Guildhall CHAMBERS

Newsletter

PI NEWS SUMMER 2010

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EDITORIAL

The other day, I saw an advertisement for a legal seminar. It boasted the line 'find out which of the Jackson recommendations will be implemented, and when'. Full of excitement, I nearly followed the direction to pay the £350 odd so the organisers could 'rush' me a seminar pack. But then it dawned on me. Ken Clarke was not the lead speaker. The Coalition would not be present. Instead, I would be exposed to theory and speculation but left feeling like I did at the end of every episode of the X-Files: knowing the truth was out there (but nowhere near to me).

My spies all inform me that referral fees are here to stay "too much commercial interest at stake", "we'll get round any ban" and so on. My favourite idea (the end of ATE premiums and liability for Defendant costs) draws a more mixed reaction. The idea of more fixed fees draws universal disapproval.

Given the uncertainty, I looked to the horizon. That was when I spotted something else, something much bigger. The apparently inappropriately named Tesco Law (the commoditisation of legal services) is beginning to take shape. The spectre of this has led at least one coalition of law firms to unite under one banner in an effort to compete with big business. So far as I am aware, we have yet to see a fully fledged alternative business structure but that is now just a question of time.

My guess? In a legal landscape fraught with change and with a government busy elsewhere Jackson will be sidelined in the short-term. I plan to spend more time considering changes to the structure of the legal landscape.

But that's enough of my speculation and on to hard facts. We bring you, as usual, a digest of developments relevant to the world of personal injury together with some interesting articles. **Adam Chippindall** analyses recent case law relevant to applications to extend time under s.33 Limitation Act 1980 and **Daniel Neill** considers the changes to credit hire law following *Copley v Lawn*.

Gabriel Farmer, Editor

Your comments and suggestions are welcomed and should be addressed to me at ***gabriel.farmer@guildhallchambers.co.uk***

Team news

As many will be aware, we have seen many changes of late. We have completed refurbishment to our building at 5-8 Broad Street, which now offers modern accommodation and ample conference facilities. We congratulate HHJ **Euan Ambrose** and District Judge **James Hassall** upon their elevation to the bench. Euan now sits in Swindon and James in St Helens. The team has seen the arrival of **Stephen Garner** (formerly practising from Birmingham). Stephen was called in 1994, enjoys a hugely successful practise, has specialised in personal injury for over ten years and is known for his approachability and client-friendly manner. In addition, **Sophie Holme** has commenced her second six pupillage having joined us in late 2009. As well as being an accomplished musician and a fluent French speaker, she is quickly earning a good reputation as an astute, thorough and hard working junior barrister. She is available for small claim cases, infant settlements and fast track work.

Seminars

The third annual one-day **Defendant seminar** at the Mansion House in Bristol was again a resounding success. Members of the team presented on a variety of practical and topical legal issues facing insurers in the current climate. These included indemnity issues, provisional damages, fatal accident claims, limitation law, discount rates, witness immunity and interim payments as well as workshop groups on interim payments, fatal accidents and credit hire.

Our fourth yearly one-day **Claimant seminar** will be held in the Autumn. 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. Further information will be posted soon. Please check our website for updates.

PI update

Liability

Control of employees

Kmiecic v Isaacs [2010] EWCA Civ 381

The Claimant (K) was employed as a casual labourer by a building contractor (B) as part of a contract to perform work on Mrs Isaacs' (D's) home. D withdrew permission for K to access the garage roof via a bedroom window and asked that instead they use her ladder. K phoned B and informed him of this instruction and requested that B ask D if they could use the window as access because the ladder was unsuitable. B refused and asked K to use D's ladder. K used the ladder which then toppled over causing him injury. B was not insured so K sued D claiming that (1) as she had controlled the means of access and provided the ladder she owed duties under the Construction (Health Safety and Welfare) Regulations 1996, the Provision and Use of Work Equipment Regulations 1998 and the Work at Height Regulations 2005 and (2) she was negligent in engaging B as he was a cowboy builder and incompetent.

HELD: (1) The 2005 Regulations applied, in the case of a non-employer, to "work by a person under his control, to the extent of his control". The 1996 Regulations imposed a duty on a non-employer who "controlled the way in which the construction work was carried out by a person at work" to comply with the Regulations "insofar as they related to matters which were within his control". However, D did not assume control over K, in the sense of being able to direct how he carried out his work. D was entitled to impose limits on K's access to her property by refusing him entry to the house for the purpose of gaining access to the roof. She did that in her capacity as an occupier, not as a person controlling the way in which he carried out his work. That was the extent of any control she exercised over him. She had no right to instruct him or direct him in his work. That right belonged at all times to S as K's employer. Such duties could be imposed upon an individual householder, but only where the householder played an unusually large role in the planning management and or execution of the relevant work. (2) The actions of B in failing to ensure a safe system of work suggested that he was irresponsible and incompetent. There was, however, no evidence that D was, or should have been aware of that fact. There was no duty on D to enquire whether B was properly insured. Accordingly, she was not negligent.

Seatbelt – contributory negligence

Stanton v Collinson [2010] EWCA Civ 81

The Defendant had sought a finding of 50% contributory negligence where the Claimant had been the unrestrained front seat passenger of a car with, in addition, a young girl sat on his lap. At first instance the Court had not been persuaded to depart from the guidelines laid down in *Froom v Butcher* [1976] 1 QB 286 on the basis that given the passage of time since Froom was decided the failure to wear a seatbelt should now be acknowledged as more blameworthy. Similarly, on appeal the Claimant argued that a finding of less than 15% should be made given a finding of fact by the trial judge that the seatbelt would have made a lesser difference to the injury, as distinct from "a considerable difference" or from reducing the injuries to ones "a good deal less severe".

Held: (1) Section 1 Law Reform (Contributory Negligence) Act 1945 does not require the court to investigate the extent of the causative difference a seatbelt would have made with a view to ordering a reduction of less than 15% for contributory negligence. (2) There may be unusual cases in which neither of the two brackets of finding contemplated by *Froom v Butcher* are appropriate. The Act requires that the reduction for contributory negligence shall be such as appears to the court to be just and equitable. It therefore permits an approach such as adopted in *Froom v Butcher* based upon two broad categories of typical case and the general proposition that, absent something exceptional, there should be no reduction in a case where the injury would not have been reduced "to a considerable extent" by the seat belt. (3) There is a powerful public interest in there being no such enquiry into fine degrees of contributory negligence, so that the vast majority of cases can be settled according to a well-understood formula and those few which entail trial do not mushroom out of control.

Vicarious liability for borrowed employees – liability for ultra hazardous acts

(1)Biffa Waste Services Ltd (2) Biffa Leicester Ltd v Mashinenfabrik Ernst Hese GMBH (First Defendant), Outokumpu Technology Wenmec AB (Second Defendant) & Vanguard Industrial Ltd t/a Pickfords Vanguard (Third Party) and Hese Umwel GMBH (Fourth Party) [2008] EWCA Civ 1257

A fire broke out in the Ball Mill of a recycling plant as the result of welding by Vanguard Industrial's employees. Outokumpu sought to appeal a judgment that it was vicariously liable for the negligence of these employees.

