LEGAL UPDATE

Adam Chippindall, Robert Sowersby & Sophie Holme, Guildhall Chambers

PROCEDURE

***Carol Keefe (Widow and PR of the estate of THOMAS KEEFE, Decd) v The Isle of Man Steam Packet Company Ltd* [2010] EWCA Civ 683**

A deafness claim against an employer. The case is fact sensitive, and unremarkable except for one point. C had called lay witnesses as to the high levels of noise over lengthy periods, but there was no expert evidence on levels and duration before the court (the ship in question no longer being in service). D had failed, in breach of its statutory duty, to take measurements. The court at first instance had concluded that there was insufficient evidence to prove levels of noise at or in excess of 85dB(A) for 8 hours. The CA whilst not reversing the burden of proof reminded us that:

"*if it is a Defendant's duty to measure noise levels in places where his employees work and he does not do so, it hardly lies in his mouth to assert that the noise levels were not, in fact, excessive. In such circumstances, the court should judge a Claimant's evidence benevolently and the Defendant's evidence critically. If the Defendant fails to call witnesses at his disposal who could have evidence relevant to an issue in the case, that Defendant runs the risk of relevant adverse findings see British Railways Board the Herrington [1972] ADC 877, 930 G. Similarly a Defendant who has, in breach of duty, made it difficult or impossible for a Claimant to adduce relevant evidence must run the risk of adverse factual findings. To my mind this is just such a case.*"

***Ministry of Defence v AB & Others* [2010] EWCA Civ 1317**

This was an appeal by the MoD in relation to the nuclear radiation claims arising from tests done in the pacific in the 1950s. It was "group litigation". In these lead cases issues as to limitation were decided; further an application to strike out under Part 3(4) was determined. At first instance all of the claims were allowed to proceed, some on the basis that "knowledge" was acquired less than 3 years prior to issue, others under s.33.

On the limitation issue the CA disagreed: it concluded that pursuant to the principle in *Spargo v North Essex DHA* [1997] PIQR P235 i.e. the possession of enough knowledge for it to be reasonable to set about investigation, the 5 lead cases permitted through under s.14 could not continue – each of those Claimants did have enough of such knowledge more than 3 years before they issued their proceedings; and in respect of the discretion under s.33, it concluded that although a fair trial was still possible, nonetheless, the case on causation was too weak. The Claimants would have to satisfy the "but for" test, and were not likely to persuade the court that an increased risk was sufficient causation.

***Whiston v London Strategic Health Authority* [2010] EWCA Civ 195**

C suffered from cerebral palsy as a result of brain damage caused at the time of his birth in 1974. His mother, a nurse, had been aware since his birth that the delivery had potentially been handled negligently. However, his parents made a decision early on in his life not to pursue a claim. C was not informed of his parents' concerns over his delivery, but was aware that he had been delivered by forceps and that his cerebral palsy resulted from a lack of oxygen at birth. The C's development was slow, his fine motor skills were poor and he was epileptic. He did well academically and obtained a PhD from Cambridge. In early 2005, unfortunately, his condition deteriorated dramatically to the extent that he was unable to remain independent. At this point, C's mother spoke to him of her concerns about the care he received at his birth and proceedings were commenced in late 2006. It was alleged that the SHO attending the delivery had been negligent in attempting the delivery with the wrong type of forceps and in persisting in these attempts for 30 minutes when confronted with signs of fetal distress, in particular Type II (late) decelerations, indicative of fetal hypoxia. At first instance, C's date of knowledge was found to have been in 2005 when his mother first informed him of her concerns. D appealed.

