A colourful illustration of this arose in *Blue v Ashley*.[3] The factual dispute there was what had been said in the course of a conversation between three investment bankers in a pub. In particular, had one of the drinkers, Mike Ashley, the CEO of the sportswear giant Sports Direct, agreed to pay £15 million to an advisor who was also there, if Sports Direct's share price reached £8. The trial judge was faced with a highly unusual situation where a contract for millions of pounds was alleged to have been made purely by word of mouth. In the absence of any contemporaneous documentary record, the judge was entirely

[3] *Blue v Ashley* [2017] EWHC 1928.

dependent on witness testimony hampered by the fact that they had been increasingly drunk as the evening wore on and no one man had been present at the whole of the discussion as they had all to take it in turns to make frequent visits to the gents. That is an example of a fact that is conceptually straightforward – what was said in the pub – however difficult to resolve in practice.

7. But facts in the legal sense can differ from what a layperson or philosopher might expect the term to cover and can extend beyond observable phenomena. Someone's mental state is also treated as a question of fact – what they knew at a particular time or what their intention was. Returning to *Blue v Ashley*, working out what had been said in a pub was only the first step of the analysis. The judge then had to decide whether the parties intended their agreement be legally binding. He emphatically concluded that they had not. As the alleged contract was oral, the subjective understanding of individual witnesses was admissible, which is rare in a contractual context. The judge found that everyone present in the pub, claimant included, had viewed the alleged contractual offer as no more than "pub banter". This was supported by the setting and the jocular nature and tone of the conversation.

8. In criminal law, it is often the defendant's subjective intention which is crucial. Proving or disproving the fact of intention will typically involve prosecution and defence relying on a wide range of secondary facts. In other words, given that you cannot get inside someone's head, the fact of their mental state has to be proved by evidence of secondary facts which point towards their intention or lack of it. There is a Biblical passage that has always intrigued me and which reminds us that divining human intent and deciding whether it is relevant is an issue which societies have struggled with for millennia. In the book of Numbers it states:[4]

> "16 And if he struck him with an iron instrument, so that he died, he is a murderer: the murderer shall surely be put to death. 17 And if he struck him with throwing a hand stone, wherewith he may die, and he died, he is a murderer: the murderer shall surely be put to death. 18 Or if he struck him with a hand tool of wood, wherewith he may die, and he died, he is a murderer: the murderer shall surely be put to death. …."

9. The interesting question raised by the passage is why the author of the Bible thought it important to stress that the fact of whether the weapon used was made of metal or stone or wood is immaterial to the question whether the attacker is to be regarded as a murderer or not. I think it is clear that the fact of the material of which the weapon is made is being used as a proxy for the likely mental state of the perpetrator. What the passage is recognising that if you strike someone with a wooden hand tool it may not be so clear that you intend to kill them as if you hit them with a metal weapon or a stone. Nevertheless, if the victim dies, you are still guilty of murder. But later on in the passage it says that if you drop a stone on someone when you didn't know they were there, then provided the victim was not your enemy, then it is up to the

[4] Numbers Ch 35 vv 16 – 18.

community to decide whether you are guilty of any offence or not. So this was quite a sophisticated code of identifying facts that point to intention or lack of it as well as identifying enmity which might be present or not.

10. An unusual factual issue about what is going on in someone's mind was raised by a trial in which Lord Neill, in whose honour it is my privilege to be speaking to you this evening, was involved.

11. Lord Neill made his glittering career at the Bar specialising in patent and commercial law. But he did make a rare foray into criminal law. He led the defence at the 1967 obscenity trial against the British publishers of the novel *Last Exit to Brooklyn* by Hubert Selby Jnr. The case is largely forgotten in the public imagination; it sits overshadowed by the celebrated acquittal of Penguin Books earlier in the decade on similar charges for publishing *Lady Chatterley's Lover*. At the time, though, the prosecution attracted significant public attention and quickly became a cause célèbre.