At first instance the trial judge considered that Outokumpu was vicariously liable for the negligence of Vanguard Industrial's employees on the basis that they became Outokumpu's employees when conducting the welding. The trial judge found that in any event, Outokumpu were liable, applying the principle in *Honeywill v Larkin* [1934] 1 KB 191 as the welding constituted a non-delegable ultra-hazardous act.

The Court of Appeal found that vicarious liability could not be established. The burden on a party seeking to show a transfer or assumption of liability to or by the hirer of an employee is a heavy one. Vanguard Industrial's employees were skilled, used all their own equipment and had their own supervision. There was no question that Outokumpu had had any control over the way they welded. Hese Umwel were responsible for safety and had decided when they issued the Hot Work Permit whether the work was safe to be carried

out. Further, there was no basis to infer an agreement that Outokumpu would have control over the Vanguard Industrial's employees. The fact that Outokumpu did have the right to supervise did not give them control. *Hawley v Luminar Leisure Ltd* (2006) EWCA Civ 18 and *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* (2005) EWCA Civ 1151 were distinguished as these were cases where the employee was integrated into the business of the companies which were held vicariously liable for their acts. Finally, Vanguard Industrial had supplied four men, not the two as contracted for by Outokumpu. It was impossible to distinguish which two men Outokumpu should be vicariously liable for.

The Court of Appeal also considered that *Honeywill* had not been correctly applied. *Honeywill* only applied where the activity undertaken was inherently dangerous no matter what precautions were taken. Here, proper precautions could have been taken to render the activity safe and so it was not inherently unsafe so as to satisfy the principle in *Honeywill*.

Comment: No new law here but a useful decision in any case where "borrowed employees" cause damage. The burden for establishing vicariously liable in this setting is heavy and is unlikely to be met where the employer alleged to be vicariously liable is not exercising direct control over the employees in question including the way in which the work is carried out.

Duty of care – police – assumption of responsibility

Vincent Desmond v Chief Constable of Nottinghamshire [2009] EWHC 2362 (QB)

The Claimant appealed against a County Court decision to strike out his claim. The Claimant had been investigated by the police in response to a complaint of assault and attempted rape. In the course of the investigation, data was entered about his arrest onto the police national computer. The police had decided to close the file as it became apparent that the Claimant was not responsible for the crime when CCTV footage showing him in a bar at the time of the alleged assault was examined. The pocket books of the investigating officers were stored as was the closed file. When the Claimant later applied for a job as a teacher, he was required to obtain an enhanced criminal record certificate. Nottinghamshire Police, without consulting the pocket book of the officer who closed the file or the file itself, disclosed information about the alleged assault recording that *"Mr Desmond was refused charge due to insufficient evidence to proceed. The OIC has since retired and we have been unable to establish why there was insufficient to charge"*. It took just over a year for the situation to be rectified and for an enhanced certificate containing no information to be issued. The Claimant claimed damages for psychiatric injury and loss of wages alleging negligence, misfeasance in public office and the tort of conspiracy to cause him injury.

Although the other aspects of his claim had no prospect of success, Mr Justice Wyn Williams upon hearing the appeal considered that it was arguable that gathering together information to allow a decision about what material should be disclosed to a potential employer might amount to an assumption of responsibility to the individual about whom information was to be disclosed. In this limited respect, the claim was permitted to go to trial. Whilst the police have immunity where the damage is caused in furtherance of the investigation or suppression of crime, this immunity does not extend where they assume responsibility to the individual to act with reasonable care: *Hill v Chief Constable of West Yorkshire* (1989) AC 53 HL, *Brooks v Commissioner of Police of the Metropolis* (2005) UKHL 24 and *Van Colle v Chief Constable of Hertfordshire* (2008) UKHL 50 were all applied.

Duty of care – damage by third parties – local authority exercise of statutory duties

X & Y (Protected Parties Represented by their Litigation Friend the Official Solicitor) v Hounslow London Borough Council [2009] EWCA Civ 286

The local authority appealed against a decision that they were liable in negligence for injuries sustained by the respondents when local youths physically assaulted them at their home. Both respondents had mild learning difficulties. The youths had befriended the respondents and used their flat to take drugs, have under-age sex and store stolen goods. One day, X and Y were effectively imprisoned in their flat and they and their children were repeatedly assaulted and abused. Prior to the assault, X and Y's social worker was aware that they were being exploited by the local youths and reported the matter to the police. She wrote to the Housing Department that X and Y's long-standing application for re-housing should be considered urgently and accompanied them to a meeting with the Housing Department's harassment officer. A further meeting was arranged, but the assaults by the youths took place the weekend before this meeting was due to take place. It was found at trial that the Council as an entity, through their Social Services and Housing Departments, should have foreseen the imminent physical danger and arranged other accommodation. Their failure to do so was a breach of a duty of care and the assaults would not have taken place but for that breach.

This reasoning was not accepted by the Court of Appeal, who applied *Gorringe v Claderdale MBC* [2004] UKHL 15. They noted that since the existence of statutory powers was the only basis upon which a common law duty was claimed to exist, it was relevant to ask whether the statute imposed a duty. Here, the National Assistance Act 1948 and the Housing Act 1996 did not impose such duties. The Court distinguished the position of vulnerable adults from that of children to whom specific obligations are owed under the Children Act 1989. Without some further voluntary assumption of duty the local authority owed no duty of care. Although their social worker, who it was conceded had behaved impeccably, may have assumed a duty of care; it was not suggested she ought to have foreseen the events that occurred nor that she should have acted differently.

Comment: In light of the Claimants' status as vulnerable adults and the high level of local authority involvement prior to some horrendous assaults this is presumably a difficult decision for the Court of Appeal. However, given no special treatment (or statutory duties) owed in respect of adults with learning disabilities (as opposed to children) the right result. However see *Merthyr Tydfil County Borough Council v C and Connor v Surrey* below.

Duty of care - third parties

Merthyr Tydfil County Borough Council v C [2010] EWHC 62 (QB)

The local authority appealed against a decision to refuse its application for summary judgment or strike out against a parent's claim for psychiatric injury. The Claimant had told the local authority on two occasions that her children had been sexually abused by a neighbour's child. On the second occasion, the local authority denied that she had ever reported the first incident. The local authority later realised their mistake and apologised. The Claimant's family were allocated the same social worker as the neighbour whose child was implicated in the abuse. The local authority's application relied on *D v East*

Berkshire Community NHS Trust [2003] EWCA Civ 1151 and contended that (i) owing a duty of care to a parent would potentially conflict with the duty of care which the Council owed to the children involved in this situation and (ii) the Claimant did not fall within the narrow parameters of those third parties to whom a duty may be owed.

