GUILDHALL CHAMBERS

PI News

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Team News

New Tenants

The PI team welcome **Oliver Moore** and **Abigail Stamp** who became full members in September following completion of their respective pupillages.

Oliver was a solicitor specialising in the field of personal injuries from 1998 to March 2005 when he transferred to the Bar, having obtained Higher Rights of Audience in 2004. In his practice at the Bar Oliver continues to specialise in personal injuries and related areas, e.g. costs. He acts for Claimants and Defendants in fast and multi track claims.

Abigail Stamp joins us having obtained a First in Law at Exeter and completed a 12 month pupillage. Her practice involves civil and criminal work and she regularly appears in the coroner's court and county court. As with most junior barristers she maintains an interest in criminal work.

Other News

We are delighted to announce Brian Watson's elevation to the post of District Judge. He now sits full time in Bristol.

In February the majority of the PI team took occupation of Holbeck House, the old bank building adjacent to 5–8 Broad Street. The team now enjoys its own specialist library and a centralised position within chambers.

I wonder what the chances are of me being called upon to set this year's LLB exam paper on civil law and procedure? Feeling bound to ensure that those who follow me suffer as I did I think my first question would have to go something like this: "Wayne and Christiano, ten year old boys, climbed an otherwise safe fire escape but then had a fight and fell off. As they fell down the steps they inhaled asbestos dust from boarding on the steps. Consequently Wayne developed pleural plaques (with associated anxiety and a risk of future disease) and Christiano developed mesothelioma. The steps were owned by three separate defendants, one of whom was penniless and uninsured. As a result of depression Christiano committed suicide ten months later. Wayne's solicitor, Sven, took on his case via a CFA agreement because Wayne's girlfriend told him there was no other funding option available (apparently she did not have any credit cards...). She didn't mind because Sven told her his costs estimate was only £100 and anyway, she was intent on lying about Wayne's claim to increase the damages. Two defendants admitted liability pre-proceedings so Sven did not investigate that issue. Sadly, Sven then served the claim form late, by fax, on the usual or last known residence of the Defendants' solicitor and had to ask for extra time. The first district judge to hear the application refused it and imposed a penalty but later another district judge decided to review the order on paper and to grant it. Thereafter the Defendants denied their admissions and filed full defences on liability citing inconsistent entries in Wayne's medical notes. "Discuss".

You know what? Just typing that question has reminded me how glad I am that the World Cup and all those exams are behind us. For the limited number of our readers (and examiners) who might need some assistance with the answers please read on...

This edition of the Newsletter contains, as usual, a digest of recent decisions, principally those of the House of Lords and Court of Appeal, which contain issues relevant to the world of Personal Injury. In addition **James Hassall** discusses the question of lies in the litigation process and the apparent disparity in sanctions imposed for fraud and mere procedural irregularity. **Matthew Porter-Bryant** analyses *Keown v Coventry Healthcare NHS Trust*, the latest in a number of cases on Occupier's Liability and continues a theme developed by him in past articles. **Selena Plowden** and **John Snell** look at the latest raft of appeals (lead cases being *Collier v Williams* [2006] EWCA Civ 20 and *Kuenyehia v International Hospitals Ltd* [2006] EWCA Civ 21) on the questions of extending time for service of and dispensing with service of the claim form. **Selena Plowden** separately analyses a further issue in these appeals – the power of the court to review its own decisions. Finally, **Adam Chippindall** marks the overruling of *Walkley v Precision Forgings Ltd* [1979] 1 WLR 606 but pauses to consider whether it is appropriate to rejoice.

Your comments and suggestions are welcome and should be addressed to me at gabriel.farmer@guildhallchambers.co.uk. Of course, solutions to the exam question are also invited – the wittiest wins a liquid prize.

Gabriel Farmer
Editor

Recent Decisions

Liability

Liability for suicide

Eileen Corr (Administratrix of the Estate of Thomas Corr (Deceased) v IVC Vehicles Limited [2006] EWCA Civ 331

The Deceased had been badly injured in a factory accident caused by the Defendant's negligence. Subsequently the Deceased suffered post-traumatic stress disorder. Six years post-accident he committed suicide. The Claimant brought a claim against the Defendant on behalf of the Estate under the Fatal Accidents Act 1976. At first instance the Judge held that the Defendant had been in breach of duty but that that duty did not extend to a duty to take care to prevent the Deceased's suicide and that his suicide was not reasonably foreseeable.

Held:

1 On the evidence the Deceased's suicide did not break the chain of causation between the Defendant's negligence and the consequences of suicide (*Holdlen Property Limited v Walsh* [2000] 19 NSWCCR 629 considered).

2 The Claimant did not need to establish that at the time of the accident the Deceased's suicide was reasonably foreseeable as a kind of damage separate from psychiatric and personal injury.

3 Responsibility for the effects of suicide depended upon whether it flowed from a condition for which, by reference to appropriate foreseeability criteria, the Defendant was responsible. In the instant case the Claimant founded her claim on depression which was admitted to have been a foreseeable consequence of the Defendant's negligence.

Damages

Care expenses – financial assistance from local authority – no deduction from award

Maria Freeman v Christopher Lockett [2006] EWHC 102

The Claimant sustained upper body paralysis in a road traffic accident for which the Defendant admitted liability. The Claimant was wheelchair dependent and required long term future care. The Defendants argued that the Claimant's award should be adjusted to reflect the fact that she was currently in receipt of and was expected to continue to receive financial assistance from her local authority towards the provision of practical assistance in her home. Published material provided by the local authority suggested that the Claimant would be required to contribute towards her care on receipt of the award of damages and that the local authority would seek to recover the direct financial payment it had made towards the cost of her care provision. Shortly before the Trial the local authority reversed its earlier decision concerning the recovery of those financial payments.

Mr Justice Tomlinson held that no local authority could ever give any guarantee or undertaking as to what its policy for future funding would be. It was unnecessary and in any event impossible for the Court to undertake the exercise of estimating what the Claimant might receive from the local authority in the future.

See also *Sowden v Lodge* [2004] EWCA Civ 1370.

It is important to note in this case that:

1 The Defendant simply failed to prove that the local authority would continue to contribute to the Claimant's costs in the future and

2 The Defendant was not prepared to offer the Claimant an indemnity in case her local authority funding should in future be withdrawn or reduced. The Claimant was therefore able to criticise the Defendant for wishing to cast upon the Claimant the entirety of the risk that funding might be reduced or withdrawn.

Part 36

Acceptance of offer after end of hearing

Hawley v Luminar Leisure Plc and Others

Court of Appeal 14 February 2006

The Defendant attempted to accept a pre-Hearing Part 36 offer made by the Claimant after the Trial had ended but before Judgment had been delivered. The Court of Appeal held that it was well known that the risks inherent in this litigation might alter significantly as soon as a Hearing started. There would be a strong case for saying that there was an implied term in any offer that it was only open for acceptance until the Hearing commenced. However, there was no doubt at all that an offer carried an implied term that it would not be available for acceptance after the Hearing ended and the Court reserved judgment. It would be contrary to the mechanism of Part 36 for an offer then to be susceptible to acceptance.

Limitation

Discretion to disapply limitation period. Walkley v Precision Forgings Ltd overruled

Horton v Sadler and another

The claimant was injured in a road traffic accident. The defendant was not insured. The MIB nominated insurers and made an interim payment. The claimant issued proceedings just before expiry of the three-year limitation period, but failed to comply with the requirement to give them notice. Having been joined as a party to the proceedings the MIB served a defence that denied liability on the failure to comply with the notice condition. The claimant then issued a second set of proceedings against the defendant, giving the correct notice to the MIB. The MIB claimed that the second claim was statute-barred under the Limitation Act 1980 s.11. The claimant sought an order disapplying the three-year time limit under s.33 of the Act. The judge at first instance indicated that had it been permissible for him to disapply the time limit under s.33 then he would have exercised his discretion in favour of the claimant. The claimant's appeal was dismissed based on binding authority, in particular, *Walkley v Precision Forgings Ltd* (1979) 1 WLR 606.

The claimant appealed to the House of Lords arguing that the reasoning in Walkley could not be supported, that the Court of Appeal frequently sought to rely on fine distinctions to allow it to disapply Walkley in any case where it was not bound to apply it.

