GUILDHALL CHAMBERS

PI News

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Summer 2005

Team News

New Pupils

Oliver Moore and Abigail Stamp have recently commenced practice as pupils and with a view to applying to join chambers in the Autumn of 2005.

Oliver Moore, formerly a solicitor of 7 years qualification, was called to the bar in March 2005. He trained with Bond Pearce and worked in the General Liability Department. Oliver was responsible for the conduct of fast-track and multi-track claims including road traffic, employer's liability, public liability and industrial disease claims. He gained his Higher Rights of Audience in 2004 from which date he has undertaken work as an advocate.

Oliver is available for bookings and is accepting instructions to draft pleadings, advices, interlocutory and fast track work.

Abigail Stamp commenced pupillage in October 2004 and is currently in her 2nd six. She obtained a First in Law from Exeter University and was called to the bar in 2004. Her practice involves civil and criminal work and she regularly appears in both the magistrates' and county courts. She has represented insurers at coroner's inquests

Abigail is also available for bookings and is accepting instructions to advise and to attend inquests, infant approvals, small claims track work and interlocutory hearings.

In Oliver Twist, Mr Bumble uttered for the first time the phrase "the law is an ass". No doubt Lord Woolf had this perception of the law in mind when he introduced the concept of the "overriding objective". This is defined within the Court rules as "dealing with cases justly". Since then, the days where cases contained significant argument over the procedural rules themselves have slipped away: the approach has become one where judges are reluctant to allow (apparently logical) legal argument on procedure to get in the way of delivering justice.

One would be forgiven for thinking, however, that the ethos has spread beyond the procedure into the substantive law. Think, for example, of the willingness of the House of Lords in *Fairchild* to avoid the (otherwise impeccable?) argument of the Defendant that the Claimant could not prove on the balance of probability the source of the particular asbestos fibre which caused the mesothelioma to develop. This has now been followed by, amongst other decisions, *Chester v Afshar*, the House of Lords deciding that although the Claimant failed to establish that a failure to warn of a surgical risk actually caused damage, nonetheless as a matter of policy causation should be held as established. Policy as a force in the legal world evidently grows stronger.

Next time I am arguing for damages perhaps I'll try the expression "please Sir, can I have some more?" With considerable luck I will not receive the same response as Oliver!

Included within this edition of the newsletter I have summarised recent decisions, principally decisions of the Court of Appeal and House of Lords, which contain features relevant to the personal injury world. **Peter Barrie** provides insightful views on the decisions in *Irvine v Commissioner of Police and others* (cost risks associated with joining multiple defendants) and *Gregg v Scott* (loss of chance in clinical negligence cases). **James Hassall** examines efficacy and (more importantly!) the cost of mediation in PI litigation and suggests why joint settlement meetings might be a more suitable alternative. Finally, **Adam Chippindall** continues his discussion of the Periodical Payments provisions which came into force on 1st April 2005. This is clearly an area where there exists relatively little guidance. Given the potential increase in liability for Defendants and difficulties in funding these schemes you should expect to see the first of any case reports in the next edition. Please note also our up-coming seminars (see below).

Your comments and suggestions are, as usual, welcome and should be addressed to me at gabriel.farmer@guildhallchambers.co.uk

Gabriel Farmer
Editor

Seminar news

Following on from the fatal accident seminars which took place in March the Guildhall PI team are currently presenting a round of seminars on the issue of Periodical Payments. As usual, the seminars attract 1.5 CPD hours and are followed by an opportunity to chat with us all over a beer at the end. We look forward to seeing you there.

23 June 2005	**Bristol**	The Novotel, 5.00pm
30 June 2005	**Exeter**	Buckerell Lodge, 5.00pm
6 July 2005	**Cardiff**	Copthorne Hotel, 5.00pm

Recent Decisions

Liability

Vibration White Finger

Alan Brooke v South Yorkshire Passenger Transport Executive and Mainline Group Limited [2005] EWCA CIV 452

The Claimant was exposed to vibrating tools from 1982 until 1999. At first instance the Recorder found that the employer negligently exposed the Claimant to harmful vibration throughout the entire course of his employment. The Defendants appealed. The Court of Appeal held that whereas in 1975 there was a publication by the British Standards Institute on the exposure of the human hand/arm system to vibration it was not reasonable to conclude that the Defendant should have been aware of that publication bearing in mind the duty of the reasonable employer as set out in *Stokes v GKN (Bolts & Nuts) Limited* [1968] 1 WLR 1776 and *Thompson v British Ship Repairers* [1984] QB 405. However, in 1987 a more substantial publication was produced by the Institute on Human Exposure to Vibration Transmitted to the Hand. This publication promulgated a British Standard and it was reasonable to find that the Defendant should have had knowledge of the 1987 publication and taken action on it by 1989. Accordingly, the Recorder had been wrong to find negligence before 1989.

Despite this finding the Court of Appeal went on to hold that a Claimant who did not develop symptoms of VWF until some years after the date of negligence could nonetheless properly argue that he should receive full verdict damages because he would never have developed any symptoms if it had not been for the employer's negligence. In other words, had steps been taken in 1989 to protect the Claimant from vibration he would never have developed VWF. The Court of Appeal therefore held that the Claimant would be entitled to the damages awarded by the Recorder.

Workplace (Health, Safety And Welfare) Regulations 1992

Lewis v Avidan Limited

Court of Appeal 13th April 2005

The Claimant slipped on a patch of water in the hallway of her workplace. The water had leaked from a concealed pipe that had burst shortly before the accident. No one was aware of the burst pipe or the patch of water on the floor. The Judge at first instance dismissed claims in negligence and in occupier's liability finding no fault on the Defendant's behalf. Further, he dismissed claims for breach of regulation 12 and 5 of the Workplace Regulations 1992. The Judge found that the Defendant had made out the Defence of reasonable practicability in relation to regulation 12 ("So far as is reasonably practicable, every floor in a workplace and the surface of every traffic route in a workplace shall be kept free from obstruction and from any article or substance which may cause a person to slip, trip or fall"). In respect of regulation 5 ("The workplace and the equipment, devices and systems to which this regulation applies shall be maintained ... in an efficient state, in efficient working order and in good repair") the Judge found that although there had been a defect in the pipe, it was not the pipe that caused the injury. Accordingly, the claim was dismissed. On appeal the Claimant argued that the Judge had been wrong to find that regulation 5 did not apply since, because of the burst pipe, the workplace had not been in an efficient state, in efficient working order and in good repair.

