dialogue

Guildhall CHAMBERS

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EDITORIAL

Ahhh. The sun's still shining and I, for one, have enjoyed immensely the spectacle of those responsible for launching the "legal fat cat" headlines having to hide behind their own duck houses for a change. Still, we can't be complacent. The Jackson Costs Review is upon us and, for all we know, this time next year we'll all have been capped, fixed and shifted. It sounds painful.

That said, some good things may come from the review. I did notice an aspiration to rid us of the "numerous interest groups and middlemen, all of whom have to meet their overheads and make a profit on top" who have populated our beloved industry. I had to read fully into the report to learn that this was not a reference to the level of court fees now charged by Ministry of Justice.

But, just imagine if referral fees got the boot. We might be back to lawyers trading on their reputations as opposed to their financial muscle and litigants being served by their local firms. (As a spin off we'd also have a not unwanted change in day time TV advertising). But will it happen? I suspect that whatever the final report holds implementation will be a long way off – we've got a general election to get through first.

So our focus should return to the now. What changes are afoot in the realm of personal injury law? As usual, we have digested the recent cases (principally, decisions of the House of Lords and Court of Appeal) relevant to personal injury.

In addition, the newsletter contains a number of articles. **Julian Benson** examines the question of contempt of court (in the setting of exaggerated/fraudulent claims), **Matthew Porter-Bryant** discusses recent developments in the area of conduct in relation to costs, **Abigail Stamp** continues her analysis of developments in cross-border European liability and **James Hassall** considers the extent to which fraudulent claims can give rise to exemplary damages.

Your comments and suggestions are welcomed and should be addressed to us at **gabriel.farmer@guildhallchambers.co.uk** or **daniel.neil@guildhallchambers.co.uk**

Team news

The PI team congratulates Stephen Garner upon joining the team in early October 2009. Stephen joins us from Number 8 chambers in Birmingham where he has established a loyal client base over ten years of specialization as a PI practitioner. He runs a busy practice of fast and multi-track work – both claimant and defendant – and is renowned for his prompt turn-around of paperwork. He tells us that outside the law, he enjoys literature and the arts.

The PI team welcomes Alastair Campbell as senior clerk to the PI team. Alastair has spent over 14 years working as junior and senior Barristers' Clerk at chambers in London, Preston and Manchester. Latterly he has worked as a Business Advisor in Lancashire. A countryman at heart, he brings with him a wealth of experience, a good sense of humour and (so he says) an embarrassing Real Tennis handicap.

Seminars

The one-day **Defendant seminar** at the Mansion House in Bristol was a resounding success. A combination of two external speakers complemented a number of presentations on the legal issues facing insurers in the current climate. These included public funding, care and accommodation claims, interim payments in catastrophic cases as well as workshop groups in other areas.

Our third yearly one-day **Claimant seminar** will be held on Tuesday 17th November, at the Mansion House, Bristol. The day will consist of presentations and workshops from members of the Guildhall Chambers PI team and external speakers on a number of legal issues relevant to claimant lawyers. Topics include care claims post *Peters*, the self-employment claimant, disadvantage and disability in loss of earnings claims and periodical payments.

Recent decisions

Liability

Liability for failed sperm storage

Jonathan Yearworth & Others v North Bristol NHS Trust

[2009] EWCA Civ 37

Sperm stored by the Trust on behalf of the Claimants (who were undergoing treatment which threatened their fertility) was lost when the storage equipment failed. The Claimants claimed that they had suffered psychiatric injury or mental distress, together with financial loss in some cases, and brought proceedings in negligence in respect of personal injury and, alternatively, damage to property in the sperm. At first instance the court held on a preliminary issue that the sperm did not amount to the Claimants' property and that the damage to it did not constitute a personal injury to them.

The Court of Appeal held that the Claimants had ownership of the sperm. They had generated and ejaculated the sperm, and the object of their ejaculation was that it might be used for their benefit. s.3 and s.4 of the Human Embryology and Fertilisation Act prevented the Claimants from dealing with the sperm as they wished, but this did not constitute a derogation from ownership. In addition, Sch.3 and s.12(1)(c) of the Act required that the trust obtain the Claimants' consent before doing certain acts with the sperm. Further, the trust required the Claimants' subsisting consent to store the sperm. Finally, the Act recognised in the Claimants a fundamental feature of ownership, namely, that at any time they could require destruction of the sperm.

There was no domestic, Commonwealth or American authority that directly supported the proposition that damage to part of a person's body, including a substance generated by it, could amount to a personal injury if the damage occurred after its removal from his body. Accordingly, the damage to, and consequential loss of, the Claimants' sperm did not amount to personal injury.

However, in addition to the action in tort, the Claimants had a distinct cause of action under the law of bailment. The trust had chosen to take possession of the sperm, to assume responsibility for its careful storage and to acquire exclusive possession of it. It had also held itself out as being able to deploy special skills in preserving the sperm. Breach of bailment was akin to breach of contract, and therefore the measure of any damages would fall under these principles. The law of contract provided for damages for mental distress where contracts had as their object non-pecuniary personal benefits. The object of banking the sperm was to preserve the Claimants' ability to become fathers, notwithstanding the threat to their natural fertility, and so fell within the ambit of non-pecuniary personal benefits. Therefore, the Claimants were entitled to compensation for any psychiatric injury or actionable distress resulting from the breach.

Comment

James Townsend fought and won this case in the Court of Appeal. Having now succeeded in establishing a valid cause of action in the preliminary issue the way is now clear for a number of similar claims based on the failure of sperm freezing equipment in several other locations in the UK.

Work Equipment

Smith v Northamptonshire County Council

[2009] UKHL 27

A 3-2 majority decision of the House of Lords upheld the Court of Appeal in deciding that a wooden ramp used by an employee of the County Council in order to access a client's home was not work equipment "provided for use or used by an employee of his at work", albeit that ramp did constitute work equipment.

Lord Mance (with whom Lords Carswell and Neuberger agreed) sought some specific nexus between the work equipment and the employer's undertaking. He took as the test:

"whether the work equipment has been provided or used in circumstances in which it was as between the employer and employee incorporated into and adopted as part of the employer's business or other undertaking, whether as a result of being provided by the employer for use in it or as a result of being provided by anyone else and being used by the employee in it with the employer's consent and endorsement."

The council did not supply or repair the ramp. It had inspected it at an earlier stage, but it was merely being careful of its employees' safety and such care should not give rise to liability which is not otherwise covered by its statutory duty.

Comment

An antidote for Defendants following *Spencer-Franks v Kellogg Brown and Root Limited* [2008] UKHL 46 where the House of Lords favoured a very wide construction of the words "work equipment". The position now is a more restricted one because whatever the nature of the equipment a connection is required between the equipment and the employer's business.

Contributory negligence - seatbelt

Stanton v Collinson

[2009] EWHC 342 (QB)

The Deceased had agreed to drive four passengers in his car. The Claimant and another girl had travelled in the front passenger seat, one on top of the

other, whilst the two other passengers had travelled in the back. None of them had worn a seat belt. The Deceased exceeded the speed limit and his car collided with another car. The Claimant sustained a serious hand injury and a severe head injury resulting in brain damage. The experts agreed that, had the Claimant worn a seat belt, it would have significantly reduced the severity of his head injury but not completely prevented it.

The Defendant estate submitted that *Froom v Butcher* (1976) QB 286 CA (Civ Div) should be departed from, and a starting point of a 50 per cent reduction should be adopted where the injuries would have been prevented by a seatbelt, and a starting point of a reduction of one third should be adopted where the injuries would have been significantly less severe had a seatbelt been worn.

The Court held that the decision in *Froom* had been made in full knowledge of the relevant research and statistical information and knowledge of the legislative background and the imminent arrival of statutory compulsion. The approach adopted had stood the test of time and continued to do so (*Wilkins, Gawler v Raettig* (2007) EWHC 373 (QB) and *Gawler v Raettig* (2007) EWCA Civ 1560 considered).

In permitting the girl to sit on his lap, the Claimant had obviously been sharing the occupancy of the front passenger seat. That was an unusual feature, but the evidence did not render it a rare and exceptional case such as to justify a departure from the guidance in *Froom*. A negligent driver had to bear by far the greater share of responsibility, his negligence being a prime cause of the damage (*Froom* applied).

It was possible that the Claimant's head injuries and their sequelae would have been less severe if he had worn his seat belt, but the burden of proving that lay upon the Defendant estate and that burden had not been discharged. Furthermore, there was no evidence that the Claimant's hand injury would have been reduced or prevented if he had worn a seat belt. The Claimant was therefore entitled to recover damages in full.

Comment

A full blown attack on *Froom* collides with judicial conservatism. Not such a surprise, perhaps. The background and motivation for these submissions is not known and it may well be that the Defendant simply considered the facts to be sufficiently extreme to warrant the submissions. It is tempting to ponder the possibility of an appeal – one where permission would need to be founded on "some other compelling reason" rather than "a real prospect of success"?

Assault – vicarious liability

Maga v Trustees Of The Birmingham Archdiocese Of The Roman Catholic Church
[2009] EWHC 780 (QB)

The Claimant alleged that he had been abused by a priest over a period of many months in 1976. The Claimant and the priest had become friends, and the priest had paid the Claimant for cleaning his car and doing small jobs in the presbytery. The Claimant alleged that the Defendant trustees were vicariously liable for the assaults committed by the priest, and that they were negligent because they had failed to follow up allegations of sexual abuse concerning the same priest in about 1974.

The Claimant submitted that at all times he had been under a disability within the meaning of s.28(1) of the Act, and so the period of limitation had never begun to run. The Defendant trustees submitted that the assaults were not so closely connected with the priest's 'employment' to render the church liable.

The Claimant did not have the mental capacity to manage his property and affairs. He was likely to be unable to deal rationally with the problems that had arisen or would arise in the course of litigation, and he did not have the capacity to conduct legal proceedings. Accordingly, he was of 'unsound mind' for the purpose of s.38(2), and his claim was not statute barred.

It was the priest's position within the church which had given him the opportunity to abuse the Claimant, but that in itself was not sufficient to render the church liable (*Jacobi v Griffiths* (1999) 174 DLR (4th) 71 and *Lister v Hesley Hall Ltd* (2001) UKHL 22, (2002) 1 AC 215 applied). The priest's association with the Claimant was founded on the fact that he paid the Claimant to wash his car and do jobs in the presbytery. The assaults carried out by the priest on the Claimant were not therefore so closely connected with his employment that it would be fair and just to hold the church liable.

Comment

A useful decision in this area given the inevitable community-based interaction of church employees (often in association with other groups) with complainants. This decision highlights the threshold criteria required to import vicarious liability. Often there is no disputing the fact of an assault so cases are often fought on this issue.

Vicarious liability – course of employment

Ministry of Defence v Radclyffe
[2009] EWCA Civ 635

The respondent second lieutenant was on an adventure training exercise in Germany when he was injured jumping from a bridge into a lake. He was on his day off and had gone with other members of the group for a swim. On the previous day the captain in charge of the group had encouraged the second lieutenant to make the jump, and on the day of the accident he had allowed him to do so again. The lieutenant was badly and permanently injured after he entered the water with his legs bent.

The Ministry of Defence argued that the second lieutenant was off duty at the material times, that the captain had been acting outside the course of his employment, and that no duty of care was owed. The judge held that the captain had been acting in the course of his employment, that he owed the members of the group a duty of care, and that he had been negligent in giving permission to jump. The second lieutenant's contributory negligence was assessed at 40%. The Ministry of Defence appealed.

The Court of Appeal upheld the judge's decision that the captain was acting in the course of his employment, since the swimming trips took place between organized adventure training exercises and were subject to military discipline. As the officer in charge of the group it was fair, just and reasonable to ascribe to the captain a duty of care. The members of the group had asked the captain if they might jump, and that was also sufficient to establish a duty of care. It was clearly dangerous to make the jump, and the captain should have ordered the second lieutenant and the other members of the group not to do so. As such, the captain was in breach of his duty. There was a sufficient connection between the captain's employment and his breach of duty to render the Ministry of Defence vicariously liable for his breach. The appeal was dismissed.

Comment

A painful case for both sides. It is often argued in MOD cases that "off duty" activities are beyond the scope of employment even when they are organized by the service hierarchy. In the circumstances of this case the mere asking of permission to jump appears a light justification for the imposition of a duty of care.

Animals Act – Horses

Marian Freeman v Higher Park Farm

[2008] EWCA Civ 1185

The Claimant sustained an injury as a result of falling from a horse supplied by the Defendant equestrian centre on a hack organised by the Defendant. The horse had a habit of bucking when going into canter. On the day of the accident, the horse bucked as it was about to go into a canter and the ride was stopped; the Claimant stated that she wanted to continue, but as the horse went into a canter a second time it bucked again and the Claimant fell off.