The House of Lords held:

1 The true question for the court under s.33 of the Act was always whether it was equitable to override the time bar which otherwise would defeat the action that the claimant had brought out of time.

2 That analysis could not be reconciled with Walkley which had held that s.11 could not prejudice a claimant who had commenced proceedings within the three-year period.

3 The reasoning of the decision in Walkley was unsound, it had given rise to distinctions that disfigured the law in this area and the effect had been to restrict unduly the broad discretion that Parliament had conferred, Walkley overruled. *Thompson v Brown (t/a Brown (George Albert) (Builders) & Co)* (1981) 1 WLR 744 applied.

4 Whilst former decisions of the House of Lords were normally binding, too rigid adherence to precedent could lead to injustice in a particular case and unduly restrict the development of the law. The House would depart from a previous decision where it appeared right to do so. It was appropriate for the House to depart from its own decision in Walkley.

See also the article by Adam Chippindall later in the newsletter.

Limitation – contribution – time runs from quantum

Judgment – Aer Lingus v Gildacroft Limited and Another

Court of Appeal 17 January 2006

An employee of Aer Lingus was badly injured in a workplace accident when a lift supplied to Aer Lingus and installed by the Defendants malfunctioned. On 9 May 2001 the employee obtained Judgment against Aer Lingus for the damages to be assessed. A later Consent Order dated 3 October 2003 gave Judgment to the employee in the sum of £490,000. On 4 February 2004 Aer Lingus commenced an action for contribution or indemnity against the Defendants under the Civil Liability (Contribution) Act 1978. The Defendants submitted that the claim by Aer Lingus was statute barred because the two year limitation period began to expire upon the entry of Judgment on liability. At first instance Mr Justice Simon found for the Defendants. The Court of Appeal held, having considered *George Wimpey v British Overseas Airways Corporation* [1955] AC 169 and *Knight v Rochdale Health Care NHS Trust* [2004] 1 WLR 371, that time started to run from the date of the Judgment or award which ascertained quantum, not merely the existence of the tortfeasor's liability.

Admissions

Defendant free to withdraw pre-action admission

Sowerby v Charlton

Court of Appeal 21 December 2005

The Claimant in visiting the Defendant's property used some stone steps which contained a handrail on the left but which were open on the right. She fell 8ft and was rendered paraplegic. In a pre-action letter the Defendant's Solicitors made an admission of primary liability. Proceedings were then issued at which point the Defendant withdrew the admission and placed liability in dispute. The Claimant successfully applied to strike out the Defence insofar as it contested primary liability. The Court of Appeal held on the facts of the case that it was inconceivable that the Claimant would fail to establish primary liability and therefore Summary Judgment was entered for the Claimant on that issue. However, on the question of the admission the Court held:

1 Pre-action admissions were within the ambit of Order 27 Rule 3 of the Rules of the Supreme Court.

2 However, the Civil Procedure Rules formed a new procedural code and Part 14 (which governs admissions) had been so carefully drafted that the rule makers could not have intended a pre-action admission of liability to be embraced by the words "a party may admit the truth of the whole or any part of another party's case" in Rule 14.1.

3 The first instance Judge had therefore been wrong to hold that Part 14 applied to the pre-litigation admission.

4 Older authorities on Order 27 Rule 3 did not provide assistance in construing CPR 14.1. In particular, *Gale v Superdrug Stores Limited* [1996] 1 WLR 1089 should now be approached with caution.

5 Valuable guidance on determining whether to permit the withdrawal of an admission that was made after an action had commenced was contained in *Braybrook v Basildon and Thurrock University NHS Trust* (unreported 7 October 2004)

- In exercising its discretion the Court would consider all the circumstances of the case and seek to give effect to the overriding objective.
- Amongst the matters to be considered would be:

  a The reasons and justification for the application which had to be made in good faith.

  b The balance of prejudice to the parties.

  c Whether any party had been the author of any prejudice he might suffer.

  d The prospects of success of any issue arising from the withdrawal of the admission.

  e The public interest in avoiding, where possible, satellite litigation, disproportionate use of Court resources and the impact of strategic manoeuvring.

- The nearer any application was to a final Hearing the less chance of success it would have, even if the party making the application could establish clear prejudice.

This decision produces a surprising result: a Claimant may receive an early admission of liability from the Defendant yet years later when proceedings are issued a Defendant may place liability in issue even though the Claimant has carried out no liability investigation and may thereby be severely prejudiced. The Claimant's Solicitors will need in each case to judge whether it is safe to assume that the admission will stand or whether it is necessary out of prudence to investigate liability in any event and garner evidence to safeguard against the future possibility of the admissions being withdrawn. The difficulty is, of course, that some Defendants will seek to withdraw their admissions whilst others will complain that, in the face of an admission which was not withdrawn, the Claimant's Solicitor has incurred unnecessary costs by investigating liability anyway.

The only way of completely securing an admission of primary liability pre-issue is to agree an apportionment of contributory negligence. In this event a contract forms on the issue of liability which cannot be undone (other than in accordance with the usual contractual principles).

Procedure

Evidential issues in medical cases

Fifield v Denton Hall Legal Services

Court of Appeal 8 March 2006

The Claimant succeeded in her case against Denton Hall. The Defendant was severely criticised in the Judgment - but that is not the only reason it is worth reading! The Court expanded on a more general issue – the proper use of medical records in cross-examining a Claimant. The Court held:

1 A party who sought to contradict a factually pleaded case on the basis of medical records or records of the Claimant's statement to doctors or others should indicate that intention in advance either by amendment of his pleadings or by informal notice.

2 The Claimant should then indicate the extent to which he or she took objection to the accuracy of the records.

3 A decision would then need to be taken whether records required proof by either of the following means:

  a If the statement was put to the witness he or she might admit to having made it. Alternatively, if she did not admit it the statement could be proved under section 4 of the Criminal Procedure Act 1865.

  b Section 6(5) of the Civil Evidence Act 1995 did not prevent the statement being proved as hearsay evidence under section 1 of that Act. If the Court concluded that such inconsistent statements had been made that went only to the credibility of the witness the statement could not be treated itself as evidence of its contents (see *North Australian v Goldsborough* [1893] 2 Ch 381, 386).

If the foregoing precautions were not taken the Trial Judge might be reluctant to permit reference to reports of the witness's statements in the medical records for the purpose of contradicting her evidence. Any such reluctance was unlikely to be criticised by the Court of Appeal. Alternatively, if there was unreasonable failure to admit that such statements were made, to the extent that it was necessary to call busy doctors to Court simply in order to formally prove them, then such failure of co-operation was likely to be penalised severely in costs.

We all have experience of the Claimant whose pleaded case is contradicted by, for example, an entry in accident and emergency notes. This decision suggests that a Defendant may not be able to use such notes at Trial to contradict the Claimant's case unless prior notice has been given. It remains to be seen whether, particularly in low value personal injury cases, such strictures will be upheld.

Minor whiplash claims – fraud – guidance

Alan Mark Kearsley v Daniel Klarfeld [2005] EWCA Civ 1510

The Court of Appeal provided guidance in relation to low velocity road traffic collisions where the Defendant contended that no injury could have been sustained in the face of a claim where whiplash was alleged.

1 The practice that had emerged in low velocity impact litigation of requiring the Defence to include a substantive allegation of fraud or fabrication was not necessary.

2 It was sufficient to set out fully any facts from which the Defence would be inviting the Judge to draw the inference that the Claimant had not in fact suffered the injuries he asserted.

3 There was no burden on the Defence to prove fraud and the Defendant did not have to put forward a substantive case of fraud in order to succeed so long as he followed the rules in CPR rule 16.5.

In these cases the Claimant's advisers should offer the Defendant's insurers access to the Claimant's vehicle for the purposes of early examination and give early disclosure of any contemporaneous GP or other relevant medical notes. In turn it might be desirable for the Defendant's insurers to state at an early stage that they regard the claim as a low velocity case in which they would be seeking more expensive advice than the claim would justify.