Mr Justice Hickinbottom cited *Sullivan v Moody* (2001) 207 CLR 562 as approved in *Lawrence v Pembrokeshire County Council* [2007] EWCA Civ 446 where it was said that *"people may be subject to a number of duties, at least provided that they are not irreconcilable"*. He set out a number of cases where local authorities have been found to owe duties to children's parents: *A v Essex County Council* [2003] EWCA Civ 1848, *Lambert v Cardiff County Council* [2007] EWHC 869 (QB) and *W v Essex County Council* [2001] 2 AC 592. He did not accept that a local authority, which owed a duty of care to children could not in any circumstances owe a duty of care to that child's parents because of the potential for conflict. The Claimant here was not a third party as the duty was not simply parasitic upon the duty owed by the Council to her children. The contention here was that she was owed a separate duty in these circumstances where she had engaged with the Council directly reporting the abuse and meeting with the Council and having an assigned social worker. As in *A v Essex County Council* a duty to the parent might have a different basis and scope to that owed to a child. The first instance decision not to give summary judgment or allow strike out on the basis that no duty of care could be owed was therefore upheld.

Connor v Surrey County Council [2010] EWCA 286

The appellant local authority appealed against a decision that it had breached its duty of care to the respondent former employee (C) and caused her to suffer personal injury in the form of psychiatric damage.

The Claimant was the headmistress and a member of the governing body of a school for which the Defendant was the LEA. In 2003, a new governor, Mr Martin, and his associates began to criticize the Claimant and the school for failing to make links with Muslim communities. Tensions rose resulting in Mr Martin being voted off the governing body in May 2005. He thereafter made a complaint of institutional racism and organised a malicious petition of no confidence in the Claimant. The local authority reacted slowly, but in July 2005 commissioned an independent inquiry into the complaint and later replaced the governing body with an interim executive board pursuant to statutory powers under the School Standards and Framework Act 1998. The judge found that: (1) the local authority's duty of care to take reasonable steps to protect the claimant's psychiatric health had required it, by May 2005 (ie earlier than it did), to replace the governing body with an interim executive board and (2) the local authority's decision to establish the inquiry into Mr Martin's complaint was made in disregard of its duty of care to the Claimant.

The local authority argued (amongst other things) that criticisms of the LEA actions were not justiciable in private law proceedings because the actions lay wholly in the field of the local authority's public law functions, in other words, the exercise of its statutory powers, for which it was immune from suit. The Court of Appeal analysed the question of the boundary between policy decisions and the operational implementation of such decisions in the context of an allegation of negligence and held: (1) Where it is sought to impugn, as the cause of the injury, a pure choice of policy under a statute which provides for such a choice to be made, the court will not ascribe a duty of care to the policy-maker and the decision will be immune from suit. (2) If a decision, albeit a choice of policy, is so unreasonable that it cannot be said to have been taken under the statute, it will (for the purpose of the law of negligence) lose the protection of the statute and therefore immunity. (3) There will be a mix of cases involving policy and practice, or operations, where the court's conclusion as to duty of care will be sensitive to the particular facts: the greater the element of policy involved, the wider the area of discretion accorded, the more likely it is that the matter is not justiciable so that no action in negligence can be brought. (4) There will be purely operational cases (for example a bus driver on the school trip who carelessly crashes the bus) where liability for negligence is likely to attach without controversy. The Court followed *X (Minors) v Bedfordshire CC* (1995) 2 AC 633 HL and *Barrett v Enfield LBC* (2001) 2 AC 550 HL and considered *Stovin v Wise* (1996) AC 923 HL *Phelps v Hillingdon LBC* (2001) 2 AC 619 HL and *Gorringe v Calderdale MBC* (2004) UKHL 15, (2004) 1 WLR 1057.

Comment: A useful decision that considers the exercise of statutory powers or duties overlap with personal injury. The Judgment of Laws LJ contains a particularly illuminating analysis of the case law in this area and distills the essential questions which determine whether a duty of care will be imposed or immunity preserved.

Occupiers' liability – absence of knowledge of occupation and ownership

Jonathan Harvey v Plymouth City Council [2009] QBD (unreported) 13/11/09

Mr Harvey sustained serious injuries when he fell a distance of 5 metres from open grassland onto a Tesco's car park. The local authority admitted owning the land concerned, but denied liability on the basis that they were unaware until after the accident that they owned the land and this lack of awareness prevented them from impliedly licensing its use.

The court found that despite the fact that no one in the local authorities' employment in 2003 actively considered whether or not they owned or occupied the land, they ought to have known they did. The fact that they did not, was of their own making. They should have known that they owned the land before the Tesco development and they should have known what had been transferred to Tesco and what they retained. They should have known when the licence to Tesco came to an end and should have considered then to what use the land was to be put. In particular, they ought to have ensured that it was safe for use.

Whilst the Claimant, who had been drinking and running in a dark area was found 75% contributorily negligent, the local authority were liable for the remainder. The Claimant was the Defendant's visitor in law and they breached their common duty of care by not securely fencing the edge and by allowing the fence to remain in such a condition as to constitute a tripping hazard.

Breach of duty – sporting events

Robert Lee Uren v (1) Corporate Leisure (UK) Ltd (2) Ministry of Defence (3) David Lionel Pratt & Ors (Syndicate 2525) [2010] EWHC 46 (QB)

At a Health & Fun Day organised by the RAF, "the pool game" consisted of running up to an inflatable pool, getting in over the side and grabbing a piece of fruit floating in the shallow water. In the first heat, contestants entered over the side head first with their arms outstretched. In the second, Mr Uren did the same and hit his head on the bottom of the pool and broke his neck resulting in him becoming tetraplegic. Mr Uren alleged that the Ministry of Defence and Corporate Leisure who had been hired to run the fun day and whose pool it was were in breach of duty to ensure that he was safe in taking part in the game. Despite findings that the risk assessments of the game were defective since, amongst other things, it was not appreciated that contestants might enter the pool head first, that contestants were not told not to dive

into the pool and that contestants were observed by the organisers to dive head first into the pool prior to the accident, no breach of duty was found.

Mr Justice Field found no breach of duty as the risk of serious injury was only very small, the contestants were told to take care when entering the pool and it was obvious that they should not dive in without sliding over the side. The fact that the risk of injury was of serious injury did not mean the Defendants were in breach. As one expert in the case observed, these types of activity are never risk-free. This means that a balance has to be struck between the level of risk involved and the benefits the activity confers on the participants and thereby on society generally. In this case, the Defendants were not obliged to neuter the game of much of its challenge by taking steps to prevent head first entry.

Comment: S.1 Compensation Act 2006 provides that in determining whether the Defendant should have taken particular steps to meet a standard of care the Court may have regard to whether a requirement to take those steps might (a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or (b) discourage persons from undertaking functions in connection with a desirable activity. Whilst not cited expressly, this theme appears to underpin the judgment.

Causation – breaking the chain – conduct of the claimant

Spencer v Wincanton Holdings Ltd [2009] EWCA Civ 1404

The Claimant initially injured his knee in a minor accident for which the Defendant admitted liability. His knee became so painful that he eventually made an informed decision to undergo an above-knee amputation for which liability was also accepted. The Claimant was unable to wear his prosthesis whilst driving until it had been fully adapted. It was cumbersome to get on and off, so he often used a pair of sticks outside the car instead. On 14th October 2003, a week or so before the car was due to go in for conversion, the Claimant pulled into a Sainsbury's petrol station. Using neither his sticks nor the prosthesis, he got to the pump and filled his tank by steadying himself against the car. As he returned to the car, he caught his foot against a raised manhole cover and fell rupturing his left quadriceps tendon and doing lasting damage which confined him to a wheelchair for good.

