Guildhall CHAMBERS

Newsletter

PI NEWS ISSUE 16

IN THIS ISSUE

EDITORIAL

In retrospect 2012 is going to be a year we will struggle to beat. The Olympics could not have gone better, Wiggins won the Tour de France, Mcllroy beat the Yanks at golf, Murray grand slammed the tennis and even the Kiwis were sent packing. And it didn't stop with the sport. The boffins finally found the God particle, the Queen Jubilated, the Mayan apocalypse turned out to be an error and, just when I could take no more, some bloke in Korea invented the Gangnam Style.

But what of 2013? We have all been awaiting the advent of Jackson - although with the finer details being so slow to emerge I have begun to wonder if some of the changes will be put back. Meanwhile, the number of ABS's appears sluggishly to be increasing – I suspect that process might accelerate once some of the Jackson-related uncertainty subsides. Finally, of course, there is the small claims limit – U-turns, gossip but still no decision.

I have to say, the one thing that has struck me is that, in spite of some doom-mongering, people in the know remain optimistic. Yes, there will be a big squeeze on costs, but I for one sense a growing certainty that those offering local high quality advice will win out.

So, in case the successes of 2012 have distracted you from developments in the law we bring you, as usual, a round-up of the recent decisions relevant to the world of personal injury litigation. In addition, you will find an interesting article by Sophie Holme on the question of the discount rate - surely there must be a decision soon?

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

Gabriel Farmer, Editor

Team news

There has been much change in the Guildhall PI and Clinical Negligence teams of late. We have gained two further tenants in the form of **Robert Sowersby** (2000 call, formerly of Devereux Chambers in London) and **Gabriel Beeby** (2006 call, formerly of Atlantic Chambers in Liverpool). Robert and Gabriel are both experienced medical law specialists with established practices. **Sophie Holme** is thriving in her second year of tenancy and we have a new pupil in the form of **Sharlene Croucher** who commenced pupillage with **John Snell** in October.

Late in the summer we said goodbye to Alastair Campbell but continue to be clerked very well by **Maggie Pearce** and **Heather Bidwell** (who has recently returned from maternity leave). The PI clerks are now overseen by **Justin Emmett**.

We are also delighted to announce that **John Whitting QC** of One Crown Office Row has joined the team as a door tenant. John brings considerable expertise and experience and will primarily focus on high value, complex clinical negligence cases. His appointment confirms our commitment to developing and growing our clinical negligence practice and maintaining the highest quality within the team.

We hope many of you will have enjoyed the seminars (one claimant, one defendant and one clinical negligence) we provided last year at the M Shed. It is a great venue and we will be back with more later this year.

PI Update

Liability

RTA 1988 – no liability for sexual assault

Axn & Oths v (1) John Worboys (2) Inceptum Insurance Co Limited (Formerly HSBC Insurance (UK) Ltd) (2012) [2012] EWHC 1730 QB, Silber J

This case concerns S.145(3)(a) of the Road Traffic Act 1988, which provides:

"(3) Subject to subsection (4) below, the policy:

(a) must insure such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person or damage to property caused by, or arising out of, the use of the vehicle on a road *or other public place* in Great Britain"

Various women passengers of D1 were assaulted by him. He had persuaded them to have a drink which he had previously laced with sedatives, and when they had taken effect he assaulted them. A preliminary issue arose as to whether the road traffic Insurer was liable to indemnify D1 pursuant to S.151 of the Act. That, in turn, required consideration of what the Insurance policy had to cover under S.145 (above).

The phrase "caused by, or arising out of, the use of the vehicle on a road" has brought about some curious decisions (See the two most celebrated being *Dunthorne v Bentley* [1966] RTR 428, and *Charlton v Fisher* [2001] EWCA Civ 112). In fact in this case the Judge concluded that it was the criminal act of D1 which "caused" the assault, not the use of the vehicle; further, he concluded that those acts were not covered by the requirement of S.145(3)(a), and in any event concluded that the actual wording of the policy in question, which was *"accidents involving your vehicle"*, required some involvement in an "accident" and could not cover deliberate acts of poisoning and sexual assaults. The Claimants failed on this preliminary issue.

Blair-Ford v CRS Adventures Ltd [2012] EWHC 2360

C attended a residential adventure activity course operated by D. D had organised a "Mini-Olympics" event, where C was told to throw a wellington boot backwards through his legs ("welly-wanging"). When throwing his welly B applied significant force and misjudged the manoeuvre such that he rotated forward and his head hit the ground thereby sustaining a spinal injury and tetraplegia.

C alleged that D was responsible for his injury because the method he was asked to employ in throwing the welly was unsafe. He submitted that his injury was a logical and foreseeable consequence of throwing it in that way, and that D owed him a duty to exercise reasonable skill and care in the conduct of its activities which it had breached by failing to conduct any adequate risk assessment. C alleged that a risk assessment would have led to modification of the technique used. D contended that the welly throwing had been subject to a dynamic risk assessment and no further action was identifiable. It asserted that the accident was a chance event and that neither it, nor any similar accident causing serious injury, could have been foreseen.

The Judge (Globe J) held:

1 Tort law should not stamp out socially desirable activities just because they carried some risk, *Scout Association v Barnes* [2010] EWCA Civ 1476 followed.

2 Whilst risk assessments were an important feature of the health and safety landscape, providing an opportunity for intelligent and well-informed appraisal of risk and a blueprint for action leading to improved safety standards, they might be a less effective tool where a lot of variables came into play, *Allison v London Underground Ltd* [2008] EWCA Civ 71, [2008] I.C.R. 719 considered, *Uren v Corporate Leisure (UK) Ltd* [2011] EWCA Civ 66, (2011) 108(7) L.S.G. 16 followed.

3 The standard of care was an objective test of reasonableness which should take into account the circumstances and characteristics of the persons at risk. It might be reasonable to take no steps to eliminate a risk which was unlikely to eventuate and which would be of small consequence if it did, *Berent v Family Mosaic Housing* [2012] EWCA Civ 961, [2012] C.I.L.L. 3213 considered

4 D ran an enterprise which provided immense social value.

5 Although there had been a formal risk assessment of the event as a whole, there was no formal assessment of the welly-wanging. C could not be criticised for not carrying out a formal assessment of the welly-wanging: a dynamic risk assessment was acceptable and had been carried out. The manner of C's throw of the wellington boot could not have been foreseen. The risk which needed to be foreseen by C was the risk of serious injury and not just the risk of any injury, Uren followed. There was no foreseeable real risk: it was a tragic and freak accident for which no blame could be established.

Comment: one man's foreseeable danger is another man's unforeseeable (or trivial) risk. This case is useful reading for anyone contemplating the litigation of an unusual accident. In such cases unfortunately much hinges on the nature of one's tribunal and, possibly, whether the D can be presented in a poor (or, as in this case) good light in other areas. D's involved in enterprises of social value may have the upper hand given the effect of the Compensation Act 2006.

Slipping – evidence – system of cleaning

Dawkins v Carnival PlC [2011] EWCA Civ 1237

The Claimant slipped on water in a busy pedestrian area on a cruise ship. The Defendant produced documentation suggesting that it had an excellent system for discovering and cleaning such spills. There was specific evidence from independent witnesses that there was no spill when they arrived 10-30 minutes earlier. The Claimant bore the burden of proving that the substance had been present for a period which, in that area, amounted to a want of care (in implementing even an excellent system). The Defendant did not call any witnesses. The trial judge nonetheless decided that the spillage occurred only a "few seconds" or "a very short time" before the accident. The Court of Appeal (unanimous behind the

judgment of Pill LJ) decided that there was no material to support such an inference, and nothing to "suggest such closeness in time between the spillage and the accident as would, at a place where close observation was required, exclude liability" (paragraph 29). In other words, it seems that it would be negligent for the Defendant to have failed to clear up a spill which occurred in a busy area in about 10 minutes (the lower end of the estimate from the independent witnesses).

Local authority liability – injury during golf lesson – extent of school's duty to supervise

Hammersley-Gonsalves (A Child) v Redcar & Cleveland Borough Council [2012] EWCA Civ 1135

C was a pupil at a school run by D: he was injured when another pupil accidentally hit him in the face with a golf club during a golf lesson.

The class had had several golf lessons previously, and none of the boys had misbehaved. On the day of the accident the teacher had created a small golf course on the school grounds. Each of the 22 boys had a club and a ball: they were told to walk in single file to the playing field, and not to use the club or hit anything until they had been told what to do next. Unexpectedly, one boy put his ball down and swung at it, hitting C on the follow through.

C alleged that the class had not been properly supervised. The trial judge accepted that the teacher had not seen the swing that had injured C and concluded therefore that the class had been inadequately supervised. At first instance the claim succeeded.

Analysis: The Court of Appeal was critical of the judge's reasoning. Pill LJ indicated that it could not be said that the teacher was negligent simply because he could not see all the boys all the time, and that it was hard to see how the case could succeed in the absence of an allegation about the staffing ratio. He then went on to express the view that even if C *had* alleged that the staff-to-pupil ratio was inadequate, the point would have failed given the age and previous good behaviour of the class, and the nature of the activity in question. The Court also noted that the trial judge had not found that if the teacher *had* seen the pupil who was about to swing his club, he would have been able to do anything to stop him: C's case should therefore also have failed on causation.

