GUILDHALL CHAMBERS

PI News

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Date for your diaries!

Guildhall Chambers Personal Injuries Team will be hosting a half day seminar designed specifically for claimant solicitors from 12.30pm – 5.00pm Thursday 8 November 2007 at the Watershed, The Habourside, Bristol.

The seminar will cover a range of topics specifically relevant to claimant's solicitors and will be presented by both members of chambers and guest speakers including accountancy expert Richard Formby, Monaghans, Claire Booth, West Country Case Management and Dr Ian Yellowlees, Consultant in Pain Management. Invitations setting out precise details of each topic and speaker will be forwarded in September 2007.

The seminar will be FREE of charge and include lunch, refreshments and accredited with 3 CPD points.

We are arranging a similar 1 day seminar, designed specifically for defendant solicitors and their insurer clients, in June 2008

Hamish Munroe – New Chief Executive

Guildhall Chambers has a new chief executive who has relocated to Bristol from "Silver Circle" law firm Simmons & Simmons, having spent twelve years prior with Eversheds and Davies Arnold Cooper. Hamish was voted one of the ten best marketing directors to the legal profession and is a well-known speaker and author on practice management by lawyers. He has worked extensively in the UK and US on developments in litigation, inquiries and pre-trial options.

You can contact him at hamish.munro@guildhallchambers.co.uk or on his direct line 0117 930 9007.

It's that time again. Time for me to ask you whether you are up to speed. Has a vital case escaped your attention? Do you really understand the changes wrought by the latest Ogden tables? Has there been more tinkering with the Civil Procedure Rules? Well, in an effort to shake the complacent and reassure the diligent here are a few questions.

For the defendants out there:

1 An oil rig worker falls from a bunk bed ladder which was not hooked properly into a retaining bracket. The ladder and bracket are not defective. A mishap of this type has never happened before. The judge concludes that therefore the ladder is "suitable" under the Provision and Use of Work Equipment Regulations because the employer does not have to anticipate what might go wrong and the accident was not reasonably foreseeable. Is he right?

2 A widow sues the MIB in relation to the death of her husband. He was a passenger but at the time he knew the driver of the vehicle was not insured. Obviously, the MIB rely on clause 6 of the Uninsured Drivers Agreement 1999. Surely the widow cannot be entitled to recover?

3 In another claim against the MIB a claimant fails to give notice of proceedings. Upon realising the mistake he discontinues, serves the correct notice and then issues but he is outside the limitation period – surely his claim must fail?

And for the claimants:

1 You reject a defendant's part 36 offer made one month before trial. You go to trial and recover less than the offer. You recover costs up to the last date for acceptance and to your surprise the judge tells you that he has no discretion other than to award a 100% success fee for all those costs. Is he right?

2 Does the latest edition of the Ogden tables substantially change the discounts that the court should apply for contingencies other than mortality?

3 You are instructed by a claimant. He's rather dim. You ask him if he has any before-the-event insurance and he says "no". In fact he is right so it wouldn't have made a material difference to him if you had asked a different question. On detailed assessment the defendant suggests your CFA is unenforceable. Is the Defendant right?

It may surprise you to learn that the answers are: to the Defendant's questions, "no" and to the claimant's questions, "yes". To find out why and to discover other changes thrust upon us all, read on. The newsletter contains digests of and commentary upon recent decisions, principally those of the Court of Appeal and House of Lords, in the area of personal injury law. In addition we include a number of articles.

The question of costs, in particular recent cases bearing on the issue of conduct in the assessment of legal costs, is considered by **Oliver Moore**. **John Snell** discusses a novel approach in seeking redress for hospital-acquired infections. He highlights the use of the Control of Substances Hazardous to Health Regulations in such cases and the advantages they bring but observes that *Ndri v. Moorfields Eye Hospital NHS Trust* [2006] EWHC 3652 may exclude the use of the regulations in this way. **Abigail Stamp** carefully summaries the new provisions of Part 36 which were significantly amended in April 2007. The abolition of payments into court and the new rules of acceptance and withdrawal are neatly summarised. Finally, **Adam Chippindall** provides insight into the latest (6th Edition) Ogden tables. Far from simply adjusting the tables to reflect more modern life expectancy, Adam argues that the tables and explanatory notes represent a sea-change in approach to the assessment of future loss and associated contingencies. His observations provoke considerable thought.

