



## UK Crown Not Immune From Jurisdiction of Gibraltar Courts

### **Introduction**

Hassans have been currently acting for the Transport and General Workers' Union against the United Kingdom's Secretary of State for Defence (**SSD**) in a case which raised issues of fundamental constitutional significance for Gibraltar. Given its importance, the case has been run by Lewis Baglietto, head of the firm's litigation team. The firm's senior partner, James Levy QC, acted as leading counsel and argued the case before the Gibraltar Supreme Court.

In a decision which overturned a previous judgment of the Supreme Court and went against decades of supposition and practice, Mr Justice

Schofield, Chief Justice, has held that UK government departments can no longer operate in Gibraltar as if immune from claims for breaches of statutory duty or in negligence. The Chief Justice also decided that in cases covered by Council Regulation (EC) 44/2001, Gibraltar claimants do not have to bring claims against United Kingdom government departments before the UK courts. Instead, they may do so in Gibraltar.

The decision, which has not been appealed, is a noteworthy advance in Gibraltar's constitutional law, as it will subject UK government departments operating here to the same "judge over your shoulder" scrutiny they are

subject to at home - but that judge will sit in a Gibraltar court.

### **The Factual Background**

The Ministry of Defence (**MOD**) is still a major employer in Gibraltar, in spite of the reduction in the armed forces' presence here. It accounts for about 3.7% of Gibraltar's gross domestic product and currently employs about 7% of its workforce.

On 17 February 2005 the MOD announced that it intended to transfer to private contractors a significant portion of the infrastructure support services provided to it in Gibraltar by civilian employees. About one-third of the civilian workforce would transfer.







# The Use of Experts in Personal Injury Cases

Damages for pain and suffering and loss of amenity caused by the negligent conduct of a third party are assessed according to the severity and duration of the injury and it therefore follows that medical experts play a vital role in the conduct of a personal injury case.

Prior to the introduction in Gibraltar of the Civil Procedure Rules (CPR) in 2000, in many personal injury cases both parties would have obtained their own medical evidence. Inevitably experienced personal injury lawyers became familiar with working with a select group of medical experts and with the parties having complete control over which expert to instruct, concern was expressed that medical evidence was becoming increasingly contentious and polarised with each party relying on their favoured "hired guns". To some extent this perception was exaggerated, experts have always been independent in recognition of their duty to assist the court, but it was nevertheless a perception that was in danger of undermining confidence in the procedure. Furthermore in many cases the medical evidence is uncontroversial and the practice of both parties getting their own reports was considered wasteful.

A major component of the overriding objective of the CPR is to ensure that cases are dealt with expeditiously and that costs of litigation are carefully controlled. With this in mind a number of provisions in the Rules address the way in which medical evidence is obtained and these measures have recently been bolstered by a new Protocol drawn up by the Civil Justice Council. The Protocol came into force in England and Wales in September 2005 but should also be followed as a matter of good practice in Gibraltar.

The purpose of the Protocol is to offer guidance to the expert and to interpret and complement the Rules. In so doing it is hoped that the protocol will -

1. Encourage the exchange of early and full information;
2. Assist the parties in avoiding, where possible, the scope of litigation by agreeing issues before the commencement of litigation;

3. Support the efficient management of proceedings where litigation cannot be avoided.

The carrot is the prospect of cases being concluded more quickly and cost effectively as a result of the Protocol. The stick is that the court is able to penalise in costs a party who fails to follow the Protocol and the objectives its supports.

The Protocol repeats the longstanding principle that whilst the expert owes a duty of care to the party instructing him, the overriding duty is to assist the court in deciding matters within the expert's area of expertise. To ensure independence, an expert must be able to satisfy himself that he would give the same opinion if instructed by the opposing party.



In promoting the need for efficiency, it is incumbent upon lawyers to ensure that experts are only instructed when necessary. This involves the lawyer in establishing what issues divide the parties and asking himself whether the court is able to adjudicate upon the point without the need for expert evidence. Where an expert is required, he should have the necessary expertise and experience to assist the court and ensure that there is no conflict of interest that would preclude him from giving an opinion. It is for the lawyer to instruct the expert which involves him in carefully addressing the issues, setting out the relevant background, advising the expert on any legal issues to be satisfied (e.g. standard of proof) etc. The letter of instruction will also address how the expert is to be paid and the timescale within which the report is required. On the question of fees, under no circumstances can payment be made contingent upon the out-

come of the case, to ensure the expert's independence.

The report should be prepared as soon as reasonably practicable and should be addressed to the court. A declaration has to be appended to the report by the expert to confirm that he believes the report to be true and an accurate reflection of his independent opinion. If there are a range of opinions available to the expert, those different opinions should be explained in the report and an explanation given as to why the expert prefers a particular view.

Following disclosure or exchange of reports there follows a process whereby the parties are permitted to put questions to the expert for the purposes of clarification of the expert's opinion.

Again in furtherance of the overriding objective, the court will not automatically permit the party to call the expert to give evidence at trial but rather the party will have to request a specific direction to that effect. The aim, of course, is to encourage the parties to agree medical evidence and thereby limit both costs and length of trials.

Perhaps the most significant recent development is the concept of single joint experts. These are to be encouraged wherever possible and will be the norm in smaller, fast track cases. Where the court makes a direction for a single joint expert both sides are encouraged to agree a single set of instructions and the expert is expected to disclose his release his report to both sides simultaneously who will then be entitled to put questions to the expert, again for the purposes of clarification.

To a large extent the Protocol simply reflects good practice that experienced personal injury lawyers have been adopting for a long time but the new Code is welcome all the same for the clarity it brings to the procedure. This is a multi disciplinary area of practice and it is hoped that the guidance continues to assist the courts in ensuring that lawyers, experts and health care providers work in a coordinated manner to provide the best possible service for clients.

