Taking on a Corporate Giant: David v Goliath Legal Cases

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Most of you will know the famous story of David and Goliath, which is found in 1 Samuel 17 in the Bible. It tells the story of how David, a young shepherd boy, defeats Goliath, the towering champion of the Philistines, whose height was six cubits and a span. David kills Goliath with a single slingshot and goes on to become King of Israel. The phrase "David and Goliath" has passed into the English lexicon to denote an underdog situation, where a person faces an adversary much bigger and stronger than they are – similar to what we lawyers sometimes call an inequality of arms.

In my career, I have represented many Davids against many Goliaths. I've represented many ordinary people taking on the might of large and powerful institutions, people who have risked everything to fight for justice against all the odds.

In the courtroom, sometimes David prevails over Goliath. But sometimes he doesn't. We're going to explore a few different examples of individuals battling powerful and wealthy institutions.

But it's important to understand that in real life, the underdog doesn't always win. I would be doing a disservice to future lawyers and the public if I pretended that every case is a feel-good story where right triumphs over might. It is not. We operate in a legal system which was built by and for powerful elites, and where the odds are often stacked against our clients. On the other hand, when they do win, ordinary people taking on powerful interests have changed the world much for the better. The law reports are full of the stories of ordinary, everyday folk who have kept up their fight for justice even when the road ahead seemed hopeless, and who have ultimately prevailed.

Litigation, Corporations and the State

Before we turn to look at some examples of cases, we're going to look at private companies and public authorities as defendants in civil litigation and compare and contrast these two types of defendant.

English civil law is broadly divided into public law and private law. Private law is the body of law that regulates relations between private individuals. It includes contract law, tort law, the law of unjust enrichment, and so on. When you sue someone for damages, for example for breach of contract or negligence, that's a private law claim.

Although private law is concerned with relations between private individuals, it also applies equally to state bodies. It's very common to bring a private law claim against a state body. For example, if a police officer assaults and wrongly arrests you, you might bring a private law claim against the police for the torts or civil wrongs of battery and false imprisonment and be awarded damages. That's a claim governed by private law, even though it involves the exercise of state power. Equally, however, you might bring the same type of private law claim against a private company if one of their employees assaulted you. In short, private law binds both private and public actors.

Public law, on the other hand, is the body of law that controls and regulates the exercise of state power. The High Court has a supervisory jurisdiction over public authorities, which individuals can invoke by bringing a claim for judicial review. For instance, if a public authority is failing to perform its legal duties or is acting in a

way that exceeds its legal powers, you might bring a claim for judicial review against it in the High Court. Public law imposes certain general principles on the exercise of state power, such as that a public authority must act rationally, must take into account relevant considerations and leave out of account irrelevant considerations, and must act in a way that is procedurally fair. In a claim for judicial review, the High Court can make an order quashing a public authority's decision (a quashing order), an order requiring a public authority to do something (a mandatory order), or an order prohibiting a public authority from doing something (a prohibiting order).

In general, judicial review only applies to public authorities, not private companies. So, you can bring a claim for judicial review against Her Majesty's Revenue and Customs, the Metropolitan Police or the Home Secretary, but you can't bring one against Tesco or Royal Dutch Shell, for example. There are some rare exceptions to this, where a private company may be exercising public functions and may be amenable to judicial review.

Another key tool in the English legal arsenal, which we discussed in detail in the last lecture, is the Human Rights Act 1998, which makes it illegal for public authorities to breach our rights under the European Convention on Human Rights and gives us the possibility of obtaining damages for breach of our human rights. Like judicial review, the Human Rights Act only applies to public authorities, not to private companies. So again, you can bring a Human Rights Act claim against the Metropolitan Police or the Home Secretary, but not against Tesco or Royal Dutch Shell.

Similarly, as we discussed in the last lecture, the jurisdictions of the Commonwealth Caribbean, where I also practise, each have a constitution which protects certain fundamental rights, and allow individuals to bring actions for breach of their rights. Again, a constitutional claim can only be brought against public authorities, not private companies.

We can see, therefore, that English law distinguishes between the private and public realms, and that there is a whole body of law which binds public authorities but does not bind private companies.

