



Recent Developments in Personal Injury Law and Relevant Cases

Liability

Workplace Regulations

Ellis v Bristol City Council

Court of Appeal 5 July 2007

[2007] EWCA Civ 685

Anthony Reddiford appeared for the Claimant.

The Claimant worked in an old people's home as a care assistant. Some of the residents of the home were incontinent and frequently urinated on the floors of the home. In particular, one corridor in the home was frequently soiled by a particular resident. The Claimant slipped and fell in a pool of urine on the floor and suffered injury. The Claimant's case included an allegation that the floor was not of suitable construction for the purpose for which it was used, contrary to regulation 12(1) of the Workplace (Health, Safety & Welfare) Regulations 1992, because it did not provide slip-resistance when wet. The Defendant contended that regulation 12(1) governed only the permanent state of the floor's construction and a floor could not become of unsuitable construction simply because it became unsafe due to a transient spillage upon it. The Court of Appeal allowed the Claimant's appeal. It held that, where the floor is frequently in a state where it is transiently wet, the court should consider whether it is of unsuitable construction because it does not offer slip-resistance when wet. On the facts of this case, the floor was frequently wet with urine and the floor surface must, therefore, offer slip resistance. The Defendant was in breach of the regulation.

On an ancillary point, the judge had declined to consider the Approved Code of Practice to the Workplace (Health, Safety & Welfare) Regulations 1992 when construing regulation 12(1). The Court of Appeal held that she was wrong to have done so and the ACOP was relevant to (but not determinative of) the proper meaning of the regulation.

Comment

This is a significant decision which adds scope to the effect of Regulation 12(1). Cases of spillages on a floor are often pleaded only under regulation 12(3) (duty to clear up spillages), which is subject to a reasonable practicability defence. Regulation 12(1), which affords no such defence, has been most used where the permanent state of the floor alone is criticised. The Court of Appeal's decision makes it plain that, provided spillages occur with sufficient frequency, the floor's susceptibility to become slippery when wet can put the employer in breach of regulation 12(1).

Work Equipment Regulations – Duty to anticipate accidents

Robb v Salamis (M and I) Limited

House of Lords 13 December 2006

In September 1999 the Claimant had been at work on an oil and gas production platform when he had attempted to descend from the top of a 2-tier bunk bed via a suspended ladder. However, the ladder had not been properly engaged within its retaining bracket and it had therefore fallen to the floor causing injury to the Claimant. At first instance the Judge had held, on the basis that there was no evidence in respect of previous accidents of this type, that it was not reasonably foreseeable by the Defendant that the ladder might not be fully engaged within its brackets. He therefore concluded that although the ladder was "work equipment" for the purposes of the Provision and Use of Work Equipment Regulations 1998 the ladder was in fact "suitable." "Suitable" is defined under the regulations to mean "suitable in any respect which it was reasonably foreseeable would affect the health and safety of any person."



The House of Lords held that when an employer was assessing risks to which his employees might be exposed when using work equipment it had to consider not only the skilled and careful man but also the contingency of carelessness and the frequency with which the contingency was likely to arise: *Hindle v Birtwistle* [1897] 1 QB 192 and *John Summers and Sons Limited v Frost* [1955] AC 740 considered. The employer's obligation was therefore to anticipate situations that might give rise to accidents. The employer was not permitted to wait for accidents to happen. Therefore, the Judge at first instance had misdirected himself.

Comment

This decision presents some assistance to the Claimant in cases where a Defendant relies heavily upon the fact that an accident was the first of its type. The key issues appear to be (a) the degree of risk that may arise in the event of carelessness and (b) the frequency of the opportunity for such carelessness to arise. On the facts it appears also to have assisted the claimant's case that the ladders could have been made completely safe simply by fixing them permanently to the bunk beds with screws. It could therefore be said that whereas the risk may have been small, it would have been cheap and simple to eliminate it completely.

Buildings Regulations – Application

Moon v Garrett

Court of Appeal 28 July 2006
[2006] EWCA Civ 1121

Selena Plowden appeared for the Claimant.

The Defendant, Mr Garrett, was carry out building works at his home. He had cleared a pit of rubble and he was intending to lay concrete beams over the pit and build a garage. At the time of the accident, the pit was just over 2m deep, and had a solid floor. The ground around the pit sloped slightly towards the edge of the pit. The Defendant had erected a fence round the pit that consisted of orange netting attached to metal stakes.

The Claimant was a delivery driver, who was delivering concrete blocks to the property. He parked his lorry on the track leading to the property and began to unload the blocks. He was about 6-10 feet away from the pit. As he was unloading the blocks, some of them became unstable and fell from the lorry, causing him to step backwards, stumble and fall, and then roll towards the pit. The netting offered no effective barrier. He fell in and suffered a serious back injury.

The Claimant brought his case in negligence/breach of the Occupiers' Liability Act 1957, and also under the Construction (Health, Safety and Welfare) Regulations 1996. At first instance, HHJ Lambert found that the Defendant was negligent and/or in breach of his duty under the Occupiers' Liability Act 1957 in failing to foresee the risk that someone might stumble and fall into the pit and in failing to guard against it by erecting a suitably strong fence around the pit. He also held that the Construction Regs did not apply.

The Defendant appealed on the issue of negligence/breach of the Occupiers' Liability Act 1957. The Court of Appeal dismissed his appeal.

However the Court of Appeal went on to consider, obiter, the Claimant's cross-appeal on the application of the Construction Regs. The question was whether the Claimant came within the class of persons to whom a duty was owed. Reg 3(1) provides that "... *these Regulations apply to and in relation to construction work carried out by a person at work.*" Reg 6(3), since revoked, sought to protect "*any person [who] is to carry out work at a place from which he is liable to fall a distance of 2 metres or more...*". The Defendant argued that because the Claimant was not himself engaged in construction work, he was not entitled to the protection of the regulations. The Claimant argued that a person involved in any activity arising out of or in connection with construction work was a person included within the definition of a "person



at work". The Court of Appeal acknowledged the force of the Claimant's submission and expressed the view, obiter, that the Claimant was "a person at work" within Reg 3(1) and therefore entitled to the protection of the regulations. The Court of Appeal gave, by way of analogy, the example of a workman who was carrying tea to his fellow employees on a construction site. Such a workman would also be entitled to the protection of the Regulations.