Fatal Accidents Act 1976 – scope of beneficiaries not extended via European law

Swift v Secretary of State for Justice [2012] EWHC 2000 (QB) (Mr Justice Eady)

Mrs Swift was the unmarried partner of Mr Winters. They had lived together for only six months before Mr Winters was killed in an accident for which his employer admitted liability. The requirement of s1(3)(b) Fatal Accidents Act 1976 that unmarried partners must have cohabited as husband and wife for at least two years before a death denied Mrs Swift relief.

She therefore sought a declaration that s1(3)(b) was incompatible with her Convention rights under Article 8 (right to respect for private and family life) and 14 (discrimination on grounds such as sex, race, colour…or other status). The Claimant argued that she had a) been treated less favourably than someone who had cohabited with their partner for two years and that b) this different treatment could not objectively be justified.

Reflecting the values of the time the 1976 Act initially allowed nothing for dependant cohabitees. An amendment was enacted in 1982 to cover dependant cohabitees but only where there was *'some degree of permanence to the relationship'* ie. two years. (per Lord Hailsham, then Lord Chancellor). In 1999 the Law Commission proposed the right to recover should be extended to a wider class of dependents (which would have included Mrs Swift). Whilst it had come tantalisingly close to being enacted, on 10th January 2011 the government decided not to proceed with the bill, citing the need to focus financial resources elsewhere.

Clearly Parliament had decided against extending the scope of the Act, but were they obliged to by the Convention?

Mr Justice Eady held that Article 8 did not impose a positive obligation to extend the class of dependants as no 'direct and immediate link' between the particular measure challenged and the Claimant's private or family life could be shown. The cases in which a 'direct and immediate link' had been shown (protection from sexual abuse, legal recognition of transsexuals, the requirement to recognise a change of name) were concerned with *'important aspects of personal identity'* or *'a most intimate aspect of private life'* and were different in nature to a financial remedy. He also held that the exclusion caused by s1(3)(b) did not come within the ambit of Article 8 for a free-standing claim.

As to the claim that Article 14 was infringed by allowing for differential treatment, it was held the '…other status' said to have prompted the different treatment had to be a personal characteristic rather than just descriptive of behaviour, of which living with someone was an example.

The final blow to the claim was the conclusion that the imposition of a two-year cohabitation requirement was well within the 'margin of appreciation' given to Convention signatories to enact the Articles.

That we have scarce economic resources to apply to such problems may have become something of a mantra. Nevertheless, although Mr Justice Eady had *'no doubt that the law will at some point be changed so as to help others in a similar plight'* there is a hard reality for Mrs Swift. Her dependency claim of £400,000 was denied and the claim for a declaration of incompatibility was dismissed.

Vicarious Liability

JGE v Trustees of the Portsmouth Roman Catholic Diocesan Trust [2012] EWCA Civ 938

The Claimant established that she had been sexually abused by a parish priest. She made a claim against the Dicoese. However, the parish priest was not (as is usual) "employed" by the Bishop. Could the principle of vicarious liability extend beyond that of "employment", and, if so, what was the appropriate test.

There were various factors that were weighed up: it was clear that the priest was bound by canon law which his Bishop could enforce against the priest; if the Bishop had known of the abuse he could have removed him from his post. In that sense the Bishop appeared to have sufficient "control" to satisfy one part of the "employment" role. The Court of Appeal considered that the church was operated in a manner sufficiently akin to a "business" (see *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151) to satisfy the so-called "organization" and "integration" test. Although the priest was not salaried but was dependent on what he raised at Mass by way of the collection, the surplus raised was then handed on to the church.

Weighing up these factors, the Court of Appeal concluded that the relationship between the Diocese and the priest was sufficiently akin to that of employer – employee that it was fair and just to make the Diocese vicariously liable.

Comment: This case will operate as a yardstick for several similar "employment" situations where there may not be direct employment, but where there is not the sense of an independent contractor either.

Richard Weddall v Barchester Healthcare Ltd: Wallbank v Wallbank Fox Designs Ltd [2012] EWCA Civ 25

In conjoined appeals the Court of Appeal considered whether in the circumstances employers were vicariously liable for assaults by their employees on another employee. In Weddall the C telephoned an off duty employee for assistance in his work at a care home. That employee was drunk and refused to assist. Twenty minutes later he attended the care home and assaulted C. In Wallbank, C was the managing director of the D company. He raised a concern with an employee about wasting heat from an oven in a manufacturing process by loading just one piece of furniture into it. He told the employee to "come on" with the intention of helping him load more furniture and was assaulted. At first instance, both claims had been dismissed on the basis that the assaults were outside the course of employment.

The Court of Appeal agreed in Weddall, but disagreed in Wallbank. It was held that in Weddall the instruction was no more than a pretext for violence wholly unconnected with the employee's role. In Wallbank the violence was closely related to the employment in time and space, and it was a spontaneous and almost instantaneous response to an instruction. When considering violence by an employee a broad view should be taken of the nature of employment and what was reasonably incidental to an employee's duties under it. There was no definitive test. Each case should be determined on its facts and by reference to the broad test in *Lister v Hesley Hall Ltd* [2001] UKHL22, [2002] 1AC 215: were the torts so closely connected with the tortfeasor's employment that it would be fair and just to hold the employer vicariously liable.

Comment: Just because an assault by an employee occurs at his place of work that does not make the employer vicariously liable – there has to be a closer connection with his employment. A "value judgment" has to be made on the facts of the case as to whether the connection is sufficiently close.

Manual Handling Regulations

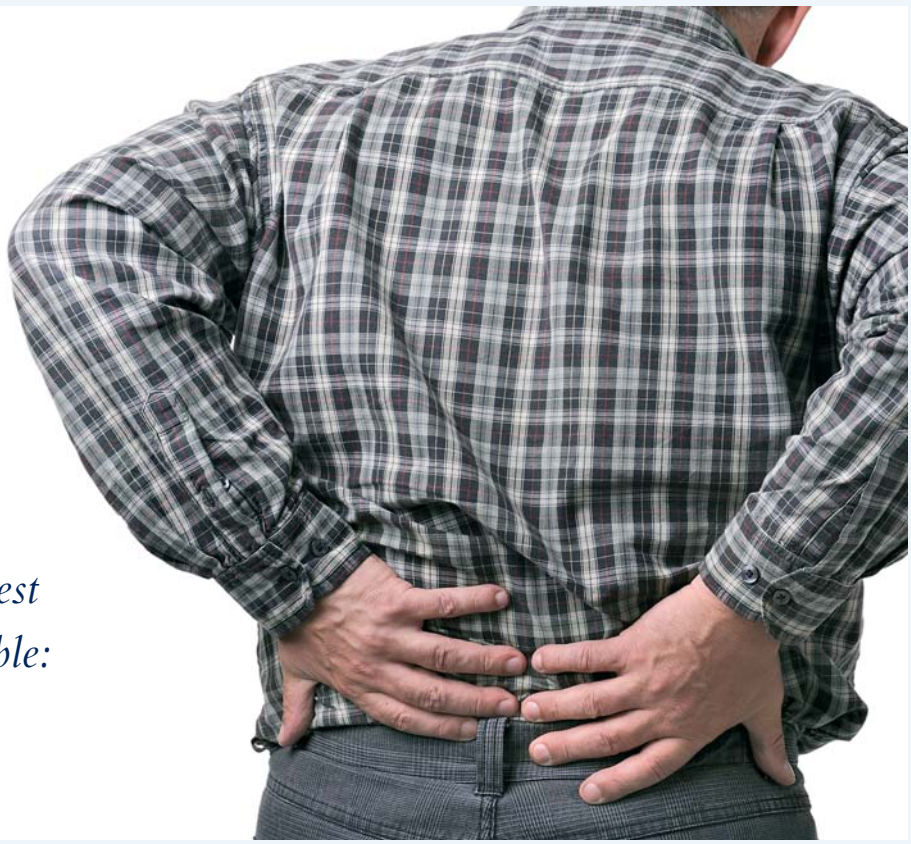
Al Ghaith v Indesit Co UK Ltd [2012] EWCA Civ 642

C's claim was for a back injury suffered during the course of his employment whilst carrying out a stock take, which required him to lift and move boxes. The claim was dismissed at first instance. The Judge considered that a risk assessment relating to the lifting of boxes satisfied the requirement of regulation 4 (1) (b) (i) of the Manual Handling Operations Regulations 1992 ("MHOR") to make a suitable and sufficient risk assessment. He concluded that C had lifting training so knew how to lift and nothing the employers did would have made a difference and prevented the accident.

The Court of Appeal (Longmore LJ giving the lead judgment) allowed C's appeal. The risk assessment did not relate to the task of handling boxes in the context of the stock take. The Judge had failed to have regard to the fact that the stock take had taken all day. The risk of injury had not been reduced to the lowest level reasonably practicable as required by regulation 4 (1) (b) (ii) of MHOR. This was a burden on the D "that is inevitably difficult to discharge". There is no obligation on C to suggest ways in which the risk could have been reduced. The obvious and reasonably practicable precaution was that there should be regular breaks of reasonable length. Causation was said to be "not a separate hurdle for the employee" – if the employer does not prove that he took appropriate steps to reduce the risk to the lowest level reasonably practicable "he will usually be liable without more ado". The onus was said to be on the employer to prove that even if he had taken all practicable steps to reduce the injury it would still have occurred.

