Although this interpretation is entirely plausible, it raises a difficulty which perhaps only the legislature can resolve. Newspapers maintain libraries of their own stories, previously cuttings, now increasingly in electronic form. Journalists rely on cuttings libraries when generating new stories. Consequently, errors in past stories tend to reproduce themselves. If section 32 applies to all newspaper operations, the fourth data protection principle, requiring data to be accurate, cannot help to correct cuttings libraries. One of the worst features of newspapers, their capacity to create myths, would continue to be legally incontestable.

DAVID HOWARTH

CAN AN EMPLOYER BE UNDER A DUTY TO DISMISS AN EMPLOYEE FOR HIS OWN GOOD IN ORDER TO PROTECT HIS HEALTH?

SUPPOSE that an employee has some personal idiosyncrasy that puts him at risk while performing work that can be safely performed by virtually all his colleagues? If the employer simply has no alternative work reasonably available, what is he to do if the employee, with full understanding of the situation, nevertheless prefers to run those risks rather than have no job at all? *Coxall* v. *Goodyear Great Britain Ltd.* [2002] EWCA Civ 1010 suggests that the employer may be under a common law duty to dismiss the employee for his own good so as to protect his health.

The claimant, Mr. Coxall, worked in the defendant's factory. The manufacturing process was safe and satisfactory for the majority of the workers (employees were given rubber gloves, goggles, and respirators), but the claimant suffered from a mild constitutional predisposition to asthma. This condition was initially unknown both to him and to his employer. When it eventually came to light, the works doctor wrote a memorandum to the claimant's team manager stating that the claimant should be removed from his job because he must avoid any work involving exposure to known respiratory irritants, including the paint used in the manufacturing process. The claimant was aware of the doctor's advice. However, he chose to continue to work because he needed the money. The company did not act on the doctor's letter, and the claimant eventually collapsed, suffering from occupational asthma caused by exposure to irritant fumes at work. He then sued the company for negligence.

An employer is under a non-delegable personal duty under the common law to his employees to see that reasonable care is taken

of them (*Wilsons and Clyde Coal Co.* v. *English* [1938] A.C. 57). The duty is owed to individual employees. This means that particular characteristics of an employee may require extra care to be taken if the employer is or should be aware of them (*Paris* v. *Stepney Borough Council* [1951] A.C. 367). The issue in the Court of Appeal in *Coxall* was whether the employer had breached the duty of care owed to the claimant. The court (Brown and Brooke L.JJ.) concluded that there had been a breach.

According to Brown L.J., "cases will undoubtedly arise when, despite the employee's desire to remain at work notwithstanding his recognition of the risk he runs, the employer will nevertheless be under a duty in law to dismiss him for his own good so as to protect him against physical danger". In his opinion, *Coxall* was such a case; the company had come to recognise that the employee should no longer continue in the work, yet it had allowed him to continue. However, Brooke L.J. simply based his decision "on the limited basis that the defendants ought to have discussed with Mr. Coxall all the available options once their works doctor had formed the conclusion ... [that Mr. Coxall should be taken off the job]".

Coxall raises at least five important questions.

First, is Brown L.J.'s judgment consistent with precedent? Prima facie, the answer is "no". A series of Court of Appeal decisions, notably *Withers* v. *Perry Chain Co. Ltd.* [1961] 1 W.L.R. 1314, *Kossinski* v. *Chrysler United Kingdom Ltd.* (1973) 15 K.I.R. 225, *Henderson* v. *Wakefield Shirt Company Ltd.* [1997] P.I.Q.R. P413, and *Hatton* v. *Sutherland* [2002] EWCA Civ 76, [2002] 2 All E.R. 1, appear to be authority for the proposition that the common law does not require employers to refuse to employ a person who is willing to work for them simply because they think that it is not in the person's best interest to do the work. For instance, in *Withers*, Devlin L.J. said "[t]he relationship between employer and employee is not that of schoolmaster and pupil ... the employee is free to decide for herself what risks she will run". Brown L.J. considered each of these cases. He nonetheless also noted: "[j]ust as employers are regularly held liable notwithstanding that their employees knowingly take risks and even disobey orders, so too the primary responsibility for safeguarding them against harm should rest with the employers". Having acknowledged the conflicting principles at play, he concluded: "the principal consideration in determining whether or not any particular case falls within the *Withers* principle must be the actual nature and extent of the known risk". He thus distinguished *Coxall* from earlier cases like *Withers* on the grounds that in none of the older cases was the position reached where the

employers came to recognise that their employee should no longer continue in the work.