The case is also noteworthy on the question of costs. The Claimant had also sued his employer. That claim was dismissed at first instance, with the first defendant being ordered to pay the employer's costs (a *Sanderson* order). The Court of Appeal upheld this costs order. In doing so, it adopted passages from *Irvine v Commissioner of the Police for the Metropolis* [2005] EWCA Civ 129 which set out the relevant considerations, although it came to a different result to the Court of Appeal in *Irvine* (which had ordered that the claimant pay the costs of the successful defendants). In *Moon* the Court of Appeal said that these passages demonstrate that there are no hard and fast rules as to when it is appropriate to make a *Sanderson* or *Bullock* order. The question of who should pay whose costs is peculiarly one for the trial judge. In *Moon* the trial judge had taken into account the manner in which the first defendant had responded to the claim initially, misrepresenting that he had no insurance and was a man of straw. The trial judge had also taken into account the fact that the first defendant had sought to blame the employer. The trial judge concluded that the Claimant had acted reasonably in joining in his employer and in all the circumstances, it was appropriate that the first defendant should pay the employer's costs.

Comment

Although obiter, the comments of the Court of Appeal may pave the way for a broader application of the Building Regulations.

Whilst not relieving a claimant of the need to consider carefully whether or not to sue a particular defendant, if that decision is a reasonable one then *Moon* provides some comfort on costs in the event that the claim only succeeds against some of the defendants.

Asbestos – Pleural Plaques

Rothwell v Chemical & Insulating Co Ltd & Ors
House of Lords 17 October 2007
[2007] UKHL 39

The long awaited decision of the House of Lords on the question of whether pleural plaques caused by asbestos exposure are actionable, either on their own or when aggregated with the risk of future disease and consequent anxiety. The House of Lords also considered whether a different result ensued in the event that a claimant suffered not just anxiety, but a recognised psychiatric illness in consequence of being told that his pleural plaques indicated a significant exposure to asbestos and therefore a risk of future disease.

The House of Lords, dismissing the claimants' appeals, held that:-

- (i) Pleural plaques were not damage that could found a cause of action.
- (ii) Neither the risk of future disease, nor anxiety about the possibility of that risk materialising, amounted to damage for the purpose of creating a cause of action.
- (iii) Although the law allowed the risk of future disease and consequent anxiety to be taken into account in computing the loss suffered by someone who had actually suffered some compensatable physical injury, in the absence of such compensatable injury, there was no cause of action under which damages could be claimed and, therefore, there could be no computation of loss in which the risk and anxiety could be taken into account.



- (iv) The pleural plaques did not amount to damage when aggregated with the risk of future disease or anxiety. It was not possible, by adding together two or more components, none of which in itself was actionable, to arrive at something that was actionable.
- (v) The Supreme Court Act 1981 s.32A, which allowed a claimant to obtain provisional damages where there was a chance that a serious disease would develop in the future, did not support the aggregation theory. The provision made it clear that it applied only where the claimant had a cause of action.
- (vi) In the appeal where the claimant had developed a recognised psychiatric illness, the claim failed on the ground that it was not reasonably foreseeable that the creation of a risk of an asbestos-related disease would cause psychiatric illness to a person of reasonable fortitude.

An Independent Contractor can owe a Duty of Care to Employees of its Sub-Contractor

Gray v Fire Alarm Fabrication Services and Others
Court of Appeal 10 November 2006

In approximately 2000 Thistle Hotels Limited appointed Humphries as the main contractor for electrical work to be carried out in its hotel. Humphries subcontracted the installation of a fire alarm system to Fire Alarm Fabrication Services (“FAFS”). In January 2001 Mr Gray, an engineer employed by FAFS, fell through a skylight window and sustained fatal injuries. The Claimant sued FAFS, and they in turn sought a contribution from Humphries and Thistle Hotels Limited.

The Court held that in certain circumstances both an independent contractor and an occupier of a building could owe a duty of care to the employee of a subcontractor. Considering both *Ferguson v Welsh* [1987] 1 WLR 1553 and *Makepeace v Evans Brothers (Reading)* [2000] BLR 737 the Court held that where an independent contractor had subcontracted work the question of whether the independent contractor owed a duty of care to employees of its subcontractor was one of mixed fact and law. However, it was unnecessary and unhelpful to formulate any specific test for deciding when such a duty arose. Following *Bottomley v Todmorden Cricket Club* [2004] PIQR P275 the facts of each case were to be tested by applying the range of tests for identifying legal duty of care which the House of Lords had developed in the years that followed *Ferguson v Welsh*. On the facts of this case a duty of care did exist because Humphries had agreed contractually with FAFS to carry out work with close liaison with Humphries’ contracts manager. Humphries therefore had a right to supervise the work in order to ensure it was carried out safely. That right imposed on Humphries a duty of care which extended to the employees of FAFS.

However, on the facts it was found that neither Humphries nor Thistle were in breach of any duty of care owed to the deceased. Accordingly, it was not necessary to decide whether Thistle owed a duty of care.

Comment

This case will obviously be of significant interest to Defendants. Given the ever expanding rigours of (for example) the Construction, Design and Management Regulations one is more likely to find closer control provided for within a chain of contractors and subcontractors. In some situations the degree of contractual control may give rise to a duty of care as outlined above. In this situation claims for a contribution may be possible in order to defray the costs of a claim.