Your comments and suggestions are always welcome and should be sent to me by email at gabriel.farmer@guildhallchambers.co.uk. This newsletter along with previous editions is available to download from our website at www.guildhallchambers.co.uk.

Gabriel Farmer Editor

Recent decisions

Liability

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

Gray v Fire Alarm Fabrication Services and Others

Court of Appeal 10 November 2006

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

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

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

Comment

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

Work Equipment – Duty to anticipate accidents

Robb v Salamis (M and I) Limited

House of Lords 13 December 2006

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

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

Comment

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

Ellis v Bristol City Council

Court of Appeal [2007] EWCA Civ 685

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

The Court of Appeal allowed the Claimant's appeal. It held that, where the floor is frequently in a state where it is transiently wet, the court should consider whether it is of unsuitable construction because it does not offer slip-resistance when wet. On the facts of this case, the floor was frequently wet with urine and the floor surface must, therefore, offer slip resistance. The Defendant was in breach of the regulation.

On an ancillary point, the judge had declined to consider the Approved Code of Practice to the Workplace (Health, Safety & Welfare) Regulations 1992 when construing regulation 12(1). The Court of Appeal held that she was wrong to have done so and

the ACOP was relevant to (but not determinative of) the proper meaning of the regulation.

Anthony Reddiford appeared for the claimant.

Comment

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

Self Defence

Ashley and Another v Chief Constable of Sussex Police

Court of Appeal 27 July 2006

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

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

Uninsured Driver – Knowledge – Motor Insurers Bureau

Phillips v Rafiq and Another

Court of Appeal 14 February 2007

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

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

Comment

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

Procedure

Withdrawal of Pre-Action Admission of Liability

Walley v Stoke on Trent City Council

Court of Appeal 31 July 2006

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

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

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

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

Comment

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

Fortunately, on 6 April 2007 rule 14.1A was inserted into the CPR dealing expressly with pre-action admissions. However, the rule is not retrospective and therefore the decisions in *Sowerby* and *Walley* continue to apply to pre-action admissions made before 6 April

2007. For admissions made after this point in time a Defendant may only withdraw an admission by agreement or with permission of the Court. Paragraph 7.2 of the Practice Direction to part 14 sets out a checklist of factors (including "all the circumstances of the case") which the Court must take into account in exercising its discretion.

Expert Evidence in Low Velocity Road Traffic Collision Cases

Casey v Cartwright

Court of Appeal 5 October 2006

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

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

a Within 3 months of the letter of claim notify all the other parties that he intended to do so.

b The issue should be expressly identified in the Defence which should be supported as usual by a statement of truth.

c Within 21 days of serving the Defence the Defendant should serve on the Court and other parties witness evidence identifying the grounds on which the issue was raised.

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

Limitation

Limitation – Knowledge to be Assessed Objectively

Young v Catholic Care (Diocese of Leeds) and Another

Court of Appeal 22 November 2006

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

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

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

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

Comment

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

a The Claimant's personal knowledge of the seriousness of the injury.

b The inhibiting and other consequences of the injury for the Claimant (including, for example, the psychiatric repression of memories) but thereafter

c In the light of the subjective issues to consider whether from an objective point of view whether he should have considered it sufficiently serious to justify the institution of proceedings.