The judge held that the Defendant was not liable under s.2 of the Animals Act 1971 because the requirements of that provision were not satisfied. As regards the second part of s.2(2)(a), the judge held that it could not reasonably be expected that the horse would buck in such a way that the Claimant would fall and suffer the injury that she had. As regards the first limb of s.2(2)(b), the judge held that the characteristic of bucking when going into a canter was not normally found in horses other than the horse in question and that therefore he could not find that the injury was likely because of that characteristic. As regards the second limb of s.2(2)(b), the judge relied on the fact that the horse had never previously bucked in such a way as to cause the rider to fall off or suffer injury. Finally, the judge held that the Defendant was excepted from liability under s.5(2) by the voluntary assumption of risk by the Claimant.

The Claimant submitted that the judge was wrong in his analysis of s.2 and that her assumption that she could cope with the horse's bucking did not amount to a voluntary assumption of the risk that she might be thrown off and injured.

The Court of Appeal held that the judge's approach to the second part of s.2(2)(a) was not correct. The relevant question was whether, if the horse caused physical injury, such injury was likely to be severe. It was reasonably to be expected that, if a horse bucked on going into a canter so that the rider fell off, severe injury would result (*Welsh v Stokes* (2007) EWCA Civ 796, (2008) 1 WLR 1224 applied). The judge's approach to s.2(2)(b) was also not correct. That provision focused on the characteristics of the species of the animal in question, which in the instant case was bucking (as opposed to bucking when going into a canter; considerations of time and circumstances were relevant to the second limb of s.2(2)(b)). Accordingly, the first limb required the judge to consider whether bucking was not a normal characteristic of horses generally. On the evidence, the judge was entitled to find that the Claimant had failed to establish this. The relevant question under the second limb of s.2(2)(b) was whether it was normal for horses generally to buck at particular times and in particular circumstances, including when beginning to canter. There was no evidence that horses generally bucked at particular times or in particular circumstances, (*Clark v Bowlt* (2006) EWCA Civ 978, (2007) PIQR P12 and *Mirvahedy v Henley* (2003) UKHL 16, (2003) 2 AC 491 considered). In the circumstances, the Claimant had not discharged the burden of establishing that the second limb of s.2(2)(b) was satisfied.

Even if the analysis of s.2 was wrong, the judge had correctly concluded that H was excepted from liability under s.5(2) of the 1971 Act by the voluntary assumption of risk by the Claimant (*Cummings v Grainger* (1977) QB 397 CA (Civ Div) applied).

Comment

Despite the relatively clear wording of the statue the Animals Acts still presents difficulty. It is easy to misconstrue the various tests to be applied under the Animals Act 1971 s.2, as is clear from the first instance decision in this case. The decision in Freeman, whilst it does not add to *Mirvahedy*, (which remains the leading case in the area), nonetheless provides helpful guidance.

Criminal conduct – ex turpi causa

Gray v Thames Trains Ltd & others

[2009] UKHL 33

The respondent was a passenger on a train involved in the Ladbroke Grove rail crash, which was caused by the appellant train operator's negligence. He suffered post-traumatic stress disorder as a result of the crash, and while receiving treatment for that condition he stabbed somebody to death. He pleaded guilty to manslaughter on the ground of diminished responsibility and was sentenced to be detained in hospital. Subsequently, he brought an action against the appellant train operator in negligence for special damages, in respect of his loss of earnings, and general damages, arising out of his detention and for feelings of guilt and remorse. The trial judge held that he was prevented from recovering both special and general damages as a result of his criminal act. The Court of Appeal held that he was entitled to recover special damages, but not general damages (*Clunis v Camden and Islington HA* (1998) QB 978 CA (Civ Div) applied). The appellant train operator argued that the principle of ex turpi causa prevented the respondent from recovering compensation for losses arising out of his criminal act or out of the sentence imposed on him for that act.

Their lordships held that the trial judge's decision was correct. It was well-established that a person could not recover for damage arising out of a sentence imposed on him for a criminal act (Clunis applied). Therefore, the respondent was prevented from recovering both his loss of earnings and general damages arising out of his detention. The wider principle that a person could not recover compensation for losses arising out of a criminal act precluded his general damages claim for feelings of guilt and remorse. The trial judge's decision was restored.

Fraud – phantom passenger claims

Anita Shah v Wasim Ul-Huq (and others)

[2009] EWCA Civ 542

In a second tier appeal the Court of Appeal dismissed the Defendant's submissions that the conduct of a husband and wife, in dishonestly supporting a claim by the wife's mother, ought to have resulted in their – modest, genuine – claims being struck out.

The Court made it clear (see especially Smith LJ, para 28; Toulson, para 47-50) that whatever the costs implications of such conduct (which were dire

for the Claimant's in this case) it was not appropriate to use the medium of a 'strike out' unless (adopting the dicta of Chadwick LJ in paragraph 54 of his judgment in *Arrow Nominees Inc v Blackledge* [2000] EWCA Civ 200) unless "a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe….."

Toulson LJ did add, as a postscript that "on the judge's findings the claimants were guilty of serious criminal offences…. If, as has been suggested, such fraudulent claims have reached epidemic proportions, it may be that prosecutions are needed as a deterrent to others."

Comment

See also Julian Benson's article on the subject of *Kirk v Walton* and the approach taken when proceedings are brought for contempt of court in respect of a dishonest claimant.

Manual handling

Donna Egan v Central Manchester & Manchester Children's University Hospitals NHS Trust

[2008] EWCA Civ 1424

The Claimant nurse sustained personal injuries whilst bathing a patient. She transferred the patient into a mechanical hoist and wheeled it to a bathroom and to the end of the bath, which stood on plinths. She then had to manoeuvre the forks of the hoist under the bath whilst avoiding contact with the plinth, which was not visible from a standing position. As she pushed the hoist forward, it suddenly stopped and she suffered a jerking injury to her back.

The judge held that, although the Defendant NHS trust had failed to carry out a risk assessment of the manual handling operation and therefore was in breach of the Manual Handling Operations Regulations 1992, the breach did not cause the injury since it was debatable whether a risk assessment would have said anything about the risk of collision with the plinth. Further, the Claimant knew of the existence of the plinth and had used the hoist on previous occasions without mishap.

The Claimant argued that the judge had failed to consider reg.4(1)(b)(ii) of the Regulations, which required the NHS trust to take all appropriate steps to reduce the risk of any injury arising from the handling operation to the lowest level reasonably practicable, and that once it was established that there was some risk of injury the onus was on the NHS trust to prove that it had taken all appropriate steps to reduce that risk. The Court of Appeal held that the judge had not given separate consideration to reg.4(1)(b)(ii), which he should have done as the requirements of that regulation were separate from and additional to the requirement to carry out a risk assessment. It was not sufficient for the judge merely to examine whether a risk assessment would have made any difference.

Once the Claimant had shown that the manual handling operation carried some risk of injury, the burden of proof shifted to the NHS trust to prove that it had taken appropriate steps to reduce that risk to the lowest level reasonably practicable. The judge had not referred to the burden of proof and may have placed the burden on the Claimant, which would have been wrong. In practice, if the Claimant alleged that there were steps that could have been taken and the employer said there were none, the evidential burden would be on the Claimant to advance the suggestions, even though the legal burden would remain on the employer.

In the instant case, the Claimants' suggestions about markings on the floor and bringing the plinth forward, which were designed to help the operator guide the forks of the hoist under the bath without snagging on the plinth, would have involved modest costs, were reasonably practicable and would have reduced the risk of injury by collision to a significant degree. Those were appropriate steps. In the circumstances, the NHS trust was in breach of its duty under reg.4(1)(b)(ii) and was liable for the Claimant's injury.

The Claimant, however, had also been careless, and so liability was apportioned equally between the parties.

Comment

This case does not break new ground. However, it is useful insofar as it illustrates the rigors of the Manual Handling Operations Regulations and the heavy burden they place upon defendants. However, remember that it is for the claimant initially to suggest ways in which it was reasonably practicable for the risk to be reduced. It is suggested that herein lies an apparent unfairness in the system: claimants get to perform this exercise after the event whereas defendants are burdened (when performing the risk assessment and deciding how to reduce risk thereafter) with foreseeing all before an event has taken place.

Causation

But for test – impossibility of proof – Fairchild exception

Grace Sanderson v Donna Marie Hull

[2008] EWCA Civ 1211

The Claimant had been employed by the Defendant as a turkey plucker. She was provided with gloves and aprons but soon started to work without gloves. Later, she was diagnosed with campylobacter enteritis. She alleged that she had been infected by bacterium during the course of her employment, and that the Defendant had breached its duty in failing to protect her from the risks of infection inherent in handling dead poultry.

The recorder found the Defendant negligent and in breach of several statutory duties, including failing to warn the Claimant of the risks of exposure to the bacterium and to advise her as to the precautions she should take to minimise the risk of infection. On causation, the recorder in his draft judgment found that the Claimant had failed to prove that but for the Defendant's negligence she would probably not have contracted the infection. However, he reconsidered his finding on causation after the Claimant submitted that it was impossible for her to satisfy the "but for" test. He held that the exception to the "but for" test applied and that the Claimant had established the causal link by showing that the breaches of duty had materially increased the risk of infection.

The Defendant submitted that the exception to the "but for" test of causation did not apply, that the recorder had wrongly extended the exception to another disease or condition and that it was not impossible for the Claimant to satisfy the "but for" test.

The Court of Appeal held that great caution was required before allowing any development of the exception to the "but for" test (*Fairchild v Glenhaven*

Funeral Services Ltd (t/a GH Dovener & Son) (2002) UKHL 22, (2003) 1 AC 32 and *Barker v Corus UK Ltd* (2006) UKHL 20, (2006) 2 AC 572 considered). The conditions set out in Fairchild in relation to mesothelioma were not intended to exclude the application of the exception to other diseases and conditions. In order to extend the exception, it was essential that it be impossible for the claimant to prove enough to satisfy the "but for" test; difficulty of proof would not be enough (*Fairchild* considered).

In the instant case, the recorder had not properly analysed the facts relating to negligence and causation. His difficulties in reaching a conclusion on causation were created not by any impossibility of proof but by his failure to make crucial findings of fact. If the these findings had been made, he would have been able to make a decision on the usual "but for" basis. Therefore, the case was not one in which it was impossible for the Claimant to prove causation. Accordingly, the recorder was wrong to hold that the case fell within the *Fairchild* exception.

Comment

Not happy reading for the Recorder. Criticised on his handling of the facts and the law! Nonetheless, this case reinforces the dicta in *Fairchild* and appears clearly to demarcate the application of its principles: only if proving causation is impossible does the exception apply.

Successive causes – contribution not appropriate

Environment Agency v Ellis

[2008] EWCA Civ 1117

The Claimant worked for the Defendant as a plant machinery driver. During the course of his employment, he fell from height and injured his back. The Defendant admitted liability. A year or so later, the Claimant had a second accident for which the Defendant was not responsible. Thereafter, the Claimant had a fall at home because his back gave way and sustained a right knee injury. At the time of his accident at work, the Claimant had a degree of symptomless spinal degeneration. The Claimant maintained that the accident at work brought about symptoms in his back 10 years before they would have occurred. The judge held that the Claimant had proved that, but for the accident at work, the fall at home would not have occurred and so there was a direct causative link between the two events. However, the judge also took into account the second accident as a further contributing event to the deterioration of the Claimant's lumbar spine. The judge attempted to apportion the causation of the claimant's loss in accordance with *Holtby v Brigham & Cowan (Hull) Ltd* (2000) 3 All ER 421 CA and *Allen v British Rail Engineering Ltd (BREL)* (2001) EWCA Civ 242 and held that the Claimant was entitled to 90 per cent of his loss.

The Court of Appeal held that the judge was wrong to apportion 10 per cent of the Claimant's loss to the second accident, for which the Defendant was not responsible. The judge intended to apply the "but for" test and in the main had done so. However, he gave no detailed reason for the 10 per cent apportionment. Applying the "but for" test would not result in any deduction; a claimant satisfying that test, as the Claimant on the judge's findings had, did not also have to prove that the Defendant's negligence was the only, or the single, or even chronologically the last, cause of his injuries (*Clough v First Choice Holidays & Flights Ltd* (2006) EWCA Civ 15, (2006) PIQR P22 considered). There was no free-standing principle that would give apportioning effect to a contributory intervening event. The Claimant's case was not one where the exception to the general "but for" rule for causation applied. The Holtby/Allen principles are an exception to the general rule intended to do justice in cases of industrial disease where there has been successive exposure to harm by a number of agencies, where the effect of the harm is divisible, and where it would be unjust for an individual defendant to bear the whole of a loss when in commonsense he was not responsible for all of it.