Self Defence

Ashley and Another v Chief Constable of Sussex Police
Court of Appeal 27 July 2006

The claim arose out of the fatal shooting of James Ashley by the Sussex Police on 15 January 1998. The police defended the claim for battery (the shooting) on the basis that the officer involved was acting in self defence. The question then arose in respect of whether the burden of proving self defence was on the Claimant or the Defendant. The Court held that whereas the criminal law had been reformed following the Criminal Law Revision Committee's 14th Report "Offences against the Person" 1980 in fact the civil law has remained unchanged.

Accordingly, in criminal proceedings the burden of negating self defence was on the Prosecution, whereas in civil proceedings the burden was on the Defendant to establish self defence. In criminal proceedings a Defendant who mistakenly but honestly believed that it was necessary to act in self defence was entitled to be judged on the basis that his mistaken belief was true. In civil proceedings, however, his belief had to be both honestly and reasonably held. The action taken in self defence has to be reasonable in both criminal and civil proceedings but, in judging what was reasonable, the Court had to have regard to all the circumstances of the case, including the fact that the action might have to have been taken in the heat of the moment.

Uninsured Driver – Knowledge – Motor Insurers Bureau

Phillips v Rafiq and Another
Court of Appeal 14 February 2007

The claim emanated from a road traffic accident whereby the Deceased's widow brought a claim under the Fatal Accidents Act 1976 following the death of her husband. The Deceased was killed in a road traffic accident when he knew the driver of the vehicle was not insured. The Claimant brought a claim against the MIB under the Motor Insurers Bureau (Uninsured Drivers) Agreement 1999. The MIB resisted the claim on the basis that clause 6 provided an exception to liability given the state of the Deceased's knowledge.

The Court observed that the wording of the 1999 agreement differed from that of the 1988 agreement in that the 1988 agreement had excepted the Bureau from liability where the person suffering death had allowed himself to be carried in an uninsured vehicle whereas the 1999 agreement contains different wording, namely "by a Claimant who, at the time of the use giving rise to the relevant liability was voluntarily allowing himself to be carried in the vehicle." Clearly, in a derivative claim such as a Fatal Accident Act claim the "Claimant" was a person other than the "person suffering death." The Court concluded that the crucial differences in the language introduced by the 1999 agreement showed that the parties to the agreement had clearly wished to make a different provision. Accordingly, the exception did not apply on the facts of the case.

Comment

This case represents a serious problem for the MIB (unless, of course, the MIB intended the wording of their agreement to reflect this result!) because a significant number of fatal road traffic accidents are likely to result in a situation whereby the dependants bringing the claim under the 1976 Act will not have had knowledge of the driver's insurance status. Remember also that following *White v White* [2001] UKHL 9 the words "knew or ought to have known that the driver was uninsured" are not sufficient to accept a passenger who gave no thought to the question of insurance or who was careless or negligent in respect of this issue.



Procedure

Withdrawal of Pre-Action Admission of Liability

Walley v Stoke on Trent City Council
Court of Appeal 31 July 2006

Following *Sowerby v Charlton* [2006] 1 WLR 568 CPR 14.1(5) (which provides that the permission of the Court is required to amend or withdraw an admission) only applies to admissions made in the course of proceedings and not pre-action admissions.

However, the Court did have power in circumstances where a Defendant wished to withdraw a pre-action admission once proceedings had commenced, to strike out a Defence under CPR 3.4(2) as an abuse of process or as being otherwise likely to obstruct the just disposal of the case.

For a Claimant to show that the withdrawal of an admission would amount to an abuse of process of the Court it would usually be necessary to show that the Defendant has acted in bad faith. In order to show that the withdrawal was likely to obstruct the just disposal of the case it would usually be necessary for the Claimant to show that he would suffer some prejudice which would affect the fairness of the Trial.

On the facts of *Walley* the Claimant was not able to establish abuse of process or any prejudice. Accordingly, the Defendant had given permission to withdraw the admission.

Comment

The decision in *Sowerby* provoked considerable controversy because it permitted a defendant to withdraw a pre-action admission upon commencement of proceedings without needing the permission of the Court even though the Claimant had (a) relied on the admission; (b) therefore not investigated the issue of liability and (c) thereby sustained significant prejudice as a result of the delay. Claimants were put in the invidious position of having to investigate liability even though it had been admitted knowing that in most cases a Defendant would argue that such costs were not reasonably incurred in the face of the admission.

Fortunately, on 6 April 2007 rule 14.1A was inserted into the CPR dealing expressly with pre-action admissions. However, the rule is not retrospective and therefore the decisions in *Sowerby* and *Walley* continue to apply to pre-action admissions made before 6 April 2007. For admissions made after this point in time a Defendant may only withdraw an admission by agreement or with permission of the Court. Paragraph 7.2 of the Practice Direction to part 14 sets out a checklist of factors (including "all the circumstances of the case") which the Court must take into account in exercising its discretion.

Expert Evidence in Low Velocity Road Traffic Collision Cases

Casey v Cartwright
Court of Appeal 5 October 2006

In *Kearsley v Klarfeld* [2006] 2 All ER 303 the Court of Appeal provided guidance in relation to low velocity road traffic collisions where the Defendant contended that no injury could have been sustained in the face of a claim where whiplash was alleged. Following on from this decision the Court of Appeal provided further guidance in relation to the use of expert evidence.

The question of whether expert evidence on causation should be admitted only arose where a Defendant contended that the nature of the impact was such that it was either impossible or very unlikely that the Claimant could have sustained a significant injury. If a Defendant wished to raise that issue he should:



- (a) Within 3 months of the letter of claim notify all the other parties that he intended to do so.
- (b) The issue should be expressly identified in the Defence which should be supported as usual by a statement of truth.
- (c) Within 21 days of serving the Defence the Defendant should serve on the Court and other parties witness evidence identifying the grounds on which the issue was raised.