However, it's important to understand that in our capitalist society, corporate power and state power are often intertwined. Sometimes you might bring legal proceedings against a private company directly, such as when it commits a tort against you or breaches a contract you have with the company. Other times you might be bringing an action against the state in which a company is an interested party, such as when you are bringing a judicial review challenging a planning authority's decision to allow an environmentally damaging development – in such a case, the relevant planning authority is the defendant, but the developer will be an interested party.

On other occasions you might be bringing litigation against the state because of what a private company has done. For example, if a private prison contractor or a private asylum accommodation provider breaches your rights, you might bring a claim for judicial review or a Human Rights Act claim against the Justice Secretary or the Home Secretary, who are responsible in public law for what their contractors do.

And on other occasions a company might not directly be involved in the litigation at all, but its influence forms part of the background to the case. For example, it's common for environmental activists to bring claims against the police for assault or false imprisonment, in circumstances where the police were protecting environmentally destructive companies from having their operations disrupted by protests.

In short, when it comes to litigation, we can't draw a clear dividing line between state and corporate power. This reflects the realities of our capitalist society, in which companies have massive influence over government and use its power to their advantage, and in which many governmental functions have been outsourced to the private sector.

Types of Claims an Individual Might Bring

So, let's move on and think about the types of claims an individual might bring to challenge corporate power. These are almost infinitely varied. They embrace both private law and public law litigation.

In private law, the law of tort is often used by individuals to obtain redress against companies that have caused them harm. This is not a recent development. As every law student knows, in the celebrated 1932 case of *Donoghue v Stevenson* [1932] AC 562, Mrs Donoghue found the remains of a decomposed snail in her ginger beer. She sued the manufacturer and won. The case established that the manufacturer of a product owed a duty of care in tort to the ultimate consumer, even where there was no direct contractual relationship between the manufacturer and the consumer. It ensured that consumers had a remedy in the tort of negligence if they were injured by defective products. Today those remedies are even stronger, because under consumer protection legislation manufacturers are under strict liability in some circumstances for defective products – that is, the consumer doesn't necessarily have to prove that the manufacturer was negligent or at fault.

Similarly, if you're injured due to the unsafe condition of a company's premises, you might want to bring a claim against them for damages. This used to be governed by complicated common-law rules which distinguished between "invitees" and "licensees", with a different duty being owed to each. In English law those distinctions were swept away by the Occupiers' Liability Act 1957, which creates a clear and coherent system for determining whether an occupier of premises is liable for the unsafe condition of the premises. Some other Commonwealth jurisdictions, where I practise, have not adopted the 1957 Act and still have the archaic common-law rules.

But even after the 1957 Act, occupiers did not generally owe a duty of care to trespassers. On the surface, that might sound fair enough – until you remember that often, the trespassers who were injured were children, who, for example, had strayed onto a railway line or ventured somewhere else they weren't supposed to. This was changed by the case of *British Railways Board v Herrington* [1972] AC 877, which decided that a trespasser – in *Herrington,* a six-year-old child who was injured on a live rail – was owed a limited duty of care. This was subsequently codified in the Occupiers' Liability Act 1984.

Another tort that is sometimes invoked to challenge corporate power is nuisance. Nuisance involves interferences with another person's enjoyment of land. In some circumstances, you might be able to sue if noise, odours or pollution are interfering with your enjoyment of your home. For instance, in *Dobson v Thames Water Utilities Limited* [2011] EWHC 3253 (TCC), residents were able to obtain damages for nuisance and negligence where the negligent operation of a sewage treatment works had caused odours that made their lives intolerable.

But the tort of nuisance is restricted in ways which are profoundly classist. First of all, it's a classic principle of the law of nuisance that what does or doesn't constitute a nuisance depends on the character of the area. As a nineteenth-century case put it, "what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey."[1] At the time, Bermondsey was a working-class industrial area in the East End, whereas Belgrave Square was and still is a wealthy part of the West End. In other words, in English law, how much protection you deserve from noise, odours and pollution depends on whether you're wealthy and privileged enough to live in an expensive area.

And you can only bring a claim in nuisance if you have a proprietary interest in the land affected by the nuisance – for example, if you are the landowner or the tenant. This was definitively established by the House of Lords in *Hunter v Canary Wharf Ltd* [1997] AC 655, which held that an adult child living in her parents' home could not sue for nuisance.