Comment: As stated by Longmore LJ this was not virgin territory; reference was made to *Egan v Central Manchester NHS Trust* [2008] EWCA Civ in which Smith LJ had analysed the application of MHOR. It is not surprising that a risk assessment should be specific to the task being undertaken and where obvious measures to reduce the risk had not been implemented the D is in

"Reducing manual handling risk to the lowest level reasonably practicable: a burden 'inevitably difficult to discharge.'"



breach of duty. Some of the dicta on causation (but not the conclusion) does appear more surprising and contrary to established authority that the burden of proof is on the Claimant to prove that the breach of statutory duty caused the injury (e.g. *Bonnington Castings v Wardlaw* [1956] AC 613). It would however be consistent with authority to emphasise that where an employee is injured carrying out a manual handling operation, and the employer has failed to reduce the risk of that manual handling operation to the lowest level reasonably practicable, causation is likely to follow unless the breach was not connected to the accident.

PPE – approach to the 1992 Regulations

Blair v Chief Constable Of Sussex [2012] EWCA Civ 633

B was injured whilst undertaking an advanced motorcycle course as part of his training as a police officer. The course required that he travel off road. He was wearing standard-issue boots, which he argued were unsuitable under the PPE Regulations 1992. He maintained that he should have been provided with motocross boots instead. The trial judge held that the requirements of the Regulations had been met and there was no obligation to provide the degree of protection provided by motocross boots as compared with standard-issue boots. On appeal, B submitted that the judge had erred in assessing suitability under regulation 4 of the 1992 Regulations.

The Court of Appeal held that the judge had failed to adopt the approach to the 1992 Regulations as set out in *Threlfall v Hull City Council* [2010] EWCA Civ 1147. That required first the identification of the risk of injury and then consideration as to whether the equipment provided was effective, so far as practicable, to prevent or adequately control that risk. Only if the equipment was effective or it was not practicable to make it effective was there any need to consider whether it was appropriate. The judge had erred in not considering effectiveness. Adopting the correct approach, the standard-issue boots clearly were not effective to prevent significant injury. It then fell to S to prove that it was not practicable for motocross boots to be used, but that issue did not arise here since it was not pleaded. Accordingly, S was liable.

Comment: *Threlfall* sets out the correct approach to the 1992 Regulations clearly and succinctly. It should be the first port of call for any lawyer when assessing, drafting and arguing PPE cases. Unfortunately, there is no accounting for some judges. Here, the judge was referred to Threlfall but failed to apply it.

Construction – Work at Height

Astrit Tafa v (1) Matsim Properties Ltd (2) Carole Gilling-Smith (3) Agora Gynaecology & Fertility Centre Ltd [2011] EWHC 1302 (QB)

T suffered serious injuries whilst working in the roof void above the third floor of a building. He was constructing a walkway to access an air conditioning unit when he fell through the suspended ceiling to the floor below. At the time, he was working under the instructions of M, who had also been engaged to carry out work on the building. GS was a director and shareholder of AG, which had taken a lease over part of the building. T argued that GS was personally liable because she had voluntarily assumed overall responsibility for health and safety on the site, or alternatively that she was a joint tortfeasor with AG because she had authorised its acts and they amounted to a breach of its duty of care.

The trial judge held, inter alia, that AG had control over the way works were being carried out by M for the purposes of the Construction (Health, Safety and Welfare) Regulations 1996 and over M himself for the purposes of the Work at Height Regulations 2005. Furthermore, it was through GS that AG exercised its control over M and T and the work they were carrying out. Therefore, both GS and AG were liable under the 1996 Regulations (by failing to ensure that T was under the supervision of someone with suitable training, knowledge and experience to protect his safety, and by failing to take steps to ensure that T did not gain access to the place where he was working without additional precautions being taken) and under the 2005 Regulations (by failing to ensure that the work at height in the roof void was properly planned, appropriately supervised and carried out in a manner that was as far as practicable reasonably safe, and by failing to ensure only competent persons were involved in the organisation, planning, supervision and performance of work at height). Both GS and AG were also liable at common law.

Comment: The first point to note is that, in accordance with *Berisha v DSM Trading* [2010] J.P.I.L. C121, company directors cannot be relieved of personal liability simply by virtue of their status as such. The second is that the question of control under the 1996 and the 2005 Regulations is one of fact; that the focus is on control of the work rather than of the site, and that acquiescence may give rise to liability. The broader lesson is always to check the insurance position of the employer as soon as possible. Here, the reason for proceeding against GS and AG was because M was uninsured.

Ex turpi causa

Sean Robert Delaney v (1) Shane Pickett (2) Tradewise Insurance Services Ltd [2011] EWCA Civ 1532

D was travelling as a passenger in P's car when it was involved in an accident as a result of P's negligence. D and P were both in possession of large amounts of cannabis at the time. The trial judge found that they had been intending to supply the cannabis for sale and so dismissed D's claim on the ground of *ex turpi causa*. He also accepted T's argument that its liability to meet D's claim against P was excluded under the MIB Uninsured Drivers' Agreement clause 6(1)(e)(iii) because D knew that the vehicle was being used in the course or furtherance of a crime.

The Court of Appeal was divided. On the facts, it upheld the judge's finding that the purpose of the journey had been the transportation of illegal drugs (Ward L.J. dissenting). However, it held that he had been wrong to uphold the *ex turpi causa* defence because the damage had been caused by P's tortious act not by D's, or D and P's, criminal activity. Therefore, D's claim against P was allowed. As for T's position as insurer, it was entitled to avoid its liability under s152 of the Road Traffic Act 1988 because P hadn't disclosed his cannabis habit and that was a material fact in respect of the granting of the policy. Therefore, the claim should be treated as an uninsured claim. Clause 6(1)(e)(iii) of the MIB Agreement excluded liability where 'the vehicle was being used in the course of furtherance of a crime'. The Court held that the clause clearly fitted the facts of the case, and that 'crime' could not be interpreted as being restricted to 'serious crime' as that would leave the clause with little practical purpose; in any event, the facts of the case amounted to a serious crime and the use of the vehicle had been an essential element in perpetrating it (Ward L.J. dissenting).

Comment: The defence of *ex turpi causa* requires that the criminal act be causative of the damage as opposed to merely incidental to it. Hence D's appeal on this ground was upheld. If that aspect of the case is straightforward enough, then the question of T's liability is much less so. D should have been entitled to compensation under s151 of the 1988 Act. However, T managed to avoid its policy with P on the ground that his cannabis habit was a material fact that hadn't been disclosed as per s152 of the 1988 Act. The latter provision, however, is inconsistent with several European directives. The Court of Appeal's first mistake was not to construe s152 in the light of those

directives, as required by the *Marleasing* principle. Its second was to proceed to treat the claim as if it was an uninsured claim under the MIB Agreement. The result was a deeply flawed decision.

David Michael Joyce (By His Litigation Friend Stephanie Tarrant) v (1) Edward Gerald O'brien (2) Tradex Insurance Co Ltd [2012] EWHC 1324 (QB)

J, who was standing on the rear footplate of a van driven by O, sustained a severe head injury when he fell as the van negotiated a sharp turn. T maintained that O and J had stolen a number of ladders and were making their escape when the accident occurred, and that therefore O should not be liable to J as they had been engaged in a common criminal enterprise. T also asserted that the reason J had been standing on the rear footplate was because the stolen ladders prevented the van door from closing and so J had been holding on to the ladders.

The trial judge held that the inference of theft was overwhelming: O and J were participating in a criminal enterprise involving the theft of ladders and their unlawful removal in a van. Accordingly, the key issue was that of causation. The judge accepted T's assertion that the only means of transporting the stolen ladders in a speedy escape meant that J had to stand on the rear footplate and hold on to them. It followed that J's actions were an essential part of the criminal enterprise. His injuries, meanwhile, were caused by a combination of his position and O's driving. Since both were part of the criminal enterprise, J could not recover for his injuries.

Comment: Unlike the case of *Delaney* (see above), the defence of *ex turpi causa* was upheld as the criminal act in which J was engaged caused his injuries. These two cases usefully illustrate the distinction between causative and incidental actions, which is central to a defence of *ex turpi causa*.

Noise induced hearing loss – Factories Act - liability

Baker v Quantum Clothing and others [2011] UKSC 17

Mrs Baker worked in a knitting factory from 1971 until 2001. From 1971 to 1989 she was exposed to noise found at trial to have been between 85 and 90 dB(A)lepd. This had led to noise-induced hearing loss. Mrs Baker brought a claim against her employers, for whom liability now rested with Quantum Clothing Group Ltd. Her claim was decided together with a number of other similar claims brought against Meridian Ltd, Pretty Polly Ltd and Guy Warwick Ltd. The other claims were dismissed as not establishing noise-induced hearing loss due to noise exposure in her employment. Mrs Baker's claims was dismissed on the basis that her employers had not committed any breach of common law or statutory duty.

The Court of Appeal held that liability at common law arose in January 1988 for employers with an average degree of knowledge. However, Quantum, Meridian and Pretty Polly were found to have had greater than average knowledge about the risks of hearing loss and were liable at common law from late 1983.

Further, s.29(1) of the Factories Act 1961 was held to create more stringent liability and what was safe was to be judged irrespective of whatever was regarded as an acceptable risk at the time. Liability therefore arose under the Factories Act from January 1978 onwards.

Q, M and P appealed. The appeal was allowed by a majority of 3:2.

The Supreme Court held that the key issue for common law liability in negligence was whether a 1972 Department of Employment Code of Practice recommending a noise exposure limit of 90 dB(A)lepd established an acceptable standard for average employers to adhere to during the 1970s and 1980s. It was held that it did until the terms of a draft European Directive came to be generally known in 1988 via a consultative document. In addition, the average employer was also allowed a further 2 year period to implement protective measures. That being said, certain employers, Courtaulds and Pretty Polly had a greater understanding of the risk by the beginning of 1983. This set them apart from the average employer and they were potentially liable at common law from 1985.