12. *Last Exit to Brooklyn* offered a disturbing and uncompromising look at the violence and deprivation of urban life in New York. The Director of Public Prosecutions decided that the novel's depiction of drugs, violence and prostitution went too far and brought charges under the Obscene Publications Act 1959. The case turned on whether the book was obscene and, if so, whether the publisher could show that the novel's publication was justified as being for the public good. As with the earlier *Lady Chatterley* trial, this resulted in remarkable court room scenes as a parade of literary luminaries were called to give evidence. Sir Basil Blackwell, son of the founder of Blackwell's bookshop, was one of the most vocal campaigners **for** the prosecution. He took the stand and bravely admitted to having been depraved by the book. That was a question of fact about which one would hesitate before disagreeing with him. Lord Neill for the publisher called some 30 witnesses who sought to establish a specific defence, namely that rather than depraving or corrupting the reader it would evoke horror and pity leave the reader determined to do all they could to eradicate the evils portrayed in the book– not to mimic them.

13. The jury found the publisher guilty. The case went on appeal, with Patrick Neill being replaced as counsel for the publisher by John Mortimer QC. Salmon LJ declined Mr Mortimer's invitation to review the literary merit of the book. He said the court did not propose to express any opinion as to whether this or books like it were obscene; still less, as to whether their publication was justified as being for the public good. Those questions were not for the court to decide; they were wholly within the province of a jury.[5]

14. This episode in Lord Neill's life offers a salutary reminder that Penguin's earlier success did not mark quite so clear a watershed on attitudes towards state censorship of creative works as is sometimes assumed. For my purposes this evening however, the real interest of the case lies in the striking illustration it offers of the law's need to

[5] *R v Calder & Boyars Ltd* [1968] 1 QB 151, 166. The appeal was allowed because the judge had failed adequately to direct the jury on the specific defence.

categorise certain issues as ‘facts’. A non-lawyer would readily describe details such as who had published the book or what it was about as facts. But it is rather less intuitive to say the same of whether the novel was obscene, and, if so, whether its literary merits nonetheless justified its publication. Yet, for the purposes of the trial, these were undoubtedly questions of fact which demanded definite answers and, crucially, therefore were suitable for jury determination.

15. Returning to the present day, the final category of legal facts I want to mention is a peculiar one, which covers events which categorically did **not** happen. Judges are often required to establish what would have happened in a counterfactual world. Questions of causation or quantification of loss may raise complex questions of what would have happened if, say, the tortfeasor had not been negligent so that the accident had not happened or if the contract had not been broken.

16. For example, in one case a promising 18-year-old Manchester United Football Club academy player had suffered a career-ending injury because of a dangerous high tackle during a match.[6] He claimed for damages on the basis that he had been deprived of his chance of a lucrative career as a professional footballer. The judge was faced with the unenviable task of assessing the value of his chance of pursuing such a career, knowing that such chances are notoriously unpredictable. In large part owing to the glowing appraisals that Sir Alex Ferguson and Gary Neville gave at trial, the judge decided as a fact that but for the injury the player would have led a successful career in the Championship or Premier League and consequently awarded him very substantial damages.

Questions of Law

17. Taking stock, we have so far seen that a fact can be an event which, had you been there at the time, you could have observed or heard, or a fact can be someone’s state of mind or their knowledge at a particular point or it can refer to something that would have happened in a counterfactual world. Let us now consider what is not a fact. The traditional counterpart to questions of fact are questions of law. The exact demarcation between the two is notoriously difficult to determine, with judges having complained about the murky dividing line for centuries. There are though some relatively clear rules. The interpretation of a contractual term or a statutory provision is a classic question of law. This is not the same in every legal system. When it comes to contractual interpretation in many civil law countries, the meaning of the contract turns on the subjective intentions of the parties and so is a question of fact.[7] But under the common law where the objective intentions are relevant, it is a question of law.