Another type of tort claim you might bring against a company arises when you've been injured through an employee's misconduct. For example, if an employee has assaulted you, sexually harmed you or stolen your property. In this area of law, the key concept is vicarious liability. What that means is that, in some but not all circumstances, the company may be strictly liable for torts committed by the employee, even though the company itself was not at fault. This is very important – because you're unlikely to be able to recover substantial damages from an individual employee, but you are much more likely to be able to recover such damages from a company, which will have deep pockets and liability insurance.

Historically, the boundaries of vicarious liability were limited to cases where the wrongful act committed by the employee was either authorised by the employer or was a wrongful and unauthorised mode of doing

[1] *Sturges v Bridgman* (1979) 11 Ch D 852

some act authorised by the employer. This was known as the "Salmond test", since it came from a textbook called Salmond's Law of Torts. In some circumstances, an employee was said to be "on a frolic of his own" and his actions were said to fall outside the scope of his employment.

The scope of vicarious liability, however, was significantly widened by *Lister and others v Hesley Hall Ltd* [2001] UKHL 22, which established that in some circumstances an employer can be liable for an employee's sexual abuse of children under their care. Even though this could not be said to be a wrongful mode of doing an act authorised by the employer, the law had moved away from the strictness of the Salmond test.

But the law of vicarious liability continues to create confusion and doubt. For example, the Supreme Court in *Various Claimants v WM Morrisons Supermarkets Plc* [2020] UKSC 12 held that, contrary to the decisions of the High Court and the Court of Appeal, Morrisons was not vicariously liable for an employee who had deliberately leaked a large amount of employee personal data in pursuit of a personal vendetta. The decision, which in my view is poorly expressed in some respects, has thrown previously settled principles into confusion, and ultimately increased the difficulties faced by individuals seeking adequate redress for wrongs done to them.

Another field of law that often involves David confronting Goliath is employment law, where ordinary workers take on employers with deep pockets. One important battleground in employment law has been the fight for justice for workers in the so-called gig economy. Often, workers in the gig economy are nominally self-employed, but this is in reality a device to strip them of the legal rights and protections that come with being employees. There have been a couple of very important cases in which self-employed workers have succeeded in establishing that, although they were not employees, they were nonetheless "workers" within the meaning of the Employment Rights Act 1996 and therefore entitled to certain protections. These cases are *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29, brought by self-employed plumbers, and *Uber BV v Aslam* [2021] UKSC 5, brought by Uber drivers. These are classic David and Goliath stories, where ordinary workers took large companies to the Supreme Court and won.

Of course, neoliberal politicians don't like workers having power. In 2013, the David Cameron government imposed onerous fees for bringing claims in the employment tribunals. But in a landmark case brought by UNISON, a trade union, *R (UNISON) v Lord Chancellor* [2017] UKSC 51, the Supreme Court held that the relevant fees order was unlawful because it interfered unjustifiably with the common law right of access to justice and breached European Union law. This was one of the most important and progressive judgments of the decade, and it shows what ordinary people can achieve when they join together in trade unions.

Similarly, the Equality Act 2010 allows ordinary people to bring claims when they are discriminated against, victimised or harassed because of a protected characteristic, whether by their employer, a service provider or a public authority. This is another route by which Davids can challenge Goliaths.

Let's now move away from private law and think about public law litigation. As we've seen, you can't normally bring a claim for judicial review directly against a private company. But sometimes a claim for judicial review might directly implicate a company's interests. A very common example is planning litigation. Suppose for instance that your local authority has approved an environmentally damaging project in your area, and you oppose it because of the damage it will cause to the environment and the risks to local residents. You might challenge the local planning authority's decision by judicial review. In that case the company carrying out the project won't be the defendant, but it will be the interested party, and it's likely to play a major role in the litigation.

For example, numerous ordinary people and environmental NGOs have courageously taken on the British state over the issue of planning approval for fracking operations, in cases such as *R (Friends of the Earth Ltd) v North Yorkshire County Council* [2016] EWHC 3303 (Admin) and *R (Preston New Road Action Group) v Secretary of State for Communities and Local Government* [2018] EWCA Civ 9. In both of those cases, they lost, and the fracking interests won. But the Government ultimately decided to put a moratorium on approving further fracking operations in November 2019. Most recently, in *R (Finch) v Surrey County Council* [2022] EWCA Civ 187, a judicial review challenge was brought against a local authority, with the aim of establishing that when granting approval for an oil extraction operation, the Environmental Impact Assessment should take into account the greenhouse gas emissions that would be produced by the eventual use of the oil as fuel.