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

Limitation – Knowledge

McCoubrey v Ministry of Defence

Court of Appeal 24 January 2007
[2007] EWCA Civ 17

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

Held the law had changed. The test under section 14(2) was substantially objective and not the mixture of subjective and objective in the way in which the analysis of Lane LJ in *McCafferty v Metropolitan Policed District Receiver* [1977] 1 WLR 1073 indicated. The question of whether an injury was "significant" within section 14(1) (a) as expanded by section 14(2) was to be decided by reference to the seriousness of the injury and not by reference to its effect on the Claimant's private life or career and still less by

reference to its subjectively perceived effect on the Claimant's private life or career. *Catholic Care [Diocese of Leeds] v Young* [2006] EWCA Civ 1534 and *Adams v Bracknell Forest BC* [2004] UKHL 29 applied, *KR v Bryn Alyn Community Holdings Limited* [2003] EWCA Civ 85 doubted.

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

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

Limitation - MIB Uninsured Drivers Agreement

Richardson v Watson and Another

Court of Appeal 6 December 2006

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

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

Quantum

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

Arnup and Arnup v M W White Limited

QBD 27 March 2007
[2007] EWHC 601

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

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

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

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

Comment

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

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

Thompstone v Tameside and Glossop Acute Services NHS Trust

[2006] EWHC 2904
QBD Manchester (Swift J) 23 November 2006

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

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

The Court held that its duty was to decide what form of order would best meet the Claimant's needs and so far as sections 2(8) and 2(9) of the Damages Act were concerned to determine what was appropriate, fair and reasonable. Those questions did not lend themselves to determination by way of the burden of proof. If the Claimant did bear a burden of proof it was an evidential one

– namely an obligation to adduce evidence sufficient to establish that the RPI was an inappropriate indexation and that there was at least one alternative more appropriate measure available. Further, there was a strong possibility that the earnings levels of the type of carers who would care for the Claimant would grow at a significantly faster rate than the RPI. Therefore, indexation of care costs to the RPI was unlikely to meet the Claimant's needs and could not be described as fair, reasonable or appropriate. However, use of the average earnings index would be likely to lead to overcompensation. Use of the ASHE would be likely to reduce overcompensation albeit to a lesser degree than the average earnings index. In the circumstances, indexation by reference to ASHE 6115 would provide a reasonable and accurate indicator of the growth of the earnings of the Claimant's carers. It would be appropriate, fair and reasonable under section 2(9) to modify the effect of section 2(8) by providing for the amount of payments to vary by reference to the 75th percentile of ASHE 6115. *Flora v Waykom (Heathrow) Limited* [2006] EWCA Civ 1103 applied.

John Corbett v South Yorkshire Strategic Health Authority

QBD 28/3/2007

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

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

2 That the future periodic payments for the cost of this care regime should be indexed by reference to the Annual Survey of Hours and Earnings 6115 earnings related index rather than the retail price index.

3 That the Court has no power under section 2(8) and 2(9) of the Damages Act 1996 to use an indexation measure other than the RPI. Further, it contended that periodical payments linked to an earnings related index would unduly impact upon NHS patients given the local authority's limited resources.

The Court held:

1 The regime favoured by the Claimant (a team of support workers) was appropriate for the Claimant. (It is interesting to note that the Court appears to have preferred the Claimant's regime not only because the Defendant's regime involves the carers working significantly longer hours which was a regime viewed as not being in the Claimant's best interests but also because the Defendant's regime conflicted with the Working Time Regulations 1998. The Defendant did not adduce evidence that there was a collective or workforce arrangement (side-stepping the Working Time Regulations). Accordingly, the Courts concluded that the Defendant's regime could not be implemented within the law).

2 Section 2(9) of the Act did include the power to dis-apply the indexation provision otherwise the words in section 2(9) would be without reference (*Flora v Wakom (Heathrow) Limited* (2006) EWCA Civ 1103 and *Thompstone v Tameside and Glossop Acute Services NHS Trust* (2006) EWHC 2904 applied.