The Court of Appeal dismissed the Claimant's appeal apparently on the basis that because the Judge had found that the employer had not acted negligently it was clear that the floor was maintained for the purposes of regulation 5 in an efficient state. Further, the Court of Appeal held that the mere fact of an unexpected flood did not mean that a floor was not in an efficient state, in efficient working order and in good repair for the purposes of regulation 5(1).

A report of this decision appears only on Lawtel. The decision appears very surprising given the wording of the regulations and other decisions, most notably, *Stark v The Post Office* [2000] ITR 1013. A Judgment transcript is awaited.

Failure to warn of surgical risk

Chester v Afshar

House of Lords 14 October 2004

The Defendant advised the Claimant to undergo lumbar surgery but failed to warn the Claimant of the small risk of partial paralysis inherent in the operation. The surgery was performed without negligence but nonetheless paralysis was sustained. On the evidence the Judge at first instance found that had the Claimant been warned of the risk he would not have consented to the operation taking place at that stage but would have sought further advice before deciding what to do. The Defendant contended that the claim lacked causation. The House of Lords (Lord Bingham and Lord Hoffman dissenting) held that:

1. The function of the law was to protect the patient's right to choose. To fulfil that function it had to ensure that the duty to inform was respected by the Doctor.
2. The law would fail in that function if an appropriate remedy could not be given if the duty was breached and the very risk the patient should have been told about occurred and she suffered injury.
3. Although the injury sustained was within the scope of the Defendant's duty to warn, causation was a problem because the Claimant would not have refused absolutely ever to undergo the operation if told of the risks but merely would have postponed her decision until later.
4. A solution in the Claimant's favour could not therefore be based on conventional causation principles but needed to be decided on the basis of legal policy, namely whether justice required the normal approach of causation to be modified.

5 To leave the patient without a remedy, as the normal approach to causation would indicate, would render the duty useless in cases where it might be needed most. Therefore, on policy grounds the House decided that the test of causation was satisfied and justice required that the Claimant be afforded the remedy she sought.

Personal injury – foreseeability of subsequent suicide

Eileen Corr (Administratrix of the Estate of Thomas Corr, Deceased) v IVC Vehicles Limited

QBD 28 April 2005

The Deceased sustained injuries at work. The Defendant admitted liability. Six years post-accident the Deceased committed suicide during a depressive episode. The Claimant (the deceased's widow) attributed the suicide to depression brought about by the accident and subsequent litigation. The Defendant denied liability for the subsequent suicide. Nigel Baker QC held that although the Claimant established the "but for" and material contribution tests in respect of causation these tests were only the first of a two part exercise in establishing liability for the damage. In addition, it was necessary to establish that the loss was of a type that was reasonably foreseeable. Further, the duty owed by the Defendants did not extend to a duty to take care to prevent the Deceased's suicide. The suicide had not been reasonably foreseeable to the Defendant and as a matter of law reasonable foreseeability of the suicide had to be established by the Claimant both in respect of the duty and the recovery of damages. The decision in *Pigney v Pointers Transport Services* [1957] 1 WLR 1121 (decided on facts similar to the instant case) was disapproved.

Liability for secondary exposure to asbestos

James Maguire (personal representative of the Estate of Theresa Maguire, Deceased) v Harland & Wolfe Plc [2005] EWCA civ 01

The Deceased was the wife of a boiler maker who between 1961 and 1965 worked at the Defendant's shipyard and was exposed to asbestos. The Deceased was subjected to secondary exposure having come into contact with her husband's dusty clothing. At first instance the Court concluded that given the state of actual or imputed knowledge before 1965 the Defendant ought reasonably to have foreseen that the Deceased was at risk of pulmonary injury from her secondary exposure. On appeal the Court of Appeal, reversing the first instance decision, held that, before 1965 and ahead of contemporary understanding, the Defendant, in failing to appreciate that the Deceased was at risk of pulmonary or other asbestos related injury and therefore in failing to take any appropriate precautions for her safety, was not negligent. Before 1965 there had been no suggestion from the industry generally, from the factory inspectorate or from the medical profession that it was necessary or even prudent for the risks arising from familial exposure to be addressed by the industry.

Costs

NHS not required to pay into Court

Crouch v Kings Healthcare NHS Trust

Court of Appeal 15 October 2004

The Court of Appeal sanctioned the practice of the NHS in making Part 36 offers without making the concomitant payment into Court of the sum offered. The Court held that such offers were admissible and that on the basis that the NHS was bound to be good for the money such offers should be treated as if a payment had in fact been made. The Court further held that there was no reason in principle why the parties to litigation could not agree that the Defendant need not pay money into Court for the Part 36 machinery to apply. However, it was not open to a Defendant to decree unilaterally that it would not make such a payment.

Part 36

Reed v Edmed

QBD 8 December 2004

The Claimant offered to settle liability for a road traffic accident on the basis of 50:50. At the Trial of liability the Judge found each party equally to blame. Counsel for the Claimant requested Part 36 consequences in the form of standard costs up to the time for acceptance of the Part 36 offer and indemnity costs thereafter. Whereas CPR 36.21 provides that Part 36 consequences should only apply where "the Defendant is held liable for more" or "Judgment against the Defendant is more advantageous to the Claimant" than was proposed in the Part 36 offer, Mr Justice Bell held that there was no reason why Part 36 provisions should not apply where the Claimant's offer was "spot on." The only exception to that would be if there was some particular circumstance, such as a significant change in the complexion of the case or some unreasonable conduct by or on behalf of the Claimant, which would make that conclusion unfair.

Conditional fee agreements

Atack v Lee & Another
Ellison v Harris

Court of Appeal 16 December 2004

The Court of Appeal gave Judgment in relation to two road traffic claims which related to accidents which took place before the date of introduction of the fixed percentage increase regime under Part 45 of the Civil Procedure Rules and where the CFAs had been entered into before the decision in *Callery v Gray No (1)* [2001] 1 WLR 2112.