Again, the claimants did not win. But these cases are good examples of David confronting Goliath through the planning system – and seeking to protect us all from the terrible consequences of unchecked climate change. I want to pay tribute to my colleague Marc Willers QC who has acted for the claimants in many of these cases.

Similarly, human rights litigation often implicates the interests of a private company. An example, which we're going to explore later, is the fight of communities in the Caribbean for constitutional protection of their land rights. That is a fight against the state, but it's a fight in which the interests and money of private developers are heavily implicated. Another example is human rights litigation about climate change, such as the famous *Urgenda* case in the Netherlands,[2] in which an environmental NGO succeeded in establishing before the Netherlands courts that the Netherlands Government was in breach of its obligations under the European Convention on Human Rights by failing adequately to address climate change. Again, this is litigation against the state, but it has massive implications for private commercial interests.

Finally, there's another type of proceeding which doesn't fit neatly into either public law or private law: the coroner's inquest. I've talked a lot about inquests in my previous lectures. In effect, an inquest is an inquisitorial proceeding where a coroner, an independent judge, inquiries into the cause of a person's death. Although inquests are officially non-adversarial, in reality they can often be very adversarial, particularly where powerful institutions are implicated in the death and are trying to protect themselves from liability.

We're now going to move on to talk about a couple of examples from my own career: the Barbuda litigation, and the inquest into the deaths of Christi and Bobby Shepherd. These two cases are very different. One is the story of a Caribbean Island community's fight to protect their land, the other is the story of a family's fight for both accountability and fair compensation after their children were killed through the negligence of a British travel agency's third-party hotel. But what they have in common is that they are both David versus Goliath stories, where courageous individuals have taken on the might of corporate interests.

The Barbuda Litigation

Let's start with the Barbuda litigation. The story of the Barbuda litigation is the story of land.

In my experience, the commodification of land is the curse of the Commonwealth Caribbean, as it is of so many other places. The real estate industry does not work in the interests of ordinary Caribbean people. It works in the interests of private developers and wealthy expats. Although many Caribbean islands and other parts of the world have laws requiring non-citizens to obtain licences from the Government in order to own land, these laws do not achieve the objective of keeping the land in the hands of local people. Rather, they simply create a lucrative source of revenue for governments and lawyers and contribute to corruption and nepotism.

In short, as with almost every aspect of the modern world, and the Caribbean is not immune from this, the part of the world which to many is a paradise is being steadily wrecked by corporate capitalism. The root of the problem is that under capitalism, land is a commodity to be bought and sold.

But there is one place that is different: Barbuda.

Barbuda is a beautiful island in the Eastern Caribbean with only a couple of thousand residents, with a rich and varied natural heritage, and with a unique culture. Compared to other Caribbean islands, it is relatively unspoiled by the tourist industry. It forms part of the State of Antigua and Barbuda, together with the much more populous island of Antigua. But the relationship has not always been an easy one.

Barbuda was once owned by the Codrington family, who were granted it in 1685 as a lease from the British Crown. The Codrington family brought enslaved people from Africa to the island. The enslaved people on Barbuda were emancipated in 1834, but the Codrington family's lease of the island continued until 1898. Barbuda formally became a dependency of Antigua in 1858 and the laws of the colony of Antigua were extended to Barbuda.[3]

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[2] *Netherlands v Stichting Urgenda* (2020) ECLI:NL:HR:2019:2007

[3] By the Barbuda (Extension of Laws of Antigua) Act 1858

The Barbudans developed a tradition of communal land ownership, in which all the land in Barbuda was held in common by Barbudans, with individual Barbudans having the right to a plot of land.[4]

However, the formal legal status of Barbudan land tenure was unclear for a long time. The Barbuda Ordinance 1904 declared all land in Barbuda to be vested in the Crown and declared all the inhabitants of Barbuda to be tenants of the Crown.

Meanwhile, Antigua and Barbuda became part of the West Indies Federation from 1958 to 1962, and then became an associated state of the United Kingdom in 1967. It became a fully independent Commonwealth country in 1981.