In terms of liability under s.29(1) of the 1961 Act, it was confirmed that this section applies to risks created by noise. The term "safe" was deemed to be a relative concept that should be assessed having regard to standards and general knowledge at the time of the alleged breach. It did not therefore impose more stringent liability than at common law.

Comment: This decision eliminated a large tranche of claims from employees exposed to noise levels between 85 and 90 db(A) between 1 January 1978 and 1 January 1990. The floodgates opened by the Court of Appeal judgment were edged closed with only those who had more developed health and safety regimes at the time remaining, perhaps ironically, at risk.

Liability / causation – averting risk sufficient cause of injury

Hadlow v Pererborough City Council [2011] EWCA Civ 1329

A really curious claimant-friendly outing for the Court of Appeal. The short version is that Mrs Hadlow worked in a local authority secure facility for women. The "inmates" were potentially violent. Accordingly the local authority had performed a risk assessment that concluded that teachers such as Mrs Hadlow should always be accompanied whilst in the classroom (both for her safety and that of the inmates). On the day of the accident Mrs Hadlow's teaching assistant was running late so another employee accompanied Mrs Hadlow to the classroom but then (wrongly) left. Mrs Hadlow appreciated that she had been left alone and got up to nip to the door in order to summon back the departed assistant. In the process she tripped over her chair. The chair was not dangerous. The claim succeeded at first instance the the local authority appealed.

The court of appeal dismissing the appeal held:

The accident did not happen in the way most likely, having regard to the breach of duty; that is, by an attack, or threat of attack, on the respondent. It arose because the respondent entirely reasonably took action to remove the risk, an action which would terminate the breach of duty involved in leaving her alone with the three young women. The known source of danger was the propensity for violence of the young women, the risk of an attack on the respondent by one or more of them. It is not necessary to postulate foreseeability of the precise chain of circumstances leading up to the accident; too great precision in the test of foreseeability is not to be expected in circumstances such as these. In my judgment the judge applied a proper test and was amply justified in reaching the conclusion he did. A risk of injury had been created by the appellants; the respondent reacted in what is conceded to be an appropriate way by hurrying through a confined space to the door before the other members of care staff were out of earshot. While hurrying she sustained injury by tripping over the chair and falling; risk of physical injury was foreseeable and, while it did not happen in the most likely way envisaged, it was sufficiently connected with a risk created by the appellants to render them liable.

Comment: Based on this rationale if I had been in the school playground and had seen Mrs Hadlow alone in her classroom and therefore decided to rush inside "to remove the risk" and "terminate the breach of duty" but had tripped over my feet on the way thereby breaking my neck I would be entitled to compensation. I think not. I would suggest that this may be a

case confined to its own facts and that ordinarily there must be a far closer connection between the risk/danger and the cause of the damage.

RTA – Contributory negligence – pedestrian

Belka v Prosperini [2011] EWCA Civ 623

The claimant was struck by the defendant's vehicle in the early hours of the morning when he attempted to cross a dual carriageway at a point where it joined a roundabout. The claimant and a friend had reached a refuge in the middle of the carriageway. As the defendant was joining the dual carriageway from the roundabout, the claimant took a deliberate risk in trying to cross in front of the defendant's vehicle while his friend remained on the refuge. The defendant saw from about 30 metres away only one person on the refuge and only saw the claimant on the road at the last moment. It was held that the defendant should have seen both men on the refuge, and that in any event he should have slightly eased his speed on seeing even one person on the refuge and if he had done that the accident would have been avoided. As to blameworthiness, the judge held that the claimant was two-thirds and the Defendant one-third to blame. As to causative potency, the judge found that the action of the claimant and the defendant's failures contributed equally to the collision.

On appeal, the claimant contended that the judge should have found the defendant's blameworthiness to have been very high, and certainly more than that of B. Further, that when deciding causative potency, the judge failed to take into account the obvious disparity between a pedestrian and a car driver and the fact that the claimant was driving what had been described in the case of *Lunt v Khelifa* [2002] EWCA Civ 801 as "potentially a dangerous weapon".

The Court of Appeal held that the claimant was far more to blame than the Defendant because he had taken a deliberate risk in suddenly moving into the path of the defendant's vehicle. As to causative potency, the Court of Appeal considered that the claimant's conduct in deliberately taking the risk of trying to cross the road in front of the defendant's vehicle contributed more immediately to the accident than anything the defendant did or failed to do. It could not therefore be said that the judge was plainly wrong in his apportionment of causative potency.

This was a decision of the Court of Appeal and is therefore authoritative. While cars must still be considered to be potentially dangerous weapons, it is clear that, depending upon the particular factual matrix, the actions of a pedestrian can readily outweigh the causative potency of the actions of a motorist.

RTA 1988 s. 151(8) – recoupment against policyholder – modification of wording

Churchill Insurance Co Ltd v Fitzgerald & Wilkinson : Evans v Cockayne & Equity Claims Ltd & Secretary Of State For Transport (Intervener) [2012] EWCA Civ 1166

The claimants had each allowed uninsured drivers to drive while they were passengers and each had been injured. In W's case, W's insurers (C) had not been entitled to reclaim compensation under the Road Traffic Act 1988 s.151(8), however, in E's case, the opposite conclusion had been reached. Churchill had argued below that s.151(8) obliged the passenger, as the insured who had caused or permitted the tortfeasor to drive, to reimburse the insurers. W and C had argued that s.151(8) conflicted with Directive 2009/103 art.13(1), wherein insurers could not exclude from insurance, vehicles driven by persons not authorised by the insurers. Following referral the ECJ found that the Directives had to be interpreted as precluding national rules whose effect was to omit automatically the requirement that the insurer should compensate a passenger victim if that accident was caused by an uninsured driver when the passenger victim was insured and had given permission to the uninsured driver. Hence the wording of s,151(8) required modification – there is disagreement over the wording.

The short version: Churchill's suggested version was preferred, namely:

"Where an insurer becomes liable under this section to pay an amount in respect of a liability of a person who is not insured in a policy…he is entitled to recover the amount from…any person who-

(b) caused or permitted the use of the vehicle which gave rise to the liability, *save that where the person insured by the policy may be entitled to the benefit of any judgment to which this section refers, any recovery by the insurer in respect of that judgment must be proportionate and determined on the basis of the circumstances of the case".*

Comment: So far so good but what do these (European law) concepts of "proportionate" and "determined on the basis of the circumstances of the case" actually mean? The honest answer is that at present we cannot be sure – there will need to be further development of the law. No doubt future cases where this section is in issue will have to look to European decisions in order to throw light on the meaning of these words and the facts necessary to trigger the relevant limitation.

Quantum

Future loss – no tinkering with Odgen: *Higgs v Pickles* [2011] PIQR P15

The issue in this case was the calculation of C's future loss of earnings. C was a bricklayer and builder, but could not return to that employment following leg and shoulder injuries sustained in a RTA. He re-trained as a computer-aided design ("CAD") technician. However, at the time of trial when C was 53 years old, despite considerable efforts, he had been unable to find any employment. The joint employment expert evidence was that his prospects of obtaining any relevant employment were less than 50% and his prospects of obtaining CAD work in an engineering field were even lower. It was agreed that C was disabled for the purpose of the Ogden Tables. C contended that the discount in the 6th edition of the Ogden Tables should be applied without adjustment. D argued that an adjustment should be made to reflect the fact that D had acquired new skills and was motivated to find work. It was also argued that a further adjustment should be made to reflect the physically demanding and risky nature of the Claimant's pre-accident work.

HHJ Ellis held that there were no special factors in this case to justify a departure from the starting point in the Ogden Tables. The contingencies argued for by D were already taken into account and there was no evidence that bricklayers were significantly more likely to be injured than other employees. An adjustment to the Ogden Tables would entail the Court taking an old fashioned "feel" approach rather than the assessment being upon any actuarial basis.

Comment: As noted by the Judge there does not appear to have been any previous reported case where the starting figures in the Ogden Tables were applied without adjustment. *Conner v Bradman* [2007] EWHC 2789 and *Clark v Maltby* [2010] EWHC 1201 were distinguished. Whether an adjustment is applied of course is likely to depend on the facts of the case, but this case supports arguments against arbitrary adjustments.

Hindmarsh v Virgin Atlantic [2011] EWCA Civ 1227

This case merits consideration in two regards: first for the award made where the Claimant had been prevented from continuing her career as a Beauty Therapist (in particular carrying out massages), but where she had obtained different but related employment earning considerably more than as a Beauty Therapist – she was awarded £5,000; and secondly, in relation to the award for Handicap on the open Labour market, where the Judge eschewed the Ogden 6 approach being advocated by the Claimant in favour of a lump sum award of one-year's salary for her defined but limited handicap in the open labour market (namely, not being able to carry out strenuous manual work).

Credit Hire – yet more arguments

W v Veolia Environmental Services (UK) plc [2011 EWHC 2020 (QB)

W claimed £138,000 in credit hire charges for a modern Bentley whilst his 21-year-old Bentley worth £16,000 was being repaired. Despite being relatively wealthy with significant savings, he was impecunious as he could not afford the non-credit daily rate of £485. The original hire contract limited the hire period to 85 days. W's car took 135 days to repair. A further hire agreement was posted, signed and returned. Critically, both agreements included a policy of insurance covering the Claimant for the cost of hire. The hire charges had been paid in full by the insurer who issued the policy. At no point was the Claimant provided with a cancellation notice as required by the Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008.