Second, if Brown L.J.'s judgment is correct, what are the principal factors in determining whether the employer should have dismissed the employee? According to Brown L.J., what is reasonable in cases like *Coxall* principally depends on "the actual nature and extent of the known risk". However, amongst other things, it would presumably also be relevant to consider the justifications for running the risk (see *Stokes* v. *Guest Keen and Nettlefold (Bolt and Nuts) Ltd.* [1968] 1 W.L.R. 1776). Thus, the health risk to the employee might have to be balanced against his interest in retaining his job.

Third, is Brown L.J.'s approach fair to the employer? Devlin L.J. rightly pointed out in *Withers* that the relationship between employer and employee is not that of a schoolmaster and pupil; the employee must take some responsibility for his decisions. On the other hand, as Hale L.J. said in *Hatton*, a serious danger with Devlin L.J.s approach is that "taken to its logical conclusion ... [it] would justify employers in perpetuating the most unsafe practices ... on the basis that the employee can always leave". Counsel for the defendant in *Coxall,* Simon Beard, argued that courts should be extremely wary of impaling employers on Morton's fork: exposing them to personal injury claims if they allow employees to remain at work, and to claims for unfair dismissal if they do not. However, Mr. Beard has noted ("Case Commentary: *Coxall* v. *Goodyear Great Britain Ltd.*", http://www.ropewalk.co.uk/news/txtnewsarticle07–02.htm) that an employer forced into a dismissal in a case like *Coxall* ought to be able to justify it as fair on the ground that the employee was unsuited to the work, "[although] he will have to surmount the hurdles imposed by the combined effects of the Employment Rights Act 1996 and the Disability Discrimination Act 1995".

Fourth, why did Brooke L.J. conclude that the company had breached its duty by not discussing all the available options with Mr. Coxall? The answer is unclear. A discussion of the available options would not do much good if the employee already understands the situation, and "the employer can only be reasonably expected to take steps which are likely to do some good" (*Hatton* v. *Sutherland* [2002] 2 All E.R. 1, *per* Hale L.J.). There might have been some other work that the employer could reasonably have offered Mr. Coxall, in which case a meeting to discuss the available options could have helped him, since he could have taken alternative work and avoided continuing to run the health risk. However, Brooke L.J. did not say that the employer

should have offered Mr. Coxall alternative work. It seems strange that, on Brooke L.J.'s approach, the company apparently could have avoided liability simply by calling a meeting in order to discuss all the available options with Mr. Coxall, even if he had already been aware of them. (It is also unclear how Brooke L.J. concluded that the breach caused the damage in question, since the trial judge found that the claimant would have rejected a transfer to other work, if he had been offered it.)

Fifth, can an employer establish contributory negligence in a case like *Coxall*? The answer is almost certainly "yes". The defence was not raised in *Coxall*. However, Brown L.J. said, "had it been, it might well have relieved the appellants of part of their liability".

JESSE ELVIN

CAUSATION, LOSS AND DOUBLE RECOVERY

IN 1987, Mr. Primavera, a restaurant owner, was approached by the defendant, who offered him a loan for the development of a second restaurant, linked to an Executive Retirement Plan (ERP) for Mr. Primavera himself. The ERP promised a tax-free lump sum payment of £500,000 after seven years. However, the defendant neglected to tell Mr. Primavera that in order to qualify for the lump sum, he would have to draw a salary of not less than £334,000 per annum for at least three of the seven years. Unaware of this, Mr. Primavera paid himself a smaller salary. When he came to claim his lump sum in 1995, he found that the maximum that he could draw tax-free was £125,875. A claim form was issued against the defendant in respect of, amongst other things, £101,000 representing the tax payable on the rest of the lump sum. In the meantime, Mr. Primavera chose to continue with the ERP, paid himself a larger salary and, in 2000, qualified for the full £500,000 tax-free.

The question before the Court of Appeal in *Primavera* v. *Allied Dunbar Assurance plc* [2002] EWCA Civ 1327 was whether, in continuing with the ERP and qualifying for the full amount, Mr. Primavera had mitigated/avoided the whole of his loss. It might be thought that the law would have tackled this problem long ago, but Simon Brown L.J., delivering the leading judgment of the Court, readily admitted that he could "not pretend to have found [the issue] an easy one". After acknowledging that the arguments of both counsel had been persuasive, the Court determined that Mr. Primavera was entitled to the damages claimed.