In 1976, the Barbuda Council, a democratic local government body for Barbuda, was set up. But the nature of Barbudan land tenure remained a disputed and controversial subject. The Eastern Caribbean Supreme Court generally took the view that land in Barbuda was vested in the Crown and that the Barbuda Council did not have ownership or control over the island's land.[5] There was a real disconnect between the Barbudan community's traditional understanding of its land rights on the one hand, and the formal position in law on the other hand.

In 2007 the Barbuda Land Act was passed by the Parliament of Antigua and Barbuda. This Act put Barbudan communal land rights on a clear statutory footing for the first time. Section 3 of the Act declared that all land in Barbuda would be owned in common by the people of Barbuda. It provided that the title to all land in Barbuda would vest in the Crown on behalf of the people of Barbuda. Section 5 prohibited the sale of land in Barbuda. Section 7 gave Barbudans the right to the grant of exclusive rights of occupation over their own plot or plots of land. Section 11 gave the Barbuda Council power over the administration and development of land in Barbuda and the granting of leases.

This was a progressive Act which protected the traditional land rights of Barbudans. It meant that the local community, not politicians and developers, was in the driving seat.

Unfortunately, things did not stay that way. There was a change of government in 2014, with the Antigua Labour Party under Gaston Browne defeating the United Progressive Party under Baldwin Spencer.

In 2014 the new Government entered into a land deal to lease land in Barbuda to a company, Paradise Found LLC, for a tourism development project. The Antiguan Parliament passed an Act, the Paradise Found (Project) Act 2015, which disapplied the Barbuda Land Act 2007 in relation to the Paradise Found project. The constitutionality of this action was challenged in court by two Barbudans, McKenzie Frank and Trevor Walker. For clarity, I was not involved in that litigation.

Meanwhile, Hurricane Irma devastated Barbuda in September 2017, causing massive damage. Unfortunately, the Antiguan Government took the opportunity to engage in some disaster capitalism. After the hurricane, the Government began the clearcutting of Barbudan forest, without the consent of the Barbudan community, to build a new international airport.

In July 2018, judicial review proceedings were brought on behalf of a Mr John Mussington and Ms Jacklyn Frank to challenge the construction of the airport. I represented Mr Mussington and Ms Frank. The airport construction had been commenced without obtaining the proper planning approval and without an adequate Environmental Impact Assessment, or EIA. In fact, the EIA subsequently conducted has never been made available to us, the courts or the public. The airport construction was botched and caused significant damage to the Barbudan ecosystem. And the airport was being built on cavernous karst limestone which posed a high risk of sinkholes, and a risk of contaminating the water supply through storm water runoff. There was no accountability and no transparency, and we had to fight hard for every scrap of information.

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[4] For background, see Sluyter, Andrew and Potter, Amy E., "Renegotiating Barbuda's commons: recent changes in Barbudan open-range cattle herding" (2010). Faculty Publications. 24
https://digitalcommons.lsu.edu/cgi/viewcontent.cgi?article=1023&context=geoanth_pubs

[5] See *Attorney General v Barbuda Council* AG 2002 CA 3; see also *Barbuda Council v Antigua Aggregates Ltd* AG 2007 CA 8

Unfortunately, after a long and arduous journey, the Claimants lost before the Eastern Caribbean Court of Appeal in 2021.[6] I can't say too much about the specifics of this litigation, because it's currently under appeal to the Privy Council. I hope to be able to say more in a future lecture when this litigation is finally resolved.

In the meantime, things changed for the worse yet again. The Barbuda Land (Amendment) Act 2017 repealed much of the 2007 Act and abolished Barbudans' land rights altogether, returning them to the status of mere tenants of the Crown. It also allowed Barbudans to buy freehold interests in land, inevitably opening up Barbuda to future exploitation by the real estate industry.

And in 2020, McKenzie Frank and Trevor Walker lost their constitutional challenge before the Eastern Caribbean Court of Appeal.[7] Again, I won't say too much about the specifics of that because it is under appeal to the Privy Council.

I'm telling this story because it is important. It isn't a heart-warming, feel-good David and Goliath story. It's a case where, so far, Goliath has won, and David has lost. But that doesn't absolve us of the responsibility to keep fighting hard for justice for the people of Barbuda, and for other communities around the world who are seeking to defend their land from corporate capitalism.