The trial judge exonerated Sainsbury's and held that the Defendants were liable for the damages consequent from the October injury with the Claimant held one third contributory negligent for these damages. The Claimant's application to cross-appeal the finding of contributory negligence was refused on sight of the papers. The Defendants' appeal was unsuccessful. The court considered the test set out in *Mckew*; that a Defendant cannot be liable for the consequences of an injured man's actions where he acts unreasonably. *Emeh v Kensington etc AHA* [1984] 3 All ER 1044, where it was said that the degree of unreasonable conduct required was very high, was also considered. However, the suggestion put forward in *Clerk & Lindsell on Torts* that "for the claimant's subsequent conduct to be regarded as a novus actus interveniens it should be such as can be characterised as reckless or deliberate" was thought unhelpful and not warranted by previous decisions. The rationale of the principle that a novus actus interveniens breaks "the chain of causation" was "fairness" as set out in *Corr v IBC Vehicles Ltd* (2008) UKHL 13. However, the court were unprepared to go further in its definition considering the issue highly fact sensitive. The trial judge's conclusions that the Claimant's conduct *"fell far below what could be described as McKew unreasonable"* and *"Insofar as the way he went about the task should be taken into account, that is a matter of contributory negligence"* were felt to be arrived at meticulously and were the result of a correct application of the law.

Evidence

Damages – expert evidence

Huntley (AKA Joseph Paul Hopkins) (by his litigation friend Alison Jane McClure v Simmons [2010] EWCA Civ 54

In this case, the court considered the role expert evidence played in the assessment of damages. The Claimant appealed against the trial judge's assessment of damages in relation to the future care needs of a claimant who had been severely brain damaged in a car accident. The Claimant's medical expert had provided evidence that 24 hour care was needed and it was contended on appeal that since the judge had rejected the evidence of the Defendant's care expert, he should not have based his assessment on that of the Claimant's expert not made his own arbitrary assessment and the Joint Statement of the expert neuro-psychologists that stated there were no prospects for improvement.

Lord Justice Waller dismissed the appeal stating that: *'In my view…criticisms of the judge are unfounded and in some respects show a misunderstanding of the status of experts' evidence and, in particular, joint statements. The evidence of experts is important evidence but it is nevertheless only evidence which the judge must assess with all other evidence. Ultimately issues of fact and assessment are for the judge. Of course if there is no evidence to contradict the evidence of experts it will need very good reason for the judge not to accept it and he must not take on the role of expert so as to, in effect, give evidence himself. So far as Joint Statements are concerned parties can agree the evidence but (as happened in this case) it can be agreed that the joint statements can be put in evidence without the need to call the two experts simply because they do not disagree; but either party is entitled to make clear that the opinion expressed in the joint statement is simply evidence that must be assessed as part of all the evidence.'* (para. 9)

Comment: It is sometimes observed that a judge must prefer one or other of competing expert opinions and cannot "come down in the middle". This case clearly sanctions the latter course assuming, of course, that the decision is rational and reasoned.

Limitation

Limitation – delay – prejudice

McDonnell & Anr v David Walker (Executor of the Estate of Richard Walker, deceased) [2009] EWCA Civ 1257

The Defendant appealed against the decision to grant an application under s. 33 Limitation Act 1980 to disapply s.11. The background to this was that proceedings had been served a day late and an application to extend time failed. At the time the decision in *Walkley v Precision Forgings Ltd* [1979] 1 WLR 606 HL(E) was still good law and where proceedings had already been brought within time and a second set were brought in which a s.33 application was made the court were unable to disapply the s.11 time limit. However, the decision by the House of Lords in *Horton v Sadler* [2007] 1 AC 307 changed this position. A second action was then commenced nearly two years later by new solicitors and the application to extend time was originally successful. Significantly, this second action was quite different in scale to the first seeking considerable damages for future loss of earnings and psychological injury.

The Court of Appeal's decision was that the s.11 limitation period should not be disapplied. The judge had only concentrated on the near two year delay post-*Horton*. This suggested that as long as there was not a delay post-*Horton* the Claimant would succeed. This was not how *Horton* worked. It remained necessary to consider whether there had been forensic prejudice caused by inexcusable delay. Here (the claim received 7 years after the accident) was on a different scale to that corresponded about previously. Forensic prejudice had been suffered as the Defendant's insurers had not had the opportunity to investigate the claim. This was therefore a different type of case to *Horton* and *Cain v Francis* (2008) EWCA Civ 1451 where the Defendant or his insurers had all the information about the claim before the end of the first action and where it could be said that a mistake by acting solicitors had given the defendants a windfall. There was not significant prejudice to the Claimant here as he had a claim against his instructing solicitors which, although a loss of chance claim, was likely to result in a high level of recovery since liability had been admitted.

Comment: *Horton*, although a useful decision for Claimants, is not a get out of jail free card. The court will want to see issues of prejudice and reasons for delay fully explored before granting permission to proceed with a second claim issued out of time.

Procedure – discovery of fraud

Owens v Noble [2010] EWCA 224

Following an assessment of damages by Field J for injuries sustained by Mr Noble, the Defendant's insurers obtained video surveillance footage that appeared to show him to be less disabled than he had claimed to be at the damages assessment. A freezing injunction was obtained pending permission to appeal.

Normally, in these circumstances, an appeal would only be allowed and a retrial ordered where fraud was admitted or the evidence was incontrovertible. Here, however, since the evidence did not incontrovertibly show fraud and Mr Noble sought to explain it, the court held that rather than dismiss the appeal, the case should be remitted to Field J. As trial judge, he was thought best placed to compare the fresh evidence with that given at the original hearing and determine whether fraud was in fact proven.

Credit hire – evidence of spot rate

Bent v Highways and Utilities [2010] EWCA 292

The Court of Appeal sent out the clear message in this case that evidence of spot rates from a later date than the date of hire is relevant to the assessment of the spot rate at the date of hire. Lord Justice Jacob stated that *"Working with comparables and making adjustments is the daily diet of judges concerned with valuation in all sorts of fields."*. Here, where evidence had been provided of the spot hire rate a year later than the date of hire, this was found to be able to *"throw considerable light"* on the spot hire rate at the date of hire. Further, spot rates presented did not need to be for an almost exactly comparable car. A replacement need only be in the same broad range of quality and nature as the damaged car. A judge presented with a bracket of spot rates for some "better" cars and some "worse" would not go awry by aiming for a reasonable average.