Three points of significance arise out of the Court of Appeal's decision:

(i) Whilst the knowledge required for the purposes of s. 14(1)(b) is "knowledge of the essence of the act or omission to which the injury is attributable" and it is not necessary for the claimant to know all the details of the D's acts or omissions on which he relies as constituting negligence as per *Dobbie v Medway Health Authority* [1994] 1 WLR 1234, 1241C and *Wilkinson v Ancliff* (B.L.T.) Ltd [1986] 1 WLR 1352; C still needs knowledge of the essence of his allegations of negligence not simply knowledge of the causation of his injury. Here, C's knowledge that he had been delivered by forceps and his injury was caused by oxygen deprivation at birth was not sufficient to give him actual knowledge of the essence of the act for the purposes of s.14(1)(b). The court regarded the essence of C's case as the persistence for at least half an hour in attempting to deliver C, use of the "wrong" forceps and delay in seeking assistance from a more senior obstetrician. These three elements of C's case were not regarded as mere details of the case. They *were* the case.

(ii) As regards the test for constructive knowledge, the court endorsed the submission that the ratio of *Adams v Bracknell Forest Borough Council* [2004] UKHL 29 requires an objective test. However, it rejected D's submission that *Adams* went further and required that where a person was aware that they had suffered an injury serious enough to be something about which they would consult a solicitor if they knew they had a claim, s.14(3) requires the court to assume they would be sufficiently curious about its cause to ask questions. Lord Justice Dyson said this did not accord with the wording of s.14(3) which refers to knowledge that a Claimant "might reasonably be expected to acquire". What was reasonable depended upon all the circumstances

of the case. Here, it was relevant that the Claimant had suffered the injury from birth and so might be less curious about its origins than a C injured in adulthood. The worsening of the injury and its severity were also relevant to the level of curiosity to be expected. Here, where the disability became more serious and he knew the disability was in some way related to the circumstances of his delivery, the court held that a reasonable person would have made the relevant enquiries no later than his early 20s, in about 1998. The claim was therefore statute barred.

(iii) The third point of significance relates to evidential prejudice. By reason of the delay, D contended their case had been significantly prejudiced such that a fair trial was no longer possible. In particular, they cited the loss of the CTG trace, which might have completely exonerated D and the completely faded memories of the clinicians as critical factors weighing against the exercise of the court's s.33 discretion to disapply s.11. The court, however, took the view that a fair trial was still possible. It viewed the loss of the CTG trace as a difficulty, but ultimately one that had not prejudiced D any more than C as it might have supported either side's case. Further, the clinicians faded memories were regarded as a factor of little if any significance as it was unlikely that they were any worse than they would have been had the claim been brought within the limitation period. The notes and the relevant clinicians were available and as such their evidence of what they would have done would have to be weighed against Mrs Whiston's evidence. Overall, given the substantial damages C would be awarded were his case successful, it was held more prejudicial to deprive him of all prospect of his future needs being properly met than to allow the claim to proceed against D even in the absence of the CTG.

***Aktas v Adepta: Dixie v British Polythene Industries Plc* [2010] EWCA Civ 1170**

These were appeals against two County Court 2009 decisions where it had been held that where there was a failure to serve proceedings in time and C subsequently issued replicate proceedings in which they sought a s.33 extension those proceedings were an abuse of process.

The court unanimously allowed both appeals stating that mere negligent failure to serve a claim form in time was held not an abuse of process. There was nothing in the CPR to indicate that a mere failure to serve in time was to be regarded as an abuse requiring anything further than the failure of the claim form itself, and Parliament had in any event enacted that personal injury claims should be treated in a special way. To say that a second action could never reach the s.33 discretion because it was an abuse of process was to ignore the will of Parliament.

***Co-operative Group (CWS) Ltd v Pritchard* [2011] EWCA Civ 329**

The D won its appeal on a causation ground (that C's injury was an acceleration case for a period of 18 months), but the notoriety of the case lies in the conclusion of the CA that contributory negligence is not a partial defence to a claim in assault, since it was not a defence prior to the passing of the Law Reform (Contributory Negligence) Act 1945. C had gone to her place of work to remonstrate aggressively and abusively with her Store Manager. He asked her to leave, but she did not go, so he got hold of her to remove her from the store which was an assault. Exemplary damages can still be reduced for provocation, but the compensatory award cannot.