If satisfied that the issue had been properly raised the Court could then give permission for the Claimant to be examined by the Defendant's medical expert. If the medical evidence then showed that the Defendant had a real prospect of success on the issue of causation the Court would generally give the Defendant permission to rely on it at Trial. However, permission might be refused if the overriding objective required it. Permission would generally be refused if the issue was not raised within 3 months of the original claim or if there was a factual dispute whose resolution was likely to resolve the causation issue so that the expert evidence would serve little purpose. Permission might also be refused where the injury alleged and the damages claimed were disproportionately small compared with the extent and complexity of the expert evidence.

Limitation

Limitation – Knowledge to be Assessed Objectively

Young v Catholic Care (Diocese of Leeds) and Another
Court of Appeal 22 November 2006

The Claimant alleged that during the 1970's he was abused by employees of the Defendant. A chance encounter in 1996 reawakened knowledge of the abuse otherwise repressed due to PTSD. However, the Claimant did not institute proceedings until 2003. Limitation was tried as a preliminary issue whereby the Judge found that the Claimant first knew he had suffered significant injuries attributable to the Defendant's acts for the purposes of section 14 of the Limitation Act 1980 when he spoke to police at the end of 2000.

In *KR v Bryn Alyn Community Holdings Limited* [2003] QB 1441 the Court of Appeal set out a substantially subjective test for deciding whether a Claimant would reasonably have considered an injury to be sufficiently serious to justify his instituting proceedings within the meaning of section 14(2) of the 1980 Act. However, in *Adams v Bracknell Forest Borough Council* [2005] 1 AC 76 the House of Lords held that a substantially objective test was to be applied when deciding what knowledge a Claimant might reasonably have been expected to acquire within the meaning of section 14(3) (b).

The decision in *Adams* compelled the conclusion that the Court of Appeal had adopted the wrong test in *Bryn Alyn*. Accordingly, the Court held that it would be a question of fact in every case whether, having regard to (a) the Claimant's knowledge of the seriousness of the injury and (b) the inhibiting and other consequences of the injury for the Claimant, at the date of knowledge he would reasonably have considered the injury to be sufficiently serious to justify his instituting proceedings.

On the facts, given that the Claimant knew the injuries were significant shortly after December 1996, his claims were statute barred.

Comment

The test in this scenario appears now to be partly subjective and partly objective. Thus in asking whether a Claimant would reasonably have considered his injury sufficiently serious to justify instituting proceedings it is necessary to consider:



- (a) The Claimant's personal knowledge of the seriousness of the injury.
- (b) The inhibiting and other consequences of the injury for the Claimant (including, for example, the psychiatric repression of memories) but thereafter
- (c) In the light of the subjective issues to consider whether from an objective point of view whether he should have considered it sufficiently serious to justify the institution of proceedings.

Please note, however, *McCoubrey v MOD* decided only nine weeks later below which doubts this decision.

Limitation – Knowledge

McCoubrey v Ministry of Defence
Court of Appeal 24 January 2007
[2007] EWCA Civ 17

The MOD appealed against the decision that the Claimant had brought a personal injury claim in time pursuant to section 11(4) (b) of the Limitation Act 1980. In 1993 the Claimant sustained hearing loss when a thunder flash exploded near him. This was confirmed by an audiogram in 1994. Subsequent audiograms showed that the damage remained consistent. However, this did not affect his career until 2001 when he was temporarily downgraded. He was formally downgraded in 2003 and told that he was likely to be permanently excluded from active service. In 2004 he issued proceedings. The Claimant relied on both section 11(4) (b) (date of knowledge of significant injury) and section 33 (disapplication of limitation period) of the Limitation Act 1980. The Judge at first instance held that the effect of the Claimant's injuries did not have a significant impact on him until the MOD restricted his activities in 2001.

Held the law had changed. The test under section 14(2) was substantially objective and not the mixture of subjective and objective in the way in which the analysis of Lane LJ in *McCafferty v Metropolitan Policed District Receiver* [1977] 1 WLR 1073 indicated. The question of whether an injury was "significant" within section 14(1) (a) as expanded by section 14(2) was to be decided by reference to the seriousness of the injury and not by reference to its effect on the Claimant's private life or career and still less by reference to its subjectively perceived effect on the Claimant's private life or career. *Catholic Care [Diocese of Leeds] v Young* [2006] EWCA Civ 1534 and *Adams v Bracknell Forest BC* [2004] UKHL 29 applied, *KR v Bryn Alyn Community Holdings Limited* [2003] EWCA Civ 85 doubted.

Accordingly, section 14(2) had a comparatively limited application. Given the power of section 33 to extend the limitation period section 14(2) should be relatively narrowly construed.

The person contemplating section 14 was a person who was in the same position, in objective terms, as the Claimant. That test was objective but it did not prevent the objective circumstances of the Claimant being taken into account, as opposed to personal characteristics like intelligence, ambition and personality which could not be taken into account. The proper approach to the question raised by section 14(2) was to consider the reaction to the injury as opposed to its possible consequences of a reasonable person in the objective circumstances of the actual Claimant while disregarding his actual personal attributes. The Judge below had therefore been in error and the case would be remitted for him to consider the application under section 33.



Limitation - MIB Uninsured Drivers Agreement

Richardson v Watson and Another
Court of Appeal 6 December 2006

The Claimant brought a personal injury action against an uninsured driver but failed to give necessary notice to the MIB pursuant to clause 9. The MIB relied upon the failure to give notice and accordingly the Claimant discontinued the claim and commenced a fresh action outside the limitation period. The Court held that there could be no objection in principle to a claim of discontinuing proceedings and commencing a fresh action in these circumstances so long as timely notice was given to the MIB in the second action. Given that the MIB agreement required notice in order to avoid the entry of default judgment rather than to prevent stale claims, the giving of notice in the second action would remove any prejudice the MIB might otherwise suffer as a result of the late notice.

Of course the second action was subject to the Limitation Act 1980. However, the Court held that it would be equitable not to apply the limitation period but to allow the Claimant's action nonetheless to proceed by exercising the Court's discretion under 33 of the 1980 Act.