The key questions were whether W was required to mitigate his loss by challenging the charges under the Regulations and whether the Regulations applied rendering the hire contract unenforceable. It was held that the Claimant had mitigated his loss by the hiring of another vehicle. He had in fact already paid the charges, albeit not personally but by his insurers. There was therefore no risk of a windfall to the Claimant who might otherwise have obtained payment and then declined to pay the hire car provider on legal grounds. On the second issue, the effect of the Regulations was that the first hire contract could not be enforced against W. However, as the second agreement had been sent by post, the Regulations could not be used to defeat it.

Costs - where Claimant exaggerates claim

Fox v Foundation Piling Ltd [2011] EWCA Civ 790

The claimant had begun proceedings against the defendant in April 2006, claiming damages in excess of £280,000. Liability was agreed but quantum in issue. At the time of the issue of proceedings, the defendant was in possession of video surveillance evidence which suggested that the claimant was exaggerating his claim, and medical evidence suggesting that the accident had merely accelerated pre-existing degenerative changes. In October 2008, the defendant offered to settle the claim for a net sum of £23,550.79. The claimant rejected that offer. In November 2009, the defendant withdrew the first offer and made a new offer of £31,702.53 which the claimant accepted.

The judge held that the defendant was the successful party in respect of the period after October 2008 and ordered the claimant to pay the defendant's costs from October 2008. The judge also held that even if he was wrong about who was the successful party, the claimant's conduct justified the costs order. The claimant appealed and the parties were able to agree that the judge had been wrong to treat the defendant as the successful party. The only issue on appeal was whether the claimant's conduct justified a departure from the general rule under the CPR r.44.3(2) that the losing party should pay the entire costs of the action.

The Court of Appeal held that where the claimant recovered more than the defendant had offered to pay, but less than he had previously offered to accept, he was normally to be regarded as the successful party within the meaning of r.44.3(2) and the starting point was that he should recover his costs. The next stage was to consider whether any adjustment was required to reflect the costs of a discrete issue on which the successful party had lost. It was also necessary to consider whether the successful party should be deprived of any costs for unreasonable conduct. The court considered *Goodwin v Bennetts UK Ltd* [2008] EWCA Civ 1658 and held that in a personal injury action, the fact that the claimant had won on some issues but lost on others was not normally a reason for depriving him of part of his costs, considered. Interestingly, the Court said that, in particular circumstances, even the fact that the claimant had deliberately exaggerated his claim might not, be a reason for depriving him of his costs. It was observed that a defendant with video surveillance evidence was well able to protect his position by making a modest Part 36 offer.

In the present case, the Court of Appeal held that there was no justification for departing from the normal rule under r.44.3(2) and that the claimant was entitled to all his costs, to be assessed on the standard basis. The central issue in terms of conduct was the claimant's alleged exaggeration of his claim. Although the amount recovered by the claimant fell far short of his pleaded claim, in part because of the video surveillance evidence and in part because of the medical evidence, the judge had expressly declined to make any finding that the claimant was guilty of any misrepresentation. The defendant had been in possession from an early stage of evidence which showed that the claimant was exaggerating his claim, but the defendant had failed to make a realistic offer until November 2009. The Court commented that in the context of personal injury litigation where the claimant had a strong case on liability but quantum was inflated, the defendant's remedy was to make a modest Part 36 offer. If the defendant failed to make a sufficient offer at the first opportunity he could not expect costs protection, although different considerations might apply where the claimant had been proved to have been dishonest.

This case clarifies the point that a large discrepancy between the claimant's pleaded claim and the final award of damages is not sufficient of itself to justify a costs award in the defendant's favour, unless the claimant is shown to have been dishonest. In cases not involving dishonesty, the starting point is the consideration of written offers made by the defendant to the claimant. This case reiterates the importance for both parties of an early and careful consideration of a Part 36 offer.

Part 36 – delayed acceptance – whether C should recover all costs

SG v Hewitt [2012] EWCA Civ 1053

C sustained a severe head injury in a RTA when aged 6. Medical reports were obtained but concluded that it was not possible to predict what the impact of the brain injury would be until C matured. D made a pre-action Part 36 offer of £500,000 when C was 9. Proceedings were issued but C accepted the offer 2 years after D's offer had been made. The court approved the settlement and the quantum of costs were agreed. However each party contended that their costs incurred from the date that C accepted the Part 36 offer should be paid by the other party. H relied on the normal costs rule in CPR r.36.10(5) whereas G argued that because of the particular circumstances of his case, the court should depart from the normal costs rule (that C should pay D's cost following the expiry of the offer).

HELD:

1. The approach of the court to an appeal such as the instant was encapsulated in *Summit Property Ltd v Pitmans* (Costs) [2001] EWCA Civ 2020, [2002] C.P.L.R. 97, Summit applied.
2. The judge at first instance had erred in failing properly to analyse the facts.
3. It would have been difficult for those advising C at the time of the Part 36 offer to have advised acceptance if there was a reasonable alternative strategy available, which there was (ie to wait for C to mature).
4. C could not have reasonably accepted the offer when it was made and should not therefore have been at risk as to costs if he chose to wait.
5. The fact that any settlement would require the approval of the court was not of itself a relevant factor, *Matthews v Metal Improvements Co Inc* [2007] EWCA Civ 215 considered.
6. Other factors that were relevant were that the offer had been made before G had commenced proceedings at a time when the prognosis was uncertain, that the inherent uncertainty in prognosis would have resolved well before the limitation period expired by the passage of time so G would not need to commence proceedings before the position was clear, that the offer was not rejected and D knew that further expert reports were being obtained as to C's development
7. G should have his costs throughout.

Comment: A useful case for those faced with pre-emptive offers from Defendants. However, such offers may still bite – it is important to demonstrate inherent inability to assess worth as opposed to the usual uncertainty in gauging value.

Costs – pursuing (solicitor) funders

Germany v Flatman [2011] EWHC 2945 (QB)

Eady J considered two joined appeals. Both concerned PI cases which the defendants had won only to find that there was no prospect of recovering their costs because C had no money, and there was no legal expenses insurance in place.

In each case the claim had been able to proceed only because someone had paid for medical records and reports, and had discharged the court's issue fee. There was no evidence of any external third party funder: the defendants knew that the claimants had little or no money, and suspected that these costs had been met by the claimants' solicitors.

The defendants sought to join the claimants' solicitors as a party to each action and to obtain an order that they reveal how the claim had been funded.

Eady J reviewed the law on this topic, and set out the following principles (the key principles are in *italics*):

- The court has the power to determine by whom and in what amount the costs of litigation can be paid (s.51 Senior Courts Act 1981)
- Such an order can be made against a non-party (*Aiden Shipping Ltd* [1986] 1 AC 965)
- Although costs orders against non-parties are to be regarded as "exceptional", in this context that means only that they are "outside the ordinary run of cases where parties pursue or defend claims for their own benefit or at their own expense" (*Dymocks Franchise Systems (NSW) Pty Ltd* [2004] 1 WLR 2807)
- The ultimate test is whether such an order is just (*Dymocks Franchise Systems*)
- Usually, the court's discretion to make such an order will not be exercised against "pure funders" (ie, against individuals with no personal interest in the litigation, who do not stand to make any money from it if it succeeds, and who are not seeking to fund it "as a matter of business" or trying to control the course of the litigation (*Hamilton v Al Fayed (No.2)* [2003] QB 1175))
- A non-party will probably not be regarded as a "pure funder" if it substantially controls the litigation or stands to benefit from it
- An order against a non-party may often be appropriate where they have a real interest in the outcome of the litigation
- A solicitor who will profit from his client's success may be regarded as having a real interest in the outcome of the litigation
- *If a solicitor pays for (say) expert reports, on the basis that the claimant will at some stage pay him back, there is nothing inherently improper about that: but if the solicitor pays for such reports on the basis that if the claim fails then he will not recover that outlay at all, then he is (to an extent) funding the claim*
- *For the defendant this arrangement could make the difference between being sued and not being sued, and the claimant's solicitor should only be able to adopt this role if it carries with it "at least the risk of having to pay the defendant's costs, or part of them, if [the defendant] is ultimately successful"*
- *It will often be difficult for the defendant to know what the crucial funding arrangements are without an order for disclosure or for the provision of further information*
- *When faced with an application for a costs order against a solicitor believed to have been funding a claim (or for the disclosure required to support the substantive application), the judge should consider (i) the strength of the substantive application without the disclosure that has been requested, (ii) the importance of the requested documentation to the fair determination of the substantive application, (iii) whether it is obvious that the documents that have been requested will be privileged, and (iv) whether the likely effect of any order will be just and proportionate*
- *The applicant will have to show at least some prima facie case that the Solicitors have been funding the claim, but in circumstances where there has been an outlay in respect of disbursements, and the claimant appears to have no money, then in the absence of any explanation as to where the money came from, it may be legitimate to draw an inference that the Solicitors might be funding the claim*
- Please note: leave to appeal has been granted and see *Tinseltime v Roberts* below.

Costs – claimants' solicitors as third party funders – when can a defendant recover his costs from an impecunious claimant's solicitors?

Tinseltime Ltd v Roberts [2012] EWHC 2628 (TCC), High Court

The case of *Germany v Flatman* (above) has already been doubted, and leave to appeal granted.