Asbestos claims

Pleural plaques – insufficient damage

Rothwell v Chemical and Insulating Co Limited and Another

Topping v Benchtown Limited

Johnston v NEI International Combustion Limited

Mears v R G Carter Limited

Greaves v S T Everard & Sons Limited

Hindson v Pipehouse Wharf (Swansea) Limited

Court of Appeal 26 January 2006

The combined cases concerned appeals on liability and quantum in relation to a number of Claimants who sustained exposure to asbestos dust. Such exposure had foreseeable consequences: the development of pleural plaques, the risk of developing asbestos related disease and the suffering of anxiety at the prospect of developing such disease. It was common ground that none of those individual consequences if experienced in isolation would constitute sufficient damage capable of founding a cause of action in negligence. The Claimant contended that by combining all three consequences sufficient damage could be demonstrated to found a cause of action.

The Court of Appeal considered each element of damage and provided reasons why it would not constitute sufficient damage:

Pleural plaques

These undoubtedly constituted a physiological change to the body but save in 1% of cases they were symptomless, had no adverse effect on any bodily function and had no affect on appearance. In negligence the ingredient of damage need not be substantial but it has to be more than minimal. The Court would not allow its process to be used to pursue a claim unless what was at stake justified the use of that process.

Risk of future disease

Where the Claimant has sustained personal injury the prospect that he might suffer further physical damage in the future could be reflected in general damages. These could be increased to reflect the chance of this adverse outcome (see *Gregg v Scott* [2005] 2 AC 176, paragraph 67). However, no claim could be made in respect of the chance of contracting the future disease which was not consequent upon some physical injury.

Anxiety

The English Courts have never entertained a claim for fear of future illness or a free-standing claim for anxiety where these were not the potential consequences of physical injury. It was only possible to claim for a diagnosable psychiatric illness if it was a foreseeable consequence of the Defendant's breach of duty in accordance with the principle in *Paige v Smith* [1996] 1 AC 155.

There was no legal precedent beyond first instance decisions for aggravating three heads of claim which, individually, could not found a cause of action, so as to constitute sufficient damage to give rise to a legal claim. There was no justification for departing from logic or legal principle in the specific case of asbestos induced pleural plaques.

Lady Justice Smith gave a dissenting Judgment.

Mesothelioma – causation – apportionment

Barker v Corus

Murray v British Shipbuilders

Patterson v Smiths Dock Limited [2006] UKHL 20

In *Fairchild v Glenhaven Funeral Services Limited* [2002] UKHL 22 it was decided that as an exception to the usual rule of causation a worker who had contracted mesothelioma after being wrongfully exposed to asbestos at different times by more than one employer or occupier could sue any of them notwithstanding that he could not prove which exposure had caused the disease. The *Fairchild* exception could operate even though not all the potential causes of damage were tortious and a non-tortious source of risk did not have to have been created by someone who was also a tortfeasor. However, it was an essential condition for the operation of the exception that the impossibility of proving that the Defendant caused the damage arose out of the existence of another potential causative agent that operated in the same way. Given that the decision of the majority in *Fairchild* proceeded on the basis that the creation of a material risk of mesothelioma was sufficient for liability then damages should be apportioned between Defendants according to the relative degree of contribution to the chance of the disease being contracted. Accordingly, all cases were remitted to determine damages by reference to the proportion of risk attributable to the breaches of duty by the Defendants.

Following the decision there have been repeated suggestions that parliament might intervene to reverse the judgment – see http://news.bbc.co.uk/1/hi/ uk_politics/5074886.stm.

Service of the claim form

Service of claim form: guidance

Collier v Williams

Marsh and Another v Maggs

Leeson v Marsden and Another

Glass v Surrendran

Court of Appeal 25 January 2006

The combined appeals raised points on CPR Part 6 relating to service and Part 7 relating to the extension of time for service of the Claim Form. The following issues were considered:

Solicitor nominated to accept service

- Where a Defendant or his insurer nominated a Solicitor for service the business address of that Solicitor was the address for service. There was no need for the Solicitor to notify the Claimant in writing that he was authorised to accept service.
- If a Defendant had given an address for service, including that of a Solicitor, it was still open for the Claimant to serve personally on the Defendant unless he had received notice in writing from a Solicitor authorised to accept service on behalf of the Defendant in accordance with Rule 6.4(2).
- But if a Claimant wished to use one of the types of service referred to in Rule 6.5(4) (first class post, by leaving it at the place of service, DX, fax or email) then if he had been provided with a Solicitor's address as the address for service he would not be able to post the document to the Defendant himself: he must post it to the address of that Solicitor.
- "No Solicitor acting for the party to be served" in Rule 6.5(6) must mean "acting so that the Solicitor can be served" or "acting in a capacity such that service can be effected on the Solicitor."
- The meaning of "usual or last known residence" in Rule 6.5(6) could not be extended to an address at which the individual to be served had never resided. See also *Smith v Hughes* [2003] 1 WLR 2441.

Extensions of time for service within the period of validity of the claim form under 7.6(2)

The Court of Appeal considered the issue of extension of time for service and the guidance in *Hashtroodi v Hancock* [2004] 1 WLR 3206.

- In deciding whether to grant a prospective extension of time under Rule 7.6(2) the Court must consider how good a reason there was for failure to serve in time (if the application was heard after the end of the four month period): the stronger the reason the more likely the Court would be to extend time and the weaker the reason the less likely.
- That involved making a Judgment about the reason why service has not been effected within the four months. It was a more subtle exercise than that required under Rule 7.6(3) (or retrospective extensions) which provided that unless all reasonable steps had been taken the Court could not extend time.
- In *Hashtroodi* the Court said that the power in Rule 7.6(2) had to be exercised in accordance with the overriding objective, which meant it would always be relevant for the Court to determine and evaluate the reason why the Claimant did not serve the Claim Form within the specified period. That was a critical enquiry that the Court had to undertake in such cases. It should be understood that where there was no reason or only a very weak reason for not serving the Claim Form in time the Court was most unlikely to grant an extension of time.

The Court also considered practice in relation to the making of applications on paper and applications without notice. On these topics please see the article by Selena Plowden later in this newsletter.

Service of the claim form

Asia Pacific (HK) Limited v Hanjin Shipping Co Limited and Another [2005] EWHC 2443 (Comm)

The Defendant's Solicitors asked the Claimant's Solicitors for confirmation that proceedings had been issued, whether proceedings could be consolidated with other claims and confirmed that they had instructions to accept service on behalf of the Defendant. The Claimant's Solicitors replied by fax and attached a copy of the Claim Form issued by the Claimant. No response pack was served, the Claim Form was marked "Claimant's copy" and the fax did not state that the Claim Form was faxed "by way of service." After the four month period for serving the Claim Form under CPR 7.5(2) had expired the Defendant took the point that the Claim Form had never been served.

The Court held that despatch of the fax did constitute service of the Claim Form. The CPR did not define what was meant by service other than prescribing how it might be done. The common thread was that the parties serving a document delivered it into the possession or control of the recipient or took steps to cause it to be so delivered. The facts were that the Claimant had delivered to the Defendant by a permitted method of service a Claim Form and thereby not only brought to the attention of the Defendant the fact that the Claim Form had been issued but also provided them with a copy of it. The Claimant did not indicate that the form was provided for information only or that although delivered it was not to be regarded as served. When a Claim Form was delivered to the recipient in a manner provided for by the rules it was served unless it was made clear by the person who delivered it that whilst he was delivering the form by such a method, he was not in fact serving it.

Dispensing with service of the claim form

Kuenyehia and Others v International Hospitals Group Limited

Court of Appeal 25 January 2005

The Claimant successfully obtained an Order from the first instance Judge dispensing with service of the Claim Form pursuant

to CPR 6.9. The Claimant had served the Claim Form at the Defendant's office by fax without obtaining the Defendant's confirmation pursuant to paragraph 3.1(1) of the Practice Direction to CPR Part 6. The Judge at first instance held that this was a comparatively minor departure from the permitted method of service as described in *Cranfield v Bridgegrove* [2003] 1 WLR 2441. Accordingly, in the circumstances he exercised his power to dispense with service under Rule 6.9. The Defendant successfully appealed. The Court of Appeal held:

1 It required an exceptional case before the Court would exercise its powers to dispense with service under Rule 6.9 where the time limit for service of the Claim Form had expired before service was effected.

2 The power under 6.9 was unlikely to be exercised save where the Claimant had either made an ineffective attempt in time to serve by one of the methods permitted or had served in time in a manner which involved a minor departure from one of those methods.

3 However, it was not possible to give an exhaustive guide to the circumstances in which it would be right to dispense with the service of a Claim Form.