But there is a ray of hope. The Barbudans can take heart from a successful fight for justice in another part of the Caribbean: the Maya land rights litigation in Belize. Much like the Barbudans, the Mayan indigenous communities of Belize traditionally enjoyed communal land rights, which have frequently been threatened by the Government and private developers. In the landmark judgment of *Cal v Attorney General of Belize* (2007) 71 WIR 110, the Mayans of Belize established that their communal land rights were recognised by law. However, that didn't bring an end to Government interference with the Mayan lands. Eventually, the Mayans had to take their case to the Caribbean Court of Justice, the supranational court that is the highest court in the Belizean judicial system. We're going to be talking more about the role of the Caribbean Court of Justice in the next lecture.

In *Maya Leaders' Alliance v Attorney General of Belize* [2016] 2 LRC 414, the Government of Belize ultimately accepted before the Caribbean Court of Justice that Mayan land tenure gave rise to collective and individual property rights that were protected by the Belizean Constitution. I believe that the same understanding ought to apply to the Barbudans' communal land rights. And we will keep fighting for the recognition of those rights in law.

I hope that one day, all over the world, land will be decommodified, and will be administered and developed democratically in the interests of the whole community, rather than private interests. That isn't a goal that we can achieve through litigation alone. But we can fight in the courts and in the legislatures to preserve and protect communal land rights where they do exist.

The Thomas Cook Litigation

Now I want to turn to a very different David and Goliath story: the story of Christi and Bobby Shepherd or the Thomas Cook Corfu litigation[8].

The facts are straightforward and well known. Christi and Bobby Shepherd - sister and brother - died while they were on a half-term holiday in October 2006 with their father and his partner.

The holiday bungalow in which the family were staying had an adjoining out-building which housed a gas hot-water boiler. This had been poorly installed and maintained with what the coroner called 'bodged and botched' work[9] and inadequate ventilation, making an accident almost inevitable. Three days into the holiday, the children started to feel unwell.

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[6] *John Mussington v Development Control Authority* [2021] ECSC J0429-1
[7] *The Attorney General v McKenzie Frank* AG 2020 CA 5
[8] https://www.telegraph.co.uk/travel/advice/Corfu-carbon-monoxide-tragedy-Can-we-trust-tour-operators-with-our-safety/
[9] https://www.telegraph.co.uk/news/uknews/law-and-order/11565922/Corfu-carbon-monoxide-poisoning-tragedy.html

On the night of their deaths, Bobby was unsteady on his feet and both children were complaining of headaches and were vomiting. The next morning, a chambermaid entered the bungalow to do the cleaning. She found the bodies of Christi and Bobby; their father and his partner were lying nearby in a comatose state. They were admitted to hospital where four days later they regained consciousness and learned that the two children were dead. Christi and Bobby's mother, heard about her children's deaths from a news report on the radio.

A Greek court found three members of the hotel staff, including the manager, guilty of manslaughter; two holiday reps employed by Thomas Cook were cleared[10]. West Yorkshire Police had also investigated the case, but the Crown Prosecution Service decided that there was insufficient evidence to bring charges against anyone in the company.

At that time, Thomas Cook was the biggest holiday tour operator in Europe with an annual turnover in the billions, but in the eight years since the children had died in bungalow 211 at one of their third-party hotels, the company treated this bereaved family appallingly.

When the children died on holiday and their bodies had to be flown back to the UK, for example, did Thomas Cook assist the family and provide a private plane for the distraught mother and her partner? No. The bodies of the children came back on the holiday package charter plane that the couple flew home in along with the rest of the holidaymakers, the last of the season at the end of October. Their mother Sharon Wood saw her children's coffins being shunted into the cargo hold.

It had taken the family a long time to get to this inquest; they had gone through the Greek system and received a modest compensation settlement from the hotel. Then there had been the Yorkshire Police investigation and the subsequent decision by the CPS not to prosecute any individuals who worked for Thomas Cook nor the company itself. Lastly, in the UK they'd had to go through the complex workings of the coronial system, which had taken its time. There was a struggle to obtain funding. The coroner had ruled that this was not an Article 2 case – Thomas Cook was not an arm of the state. It was difficult to argue against this legal reasoning, which made it problematic to secure legal aid[11].