CAUSATION

***Karen Sienkiewicz (Administrator of the estate of ENID COSTELLO, Decd) v Greif (UK) Ltd* [2009] EWCA Civ 1159**

Issues about proving causation in asbestos cases seemingly are never-ending. This case is interesting for two reasons: first because it is the first time the CA have looked at the interpretation of s.3(1) of the Compensation Act 2006, and in particular its 4 pre-conditions. Smith LJ stated that, except in mesothelioma cases, *"in my view, it must now be taken that, saving the expression of a different view by the Supreme Court, in a case of multiple potential causes, the Claimant can demonstrate causation in a case by showing that the tortious exposure hazard at least doubled the risk arising from the non-tortious cause or causes."*

However, in mesothelioma cases that rule was not applicable. Instead all a Claimant had to establish was that the exposure to asbestos had materially increased the risk of contracting mesothelioma.

DUTY OF CARE

***Robert Uren v (1) Corporate Leisure UK Ltd (2) Ministry of Defence* [2011] EWCA Civ 66**

When Field J decided at first instance that the Claimant, who was an RAF Aircraftman, failed in his action against the Defendants when he was rendered tetraplegic upon "diving" into a shallow portable "pool" during a fun day at his RAF base, some of us were surprised by the decision. The CA has now reviewed that decision, set it aside, and remitted the matter for a re-trial. The CA was concerned as to the judge's decision to prefer one expert against the others, and in his failure to weigh the lay evidence in the balance. The CA concluded that whereas the decision could not be said to be "wrong", nor could it be said to be "sound". Furthermore, Smith LJ made clear and underlined that the Claimant's employer (the RAF) could not delegate its duty to him to assess the risk of this activity. In this case the game which caused the injury had been set up, organised and run by the First Defendant, who was a professed expert in providing this sort of entertainment and an independent contractor. Smith LJ commented on the inadequacy of the risk assessments of both parties, and how approaching such assessments in a

formulaic and unthinking way, could reduce their effectiveness. She acknowledged that where an independent contractor carried out a thorough and reasoned assessment, an employer's risk assessment might be compliant even if somewhat lacking in detail. The case bears reading for important information on the value of risk assessments.

***Everett & Anor v Comojo (UK) Ltd* [2011] EWCA Civ 13**

The Claimant was a visitor to a bar in a hotel owned and managed by the Defendant. He was stabbed by another guest over an alleged touching of the bottom of a waitress. The waitress had been told by a guest that her "assailant" would apologise to her before the end of the night. She was suspicious that something might happen and warned her manager (not the door-staff). E was stabbed by another guest. His claim failed at first instance, although the Judge concluded that D could owe C a duty of care in such circumstances per *Caparo* on the basis there was more than sufficient "proximity" between the bar owner and its guests, that injury was reasonably foreseeable, and "fair, just and reasonable". In the CA it was held that the Judge was correct even though the assailant was a third party and referred to *Home office v Dorset Yacht Co Ltd* [1970] AC 1004 HL. No breach of any such duty was made out because the waitress had acted reasonably.

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

A 1st tier appeal from a County Court Judge who had refused the Defendant's application to strike out the claim. The issue was whether the Council owed the mother of children who were the subject of abuse by a neighbouring child a duty of care in respect of her psychiatric harm. The Council sought to argue, in vain, that the effect of the decision of the House of Lords in *D v East Berkshire Community Health NHS Trust* [2003] EWCA Civ 1151 was that because of the paramountcy of a council's duty to children within their region they could not owe a concurrent duty of care to that child's parents; and certainly in respect of "child care decisions". In *D v East Berkshire* the parents were (falsely) alleged to have abused their own children. The learned Judge ruled that unless the duties were "irreconcilable" then a number of concurrent duties could exist. He pointed to a number of authorities where a duty to the parent had been found to exist (*A v Essex County Council* [2003] EWCA Civ 1848*; Lambert v Cardiff Council* [2007] EWHC 869*; and W v Essex County Council* [2001] 2 AC 592.