4 The failure to comply with paragraph 3.1(1) could not fairly be characterised as no more than a minor departure from the provisions of CPR 6.2(e).

5 While there might be exceptional cases prejudice was only relevant in such cases to assist a Defendant where the Court would otherwise think it right to dispense with service. The absence of prejudice to a Defendant could not usually, if ever, be a reason for dispensing with service.

See also *Vinos v Marks & Spencer PLC* [2001] 3 All ER 789, *Godwin v Swindon Borough Council* [2002] 1 WLR 997, *Anderton v Clwyd County Council* [2002] 3 All ER 813, *Wilkey v BBC* [2003] 1 WLR 1 and *Cranfield v Bridgegrove* [2003] 1 WLR 2442.

See also the article by John Snell later in this newsletter.

Costs

A successful defendant can be deprived of costs

Daniels v Commissioner of Police of the Metropolis

Court of Appeal 20 October 2005

The Claimant Police Officer sustained injuries while on a training course. She bought a claim for damages quantified at £7,000. The Defendant refused to enter into negotiations with the Claimant's Solicitors and rejected three Claimant's Part 36 offers. At first instance the Judge dismissed the claim and ordered the Claimant to pay costs in the region of £50,000. The Claimant appealed on the basis that the Defendant had acted unreasonably. Citing *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002 the Court of Appeal held that departure from the general rule that the unsuccessful party should bear the costs was not justified unless it was shown that the successful party acted unreasonably in refusing to agree to alternative dispute resolution. The definition of ADR included any kind of negotiation between the parties whether direct or indirect. In refusing the appeal the Court held that it was entirely reasonable for a public body such as the police to take the view that it would contest what it reasonably considered to be an unfounded claim in order to deter other similarly unfounded claims. Whilst it was well known that large organisations often made small payments to buy off claims they considered speculative in order to avoid contesting them, such conduct might in part be responsible for fuelling a compensation culture. Accordingly, Defendants in this situation were entitled to take a stand and contest claims even though the costs incurred were wholly disproportionate to the sums being claimed.

Importance of providing costs estimate to client

Garbutt and Another v Edwards and Another

Court of Appeal 27 October 2005

The Defendant attempted to evade liability for costs. It submitted that the Claimant had no costs liability to pay their own Solicitors because those Solicitors had not provided the Claimants with a costs estimate in breach of rule 15 of the Solicitor's Practice Rules 1990 and the Solicitor's Costs Information and Client Care Code 1999. The Court of Appeal held that failure to comply with the Code did not render the contract or retainer unlawful or unenforceable, however:

1 In assessing costs the Costs Judge could be asked to require the winning party to prove that an estimate had been given: the procedure in *Pamplin v Express Newspapers Limited* [1985] 1 WLR 689 would then apply.

2 The Costs Judge must also give weight to a certificate as to its accuracy and if, exceptionally, the receiving party was required to demonstrate the provision of a proper costs estimate and failed to do so, this was a factor the Costs Judge would take into account in assessing the amount of costs which were reasonable and proportionate for the purposes of CPR 44.4 and 44.5.

In fact the appeal failed because the Defendants could not advance any reason why an estimate of costs would have made any difference to the level of costs payable.

Costs – the danger of paying into court

Walker Residential Limited v Davies and Another

Chancery Division 9 December 2005

On 18 March 2004 the Defendant offered to settle the Claimant's claim for alleged misrepresentation against the Defendant in the sum of £85,000. The Claimant rejected the offer and subsequently issued a Claim Form. On 8 March 2005 the Defendant paid £85,000 into Court which the Claimant accepted. The Defendant

then applied for an Order that the Claimant should pay the Defendant's costs from March 2004 (i.e. the date of the original offer). The Defendant argued that had the Claimant accepted the first offer then the Defendant would not have incurred the costs of defending the claim. Mr Justice Park held that when the Claimant accepted the payment it was entitled to accept without the Court's permission and the Claimant was automatically entitled to costs under CPR 36.13.

CFAs; enquiries as to alternative funding – enforceability

Salmonini v London General Transport Services Limited

[2005] PIQR P20 (Supreme Court Costs Office Chief Master Hurst, 28 January 2005)

The claimant's costs were disallowed in total on detailed assessment on the basis that there was insufficient evidence to show that the claimant's legal representatives had made proper enquiries as to the existence of alternative legal expenses insurance.

The court was entitled to look behind the solicitor's signature on the bill because as the claimant was a taxi driver it was unusual that he did not have BTE insurance and this required investigation. There had been a breach of the Conditional Fee Agreement Regulation 4(2)(c) as the enquiries made by the solicitor were inadequate and insufficient to comply with the Regulations. The breach had a materially adverse effect upon the protection afforded to the client as the client had entered into a CFA, a loan agreement and an ATE insurance policy. The CFA was unenforceable and no costs could be recovered under it.

This case follows on from *Sawar v Alam* [2001] EWCA Civ 1401 which laid down guidance on the nature of the search required in order to comply with Regulation 4(2)(c) – the requirement to ascertain whether alternative methods of funding exist. Of course given the inception of the latest CFA regulations this type of challenge has a limited life span. However, as is demonstrated by the decision below this is an area that continues to be fruitful for defendants.

Conditional fee agreements – enforceability

David Myatt and Others v National Coal Board

Supreme Court Costs Office 12 August 2005

The Claimants had sustained occupationally induced hearing loss. The claims had been settled and the Defendant had agreed to pay the Claimant's costs. The Claimants had entered into CFAs with their Solicitors. The Defendant challenged the enforceability of the CFAs based upon the procedure that the Solicitors had adopted to determine the existence of legal expenses insurance or before the event insurance that the Claimants may have been entitled to under credit cards, motor insurance policies, household insurance or trade union membership.

The Claimants had stated to their Solicitors that they did not have any of the listed legal expenses insurance or, that if they did, they could not be used to fund the claim against the Defendant. The Defendant argued that regulation 4(2)(c) required the Solicitors to do more than simply ask whether the Client had BTE insurance. The Defendant contended that the Claimant should have been asked to provide documents to their Solicitors in order for the Solicitors to decide on their relevance and give appropriate advice. The Court held that simply to ask the Claimants whether they had insurance policies which would entitle them to legal expenses cover required the Claimants to interpret what could have been complex documents. The Claimants were unsophisticated Clients, accordingly it was an inadequate enquiry and would not have satisfied regulation 4(2)(c) of the Conditional Fee Agreement Regulations 2000. Importantly, whilst the Court concluded it was unlikely that such cover would have been available under credit card, household, motor policy or trade union membership for cases of industrial disease, no evidence was produced to establish that point. Accordingly, the CFAs were held to be unenforceable by virtue of regulation 4(2)(c).

The important points to note from this decision are:

1 It is necessary to ask prospective Claimants to produce any policies of insurance that they may have from credit cards, household or motor policies or trade union membership and to provide advice to the Client based on those documents or

2 If this point is taken against a Claimant to conduct this enquiry before the detailed assessment takes place: if in fact a Claimant can prove that had the enquiries been carried out properly they would have revealed that there was no insurance in place, it is difficult to see how the breach of the regulations can have had a "materially adverse effect" upon the Claimant pursuant to *Hollins v Russell* [2003] EWCA Civ 718.

CFA enforceability – fixed recoverable costs – indemnity principle does not apply

Mohammed Butt v Christie Mizami Mohammed Butt v Cadhar Kamuluden

Queen's Bench Division 9 February 2006

The Defendant attempted to argue that the Claimant's conditional fee agreement was unenforceable by reason of the Claimant's Solicitor's failure to make appropriate enquiries about the availability of before the event insurance. The claim was one where the claim had been settled but costs could not be agreed. The Claimant started costs only proceedings claiming fixed recoverable costs under CPR 45.9 and a success fee under CPR 45.11. Held the indemnity principle does not apply to the fixed recoverable costs regime. The objective of the CPR included saving expense and dealing with cases in ways which were proportionate to the amount of money involved and the whole idea underlying CPR Part 45 was that it should be possible to ascertain the appropriate costs payable without the need for further recourse to the Court.

"What happens when they lie?"

People lie in personal injury litigation. Perhaps not often, perhaps not regularly, but they do lie. They lie to get bigger awards of damages. They lie to dismiss a claim and stop their workforce getting ideas about bringing others. And they lie to get more costs paid by the other side.