Comment

Another case where the judge at first instance erred in his approach to causation. A useful case where one encounters successive causes of injury and where there is a dispute as to causation. The normal rule for causation in personal injury negligence cases is the "but for" rule. The *Holtby/Allen* principles are an exception to the general rule intended to do justice in a particular class of case. It is limited to industrial disease or injury cases where there has been successive exposure to harm by a number of agencies, where the effect of the harm is divisible, and where it would be unjust for an individual defendant to bear the whole of a loss when in commonsense he was not responsible for all of it.

Contributory negligence – sufficiency of cause of damage

St George v Home Office

[2008] EWCA Civ 1068

When the Claimant had entered prison aged 29, he had been abusing alcohol and drugs since the age of 16. He informed prison staff that he was a heroin user who drank heavily and had previously had withdrawal seizures. He was allocated a top bunk bed. A few days later, he suffered a withdrawal seizure and fell from the bed, suffering a head wound. The seizure developed into "status epilepticus", and he sustained severe brain damage. The judge held that the Claimant's damages should be reduced by 15 per cent because his injuries were caused partly by his addiction, which was the result of his lifestyle decisions and, therefore, his "fault" within the meaning of the Law Reform (Contributory Negligence) Act 1945 s.1(1).

The Claimant appealed, arguing, inter alia, that the damage suffered by him was not the result of any fault on his part, and, alternatively, that it would not be just and equitable to reduce his damages having regard to his share in the responsibility for his injuries.

The Court held that the Claimant's fault in becoming addicted to drugs and alcohol in his mid-teens was not a potent cause of the status and the consequent brain damage that was triggered by his fall. It was too remote in time, place and circumstance and was not sufficiently connected with the negligence of the prison staff to be properly regarded as a cause of the injury. It also held that, if the Claimant's injury had been partly the result of his fault in becoming addicted to drugs and alcohol, it would not have been just and equitable to reduce his damages having regard to his share in the responsibility for his injuries.

Comment

A case confined to its facts but included as a rare illustration of something the court considers not falling within the "just and equitable" criterion of the

1945 Act. The judgment considers a number of authorities on causation and contribution and provides useful analysis in separating matters amounting to a "potent cause" of damage as opposed to "no more than part of the history" behind the circumstances of the damage.

Clinical negligence – consent – alternative treatment and risks

Birch v University College London Hospital NHS Foundation Trust

[2008] EWHC 2237 (QB)

The Claimant was admitted to hospital displaying atypical symptoms of vascular third nerve palsy. The consultant doctor recommended that she undergo an MRI scan in order to exclude the possibility that she was suffering from either a posterior communicating artery aneurysm or cavernous sinus pathology. There were no available MRI slots available at that hospital so her consultant requested that she be transferred to a neurology ward in a specialist hospital operated by the trust; later, she was transferred to a neurosurgical ward at that hospital. The trust's neurosurgeons decided to perform a catheter angiography, a mildly invasive procedure that had increased risks for people in the Claimant's position. The associated risks of angiography were explained to the Claimant, who then signed the relevant consent form. Subsequently, there were complications with surgery and the Claimant suffered a stroke. The Claimant submitted, inter alia, that the trust had negligently failed to disclose the comparative risks of MRI scanning to her.

The Court held that if there was a significant risk that would affect the judgment of a reasonable patient then the doctor should inform the patient so as to enable her to determine for herself which course she should adopt (*Pearce v United Bristol Healthcare NHS Trust* (1999) ECC 167 CA (Civ Div), *Chester v Afshar* (2004) UKHL 41, (2005) 1 AC 134, *Bolam v Friern Hospital Management Committee* (1957) 1 WLR 582 QBD and *Bolitho (Deceased) v City and Hackney HA* (1998) AC 232 HL applied). By logical extension of that principle, the duty to inform a patient of significant risks would not be discharged unless and until a patient was made aware that fewer or no risks were associated with another form of treatment. In the instant case, the Claimant had been informed of the risks of catheter angiography but not those of MRI. Although there was no requirement that a doctor should disclose comparative risks of other treatments in every case, there were special circumstances in the instant case that justified the imposition of such a duty. The Claimant had entered a neurosurgical rather than a neurology ward under a recommendation that she undergo an MRI and would have selected the option of undergoing the less invasive procedure had she been properly apprised of the comparative risks.

Comment

Whilst clearly dependant upon the relative risks of the proposed and alternative treatments, in cases were the risks associated with the alternative treatment were substantially below those of the treatment proposed then (and not otherwise) there would be a duty to advise of the of the disparity between those risks. This therefore appears to require treating doctors to consider the comparative risks and, if necessary to offer the appropriate advice, even though (as in this case) the alternative treatment was not available at the time.

Quantum

Accommodation claims – defendant must pay

Chantelle Peters v (1) East Midlands Strategic Health Authority and another (Defendants) and Nottingham City Council (Part 20 Defendant)

[2009] EWCA Civ 145

The Defendant health authority appealed against a decision that there should be no reduction in the accommodation and care element of damages awarded to the Claimant to reflect the local authority's statutory duty to provide accommodation and care for her. The Part 20 Defendant local authority appealed against the finding that the Claimant's damages were to be disregarded for the purposes of determining whether it had a duty to provide her with accommodation and care.

The 20-year-old Claimant was severely disabled, having been born with congenital rubella syndrome. The health authority had been ordered to pay damages to her on the basis of negligence. A sum of almost £4 million had been awarded in 2000 in respect of future care and accommodation. In 2007, the Claimant had been moved from a local authority care home to a private care home pursuant to a contract between the care home and the local authority. The cost of the accommodation was shared equally between the local authority and the health authority. The broad question was whether the cost of the care and accommodation should be borne by the health authority as the tortfeasor or by the local authority charged with the statutory duty of making arrangements for providing care and accommodation. Specific issues for determination included whether the judge had been correct to rule that the Claimant was fully entitled as a matter of law to pursue the tortfeasor and whether the judge had been correct to find that it was reasonable for the Claimant to opt for her care accommodation to be self-funded rather than provided by the local authority.

The Court of Appeal held that a claimant who wished to opt for self-funding by way of damages in preference to reliance on the statutory obligations of a public authority should be entitled to do so as a matter of right, provided there was no double recovery. In assessing whether a person had the means to pay for or contribute towards their care costs, the disregard in respect of "damages for personal injury" applied to all damages received and not just those for pain suffering and loss of amenity (*Firth v Geo Ackroyd Junior Ltd* [2001] PIQR Q4 affirmed). Regarding double recovery, where the court had ordered a tortfeasor to pay 100 per cent of the care costs necessary to meet a claimant's needs, there was no duty on a case manager to seek full public funding. An effective way of dealing with the risk of double recovery where a claimant's affairs were being administered by the Court of Protection was to provide that court with a copy of the judgment of the personal injuries claim and seek an order that no application for public funding of the claimant's care under the National Assistance Act 1948 should be made without further order. There should also be provision for the defendants to be notified of an application for permission to apply for public funding. Therefore, the risk of double recovery could not justify rejection of the judge's decision to award the Claimant the full cost of care and accommodation in her damages.

Comment

The conclusion to a long-running debate about whether a defendant may avoid liability for housing costs based upon the claimant's ability to rely upon state provision and a significant victory for claimants. The Court of Appeal held that, provided the risk of double recovery is guarded against and provided it is reasonable to do so, claimants may claim the cost of future care from the tortfeasor notwithstanding the state's obligation to provide such care. So, from now on, if a Defendant seeks a s.47 assessment (an assessment of accommodation need carried out by the local authority) a claimant may simply refuse and require the Defendant to pay the costs of private provision. Whereas guidance is provided in respect of a claim administered by the Court of Protection it is less clear how a defendant can protect itself against double recovery in other cases.

PPO's - precedent orders

Thompstone v Tameside Hospital NHS Foundation Trust

Corbett v Yorkshire & Humber Strategic Health Authority

RH v University Hospitals Bristol Healthcare NHS Foundation Trust

BB v National Health Service Litigation Authority, Adam v Royal Free Hampstead NHS Trust

[2008] EWHC 2948 (QB)

The Court of Appeal had considered periodical payment orders in the three instant cases and had found that, when providing for the recovery of future care costs, reference should be made to the annual survey of hours and earnings for the occupational groups of care assistants and home carers (ASHE 6115) rather than to the retail price index. Orders giving effect to that judgment were drafted and approved. However, the orders were later redrafted. The instant court was required to consider model schedules to be incorporated in orders in the instant cases and also unrelated pending and future cases.

The model schedules did no more than offer practitioners a precedent for adaptation to meet the particular nature of an award of damages. However, the terms represented the best current expertise and departure from them in any future draft order would have to be justified to secure court approval.

Periodical payments as ordered were immediate or deferred. In each instance, the order would specify a multiplicand. Immediate payments were indexed from inception and thereafter annually. When deferred payments took effect, the multiplicand would reflect indexation as applicable as from the making of the order and, once used, would be subject to the same annual indexation. With both types of payments, the order could provide for future enlargement of the multiplicand on a specified date.

The draft orders sought to anticipate reclassification and revision of ASHE 6115. Despite the uncertainties as to the occurrence and the nature of reclassification, there was no reason to negate the parties' efforts to deal with those problems which might be successful or help promote agreement as to a resolution.

Comment

Essential reading in any periodical payments case. The model orders can be found at http://www.lawtel.com/content/display.asp?ID=AC0119222QBD.pdf

Credit hire – mitigation of loss

Copley v Lawn; Maden v Haller

[2009] EWCA Civ 580

The Appellants' cars had been damaged in separate accidents caused by the Respondents' negligence. Both Appellants had refused offers of a replacement car paid for by the Respondents' insurers and instead hired replacement cars on a credit hire basis. C had already hired a car by the time she received the insurer's offer; M had not. In C's case the judge allowed only seven days' hire on the basis that at the end of that period she should have cancelled the hire agreement and accepted the insurers' offer. In M's case the judge dismissed his claim in its entirety on the basis that he should have accepted the insurers' offer.

On appeal, the judge held that the rejection of the Respondents' insurers' offers was unreasonable and that the hire costs incurred were irrecoverable. The Appellants argued that they had not acted unreasonably, and in the alternative that they could nevertheless recover damages in line with the rate that the insurers would have had to pay.

The Court of Appeal held that the Appellants had not acted unreasonably. Any offer made by the insurers had to contain all relevant information to allow the Claimants and their advisers or representatives to make a reasonable response, including the cost to the insurers of hiring the cars. A Claimant only had to take reasonable steps to mitigate his loss, and he could not be said to act unreasonably if he made or continued his own car hire arrangements unless he was made aware that such arrangements could be made more cheaply by the insurer. On the alternative argument, the Court held that if a Claimant did unreasonably reject such an offer of a replacement car then he was nonetheless entitled to recover at least the cost which the Defendant's insurer would have incurred.

Comment

A difficult case for those with interests in credit hire. Insurers are at very long last getting their act together and offering a hire car up front to the victims of accident damage. Whilst such offers do not defeat hire claims completely I fear there is a danger that they may make credit hire generally an unprofitable business?

Procedure

Interim payments – guidance in PP cases

Cobham Hire Services Ltd v Benjamin Eeles

[2009] EWCA Civ 204

The Defendant appealed against an interim payment order for £1.2 million. The Claimant, an 11- year-old boy, had suffered a serious head injury causing

difficulties were with cognition and intellect. Liability was not disputed and judgment for damages to be assessed was entered.

The Claimant's legal team maintained that it was not possible to quantify his claim until about 2010, and the Claimant received interim payments amounting to £450,000. His parents decided to buy a family home to meet his needs and subsequently requested a further interim payment of £1.2 million to pay for the purchase price and refurbishment costs. The judge concluded that the application for a further £1.2 million would bring the total interim payments to just under one half the estimated value of the claim and so would not exceed a reasonable proportion of the likely amount of the final judgment as per CPR r.25.7(4). The judge rejected the Defendant's argument that such an interim award might tie the hands of the trial judge who might want to make a substantial periodical payments order.

The Court of Appeal held that the discretionary power to order an interim payment was limited by r.25.7(4) to no more than a reasonable proportion of the likely amount of the final judgment. The judge had taken the full capital value of the claim as the basis for his consideration of an interim payment. In a case in which a periodical payments order might be made, that was not the correct approach (*Braithwaite v Homerton University Hospitals NHS Foundation Trust* (2008) EWHC 353 (QB) approved). The judge had also misunderstood and underestimated the importance of not fettering the trial judge's freedom to allocate the heads of future loss and had not carried out the essential task of estimating the likely amount of the final judgment.