Quantum

Fatal Accidents Act 1976 Section 4 – Death in Service Benefits – Benevolence of Third Parties

Arnup and Arnup v M W White Limited
QBD 27 March 2007
[2007] EWHC 601

The Claimant pursued damages for dependency and other losses under the Fatal Accidents Act following the death of Mr Arnup. Liability was admitted. However, the Claimant contended that two payments were benefits accruing as a result of Mr Arnup's death so that by section 4 of the Act they should not be accounted for in assessing damages. The first payment of £129,600 had been paid to the Claimant in respect of Mr Arnup's death benefits scheme. The second amount of £100,000 had been paid in respect of benefits received under a life policy from the Defendant's employee benefits trust.

Held: the essential question in the instant case was whether either or both payments accrued as the result of Mr Arnup's death. That was a question of causation.

The £129,600 had become payable under the death in service policy on Mr Arnup's death but payable to the Defendant not the Claimant. Under the scheme rules the Defendant could not keep the sum but had to pay it out. In the circumstances, what had caused the payment of £129,600 to the Claimant was the decision of the Defendant to pay that sum to her and not the death of Mr Arnup. Accordingly, it could be taken into account.

The £100,000 also became payable under the life policy on the death of Mr Arnup to the employee benefit trust. The trust did not have to pay the money on to anyone. It could have added it to the trust fund. The £100,000 had been paid as a result of the trust's decision to pay that to the Claimant. Accordingly, that also was not a payment that accrued as a result of Mr Arnup's death. However, the payment of £100,000 did fall within the scope of the exception for benevolent payments. The trust was a third party independent of the Defendant with an unfettered discretion as to how to deal with the assets of the trust fund. Accordingly, the £100,000 would not be taken into account.



Comment

This case demonstrates that in respect of payments made as a result of someone's death it is often fruitful to examine in detail the precise mechanism of the payment and the background of the cause of the payment. Crucially, on the facts there was no evidence that the Claimant himself had contributed towards the cost of the death in service benefit or the life policy otherwise the Claimant could have claimed that she was entitled to benefit from that contract of assurance without those sums being taken into account to offset the Defendant's liability.

Periodical Payments – Appropriate Indexation Section 2 Damages Act 1996 – five further decisions following *Flora v Waykom*

Thompstone v Tameside and Glossop Acute Services NHS Trust
[2006] EWHC 2904
QBD Manchester (Swift J) 23 November 2006

The Claimant suffered spastic quadriplegic cerebral palsy as the result of oxygen deficiency at birth. The NHS admitted liability and agreed lump sums in settlement of all heads of damage save losses of earnings and care costs. The Claimant argued for periodical payments linked not to the retail price index but to the average earnings index or the Annual Survey of Hours and Earnings (ASHE): median earnings level index or the ASHE: occupation earnings for care assistants and home carers index (ASHE 6115) because those indices more accurately reflected increases in wages payable to carers.

The NHS argued that the burden of proof lay on the Claimant, that a periodical payments order linked to the RPI was appropriate and that indexation to other indices would result in overcompensation.

The Court held that its duty was to decide what form of order would best meet the Claimant's needs and so far as sections 2(8) and 2(9) of the Damages Act were concerned to determine what was appropriate, fair and reasonable. Those questions did not lend themselves to determination by way of the burden of proof. If the Claimant did bear a burden of proof it was an evidential one – namely an obligation to adduce evidence sufficient to establish that the RPI was an inappropriate indexation and that there was at least one alternative more appropriate measure available. Further, there was a strong possibility that the earnings levels of the type of carers who would care for the Claimant would grow at a significantly faster rate than the RPI. Therefore, indexation of care costs to the RPI was unlikely to meet the Claimant's needs and could not be described as fair, reasonable or appropriate. However, use of the average earnings index would be likely to lead to overcompensation. Use of the ASHE would be likely to reduce in overcompensation albeit to a lesser degree than the average earnings index. In the circumstances, indexation by reference to ASHE 6115 would provide a reasonable and accurate indicator of the growth of the earnings of the Claimant's carers. It would be appropriate, fair and reasonable under section 2(9) to modify the effect of section 2(8) by providing for the amount of payments to vary by reference to the 75th percentile of ASHE 6115. *Flora v Waykom (Heathrow) Limited* [2006] EWCA Civ 1103 applied.

John Corbett v South Yorkshire Strategic Health Authority
QBD 28/3/2007

The health authority admitted liability and agreed all heads of loss save care and case management in respect of a claim brought by the Claimant who sustained brain injuries at birth. The Claimant required almost constant supervision given that he did not have an established sleep pattern. The health authority contended that:

- (1) The Claimant's care should be provided by two live-in carers provided through an agency who would work alternative periods of a week or more with respite care for 3hrs a day provided by another carer.



- (2) That the future periodic payments for the cost of this care regime should be indexed by reference to the Annual Survey of Hours and Earnings 6115 earnings related index rather than the retail price index.
- (3) That the Court has no power under section 2(8) and 2(9) of the Damages Act 1996 to use an indexation measure other than the RPI. Further, it contended that periodical payments linked to an earnings related index would unduly impact upon NHS patients given the local authority's limited resources.

The Court held:

- (1) The regime favoured by the Claimant (a team of support workers) was appropriate for the Claimant. (It is interesting to note that the Court appears to have preferred the Claimant's regime not only because the Defendant's regime involves the carers working significantly long hours which was a regime viewed as not being in the Claimant's best interests but also because the Defendant's regime conflicted with the Working Time Regulations 1998. The Defendant did not adduce evidence that there was a collective or workforce arrangement (side-stepping the Working Time Regulations). Accordingly, the Courts concluded that the Defendant's regime could not be implemented within the law).
- (2) Section 2(9) of the Act did include the power to dis-apply the indexation provision otherwise the words in section 2(9) would be without reference (*Flora v Wakom (Heathrow) Limited* (2006) EWCA Civ 1103 and *Thompstone v Tameside and Glossop Acute Services NHS Trust* (2006) EWHC 2904 applied).
- (3) It was not just or practicable for the Court to adopt different approaches to the appropriate indexation measure by reference to the identity of the Defendant. Such an approach was contrary to authority: *White v Chief Constable of South Yorkshire* [1999] 2 AC 455 and *McFarlane v Tayside Health Board* [2000] 2 AC 59 considered, *Heil v Rankin* [2001] QB 272 applied. The Defendant's argument based upon competing resources breached the principle that damages should be calculated to achieve as closely as possible full compensation for the Claimant therefore the Court selected as an appropriate index 70% of the ASHE index rather than the RPI.