***Vaile v London Borough of Havering* [2011] EWCA Civ 246**

The Claimant was a teacher at the Defendant's school for pupils with learning difficulties. A child, X, assaulted the Claimant. She was stabbed in the hand with a pencil, hit on the ear, and grabbed around the neck. She suffered a detached retina and psychological injury and has not worked since. In fact, about 1 month earlier X had bitten the Claimant in class, which had been reported to the Headmaster and his Deputy. There was an issue as to whether X should have been classified as Autistic and therefore taught by a specialist TEACCH team. The Judge at first instance dismissed her claim on the ground that

he did not find that C was provided with an unsafe system of work. The CA disagreed: the fact that C did not know she was teaching someone with ASD was important, which, together with the fact that she had not received adequate training in TEACCH meant that her system of work was not safe. Furthermore, there had not been an adequate response in relation to the earlier assault.

In relation to causation there is an impression of some benevolence on the part of CA: C could not show that any of the training or safer systems would specifically have prevented this assault, but the court concluded that whilst it was "difficult for [C] to show precisely what she or the school could have done to avoid the incident if she had been appropriately instructed in suitable techniques ...." nevertheless, the probability was that she would not have met with the injury if those procedures had been in place.

***Goad v (1) Peter Butcher & (2) W.I. Butcher & Sons* [2011] EWCA Civ 158**

The Claimant was a motorcyclist exceeding the speed limit. The Defendant was crossing his path turning his tractor and trailer into a minor road. The Defendant cut the corner (in breach of s.156 of the Highway Code). It also had the effect of reducing his visibility in the Claimant's direction by another 20 metres which might have been critical. By a majority, the CA thought that the cutting of the corner was not significant and that although D was required to have regard to the fact that on-coming motorists might exceed the speed limit, he was not negligent in turning where he did, with 110 metres of visibility. Jackson LJ gives a compelling dissenting Judgment.

***Wilkinson v City of York Council* [2011] EWCA Civ 207**

The Claimant was a cyclist who was dislodged from the saddle and suffered injury when she hit a pothole. This fast track trial reached the CA! The kernel of the appeal related to s.58 of the Highway Act 1980. The road was one which was given annual inspection. However, the national code (which has no rule of law) would have suggested a 3 month inspection for this particular highway. The evidence suggested that the Defendant was constrained by its lack of financial resources and manpower. The CA agreed that the test under s.58 is an objective one: was the care such as in all the circumstances was reasonably required to secure that the relevant part of the highway was not dangerous for traffic? This was an objective judgment based on the risk presented by the highway concerned.

CRIMINAL INJURIES COMPENSATION SCHEME

***CICA v (1) CICA Appeals Panel (now 1st Tier Tribunal (Criminal Injuries Compensation) (2) Irene Lamb* [2010] EWCA Civ 1433**

The CA looked at ss. 56 & 57 of the Scheme. The victim of an assault obtained an award of £2,500 in March 1999 for her physical injuries. There was no evidence that her claim then had included any psychiatric damage. Her GP records showed that in 2003 she had started counselling for panic attacks which were attributable to the somewhat frightening assault. She was diagnosed with PTSD. She

applied to the CICA to re-open her claim. An adjudicator refused that application which was quashed on appeal. The CICA then applied to overturn that quashing in the CA. The CA refused. The evidence was clear that the psychiatric damage the victim was suffering from was (a) attributable to the assault; (b) had not formed part of the original application; (c) constituted a "material change in the victim's medical condition" such that an injustice would occur if it was not re-opened; and (d) would not require "further extensive enquiries."