# Focus: Maternity Leave

Conn MacEvilly

The Government of Gibraltar plans to increase maternity leave from 14 to 18 weeks. It has already recently prolonged the period during which it will pay statutory maternity allowance, to match that extension.<sup>1</sup> This note looks at the practical impact of those changes.

## **What will the changes mean for my business?**

At present, statutory maternity leave lasts for 14 weeks or (if the baby has not been born by the time those 14 weeks run out – a rare occurrence) until the birth of the child.<sup>2</sup> All women are entitled to this time off, regardless of how long they have been employed. The earliest it can be taken is eleven weeks before the expected date of childbirth. Once the new law comes into force, you will be required to allow female employees to take up to 18 weeks' statutory maternity leave.

## **Does this mean I have to increase the duration of paid maternity leave?**

No. Even now, there is no statutory obligation on employers to pay employees who are on maternity leave. Equally, though, there is nothing to prevent you from making a payment if you wish – and that position will not change.

Instead, it is the Government of Gibraltar which is obliged to pay women during maternity leave. Statutory materni-

ty allowance is paid to those women who have made sufficient contributions to the Social Insurance Fund, have given the required notice to their employer and have made a claim for it in time.<sup>3</sup>

## **Will the period of unpaid maternity leave be reduced?**

Yes, by four weeks. Only those women who have been in the same employment for more than one year at the beginning of the eleventh week before the expected week of childbirth have a statutory right to unpaid maternity leave. They can delay their return to work for up to 29 weeks after the week of childbirth (plus up to a further four weeks for medical reasons).<sup>4</sup> The changes to the law will mean that the woman will receive statutory maternity allowance for an extra four weeks out of those 29 and so in a sense the period of unpaid leave will be reduced (although the maximum deadline for return to work will not change).

## **What about paternity leave for fathers?**

There is no right to paternity leave under Gibraltar law, although employers may provide it if they wish. There are no plans to imitate here the recent UK legislative proposals on paternity leave.

However, fathers have the same right as mothers to unpaid "parental" leave: both are entitled to a total of 13 weeks'

unpaid leave during the first five years of the child's life, provided that they have one year's continuous service on the date on which the first period of unpaid leave is expected to start.<sup>5</sup> A maximum of four weeks' parental leave may be taken in any one year. Although parental leave is a right, the employer is entitled to take business needs into account when deciding precisely when the leave is to be taken.

## **What is the maximum period of leave a woman can take because of her pregnancy?**

A woman can take maternity leave as early as the law lets her (eleven weeks before the birth),<sup>6</sup> then delay her return for the full 29 weeks after the birth (if entitled to do so) and extend it for the maximum four weeks for medical reasons (if those reasons apply), giving a total of 44 weeks which the employer must allow her to take.

In addition to that, she can request to take the annual leave entitlement which she has generated during those 44 weeks and the maximum unpaid parental leave to which she is entitled (another four weeks). In both cases she must accommodate to the business needs of her employer. If the employer consents to these additions, she could be away from work for a total of 48 weeks plus her annual leave.



<sup>1</sup> By means of the Social Security (Insurance) (Amendment) Ordinance 2004, which amends s. 11A(2) of the Social Security (Insurance) Ordinance and which came into force on 1 July 2004.

<sup>2</sup> Section 5(1) of the Employment (Maternity and Parental Leave, and Health and Safety) Regulations 1996.

<sup>3</sup> This gives rise to an anomaly under the current legislation. An employee who has not met the one-year threshold for entitlement to the right to delay her return to work, or who has failed to fulfil the notice requirements in order to avail of it, can stay on statutory maternity leave for only 14 weeks but has the right to be paid maternity allowance for 18 weeks.

<sup>4</sup> Section 11(1) of the same. In order to enjoy this right, the employee needs to inform her employer that she plans to exercise it when she gives notification of her pregnancy and the expected date of childbirth and must also provide (if her employer requests it within 21 days of the end of her statutory maternity leave period) confirmation of her intention within 14 days of receiving a request.

<sup>5</sup> Section 25 of the same.

<sup>6</sup> Section 6(2) of the same.

## Tribute to Sir Alister Kneller

Sir Alister Kneller who was Chief Justice of Gibraltar from 1986 to 1995, died on 7<sup>th</sup> November 2005 aged 77.

In a tribute to Sir Alister which was held in the Supreme Court of Gibraltar on 14<sup>th</sup> November 2005, the Chief Justice (and successor to Sir Alister), Mr Justice Schofield, recalled that Sir Alister was born in Kenya and after attending the King's School, Canterbury and Corpus Christi College, Cambridge, returned to Kenya where he enjoyed a distinguished legal career as a barrister, Registrar, a Judge of the High Court and a Justice of Appeal.

The Chief Justice further stated that Sir Alister was "remembered with great respect and affection" and "had an excellent legal brain and wrote careful and sound judgments. He was a man of fairness and justice" said the Chief Justice who was "highly regarded by the Court of Appeal" and had the "confidence of the Bar"

The considerable number of lawyers who attended the Chief Justice's tribute was testimony in itself of Sir Alister popularity during his term of Chief Justice in Gibraltar. Sir Alister will be particularly remembered for his unique sense of humour.



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## Judiciary 2005

### Supreme Court

Chief Justice  
Additional Judge

The Hon. Mr Justice Schofield  
The Hon. Mr Justice Dudley

### Court of Appeal

President  
Justices of Appeal

Sir Christopher Staughton, JA  
Sir Murray Stuart Smith  
Sir Philip Otton  
Sir William Aldous, JJA

### Magistrates Court

Stipendiary Magistrate & Coroner Mr Charles Pitto

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