3 It was not just or practicable for the Court to adopt different approaches to the appropriate indexation measure by reference to the identity of the Defendant. Such an approach was contrary to authority: *White v Chief Constable of South Yorkshire* [1999] 2 AC 455 and *McFarlane v Tayside Health Board* [2000] 2 AC 59 considered, *Heil v Rankin* [2001] QB 272 applied. The Defendant's argument based upon competing resources breached the principle that damages should be calculated to achieve as closely as possible full compensation for the Claimant therefore the Court selected as an appropriate index 70% of the ASHE index rather than the RPI.

Sarwar v Ali and MIB

[2007] EWHC 1255

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

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

RH v United Bristol Healthcare NHS Trust

[2007] EWHC 1441

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

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

Comment

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

Costs

Costs Successful Party's Dishonest Conduct – Appropriate Deduction

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

Court of Appeal 6 December 2006

[2006 EWCA Civ 1660]

Ultraframe appealed a costs order made in proceedings where Fielding had been successful but had also been found guilty of serious dishonesty by attempting to maintain forged documents.

Ultraframe considered that by reason of *Aaron v Shelton* [2004] EWHC 1162, [2004] 3 All ER 561 it would be precluded from referring upon detailed assessment to the finding of dishonesty when the costs incurred by the dishonest party fell to be considered.

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

Comment

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

Conditional Fee Agreements – Enforceability – Loss to Client not Required

Garrett v Halton Borough Council
Myatt and Others v National Coal Board

Court of Appeal 18 July 2006

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

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

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

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

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

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

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

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

Comment

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

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

Indemnity Principle not Applicable to Fixed Recoverable Costs

Butt v Nizami; Butt v Kamuludn

QBD 9th February 2006

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

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

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

Lemont v Burton

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

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

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

Comment

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

Costs – dishonest conduct - assessment

Lahey v Pirelli Tyres Limited

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

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

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

Comment

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

Effect of Dishonesty on Recovery of Damages

Churchill Car Insurance v Victor Kelly

QBD 8 February 2007, [2006] EWHC 18

At first instance a Claimant who had been injured in a road traffic collision produced a letter purporting to show that he

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

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

Comment

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

Costs Capping Orders

Brenda Willis v Neil Nicholson

Court of Appeal 13 March 2007
[2007] EWCA Civ 199

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

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

Comment

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

Gabriel Farmer

Costs –raising conduct

It is prescribed by CPR 44.3 (4) that: *"In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including ... (a) the conduct of all the parties"*. Sub-paragraph (5) of the rule makes clear the potential breadth of "conduct" issues. They can in effect cover anything done or not done by a party at any stage in the proceedings including compliance with the protocol, reasonableness and manner of raising or contesting an allegation or issue and exaggeration.

The court may reflect the conduct of the parties in the order for costs in a number of ways. For example, a partial order for costs or a percentage reduction to the receiving party's costs may be made e.g. defendant shall pay 75% of the claimant's costs to be assessed on the standard basis.

The court could, for example, order the defendant to pay the claimant's costs on the indemnity rather than standard basis. The considerations for deciding whether to make an order for costs on the indemnity basis are still those under rule 44.3 (save for where the order is made under Part 36). In *Excelsior Commercial & Industrial Holdings Ltd v (1) Salisbury Hamer Aspden & Johnson & Ors* [2002] EWCA Civ 879 the Court of Appeal stated that it was dangerous for the court to try to add to the requirements of CPR 44.3. Per Waller LJ: *"The question will always be: is there something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs?"*

If following a trial a party wishes to seek an order for costs that departs from the starting point of 100% of the successful party's costs being paid on the standard basis (r.44.3 (2) (a), there should be little difficulty in the trial judge determining the order. The trial judge should be familiar with the issues, or at least if he is not familiar with some of the matters that the parties wish to raise he is likely to be in a better position than a judge who has not heard the trial to deal with any conduct issues.