In the main Tinseltime litigation the claimant had brought a series of ill conceived claims against a variety of defendants. Those claims had all been struck out, whether initially for lack of merit or later as a result of the claimant's failure to comply with orders for security for costs.

The claims were brought under CFAs, and there was no legal expenses insurance.

The successful defendants wanted to recover their costs, but Tinseltime was insolvent and the man behind it (the director and sole shareholder) had vanished without trace.

It came to the defendants' attention that the claimant's solicitor had paid

for a vital expert report on the understanding that the solicitor would recoup this expense only if the claim succeeded.

On the authority of *Germany* there was a good argument for the defendants obtaining a third party costs order against the solicitor.

However, a number of points arose during the course of this hearing. First, the judge was informed that Rix LJ had already granted leave to appeal in *Germany*, and had granted leave for the Law Society to intervene in the case. Second, it was noted that in *Germany*, Eady J. had made no mention of s.58 of the Courts and Legal Services Act 1990: s.58 provides that an enforceable CFA can include provision for a solicitor's fees and expenses (which can of course include disbursements) to be payable only in specified circumstances. The point was made that since disbursements often include the cost of expert reports, it would be odd if a solicitor could be acting outside his normal or proper role (in funding the expert reports) while still acting *within* the scope of an enforceable CFA (in providing that that expense will only be reimbursed in specific circumstances).

Judge Stephen Davies QC held that the position of a solicitor who had funded disbursements should be no different from the position of one who had not, since both approaches were permissible at law; and that the position was no different when a solicitor had an impecunious client in respect of whom there was no ATE insurance in place. He doubted the decision in *Germany*, and disagreed with the suggestion that the circumstances of that case were sufficient to justify a costs order against the claimant's solicitor. He indicated that in his view a costs order against a claimant's solicitor should only be made where the solicitor had stood to receive some financial benefit over and above the expense that he could properly expect to receive under a CFA, and / or some control over the litigation above and beyond that which would normally be expected from a solicitor acting on behalf of a client.

No costs order was made against the claimant's solicitor.

Costs – effect of P36 on P45 fixed cost regime

Solomon v Cromwell / Oliver v Doughty [2011] EWCA Civ 1584

The Court of Appeal considered the effect of acceptance of a pre-proceedings offer expressed to be made pursuant to Part 36 in road traffic accidents where the amount of damages was less than £10,000.

Part 36.10 provides that where a Part 36 offer is accepted within the relevant period the Claimant will be entitled to costs of the proceedings up to the date on which notice of acceptance was served. Pursuant to 36.10(3) those costs will be assessed on the standard basis. Section II of Part 45 provides for the 'predictive costs' regime in respect of RTA claims which settle prior to the issue of proceedings for less than £10,000.

It was argued that where a Part 36 offer is accepted in a sub-£10,000 RTA claim, costs fall to be assessed on the standard basis rather than the 'predictive' costs regime.

The Court of Appeal held that:

- For the purposes of CPR 36.10, 'costs of proceedings' are to be regarded as steps taken in contemplation of proceedings;
- It is inescapable that there is some conflict between 36.10 and Section II of Part 45. Although the latter regime does involve an 'assessment' of costs of some kind, it cannot properly be regarded as an assessment on the standard basis;
- It is difficult to believe that the Rule Committee can have intended that a Claimant, by accepting a Part 36 offer rather than an offer made by some other mechanism, can recover more than that provided for by the predictive costs regime. This would undermine the regime and discourage the making of Part 36 offers;
- The Rules must be read in accordance with the 'established principle that where an instrument contains both general and specific provisions, some of which are in conflict, the general are intended to give way to the specific.' Here, 36.10 contains rules of general application whereas section II of Part 45 contains rules specifically directed to a narrow class of cases. In sub-£10,000 RTA claims Part 45 is the starting point for assessment therefore;
- While parties can agree to settle on whatever terms they wish, it is not possible to expand or limit the court's powers and if a party chooses to proceed under 44.12A ('Costs-only proceedings') he will be unable to recover more than the amount for which section II of Part 45 provides. However, there is no reason in principle why, if parties chose to agree different terms, the agreement should not be enforceable by ordinary process. As such an offer to pay the Claimant's costs in accordance with 36.10 cannot properly be said to be anything more than an offer to pay costs on a basis more or less generous than that set out in the Rules. As such the Claimants could not recover more than that set out in the predictive costs regime of section II of Part 45.

A nice try by the Claimants to wriggle free from the predictive costs regime but one that the Court of Appeal was never likely to uphold.

Costs – claimant recovers a tiny fraction of the damages claimed

Marcus v (1) Medway Primary Care Trust and (2) Ashiq Hussain [2011] EWCA Civ 750

C suffered blocked arteries in his left leg, leading to a reduced blood supply to his foot. In the short term he suffered very severe pain in the foot; the longer term outcome was that he had to undergo a below-knee amputation. He brought a claim alleging that there had been a negligent delay in diagnosis and that if the defendants had treated him appropriately then he would have avoided amputation.

One defendant admitted breach of duty in its defence; the other some days before trial. The real issue between the parties was causation (ie. whether the amputation would have been avoided with appropriate treatment). Shortly before trial damages were agreed at £525,000 (subject to arguments on causation).

At trial the Judge held that with appropriate treatment C would have received analgesia over the relevant period (of around 28 days), and that he would therefore have suffered less pain in the short term, but that the leg would have been amputated in any event. Damages of £2,000 were awarded.

On costs, the trial Judge concluded that the claimant had brought a legitimate claim and had won: awarding him 50% of his costs. The defendants appealed the costs order, arguing that the claimant had failed in respect of the principal issue in the case.

The Court of Appeal concluded that although the claimant had recovered £2,000, the real issue in the case was whether the defendants' negligence had caused his amputation: an issue on which the defendants had succeeded. The starting point was therefore a costs order in the defendants' favour, subject to a deduction to reflect (a) the claimant's very limited success, (b) the late admission of liability by the defendant trust, (c) a late change in the defendants' factual case, and (d) the fact that neither defendant had written a Calderbank letter offering to settle for, say, £3,000 plus costs

"Multiple passengers on a bus involved in a low speed collision claimed for whiplash type injuries. The Defendant attacked the credibility of the Claimants and sought to rely upon inconsistent statements recorded in the medical reports contained within the trial bundle."

proportionate to that sum. No real significance was attached to the absence of a Pt 36 offer. The claimant was ordered to pay 70% of Ds' costs.

Comment: It must be right that amputation was the real issue: C would not have brought a claim like this (incurring vast costs) to recover £2,000.

Those defending such claims may well wish to avoid making a Pt 36 offer given its attendant costs consequences, but would be well advised to consider making an early Calderbank offer instead – indicating a willingness to pay a modest sum in damages along with costs proportionate to that limited claim. The case also highlights the need to have a clear view of the case at an early stage: it is hard to see how a claim of this size could have got as far as it did only for a defendant to admit breach of duty days before trial.

Procedure

Evidence – hearsay – agreed trial bundles

Charnock v Rowan [2012] EWCA Civ 2

Multiple passengers on a bus involved in a low speed collision claimed for whiplash type injuries. The Defendant attacked the credibility of the Claimants and sought to rely upon inconsistent statements recorded in the medical reports contained within the trial bundle. The judge at first instance expressed the view that minimal weight should be attached to such inconsistencies as these were hearsay statements. Moreover, as they were hearsay statements notice should have been given to the Claimants of the intention to rely upon the same. The judge relied upon *Denton Hall v Fifield* [2006] EWCA Civ 169. Judgment was given for the Claimants with the judge observing that he had considered all of the evidence and each appeared honest. The Defendant appealed on the basis that the approach the judge took toward the inconsistent statements was wrong.

The Court of Appeal observed that, notwithstanding the approach the trial judge had indicated as regards the inconsistencies, he had nonetheless examined all of the evidence before him and concluded that the witnesses were essentially honest. The basis for his conclusion as to the Claimants honesty could not be faulted and had been made after considering all material before him. The appeal would therefore fail. Nonetheless, the Court went on to consider the approach to be taken toward such inconsistencies.

The starting point is CPR 32 PD 27 which provides that all documents contained within a bundle which has been prepared for use at a hearing shall be admissible at that hearing as evidence of their contents unless a) the court orders otherwise, or b) a party gives written notice of objection to the admissibility of particular documents.

It was submitted on behalf of the Respondents (Claimants) that more is needed for the admission of such hearsay than the agreement of a court bundle. It was argued that express notice of the fact that reliance is to be placed on the hearsay contained in the bundle is required. The Court of Appeal rejected this approach observing that it sits ill with the Practice Direction. Rather, the obligation rests on each party's lawyers to go through the agreed documents with the client or witnesses and to take instructions on any discrepant evidence relevant to the pleaded issue. However, it was observed that the mere fact that a hearsay document or statement is contained within the bundle will not allow a party to rely upon that evidence in support of an *unpleaded contention*.

Comment: The judgment is plainly obiter and on many of the issues the Court declined to pass comment. However, it is interesting to note that highlighted within the judgment was the observation of counsel that the decision in *Denton Hall* contained an error of law as regards the procedure to be employed when intending to rely upon a hearsay statement. This Court of Appeal were clear that the 'notice' of an intention to rely upon a hearsay statement is given (or obviated) by the agreement of a bundle pursuant to the Practice Direction.