We didn't know if we would have funding for the inquest, which was likely to last at least three weeks. In the end the family did manage to secure legal aid funding for the family after the intervention of their MP Mary Creagh during Prime Minister's Questions and eventually a meeting with the British Prime Minister David Cameron. It took the Legal Aid Minister Shailesh Vara to authorise legal aid for representation[12].

Herein lies the problem with the mentality of the legal aid system. It takes the determination and grit of a grieving family to lobby their MPs, politicians and even the Prime Minister just to secure funding so that they can be put on an equal footing with a goliath like Thomas Cook, and the hardworking lawyers who keep it going. Families and legal aid lawyers become so downtrodden with one negative decision on legal aid after the other knocking us back, that when we eventually get it we are so grateful for even the modest crumbs of funding we are handed. There is no doubt that the legal aid system is broken. I know for a fact that the other two QCs who were instructed on this inquest – one for the company itself and the other QC who was representing the individual employees – were paid undoubtedly handsomely and properly for a high-profile case such as this. Whereas the families and their lawyers have to beg for legal aid and when it is eventually received it at the junior lawyer's rates and not at senior counsel's rates. There are no two ways about it: we do not have a fair system of remuneration for the representation of families in these complex cases. Money talks, and if you are a legal aid family wanting to instruct good lawyers, well, tough. It is a testament to the public funding lawyers who nevertheless take these cases on and fight just as hard without concern for proper remuneration. They take what they are given and do not complain. Now don't get me wrong this isn't about the pay that lawyers receive but about the system and so you can see it is not equal. This is important when looking at the question of equality of arms.

[10] http://news.bbc.co.uk/1/mobile/england/bradford/8658972.stm

11 "Corfu gas death family secures legal aid for inquest". BBC News. 30 May 2014. Retrieved 17 May 2015.

[12] https://www.bbc.co.uk/news/uk-england-leeds-27638124

The inquest was held at Wakefield Coroner's Court, sitting before David Hinchliff, the senior coroner for West Yorkshire. Mr Hinchliff had accepted an application from me that the case should be heard with a jury. He didn't *have* to call a jury, and many coroners would not have done so, because this inevitably added to the length and cost of the case. But in giving a ruling on this issue, Mr Hinchliff said in strong terms that if Christi and Bobby had died on British soil they would have been entitled to a jury as of right, because of the Coroners' Rules and the fact that their death was a suspected carbon monoxide poisoning. Because they died abroad, however, that automatic entitlement did not apply. Mr Hinchliff did not want justice to be a lottery, dependent on where these British children in the care of a British company had died. It was a strong ruling and clearly sent a message to all the interested persons that this would be a searching and in-depth inquiry. And it was.

The jury were sworn in. Good Yorkshire people.

Now Thomas Cook did not make matters easy on themselves in defending their decisions and actions at this inquest. Firstly, they did not call key witnesses; they used the excuse that any witnesses were abroad. If a witness is outside the jurisdiction, the coroner cannot compel them to give evidence. However, with the advent of video conferencing facilities, a witness doesn't need to be in court *physically*. The jury would have been aware of this.

Those witnesses in the UK who were compelled to give evidence decided to exercise their right not to incriminate themselves when giving evidence and relied on their right to silence. Any experienced advocate knows that when an explanation for a witness to rely on their right to silence is called, it simply looks bad. However, many directions a coroner gives to a jury, explaining that it is a witness's right not to incriminate themselves and this should not be held against them, one can only imagine what the jury is thinking. It appears as if the witness is hiding something. Certainly, this jury was not happy with Thomas Cook or its employees. They looked with disdain at witness after witness who was either silent or said they were not to blame for the glaring failures and mistakes which led the third-party hotel to have dodgy boilers and inadequate ventilation. In short, a heating system which, had anyone competent stopped and inspected it, they would have condemned it at the first opportunity.