Sarwar v Ali and MIB
[2007] EWHC 1255

A 17 year old was severely injured in a road traffic accident. Liability was agreed 75/25 in his favour. The court was asked to assess his losses. S contended for a lump sum award but, if a periodical payments order was to be made it should be linked to an index other than the RPI.

The court held that all heads of loss should be awarded by way of a lump sum save future losses of earnings, care and case management. When allowance was made for contributory negligence this method was more likely to secure the claimant's position. S was assessed as someone who would have become a professional with average lifetime earnings of around £55,000 per annum and who would have retired at 68. Following *Flora v Wakom (Heathrow) Limited* (2006) EWCA Civ 1103 the court used as an index the ASHE aggregate for male full-time employees at the 90th percentile. In respect of care ASHE 6115 would be utilised, again at the 90th percentile.

RH v United Bristol Healthcare NHS Trust
[2007] EWHC 1441

The claimant suffered brain damage at birth. Liability was admitted and the quantum of the claim, if assessed on a lump sum basis, was agreed. However, if part of the award was to be made by way of periodical payments order the parties could not agree the appropriate indexation to be used. The Defendant contended for the RPI and the claimant for either the average earnings index, ASHE or ASHE 6115.



Applying *Thompstone*, and considering *Corbet* and *Sarwar* the court held that it was compelled to find a more suitable index than the RPI and therefore applied ASHE 6115 (at 80th percentile for ages 6-19 and 75th percentile from 19 onwards).

Comment

It appears that the tide is flowing against defendants on the issue if the appropriate indexation for periodical payments for care. It remains to be seen whether, in the light of these decisions, a further case will be taken to the Court of Appeal. Given some of the comments made in *Flora* (Brooke LJ) many take the view that a more restrictive interpretation of s. 2 of the Damages Act is unlikely.

Costs

Costs Successful Party's Dishonest Conduct – Appropriate Deduction

North Star Systems Limited and Sequest Systems Limited and Ultraframe (UK) Limited v Fielding and Others

Court of Appeal 6 December 2006

2006 EWCA Civ 1660

Ultraframe appealed a costs order made in proceedings where Fielding had been successful but had also been found guilty of serious dishonesty by attempting to maintain forged documents. Ultraframe considered that by reason of *Aaron v Shelton* [2004] EWHC 1162, [2004] 3 All ER 561 it would be precluded from referring upon detailed assessment to the finding of dishonesty when the costs incurred by the dishonest party fell to be considered.

The Court of Appeal held, doubting *Aaron v Shelton*, that where a paying party had in his favour a finding that the successful party had been dishonest and raised that factor as a ground for a reduction of costs at the end of the Trial and the Judge ordered a reduction, the natural construction of that order, unless the contrary was expressly stated, was that the party guilty of dishonesty should not be entitled to argue on assessment that the costs incurred in seeking to make a dishonest case could be taken as reasonably incurred because the Judge had made a reduction. Consideration of a party's conduct should normally take place both at (a) the stage when the Judge was considering what orders for costs he should make and, also (b) during assessment. However, the dishonest party should not be susceptible to double jeopardy and it would therefore be advisable for a Judge to make clear whether he was making the order on the basis that the paying party would still be entitled to raise the dishonesty point on assessment.

Comment

The decision in *Aaron v Shelton* has led many Defendants to insist that (whether a costs order is made by a Trial Judge following Trial or simply between parties as part of a compromise agreement) that it is necessary within the Order or settlement agreement to deal with the question of conduct or otherwise expressly reserve it for the detailed assessment. This decision appears to clarify the position. However, claimants facing such arguments should be careful to ensure that they do not suffer a double reduction – a percentage reduction and the disallowing of the costs of an issue when in reality both penalties cover the same conduct.



Conditional Fee Agreements – Enforceability – Loss to Client not Required

Garrett v Halton Borough Council
Myatt and Others v National Coal Board
Court of Appeal 18 July 2006

In *Garrett* the Deputy District Judge at first instance found that the solicitors when recommending after the event insurance had failed to inform the Claimant that they had an interest in doing so contrary to regulation 4(2) (e) (ii) of the Conditional Fee Agreement Regulations 2000.

In *Myatt* Master Wright in assessing costs on a detailed assessment found that the Claimants' solicitors had not informed the Claimants whether they considered that the Claimants' relevant before the event legal expenses insurance cover in breach of regulation 4(2) (c) of the Conditional Fee Agreements Regulations 2000.

Giving the Judgment of the Court Lord Justice Dyson held that there were two questions to be answered. These were:

- (1) Did the test in *Hollins v Russell* [2003] 1 WLR 2487 (paragraph 107) "has the particular departure from a regulation ... had a materially adverse effect either upon the protection afforded to the client or upon the proper administration of justice?" require the Court to consider whether the solicitors client had suffered actual prejudice as a result of an alleged failure to satisfy the conditions? and
- (2) Was a conditional fee agreement's enforceability to be judged by reference to the circumstances existing at the time when it was entered into or to those existing when the question arose?

In stark contrast to the Claimant friendly decision in *Hollins* it was held that the language of section 58(1) and (3) of the Courts and Legal Services 1990 Act was clear and uncompromising – if one or more of the conditions was not satisfied the conditional fee agreement was unenforceable. It would be fallacious to say that a breach was trivial or not material simply because it did not in fact cause loss to the client in a particular case. Further, there was no reason to depart from the general rule that the legal character of a contract must be determined at its commencement and subject to the principle of *de minimis non curat lex* a breach was a breach even if it caused no loss.