Costs

Contributory negligence – costs

Sonmez v Kebabery Wholesale Ltd [2009] EWCA Civ 1386

Following trial of the issue of contributory negligence as a preliminary issue, the Claimant was found 20% contributorily negligent. The Defendant had prior to trial made a Part 36 offer on a two-thirds/one-third basis in the Claimant's favour and had later made an offer (although it was doubted whether this constituted a Part 36 offer) at 75/25 in the Claimant's favour. The Claimant had not conceded any negligence at any point. The trial judge held that in establishing contributory negligence of any degree, the Defendant had succeeded on the issue and awarded them their costs of the preliminary issue.

The Court of Appeal did not agree with this reasoning. As recently determined in *Onay v Brown* [2009] EWCA Civ 775, the trial of contributory negligence necessarily involved assessment of the Defendant's liability and constituted a trial of liability even though it was unnecessary to determine primary liability. Therefore, the general rule that costs follow the event applied and the Claimant was entitled to his costs. Whilst a failure to negotiate could be characterised as unreasonable conduct affecting a costs order, such an order was not appropriate here especially in light of the fact that it had, of course, been open to the Defendant to protect itself by making a sensible Part 36 offer.

Dishonest exaggeration of a claim

Widlake v BAA Ltd [2009] EWCA Civ 1256

Following a fall at work, for which liability was admitted, there was an issue as to whether the accident had aggravated pre-existing back pain for about 12 months or advanced her low back deterioration by about 5 years. The trial judge held that the Claimant had sustained minor injuries in the fall, but that she had deliberately concealed her previous back pain history from two medical experts she instructed in order to try to increase her compensation. The Claimant still beat the payment in of £4,500, but the trial judge ordered her to pay the Defendant's costs.

The Court of Appeal was satisfied that the trial judge had misdirected himself in finding that the case was "a rather more serious case" than *Molloy v Shell UK Ltd* [2001] EWCA Civ 1272 - the Claimant in that case had claimed loss of earnings when for 3 years prior to trial he had been fully employed. Further, the *obiter* contention in *Molloy* that this type of manipulation of the justice system should result in a strike out was doubted. The court should instead apply the relevant CPR. The first question is the determination of who is the unsuccessful party. The court endorsed the view expressed in *Straker v Tudor Rose (A Firm)* (2007 EWCA Civ 368 that the most important thing is:

1. to identify the party who is to pay money to the other even in a case of personal injury. In this case, the Claimant had received a judgment in her favour and passed this first hurdle.

2. the court should then consider 44.3(5) (b) and (d): the court should have regard to the reasonableness of a Claimant pursuing an issue and whether the claim was exaggerated in whole or in part. The way in which court should have regard to this conduct was *'principally to enquire into its causative effect: to what extent did her lies and gross exaggeration cause the incurring or wasting of costs'?* On top of this, the court could where appropriate for particularly egregious misconduct impose the punitive sanction of depriving the offending party of their costs.

This was felt to be appropriate in this case as the judge had made findings of dishonesty, but the court cautioned that *'lies are told in litigation every day up and down the country and quite rightly do not lead to a penalty being imposed in respect of them'*. No order as to costs was made. The Defendant knew the truth in this case when they received their expert's report as he had access to the Claimant's medical records and could have protected itself further with an appropriate Part 36 offer.

Comment: The cost consequences of fraud, malingering or exaggeration have become very much in vogue in the last few years. *Molloy and Painting v Oxford University* [2005] PIQR Q5, amongst others, are routinely deployed by Defendants in cases involving malingering. At last, a judgment setting out a more formulaic approach to the resolution of the costs of such claims and reminding Defendants that a P.36 offer is their best Defence.

Consent order for costs on standard basis – small claims track costs

O'Beirne v Hudson [2010] EWCA Civ 52 and *Drew v Whitbread* [2010] EWCA Civ 53

These appeals were both argued consecutively. The two judgments both with the leading judgment given by Lord Justice Waller were handed down at the same time with the relevant provisions of the CPR set out in *Drew* only to avoid repetition.

In *Drew*, the issues were whether a case heard on the multi-track with costs awarded on the standard basis, the trial judge was entitled to rule that costs should be assessed on the fast track basis and whether the issue as to whether the point that costs should be assessed on the fast track basis was required to be taken before the trial judge.

Lord Justice Waller held on the latter that, among other possible orders under r44.3, the court can make an order at the end of a trial that trial costs should be restricted to fast track costs. Once this order has been made, a costs judge cannot vary it or rescind it. The fact that no special order has been made will not prevent the costs judge from assessing an issue. There may be circumstances where, in the interests of keeping the costs of assessment proportionate, the costs judge may be entitled to say an order should have been sought. However, this was considered different to there being a rule founded on *Henderson v Henderson* that a failure to raise a matter for 44.3 purposes precludes it from being raised for r44.5 purposes. This meant that whilst an indication from the trial judge as to whether the case was a fast track case might have been helpful, it did not preclude the issue from being raised before the costs judge. However, the costs judge was not then entitled to rule that she was going to assess the trial costs as if the case were fast track as to do so would rescind the trial judge's order. However, she was entitled to assess costs on the standard basis taking into account that the case should have been allocated to the fast track. This was not necessarily a distinction without a difference as where a case had run for more than one day separate consideration would need to be given to whether the trial would always have been likely to run for more than one day.

In *O'Beirne*, the issue was whether, where a case has been settled before allocation by a consent order with costs ordered to be paid on the standard basis, the costs judge is entitled to take the view that the case would have been allocated to the small claims track and only award costs as available on the small claims track. The court considered *Voice & Script International v Alghafar* (2003) EWCA Civ 736 and held that, as in *Drew*, whilst the order itself could not be varied, it was quite legitimate to give bills 'very anxious scrutiny' as to whether costs had been necessarily or reasonably incurred, and thus whether it was reasonable for the paying party to pay more than would have been recoverable in a case that would have been allocated to the small claims track. This included considering whether it was reasonable for the paying party to pay for lawyers at all.

Gabriel Farmer and Sophie Holme

Post *Horton* - understanding S.33

We all know that the House of Lords in *Horton v Sadler*[1] overturned *Walkley v Precision Forgings Ltd*[2]. Since then, it has been possible to commence a second set of proceedings, based on the same cause of action as that in the first, where the first set has become time-barred.

In *Horton*, the Claimant had issued his proceedings a few days before the expiry of the applicable limitation period; however, the Defendant was uninsured and the Claimant had failed to notify the MIB correctly. Therefore, he sought to get around the problem by issuing fresh proceedings, outside of the limitation period, and to rely upon s.33 of the Limitation Act 1980. To succeed he had to overturn *Walkley* in the House of Lords. The essential rationale of *Walkley* had been that where the Claimant had commenced his first proceedings within the limitation period, s.11 did not prejudice the Claimant, and s.33 was therefore of no avail in most cases[3]. The House of Lords recognised that it was not whether s.11 prejudiced the Claimant in the first proceedings that mattered; it was the fact that s.11 did prejudice him in the new second proceedings. Post *Horton* a Defendant can no longer stand behind a blanket immunity of abuse of process and say that since the first action had been started within the limitation period the Claimant is debarred from issuing again. In the brave new world, the parties must consider the position having regard to s.33 of the Limitation Act 1980.