18. The designation of contractual interpretation as a question of law is a legacy of the system of jury trials in England and Wales. In medieval times, juries were often largely illiterate and so it fell to the judge to construe a contract.[8] The rule helped a

[6] *Gary Smith v Ben Collett* [2009] EWCA Civ 583.
[7] Catherine Pédamon, 'Judicial Interpretation of Commercial Contracts in English and French Law: A Comparative Perspective' European Business Law Review 2021 Volume 32 Issue 6 (1093-1124).
[8] *Carmichael v National Power plc* [1999] UKHL 47.

coherent and consistent body of English commercial law develop, as judges, unlike juries, provide reasoned judgments which can slowly accumulate under a precedential system into a vast edifice of rules. Of course, today there are now no juries in civil trials, literate or illiterate. But as Lord Diplock noted in the 1980s, it is far too late to change the technical classification of contractual construction from being one of law.[9]

19. Whilst the meaning of a statute is also undoubtedly a question of law, more difficult questions arise when that statutory language falls to be applied to a specific set of facts. How should the process of application be categorised? Tax statutes are a rich source of these sorts of cases: a taxing provision will state that it applies to a particular thing and then a dispute will arise about whether the thing in dispute falls within the provision.

20. Take the case of *Perks v Clark*:[10] the taxpayers were workers on a mobile oil-drilling rig and claimed a tax exemption. Their entitlement to the tax exemption depended on whether as oil rig workers they were employed as "seafarers". That in turn depended on whether the oil rig was a "ship"; the word used in the relevant taxing provision. The General Commissioners (who were then the first tier of judges deciding tax appeals) decided that the mobile oil rigs were "ships" so that the men were "seafarers" and entitled to the tax exemption. On appeal, the High Court judge decided that, whilst he was bound by the findings of primary fact made by the General Commissioners regarding how the rigs were built and operated, the question whether oil rigs were "ships" was a question of law on which he was entitled to form his own view. He reversed the Commissioners' decision and held that they were not ships.

21. On further appeal, the Court of Appeal disagreed and categorised the question as one of fact. There was still a question of law involved – what the statute meant by 'ship'. But once it had been decided that the word "ship" bore its ordinary meaning, then its application to the facts of the case was a question of fact.

22. Why does this matter? First it is important to stress that the categorisation of the issue as one of fact or law does not denude the decision of precedential value. As I explained in a later judgment,[11] if, following the decision, one of Mr Perks' colleagues working the same oil rig claimed the same tax exemption, they would also have been entitled. Similarly, if a worker on another oil rig could show that their rig was relevantly similar to Mr Perks', they too would be entitled to the exemption. If claims arose concerning a seaborne structure that differed in material ways from the rig, a court would undertake an orthodox process of judicial reasoning and consider whether the earlier judgment should be followed or distinguished on its facts.

23. The main reason why it matters is that one of the primary consequences of the categorisation of a matter as one of fact or law is that each triggers a different approach on appeal. An appellate court is always entitled, indeed bound, to correct an error of law made by the court below. But a more deferential approach is adopted

[9] *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724.
[10] *Perks v Clark (HM Inspector of Taxes)* [2001] EWCA Civ 1228.
[11] *Haworth v HMRC* [2021] UKSC 25.

when reviewing a lower court's factual findings. It has often been said that a trial judge will have been immersed in the evidence in a way that an appellate judge is not. Their findings of fact will be informed by the totality of the evidence before them – what Lord Hoffmann termed the "penumbra of impression as to emphasis, relative weight, minor qualification and nuance".[12]

24. Appellate courts calibrate the intensity of their review depending on the nature of the factual issue being appealed. The guiding principle is to consider the extent to which the trial judge had an advantage over the appellate court; the greater the advantage, the more deferential the review should be.[13] Conclusions of primary fact based exclusively on the assessment of witness evidence will very rarely be overturned. By contrast, where a judge has based their conclusion on a photograph, it may be that the appellate court is just as well placed to take a view.[14]

25. Judges have recognised that the two categories of fact and law are not sufficiently analytically precise to offer an objective answer in every case. This flexibility has been particularly clearly on display in the context of the tribunal system. The Upper Tribunal was established as a specialist tribunal with a jurisdiction limited to hearing points of law. Supreme Court decisions such as *Jones*[15] and *Pendragon*[16] are replete with references to the need for everyone to take a "pragmatic" and "expedient approach" to the law-fact division in this context so as not to constrain the jurisdiction of the Upper Tribunal unduly, particularly given that the decisions of the First-tier tribunal do not have binding precedential value. The focus of the inquiry should be on whether, as a matter of policy, it would be helpful for a specialist appellate tribunal to provide guidance on a point even if it might otherwise be considered questions of fact. Or as Lord Carnwath put it, there may be good reasons for the Upper Tribunal as an appellate body to "venture more freely into the 'grey area' separating fact from law, than an ordinary court".[17]