Lord Justice Brooke held that it was permissible for any conditional fee agreement to include a two stage success fee and that such was to be encouraged. The success fee might be higher during the first stage, for example during the protocol period, and at a lower rate, down to 5% in the simplest of cases, in claims which did not settle within that period.

Success fees

K U (a child, by her mother and litigation friend P U) v Liverpool City Council [2005] EWCA civ 475

The Claimant was injured when she tripped on the highway. Although the Defendant initially denied liability, Judgment was subsequently entered and thereafter the claim settled for £2,500 plus costs on a standard basis. On assessment of costs the District Judge held that a success fee of 100% was reasonable for the period up to the entry of Judgment but thereafter the success fee should be reduced to 5%. On appeal to the Circuit Judge it was held that the District Judge had no power to reduce the success fee.

The Court of Appeal held that in accordance with paragraph 11.7 of the Costs Practice Direction and *Atack v Lee* [2004] EWCA civ 1712 in assessing the reasonableness of the success fee the Court had to have regard to the facts of the circumstances as they reasonably appeared to the Solicitor at the time when the CFA was entered into and not in hindsight. On this basis the Court of Appeal concluded that a success fee of 50% would have been appropriate.

The Claimant's CFA agreement with her Solicitor was a single stage CFA agreement (as opposed to a so-called "staged" agreement). The Court of Appeal held that it had no power to direct that a success fee was recoverable at different rates for different periods in the proceedings because the CFA itself did not allow contractually for this possibility. Furthermore, insofar as the Costs Practice Directions paragraph 11.8(2) suggested otherwise, it was wrong.

It is important to note that this decision applies to single stage uplift CFA agreements. The effect of the decision is that as opposed to empowering the Court to allow different success fees for different periods of time in the litigation it will be reduced to assessing one success fee for the whole period. This straightjacket is less likely to apply where the CFA agreement itself allows for different success fees during different periods of time. It is generally a Claimant friendly decision because it tends to reinforce the fact that success fees should be assessed without hindsight based upon the information available to the Solicitor at the time the CFA was entered into irrespective of subsequent events which reduce risk such as an admission of liability. Of course, the temptation for many District Judges is to allow 100% over a relatively short period of time up the institution of proceedings or other admission of liability and thereafter to allow (as in this case) only 5%. If, despite a later admission, the claim was genuinely risky at the outset this decision reinforces the fact that a significant uplift should be permitted for the entire duration of the case.

Claimant betters the Defendant's Part 36 offer but pays costs

Painting v University of Oxford [2005] EWCA CIV 161

The Claimant was injured at work as a result of the Defendant's admitted breach of duty. The Claimant thereafter sought damages pleaded in excess of £400,000. The Defendant initially paid in £184,442 but, belatedly appreciating the potency of its own covert video surveillance, successfully applied to reduce this sum to only £10,000. At a subsequent hearing to assess the Claimant's damages she was awarded a total of £23,331. The Trial was fought solely on the issue of whether the Claimant had been malingering or otherwise exaggerating her injuries. The Claimant was found substantially to have exaggerated but not to the extent submitted by the Defendant. On the basis that the Claimant had beaten the payment into Court, the Judge ordered the Defendant to pay the Claimant's costs of the action. The Defendant appealed the Costs Order.

Applying *Islam v Ali* [2003] EWCA civ 612 and *Malloy v Shell UK Limited* [2001] EWCA civ 1272 the Court of Appeal held that the Judge had failed properly to exercise his discretion on costs. The Judge was required to have regard to the conduct of the parties under CPR 44.3(iv) (a) and whether the claim had been exaggerated under CP44.3(v) (d). The Claimant had exaggerated, at no stage had she made any offer or counteroffer and had not attempted to accept the initial payment into Court. A Claimant who made no attempt to negotiate should expect the Court to take that failure into account when determining costs. Furthermore, the Defendant, although failing to achieve a successful payment into Court, had effectively won the case on the principal issue litigated.

Gabriel Farmer acted for the Claimant at first instance and in the Court of Appeal.

Damages

No damages for loss of a chance in clinical negligence

Gregg v Scott House of Lords 28 January 2005

The House of Lords upheld the Court of Appeal in finding that the Claimant could not recover damages on the basis that a delay in the diagnosis of his cancer had reduced his chances of surviving for ten years from 42% to 25%. A detailed analysis of this decision is contained in an article by Peter Barrie on page 7.

Exposure to asbestos – damages for pleural plaques

John Greaves and Others v T Everard & Sons and British Uralite Plc & Others [2005] EWHC 88 (QB)

Ten cases were considered where in breach of duty employees had been exposed to asbestos and developed pleural plaques. The Defendants contended that the mere presence of pleural plaques did not constitute an injury giving rise to a claim in negligence and that, in any event, historic levels of damages awarded in such cases were too high. Mr Justice Holland held that pleural plaques per se could not found a cause of action because they did not constitute an injury which was real, other than minimal and capable of being discovered (in accordance with *Cartledge v Jopling* [1963] AC 758). However, the physiological damage caused by permanent penetration of the chest by asbestos fibres with the attendant assessable risk of the future

onset of symptomatic disease and the anxiety engendered by the physiological damage did give rise to a cause of action. When pleural plaques were present there was sufficient to found an award for damages notwithstanding the overall condition was asymptomatic.

On damages, he held:

1 *Provisional damages* for penetration of the body by asbestos fibres of sufficient extent and maturity to give rise to pleural plaques and to the risk of the onset of a symptomatic condition with consequential suffering or loss of amenity in terms of anxiety justified an award of no more than £4,000.

2 *A final award*, taking into account future risks, but based upon the low level of risk in the instant cases justified an award in general damages of £6,000 - £7,000. Awards that did not recognise the strong overall probability that the identified risks would not materialise were too high.