Most readers are, I hope, by now thinking, "Yes, maybe, but thankfully not very often". I am inclined to agree, but of course murder does not happen very often, yet laws still exist to deal with it. The purpose of this article is not to theorise on the prevalence of lying in litigation, but rather to examine the consequences of it.

The potential consequences are: (i) penal sanctions, such as prosecution or an application to commit for contempt; (ii) costs penalties; (iii) the dismissal of the claim / a debarring order in respect of the defence; (iv) a complaint to a professional body. The latter is self-explanatory, but the others warrant expansion. I will also mention some of the procedural issues that arise when a finding of lying is made, or considered.

Penal Sanctions

If a judge has made a finding that someone has lied in the course of proceedings, both the judge and the other side's representatives will need to consider what punitive steps, if any, are warranted.

Lying during the course of proceedings will amount to a contempt of court and a number of possible criminal offences. If the lie was given (or repeated) on oath then there could be a prosecution for perjury. Lying in witness statements, statements of case, schedules of costs or other documents without an oath may still result in a prosecution for doing an act intended to pervert the course of justice, for attempting to obtain property or a pecuniary advantage by deception, or (if more than one person is involved) conspiracy to defraud. Although the law of England & Wales allows for private prosecutions, in practice any criminal prosecution is likely to be brought by the Crown Prosecution Service following a complaint by an aggrieved person to the police or to the Director of Public Prosecutions.

It must be noted, however, that frequently there may be difficulties over proof. In simply refusing to accept a party's' evidence, a judge makes a finding on balance of probabilities. Both criminal proceedings and contempt proceedings require proof beyond reasonable doubt. To complicate matters, a finding of fraud in civil proceedings does not require proof to the criminal standard, but it does require proof to a high standard. Per Denning LJ (as was) in *Hornal v Neuberger Products* [1956] 3 All E.R. 970:

"the standard of proof depends on the nature of the issue. The more serious the allegation the higher the degree of probability that is required: but it need not, in a civil case, reach the very high standard required by the criminal law."

It follows that it is quite possible that a finding of fraud in civil proceedings will not give rise to a conviction in subsequent criminal proceedings. Indeed (although in practice it is difficult to imagine such a difficulty ever arising) it is theoretically possible that, on the law as stated, the same judge could be sufficiently satisfied of fraud to dismiss a claim for it, yet insufficiently satisfied of fraud to sentence for contempt for it.

However, for simplicity's sake, let us assume that the liar is bang to rights. What next? The other side will need to consider whether to report the matter. They will also, perhaps more pertinently, need to consider whether to make an application to commit.

The judge's duty in this situation is not merely responsive. The judge is under a positive duty to consider two things irrespective of the position of the other party: firstly, is the court able to remedy the situation itself? If the court can make appropriate costs orders and/or impose a sanction due to contempt of court (necessitating a committal hearing) then it will rarely be necessary for the judge to go further and to report the matter to the authorities. However, if the court does not have power to deal with the illegal conduct, there has to be a compelling reason for the court *not* to report it: see the judgment of Mr Justice Charles in *A v A; B v B* [2000] FLR 701. The Civil Bench Book (the JSB guidance manual for judges sitting in civil cases) describes this judgment as *"not necessarily the last word, but it is certainly the first point of reference [for the judge to consider]"*. If the judge considers that the matter should be reported, a letter (drafted or approved by the judge) should be sent by the court manager to the DPP, local police or other prosecution authority as appropriate.

In personal injury claims, the most likely steps would be to deal with a contempt of court and/or (in the case of a legal representative) to refer the matter to an appropriate professional body (such as the Office for the Supervision of Solicitors). It is suggested that only in the most serious cases would a further report to a prosecution authority be necessary, because the court's own power to sentence to up to 2 years' imprisonment for contempt is likely to be adequate to deal with the situation.

Contempt proceedings arising out of a personal injury claim are very rare, but perhaps the best-known recent example is *Caerphilly County Borough Council v Hughes.* Mr. Justice Silber, sitting in Swansea on 6th December 2005, sentenced the Respondent (the erstwhile Claimant) to 14 days in prison. His witnesses were fined. The Claimant said that he had tripped in a pothole and brought a claim. One of the consequences of the alleged accident was said to be that he could not play football for 18 months. The Council (represented by Dolmans) later uncovered evidence to show he had been a prolific goal scorer for his club and had played 29 matches over the period. Indeed, just one hour after the claimed pothole tripping accident in September 2001, he was pictured kneeling on the injured knee in a team line-up of players prior to taking part in a match in which he scored a goal. The court found that the pothole tripping accident had never occurred.

In an interesting warning to future fraudulent claimants, the High Court Judge said: *"There is evidence that a very large number of false claims of this kind are made against Councils and it is Council taxpayers who bear the costs. Those who in future make fraudulent witness statements in order to pursue fraudulent claims can expect immediate prison sentences substantially longer than the one imposed on you".*

Costs

Where the lying goes to factual issues upon which liability depends, there are unlikely to be any particularly complex issues over costs. Most likely the judge will dismiss the culprit's case and the other side will be entitled to costs on the indemnity basis.

More interesting issues arise if a party has lied, yet "succeeded". This tends to occur where liability is not in issue. A recent example was the widely-reported case of *Painting v Oxford University* [2005] EWCA CIV 161, in which the Claimant's sinking ship was dutifully manned by our own Gabriel Farmer.

C sought £400,000, but was found to have exaggerated her claim and was awarded £23,331 against a payment in of £10,000. The Court of Appeal found that the *"substantive dispute"* before the judge had been whether P had been exaggerating her claim. Hence C was ordered to pay D's costs from the date of the payment in (which, admittedly, had been reduced once the evidence of exaggeration had come to light), notwithstanding that she had beaten it.

The short point is that lying will almost always be a reason to depart from the "normal rule" that the victor receives costs. Although the extent to which lying should be marked by costs will often be a matter for individual discretion, I would venture to suggest that a judge should always reflect such a finding by some alteration to what would otherwise have been the costs order. If no alteration at all is made, it is difficult to see how such an order could not be appealed.

There is a sting in the tail, however – Defendants should of course be aware that a finding that the Claimant has lied may be a finding too far, when it comes to costs recovery. The author has acted for the Defendant in at least one case where total victory seemed to have been achieved (the Claimant and all her witnesses were found to have lied on oath and the claim was dismissed) only for it to be marred by her ATE insurer's consequent refusal to indemnify her against our costs order ... not much of a problem if the Claimant owns a house, but a significant one if the Claimant is impecunious.

If the alleged lying itself concerns an inflated bill of costs, then the consequences and procedure will depend upon the stage reached. At summary assessment, the first step would normally be for the judge to list the matter for a detailed assessment with the full file to be produced and considered, possibly with an order that a partner of the firm attend.

Strike-out

This is the sanction least explored. If a party is found to have abused the process of the court by lying within it, should that party lose the right to continue to be a part of the court process at all? The author's view is that a strike-out should always be at least considered – yet often it is the one step that the aggrieved party does not attempt to take. Although the practice of striking out a personal injury claim (or debarring a Defendant from defending) for *procedural* failures has atrophied, it is not yet gone altogether. The most obvious example is, of course, CPR 7.6(3) and the plethora of Court of Appeal decisions over when a case should end because of late service of the claim form. This gives rise to a serious question over whether the treatment of claimants who merely delay is consistent with the treatment of claimants who lie.

In *Hashtroodi v Hancock* [2004] EWCA 652 a tetraplegic was refused a *prospective* application for extension of time for service, meaning that the claim was struck out notwithstanding that liability was not in issue. Consider the scale of that procedural failure, against the scale of wrongdoing inherent in deliberate lying so as to obtain a fraudulently enhanced award of damages. It is difficult to see how the former is worse than the latter, or that any reason of public policy should cause the former to be dealt with more harshly than the latter. There is, clearly, an argument that the courts should reward a conscious decision to attempt a fraud with the loss of the entire claim.

This possibility has received some judicial attention, albeit obiter, in *Molloy v Shell UK Ltd* [2001] EWCA 1272. The Claimant had maintained that he was unfit for work during a period when he had actually returned to his former employment (on oil rigs). Although the only issues before the Court of Appeal were issues of costs, Laws LJ noted that: *"I entertain considerable qualms as to whether, faced with manipulation of the civil justice system on so grand a scale, the court should, once it knows the facts, entertain the case at all save to make the dishonest claimant pay the defendant's costs."*

It will be interesting to see whether such an approach ever becomes standard practice. It has not done so yet. Perhaps it should.