It is important to know how to approach s.33 in these cases. Does the Court have a wide, unfettered, discretion to apply the factors set out in s.33, and if so, will there be any uniformity in approach in different courts around the country? What are the indicators for gauging the chance of success?

There was not much specific guidance from *Horton*, but Lord Bingham touched on this topic, when he said:

"33. Given the rarity of its exposure to problems arising under section 33, the House cannot match the experience and insight which first instance judges and Lords Justices bring to bear on these problems. I do not therefore think it would be well–advised to seek to give guidance on the exercise of this discretion. If *Walkley* represents a very clear case for refusal to exercise the discretion, *Hartley v Birmingham City District Council* [1992] 1 WLR 968, 978–979, might be thought a clear case for its exercise: the writ was issued one day late; there had been early notification of the claim; and the Defendant's ability to defend the case was unaffected. Thus even if the plaintiff had a cast–iron claim against her solicitors the limitation defence could fairly be regarded as a windfall or gratuitous bonus. Between these extremes lie a variety of cases turning on different facts.".

Lord Hoffman made the following observations;

"(a) The prejudice to the Claimant by the operation of the limitation provision and the prejudice to the Defendant if it is disapplied tend, as Parker LJ pointed out in *Hartley v Birmingham City District Council* [1992] 1 WLR 968, 979, to be equal and opposite. He regarded the effect of the delay on the Defendant's ability to defend as being of paramount importance.

(b) In *Das v Ganju* [1999] Lloyd's Rep Med 198 at 204 and *Corbin v Penfold Metallising Co Ltd* [2000] Lloyd's Rep Med 247 at 251 the Court of Appeal expressed the view that there was no rule that the claimant must suffer for his solicitor's default. If this is interpreted, as it was in *Corbin*, as meaning that the court is not entitled to take into account against a party the failings of his solicitors who let the action go out of time, that could not in my view be sustained and the criticism voiced in the notes to the reports of *Das* and *Corbin* would be justified. The Claimant must bear responsibility, as against the Defendant, for delays which have occurred, whether caused by his own default or that of his solicitors, and in numerous cases that has been accepted: see, eg, *Firman v Ellis* [1978] QB 886, *Thompson v Brown* [1981] 1 WLR 744 and *Donovan v Gwentoys Ltd* [1990] 1 WLR 472. The reason was articulated by Ward LJ in *Hytec Information Systems Ltd v Coventry City Council* [1997] 1 WLR 1666, a case of striking out, when he said, at p1675:

"Ordinarily this court should not distinguish between the litigant himself and his advisers. There are good reasons why the court should not: first, if anyone is to suffer for the failure of the solicitor it is better that it be the client than another party to the litigation; secondly, the disgruntled client may in appropriate cases have his remedies in damages or in respect of the wasted costs; thirdly, it seems to me that it would become a charter for the incompetent (as Mr McGregor eloquently put it) were this court to allow almost impossible investigations in apportioning blame between solicitor and counsel on the one hand, or between themselves and their client on the other."

(c) That said, whereas the Claimant will suffer obvious prejudice if the limitation period is not disapplied, this may be reduced by his having a cause of action in negligence against his solicitors. The extent of that reduction will vary according to the circumstances, but even if he has an apparently cast–iron case against the solicitors the factors referred to by Lord Diplock in *Thompson v Brown* at p 750 require to be borne in mind.

(d) Judge Cooke was urged to agree with the proposition accepted in *Morris v Lokass* (2003, unreported), that the loss should fall on the insurers who had accepted a premium for the risk which has caused the Claimant the relevant loss (the solicitor's professional liability insurers) and not on the MIB who have collected no such premium. The judge expressed himself as unpersuaded by that argument, and in my view he was correct in this. The MIB entered into their first agreement with the Minister of Transport in 1946 and the subsequent agreements for their own good reasons, and for the purposes of considering applications of the present nature they should not be regarded differently from motor insurers or professional liability insurers.

54. The judge carried out the exercise of balancing the prejudice on each side and concluded: "In my judgment that particular balance is a fairly fine one but I think it resolves into a finding (as I would make) that the MIB who have been on notice of the claim and have no problems over evidence that they did not have before are simply losing the windfall of a limitation defence while the Claimant has to bring yet further litigation against a new Defendant. So balanced I think it comes down in favour of the Claimant."

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1 [2007] 1 AC 307; [2006] UKHL 27

2 [1979] 1 WLR 606

3 It will be remembered that this had not been the approach of the Court of Appeal in *Firman v Ellis* [1978] QB 886 in relation to the old s.2D of the Limitation Act 1975

55. At the conclusion of the hearing I felt some doubt whether Judge Cooke's conclusion should be sustained. I was unsure that he had given sufficient weight to the strength of the appellant's case against his solicitors (which has been borne out by the fact that their insurers have already settled with him, but that fact post–dated the judge's consideration of the application and one should not take it into account now). I also felt that it might not be inappropriate to mark the fact that the solicitor's mistake was very elementary. Any solicitor who undertakes a road accident case for a Claimant has to be aware that he must serve notice on the insurers of the bringing of the proceedings to trigger their obligation to meet a judgment; and if there is no insurer on risk, involve the MIB and serve the necessary notice under clause 5(1) of the MIB Agreement of 21 December 1988. These are such basic requirements that failure to fulfil them can only be regarded as a serious piece of professional negligence.

56. On reflection, however, I have come to the view that Judge Cooke's decision should not be upset. It was carefully considered, by reference to the correct factors, and it is not for this House to reverse it lightly, whatever conclusion the several members of the Committee might have reached if hearing the application de novo. Nor do I think, on similar reflection, that the seriousness of the solicitors' error should weigh in the balancing exercise under section 33, which should assess the prejudice to the respective parties. I also consider that decisions by judges who deal regularly with applications of this nature should carry substantial weight, and that the Court of Appeal is well equipped to oversee them and lay down any necessary guidelines."

There have been several first instance decisions, and two relevant and helpful decisions in the Court of Appeal, since then. It is worth noting them in chronological order:

In Horton the Claimant had issued his proceedings a few days before the expiry of the applicable limitation period; however, the Defendant was uninsured and the Claimant had failed to notify the MIB correctly.

Sian Williams v (1) the Estate of JM Johnstone (2) BM Cooper Johnstone (3) MIB [2008] EWHC 1334 (QB) [02/05/08] went against the Claimant. This was a case, like *Horton,* where the second proceedings were instituted because in the first proceedings the Claimant's solicitors had failed to notify the MIB timeously. However, and very much unlike *Horton,* the intermediate history went against success in the s.33 application. Since the expiry of the primary limitation period 7 years had elapsed. After discontinuance of her claim, the Claimant had then pursued a professional negligence suit against her solicitors. There was a delay of a year post publication of *Horton* which was unaccounted for. The professional negligence claim was well advanced and the investigation of the Claimant's medical condition had been carefully progressed over the intervening years, but the MIB had not been involved in that process. If not expressly, then implicitly, the Judge was finding that the MIB would suffer severe disadvantage in trying to deal with the quantum claim, whereas that disadvantage did not occur in the professional negligence claim.