If a claim is settled save for there being a dispute over the order for costs, with one party, or possibly more than one party, wishing to raise conduct issues then it is more difficult to do so. The parties can agree for the court to decide the order for costs. However, in BCT *Software Solutions Ltd v C Brewer & Sons Ltd* [2003] EWCA Civ 325 the Court of Appeal emphasised that in cases of any complexity (which that was) there were *"real difficulties inherent in asking a judge to exercise his discretion in respect of the costs of an action which he had not tried"*, without embarking on a course that came close to conducting a trial of the action, which the parties had intended to avoid by settling the claim. Where the substantive issues have been compromised in a case, *"the judge should be slow to embark on a determination of disputed facts solely in order to put himself in a position to make a decision about costs"*. Further, *"in all but straightforward compromises, which are, in general, unlikely to involve him a judge is entitled to say to the parties that "If you have not reached an agreement on costs, you have not settled your dispute. The action must go on, unless your compromise covers costs as well""*.

Despite the cautionary message from the Court of Appeal as to whether the court should be prepared to determine the costs order when the substantive issues have been resolved, in practice the court will generally be prepared to resolve the issue if asked, particularly if it is with the agreement of both parties or at least where neither party objects. Of course should a party object to the court resolving costs that could unravel the potential settlement. My experience in two recent cases where the substantive issues had been compromised leaving the order for costs to be determined by a judge following an application by one of the parties, was judges were still prepared to determine the orders for costs despite there being raised a number of relatively complex issues in respect to the substantive proceedings. However, where in one of those cases a particular conduct point turned on disputed facts, the judge was rightly, on the basis of *BCT Software*, not prepared to resolve that question and did not take it into account in deciding the order for costs. To that extent clearly the matters that can be relied on in respect of costs will be more limited where there has been no trial. It is however always for the judge to decide whether he is willing to make an order for costs and resolve any issues arising on the basis of the papers before him.

If an order for costs is made without the parties having raised issues in respect of conduct that they wish or intend to raise (perhaps to facilitate settlement or because the costs order is deemed to be made under Part 36) can those conduct issues still be raised on the assessment of costs? On the face of the rules the position may appear to be straightforward; pursuant to CPR 44.5 (3), the court must also have regard to the conduct of all the parties in deciding the amount of costs. However, in recent decisions the courts have grappled with this issue.

In *Aaron v Shelton* [2004] EWHC 1162 (QB) proceedings between the claimant and the defendant had been settled at trial by a consent order that the action be dismissed and the claimant pay the defendant's costs on an indemnity basis. At the detailed assessment the claimant sought a reduction on the basis of the defendant's alleged conduct of the proceedings. It was held by Jack J that where a party wished to raise a matter concerning the conduct of his opponent it was his duty to raise it before the judge making the costs order where it was appropriate to do so, such as where the judge was in a position to deal with the matter because of his involvement with the case. If he failed to do so it was not open to the party to raise the same matter under r. 44.5(3) as a ground for the reduction of the costs that he would otherwise have to pay. It was an abuse of process to raise an issue before the costs judge that should have been raised before the judge making the costs order.

In *Nicholas Drukker & Co v Pridie Brewster & Co* [2005] EWHC 2788 (QB), an action in respect to professional negligence, it was held in line with *Aaron v Shelton* that it was an abuse of process to seek to raise before the costs judge, by way of the points of dispute, matters that could, and should, have been litigated before the court after the exchange of pleadings in the protocol, but that had not been pursued. The conduct issues went to the heart of the litigation, as they had in *Aaron v Shelton*. It was also held that it was highly questionable whether a costs judge had the jurisdiction to hear claims of professional negligence involving the issues and allegations raised. The type of trial that would have been required to resolve the issues in that case were entirely unsuitable by reasons of the factual complexities and subject matter for trial by a costs judge. Such matters should have been tried in the High Court.

In *(1) Northstar Systems Ltd (2) Seaquest Systems Ltd (3) Ultraframe (UK)Ltd v Fielding & Ors* [2006] EWCA Civ 1660 the Court of Appeal has recently doubted Aaron v Shelton and taken a different, less restrictive view, on when conduct can be raised.