Setting aside the order the Court of Appeal held that the correct approach when considering whether to make an interim payment in a case in which the trial judge may wish to make a periodical payments order was as follows:

a assess the likely amount of the final judgment, leaving out of account the heads of future loss which the trial judge might wish to deal with by a periodical payments order;

b assessment should comprise only special damages to date and damages for pain, suffering and loss of amenity, with interest on both;

c as the practice of awarding accommodation costs (including future running costs) as a lump sum was sufficiently well established, it would usually be appropriate to include accommodation costs in the expected capital award;

d the assessment should be carried out on a conservative basis;

e save in certain circumstances, the interim payment would be a reasonable proportion of that assessment (and a reasonable proportion may well be a high proportion, provided that the assessment had been conservative);

f the judge need have no regard as to what the Claimant intended to do with the money; if he was of full age and capacity, he could spend it as he wished, and if not, expenditure would be controlled by the Court of Protection;

f additional elements of future loss could be included in the judge's assessment of the likely amount of the final judgment when the judge could confidently predict that the trial judge would wish to award a larger capital sum than that covered by general and special damages, interest and accommodation costs alone;

before taking such a course, the judge had to be satisfied by evidence that there was a real need for the interim payment requested; if the judge was satisfied of that, to a high degree of confidence, then he would be justified in predicting that the trial judge would take the course indicated and in assessing the likely amount of the final award at such a level as would permit the making of the necessary interim award.

Negative declarations

Jewel Ahmed Toropdar v D (A Minor By The Official Solicitor As His Litigation Friend)

[2009] EWHC 567

The Claimant claimed a declaration that he was not liable for personal injuries sustained by the Defendant child in a road traffic accident. On the facts the court concluded that the Defendant's driving fell below the standard expected and that he was liable. However, in addition the court considered (as an obiter point) the question of negative declarations:

There was no valid reason for taking an adverse view of negative declarations. The court was endorsing the practise of insurers seeking a negative declaration in personal injury actions. Such a course was and should be unusual. It was for the would-be claimant to decide whether or not to make a claim or to start an action against the alleged wrongdoer and to run the risk of an adverse costs order. If an attempt to seek a negative declaration gave rise to an injustice the court would not countenance it. A court was unlikely to be sympathetic to a claim for a negative declaration where a claim had never been seriously canvassed. Whilst a declaration was always a discretionary remedy, in most cases where an action for a negative declaration had been allowed to proceed, there should not be a further round of argument at the hearing as to whether the court should be entertaining it at all.

Comment

This is litigation in reverse. However, one can understand the motivation to bring the liability aspect to trial in the case of a young child. The alternative was simply the driver to wait. However, in the case of a young child proceedings might not be brought for 15 years or more in which time the driver's ability to defend the issue might have suffered prejudice. The important point to note, despite the driver losing on the facts, is that, in appropriate circumstances, the court would permit a negative declaration to be sought.

Contempt

Carol Walton v Joanne Kirk

[2009] EWHC 703 (QB)

The Applicant's insurers applied to commit the Respondent for contempt of court. The Respondent had claimed substantial damages against the Applicant arising out of a road traffic accident. During the course of those proceedings, the Respondent claimed to have suffered significant and long-term disability as a result of the accident. The Applicant's insurers believed that the Respondent was exaggerating her disability and her claim for damages. They paid a small sum into court and engaged a surveillance company to film the Respondent. The videos were disclosed to the Respondent, who accepted the sum paid into court.

At trial, the Applicant's insurers relied on various documents, including an "Incapacity for Work" questionnaire and an application for a disabled parking blue badge, both verified by a statement of truth, and on the contents of the videos. The Respondent gave evidence herself and called her doctor as well as family members and friends to give evidence on her behalf. The Applicant's insurers submitted that the videos showed that the Respondent's descriptions of her symptoms were untrue and dishonest.

The Court held that the Respondent had been injured to some extent by the accident and was therefore entitled to bring her personal injury claim. The majority of the allegations as to contempt were not, in the circumstances, made out. In respect of the Respondent's "Incapacity for Work" questionnaire and blue badge application, however, the Court found that the Respondent had not honestly believed in many of the answers she had given and that those answers were irreconcilable with the video evidence and the evidence of her own witnesses. In making those claims for state benefit and in verifying the documents in the litigation, the Respondent was guilty of a contempt of court.

Comment

The impact of this decision is not to be underestimated. Yes, Walton offers clarification of the circumstances which may give rise to a contempt of court in personal injury claims. It will no doubt spawn a raft of sabre-rattling on behalf of defendants where they suspect dishonesty. But, given that the headlines have been achieved, does the case mark an increased willingness on behalf of insurers to seek prosecutions in other contempt cases?

Costs

Inquest costs recoverable in civil claims

Roach and Roach v Home Office

Frances Matthews v Home Office

[2009] EWHC 312 (QB)

The Respondents both had children who had died in police custody. They both obtained exceptional funding from the LSC for solicitors and counsel to attend the subsequent inquests. As a result of the inquest findings, they both issued civil proceedings for damages. Offers were made and accepted in both cases, it being agreed that the Home Office would pay reasonable costs to be assessed if not agreed. The Home Office objected to the proportion of the costs that related to the attendance of counsel and solicitors at the inquests, and the matter went before the costs judge. The costs judge held that the role of legal representatives at an inquest fell into two equal parts: (1) assisting the coroner and (2) obtaining evidence necessary to pursue any civil claim. The costs judge awarded the Respondents 50% (Roach) and 100% (Matthews) of their costs.

The Home Office appealed the decision of the costs judge on the basis that the costs of one set of proceedings were never recoverable as costs of and incidental to another set of proceedings. It submitted that there was no exception to that rule and therefore there was no jurisdiction to award such costs. It also argued that there were no costs in coroners' proceedings, and therefore such costs were not subsequently recoverable. Roach appealed against the decision to award only half of their costs.

Held: It was common ground that the courts were entitled to award the costs of and incidental to civil proceedings, pursuant to the Supreme Court Act 1981 s.51. There was also no doubt that costs incurred prior to proceedings were capable of being recoverable as costs in the proceedings. From the wording of s.51, it was impossible to extract a rule as asserted by the Home Office. In fact, the wide wording of s.51 was inimical to such a rule. Therefore, there was no reason why the costs of attending the inquest should not be allowed as incidental costs. Also, Parliament had not decided that there were no costs in coroners' proceedings. A coroner himself had no power to award costs, but it was clear from s.51 that all costs of and incidental to civil proceedings could be recovered.

It was not appropriate to divide the costs of an inquest by reference to the dual role of the legal representative in attendance. It was necessary to have regard to considerations of relevance where the costs of attendance at an inquest were claimed, in whole or in part, as costs incidental to the subsequent civil proceedings. Accordingly (subject to remission to the costs judge to decide questions of proportionality and reasonableness) each claim was entitled to 100% of the costs of attending the inquest.

Comment

Reluctance on the part of claimants fully to participate in an inquest on account of the risk of incurring irrecoverable costs should now be a thing of the past. That said, it is difficult to justify as either reasonable or proportionate a decision to participate where there is an admission of full (as opposed to primary) liability. Accordingly, this decision should provide incentive for (a) defendant's to admit liability in full early in fatal cases and (b), in cases where contributory negligence is alleged or liability denied, for claimants fully to participate.

Success fee claimable in BTE insured cases

Jane Kilby v Donald Gawith

[2008] EWCA Civ 812

The Claimant was involved in a road traffic accident for which the Defendant admitted liability. The Claimant possessed before-the-event insurance yet entered into a CFA with her solicitor and the solicitor sought a 12.5% uplift in accordance with fixed recoverable costs scheme of CPR r.45.11(2). The success fee was awarded and the Defendant appealed (to the circuit judge and then to the Court of Appeal).

Construing CPR 45.11 by reference to its ordinary natural meaning in the context of the rules as a whole the Court of Appeal held that the success fee was recoverable. The purpose of the rules was to provide fixed levels of remuneration, *Nizami v Butt* (2006) 1 WLR 3307 and *Lamont v Burton* [2007] EWCA Civ 429 applied. The approach to before-the-event insurance in *Sarwar v Alam* [2001] EWCA Civ 1401 did not lead to the conclusion that r.45.11(2) should be construed any differently.

Comment

A 2008 case that escaped our radar. It is included now given the very significant effect it may have upon the recoverability of costs and the attraction of cases where a claimant benefits from BTE but where a "non-panel" firm wishes to pursue the claim.

Part 36 offers – ambit – indemnity costs

Fitzpatrick Contractors Ltd v Tyco Fire & Integrated Solutions (Uk) Ltd (Formerly Wormald Ansul (Uk) Ltd) (No.3)

[2009] EWHC 274 (TCC)

The Claimant contractors made a Part 36 offer to the Defendant company to settle the litigation. The relevant period for acceptance expired and there was a trial of preliminary issues on which the Claimant was successful. The Defendant company then wrote to the Claimant accepting the Part 36 offer. The Claimant argued that, had there been a trial and had damages been recovered equivalent to the Part 36 offer, it would have been entitled to indemnity costs, unless the court concluded that it was unjust to make such an order, by analogy with r.36.14. In the alternative, the Claimant argued that it was entitled to seek indemnity costs under r.44.3.

The Court held that since there had been a valid acceptance of a valid Part 36 offer the starting point was r.36.10. There was no reference in r.36.10 to a presumption that, unless it was unjust to do so, the court would order a defendant who accepted a Part 36 offer late to pay a claimant's costs on an indemnity basis. If there was an entitlement to seek indemnity costs then that was expressly spelled out in the CPR. A party could seek indemnity costs in one of two ways: (1) because there was a presumption that such costs would apply, for example under r.36.14; and (2) because it could demonstrate evidence of the conduct required by r.44.3. Therefore, the Claimant's claim for indemnity costs failed as a matter of principle. An indemnity costs presumption should not be imported into r.36.10; and, in all the circumstances, it was impossible to say that there was any basis on which the Claimant could be entitled to have its costs assessed on an indemnity basis under r.44.3.

Comment

Not a surprising result; the award of indemnity costs (and other benefits) derives from Part 36 and unless you can get within the letter of the rule the benefits do not apply. Given that 36.14 states that a claimant must obtain judgment "at least as advantageous to the claimant as the proposals contained in the claimant's Part 36 offer" presumably it was open to the claimant in this case to offer (a) a sum of money in settlement and (separately) (b) a finding in its favour on the preliminary issue? In that event 36.14 would be engaged and indemnity costs might flow.

Success fees where liability admitted

C v W

[2008] EWCA Civ 1459

The Defendant admitted liability for injuries to the Claimant whereafter the Claimant instructed solicitors and entered into a CFA which provided for a success fee of 98 per cent (of which 15 per cent represented the cost of funding). The CFA (the Law Society's standard form of agreement) provided that in the event that the Claimant was advised to reject an offer of settlement and damages were subsequently awarded that were less than or equal to the offer, the Claimant would not have to pay any of the solicitors' basic costs or percentage increase for work done after notice of the offer was received. The claim was subsequently settled. When assessing costs, the district judge allowed a success fee of 70 per cent and the Defendant appealed to the circuit judge. On appeal, that was reduced to 50 per cent.

The Defendant appealed to the Court of Appeal and contended that the success fee was too high because at the time of entering into the CFA liability had already been admitted and so there was no significant risk that the Claimant would fail to recover substantial damages. The Defendant submitted that it was wrong to calculate the success fee in the way that would have been appropriate if liability had been in doubt.

The Court of Appeal held that, since there was no evidence that the accident had been caused by anything other than the Defendant's negligence, and since liability had been admitted, it was difficult to see how the Claimant would have failed to recover substantial damages. Therefore, the chance of success was very high. The difficulty lay in assessing the risk that the solicitors might lose the right to recover part of their fees as a result of the Claimant's failure to beat an offer which she rejected on their advice. The chance that the solicitors would so advise the Claimant was difficult to assess, but it was unlikely that highly experienced solicitors practising in that field would differ widely in their assessment. A costs judge could not refuse to award a success fee on the basis that the difficulty of assessing the risks made it unreasonable to enter into a CFA at all. There was nothing unreasonable in entering into a simple CFA at a time when liability had been admitted, provided that the parties made a proper assessment of the much reduced risk of failure. In the circumstances, the success fee allowed by the judge was too high and a success fee of 20 per cent was allowed.

Comment

It is important to remember that this case was not one which fell into the fixed uplift regime of Part 45 (it was a RTA but one which fell before the inception of CPR 45.15 –fixed uplifts in RTA cases). No doubt points of dispute will now make repeated reference to this decision in liability admitted cases that subsequently settle. However, it is important to bear in mind that here liability was admitted before the CFA was executed, which distinguishes this case from the norm. In any event, 20% seems relatively generous given that an identical case which fell with 45.15 would garner only 12.5%.

Retrospective CFA held to not be contrary to public policy

Birmingham City Council v Forde

[2009] EWHC 12 (QB)

The local authority appealed against a decision on preliminary issues about litigation costs in relation to F, one of its tenants. Ms Forde had entered a CFA agreement with her solicitors in relation to proceedings against the local authority for failure to repair her property. Just before the proceedings were compromised the local authority had challenged the validity of similar CFA's and her solicitors wrote to her asking her to sign a second CFA. The letter explained that the legal costs up to that date would be dealt with under the second CFA unless the court ruled it invalid, in which case they would revert to the first CFA, and that the second CFA contained a success fee, whereas the first did not. The consideration expressed in and for the second CFA was that the solicitors would continue to act for F.