HUMAN RIGHTS ACT

***Richard & Gillian Rabone v Pennine Care NHS Trust* [2010] EWCA Civ 698**

The Claimant's daughter had been a voluntary patient in the Defendant's hospital suffering from depression with ideation of suicide and self-harm. Contrary to the parents concerns, the daughter was allowed home on a short leave, and regrettably committed suicide. The estate's claim was compromised, but the parents continued with their claim for damages under s.7 of the Human Rights Act 1998 for a breach of Article 2 ("Everyone's life shall be protected by law") of the European Convention on Human Rights. This case follows on from *Osman v United Kingdom (23452/94)* (1999) 1 FLR 193 and *Van Colle v Chief Constable of the Hertfordshire Police* [2008] UKHL 50. Compare: *Powell v UK (*2000) 30 EHRR CD 362 and *Savage v South Essex NHSA Trust* [2008] UKHL 74. It is now clear that the state has "a positive obligation .... to take preventive operational measures to protect the life of an individual". It would appear that where the "state" has incarcerated an individual the obligation is engaged (either in custody as a potential criminal, or in detention under the Mental Health Act). The issue here was whether the state, in the form of the NHS, had failed in that obligation where there was no compulsory detention - where does negligence become a breach of the Article? Here the CA stated that voluntary patients have no claim, because the operational obligation does not engage.

COSTS

***Estelle Clarke v Colin Maltby* [2010] EWHC 1856 (QB)**

The Defendant cross-examined the Claimant (a solicitor) on the basis that she was fraudulently exaggerating her symptoms. D's Counter Schedule had not expressly pleaded such fraud, and it was unsupported by any of the medical evidence. D did not succeed in showing such fraud. It conceded that it had to pay the costs, but refuted that it should be on the indemnity (rather than "standard") basis. Owen J had little difficulty in ordering that D pay C's costs on an indemnity basis.

***Gibbon v Manchester CC; LG Blower Specialist Bricklayer Ltd v (1) John Reeves (2) Ann Reeves* [2010] EWCA Civ 726**

The CA has given important guidance on two aspects of offers to settle and costs: first, a Part 36 Offer remains open for acceptance until it is withdrawn or changed (Prt 36.3(6)) which is effected by serving "written notice" of that withdrawal or change (Prt 36.3(7)). The common law rule to the effect that once an offer is rejected (or in some circumstances, not accepted) then the offer lapses has no place in the confines of the Part 36 regime. Secondly, whilst acknowledging that it was bound by the difficult decision of *Carver v BAA Plc* [2008] EWCA Civ 412 it sought to stress that in claims for financial relief (as in personal injury claims) usually the fact that a judgment was in a greater amount of damages should be viewed as "success". *Carver* remains as a binding authority, but the courts are now encouraged to attach much less weight (even none) to factors beyond whether the judgment exceeds the offer or not.

DAMAGES

***Nottingham CC v (1) Emma Kate Bottomley (by her Litigation Friend HELEN RYAN) (2) East Midlands Strategic HA* [2010] EWCA Civ 756**

Emma Bottomley was in the care of Nottingham CC having suffered brain damage with associated spastic quadriplegia during her birth because of the negligence of the E Midlands Strategic HA. Emma's mother was not providing instructions, so that an employee of the Nottingham CC was, at the time of this hearing, her Litigation Friend. There was an imminent trial of the assessment of her damages, at which the method of providing damages (lump sum / periodic payments) would be determined. Shortly before that hearing Nottingham CC had applied to be joined in order to be heard on that issue. Emma was then in a process whereby the local authority were assessing her needs and determining what care package should be put in place for her.

On the issue of whether Ms Ryan could act as the Litigation Friend the CA were in no doubt. She was conflicted, albeit that she had, to date, shown objectiveness and a willingness to accept advice given to her. She had to be replaced.

On the broader issue of whether the Local Authority should be joined, the CA agreed that it should. It found that Part 19 and Part 41 were both wide enough to admit the Local Authority as a party to make representations to the court both as to the type of award, and as to whether any undertaking might be given, and as to its content (per *Peters v East Midlands SHA* [2009] EWCA Civ 145).