Questions of fact in the JCPC

26. The reluctance of appellate courts to revisit findings of fact is demonstrated very strongly in appeals to the Judicial Committee of the Privy Council (JCPC). The Board's established practice, which dates to 1848, is to decline to review concurrent findings of fact made by the two lower courts which have already examined and decided the case. There are only narrow exceptions to this practice, such as where there has been an error of law in relation to those factual findings or if there has been a radical procedural flaw somewhere in the judicial process. As Lord Burrows

[12] *Piglowska v Piglowski* [1999] 1 WLR 1360.
[13] *Datec Electronic Holdings Ltd and Another and United Parcels Service Ltd and Another* [2007] UKHL 23.
[14] *Manning v Stylianou* [2006] EWCA Civ 1655.
[15] *Jones (by Caldwell) v First Tier Tribunal and Criminal Injuries Compensation Authority* [2013] UKSC 19.
[16] *Commissioners for Her Majesty's Revenue and Customs v Pendragon plc and others* [2015] UKSC 37.
[17] Ibid.

explained in a recent appeal, this approach constitutes a "super-added constraint" on the JCPC which goes beyond the standard constraints on any appeal court.[18]

27. There are two principal reasons for this added deference. First, the factual findings will necessarily already have been upheld by one appeal court; there is no reason to think that a third court looking at the facts is more likely to reach a different, let alone a more accurate decision. Second, the JCPC is necessarily more removed from the circumstances and practices in the country from which the appeal comes. It is right that the Board should generally defer to the expertise and local knowledge of the judges in the courts below.

28. The Board has considered the outermost boundaries of this practice in two recent appeals. One concerned a claim for damages for false imprisonment.[19] The claim turned on whether the police officer who arrested and imprisoned the claimant had suspected, with reasonable cause, that the claimant had committed an arrestable offence. Whether the police officer had *actually suspected* the claimant was a pure question of fact which could not be challenged on appeal. That may have been something within the police officer's head but it was still a question of fact. However, whether the officer had *reasonable cause* for his suspicion was found to involve a value judgment about the proper balance between the liberty of the individual and the public interest in crime investigation. That was an evaluative exercise which the appellate court would be more ready to revisit.

29. This does not mean that all findings which involve an evaluative exercise will be similarly treated. As the Board explained in a different appeal, making primary findings of fact will often also involve an evaluative exercise – the judge must weigh up multiple pieces of evidence and make decisions as to weight and credibility.[20] However, there the analytical exercise involves assessing the probative value of evidence rather than making a general objective value judgement about "what is just or reasonable". Such questions of evaluation of evidence remain pure questions of fact which fall within the scope of the Board's practice not to review concurrent factual findings.

Relevance and admissibility of facts

30. Let us think further about the rules governing what facts are relevant to a particular legal inquiry. Sometimes the law decides that a whole area of fact which might otherwise appear to be highly relevant should be excluded from consideration for some policy reason. The number and scope of these exclusionary rules have gradually reduced over time, particularly in civil proceedings. However, a number of important exclusionary rules remain.

[18] *Dass (Appellant) v Marchand and others (Respondents) (Trinidad and Tobago)* [2021] UKPC 2.
[19] *Betaudier v Attorney General of Trinidad and Tobago* [2021] UKPC 7.
[20] *Water and Sewerage Authority of Trinidad and Tobago v Darwin Azad Sahadath and another (Trinidad and Tobago)* [2022] UKPC 56.

31. A classic example in the civil context is the exclusion of what happened in pre-contractual negotiations when deciding what the words of the contract mean. In other words, when the court is construing a contract to work out what an ambiguous clause means, facts about what was put in or taken out of earlier drafts or what was said or not said in discussions before the contract was signed are not admissible facts tending to show one meaning or the other. The rationale for this rule was subject to searching inquiry by the House of Lords in *Chartbrook* in 2009.[21] Their Lordships recognised that evidence of pre-contractual negotiations could in principle be relevant. Maintaining the prohibition might therefore result in some cases in parties being held to have agreed terms which a court would have decided that a reasonable observer, sitting with them during negotiations in a now smoke-free room, would **not** think they had expressly agreed.