Evidence

Similar fact evidence in civil proceedings

Michael O'Brien v Chief Constable of South Wales Police [2005] UKHL 26

The Claimant alleged that he had been framed for a murder which he did not commit. He gave notice of his intention to adduce evidence designed to demonstrate that the investigating police officers had behaved with similar impropriety on other occasions. The House of Lords, overruling the Court of Appeal's decision that the test of admissibility in civil proceedings was the same as it was in criminal proceedings, held that the appropriate test for similar fact evidence in a civil suit was relevance. Such evidence was admissible if it was potentially probative of an issue in the action. However, it was necessary that policy considerations should be taken into account in the conduct of civil litigation and the Court still had power to exclude evidence that would otherwise be admissible and still limit cross-examination. The House further held that Judges should be astute to see that the probative cogency of similar fact evidence justified the risk of prejudice to the interests of a fair Trial.

Legislation and Rules

Control of Vibration at Work Regulations 2005

On 6 July 2005 the Control of Vibration at Work Regulations 2005 come into effect. These regulations provide a daily exposure limit of 5m/s^2 A(8) and a daily exposure action value of 2.5m/s^2 A(8) and further parameters for whole body vibration. The regulations include a requirement that employees are not exposed to vibration above the exposure limit value and a duty to eliminate vibration at source or, where this is not reasonably practicable, to reduce it to as low a level as is reasonably practicable. Please note, however, that some aspects of the regulations do not apply until 6 July 2010. The regulations may be found at www.uk-legislation.hmso.gov.uk/si/si2005/20051093.htm.

Fixed success fees in RTA and EL cases

Following the agreement in relation to fixed fees in relation to road traffic cases (which are worth less than £10,000 where damages are agreed) Part 45 now includes sections which govern fixed success fees in both road traffic accident cases (where the accident took place after 6th October 2003) and employers' liability cases (where the accident took place after 1st October 2004). These rules came into force in June 2004.

New PI protocol: 38th edition of CPR

The pre-action protocol for personal injury claims has been revised and now incorporates the Rehabilitation Code of Practice as annex D. The new Code comes into force on 1 April 2005.

Case commentaries

The cost risks of 'Safety First' when adding defendants

Irvine v Commissioner of Police and others [2005] EWCA Civ 129

Michael Irvine tripped and fell when he was walking upstairs at his place of work. He had caught his foot in a loose piece of stair carpet. His injuries were severe enough to cause him to retire from the police and he was awarded £26,355 damages in a claim against his employer, who was liable for breach of statutory duty in failing to maintain the stair carpet under reg. 5 of the Workplace Regulations.

When his solicitor had sent a letter of claim, the response from the employer had been to disclose the identity of a property management company that had a contractual responsibility for maintaining the premises, and the identity of a carpet laying company that had been engaged by the management company to repair the carpet in question only some 6 weeks before the accident. The employer suggested that the claim should be directed to the management company.

In the light of this correspondence, the claimant issued proceedings against all three defendants, alleging negligence against the management company (D2) and the carpet company (D3). The employer (D1) in its defence disputed liability, averred that any liability lay on D2 and/or D3, and brought a Part 20 claim against D2. The claim proceeded to trial. It appears from the Court of Appeal's judgment that the claimant did little to prove a case against D2 or D3, perhaps thinking that he was merely adopting the allegations that had been made by D1. At trial, all three defendants disputed liability. The claimant established that D1's failure to maintain the workplace was in breach of the Regulations, but the Judge was not prepared to draw any inference of negligence against D2 or D3 when there was no real evidence against either of them except the shortness of time between the repair and the accident. Who then should pay the costs of D2 and D3, which had both been successful in defending the claims brought against them? The trial judge said that the claimant must pay, and the Court of Appeal has upheld this.

CPR 44 was held to preserve the jurisdiction to make an order that the costs of the successful defendants should be liability of the unsuccessful defendant (a "*Sanderson*" order). However, the claimant must not blindly follow the allegations of one defendant, but must make his own decision about the prospects of success against each defendant. In particular, this was not a case where the additional defendants were sued in the alternative. The fact that claims are made in the alternative is a significant factor in favour of imposing the costs liability on to the unsuccessful defendant. Here, the claimant was making allegations against the additional defendants which would be unnecessary if the claim against the employer had a good prospect of success: which will often be the case in employers' liability claims in view of the strict nature of liability under the health and safety regulations. It was not enough for the claimant simply to rely on the pre-action correspondence, and the subsequent joinder of D2 as Part 20 defendant. The merits of the claims against D2 and D3 were poor, the claims failed, and the general rule of CPR 44.3(2)(a) should apply, that an unsuccessful party will be ordered to pay the costs of a successful party.

The Court of Appeal recognised the difficulty which faces a claimant who really cannot tell against whom his claim should be brought, such as a person injured as a result of a collision between two vehicles when each driver blames the other. Generally, in that situation it will be reasonable for the claimant to join both drivers, and to expect that the unsuccessful defendant will be liable for the costs of the successful defendant.

This decision should remind claimants' advisers that the step of joining an extra defendant has costs implications which call for a careful tactical decision. It is tempting to think Safety First, and to sue every potential defendant, particularly when the positions of the potential defendants remain unclear when the expiry of the limitation period approaches. The claimant's nightmare is to sue a defendant who successfully defends by proving that someone else should have been liable, or who makes that case only after the limitation period has expired. It may seem prudent, and safe on costs, to join the extra defendant if there is open correspondence denying liability and blaming the other; and all the more so if the allegation has been repeated in the pleadings and supported by a Part 20 claim. So far as one can asses the facts from the Court of Appeal judgment, it is respectfully suggested that, in view of the pre-action correspondence and the pleadings of the employer, the decision against the claimant in this case was surprising and tough, and many judges would have decided the other way. Guilty defendants should also be responsible about the allegations they make, and should accept that allegations made against third parties may have the effect of inducing the claimant to incur costs to protect his position.

In the light of Mr Irvine's case, a claimant should not rely on adopting the allegations that others have made, but must make up his own mind about the merits of each claim and the reasonableness of joining each defendant. The correspondence might be significant. For example a claimant might protect his position by saying explicitly to the defendant that either his allegations against the third party should be withdrawn, or they will be relied on in joining the extra defendant with a resulting increase in costs, a step which the claimant would not otherwise take. This case is however a reminder that each defendant is always joined at the claimant's risk as to costs.