Accordingly, in *Garrett* the solicitors were found to be in breach of regulation 4(2) (e) (ii) (which provides that the solicitors should have informed the Claimant whether the solicitors had an interest in recommending a particular contract of after the event insurance) because (a) the solicitor was on the insurers "panel" and there was therefore an interest to the solicitor in recommending the insurance because it assisted in maintaining a flow of work to the solicitor and (b) the solicitors gained a commission on the insurance premium. Accordingly, the solicitors had not disclosed the real financial interest they had in recommending a particular policy and they were rightly found in breach of regulation 4(2) (e) (ii).

In *Myatt* the solicitors had asked their clients (ex-miners) to decide whether they had before the event insurance which would cover legal expenses. The solicitors should have taken reasonable steps themselves to ascertain the true insurance position so as to be able to inform their clients whether they considered that the risk was already insured (regulation 4(2)(c) requires that the client must be provided information about whether the legal representative considers that the client's risks of incurring liability for costs...is insured against under an existing contract of insurance). Accordingly, the solicitors had asked the wrong question and had thereby failed to provide the appropriate information. Vitaly, even though none of the miners in question had before the event insurance the Court held that there was nonetheless a material breach of regulation 4(2)(c).



On the question generally of the steps required of a solicitor in ascertaining whether before the event insurance exists in respect of a client the Court held that it was not possible to give rigid guidance. Guidance had already been provided by the Court of Appeal in *Sarwar v Alam* [2002] 1 WLR 125 but solicitors were not required slavishly to follow that guidance. In determining what was reasonably required of a solicitor a number of factors could be relevant including (a) the nature of the client; (b) the circumstances in which a solicitor was instructed; (c) the nature of the claim; (d) the costs of the after the event insurance; (e) if the issue had been referred to solicitors who were on a panel, the fact that the referring body had already investigated the question of the availability of before the event insurance.

Comment

There can be no question that this decision marks a softening of approach by the Court of Appeal to arguments advanced by Defendants in relation to the enforceability of CFA agreements. The decision in *Hollins* (Brooke, Hale and Arden LLJ) held expressly that in determining whether the 2000 regulations had been satisfied it was appropriate to consider whether any alleged breach had a materially adverse effect upon the protection afforded to the client or upon the proper administration of justice. It is difficult to see how in circumstances where a particular Claimant does not have before the event insurance failure to advise him of this fact can have led to such a result. For example, a memorable sentence from *Hollins* is “in future District Judges and Costs Judges must be equally astute to prevent satellite litigation about costs from being protracted by allegations about breaches of the CFA Regulations where the breaches do not matter...”

It is also important to remember that the Conditional Fee Agreements Regulations 2000 do not apply to conditional fee agreements entered into after November 1 2005. However, that will still leave for many Claimant solicitors a substantial number of cases in progress where these points may be taken. Of particular concern are cases which were handled by claims management companies in the early stages, particularly where the pre-CFA inquiries were carried out by these entities.

Indemnity Principle not Applicable to Fixed Recoverable Costs

Butt v Nizami; *Butt v Kamuludn* QBD 9th February 2006

Mr Butt (the defendant at first instance) appealed against a Cost Judge’s decision that entitlement to fixed recoverable costs under CPR 45.9 and a success fee under CPR 45.11 did not depend on the existence of an enforceable conditional fee agreement. CPR 45.9 relates to fixed costs allowed in road traffic accident cases where damages of less than £10,000 are agreed. Mr Butt’s Solicitors were concerned that the Claimant’s Solicitors had failed to make appropriate inquiries about the availability of before the event insurance and sought a direction that the Claimant’s Solicitors certify compliance with the Conditional Fee Agreement Regulations 2000.

It was held that the intention of CPR Part 45 was to provide an agreed scheme of recovery that was certain and easily calculated by providing fixed levels of recovery which might over reward in some cases and under reward in others but which were regarded as fair when taken as a whole. It was therefore clear that the indemnity principle should not apply to the figures that were recoverable and there was therefore no reason why the indemnity principle should have any application to CPR 45.9 and 45.11. In seeking costs under CPR Part 45 the receiving party had only to demonstrate that the conditions laid down under the rules had been complied with. It did not have to demonstrate a valid retainer between Solicitor and client.



Costs - Conditional Fee Agreements - Fixed Success Fees – CPR 45.16

Lemont v Burton

Court of Appeal 9 May 2007
[2007] EWCA Civ 429

The Claimant bought a claim following a road traffic accident. His Solicitors were instructed under a conditional fee agreement which provided for a success fee. The Defendant admitted liability and advanced a Part 36 payment which was not accepted by the Claimant. At Trial the Claimant secured a sum less than the Part 36 payment. Accordingly, the Judge awarded the Claimant his costs up until the latest day upon which the Part 36 payment could have been accepted. However, pursuant to CPR 45.16 (fixed percentage increases in road traffic claims) the Judge awarded the Claimant's solicitors a 100% success fee. It was agreed that the Claimant's claim had concluded at Trial and the issue was whether the 100% success fee was mandatory in all cases or whether there was a discretion to vary it. The Defendant argued that although CPR 45.16 did not itself give the Court jurisdiction to allow a different percentage it was a pre-condition to the application of CPR 45.16 that the Court should have first exercised its discretion under CPR 44.3 (Court's discretion and certain circumstances to be taken into account when exercising its discretion as to costs). Where a Claimant has failed to better a Part 36 offer or payment the Court should award a success fee no greater than it would have been under CPR 45.16 had the offer been accepted, namely 12.5%.

Held: the court could not use CPR Rule 44 to circumvent the mandatory provisions of CPR Rule 45. It could neither directly award a different success fee nor award a Claimant a proportion of his costs calculated for the purpose of awarding a different success fee. Otherwise, the whole of the Part 45 scheme would be unraveled.