***Penny Johnson v Le Roux Fourie* [2011] EWHC 1062 (QB)**

The Claimant sustained severe facial disfigurement due to negligently performed plastic surgery. This undermined her confidence and ability to run her business, which prior to her injury had an annual turnover of £3 million. The parties agreed that the claim for loss of earnings was to be approached on the

basis of the loss of a chance since the increase in business turnover depended not only on the Claimant's actions but also on the decisions of third parties. The court adopted the approach from *Allied Maples Group Ltd., v Simmonds & Simmonds* [1995] 1 WLR 1602. The first test, therefore, was whether there was a 'real and substantial chance' that turnover would have increased and, if so, to what extent. Here, it was found the evidence indicated there was a real and substantial chance of her business having achieved a turnover of not less than £25 million per annum. This figure was then decreased to £20 million to reflect the risk of not achieving such turnover. From this, it was possible to extrapolate gross earnings for 2010.

INSURANCE

***Churchill Insurance Co Ltd v Benjamin Wilkinson (by his Father and Litigation Friend, Steven Wilkinson); Tracey Evans v Equity Claims Ltd* [2010] EWCA Civ 556.**

Two different judges at first instance interpreted s.151(8) of the Road Traffic Act 1988 differently. In both cases, the insurer wanted to recover damages they had paid out from their insured. In one case the insured had allowed another to drive knowing that person was uninsured, in the other case the insured had not known. At the heart of the issue is whether s.151(8) complies with the European Directive 2009/103 or not; and if it did not how could it be framed so as to comply. The CA referred those questions to the European Court of Justice.

***Clinton Jacobs v MIB* [2010] EWCA Civ 1208**

Mr Jacobs, whilst resident in the UK, was injured in Spain by a German national driving a car which was based in Spain. No insurance could be detected for that car, and so Mr Jacobs was entitled to claim compensation from the MIB. The issue was what national law governed the issues in the claim? The MIB contended that Article 4(1) of Rome II required the trial to apply the law of the country "in which the damage occurs" – even if that is different from the country where the event which gives rise to the damage occurs. However, Regulation 13 of the European Communities (Rights Against Insurers) Regulations 2002 provided that the MIB was the Compensation Body under the Regulations and that the Compensation Body (the MIB) shall compensate him "as if the accident had occurred in Great Britain". The CA ruled that the MIB must compensate Mr Jacobs by an assessment in accordance with the law of England.

***Durham v BAI (Run Off) Ltd and Other lead cases* [2010] EWCA Civ 1096**

This case concerns, mainly, the interpretation of various employer's liability insurance contracts. The so-called "trigger" litigation. It concerns claims for damages arising from Mesothelioma. When the insurance contracts covered "injury sustained" or "disease contracted" in the course of employment, did that mean that the policy had to be in force at the time of the inhalation of the asbestos or at the time when (usually

about 40 years later) the disease manifested itself. CA decided that in relation to "injury sustained" that meant that the policy only gave rise to indemnification at the time when the disease manifested itself; whereas, with those policies defined by "disease contracted", the indemnification arose when the asbestos was inhaled.

***X v Y* [2010] EWHC 1983 (QB)**

The Claimant is an adult seeking to sue his Mother on two separate grounds: first, for assault both by his Mother upon him, and for her complicity in respect of physical assaults on him by his Father; secondly, against his Mother in negligence in failing to protect him from his Father. However, since the torts were very historical, the first issue was limitation. The Judge ruled that the Assaults could continue by virtue of S.33 of the Limitation Act 1980 because the evidence in relation to that was unaffected to any serious degree by the lapse of time; however, in respect of the claim in negligence he reached the opposite conclusion.

He was clear that the Mother had not joined in with the Father when the Father engaged in systematic and excessive beatings of the Claimant. Mother had beaten C herself but the Judge was not satisfied that such beating went beyond the normal chastisement of such a family in the 1950's and so the claim foundered.

In any event the court was concerned about whether it was "fair, just and reasonable" (*Caparo*) to impose such a novel duty of care on such a Mother.

Adam Chippindall
Robert Sowersby
Sophie Holme
Guildhall Chambers
June 2011