Loss of a chance

Gregg v Scott HL 28th January 2005

As a result of the negligence of his GP, Mr Gregg suffered a nine month delay in the diagnosis and treatment of cancer. Evidence from medical statistics showed that his chances of a cure - that is, survival for 10 years free of disease - had fallen from 42% to 25% as a result. The House of Lords[1] (by 3:2) has followed the Court of Appeal[2] in holding that damages cannot be recovered to compensate for this harm.

It is difficult to do justice to the reasoning of the opinions in a paraphrase. It is hard to disentangle two different questions: whether the evidence at trial supported the conclusion that the negligence had caused this damage, and whether, if causation of this damage were satisfactorily proved, an award of damages could in principle be made. In the majority, Lord Hoffman and Baroness Hale held that the consequences of the delay had to be decided on the balance of probabilities. They argue that this is a basic rule of the proof of causation of damage. There would be no difficulty about a claim for the increased pain of more extensive treatment because this was a result of the delay which passed the test of probability. The same requirement of proof applies to a claim for reduced expectation of life. From the outset it was probable that Mr Gregg would not survive, and they argue that it is not legitimate in clinical negligence to make a claim for the loss of a small chance in order to circumvent the requirement for proof of causation on the balance of probabilities. This was decided by Hotson[3]. This is not the same as, for example, making an award for a small chance of future arthritis when a joint has been injured: in that case, causation is not in doubt and it is the likelihood of future damage that is uncertain. Baroness Hale explained that allowing this claim would lead to the widespread incorporation of chances in awards, reducing the award made for all outcomes that are probable but less than certain, where at present the proof of a probable event results in full recovery.

Lord Phillips supported the decision of the majority but the main thrust of his opinion was to question the interpretation of the expert evidence about statistically probable outcomes, influenced by the cheering news that Mr Gregg had in fact survived to the hearing of the appeal nine years on. The difficulty of drawing useful legal conclusions from the limited medical information available at the trial led him to say that in clinical negligence claims the law should not allow an award for the loss of the chance of a more favourable prospective outcome.

Lord Nicholls and Lord Hope dissented, noting that awards for the loss of a chance are common in personal injury claims to compensate for future risks, and finding it unjust that the law should offer no remedy for a reduction in the chances of survival, a consequence of the doctor's negligence that most people would regard as a real harm. The difficulty of assessment should not be a reason for disallowing the claim in principle.

As a result of this decision, where negligence in clinical treatment results in a poorer outcome for the patient, the facts are to be decided on the balance of probabilities. Mr Gregg was unable to recover for a reduction in his chances of a cure when the chances of surviving for 10 years were always less than 50%.

The law allows an award for the loss of a chance of less than 50% in other contexts, for example where a solicitor's negligence results in the loss of a cause of action with less than a 50% prospect of success[4]. There are established grounds to claim for a reduction in expectation of life and a claim for the 'lost years'. There is an established common law rule for deciding the consequences of an injury: past facts must be decided on the balance of probabilities but future facts are decided by an assessment of the chance, often less than 50%, that they will happen, and the damages are discounted to value the chance[5]. This is a fundamental characteristic of a system which awards once-and-for-all lump sum damages for future loss, and to this writer the reasons given by the majority for applying a different principle of assessment in clinical negligence are not convincing.

Recently the House of Lords has made three landmark decisions which show a willingness to adapt legal rules in order to meet hard cases. In *Fairchild*[6] the requirement of 'but for' causation was set aside in favour of a claimant with mesothelioma resulting from exposure to asbestos, allowing the claim on proof that the defendant contributed to the risk. In *Rees*[7] an entirely new right to a compensatory award for unwanted childbirth was created. In *Chester*[8] an extended law of informed consent was allowed in clinical negligence claims, again altering the 'but for' rule of causation. These changes were made in order that the law should provide a remedy where justice demanded it. 2005 seems to have begun on the other foot. It is, to this writer, disappointing that *Gregg v Scott* did not allow a remedy: the dissenting opinions of Lord Nichols and Latham LJ are persuasive.

Peter Barrie

1 *Gregg v Scott* [2005] UKHL 2, LTL 27/1/2005 Doc AC0107750, The Times 28 Jan 2005

2 *Gregg v Scott* [2002] EWCA Civ 1471 CA, [2003] Lloyd's Rep Med 105

3 *Hotson v East Berks AHA* [1987] AC 750

4 *Kitchen v RAF Association* [1958] 1 WLR 563

5 *Mallett v McMonagle* [1970] AC 166, Davies v Taylor [1974] AC 207

6 *Fairchild v Glenhaven* [2002] UKHL 22, [2003] 1 AC 32

7 *Rees v Darlington* [2003] UKHL 52, [2004] 1 AC 309

8 *Chester v Afshar* [2004] UKHL 41, [2004] 3 WLR 927

"Do we have to?"

James Hassall glances at mediation, eyes the price tag, and starts to wonder about other types of ADR...

Mediation hit the headlines in *Dunnett v Railtrack* (CA 22/2/02), when the successful respondent to the appeal was denied costs for rejecting ADR "out of hand".

The issue was examined in more detail in *Halsey v Milton Keynes* (CA 11/5/04). The CA said that: "All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR". However, the Court went on to examine the circumstances in which it might be reasonable not to go to mediation. In particular, they held that costs sanctions should only follow when the decision not to use ADR was unreasonable.

Following *Halsey*, the fear-factor attendant on rejecting mediation may have lessened slightly, but awareness of the need to consider it could not be higher. Indeed, I know that some readers continue to be the recipients of particularly insistent letters urging mediation, especially in cases where the other party is being advised by someone who is involved in providing both advocacy and mediation services (intriguingly, these letters always suggest that a certain mediation - providing organisation is used).

But is mediation the only way? So far in this article, "ADR" and "mediation" have been used interchangeably. Should this be the case? Two alternatives to mediation, in the most formal sense, spring to mind.

On the Western Circuit's "East Group" (the half of the Circuit including Southampton, Bournemouth and Portsmouth) all civil claims feature a CMC with a 1 hour time estimate which is treated as an opportunity to explore settlement. The parties (or someone with the authority to settle) are required to attend and the judge (who is debarred from hearing the trial) acts as a mediator. Readers who have practised in family law may recognise the similarities with the FDR hearing that occurs in ancillary relief cases. Some readers who do not normally practise on East Group may recall with a shudder attending their first CMC in Bournemouth without (surely not) taking the standard directions as seriously as they might have done, and to their surprise being expected to pursue negotiations in front of the judge for an hour.