32. However, their Lordships ultimately decided that the rule was justified by considerations of economy and predictability. Statements made during negotiations would frequently be oral and "drenched in subjectivity". Deciding whether they merely reflected the aspirations of one of the parties rather than embodying a provisional consensus would be near impossible for the factfinder. One might add that it would also greatly extend the amount of oral and documentary evidence that would need to be placed before the court. It might also lead to negotiators trying to "game the system" by putting something they really did not want to agree to in a draft and then deliberately taking it out of the next draft in order to be able to make some point if a dispute arose at a later date.

33. Sticking with contractual terms, there is also a rule excluding facts about how the parties have operated an agreement in practice **after** it was signed as being relevant to construing its terms. The underlying idea is that the meaning of the words in the agreement was fixed when the contract was signed. This means that unless one party is raising an issue of estoppel by convention, or waiver of breach, how the parties chose to implement the agreement cannot affect its meaning.

34. As with the parol evidence rule, the rationale for excluding facts about post-contractual conduct is fundamentally pragmatic. Evidencing post-contractual actions would often require additional detailed factual evidence about events covering a potentially long period of post-contract time. Further, as Lord Neuberger has warned, if it's known that post-contractual words and conduct are relevant, parties will incur time and expense scurrying back to their lawyers to ensure what they are saying or doing is not harming their interests.[22] This is another case where the added expense and time involved in permitting a particular sort of fact to be treated as relevant is not justified by the relatively few cases in which it would be of real value.

35. But this rule does not always apply, and facts about post-contractual conduct can be essential in considering what the parties have agreed in a different context. This was

[21] *Chartbrook v Persimmon Homes Ltd* [2009] UKHL 38.
[22] Lord Neuberger, 'The impact of pre– and post-contractual conduct on contractual interpretation' (Banking Law and Financial Law Association Conference, Queenstown 2014).

discussed in the Supreme Court's landmark *Uber v Aslam* decision.[23] The question there was whether the contract between Uber and its drivers was a contract of employment within the meaning of the employment protection legislation. The contract was drafted very clearly on the basis that all that Uber was supplying to the supposedly independent drivers was the technological service via the Uber app and a payment collection service. This then enabled the drivers to provide transportation services to the ultimate user.

36. In practice of course the relationship between the parties was completely different from how it appeared in the signed written agreement. But did the factual reality of the way the contract was operated after it was signed affect the legal analysis? The answer was that yes it did. This was because the task of the court in *Uber* was not really to ascertain what contractual obligations the parties had committed to. Rather it was to work out whether the Uber drivers fell within the scope of the statutory employment protections. In that context, the court was not limited by ordinary principles of contract law as to which facts it could examine. The courts must look to the reality of the relationship as reflected by what happens on the ground.

37. Criminal trials operate considerably stricter rules about what facts are considered admissible. A striking example is the attitude towards the fact of previous convictions of the defendant. The common law historically took a sceptical attitude towards the relevance of the fact that the defendant had previous convictions to the issue of whether he had committed the offence for which he was now being tried. So a previous conviction was generally inadmissible, unless it could be categorised as similar fact evidence. The rationale for the general exclusion was not that such evidence would necessarily be irrelevant, but that it would tend 'both to confuse and unduly to prejudice the jury'.[24]

38. Lord Sankey described it as one "the most deeply rooted and jealously guarded principles of our criminal law".[25] Lord Sankey notwithstanding, the Criminal Justice Act 2003 abolished and replaced the common law rule with a highly complex legislative regime. There are now seven possible gateways through which facts about the defendant's bad character are admissible, which taken together are considerably more expansive than the previous common law position. The court retains the ability to exclude such evidence if it would have a particularly prejudicial impact on the fairness of proceedings.