Procedure

An application for committal may be made in the course of proceedings. It is beyond the scope of this article to set out the procedure in detail, but practitioners should note that there is a considerable volume of law on the need for clarity within the notice – given that this is not something many practitioners will deal with day-to-day, careful research will be needed before the application is drafted, lest the whole application be lost.

It is generally well-known that an allegation of malingering (conscious exaggeration of symptoms) for financial gain constitutes a serious allegation of fraud and has to be specifically pleaded : *Cooper v P&O Stena Line Ltd* [1999] 1 Lloyd's Rep. 734

However, in *Kearsley v Klarfeld* [2005] EWCA Civ 1510 the Court of Appeal held that the practice that had emerged in low velocity impact litigation of requiring the defence to include a substantive allegation of fraud or fabrication was not necessary. It was sufficient to set out fully any facts from which the defence would be inviting the judge to draw the inference that the claimant had not in fact suffered the injuries he asserted.

Kearsley also served as a reminder that where an allegation of fraud is made a personal injury claim should ordinarily be allocated to the multi-track notwithstanding that it would otherwise have proceeded in the fast track. Practitioners should note that at the allocation stage the district judge can also direct that the trial must be listed before a full time judge, which may be desirable if serious allegations of fraud are to be tried.

James Hassall

Keown v Coventry Healthcare NHS Trust [2006] EWCA Civ 39

On 8 October 1995 Martyn Keown, then 11 years of age, climbed the underside of a fire escape attached to a building situated within the grounds of Gulson Hospital, Coventry. Other children had previously climbed the fire escape in this way. While the Defendant NHS Trust knew that children played within the grounds, there was no evidence that it knew that children played on the fire escape. The fire escape had diagonal cross-bars on its outside which made it easier to climb. The Claimant fell about 30 feet fracturing his arm and suffering a significant brain injury. He gave evidence that he had appreciated it was dangerous to climb the underside of the fire escape and that he knew he should not have been doing it.

At first instance the court found that the Defendant was in breach of duty owed pursuant to the Occupiers' Liability Act 1984 but found the Claimant to have contributed to the extent of two-thirds. The Defendant appealed.

Both parties accepted that the Claimant must be treated as a trespasser and so the 1984 Act was to be considered. The Defendant argued that the injury was not as a result of a "danger due to the state of the premises" and so liability did not attach (section s1(1)(a)). Rather, the injury arose as a result of the Claimant's *activity* on what were safe premises.

On behalf of the Claimant it was submitted that the injury was caused by a danger due to the state of the premises as the fire escape was amenable to being climbed from the outside (with a consequent risk of harm from falling from height) and constituted an inducement to children habitually playing in the grounds of the hospital.

Longmore LJ considered the cases of *Donoghue v Folkestone Properties Ltd* [2003] EWCA Civ 231 and *Tomlinson v Congleton BC* [2002] EWCA Civ 309 and concluded that the authorities would answer the point in favour of the Trust if the Claimant were an adult. Did it make a difference that the Claimant was a child? His Lordship concluded that it did not. Premises that are not dangerous from the point of view of an adult can be dangerous for a child but it must be a question of fact and degree. In this case the Claimant knew what he was doing, appreciated the risk of falling and knew that his activity was dangerous:

"In those circumstances it cannot be said that Mr Keown did not recognise the danger and *it does not seem to me to be seriously arguable that the risk arose out of the state of the premises which were as one would expect them to be. Rather it arose out of what Mr Keown chose to do."* (at paragraph 12, my emphasis).

His Lordship also offered tentative and obiter agreement with the Trust's submission that it could not reasonably be expected to offer protection against a risk of falling from an unguarded or unfenced fire escape. Otherwise occupiers would have to offer similar protection in respect of similar structures, such as balconies, drain pipes, roofs, windows and even trees.

Lewison J stated that the threshold question is not whether there is a risk of suffering injury by reason of the state of the premises but whether there is "a risk of injury by reason of any *danger* due to the state of the premises." For the question to be answered in the affirmative it must be shown that "the premises were inherently dangerous". Given that there was nothing inherently dangerous about the fire escape, no hidden defect or danger and that the only danger arose from the Claimant choosing to climb up it, the point was decided in favour of the Trust.

As for the question of whether the state of premises can be dangerous for children but not adults, Lewison J expressed the view that the age of the trespasser will not usually affect the question of whether the danger is or is not attributable to a danger due to the state of the premises. The age of the claimant will have a bearing on the *extent of the duty* rather than whether a danger is due to the state of the premises which is the hurdle that must first be overcome.

Mummery LJ agreed with both judgments.

The Court of Appeal also considered the decision in *Young v Kent CC* [2005] EWHC 1342 where a 12 year old went onto the roof of a school building in which an after-school sports and youth club was being held in order to retrieve a football. The Claimant jumped on a brittle skylight and fell through sustaining significant head injuries. In that case, Morison J held, at paragraph 29, that "[t]he state of the premises did pose a risk in the sense that children could fall off or be hurt by going through the skylight."

Longmore LJ disagreed with the idea that a risk of suffering any injury on any roof must be due to the state of the premises. Rather a conclusion that a roof with brittle skylights is dangerous premises would be less controversial. Lewison J also rejected the idea that a flat roof is dangerous merely because a trespasser (even a child) could fall off it and went on to suggest that had Young been argued as a "danger due to the state of the premises" case Morison J may have concluded that the only danger was attributable to the claimant's own activity of jumping on the skylight rather than any inherent danger in the premises themselves. In those circumstances liability may have been avoided.

The decision of the Court of Appeal emphasises the need for a claimant to distinguish between a risk of injury attributable to a danger due to the state of the premises and a risk attributable instead to the activities of the claimant on premises that are not inherently dangerous. On the strength of the comments of Lewison J the decision also highlights the need, in the majority of cases, to identify that danger before then lending significant weight to the age of the claimant.

The decision reflects an extension of the principles considered in *Tomlinson* and favours occupiers. The obiter comments regarding the unreasonableness of any expectation that the Trust 'childproof' premises, coupled with the clarification offered in respect of the approach one must take when analysing whether a duty is even owed (much less breached), will result in less claims succeeding with the decision in *Young* very much restricted.

Matthew Porter-Bryant

CPR 7.6 (2): Extending time for service of claim forms before expiry of the four month period

Civil Procedure Rule 7.6 provides that a Claimant may apply for an extension of time for service of the claim form and that the usual rule is that such an application should be made before the expiry of the four month period allowed by the rules or such period as has been allowed by order of the court. Under sub paragraph 7.6(3) guidance is given as to the limited circumstances when an application made after this time can be granted. However, the rule provides no guidance as to when a prospective application should be allowed.

Clearly, the court should exercise its discretion in accordance with the overriding objective but what does this mean in this context? Consideration of the overriding objective in relation to any single application for a short extension of time generally operates so as to favour the Claimant: the Defendant is unlikely to be able to point to any significant prejudice caused by an additional short extension of time whereas the Claimant may well be left without a remedy if denied the extension.

The Court of Appeal considered the question as to how courts should exercise their discretion under CPR 7.6(2) in the case of *Hashtroodi v Hancock* [2004] 1WLR 3206. In that case, the Claimant's solicitor had been asking the Defendant insurer to nominate solicitors to accept service to no effect. One day prior to the final date for service, the Claimant's solicitor applied to the court for a three week extension of time in order either to await nomination of the solicitor by the insurer or alternatively to allow for service direct on the Defendant. The Judge granted this 7.6(2) application and the Defendant appealed to the Court of Appeal. The Court of Appeal declined to accept the Defendant's submission that courts should be guided by the pre CPR law and should adopt the previous threshold requirement of there being a "good reason" to allow an extension, and reaffirmed that the rule is to be interpreted afresh and in accordance with the overriding objective. One might have thought at this point that the Claimant was in the winning seat.