There are two obvious benefits to the parties from this process: (i) they obtain the services of a judicial mediator with no separate charge beyond their lawyers' fees; (ii) indications from a judge sitting in court as to how certain issues are likely to be decided may carry more weight with the parties than such indication as a non-judicial mediator, or their own lawyers, would give them.

Against that, it will of course be noted that in cases that are not settled, substantial costs can be incurred in attending this type of CMC, with both parties often represented by counsel, when on West Group or in Wales there might instead have been a 10 minute telephone hearing.

As this scheme is not available on demand, whether there will be a CMC of this kind depends entirely on which part of the country the claim is proceeding in.

Most practitioners will be familiar with Joint Settlement Meetings, or "round table conferences", as they used to be called. JSM's are so highly esteemed on the Northern Circuit – being, of course, renowned as one of the most fertile areas of PI litigation in the country – that from 1st May 2004 any claim with a value over £100,000 proceeding in Manchester is expected to have a JSM – in default of which, the parties have to justify their decision to the court. This measure followed on from work by the Northern Circuit Working Party on Joint Meetings, which drew up a Best Code of Practice in relation to JSM's.

It will immediately be noted that many of the desirable features of mediation are present in a properly organised JSM. The parties are present, or those present have authority to settle. Both sides are able to explain their positions live to the other. There is a desire to settle (which may partly be attributable to a desire not to have wasted the time and costs of attendance). The parties do lose the assistance of a neutral, trained facilitator. But they save the cost of that facilitator – which would usually be borne by the parties jointly. That cost may be at an hourly rate or agreed in the manner of a brief fee. A charge of £2,000, or an hourly rate of £200-£250/hr, are not unusual.

Apart from "mediation" in the sense of "facilitation", the parties also lose the opportunity to see what the mediator thinks of their points – to gain an independent second opinion, or series of indications. But it should be noted that the relevance – or even availability – of meaningful indications will depend entirely on the personal experience of the mediator concerned. An excellent mediator may still have no more – and sometimes less – to say on the merits of substantive issues in the case than the parties' legal advisors.

A JSM affords some opportunity for the intangible benefits of mediation to occur (such as a feeling of recognition on the part of the Claimant, sometimes coupled with a live apology on behalf of the Defendant). But cases in which these are significant issues are clearly better suited to mediation. It is for this reason that, at least as a starting point, I would tend to look more to mediation in a clinical negligence case and more to a JSM in a PI case. Of course this can and does vary. But my experience of practice is that the settlement of most PI cases is about figures: plain, simple, and unadulterated by considerations about a desire for apology, recognition, or to prevent the same thing happening to other people. I acknowledge that there are genuine exceptions to the above. But I seriously question whether they could be described as common.

To begin with, most RTA cases (although not always, in passenger claims) involve no pre- or post-accident relationship between Claimant and Defendant. The same goes for practically all Public Liability cases. In most serious EL cases the Claimant is no longer employed by the Defendant. It follows that one factor of crucial relevance to everything from a GP negligence case, to a commercial case, to a boundary dispute – the relationship that exists outside the litigation - is absent from most PI claims.

Secondly (and I mean this as an observation rather than a criticism) many PI Claimants view insurers as both an unlimited and a relatively undeserving repository of funds. I do not think that the same is true of many clinical negligence Claimants, as the NHS is generally viewed as having some legitimate alternative demands on its funds. So there is, I think, a greater degree of common ground in terms of considering the effects of the settlement.

Finally (although this is not meant to be an exhaustive list!) the sense of outrage that permeates so many clinical negligence claims is, I think, absent from most PI claims (although certainly not all). I find that most PI Claimants are prepared to treat misfortune at the hands

of another driver (and surprisingly often, another employee) as an "impersonal" wrong – where the principal concern is the effect of the accident, rather than its cause. There is, I think, a far greater sense of breach of trust, of "how could this be allowed to happen?" in many clinical negligence cases.

It is interesting to speculate as to what percentage of successfully "mediated" PI cases would have settled in the absence of the mediator. As ever, it is for the lawyer, working without firm percentages, to form a view of the cost-benefit analysis and to advise the client accordingly.

It follows that, in my opinion, after deeming a PI claim suitable for ADR, the key question that needs to be asked is: do we need a mediator at the JSM? In a case worth over, say, £250,000 the mediator's fee may simply be a small part of the overall costs and not, therefore, something to try to economise on. In an unusually charged dispute, the assistance of a mediator could be essential. But in many PI cases, the cost-benefit analysis will be quite different and a JSM may be all that is required.