<u>The influence of facts on legal doctrine</u>

39. The relationship between facts and the law is not all one way. Just as substantive legal rules regulate what facts may be taken into account, considerations of fact-finding also shape the development of legal rules. Judges are keenly aware of the realities and limitations of the courts' ability to make factual determinations and consciously try to

[23] *Uber v Aslam* [2021] UKSC 5.
[24] *O'Brien v Chief Constable of South Wales Police* [2005] UKHL 26.
[25] *Maxwell v The Director of Public Prosecutions* [1935] A.C. 309.

develop the law in a way that is practicable. Let me give you a recent example from the Supreme Court.

40. The Supreme Court recently handed down judgment in three appeals heard together considering whether an individual can claim for psychiatric injury caused by witnessing the death of a close family member in distressing circumstances, where that death was caused by earlier clinical negligence.[26] A number of tests to limit the scope of such liability were proposed by the claimants because they realised the Court would be concerned not to extend liability too far. One proposed test was that liability would be limited to a situation where the traumatic death of the loved one was the "first manifestation" of the illness which would have been avoided if the doctor had properly diagnosed the medical problem. This would mean that if, for example, an individual's fatal heart attack was preceded by months of symptoms of the pending attack, their relatives could be precluded from recovering damages.

41. We rejected that test as normatively unacceptable and practically unworkable. A court would be required to work out what, if any, symptoms had manifested during the potentially long period between misdiagnosis and the event witnessed by the claimant. If applied in a different context, it might mean, for example, that if the claimant witnessed the collapse of a building, knowing that her family were inside and it turned out the collapse was due to a design fault, then it would be relevant whether the collapse of the building had been the first hint that something was wrong. This would open up a whole range of facts that would need to be explored as to whether there had been any unusual cracks in the building and whether those were or should have been spotted. That was not a factual inquiry that was needed for any other purpose in the litigation and it would be undesirable to establish a legal test that would inevitably expand the time and expense needed for deciding the claim.

<u>The Importance of Facts</u>

42. Those cases bring me back neatly to the title of my talk and the reference to the "sordid controversies". That phrase is taken from a passage in Judge Benjamin Cardozo's classic treatise *The Nature of the Judicial Process*.[27] The book is a compilation of four lectures Judge Cardozo delivered at Yale Law School in 1921 when he was at the height of his powers as a member of the New York State Court of Appeals, before he became a Justice of the US Supreme Court.

43. Cardozo remarked that "as a system of case law develops, the sordid controversies of litigants are the stuff out of which great and shining truths will ultimately be shaped. The accidental and the transitory will yield the essential and the permanent".

44. When I first read that, I bristled slightly that a judge should belittle in that way the human drama behind the cases we decide – that human drama of course arising from the facts of the case, not from the law.

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[26] *Paul and another v Royal Wolverhampton NHS Trust* [2024] UKSC 1.

[27] *The Nature of the Judicial Process* Benjamin N Cardozo. Pubd in the 2010 *Legal Legends* edition by Quid Pro Books, Lecture 1 p. 18.

45. I would therefore say two things about Cardozo's reference to facts as sordid controversies. First, it is certainly true that some great legal principles arise from the most accidental and transitory sets of facts. *Donoghue v Stevenson* and the caterpillar in the peas are two good illustrations of that. Other great legal principles have arisen from similar tiny circumstances. Mr Nattrass' inability to find in his local Tesco a packet of Radiant washing powder reduced in price from 3s. 11d. to 2s. 11d. as advertised on posters in the shop led the House of Lords to establish the principles by which the mens rea of an employee can be attributed to the company to make the company guilty of a criminal offence.[28] And it was Mr Costa's refusal to pay his very modest electricity bill that led to the European Court of Justice establishing the supremacy of Community law.[29] I recently sat in a case about the application of the tariff for compensation for whiplash injury in circumstances where the claimant also suffers other minor soft tissue injuries. The difference in damages turning on what we decide was £790 in one of the appeals before us and about £1000 in the other. Yet permission to appeal was granted because it raised a point of law of general public importance which it was appropriate for the Court to consider.[30]

46. But the second point is that if Judge Cardozo is downplaying the importance and the interest of the facts from which the legal principles emerge then I strongly disagree with him on that. For me as a trial judge the facts of the case were often as interesting and important as the legal principles. Making factual findings is one of the key judicial tasks and one of the most difficult things judges have to do.