In that case the receiving party had been the overall winner in the substantive proceedings however, the judge made a finding that they had been guilty of serious dishonesty in that they had lied and sought to maintain forged documents. As a result the judge awarded only 80% of their costs. The basis of the appeal by the paying party was that the percentage by which the judge had reduced the costs payable did not properly reflect the dishonesty found. However, the Court of Appeal also considered the question of when conduct had to be raised and the effect on assessment of an order providing for a reduction in costs – can conduct be raised on assessment as well?

It was held, albeit strictly obiter, that contrary to the apparent principle in *Aaron v Shelton* (although it was stated that the decision not to allow conduct to be raised on costs was right in the particular circumstances of that case), in a case such as *Northstar* where dishonesty had been found, the fact that the paying party had not sought an order from the judge reflecting that misconduct did not deprive that party of referring on the assessment to the finding of dishonesty when considering whether the costs incurred by the dishonest party were reasonable.

Where a paying party had in his favour a finding that the successful party had been dishonest, and raised that factor as a ground for a reduction of the costs at the end of the trial, and the judge ordered a reduction, the natural construction of that order, unless the contrary was expressly stated, was that the party guilty of dishonesty should not be entitled to argue on assessment that the costs he incurred in seeking to make a dishonest case could be taken as reasonably incurred because the judge had made a reduction. Consideration of a party's conduct should normally take place both at the stage when the judge was considering what order for costs he should make and during assessment.

However, the dishonest party should not be placed in double jeopardy. Where dishonest conduct was being reflected in a costs order made by a judge, it would be advisable for the judge to make clear whether he was making the order on the basis that, on assessment, the paying party would still be entitled to raise the dishonesty point in arguing that the costs incurred in making the dishonest case were unreasonably incurred.

In *Northstar* the receiving party had made a concession that they could not recover the costs of attempting to establish as honest what was found to be dishonest; the Court of Appeal said that concession was rightly made. It was held that once the proper construction of the order was understood and the concession was made the judge's order could not be attacked.

Further clarification in respect to when to raise conduct and how the court can take it into account was provided by the Court of Appeal this year in *Lahey v Pirelli* [2007] EWCA Civ 91. The claimant had accepted within 21 days a Part 36 payment amounting to £4,000 that the defendant had made in an attempt to compromise his personal injury claim. In the defendant's points of dispute it was asserted that the claimant's original claim relying on a repetitive strain injury had been abandoned and that it had made an offer of £5,000 before proceedings had been issued. Before the costs judge embarked on the detailed assessment, the defendant asked him to make an order that the claimant should be awarded only 25 per cent of the assessed costs. The costs judge declined to make such an order and his decision was upheld by the judge.

The Court of Appeal held that a costs judge did not have jurisdiction to make a percentage reduction of the assessed costs before embarking on an assessment. Upon acceptance of the Part 36 payment, "a costs order [was] deemed to have been made on the standard basis". That meant that the claimant was entitled to 100 per cent of the assessed costs. If a reduction were made the judge would not be giving effect to the order for costs, which he is required to do under 44.5 (2).

The position of the costs judge is quite different from that of the judge exercising his discretion under 44.3. When carrying out a detailed assessment, the costs judge was not making an order for costs. There is a distinction between taking into account conduct in the order for costs and taking into account conduct in the assessment of costs. The court had the power under r. 3.1(7) to vary an existing order, but that power was only exercisable in relation to an order that the court had previously made, not in relation to an order that was deemed to be made by operation of the rules.

In any event, it was held that in fact it was quite unnecessary to give the costs judge the jurisdiction argued for by the defendant, as he had the power, in an appropriate case, to disallow entire sections of a bill of costs. *"If the costs judge considers that the claimant acted unreasonably in refusing an offer to settle made before proceedings were issued, he is entitled to disallow all the costs post-issue on the footing that they were costs unreasonably incurred: rule 44.4 (1). Similarly, where he decides that a party was unreasonable to raise and pursue an issue, the costs judge is entitled to disallow the costs relating to that issue on the grounds that they were unreasonably incurred".* It had been open to the defendant to raise during the detailed assessment the arguments relied on in support of the submission of a percentage reduction, but they had not done so. They could have submitted that the claimant should not have any post-issue costs or not have any costs attributable to the repetitive strain injury.