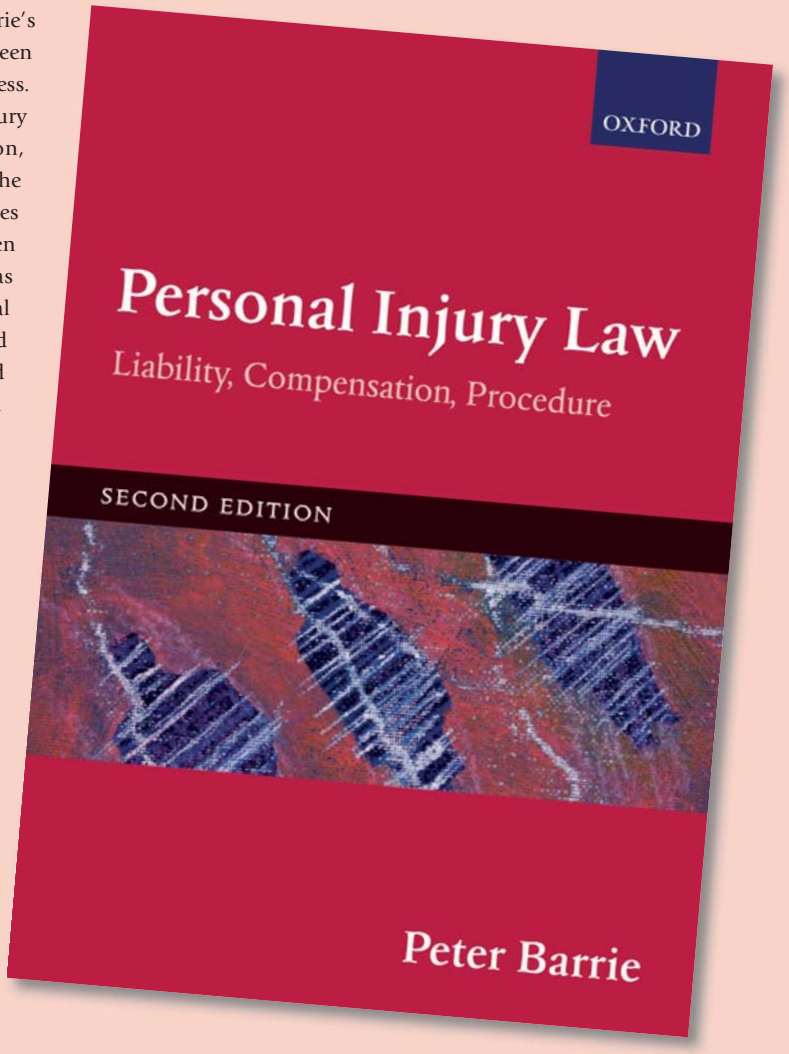
James Hassall

Personal Injury Law – Liability Compensation, Procedure

The second edition of Peter Barrie's book on personal injury law has been published by Oxford University Press. It has a new title Personal Injury Law: Liability, Compensation, Procedure and it incorporates the 7th edition of the JSB Guidelines and the 5th edition of the Ogden Tables. The whole of the text has been brought up to date. Several chapters have been rewritten and the text has been reorganised to make it even more useful and user-friendly, with thumb tabs for ready reference. It still includes all the key statutes and Regulations, the CICA scheme, the MIB agreements, the Rehabilitation Code, both the Protocols, brief summaries of all the key cases, and legal and medical glossaries. Keep a copy on your desk for access to concise, authoritative guidance across the whole range of personal injury practice.

The updating website is now a part of the main OUP website and it can be found at www.oup.com/uk/law/practitioner/cws. It is still a free resource giving a summary of recent developments in the personal injury field.

To order a copy (price £65 and postage £3), telephone 01536 454586, e-mail to laworders.uk@oup.com or write to Direct Sales Department, OUP, Saxon Way West, Corby, Northants NN18 9ES.



Periodical payments

You are probably all aware that as from the 1st April 2005 the court can make a periodical payment order in relation to future pecuniary loss.

The primary legislation has been followed by new Rules: there are new provisions in CPR Part 41 to deal with how the court should determine whether to make such an order; and there have been changes to CPR Part 36 as well.

Since the 1st April 2005 in all cases where the court will/may be awarding damages for "future pecuniary loss":

1. The court *shall* consider whether to make such a Periodical Payments order[1];
2. The court *shall* indicate to the parties as soon as practicable whether a periodical payment order is, in its view, likely to be more appropriate in that case[2];
3. The court can make a PP order in any case not settled or subject a final order prior to 1st April 2005 but a Variation Order under S.2 will only be capable of being made in those cases where the proceedings were commenced after 1st April 2005.

My purpose is to highlight some areas where action and thought is required immediately.

Considering Value

We may all have to start to move away from the traditional "top down" approach, i.e. valuing the claim by reference to an overall lump sum, and approach valuation from a "bottom up" perspective, at least in relation to future losses, i.e. ascertaining the annual value of the pertinent future loss.

This may eventually impact on a claimant's perception of the value of his/her case in that he/she will no longer be thinking in terms of a case worth (say) £500,000, but a case worth (say) £100,000 with a periodical payment of £10,000 for life.

Advising the Client

The Government's intention was that the new power should be available to the court in all cases where there was an element of future pecuniary loss. There is no financial threshold for the making of a periodical payment order. There is speculation that Judges will only apply the power in cases where the awards for future pecuniary loss will be at or above £500,000[3] but there is no good reason why that should be. The requirement that the court considers a periodical payment order applies to all cases where there is future pecuniary loss. If a periodical payment order suits the case and claimant, then the fact that it is of a small value should not be an impediment.

Perhaps the principal questions which claimants will have in their minds will be : which type of order is financially better for me, and how would each type of order work for me?

The financial considerations are complex. If the Defendant is an NHS Trust, or the Home Office (prisons) or the MOD (armed services) then you will not be troubled by the new S.2 (4) of the Damages Act 1996, and the requirement for the court to ensure that the continuity of payment is reasonably secure. In other cases there will be a need of a ministerial guarantee, or protection under the Financial Services and Markets Act 2000. Already commentators are highlighting two particular problems which will affect general insurers: the first is that ILGS stock indexed to the RPI is currently only available to 2035; the second is that there is no annuity available to a general insurer which can be increased by reference to either the Average Earnings Index or some other index than RPI.

A periodical payment order ordinarily is protected against inflation by increase in line with the RPI, but there is express provision for applying a different rate[4]. But what is the position about the inflationary increase of the cost of care and by what factor is it likely that earnings will increase? After all, these are the two most significant claims for future pecuniary loss. Will a periodical payment order which is designed to increase by reference to the RPI adequately protect the claimant against future "inflation"?

In *Cooke v UBHT*[5] the Claimant argued that the cost of care and the increase in earnings could be shown to have escalated historically at a rate significantly above the RPI. Some of the material relied upon has been re-presented in an Article by Rowland Hogg in the Journal of Personal Injury Law[6]. If his view is correct (that both the cost of care and wages will be subject to inflationary increases in the future above the RPI) then two things probably follow: the first is that any periodical payment order which is concerned to provide for either the cost of future care, or the loss of future income, will fall short of providing full compensation if it is linked only to the RPI.

However, the second point must surely be that a claimant who is awarded a lump sum cannot protect him/herself adequately by purchasing ILGS stock[7] since ILGS will escalate by reference to the RPI, and so his compensation will, again, fall short. Furthermore, where that claimant's life expectancy is likely to exceed the year 2035, ILGS will not be available to him/her beyond that date in any event. Thus to try to achieve full compensation claimants must chance their luck and judgment on the open markets.