In costs proceedings the master decided that the letter formed part of the second CFA, that the solicitors' agreement to act was adequate consideration, that the presumption of undue influence did not arise, that a retrospective success fee was not permissible but that that did not invalidate the second CFA and that accordingly it was enforceable.

The local authority appealed on a number of grounds including that the CFA had been procured by undue influence and that a retrospective CFA was abhorrent and unenforceable.

The appeal was dismissed on all grounds. In particular it was held that there was no prohibition on CFA's being retrospective and no reason per se why a retrospective success fee was contrary to public policy, (*Adam Musa King v Telegraph Group Ltd* Unreported disapproved). The court had the ability to disallow or reduce retrospective fees that were unreasonable and in any event there was no reason why the court could not delete the success fee leaving the obligation to pay unaffected. There was nothing in the statutory provisions requiring a retrospective CFA to comply with the notice requirements in reg.4 of the 2000 Regulations and no reason to conclude that the second CFA was invalid because the retrospection extended back to before the 2005 Regulations (which removed the rigors of the 200 Regulations) had been introduced.

Comment

A resounding success for the Claimant's solicitors (who, no doubt, had hundreds of other cases based on the same CFA contingent upon this result). Since the passing of the 2005 CFA (revocation) Regulations attacks on the enforceability of CFA's has dwindled but this decision remains of relevance to cases involving CFA executed before 1st November 2005.

Limitation

Delay – loss of windfall not amounting to prejudice

Stephen Cain v Bernice Francis

Shona Mckay v Stephen Hamlani and another

[2008] EWCA Civ 1451

In both sets of proceedings (RTA's where liability had been admitted) the Claimant's solicitors negligently issued the claim outside the primary limitation period. s.33 Limitation Act 1980 applications (to disapply the relevant time limits) were made in each case. SC's case had been issued one day late and the judge refused to disapply the limitation period. SM' case had been issued one year late and the judge disapplied the time limits.

The cases were joined on appeal. In both cases the s.33 applications were successful on appeal. Although a judge's discretion is unfettered, there should be consistency of approach between judges on this issue. In a case where the defendant has had early notice of the claim, the accrual of a limitation defence should be regarded as a windfall and the prospect of its loss, by the exercise of the s.33 discretion, should be regarded as either no prejudice at all or only a slight degree of prejudice. The length of the delay cannot be the deciding factor (although reasons for the delay should be considered). The key point was whether the Defendant had suffered any evidential or other forensic prejudice as a result of the delay. The financial prejudice to D of having to pay damages was not something that Parliament had intended to be taken into account in the exercise of the discretion. The fact that C has a possible claim against his solicitor would not necessarily mean that the time limit should not be disapplied. The basic question to be asked is whether it was fair and just in all the circumstances to expect D to meet the claim on the merits, notwithstanding the delay.

Comment

Not a surprising decision and one which rightly focuses attention to s.33(3)(b): "the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11". From the defendant's standpoint it is essential in such cases to consider whether the delay has prejudiced the defendant's ability to investigate quantum but, again, this is often difficult to establish.

Date of knowledge – extension of time

There have been a run of limitation cases of late – the majority finding favour with claimants. The following cases are fact based but are worthy of report given the periods of delay in question and for their illustrative value.

AB and others v Ministry of Defence

[2009] EWHC 1225 (QB)

The Claimants were veteran servicemen who had suffered exposure to radiation as a result of nuclear tests carried out by the British Government in the 1950s. They alleged that the Defendant had negligently failed to protect them from exposure and that the negligence was causative of numerous illnesses since suffered by them.

The Defendant contended that the claims should be struck out. It argued that the Claimants had conceded that there were a number of possible factors that could have caused the subsequent illnesses and as such the claims were bound to fail on causation. In respect of limitation, it argued that time started to run as soon as the Claimant had knowledge of the first significant injury, even though he might learn of other injuries much later, and that a claim for the later injuries could only be brought if the limitation period was disapplied under s.33; since the Claimants had known the material facts relevant to their cause of action for longer than three years before proceedings were issued their claims were statute-barred.

The Court declined to strike out the claims. The causation issue needed to be dealt with at trial, and on the limitation point the court should be allowed to consider what was alleged to be the injury in question. In this particular case, a veteran could only have acquired the requisite knowledge upon being made aware of the findings of the Rowland study in 2007 which provided the first credible evidence that radiation exposure above background level could cause the kind of illnesses complained of by the veterans. However, that approach could not apply where there was a sufficiently strong belief that radiation had caused the illnesses to amount to knowledge (*A v Hoare* (2008) UKHL 6, *Spargo v North Essex DHA* (1997) PIQR P235 CA (Civ Div) and

Sniezek v Bundy (Letchworth) Ltd (2000) PIQR P213 CA (Civ Div) followed). Applying the latter approach, five of the claims were statute-barred.

In the circumstances, however, the s.33 discretion should be exercised in each case that was statute-barred. It was essential to consider whether there could be a fair trial of the factual issues despite the delay, and in this case a fair trial remained possible. It was also significant that although the general claim in respect of fall-out radiation could have been advanced earlier, it would have been largely incapable of proof until the Rowland report.

Raggett v (1) Society of Jesus Trust 1929 for Roman Catholic Purposes (2) Preston Catholic College Governors

[2009] EWHC 909 (QB)

The Claimant brought a personal injury claim arising out of sexual abuse allegedly committed by a teacher at the second defendant school which he had attended during the 1970s. In 2005, the Claimant stated that he had suddenly remembered a number of incidents of sexual abuse committed by S upon him, including fondling and examination of his genitals. Following a course of therapy, he remembered further incidents of abuse. He commenced proceedings in 2007.

The school argued that the claim was time statute-barred because it had not been brought within three years of the Claimant's 18th birthday in 1976. The Claimant maintained that it had been commenced within three years of his date of knowledge, which was 2005, and argued in the alternative that it would equitable to disapply the limitation period under s.33.

The Court held that the Claimant had not acknowledged to himself that he had been the subject of sexual abuse until 2005, but that applying the "practical and relatively unsophisticated approach to the question of knowledge" (*A v Hoare* (2008) UKHL 6, (2008) 1 AC 844) he had to be taken to have "known" the nature and extent of the sexual abuse from the time it was committed. Therefore, his claim became statute barred in 1979.

However, it was not until 2005 that the Claimant had recognised the teacher's behaviour for what it was: serious sexual abuse. Delay was not uncommon in cases of sexual abuse, and the Claimant had to some extent suppressed his memories of the nature and the extent of the abuse. Furthermore, the school's ability to defend the claim was not materially affected by the delay and a fair trial remained possible. In these circumstances, it would be equitable to disapply the limitation period and allow the action to proceed.

Albonetti v Wirral Metropolitan Borough

[2009] EWHC 832 (QB)

The Claimant brought a claim arising out of alleged sexual abuse while he was resident in a children's home over thirty years previously. The claim fell outside the limitation period but had been allowed by assessing the Claimant's date of knowledge by means of a subjective test. The Court of Appeal held that an objective test was required, following the decision in *A v Hoare* (2008) UKHL 6, and that the Claimant had had the requisite knowledge from the time of the alleged abuse. The issue was remitted for determination of whether the limitation period should be disapplied under s.33.

The Defendant local authority argued that it would be unsafe for the court to make any meaningful assessment of the nature and extent of any alleged abuse so long after the event, and that the chances of a fair trial were therefore remote.

The Court held that the delay was understandable and that the Claimant had acted reasonably in not issuing proceedings earlier. However, the delay of almost 40 years was decisive owing to the prejudice to the Defendant. The perpetrator of the alleged abuse had died many years ago, no complaint was made at the time of the alleged abuse, and the claim had come out of the blue. It was impossible to hold a fair trial as to whether the alleged abuse had in fact occurred. Therefore, it was not appropriate to exercise the court's discretion under s.33 not to apply the limitation period.

Code of conduct

Referrals – conflict of interest

Chantal Ann-Marie Reed v George Marriott (on behalf of Solicitors Regulation Authority)

[2009] EWHC 1183 (Admin)

The appellant solicitor entered into an agreement with an insurance company whereby personal injury claims were referred to her firm. The insurance company set up two subsidiary companies (B and E). B referred claims to the solicitor, who then subcontracted work on those claims to E. It was alleged that the solicitor had breached the Solicitors' Practice Rules 1990 and the Solicitors' Introduction and Referral Code 1990 in relation to referrals and fee-sharing. The solicitor argued that the scheme avoided the Rules and the Code because B was not paid for the referral of work, and the payments to E were not referral fees but payment for work done. She also argued that the mere existence of the agreement between herself and E did not establish that the services provided were not in the client's best interests. The tribunal found against her. The solicitor appealed.

The Court held that the scheme only notionally separated the introducer (B) from the person receiving payment (E). In reality, the solicitor was paying one wholly owned subsidiary for another wholly owned subsidiary to refer clients to her. The true introducer and the true person receiving payment was the insurance company, and the scheme was merely a device to obscure that. Referral fees created a commercial link of reliance between the solicitor and the referrer, and this was contrary to the solicitor's independence, the client's freedom to instruct a solicitor of its choice, and the solicitor's duty to act in the client's best interests. As a result of the scheme, the solicitor had become overly reliant on a single client to the detriment of her independence. Her appeal was dismissed.

Comment

A tawdry tale of referral fees, obvious conflicts of interest, front companies, million pound overdraft facilities and, er, a well known insurance company. The transcript is worth a read. The Claimant was obviously a financial wiz – she managed to run a profitable firm notwithstanding a referral fee in each case amounting to two thirds of her recovered fees!

Gabriel Farmer and Daniel Neill.

The tribulations of Mrs Kirk

Joanne Kirk v Carol Walton

[2008] EWHC 1780 (QB) Cox J (Kirk 1)

[2009] EWHC 703 (QB) Coulson J (Kirk 2)

Contempt, as the Chancellor knows, can come in many forms. The same is true of Contempt of Court. It can arise from behaviour in Court, so-called 'contempt in the face of the Court[1]', but is most often associated with deliberate dishonesty in legal proceedings. It carries a maximum penalty of two years imprisonment.

A rare beast in daily practice, 'contempt' is an ever-present (if ignored) onlooker in the Court. Ignored that is, until now.

The context of contempt

Paragraph 32.14 of the CPR provides as follows:

1 Proceedings for contempt of Court may be brought against a person if he makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

2 Proceedings under this rule may be brought only:

- a by the Attorney General; or
- b with the permission of the Court.

In Kirk 1, Cox J, who granted permission for contempt proceedings to be brought by the Defendant, quoted *Malgar Limited v R E Leach* (Engineering) Limited (1999) WL 104 8312 in which the VC of the Chancery Division made the following points clear (page 2 of that judgment):

"Proceedings for contempt are not private law proceedings. They are public law proceedings. … It is a case of an allegation of public wrong, not private wrong. Interference with the course of justice is plainly a public wrong and it is right therefore that there should be a public control over the launching of proceedings for this species of contempt … The Court from which permission is sought will be concerned to see that the case is one in which the public interest requires the committal proceedings to be brought. I repeat that these are not proceedings brought for the furtherance of private interest. They are brought in the public interest and are in some respects like criminal proceedings. Nonetheless they are civil proceedings and they are civil proceedings to which the overriding objective set out in CPR 1 is therefore applicable."

Cox J then referred to important qualifications by Pumfrey J in *Sony Computer Entertainment & Others v Ball* [2004] EWHC 1192 (Ch):

"The discretion to permit applications of this nature to proceed must be exercised with very great caution. It can hardly be appropriate, it seems to me, to permit a general investigation of the facts surrounding the particular infringement in the context of the contempt proceedings. … The Claimant must satisfy the Court there is a strong case – and preferably an admitted case – that a particular misrepresentation is untrue."

The test for contempt in practice

In Kirk 2, Coulson J summarised the three principles which guide the Court's determination of contempt of this nature:

- a The applicant must prove each of the three elements of the contempt beyond a reasonable doubt. Given the quasi–criminal nature of contempt proceedings, any genuine doubt must be resolved in the respondent's favour.
- b The three elements are:
  - i the falsity of the statement;
  - ii the false statement has or would have interfered with the course of justice;
  - iii when the false statement was made the maker had no honest belief in the truth of the statement.
- c Exaggeration of a claim is not, without more, automatic proof of contempt of court. What may matter is the degree of exaggeration (the greater the exaggeration, the less likely it is that the maker had an honest belief in the statement verified by the statement of truth) and/or the circumstances in which any exaggeration is made (a statement to an examining doctor may forgivably focus on the worst aspects of the maker's physical condition, whilst it may be less easy to dismiss criticism of a similar statement made when the maker has been repeatedly asked to specify variations in his or her physical condition, and chosen only to give one side the worst – of the story).