However, Dyson LJ, giving the judgment of the Court of Appeal, went on to give guidance as to the application of the overriding objective with an emphasis on ensuring justice through a *disciplined approach* to civil litigation rather than increasing the discretion to prevent hardship in individual cases: *"It is easy enough to take the view that justice requires a short extension of time to be granted even where the reason for the failure to serve is the incompetence of the Claimant's solicitor, especially if the claim is substantial. But it should not be overlooked that there is a three year limitation period for personal injury claims, and a claimant has four months in which to serve his or her claim form. ... These are generous time limits..."*

This was the language used in the cases with which we have all become familiar relating to rule 7.6(3) and retrospective applications for extension of time and indeed he went on to cite those authorities in support of this approach. The Defendant's appeal was consequently successful and the Claimant was refused an extension of time.

So, what is the test? In his judgment, Dyson LJ gives specific guidance as to how the overriding objective should be applied in 7.6(2) cases [see paragraphs 17 to 21]. He states that in order to do justice in accordance with the overriding objective, it will always be important for the court to "know and evaluate the reason" for an application for late service. He described this exercise as "*the critical inquiry*". Having conducted such an inquiry, the court should adopt a "*more calibrated approach*" than the previous threshold requirement of "a good reason": *"If there is a very good reason for the failure to serve the Claim Form within the specified period, then an extension of time will usually be granted."*

The only example given of a very good reason however, was where the Claimant has fulfilled the 7.6(3) conditions (i.e. has taken all reasonable steps to serve but has been unable to do so). He goes on to say that the weaker the reason, the more likely it is that the application will be refused. The example given of such a reason is the incompetence of the Claimant's solicitor, and that, he states, will be a "*strong reason*" to refuse the extension of time.

Despite this judgment, the experience of many was that District Judges were prepared to distinguish *Hashtroodi* from other cases on its facts: the solicitor had left things particularly late in the day. However, the Court of Appeal have now reaffirmed this approach strongly in three of the cases collectively heard with *Collier v Williams* [2006] EWCA Civ 20 (see the parts of the report concerning the cases of *Marshall, Leeson and Glass*). In *Leeson v Marsden and UBHT*, the Claimant's solicitor had served the claim form a day late. There were reasons to mitigate her culpability: unlike the solicitor in *Hashtroodi* she had made an application to the court in quite good time seeking an extension and the court had delayed hearing it; she had significant personal events in her life at the time of service; she had obtained consent by one Defendant for an extension of time for the service of the Claim Form; both Defendants had agreed to an extension for service of the Particulars

of Claim so that no obvious prejudice would relate from a short delay in service of the claim form; breach of duty had been admitted and the Defendants had delayed in responding to the letters of claim. At an initial paper hearing, the District Judge refused an extension of time for service of the Claim Form but, at a subsequent hearing, the District Judge had accepted the Claimant's arguments that the case should be distinguished from *Hashtroodi* and had granted an extension of time. On appeal, this approach was not accepted. The main judgment was again given by Dyson LJ. He undertook the "critical inquiry" and found that the Claimant had had "no reason" to seek an extension of time and in such circumstances, a proper exercise of discretion required that the extension be refused. He put it thus: *"The strength or weakness of the reason for the failure to serve is not one of a number of factors of roughly equal importance to be weighed in the balance. The exercise of going through the checklist of factors in CPR 1.1(2) will often not be necessary. If, as in the present case, there is no reason to justify the service of the claim form in time, it should normally not be necessary to go further."*

What might constitute a sufficiently good reason to justify an extension of time? Compliance with the requirements under 7.6(3) would. Beyond that we do not yet know: what we do know is that the following would not constitute sufficiently good reasons: incompetence/oversight by the solicitor; incomplete evidence or the lack of a letter of response (which may justify an extension for service of the particulars of claim but not the claim form); stalling by the Defendant; the fact that an outstanding application is with the court on the final date for service; the fact that liability is admitted; the fact that the Defendant will suffer no prejudice.

Since writing this article, the House of Lords has delivered its judgement in *Horton v Sadler* [2006] UKHL 27, which is considered elsewhere, but will in many personal injury cases be likely to make these arguments academic as the Claimant will simply be able to reissue and depend upon the Court's wider discretionary powers under section 33 of the Limitation Act 1980.

Court's power to review its own orders

Another interesting aspect arising out of the Leeson case (see above, one of the conjoined appeals in *Collier v Williams*) is the guidance by the Court of Appeal as to the exercise of the courts' powers to make orders without hearings and as to their powers to review those and other orders without an appeal.

In that case, the Claimant had sought and been refused an extension of time for service of the Claim Form. The order had been made without a hearing (under CPR 23.8). The Claimant made a new application by writing to the court asking it to review the first order. A different District Judge reviewed the application and made an order allowing an extension of time, again without a hearing. Unfortunately this extension of time was no longer sufficient and the Claimant wrote again to the court seeking a further review, and a further extension of time was made again without a hearing. The Defendant sought to set those orders aside at a hearing for review before a further District Judge. Had the Defendant been successful, the original order refusing an extension of time prospectively would have stood, and the Claim would have been struck out.

A part of the Defendant's argument relied on *Hashtroodi* and the absence of a good reason for the Claimant's delay (and the Defendant eventually succeeded on this point on appeal and at the Court of Appeal) but a part of the argument was that the Court had no power to review its own orders at the request of the Claimant applicant without an appeal.

The court has power to review its own orders without an appeal under CPR 3.3(5) (power to review an order made on the court's own initiative) and CPR 3.1(7) (a widely expressed power enabling the court to review its own orders).

The Defendant argued that CPR 3.3(5) could not be relied upon by the party who had made the application to the court in the first place. It also argued that CPR 3.1(7), though widely expressed, could not be interpreted so as to allow a court to review its own orders unless special circumstances arose including substantially new material since the making of the original order.

The Court of Appeal declined to accept the argument that the applicant could not pray CPR 3.3(5) in aid. It is now clear that, unless the parties have agreed to the terms of the order, or to the absence of a hearing, *any order made without a hearing will be deemed to be made on the court's own initiative* and so CPR 3.3(5) is engaged and either party may apply for a review.

However, the Court of Appeal recognised that this approach led to two potential problems:

a Important and potentially controversial decisions were being made on the application of one party for a review without a hearing, and

b The rules did not provide a mechanism to stop successive identical applications, offending against the need for finality.

Consequently the judgment laid down the following guidance:

a Courts should not make orders about important matters without a hearing if at all possible: telephone hearings could be used (paragraph 38).

b In particular reviews under CPR 3.3(5) should be by hearing.

c One review only: any application to review a CPR 3.3(5) review should be struck out as an abuse of process.

d Unless: there is substantially different material. Where that is the case, a review under CPR 3.1(7) may be appropriate. What qualifies as substantially new material? Here is the small chink of hope for those seeking the review: new evidence, new circumstances or possibly just new arguments? Paragraph 120 of the judgment is fertile ground for the desperate and ingenious!

Selena Plowden

Dispensing with service of the claim form

Selena Plowden has written above about the circumstances in which a court might be persuaded to extend the time available for service of a claim form. Where a claimant has failed to effect service of the claim form within time, an application for retrospective extension of time pursuant to CPR Rule 7.6(3) will generally be accompanied by an alternative plea that service should be dispensed with altogether pursuant to Rule 6.9.

Rule 6.9 is the last resort for a claimant when it has all gone wrong with service of the claim form. The question is whether such an application is, by and large, hopeless or whether a claimant may expect to succeed in a significant number of cases. It seems to me that the short answer is that if a claimant is having to rely on Rule 6.9 to escape from service difficulties then the position is hopeless except in the rarest of cases.

Kuenyehia v. International Hospitals Ltd [2006] EWCA Civ 21 is the Court of Appeal's latest word on Rule 6.9. It is a rule which has occupied the Court of Appeal for a considerable amount of time since the inception of the CPR and readers will be familiar with the preceding quintet of cases: *Vinos v. Marks & Spencer plc*, *Godwin v. Swindon B.C.*, *Anderton v. Clwyd C.C.*, *Wilkey v. BBC* and *Cranfield v. Bridgegrove Ltd*. The recent case of Kuenyehia should be seen as a distillation of the principles emerging from the previous cases but it is a short judgment and is no substitute for reading at least the head notes of the earlier cases in order to trace the development of the applicable principles. I think it becomes apparent on reading the cases together just how high a hurdle Rule 6.9 poses for those in difficulty on service of the claim form.