Although a brief judgment, several points may be taken from it:

- The pleaded case must be clear and the hearsay evidence relied upon must be pursuant to arguments raised in the pleadings otherwise reliance upon such hearsay evidence may be seen as trial by ambush;
- In cases involving possible fraud a court may be slow to permit cross-examination based upon 'generic' or 'thin' defences (beware the use of Defences employing the phrase 'put to proof' as an incantation with no substance);
- Finally, I would suggest that where such hearsay evidence is not agreed, that must be made clear (either by i. not agreeing the inclusion of the document in the bundle, or ii. a "document-specific counter-notice", or iii. via the pleadings or, perhaps, iv. in the witness statements);

Case management – a hardening of approach?

Guntrip v Cheney Coaches [2012] EWCA Civ 392

The Claimant worked for the Defendant as a coach driver. He claimed that his work caused significant knee pain resulting in him having to give up driving coaches.

The Claimant was given permission to rely upon a named expert, Mr J, who expressed the view that the Claimant's work 'may' have accelerated symptoms. The Defendant's expert, Professor B, was firmly of the view that the work was incidental to knee pain. In the joint statement Mr J dropped any suggestion that the work had accelerated symptoms. With a trial date fast approaching the Claimant sought an opinion from a fresh expert, Mr B, who opined that symptoms were caused by loosening of a knee implant performed pre-incident with the Claimant's work implicated. In fact, a subsequent exploratory operation revealed the implant to be secure following which Mr B prepared a second report advancing an alternative thesis for the cause of the pain but still linking it to the Claimant's work. The Claimant applied to rely upon the evidence of Mr B in place of Mr J.

At first instance the application was rejected with that decision overturned on appeal to the Circuit Judge. The Defendant appealed to the Court of Appeal who upheld the first instance decision of the District Judge observing that:

- The matter was one of case management. An appeal court will be slow to interfere with such decisions. It was 'vital' that the Court of Appeal support robust but fair case management decisions made at first instance;
- The fact that an expert had changed his view was not, in and of itself, sufficient to justify permission to rely upon a fresh expert. Experts should say (and were to be encouraged to say) when their opinion has changed. In any event, at best Mr J had only ever expressed a tentative view;
- The exercise of discretion must be performed according to the overriding objective. The court must deal with cases justly. This includes justice to the Defendant. Moreover, granting permission would delay the trial and would thereby cause greater difficulty for the Defendant in dealing with issue of fact;
- The court must look to save expense. The District Judge was right to compare the extra expense that would be incurred as against the amount in issue. A significant part of the decision making was the fact that the trial window could not be met (and not for the first time);
- The fact that refusal of permission would lead to the Claimant's claim failing is not of itself decisive: "it is part of justice that unfounded claims should fail just as much as that meritorious claims should succeed."
- While a judge should not conduct a mini-trial, a District Judge exercising his discretion is entitled to consider the cogency of the evidence. In this case Mr B's first thesis had been shown to be wrong and his second report advanced a tentative and "sparsely reasoned" cause of symptoms.

Comment: The decision serves as a reminder of the tough-task facing a party who seeks to change expert. While each case is fact (and perhaps judge) dependent, the Court of Appeal were keen to impress upon litigants the fact that a change of expert will not be permitted simply because otherwise a claim will fail (even when there is potentially a contrary expert view albeit here that contrary view was not especially strident); this is simply part and parcel of litigation. Moreover, Judges at first instance must be conscious of the expense caused by further delay. The Court of Appeal drew similarities with applications to amend a statement of case observing that a "heavy onus" lies on such an applicant. Indeed, the judgment is further evidence of the fact that robust yet reasoned exercises of discretion at first instance will not be interfered with. A timely reminder also of the need to ensure expert evidence is as robust as can be long before trial since a last-minute application, even if prompted by an expert's change of heart, may not go down especially well.

Relief from sanctions – a hardening of approach?

Fred Perry v Brands Plaza [2012] EWCA Civ 224

Fred Perry brought an action against Brands Plaza and Mr Ivan Genis for passing off and infringement of trademarks. The Defendants failed to comply with a series of court orders. An unless order was eventually made with which the Defendants also did not comply. The day before the hearing for judgment in default of defence, the Defendants applied for relief from sanction. This was on the basis that the failure to comply with the unless order was not intentional. It asserted the Defendants had run out of money, struggled to cope with running a business and litigation at the same time and had a genuine defence. It was argued that to deny the case an opportunity for a full trial would be against the interests of justice. It accepted that there had been an impact on Fred Perry but suggested that an appropriate sanction would be a costs order against the Defendants. The defences were automatically struck out. Mann J dismissed an application for relief against sanctions under CPR 3.9. The Defendants appealed.

LJ Lewison's leading judgment re-iterated the discretionary nature of the power to grant relief against sanctions. He cited the report of Jackson LJ with approval which argued that courts at all levels had become too tolerant of delays and non-compliance with orders and that it was vital that the Court of Appeal support first instance judges who make robust but fair case management decisions. He confirmed that whilst each element of r3.9 should be considered, it was not a question of adding up the score of each party under the various paragraphs as some factors will have greater weight than others and in some cases some of the factors will not apply at all. The judge in this case was held to have carefully gone through r3.9 and applied it appropriately to the facts. The court noted that amendments to r3.9 were anticipated to come into force on 1 April 2013 and that after that date litigants who substantially disregard court orders or the requirements of the CPR would receive significantly less indulgence than hitherto.

Comment: The new r3.9 of April 2013 will consider the need for litigation to be conducted efficiently and proportionately and the need to enforce compliance with rules, practice directions and court orders. The courts will be taking an increasingly robust approach with less tolerance of breaches of orders and the CPR. Delays will no longer be as acceptable.

MoJ discount rate consultation: In Brief

There has been much debate as to how and the level at which the discount rate should be set. The current 2.5% rate was set in 2001 mainly by reference to a three year average of the gross redemption yields of Index-Linked Government Gilts (ILGS). The fall in yields on IGLS has left a reality of under-compensation for future loss which stands in stark opposition to the principle aim of civil personal injury compensation to put the Claimant back in the position they would have been in but for their injury.

The extent of this under-compensation brings into sharp relief the importance of the method used for the calculating the discount rate. The Ministry of Justice has recently consulted on this issue. The selected methodology will *'in effect, define the types of investments by reference to whose yields, subject to appropriate adjustments, the discount rate is to be set.'*. The full consultation paper runs to some 130 pages and can be found on the MoJ website.

This article summarises the proposals for those interested in a taster before they dive into the full paper or for those who only dream of the time to read the full consultation document.

Damages Act 1996 & *Wells*

By way of background, the Lord Chancellor is empowered by section 1(1) of the Damages Act 1996 ('DA 1996') to prescribe a rate of return by order, which the court **shall** take into account *'in determining the return to be expected from the investment of a sum awarded as damages for future pecuniary loss in an action for personal injury'*. This does not prevent the court taking a different rate of return into account if any party to the proceedings shows that it is more appropriate in the case in question (1(2)DA 1996). Further, the Lord Chancellor may prescribe different rates of return for different classes of case (1(3) DA 1996).

In addition to the statutory background, the House of Lords tackled the principles to be utilised in setting the discount rate in *Wells v Wells* [1999] AC 345. In setting the rate, the Ministry of Justice has declared its intention would be to support a methodology that remains guided by the principles laid down in *Wells*:

- that for the purposes of calculating the discount rate, the consequences for Defendants of paying awards to Claimants are not a matter to be taken into account;
- that Claimant's in personal injury cases are not in the same position as ordinary investors and what is prudent for ordinary investors, who could not ride out difficult times, is not necessarily prudent for personal injury Claimants, particularly ones suffering from serious long term illness or disability;
- that the measure of the discount is the rate of return which can reasonably be expected on that sum if invested in such a way as to enable the plaintiff to meet the whole amount of the loss during the entire period which has been assumed for it by the expenditure of income with capital;
- the rate of interest to be expected should be without risk there being no question of loss due to inflation or otherwise.

The House of Lords, therefore, concluded that equities carried too great a risk even for long term investment. An early depressed market may lead a Claimant to use so much capital in the early years that there would be insufficient funds left to generate the interest needed for later years.

The determination in *Wells* was that the discount rate would be best linked to ILGS. They are a low risk investment as the investment is with the Government and it rises in line with the UK Retail Price Interest. Thereby, at least notionally, they keep pace with inflation. *"Thus, the purchaser of £100 of ILGS with a maturity of 2020 knows that his investment will then be worth £100 plus x percent of £100, where x represents the percentage increase in the retail price index between the date of issue and the date of maturity"* (per Lord Lloyd of Berwick 365B, *Wells v Wells*).

Recent performance of ILGS

Of course, there are disadvantages to ILGS as an investment for a lump sum award. ILGS have a fixed coming of age, if the capital is needed earlier, then the sale will be subject to short term market fluctuations. Further, maturity dates are simply not available in some years so again an annual income is not provided for without early redemption. They are not, in fact, a fit for purpose vehicle for Claimant investment.