47. The facts of any legal dispute are crucial because of the nature of the enterprise the court is engaged in. The primary audience for a judgment is, after all, the parties to the claim. I am always acutely aware that when the parties read any judgment I have drafted, particularly when I was a High Court judge, the parts of the judgment they are interested in are the bits that law students or academics might skip over, the bits that set out the findings of fact. My point is not to deny that courts have to deal with cases of grubby human behaviour – of course they do. Rather, it is that adopting a dismissive attitude towards litigants and their travails can lead to a viewpoint from which the work of the courts, with its sheen of rationality and logic, appears completely detached from and even purports to be superior to the people and stories we are called upon to adjudicate.

48. And, certainly, judges at all levels of the judiciary recognise the importance of "telling the tale" when it comes to writing the judgment. What is set down is never just the bare bones of the factual matrix limited to the facts essential to deciding the case. How much shorter - but how much less interesting - would judgments be if they were so limited. We do not really need to know that the little caterpillar in *Smedleys v Breed* was cooked at 250°F in the tin, anymore that we need to know that it was bluebell time in Kent on 19 April 1964 when Mr Hinz was killed in sight of his wife[31]

[28] *Tesco Supermarkets v Nattrass* [1972] AC 153.
[29] *Costa v ENEL* (Case 6/64) [1964] ECR 585.
[30] On appeal from *Hassam v Rabot* [2023] EWCA Civ 19.
[31] *Hinz v Berry* [1970] 2 QB 40.

or that Mr Thornton was a free-lance trumpeter of the highest quality when he parked his car in the Shoe Lane car park and took the ticket from the machine which included an exclusion of liability.[32]

49. Let me end by citing an illustration of exactly what Judge Cardozo may have had in mind by telling you about one of my favourite cases: *Kearry v Pattinson*.[33] The law report records the events as set down by His Honour Judge Sir Reginald Banks sitting in Hull County Court. The plaintiff, Thomas Kearry, is a beekeeper. On June 16, 1938, about noon, some of his bees swarmed, and settled in the back garden of the defendant, Walter Pattinson, who is his next door neighbour. At about 1 pm the plaintiff, accompanied by his brother and a Mr. Taylor, another beekeeper, went to the defendant's house and asked the defendant's permission to go into his garden and recover the bees. The defendant said "No, you only speak to me when you want something." It is a fact, said the judge, that the parties have been unfriendly for some years, the plaintiff at one time having assaulted the defendant's wife. The plaintiff went away. Mr Pattinson relented the next day and allowed Mr Kearry into his garden but it was too late, the bees had gone. Mr Kearry sued his neighbour in conversion for the loss of the swarm and the loss of profit on the honey he would have got. Not, one might have thought, conducive to improving neighbourly relations between them. The County Court judge dismissed the claim as did the Court of Appeal.

50. The case is authority for the question whether the bees, being wild animals, can be chattels. It was held that following Book II Chapter 25 of Blackstone's Commentaries Mr Kearry only had any property rights in the bees whilst they were in his hive. Once they had swarmed he lost any property rights he had in them so it was impossible for his neighbour to be liable in conversion for their loss. Now we don't really need to know why Pattinson refused to let Mr Kearry come to collect his bees – and Judge Cardozo may think that is a very good example of a "sordid controversy". But how much poorer our law reports would be if these little insights into the human drama were not recorded for posterity.

51. But the law builds up to reflect and control how human beings interact with each other bearing in mind our two conflicting traits – that we are social animals and want to work and live in communities but we have a tendency sometimes to behave badly towards each other. And more fundamentally, it is a reminder that a case that appears to be a cerebral question of property rights is in reality a very human dispute. And for the humans concerned, facts certainly matter.

[32] *Thornton v Shoe Lane Parking* [1971] 2 QB 163.
[33] *Kearry v Pattinson* [1939] 1 KB 471. The case was discussed in *Borwick Development Solutions v Clear Water Fisheries Ltd* [2020] EWCA Civ 578, a case about proprietary rights in fish in a lake.