By the time the inquest opened, a new chief executive, a Swiss gentleman called Peter Fankhauser, had taken over at Thomas Cook. When offered the opportunity to apologise, all Mr Fankhauser had to say to Christi and Bobby's parents was, 'I feel so thoroughly, from the deepest of my heart, sorry, but there's no need to apologise because there was no wrongdoing by Thomas Cook.' He refused to apologise[13]. He refused to take an opportunity to put right what was so obviously wrong. An apology would have cost him and Thomas Cook nothing. This is a corporation mindset –, deny, deny and deny and not to apologise for fearing of the potential legal consequences[14].

I don't know whether the bottom line was money; they were worried perhaps, that to give any apology would have been an implied admission of liability. In fact, that was not the case, since the family had already settled their case in Greece. But Thomas Cook did not handle the deaths of two young children while on one of their package holidays fittingly.

When Mr Fankhauser said he had nothing to apologise for, the jury looked at him with daggers. Although you can't have a victory in an inquest because it can't be won or lost, I knew we had, in that moment, won. At the end of the inquest on 13 May 2015, the jury came back with an unlawful killing verdict and said that Thomas Cook had been negligent and had failed in their duty of care[15] to Christi and Bobby and to their grieving parents. It should be noted that negligence denotes civil responsibility, something which inquests generally are not allowed to do, but the coroner did not amend the jury's conclusion and allowed it to stand. Thomas Cook could have tried to challenge the jury's decision by judicial review and get parts of it struck out, but that would have involved even further litigation and even more publicity, none of which was good for the company.

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[13] https://www.independent.co.uk/news/uk/crime/corfu-carbon-monoxide-inquest-thomas-cook-boss-refuses-to-apologise-for-children-s-deaths-10233090.html

[14] https://www.prweek.com/article/1347921/thomas-cook-expert-panel-assesses-companys-handling-tragedy and see https://www.cityam.com/leslie-thomas-qc-why-the-barrister-who-represented-the-family-of-christi-and-bobby-shepherd-who-died-while-on-a-thomas-cook-holiday-thinks-companies-should-stop-relying-on-lawyers/

[15] https://www.bbc.co.uk/news/uk-england-32719823

At the end of the inquest, I made a statement to the national media and reporters outside the court who had been following the story diligently. At that moment, I felt so angry with the way the company had conducted itself and I said, 'Thomas Cook should hang its head in shame as a result of these deaths[16]. The families of Christi and Bobby have waited nearly nine years for an apology – they are still waiting.'

In the days after the hearing there were calls for the company to be boycotted.[17] The Thomas Cook share price tumbled[18].

The following week after the verdict. Mr Fankhauser Thomas Cook agreed to meet with the parents of Christi and Bobbi. Thomas Cook through its CEO made a public apology and met with the family. Finally, things were put right with a financial gesture of goodwill.[19]

This ordinary family with courage and persistence had prevailed and got justice for their children even though nothing was going to bring them back.

Conclusion

I want to wrap up this lecture with some general thoughts about litigation: what it can achieve, and what it can't.

Litigation regularly changes the world. At its best, it can secure justice, protect the powerless and challenge the powerful. I have spent my career seeking to do just that. And in this lecture, we've looked at some examples of David taking on Goliath in the courts.

But we have to remember that litigation involves operating in a court system which was built by and for the powerful, and which frequently serves the interests of the powerful. We also have to remember that judges are human beings, with their own flaws and assumptions and prejudices, like the rest of us. We have to remember, therefore, that David won't always defeat Goliath.

And we have to remember that for every lawyer who takes on Goliath in the courts, there are many Davids, many ordinary people on the ground who do the hard work of activism and protest and resistance that moves society forward. The courtroom can sometimes be the scene of progress, but progress is ultimately driven by ordinary people.

I want to close with a quote, which is often attributed to the anthropologist Margaret Mead, although that attribution is disputed.

> *"Never doubt that a small group of thoughtful, committed citizens can change the world. Indeed, it is the only thing that ever has."*

[16] https://www.theguardian.com/uk-news/2015/may/13/thomas-cook-shame-over-deaths-children-in-corfu
[17] https://www.channel4.com/news/calls-for-thomas-cook-boycott-over-corfu-deaths
[18]https://www.dailymail.co.uk/news/article-3087540/Now-Thomas-Cook-hit-75million-shares-sell-consumer-boycott-family-children-killed-boiler-fumes-say-weren-t-consulted-firm-s-charity-gift.html
[19] https://www.bbc.co.uk/news/uk-england-leeds-32835029