Susan Leeson v (1) Rachel Marsden (2) United Bristol Healthcare NHS Trust [2008] EWHC 1011 (QB) [13/05/08] was a decision of Cox J. Here the Claimant's clinical negligence claim had been lost when her solicitors had failed to serve her Claim Form within the limitation period by 1 day. At the end of a full appeal procedure her claim remained barred, and she began to proceed against her solicitors shortly after the decision in *Horton*. Then she decided to institute a second claim against the doctor and Trust. They contended that it was an abuse of process, essentially because of the court time expended in the appeal process in relation to the first claim. The Judge concluded that such an argument was an attempt to fetter the discretion under s.33; and that the Claimant's appeals had not been shown to be a "misuse" of the court's resources. She went on to consider the matters raised under s.33. She was impressed by the fact that the Defendants had had early notification of the claim and substantial opportunity to investigate it and meet it at a trial. Indeed, liability had been admitted in part. Furthermore, the First Defendant had failed to provide a letter of response under the protocol process. The judge concluded that since all the medical evidence was still available, and the Defendants had been in a good position to prepare their case before the lapse of the first claim, the Defendant had not suffered any real prejudice in the trial which could be undertaken fairly to both parties. Furthermore, in her professional negligence claim she would only recover a percentage of what she had lost. She allowed the application to disapply s.11.

In *Francis Hall v John Laing PLC* (Unreported but on Lawtel) [22/12/08] Judge Briggs allowed the disapplication of s.11 where the Claimant had brought a claim relating to asbestos exposure some 45 to 50 years earlier. It was issued within time, but his solicitors failed to serve it within time. 2.5 years later he issued fresh proceedings. The judge noted that the Claimant would have a good claim against his former solicitors but that he was likely to recover less than from the Defendant. The delay was not the Claimant's fault, and the claim was brought promptly after the decision in *Horton* had been published. The judge recognised that the real delay which prejudiced the Defendant was that between the negligence and the commencement of the original claim, but that was not the fault of the Claimant who was unaware of his condition during that time. The judge determined that the balance of prejudice weighed in favour of the Claimant.

Then, on the 18th December 2008, the Court of Appeal heard the conjoined appeals in *Stephen Cain v Bernice Francis and Shona McKay v (1) Stephen Hamlani (2) Direct Line Insurance Plc* [2008] EWCA Civ 1451. Both cases involved personal injury claims where liability was admitted early on, and because settlement was not possible, interim payments were made. In both cases the actions lapsed. In *Cain* the Claimant's solicitor overlooked service of the claim by one day in a case where he had asked the Defendants for an extension of time which they had rebuffed. In *McKay* the proceedings were issued in time, but were not served within the 4 months thereafter provided for in the Civil Procedure Rules.

In *Cain* it was contended that the judge at first instance had not applied the decision of the Court of Appeal in *Hartley v Birmingham City Council*[4] to the effect that the s.11 defence was a windfall which should weigh lightly

[4] [1992] 1 WLR 968, particularly look at p 972F; 979H; 982B. In *Hartley* the writ was issued 1 day late; and the application under s.33 was allowed on the basis that the s.11 defence was a "wholly fortuitous cast-iron technical defence to a claim , which in justice, they ought to meet"

[5] [1978] QB 886

[6] [1992] 1 WLR 968

[7] [1981] 1 WLR 744

in the balance; further that the judge had put too much weight on the fact that the Claimant had a claim over against the solicitor. It was pointed out that the Defendant had conceded that the cogency of the evidence had not been affected. In *McKay* the Defendant had advanced arguments to show a potential pecuniary prejudice if the claim was allowed to proceed, and that she had a claim against her solicitor for some damages. The judge weighed up these two heads of prejudice in favour of the Claimant.

Lady Smith gave the lead judgment. She went through the history of the cases dealing with s.33. It is possible to draw out two important principles from her judgment and that of the Chancellor of the High Court (Sir Andrew Morritt).

First, that in considering the prejudicial effect of the Defendant losing his limitation defence, one should return to the approach demonstrated in the cases of *Firman v Ellis*[5], and then *Hartley v Birmingham City Council*[6], and *Thompson v Brown*[7]. She reached this conclusion,

"It appears to me that there is now a long line of authority to support the proposition that, 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 section 33 discretion, should be regarded as either no prejudice at all (see *Firman*) or only a slight degree of prejudice (see *Gwentoys*). It is true that, in *Thompson*, Lord Diplock said that the accrual of the defence might be regarded as a windfall only where the delay in issuing proceedings was short. However, with great respect, it does not seem to me that the length of the delay can be, of itself, a deciding factor. It is whether the Defendant has suffered any evidential or other forensic prejudice which should make the difference."

It would appear, therefore, that in most circumstances, the loss of this fortuitous limitation defence ought not to count for very much.

However, the judgment also identified how "prejudice" to the Defendant (and to the Claimant) should be looked at. The prejudice with which she was concerned was "forensic prejudice"; in other words, has the relevant delay caused the Defendant to suffer "any evidential or other forensic prejudice which should make the difference". At paragraph 69 of her judgment she put it this way; *"The defendant, on the other hand, had an obligation to pay the damages due; his right was the right to a fair opportunity to defend himself against the claim. The operation of section 11 has given him a complete procedural defence which removes his obligation to pay. In fairness and justice, he only deserves to have that obligation removed if the passage of time has significantly diminished his opportunity to defend himself (on liability and/or quantum)."*

Sir Andrew Morritt put it succinctly:

"By subsection (1)(b) the court is required to have "regard to the degree to which – [such a decision]…would prejudice the defendant…". Thus the prejudice is to be ascertained on the assumption that the provisions of s.11 have been disapplied by an order made under s.33. The subsection does not direct the court to have regard to the prejudice the defendant would suffer from the very act of disapplication."

It would appear, then, that practitioners would be well advised to have in mind that early notification of both matters relating to liability and matters going to quantum will be of considerable advantage in those cases where the limitation period is pressing. The easier it is to show that the Defendant has had the opportunity to investigate and collate the defence, the harder it will be for that Defendant to show the relevant prejudice.

Secondly, any delay in commencing the second proceedings may be telling. Such delay, where it causes some real or significant forensic prejudice to a Defendant, will render it less likely that the court will disapply the effect of s.11 of the Limitation Act 1980.

In *McDonnell & Anr v David Walker (Executor of the Estate of Richard Walker, Decd)*[8] the Court of Appeal returned to this topic. Here the accident happened on the 24th April 2001, and a claim was intimated to the Defendant by end of July 2001. Liability was admitted in November 2001. There was delay caused by the Claimants' solicitors not being able to obtain instructions, so that the Claimants were not examined by their medical expert until nearly the end of the limitation period. A Claim Form was issued on 20th April 2004, but it was not served until 23rd August 2004, which was one day late. The Defendant would not accept service. The Claimants sought to escape by applying under CPR 7.6(3) for a retrospective extension of time, which failed.