Pausing there, it is noteworthy that the test is a very high one[2]. 'Contempt' allegations cannot be made willy-nilly. They have to be framed in great detail and proved to the criminal standard. Woe betide the over-enthusiastic applicant who does not bear those points in mind.

[1] Perhaps but typical of the 'old days', when the local County Court was a quasi-fiefdom which did not need recourse to the laws. Anyone unfortunate enough to have frequented Kingston CC in the early 1990's will remember HHJ Percy Harris's penchant for brandishing first yellow then red cards at counsel – the latter meaning that s/he would pay costs personally for all of the time wasted while s/he persisted.

Short summary of the background facts and evidence

Mrs Kirk suffered a minor rear end shunt RTA on 14.9.01. Proceedings were issued in August 2004 shortly before limitation. At the time the Claimant (then 45) had been a university administrator, and had a significant history of musculoskeletal complaints. She alleged that (in October 2002) she had had to give up work as a result of her symptoms.

In January 2005 the Claimant's revised Schedule amounted to over £800,000, including substantial claims for past/future loss of earnings and care/assistance. On 16 February 2005, the Defendant paid £25,000 into Court and in addition offered to pay the CRU of £9,000. After a long hiatus, on 1st December 2006 the Defendant offered to allow the Claimant to take the earlier offer, with the usual costs consequences – and the claim settled on that basis by a Consent Order dated 26 June 2007. As can be anticipated from the level of settlement, a great deal of evidential water had passed under the bridge between issue and settlement.

In a nutshell, prior to the service of any DVD evidence, the Claimant relied on orthopaedic and rheumatological evidence. The later diagnosed accident-related fibromyalgia in November 2004. In 2005, the Defendant's rheumatologist concluded that "Exaggeration is the major and probably dominant feature. I believe Mrs Kirk's condition is now no worse than before the accident."

The Orthopaedic evidence was not as divided. The Claimant's spinal surgeon, found it "difficult to understand why her symptoms were persistent … there were no physical findings to explain her presentation in orthopaedic terms (Cox J, paragraph 12).The Defendant's orthopaedic surgeon, who examined the Claimant on 8 December 2005, "could identify no physical cause for the Claimant's symptoms, and he could not explain her marked disability 'solely on the basis of a so called whiplash type injury to her neck' " (Cox J, paragraph 12).

The Claimant's statements were served on 10 April 2006 and 7 June 2006 and depicted, as the Cox J found "a woman who is severely disabled, unable to work and in need of substantial care and assistance". Coulson J summarised the picture the Claimant painted as "unremittingly grim".

What got Coulson J's goat was that the extensive surveillance (in each of 2005 -2007), told an entirely different story to that painted repeatedly by the Claimant variously in statements, benefit applications, part 18 answers, and in oral evidence:

"where Mrs Kirk was at fault was not so much for her endless descriptions of her bad days, but for her failure to identify the relatively normal life (even if it was accompanied by some pain) that she was able to lead on her good days. That has inevitably led me to conclude that some aspects of her presentation of her post–accident condition were very unreliable." (Paragraph 77)

Notwithstanding his repeated concerns about the Claimant's evidence and conduct, his exhaustive (36 page) judgment gave the Claimant the benefit of the doubt, in respect of, fully 9 of the 11 particulars of contempt, often doing so because of the high burden of proof.

In fact, the two proven allegations related to the content of an "incapacity for work questionnaire" and a "disabled badge" application (confirmed in the Claimant's Part 18 answers) and proved Mrs Kirk's undoing (Kirk 2, paragraph 102-106; 115-120). It is for those that she awaits sentence for contempt.

As anticipated from the tenor of the initial judgment, the Judge subsequently imposed a modest penalty, a fine of £2,500, in respect of the proven particulars of contempt. The contempt proceedings thus bore very little fruit, but perhaps they did focus the mind of practitioners on both sides, of the importance of running litigation honestly and proportionately.

Julian Benson

Practice Points - lessons to be learned

Claimants

1. Obtain/analyse DSS applications, GP/medical notes, OH file early.
2. Go through inconsistent entries with Claimant before s/he signs a statement of truth.
3. Prepare a statement explaining misunderstandings/errors, and if possible write to the author to correct errors.
4. Above all, make sure the Claimant understands the importance of the statement of truth – within the proceedings and in benefit applications.

Defendant

1. Spend time and effort on medical/OH notes – it always pays dividends.
2. Use Part 18 requests to 'flush out' dishonesty.
3. Generally wait for documents verified by a statement of truth before serving DVD footage.
4. Do not aim/expect to use 'contempt' proceedings as a general weapon – as Coulson J said at the outset: "This is an unusual and difficult case." (paragraph 1). The Courts will not want to become a forum for PI related contempt litigation.
5. Keep in mind the expense of proceedings, and difficulty in succeeding.

[2] In *Rogers v Little Haven Day Nursery Limited* (30th July 1999, unreported), a decision of Bell J, the claimant had said that her injury sustained at work was such that her right wrist was completely useless. The video showed the claimant using her right hand to carry boxes, hold papers, pen, mugs and a cigarette. The judge found that the video showed that she could use her right hand and that she did so without any sign of pain. Having considered all of the evidence, Bell J concluded that the claimant had exaggerated her condition but that: *"the exaggeration which I have described falls within the bounds of familiar and understandable attempts to make sure that doctors and lawyers do not underestimate a genuine condition, rather than indicating an outright attempt to mislead in order to increase the value of her claim beyond its true worth."*

A review of recent cases

All readers of this article will be acutely aware that the costs argument at the end of any PI claim can often be as lengthy and hard-fought as the main litigation. Not only are there arguments over how much but, all too frequently, which party should be paying the other.

With the introduction of the new Part 36 rules in April 2007 a claimant was no longer guaranteed his or her costs by simply doing financially better than a Part 36 offer or payment. Instead the court has to determine whether the award is "more advantageous" than a defendant's Part 36 offer[1].

But defendants have for some time had other strings to their costs bow. Part 44.3 provides the court with a broad discretion when deciding whether costs are payable by one party to the other and the amount of those costs. A list of factors to be taken into account when exercising its discretion is set out with conduct a specific consideration[2].

The purpose of this article is to look at the approach of the courts to Parts 44 and 36 with particular consideration of three decisions of late last year.

Painting v The University of Oxford

The application of Part 44 in the context of an exaggerated claim came up for consideration in *Painting v The University of Oxford*[6]. The Claimant claimed damages for injuries sustained while working for the Defendant. She claimed over £400,000. A payment in of £184,000 was not accepted of which only £10,000 remained in court by the time of trial. In the event the sum of £25,331.78 was awarded. The Claimant had obviously achieved a greater sum than that remaining in court but just a fraction of the amount originally claimed. In light of the size of the award as against that claimed and the findings that the claimant had exaggerated her injuries and claim, the Defendant sought payment of its costs from the date of the payment in relying upon Part 44 and citing the claimant's conduct.

In ordering that the Claimant pay the Defendant's costs from 21 days after the date of payment in, Maurice Kay LJ stated[3]:

"The two-day hearing was concerned overwhelmingly with the issue of exaggeration, and the University won on that issue. ..viewed objectively, the totality of the judgment was overwhelmingly favourable to the University. It was in real terms the winner. Moreover, the costs incurred after the reduction of the money in court were expended almost entirely on the preparation for and conduct of a trial in which the central issue was that of exaggeration."

Of particular importance was:

"the strong likelihood that, but for exaggeration, the claim would have been settled at an early stage and with modest costs. The second is that at no stage did Mrs Painting manifest any willingness to negotiate or to put forward a counter-proposal to the Part 36 payment. No one can compel a claimant to take such steps. However to contest and lose an issue of exaggeration without having made ever a counter-proposal is a matter of some significance in this kind of litigation. It must not be assumed that beating a Part 36 payment is conclusive. It is a factor and will often be conclusive, but one has to have regard to all the circumstances of the case."

Longmore LJ agreed with Maurice Kay LJ and underlined that the exaggeration of the Claimant was intentional and also underlined her failure to make any attempt to negotiate[4].

Carver v BAA[5]

Carver was another employer's liability claim. At a trial before HHJ Knight QC the Claimant beat a Part 36 payment made a year before by just £51 (she was awarded £4,686.26 inclusive of interest). The best offer the Claimant had made was in the sum of £12,500 which was in fact withdrawn soon after being made. With uplift the Claimant's solicitors sought costs of £57,000 which the Defendant resisted on the grounds that the offer was so close to the final award that in fact the Defendant should be awarded its costs.

Judge Knight was taken to Parts 36 and 44 and concluded that the Claimant had not obtained judgment 'more advantageous' than the offer made. The Defendant was therefore awarded its costs from June 2006 to trial. The judge went on to make no order as to costs for the period November 2005 (when a pre-issue offer of £4,006 was made by the defendant) to June 2006 on the basis that Part 44 allowed him to have regard to the claimant's conduct and the offer was 'adjacent to the sum awarded'.

The Court of Appeal upheld the trial judge's decision on both Part 36 and Part 44. In respect of the former it was noted that (per Ward LJ):

"31…The Civil Procedure Rules, and Part 36 in particular, encourage both sides to make offers to settle. Compromise is seen as an object worthy of promotion

1 CPR 36.14(1)

2 CPR 44.3(4)

3 [2005] EWCA Civ 161

4 Paragraph 21

5 Paragraphs 26 and 27

6 [2008] EWCA Civ 412

for compromise is better than contest, both for the litigants concerned, for the court and for the administration of justice as a whole. Litigation is time consuming and it comes at a cost, emotional as well as financial. Those are, therefore, appropriate factors to take into account in deciding whether the battle was worth it. Money is not the sole governing criterion.

32. It follows that Judge Knight was correct in looking at the case broadly. He was entitled to take into account that the extra £51 gained was more than off set by the irrecoverable cost incurred by the claimant in continuing to contest the case for as long as she did. He was entitled to take into account the added stress to her as she waited for the trial and the stress of the trial process itself. No reasonable litigant would have embarked upon this campaign for a gain of £51."

On the issue of Part 44 the Court of Appeal observed that the November 2005 offer was 'relevant and not derisory' and yet was met with no counter proposal. Again reference was made to the costs incurred as against the award. Having regard to all the circumstances the Court of Appeal upheld the decision of the trial judge not to award costs for the period November 2005 to the date of the payment in June 2006.

As was commented in the Summer 2008 edition of PI News, the decision definitely has had the effect of removing the certainty enjoyed under the old rules in respect of Part 36 offers and indeed since that time an application from the defendant for a costs order against the claimant in the face of a Part 36 payment within 10% or so of the final award has become almost ubiquitous.

What has remained at the forefront of every application though is the question of when a fight is worth it or not. Will the court focus solely on exaggeration and the extent of the same or will other factors come to the fore? Of course, while each case will fall to be decided on its own facts, three cases decided in the last six months provide us with some further guidance.

Morgan v UPS

On 11 November 2008 the Court of Appeal delivered judgment in *Morgan v UPS*[7]. The Claimant was awarded damages for personal injuries sustained while at work in the sum of £44,329.12. A payment in had been made much earlier in the litigation which, when interest was taken into account, the claimant had beaten by just £629.10.

The trial judge found that there had been exaggeration in the case. The Claimant had claimed not to be working yet covert surveillance showed him to be working as a mechanic on at least two occasions. That same surveillance showed the Claimant was not as disabled as he claimed to be.

In March 2006 the Claimant claimed £200,000. After disclosure of the surveillance footage this was reduced to £91,000 in a schedule dated May 2007. Subsequently two claimant Part 36 offers of £60,000 and £55,000 were made, the latter just two months before the hearing in May 2007. The Defendant sought costs against the Claimant.

Although observing that the Claimant had beaten the payment in "only by a whisker" the judge awarded the Claimant his costs of the entire action. Central to the findings of the judge were the fact that the Claimant did seemingly lower his expectations in light of the video surveillance, the Defendant was found to have pursued arguments relating to the Claimant's medical treatment that ultimately failed and the impact of the untruthfulness of the Claimant upon the time taken at trial was very small. The Defendant appealed.

It may be that if one were concentrating solely on the award as against the payment in alone one would expect the court of Appeal to accede to the Defendant's application. Indeed, on such a confined analysis the answer to the question "was the extra amount awarded really 'worth the fight'" the answer would be "no". However, the Court of Appeal agreed with the trial judge that the matter should not be looked at so narrowly and that the closeness of the offer to the award was not the only issue.