In *Godwin*, where the claimant fell foul of the deeming provisions which deemed service in that case to have been one day late despite the fact that the defendant had in fact received the claim form in time, the Court of Appeal held Rule 6.9 could not be used to extricate a claimant from the consequences of late service where rule 7.6(3) did not avail the claimant. *Godwin* thus presented a firm barrier to claimants seeking to extricate themselves from a service failure.

The position in *Godwin* was ameliorated to some extent by *Anderton* in which a distinction was drawn between cases where a claimant had not even attempted to serve the claim form in time and those cases in which the claimant had in fact made an ineffective attempt to serve within time. In the latter type of case, the discretion to dispense with service could be exercised but the Court of Appeal warned that the position would be different for the future: there would be very few (if any) acceptable excuses for future failures to observe the rules for service of a claim form.

Wilkey confirmed the position that there was a presumption in favour of exercising the discretion to dispense with service in pre-*Anderton* cases where there had been an ineffective attempt to serve. On the other hand, the deemed service rule would continue to apply in all but the most exceptional post-*Anderton* cases.

In *Cranfield*, the Court of Appeal considered five pre-*Anderton* cases and held that Rule 6.9 could be invoked "where there has been some comparatively minor departure from the permitted method of service." This was a broadening of the jurisdiction to add a new ground in addition to that of the ineffective attempt in time to serve by a permitted method. After *Cranfield*, a claimant could either rely on falling foul of the deeming provisions or else could point to a minor departure from a permitted method of service. The question arising from this new ground was what amounted to a "minor departure"?

Kuenyehia demonstrates that only a very narrow range of errors will satisfy the "minor departure" test. In that case, the claimant sent the claim form by fax to the defendant's offices on the last permitted day for service. Service was not effective because the defendant had not provided the claimant with written confirmation of agreement to accept service by fax – see Rule 6.2(1)(e) and the practice direction. The Judge at first instance held that the failure to obtain consent to service by a fax was a relatively minor departure from a permitted method of service and therefore exercised the Rule 6.9 jurisdiction in favour of the claimant. The Judge also emphasised that there had been no prejudice to the defendant. The Court of Appeal took a different view and held that service by fax without consent was not a minor departure from the rules. Furthermore, it was held that this was not an exceptional case such as to merit exercise of the discretion in favour of the claimant. The Court of Appeal went on to say that the absence of prejudice to the defendant was irrelevant.

It is of interest to note that the Court of Appeal did give one example of what might constitute a minor departure from a permitted method of service. The Court indicated that the use of a second class stamp where the rules required first class post would probably be viewed as a minor departure. I think this serves to illustrate just how minor a departure will have to be to qualify.

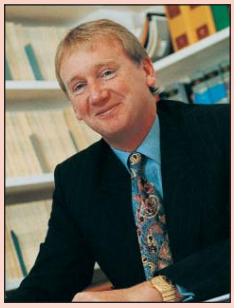
Following *Kuenyehia*, the following principles are clear:

- A claimant must either point to an ineffective attempt to serve within time or else a minor departure from a permitted method of service
- In addition, the claimant must show that the case is an exceptional one
- Absence of prejudice to the defendant is not relevant (but, to the contrary, prejudice to the defendant is a good reason for not exercising the discretion in favour of the claimant)

It is because of the need to show not only that a case falls into one of the two permitted classes of error, but the additional need to demonstrate that the case is exceptional, that I said at the start of this piece that I thought that, by and large, applications for relief under Rule 6.9 are probably hopeless except in the rarest of cases. It remains to be seen what other "minor departures" may emerge in the future.

John Snell

The House of Lords finally calls "time!"



In the case of *Horton v Sadler* [2006] UKHL 27 the House was confronted with a familiar difficulty in a slightly different form.

Mr Horton had been injured on the 12th April 1998. Pursuant to Sections 11 and 14 of the Limitation Act 1980 he had 3 years in which to bring his claim. In his case, however, his injuries had been sustained in a road traffic accident in which the Defendant driver was uninsured. Thus, he needed to comply with the condition precedent as to notification of the MIB. Although he commenced his action by issuing the Claim Form within the 3 years (actually on the 10th April 2001) he failed to notify the MIB timeously. His only remedy (apart from abandoning his claim against the Defendant / MIB and pursuing a professional negligence claim against his solicitors) was to re-issue and make effective notice of the second proceedings. So, some 4 months after the limitation period had expired, he issued a second time, giving effective notice on this second claim to the MIB.

The MIB defended by pleading the limitation defence; the Claimant responded by seeking relief under Section 33 of the Act, saying that it was equitable to disapply the limitation period.

In fact the Judge at first instance, in the case of *Horton*, applied *Walkley v Precision Forgings Ltd* [1979] 1 WLR 606, but indicated that had he been free to exercise his discretion under Section 33 he would have exercised it in favour of allowing the Claimant to proceed.

Most of us might have advised, at this stage, that the Claimant faced an insurmountable obstacle in *Walkley*. In that case the Claimant had commenced his proceedings but had allowed them to be struck out through inefficiency on the part of his legal team. The House ruled that his second set of proceedings, based on exactly the same cause of action, could not be allowed to proceed, because the discretion provided in what was then Section 2D of the Limitation Act 1939, as amended by the Limitation Act 1975, now Section 33 of the 1980 Act, was unavailable to the Claimant. The rationale being that the Claimant had not been prejudiced by the primary limitation period in the Act, because he had managed to start the first proceedings within time.

The curious, and obviously unsatisfactory, result of this ruling was that a Claimant whose solicitor was competent enough to start the proceedings within time, but incompetent enough to allow the proceedings to fail while in progress, was worse off than a Claimant whose solicitor was so incompetent as not to start proceedings within time at all, because in the latter case Section 33 was still available.

This injustice has been known of by lawyers for many years as "an anomaly".

Led by Lord Bingham, the House used its power pursuant to the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 and overruled the decision in *Walkley*. Thus, where an action has been started within time, but has failed through some procedural irregularity, those proceedings can be started again, out of the applicable limitation period, and if the Defendant seeks to assert the limitation defence available to it under the Act, then the Claimant can invite the court to disapply the provisions of the Act, under Section 33.

For those interested, the rationale of the House of Lords was that in *Walkley* the Lords failed to realise that although the first proceedings had not been prejudiced by the effect of Sections 11 and 14 of the Act, because those proceedings had been started within time; they were incorrect to conclude, in effect, that the second proceedings were not so prejudiced. To the contrary, in relation to the second proceedings it was exactly the effect of the limitation period set out in Sections 11 and 14 which prevented the second proceedings from continuing (if the Defendant took the limitation defence).

Given this logic, the second proceedings cannot be said to be an abuse of proceedings. Furthermore, this decision means that the approach taken by the House in *Firman v Ellis* [1978] QB 886 must be taken to be re-instated, namely that the Act provides the court with a discretion to allow "equity" to be done, and that no "judicial fetters" should be placed on that discretion.

Many firms of solicitors who act for claimants may be breathing sighs of relief and expect their premiums to reduce. However, now they will have to take up the cost burden of making the Section 33 application, which, I expect, often will be defended with some vigour by Defendants.

It is worth noting two further matters, particularly in light of the fact that in *Horton* the Claimant had already obtained a payment from his former solicitors for their negligence by the time the case came before the House of Lords:

First, that on the facts of this case Lord Carswell clearly was unconvinced that he would have allowed the second action to proceed, if he had been deciding it at first instance.

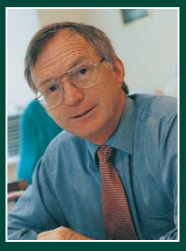
Secondly, the consideration that the Claimant will have a claim against his former solicitors is still a matter which the Court at first instance will take into account. On one reading of paragraph 35 of the opinion of Lord Bingham, he, too, might have been persuaded to refuse to apply Section 33 in favour of the Claimant. In the event the delay was so short, and the MIB had been on sufficient notice, that he would not interfere with the decision of the Judge at first instance.

It seems to me that Claimant solicitors who are breathing a sigh of relief, may well want to think again. In modern jurisprudence, courts may view the type of failure such as that in *Horton* with little favour. If the period of delay beyond the expiry of the limitation period is too great, and it can be allied to any significant prejudice to the Defendant, then they will not be let off the hook.

But this decision will allow those cases of minor mishap where there is very little or no prejudice to the Defendant to proceed.

Adam C Chippindall

The Personal Injuries Team



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