The Claimants went to different solicitors, presumably contemplating suing their first solicitors. However, the new solicitors also experienced delay in obtaining the necessary client care letters. They were instructed in January 2005, but did not receive a signed client care letter until December 2006. Of course, *Horton* was decided in June 2006. For a variety of reasons, it was not until April 2008 that the second proceedings against the Defendant were commenced.

In these circumstances, it was crucial to decide what was the relevant delay or periods of delay. It is clear that the delay referred to in s.33 (3) is the delay post the end of the limitation period[9], but although any delay post-*Horton* may be significant, it does not follow that no, or little, delay post-*Horton* will get the Claimant off the hook, see Waller LJ from *McDonnell*: *"In particular it seems to me that the judge did think he was to concentrate on the 22 month period post-*Horton*. The impression given by identifying that period as the most material is that it seems to suggest that provided there is no delay post-*Horton*, a claimant should be able to succeed in a disapplication of the limitation period in any second action. That totally misunderstands the effect of* Horton *where the disapplication was granted in circumstances where a defendant could show no forensic prejudice whatever.* Cain v Francis *similarly supports the disapplication in a second action where there is no forensic prejudice, but if there is forensic prejudice, then where that prejudice is caused by inexcusable delay and where there is little if any prejudice to a claimant with an action against his solicitors the position will almost certainly be different."*

He went on to say, *"The delay which is relevant is the whole period since the accident occurred. Each period of delay needs separate consideration as to whether it was excusable."*

Finally, Waller LJ pointed to an anomaly, which is the stringent application of CPR 7.6 where none of the factors applicable under s.33 can alleviate the Claimant's predicament. Even where the Defendant has suffered no forensic prejudice, yet that claim must fail. He went on to say;

"But since the decision in *Horton* there is no doubt that there have been cases including *McKay v Hamlani* (considered by the Court of Appeal with *Cain v Francis* [2009] 3 WLR 551) in which time has been extended under s.33 in second actions where CPR 7.6 prevented an extension of time for service of a first action. Thus it cannot be said that in a CPR 7.6 case an extension of time for bringing a second action should never be granted, but it seems to me to be a relevant context and to at least show that it should not be easy for a claimant to commence a second action and obtain a disapplication of the limitation period under s.33."

It remains to be seen how the Court of Appeal will approach this situation in the many and varied circumstances which will come to light; but can it be the case that even in a CPR 7.6 case where the Defendant has suffered no forensic prejudice and the period of delay post limitation period is relatively small that no relief will be granted? I suspect not.

Adam C Chippindall

[8] [2009] EWCA Civ 1257

[9] See *Donovan v Gwentoys* [1990] 1 WLR 472 @ 478

Roll up, roll on

Copley v Lawn; Maden v Haller [2009] EWCA Civ 580

Practitioners familiar with the landscape of credit hire litigation may be forgiven for thinking that the courts have done very little to smooth the way either for the credit hire companies themselves or for the defendant's insurers. After *Dimond v Lovell, Clark v Ardington and Lagden v O'Connor*, we now find ourselves grappling with the implications of the decision of the Court of Appeal in *Copley v Lawn; Maden v Haller.*

The Background

Mrs Copley's car was damaged in an accident caused by Mr Lawn's negligence. Three days later she hired a replacement car on a credit hire basis. The same day she received a 'cold call' from Mr Lawn's insurer offering to provide her with a replacement car. Two days later she received a letter from the insurer repeating the offer. She passed the letter to her solicitor and continued to use the credit hire car.

Captain Maden's car was damaged in an accident caused by Mr Haller's negligence. The following day he received an offer of a replacement car from Mr Haller's insurer. He ignored the offer. About three weeks later he made an agreement for a replacement car on a credit hire basis.

The judge in Mrs Copley's case allowed only seven days hire on the basis that at the end of that period she should have cancelled the credit hire agreement and accepted the insurer's offer. The judge in Captain Maden's case dismissed the claim in its entirety on the basis that he should have accepted the insurer's offer.

On appeal the judge upheld the decisions at first instance on the basis that Mrs Copley and Captain Maden had acted unreasonably in rejecting the insurers' offers.

The Decision of the Court of Appeal

The Court of Appeal held that Mrs Copley and Captain Maden had not acted unreasonably in rejecting the insurers' offers since the offers did not state the cost to the insurers of providing the replacement cars and therefore Mrs Copley and Captain Maden were unable to make an informed decision in respect of mitigating their losses.

More broadly, the Court of Appeal was faced with two issues:

1. If a Claimant rejects the offer of a replacement vehicle by a Defendant's insurer has s/he failed to take all reasonable steps to mitigate her/his loss?
2. If the offer is unreasonably refused is the Claimant entitled to:
    a. the cost to the Defendant's insurer of providing the replacement vehicle (had the offer been accepted), or
    b. nothing?

On the first issue, the Court held that claimants and their advisers need to know the cost to insurers of providing a replacement vehicle. If the offer does not state the cost then it is not unreasonable not to accept the offer, but if the offer makes it clear that the replacement vehicle will cost less than the credit hire vehicle then, to quote Longmore LJ, '(other things been equal) it may well be the case' that the offer should be accepted.

On the second issue, the Court held that a Claimant who rejects a Defendant's insurer's reasonable offer of a replacement vehicle cannot be entitled to nothing since s/he has still suffered a loss. If a Claimant unreasonably rejects or ignores such an offer s/he is still entitled to the cost to the insurer of providing the replacement vehicle (had the offer been accepted).

The Court also held that (a) the practice of 'cold calling' is inappropriate, (b) Claimants should pass letters of offer to their advisers (i.e. solicitors, brokers or insurers) and (c) the courts should look at the combined position of Claimants and their advisers in deciding whether or not they have acted reasonably.

> *For insurers, (the decision) clearly establishes that offers to provide a replacement vehicle must be in writing and must state the cost to the insurer of providing the vehicle.*

The End of the Road?

What, then, may be learned from the decision of the Court of Appeal?

For insurers, it clearly establishes that offers to provide a replacement vehicle must be in writing and must state the cost to the insurer of providing the vehicle. No doubt any such offer should be made before the Claimant makes an agreement with a credit hire company since the rejection of an insurer's cheaper alternative once an agreement has been made may not constitute a failure to a reasonable step for the purpose of mitigation.

For credit hire companies, it clearly establishes that such offers must be considered by Claimants and their advisers since the courts will look at their combined position. No doubt credit hire companies will now redouble their efforts to place Claimants in vehicles before any such offer is made.

However, we must bear in mind the words of Longmore LJ: '[…] (other things been equal) it may well be the case that a Claimant should accept that lower cost replacement.' (emphasis added) What other things? No doubt this is a reference to other points of comparison between the credit hire vehicle and the insurer's vehicle and, where relevant, the Claimant's own vehicle: make and model, collision damage waiver, charges for delivery and collection and for additional drivers, and so on. Presumably this information must also be included in any offer made by an insurer. Practitioners are well aware that credit hire cases frequently turn on these seemingly small details. In this respect, the decision of the Court of Appeal leaves the landscape untouched. The credit hire bandwagon, it seems, is set to roll on.

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