Against this backdrop it may be tempting to say that a Lump Sum still provides a claimant with the best option. It has flexibility, the claimant can shift his investments to his best purpose, he can draw down what is required and when he requires it; and on the open market it is possible to achieve profits from the investment at a rate above RPI.

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1 The new S.2 (1) (b) of the Damages Act 1996

2 The new CPR Part 41.6

3 Perhaps because this was the limit originally imposed for consideration of a structured settlement, see the old CPR Part 40 Practice Direction C, now amended to take periodical payment orders into account.

4 Section 2 (8) and (9)

5 [2204] 1 WLR 251 CA

6 September 2004, P209. He was the expert relied upon by claimants in Cooke and others.

7 In any event currently only available to 2035

However, the Government in introducing this legislation, pointed out that the Markets are volatile and insecure, and a claimant cannot afford to lose his/her compensation though bad investment. Also, it is usually necessary to obtain financial advice and assistance with investments on the open markets, and the current jurisprudence suggests that the cost of that advice and assistance will not be recoverable from the Defendant[8]. Furthermore, the legislation provides that periodical payments will be exempt from income tax, whereas revenue from investments on the open markets is not. The worth to the claimant of this latter point should not be underestimated.

Flexibility is a problem in periodical payment orders: although the relevant expert evidence should provide a sound basis for estimating what care needs the claimant will have in the future, and it will be possible to provide for recognised "steps" in the proposed care regime, the fact is that unexpected events are quite possible! With a periodical payment order the opportunity to change the stream of payment is virtually nil[9]. Of course, some attempt can be made to offset this disadvantage by retention of a sufficient lump sum for investment.

All this goes to show that advice from an IFA will almost certainly be necessary. This is likely to become a standard cost in such cases, and there must be a very good chance that it will be a recoverable item on assessment.

Settlement

CPR Part 36 has been amended to take into account periodical payments. As from 1st April consideration must be given to whether a periodical payment order should be made in each case where there is a claim for future pecuniary loss.

Under the new Part 36.2A in all cases where there is a claim for future pecuniary loss Defendants must heed that unless the offer has been made by way of a Part 36 offer and any lump sum has been made by a Part 36 payment, then the consequences of Part 36 will not apply[10]. Furthermore there are detailed requirements of how the offer is to be expressed under subsection (5).

Part 36.20 has been amended to cover the cases under 36.2A: now, where the matter has gone to trial in the face of a Defendant's offer and payment under Part 36, the test is whether the claimant has failed "to obtain a judgment which is more advantageous than the Part 36 Offer made under the rule."

Clearly this more open and flexible test will provide much scope for argument. What will be the outcome on costs where the male 50 year old claimant offered a lump sum of £100,000 and a periodical payment order of £10,000 for life for cost of care (where the Ogden Table multiplier would be 21.65 – so that before the periodical payment provisions it would be worth £316,500), against a Defendant's Part 36 Payment of £315,000, and the judge awards £90,000 and a periodical payment order of £10,000 for life?

Practicalities

Will you avail yourself of the provision[11] that allows you to plead in your statement of case that you are seeking a periodical payment order? You will need to obtain instructions from your client. You will need to be able to advise him/her of the advantages and disadvantages of such an order. Perhaps the threat of such an order might encourage the Defendant to settle for a lump sum, but as time goes on it will become clearer when courts will and will not exercise this power.

A court near you will soon say that your case (which has an element of future pecuniary loss) is suitable for a periodical payment order. If the tortfeasor is insured by a general insurer you will need to obtain independent financial advice. You will need to be able to advise your client on such matters as the comparative benefits of a lump sum invested in the markets, and under the claimant's control, and a periodical payment order, which might have to include advice on which is financially better for him/her.

You will need to consider what level of indexation is required, and whether it can be obtained. Consideration will need to be given to whether a periodical payment order, which is ordinarily indexed with RPI, will be sufficient, (perhaps taking account of investment of all or some of the additional lump sum). Take note of the possibility of RPI plus orders[12]. But note this type of order will, itself, be inflexible. Such a "RPI plus" order will fix the index for the duration of the order, and may not suit what happens to the inflation pressure on costs of care, or income streams.

If you represent a child or patient then note the change to the CPR Part 21 Practice Direction, which now provides that the court will have to be satisfied that a periodical payment order has been considered. You will need to address what is contained in the accompanying Advice, and whether financial advice is required.

Should the fact that no variation order is yet capable of being made (assuming this is not a case started after 1st April 2005) have an impact on submitting to a periodical payment order?

Contributory Negligence always has the effect of ensuring that the claimant has less compensation than he needs. It may well be less easy to convince a claimant to seek compensation by periodical payment when that monthly / annual payment will not be adequate. The temptation for the claimant may well be to have a lump sum which can provide adequately for a shorter time, or to use the money for some entirely different purpose. To what extent will courts seek to impose a periodical payment order on a claimant in this situation?

Should you now be revising your Offers to settle? Probably not in relation to offers already made and where the 21 days has expired, *unless* the claimant is attracted to the idea of a periodical payment order.

The cases where a periodical payment order is most likely to be actively considered is where there is an issue on Life Expectancy. In that situation the potential inaccuracies of the medical forecast on life expectancy might make the potential problems of RPI indexation quite trivial, compared with the ancillary consequences of an incorrect forecast of life expectancy and the uncertainties of investment of the lump sum on the open market. A periodical payment order for the claimant's life will at least guarantee payment of the expected cost each year of his/her life.

Has the death knell for single lump sum compensation finally sounded? We await developments ...

Adam C Chippindall

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8 See Eagle v Chambers [2004] EWCA (Civ) 1033

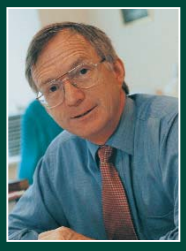
9 I leave aside the question of variation orders, which relates to deterioration, disease, as with the provisional award of old, or improvements in the physical condition of the claimant.

10 See CPR Part 36.2A(1)

11 See the new CPR Part 41.5

12 See Rowland Hogg's article in JPIL September 04

The Personal Injuries Team



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