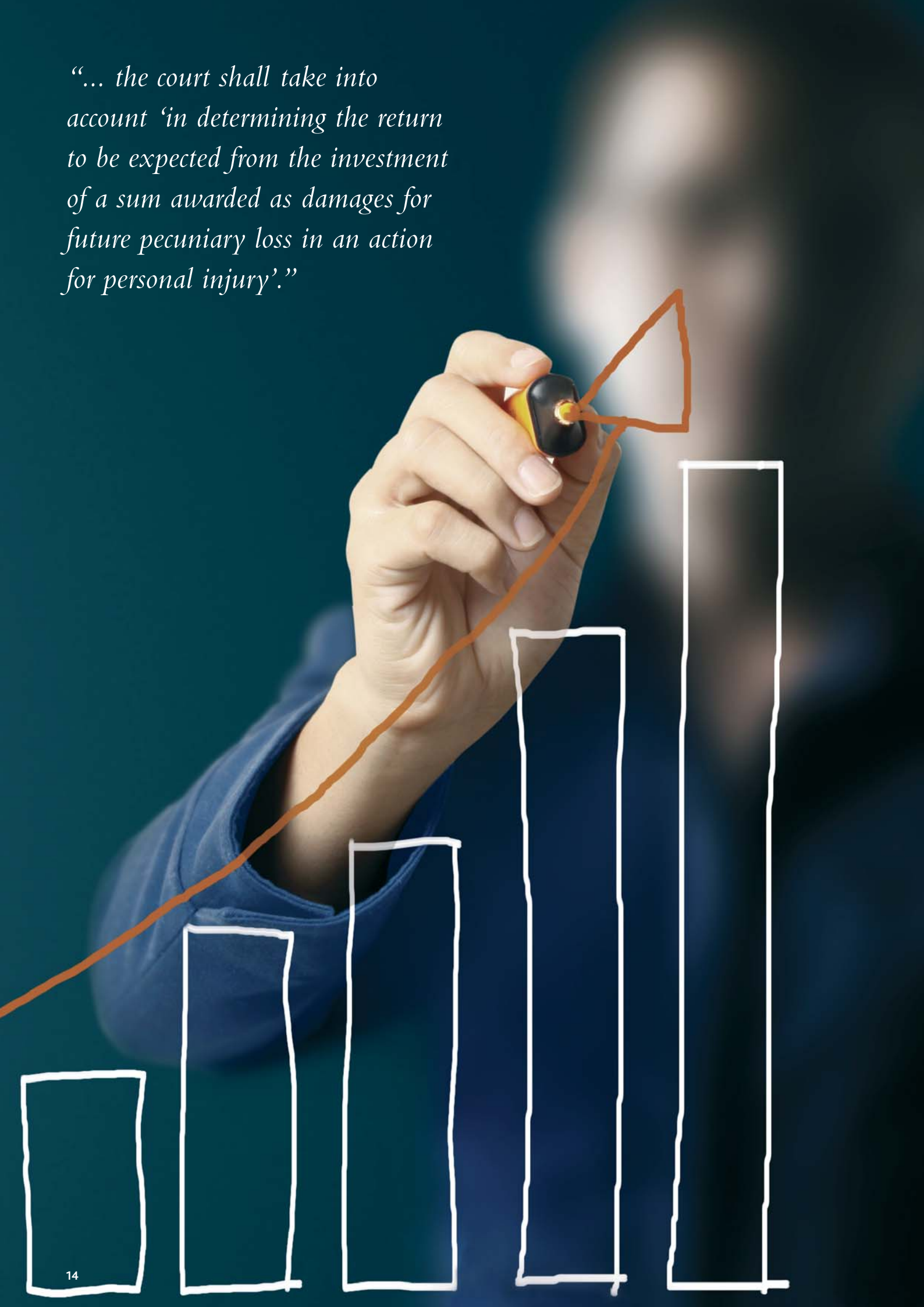
Notwithstanding the above, the discount rate in 1998 and 2001/2002 was largely (although not exclusively) set by reference to the yield on ILGS. However, the three year average yields has declined from 2.46% pre-tax to around 0.2% pre-tax in mid-2012, thereby provoking the need for a revision of the discount rate which remains, despite current ILGS yields, at 2.5%.

Two broad options are proposed in the consultation for the approach to revising the discount rate:

1. To use an ILGS based methodology applied to current data.
2. To move from an ILGS based calculation to one based on a mixed portfolio of appropriate investments.

"The determination in Wells was that the discount rate would be best linked to ILGS. They are a low risk investment as the investment is with the Government and it rises in line with the UK Retail Price Interest."

"... the court shall take into account 'in determining the return to be expected from the investment of a sum awarded as damages for future pecuniary loss in an action for personal injury'."



Option 1: Key issues

Questions remain about how the details of a methodology constructed around ILGS might work:

- The previous rate was set on the assumption that ILGS stock would be held until maturity. However, since this is an unrealistic model of Claimant investment perhaps an alternative (and this is simply the writer's suggestion not one put forward by the consultation document) may be to assume a certain proportion of ILGS stock would be redeemed early as a basis for the model of rates of return.
- The current rate also used a simple non-weighted previous three year average of ILGS real yields. This assumes past economic performance is a guide to future performance. However, standard economics suggest this is not so and that current market conditions are the best predictor of future returns, not past performance of investments. Views are sought as to preferable forecasting methods and the period over which such forecasts are likely to remain valid.
- Short term gilts of less than five years are heavily weighted when a simple average is used and this may not be representative of ILGS yield. However, the counter to this is that if the majority of awards are for shorter periods, then giving a weighting to longer-dated bonds may itself distort the rate unfairly. It is, though, too simplistic to say that the model should prefer those with longer term awards as they are likely to be the more seriously injured. What of the seriously injured with short life expectancies? There is a third way, which would be to provide for more than one rate of return depending upon the award period. In the writer's view, it would be worth (from the point of view of maximising the chances of obtaining full compensation) modelling the discrepancy between more short term and more long term weighted models and the extent to which the adoption of one or the other affects the overall return for a Claimant with a short term and one with a long term award.
- A further question is whether allowance should be made of potential differences between RPI inflation and health care costs inflation. Arguably, this is essential, but again perhaps in applying it to every case, particularly those where health care costs are not required to be met, risks over-compensation.

Option 2: Key issues

As identified, ILGS is not a practical Claimant investment vehicle so option 2 proposes a potential model based on other adequately secure vehicles. The alternatives for consideration proffered are 'Mixed investment 0-35% shares', 'Sterling Fixed Interest' and 'Money Market' (all ABI portfolio classifications). These assume future returns of ILGS +1%, ILGS +0.75% and ILGS +0.5% respectively. They are each also attached to risks both to capital value and of insufficient investment growth ('money market' capital value aside where the risk is negligible).

Whatever portfolio is selected, the questions as to how any data derived from it should be used remain similar to those surrounding option 1. To what extent should historic data be used? How should any averages be calculated? Should allowance be made for inflation, tax or investment expenses?

Multiple Discount Rates?

The phrasing of the consultation does not appear favourable to those who would favour multiple rates albeit the question is asked as to whether multiple rates are suitable. *'Since 2001/2002, however, there has only been one prescribed rate. We are not aware that this has caused any widespread problems and assume that the power to disregard the prescribed rate provides adequate safeguard for cases where it is not appropriate.'* (p. 38). This argument is difficult to square with *Warriner v Warriner* [2002] 1 WLR 1703 and *Cooke v United Bristol Health Care* [2003] EWCA Civ 1370 where the need for an alternative discount rate reflecting the steeper curve of increase in care costs was clearly illustrated and the use of such an alternative so firmly rejected on the basis that to do so would go behind the Lord Chancellor's rate.

Whilst *Warriner* and *Cooke* represent the top end cases where such argument can be 'afforded', it is noteworthy that adaptation to the rate was rejected and remains the case in all bar 'exceptional circumstances'. If a change to the rate is now firmly in view, this consultation and the months following its closure represent a window to make such arguments at a point where they may actually make a difference - not simply to cases of the order of *Warriner* and *Cooke*, but across the board.

Sophie Holme

"A further question is whether allowance should be made of potential differences between RPI inflation and health care costs inflation. Arguably, this is essential, but again perhaps in applying it to every case, particularly those where health care costs are not required to be met, risks over-compensation."

Members of the Personal Injury & Clinical Negligence teams

Adrian Palmer QC
adrian.palmer@guildhallchambers.co.uk

John Whitting QC (Door Tenant)
john.whitting@guildhallchambers.co.uk

Adam Chippindall
adam.chippindall@guildhallchambers.co.uk

James Townsend
james.townsend@guildhallchambers.co.uk

Anthony Reddiford
anthony.reddiford@guildhallchambers.co.uk

Julian Benson
julian.benson@guildhallchambers.co.uk

Selena Plowden
selena.plowden@guildhallchambers.co.uk

John Snell
john.snell@guildhallchambers.co.uk

Gabriel Farmer
gabriel.farmer@guildhallchambers.co.uk

Oliver Moore
oliver.moore@guildhallchambers.co.uk

Matthew Porter-Bryant
matthew.porter-bryant@guildhallchambers.co.uk

Robert Sowersby
robert.sowersby@guildhallchambers.co.uk

Abigail Stamp
abigail.stamp@guildhallchambers.co.uk

Gabriel Beeby
gabriel.beeby@guildhallchambers.co.uk

Daniel Neill
daniel.neill@guildhallchambers.co.uk

Sophie Holme
sophie.holme@guildhallchambers.co.uk

Maggie Pearce, Team Clerk
maggie.pearce@guildhallchambers.co.uk

Heather Bidwell, Team Clerk
heather.bidwell@guildhallchambers.co.uk

Jeremy Sweetland, Chief Executive
jeremy.sweetland@guildhallchambers.co.uk

Guildhall CHAMBERS

23 Broad Street, Bristol BS1 2HG **Tel:** 0117 930 9000 **Fax Civil:** 0117 930 3898
DX: 7823 Bristol **www.guildhallchambers.co.uk**