Upholding the judgment, the Court of Appeal expressed their agreement with the principles in Carver or Painting but sought to distinguish both. Pill LJ noted[8] that, unlike either, in this case:

- The Claimant's exaggeration was not the only issue which took the time of the court;
- The claim was not an easy one and there was extensive argument as to the appropriate quantum; and
- Counter-offers were made by the Claimant and these were wholly reasonable

Longmore LJ observed[9] that the present case was different to Painting in that:

"In that case Mrs Painting…made no attempts to negotiate despite her obvious exaggeration of her claim. In this case, however, the claimant did accept the effect of the contents of the video evidence that had been procured and reduced his claim accordingly, both openly and in the course of 'without prejudice' negotiations…"

Multiplex Constructions v Cleveland Bridge

In September 2008 Jackson J delivered judgment in *Multiplex Constructions v Cleveland Bridge & Othrs*[10] - a long running dispute concerning Wembley Stadium. The costs of the action ran into many millions of pounds. Having considered a number of authorities relating to Part 44, Jackson J sought to set out a number of principles to be considered (at paragraph 72):

"…(ii) In considering how to exercise its discretion the court should take as its starting point the general rule that the successful party is entitled to an order for costs.

(iii) The judge must then consider what departures are required from that starting point, having regard to all the circumstances of the case.

(iv) Where the circumstances of the case require an issue-based costs order, that is what the judge should make. However the judge should hesitate before doing so, because of the practical difficulties which this causes and because of the steer given by rule 44.3(7)[11].

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7 [2008] EWCA Civ 1476

8 Paragraph 18

9 Paragraph 21

10 [2008] EWHC 2280

11 44.3(7) –Where the court would consider making an order for costs relating only to a distinct part of the proceedings, it must instead if practicable make an order that a party must pay a proportion of another party's costs or costs from or until a certain date only instead.

(v) In many cases the judge can and should reflect the relative success of the parties on different issues by making a proportionate costs order.

(vi) In considering the circumstances of the case the judge will have regard not only to any Part 36 offers made but also to each party's approach to negotiations (insofar as admissible) and general conduct of the litigation.

(vii) If (a) one party makes an order offer under part 36 or an admissible offer within rule 44.3(4)(c) which is nearly but not quite sufficient, and (b) the other party rejects that offer outright without any attempt to negotiate, then it might be appropriate to penalise the second party in costs.

(viii) In assessing a proportionate costs order the judge should consider what costs are referable to each issue and what costs are common to several issues. It will often be reasonable for the overall winner to recover not only those costs specific to the issues which he has won but also the common costs."

Not only are those points specifically referable to the issue of 'conduct' of interest but also the more general guidance relating to the 'issue based' costs approach and in particular point v. It remains to be seen whether the guidance will be taken as encouragement for courts on assessment to make percentage awards of costs where a party has succeeded on some issues but not others rather than attempting to perform an accounting exercise and calculate with precision the actual costs attributable to particular issues. Certainly such an approach would reflect the reality of most litigation in that it is more often than not impossible to weed out with precision those actual sums spent arguing particular points. The best a court can do is to approach the matter broadly which a percentage award would allow.

Biffa Waste v Machinenfabrik

On 31 October 2008 Ramsey J considered the issue of Part 44 in the context of a commercial claim. In lengthy and involved litigation the Claimant claimed for damages in excess of £1.9M. In fact just £140,249 was recovered. The costs claimed were in excess of £1M. The Defendant argued that had the claim been advanced for its true value the case would never have fought with the majority of costs saved. Unsurprisingly the Defendant also argued that the costs claimed were not proportionate. It was submitted that the Claimant's conduct in advancing such an inflated claim was such that there should be no order for costs or the Claimant should be entitled to a proportion only.

Having reviewed a number of recent authorities dealing with Part 44 including Painting (judgment in Multiplex had not been handed down by the date of hearing), Ramsey J concluded that:

"33. These authorities illustrate the case sensitive nature of the exercise of discretion on costs. There are, however, the following principles relevant to this case:

(1) That there is a difference between a case where a party has recovered less than it has claimed so that there is unintentional exaggeration and a case where there has been intentional exaggeration, that is where a party has intentionally increased the claim or exaggerated symptoms so as to be deliberately misleading or fraudulent.

(2) Conduct under CPR rules 44.3(4)(a) and 44.3(5)(d) includes the question of whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim. Where the claimant has put the case too high then any consideration of that fact must also take into account the fact that a party faced with such a claim can make a Part 36 offer.

(3) Where a party has not made an offer, the court should not speculate on what the position might have been had that party made an offer.

(4) Where a party makes no offers and does not respond to offers, the court may take that conduct into account in deciding on the appropriate order for costs.

(5) Where a party succeeds in reducing a claim and, in doing so, succeeds on the majority of the issues which formed the basis of the trial then such partial success can deprive the other party of its costs."

On the facts of this case the judge rejected the Defendant's application.

Claimants will undoubtedly take heart from principle 3. A defendant who refuses to make an offer or engage in negotiation on those uncontested parts of a claim will be hard pressed to argue that the claim would have settled with costs saved had the claim been brought on a more reasoned basis – Ramsey J has specifically highlighted the availability of a Part 36 offer to a defendant.

While each case will turn on its own facts to some extent - and the higher courts are keen to stress the point – what the authorities do reveal is that the presence of exaggeration alone will not of itself necessarily result in an adverse costs order against the claimant. The wider circumstances of the case have to be examined and the considerations for applications under 36.14 where the claimant has just beaten a Part 36 offer are likely to be the same as those under 44.3.

I would suggest that in cases where there has been exaggeration the court is likely to focus not only on the nature of that exaggeration but specifically on how the parties have acted in the face of the same. A claimant who before trial finds, for one reason or another, that the value of his claim has been slashed would be well-advised to make a prompt and very realistic offer to settle. As Morgan demonstrates even a claimant found to have been intentionally misrepresenting the position for gain may escape the worst ravages of 36.14 and / or Part 44 if, upon being discovered, he or she comes to the litigation with clean hands. Of course, it helped in that case that the claimant could point to arguments raised by the defendant that had failed and also that he was able to demonstrate that by the time of trial the deceit was no longer the main focus of the action.

Defendant's faced with what they believe to be inflated or exaggerated claims should nonetheless avoid taking too dogmatic a stance in relation to that part of the claim perceived to be justified. As Biffa demonstrates, stonewalling the entire claim risks losing any advantage that might be derived from Part 44.3.

It may be that the cases demonstrate a softening of the attitude of the court toward the principles espoused in Carver. Of real significance to the final order is the question of whether the parties have negotiated and negotiated sensibly. However, neither party should doubt that there remains plenty of scope for a court to bear its teeth in those clear cases such as Painting.

Matthew Porter-Bryant

Rome II

When bringing a claim in respect of an accident which has occurred abroad practitioners must consider firstly whether the English Court has jurisdiction to hear the claim and secondly which countries' law should be applied by the English Court when determining the issues (the "applicable law"). Thought then has to be given to how the use of foreign law might impact upon the determination of liability and assessment of damages.

The circumstances in which an English court has jurisdiction to hear a claim arising out of an accident which occurred abroad is unchanged by Rome II. The most usual reasons for bringing a claim in respect of an overseas accident in England will be because the defendant is domiciled in England or because the claim arises out of a road traffic accident which occurred in a member state[1]. The regulations, however, make important changes to the test used to determine the applicable law and the manner in which damages should be assessed. Rome II applies to proceedings issued on or after January 11th 2009, providing the accident occurred on or after 19th August 2007.

How will the "applicable law" be selected?

Previously the general rule was that the applicable law was the law of the country where the accident occurred. Article 4(1), however, now provides that the applicable law shall be *"the law of the country in which the damage occurs". This is "irrespective of the country in which the event giving rise to the damage occurred"* and *"the country in which the indirect consequences of that event occur"*. This change is unlikely to make much of a difference in personal injury cases since, recital 17 provides that *"the country in which the damage occurs should be the country in which the injury was sustained"*. The change, however, could arguably lead to a different result in fatal accident claims.

Articles 4(2) and 4(3) provide two "escape clauses" from the general rule set out in Article 4(1). The first applies where the proposed defendant and claimant both had their habitual residence in the same country at the time when the damage occurred. In such circumstances the applicable law would be the law of their home country. The second escape clause applies where it is clear from all the circumstances of the case that the tort is *"manifestly more closely connected"* with a country other than the country where the damage occurred. This is subtly different to the previous position which allowed the general rule to be disapplied if a comparison of the factors connecting the tort to each country indicated that it was *"substantially more appropriate"* to apply the law of the other country. Arguably the wording of the new test suggests that a higher threshold needs to be met before the general rule will be displaced.

What issues will the applicable law be used to determine?

The issues which will be determined by the applicable law are set out in Article 15. This states that the applicable law shall govern:

(a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them;

(b) the grounds for exemption from liability, any limitation of liability and any division of liability;

(c) the existence, the nature and the assessment of damage or the remedy claimed;

(d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation;

(e) the question whether a right to claim damages or a remedy may be transferred, including by inheritance;

(f) persons entitled to compensation for damage sustained personally;

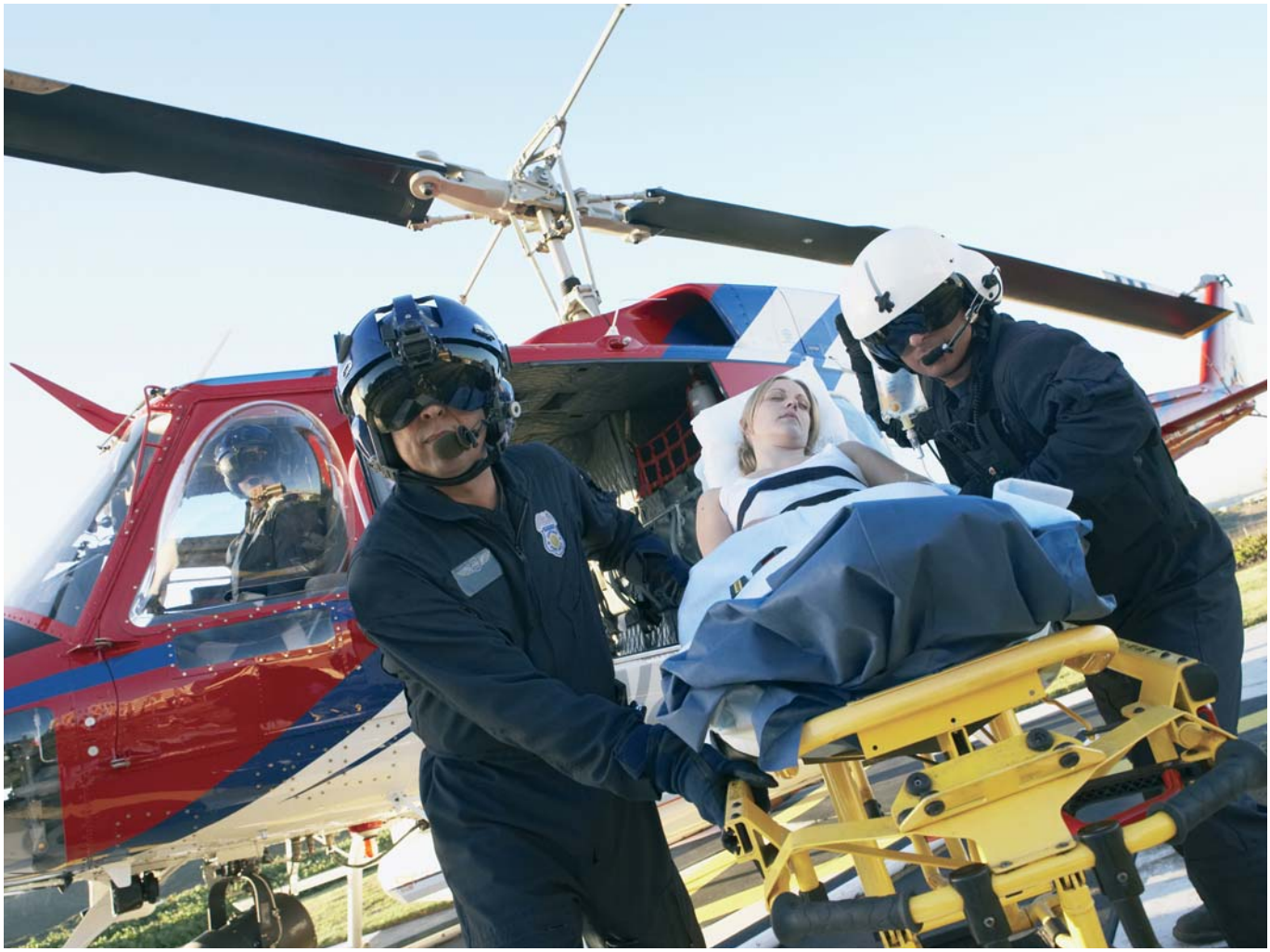
(g) liability for the acts of another person;

(h) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation.

Paragraph 15(c) is significant as it provides that the existence, the nature and the assessment of damage shall be determined by the applicable law. This appears to represent a significant change from the previous law.