Comment

In common with *Butt v Nizami* this is an example of the rigorous application of Part 45 such that it produces an unfair result in an individual case. Could the Defendant have avoided this difficulty? It seems not.

Costs – dishonest conduct - assessment

Lahey v Pirelli Tyres Limited

Court of Appeal 14 February 2007
[2007] EWCA Civ 91

The Claimant accepted within the relevant time limit a Part 36 payment of £4,000 in compromise of his personal injury claim. The Defendant served points of dispute asserting that the Claimant's original claim relying on a competitive strain injury had been abandoned and that the Defendant had made an offer of £5,000 before proceedings had been issued. The Defendant asked the Costs Judge to make an Order that the Claimant should be awarded only 25% of his assessed costs. The Costs Judge refused.

On appeal it was held that the Costs Judge did not have jurisdiction to make a percentage reduction of assessed costs given the mechanics of Part 36. Upon acceptance of a Part 36 payment a Costs Order was deemed to have been made on the standard basis. Accordingly, the Claimant was entitled to 100% of his assessed costs and the Court had no power to vary that Order. That situation was unlike the situation where under Part 3.1(7) the Court had the power to vary an existing Order - that power was only exercisable in relation to an Order that the Court had previously made and not in relation to a deemed Order by operation of the rules. In any event, it was unnecessary to give the Costs Judge jurisdiction to reduce costs in this way because he had power in an appropriate case to disallow entire sections of a bill of costs.



Comment

This case is like *Walker Residential Limited v Davies and Another* (Chancery Division 9 December 2005) - a warning to Defendants of the risks of exposing themselves to a Costs Order by virtue of the acceptance of a payment into Court or Part 36 offer. Should a Defendant wish to argue separately for a non-standard Costs Order it is therefore necessary specifically to state the terms of the Costs Order in advancing a proposal for settlement. Of course, in some cases this may fail to lead to the compromise of an action and on grounds of risk it may therefore be prudent to allow the Claimant to accept an offer (and thereby gain the advantage of a Costs Order for 100% of his costs) and thereafter to argue conduct at the detailed assessment.

Effect of Dishonesty on Recovery of Damages

Churchill Car Insurance v Victor Kelly
QBD 8 February 2007, [2006] EWHC 18

At first instance a Claimant who had been injured in a road traffic collision produced a letter purporting to show that he had been dismissed by his employer because of his accident related injuries and non-attendance at work. He also alleged that the employment tribunal had considered his dismissal. The Defendant was ordered to pay damages to the Claimant including a sum for loss of earnings. The Defendant was refused permission to appeal but thereafter obtained fresh evidence demonstrating that the Claimant had been dismissed due to theft of a tax disc. In addition, there had been no employment tribunal proceedings and the letter of dismissal was a forgery. The Defendant applied for permission to appeal and adduce fresh evidence and argued that because the tax disc had been used by the Claimant when the collision had occurred he was driving unlawfully and he should not be able to rely on his unlawful conduct as a basis for a claim.

Held although permission to appeal would be granted and it was obvious that the Claimant had embarked on a calculated and dishonest scheme to obtain money from the Defendant by fraud which involved giving perjured evidence, those facts did not disentitle the Claimant in law from recovering heads of loss that were indisputably made out. Justice could be achieved by varying or setting aside the appropriate findings of the Court on the respective heads of damage and penalising the Claimant in costs.

Comment

This case must be contrasted with *Molloy v Shell UK Limited* [2001] EWCA Civ 1272 often cited in the face of dishonest Claimants wherein Lord LJ stated: "...Until he was found out the Respondent's approach to this action had been nothing short of a cynical and dishonest abuse of the Court's process. For my part I entertain considerable qualm as to whether, faced with manipulation of the Civil Justice on systems on so grand a scale, the Court should, once it knows the facts, entertain the case at all save to make the dishonest Claimant pay the Defendant's costs..." The decision in *Kelly* provides a potential fallback from this otherwise draconian sanction. Of course, these cases are fact sensitive and it would be correct to observe that whilst in some cases a Claimant's damages may be pared down, in other cases it may still be found appropriate to strike the claim out completely.



Costs Capping Orders

Brenda Willis v Neil Nicholson
Court of Appeal 13 March 2007
[2007] EWCA Civ 199

The Appellant, Willis, appealed against the refusal of a Costs Judge to make a Costs Capping Order. On three occasions the Respondent had provided estimates of costs, the most recent being an estimate of £459,496 for the future costs of the action bringing the total costs for the whole claim to £959,342. The Judge refused to make a Costs Capping Order ordering instead that future costs of the action should not exceed £459,496. The Appellant submitted that the Judge should either have ordered a lower limit than the estimate or should have remitted the case to a Costs Judge for him to set such a cap.

The Court of Appeal held that the Judge's decision could not be disturbed. In addition, the Court made general observations about Costs Capping Orders. First instance Judges had made Orders in limited circumstances, for example *Smart v East Cheshire NHS Trust* [2002] EWHC 2806. On the other hand, there have been indications from the Court of Appeal encouraging the use of such orders – see *Griffiths v Solutia (UK) Limited* [2001] EWCA Civ 736, *Leigh v Michelin Tyre Plc* [2003] EWCA Civ 1766 and *King v Telegraph Group Limited* [2004] EWCA Civ 613. The difference of opinion expressed in these decisions was in need of resolution. However, the Court expressed serious doubt as to whether further guidance on costs capping if it were to be given at all should emanate from the Court rather than the Civil Procedure Rule Committee. It would be for the committee to decide whether to take up the issues that had been raised.

Comment

It appears that obtaining a Costs Capping Order may in future (in the absence of further guidance from the Civil Procedure Rule Committee) be difficult. However, the same (albeit less potent) result can be achieved by securing an Order that a party be held to its costs estimate. This decision may therefore lead to future applications for Costs Capping Orders being advanced in this way and, possibly, more ambitious estimates of costs being advanced in high cost cases.

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November 2007