Previously the general rule was that the "applicable law" would be used to determine matters of substance (e.g. liability, causation and limitation) and that English law would be used to determine matters of procedure. The House of Lord confirmed in the case of *Harding v Wealands* [2006] that the assessment of damages was a matter of procedure. A distinction was drawn between the question of whether a head of damage was recoverable in principle (a matter of substance to be dealt with by the applicable law) and the method by which any recoverable heads of damage should be quantified

[1] A direct action can be brought against the insurer in the country where the injured person is domiciled following the case of *FBTO Schadeverzekeringen NV v Jack Odenbreit* EJC 13th December 2007 [2007] EUECJ C-463/06



(a matter of procedure to be dealt with in accordance with English principles). The assessment of quantum in accordance with English principles generally worked to the advantage of a UK domiciled victim since England is usually regarded as a high damages jurisdiction. It also meant that the Claimant's legal representatives were quantifying the claim in accordance with principles with which they were familiar and avoided the need to put before the court detailed evidence about what level of damages might be awarded in the jurisdiction where the accident occurred.

At first glance it now appears that, as a result of Article 15(c), the assessment of damages will be determined in accordance with the applicable law. The correctness of this proposition, however, is controversial. Article 1(3) specifically indicates that the regulations do not apply to matters of evidence or procedure. Article 15(c), however, specifically states that the applicable law applies to the assessment of damages (which has traditionally been regarded as a matter of procedure). It is not clear how the court will deal with this conundrum. Has the decision in *Harding v Wealands* been reversed? Or should the court assess damages in accordance with the applicable law insofar as they consider the assessment to be a non procedural matter? Could it be argued that some aspects of the assessment of damages remain questions of procedure and thus fall outside of the scope of Rome II? For example, could it be argued that the use of the 2.5% column in the Ogden tables or the use of a tariff remain a matter of procedure to which Rome II does not apply?

Whatever the answer to these questions, it is clear that some of the difficulties which Article 15(c) causes accident victims may be alleviated by recital 33 in the preamble of Rome II. This states that "according to the current national rules on compensation awarded to victims of road traffic accidents, where quantification of damages for personal injury in cases in which the accident takes place in a state other than that of habitual residence of the victim the state seized should take into account all of the relevant actual circumstances of the specific victim including in particular the actual losses and costs of after care and medical attention". This recital suggests, therefore, that there is some scope to take into account the actual level of loss sustained following a road traffic accident when looking a special damages. The problem is, however, that the statement of principle referred to in the preamble does not link to any substantive provision in the Regulations. It is not at all clear, therefore, how or when the Courts are supposed to "take into account" the actual losses or depart from the applicable law which the regulations impose.

Conclusion

Generally claims in respect of accidents abroad will be brought in England only if the defendant is domiciled here or if the claim relates to a road traffic accident which occurred in another member state. In the former situation the presumed applicable law will be the law of England. As a result damages are likely to be assessed in accordance with English principles. In the latter situation, however, the presumed law will be the law of the country where the accident occurred. Article 15(c) indicates that this law should be used to assess damages. This is a significant change from the previous position and is likely to leave claimant's worse of than they would, hitherto have been. Recital 33 makes it clear that the Courts should, however, take into account the actual loss suffered when determining quantum. The trouble with this recital is that it does not link to any substantive provision in the Regulation. It is currently unclear how the Courts will give effect to this principle but no doubt will be considered at appellate level in the near future.

Abigail Stamp

A question and answer session

"What are exemplary damages?"

In the leading case of *Rookes v Barnard* [1964] AC 1129, Lord Devlin said at 1221:

"Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter."

"Aren't you only allowed to claim exemplary damages in a few types of case?"

Yes. Relevant to PI fraud, Lord Devlin went on at 1226:

"Cases in the second category [of permitted claims] are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.

Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity."

"What's this got to do with PI?"

Any fraudulent PI claim would be likely to make out the component parts of the tort of deceit. The victim (generally, the defendant's insurer) of the deceit is entitled to sue the revealed fraudster. The conventional damages available would be very small (limited to a quantification of matters such as wasted time and expense). However, if exemplary damages are included and awarded everything changes – for example, damages could be awarded against the fraudster in the full amount of his fraudulent PI claim – making him pay out the same amount that he dishonestly sought to gain.

"OK, but I think my law school Prof said that you couldn't get this type of damages for deceit?"

Opinions have changed. There was a problem, following the House of Lords decision in *Broome v Cassell & Co Ltd* [1972] AC 1027. Lord Diplock said at 1131:

"*Rookes v Barnard* was not intended to extend the power to award exemplary or aggravated damages to particular torts for which they had not previously been awarded; such as negligence and deceit. Its express purpose was to restrict, not to expand, the anomaly of exemplary damages."

Therefore, from 1972 to 2002, it was thought that exemplary damages could not be awarded for torts, such as deceit, which were not so recognised as warranting exemplary damages before 1964. This was, indeed, the approach taken by the Court of Appeal in *AB v South West Water Services Ltd* (1993) QB 507.

However, in *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122 the House of Lords held that the power to award exemplary damages was not limited to cases where it could be shown that the cause of action had been recognised before 1964 as justifying an award of such damages. The issue was determined by whether the factual situation was covered by either of Lord Devlin's formulations in *Rookes v Barnard*. Indeed (although he did so with some displeasure, if you wish to read the whole judgment), Lord Scott specifically observed that:

"Claims could be made in cases of negligence and cases of deceit provided only that the conduct complained of fell within one or other of the two [*Rookes v Barnard*] categories."

Accordingly, the current edition of *McGregor on Damages* expresses the view that: *"… it can confidently be said that today exemplary awards are possible across the whole range of tort."*

"So who's been after exemplary damages?"

Insurers. There are various examples. The two recent cases that are most analogous to PI were not third-party PI (or other damages) claims, in the conventional model of A sues B, who is insured by C. They were policyholder frauds.

In *Axa Insurance v Thwaites*, Norwich County Court, 8/2/2008 (Lawtel 23/5/2008), HHJ Darroch held that there was a discretionary power to award exemplary damages in a claim for deceit. Mr Thwaites had pretended that a car of his had been vandalised and had made a claim for £10,000. He was found out, was criminally charged and convicted and was sentenced by the magistrates to a suspended prison sentence without a fine. In subsequent civil proceedings, HHJ Darroch recognised the power to make the award sought, but declined to add to the penalty already imposed by the criminal court, holding that:

"… there is power to award damages in this case, but I should be very mindful of avoiding a double penalty."

In *Axa Insurance v Jensen*, Birmingham County Court, 10/11/2008 (Lawtel 18/2/2009), Mr Recorder Lochrane was prepared to go further. Once again a policyholder perpetrated a fraud on her insurers, this time by pretending that a motor caravan had been stolen. A pay-out was actually achieved before the fraud was discovered. Although the Recorder considered HHJ Darroch's judgment in Thwaites, he held that in the instant case the imposition of a caution (which was the only criminal sanction) had not been "punishment", within the context of avoiding double punishment. Exemplary damages were awarded, in the amount of £4,000. These were calculated as around 50% of the basic claim of £8,103 for the return of the money paid out under the

policy. The insurer had sought a full, further £8,103 in exemplary damages, being the amount of the fraud.

"What about, specifically, exemplary damages for fraudulent personal injuries claims?"

In "proper PI cases", examples are thin on the ground. Tribute must be paid to Messrs Keoghs, who appear to have been leading the charge and acted in both of the Axa cases cited above. They also acted in *Sabre Insurance Company v Shamin Akhtar, Nadeem Ali and Liagat Ali,* Altrincham County Court, 8 November 2005, before DJ Horan (unreported).

Three "phantom passengers" were each ordered to pay £2,250 in damages to the defendant driver's insurance company. The sums were calculated as being equivalent to the value of the PI awards which the fraudsters would have achieved, had their fraud succeeded.

"So does that mean that the higher courts have yet to award exemplary damages in a reported case against a fraudulent PI claimant?"

Yes.

"I only act for claimants – what's the relevance to me?"

In most cases it will probably not be relevant, because by the time the defendant's claim for exemplary damages is heard, the fraudulent claimant and his erstwhile solicitor (and, for that matter, ATE insurer) will long since have parted company. There are three principal situations in which the claimant solicitor would have to deal with such a claim:

(i) (*probably very rare*) – where the fraud has been exposed, but the fraudster is solvent, wishes to continue to be represented by his former solicitors, and they are content so to act;

(ii) (*much more relevant*) – where the defendant makes the claim for exemplary damages by way of a counterclaim in a defence pleading fraud – so the claimant has not been adjudged to be a fraudster but is merely alleged to be one. The claimant may have a completely different version of events. Thus the defendant's claim for exemplary damages would simply be one of the consequential issues within the PI litigation, most of which would probably be devoted to deciding the contested issues of fact;

(iii) (*novel but interesting*) – where it is not the defendant, but the PI claimant, who seeks exemplary damages: for example, if he has good evidence that the defendant's resistance to his PI claim is deceitful, with the defendant not in truth believing in factual averments made in the defence.

"You mentioned earlier that an exemplary damages award might be equivalent to the full value of the attempted fraud … ?"

It might be, although note that the award is discretionary, and in both of the policyholder frauds cited above, less was given (nothing in the first case and 50% in the second). An extensive consideration of the factors to be considered (which may include the means of the fraudster) features in *McGregor*. However, the full value of the claim is a reasonable starting point for consideration (as it was utilised in *Jensen*, and was actually awarded in *Sabre v Akhtar*).

Hence a fraudulent claimant could be ordered to pay to the defendant the full amount of money which he would have received had his fraudulent been successful. In other words, in the case of a liability fraud, the entire value of the defeated PI claim, including the putative claim for pain, suffering and loss of amenity, past and future loss of earnings and all other heads of loss. Bearing in mind that claims involving dishonesty in the liability will often also include the "kitchen sink" in the quantum, such a sum could be considerable.

Note, however, that only the fraudulent component of the claim could be quantified in this way. So, in a "phantom passenger" case the whole claim is fraudulent and would be the appropriate measure. By contrast, those who have a genuine liability claim but exaggerate the quantum would only be liable to pay the defendant the amount by which their exaggeration increased the claim. In other words, if you are caught gilding the lily, exemplary damages would be measured by reference to the gold, not the flower. However, as any such damages would doubtless be set-off against the true claim, in many cases any payment to the PI claimant would be completely extinguished.

In the case of a claim against a fraudulent PI defendant, logic would suggest that if a PI claimant were to establish that, for example, the defendant's witnesses had "got their heads together" and sought, to the defendant's knowledge, fraudulently to dispose of a genuine claim, then the measure of exemplary damages could be the entire value of the claim. In short, the exposed fraudulent PI defendant could have to pay the claim twice: once under the standard tortious measure of damages, and then the whole sum again as exemplary damages.

"Claim and counterclaim … ?"

With some irony, it is indeed possible to imagine a situation in which both the claimant's and the defendant's version of events simply cannot be reconciled by any amount of judicial diplomacy (*"genuine but mistaken"*, *"confusion in the heat of the moment"* etc.) – one or other side must simply be lying. In such circumstances, it is possible to imagine both a claim and a counterclaim for deceit. If the claimant wins he could double his damages, if the defendant wins he not only defeats the claim but is then enriched by the same value as the claim would have had.

"But if we all start doing this, where is all this money going to come from?"

The usual answer in PI might be "from the insurance premium payer". But this is a problem with exemplary damages claims which are predicated upon a proven fraud by the lay client (whether claimant or defendant). Both claimant (whether BTE or ATE) insurance providers and defendant insurers routinely withdraw indemnity if it is established that a fraud has taken place. Indeed, if the fraud in question is a liability fraud and so the entire claim (or defence) has been based upon it, it is difficult to imagine any successful challenge to a complete refusal to indemnify.

It follows that exemplary damages highlight the problematic area of *"winning by too much"*. Leaving aside exemplary damages, it is often, nowadays, in a defendant's interests to succeed in having a claim dismissed without any

direct reference to fraud, in order to avoid jeopardising the PI claimant's ATE or BTE insurance cover and thus ensure payment of the costs of the successful defence. This is because the claimant is himself so often a man of straw.

On the other hand, major insurers may feel that such damages are truly "exemplary", in that whether they are paid or not in the individual case, much is to be gained by the deterrent effect, with sufficient publicity, against other would-be fraudsters.

If PI claimants start to seek such awards in appropriate cases, loss of insurance cover may be less of a worry. Corporate or institutional defendants will be more likely to be able to satisfy a judgment themselves. But in these straitened times, it may well be that many claimants would prefer the certainty of knowing that (for example) their employer's insurers will settle both damages and costs, than to secure the Pyrrhic victory of a finding of fraud against their employer, only then to discover that they will receive neither exemplary damages, nor any damages, nor any costs, because their employer's EL insurers have consequently withdrawn indemnity and the employer is shutting up shop.

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