Although the Court of Appeal has stated that the jurisdiction to make a percentage reduction on assessment is unnecessary the scope for reducing a bill of costs if conduct is only raised on assessment is less. The court's powers in respect to conduct exercisable on assessment alone are clearly more limited. As pointed out in *Northstar* conduct should be considered in making the order and on assessment; the order in that case provided for a reduction and the effect of the order was also that the costs unreasonably incurred would be disallowed on assessment.

On the basis of *Northstar* and *Lahey* raising conduct can be left to assessment, however it is arguable that the ability to raise conduct on assessment is limited to where there has been a finding in relation to conduct that can be applied by the costs judge or where there has been no opportunity to raise the conduct at a previous hearing or trial. If conduct issues could have been raised at a previous hearing, but are not raised then there remains a risk of a finding of abuse of process if they are then raised on assessment. If conduct goes to the heart of the action (unusual in a personal injury case but possible in for example harassment or stress claims) then it is likely it would be an abuse of process to raise the same issues on assessment.

There are potential difficulties in a costs judge being able to properly consider issues of conduct on assessment where there has been no hearing at which relevant findings could be made. The costs judge on assessment is faced with the same difficulty, highlighted by the Court of Appeal in *BCT Software*, that the judge would face in making the order for costs.

Although conduct issues can generally be left to detailed assessment proceedings it is prudent to raise any relevant issues in correspondence, pleadings and before the Court at applications or CMCs as they arise. The issues are then flagged for the costs arguments at the conclusion of the claim. Further, where the court is able to make a finding at an interlocutory hearing about the conduct of a party and record it in a judgment, order, or at least a note on the court file then it should be asked to do so. Any such finding can then be raised when the order in respect to the costs of the claim is decided or when costs are assessed.

Oliver Moore

Are the CoSHH Regulations 2002 the answer in claims for hospital-acquired infection?

It is a well-publicised fact that there is an increasing incidence of hospital-acquired infection in the United Kingdom. Attention in the media has concentrated upon MRSA (methillin-resistant Staphylococcus aureus), but there are other potentially serious infections which are a hazard for those in hospital. By way of example, Clostridium difficile (C. difficile) is a particularly nasty bacterium which is easily spread around the hospital environment and can cause very severe diarrhoea, peritonitis and, not infrequently, death.

In the early 1990s there were less than 1000 reports to the Health Protection Agency of C. difficile infection each year. In 2002 there were 22,000 reports and this rose to 44,480 in 2004. The increase in the incidence of C. difficile mirrors that of MRSA. In July 2004, the National Audit Office reported that there were currently 5000 deaths each year from hospital-acquired infections of all kinds.

Given the rising incidence of such infections, it is not surprising that hospitals in the United Kingdom are facing a growing number of claims for compensation on behalf of patients who have suffered adverse consequences from hospital-acquired infection. Until recently, the majority of such claims have been framed in negligence alone and claimants have sought to establish that the hospital allowed the patient to become infected through a breach of satisfactory standards. Such claims are, however, notoriously difficult for a number of reasons. It is often difficult to prove the source of infection because the bacteria with which we are concerned are found widely in the hospital environment: the bacteria can be spread by visiting relatives and can be brought into the hospital from outside. Further, there are major difficulties in establishing that the infection was due to a breach of duty. The majority of hospitals have an appropriate protocol for infection control following guidelines issued by the National Institute for Clinical Excellence in July 2003 and all hospitals are required to have in place a Consultant with responsibility for infection control. It is necessary for a claimant to prove a departure from such guidelines and it is very often difficult to obtain the necessary evidence to do so.

In order to avoid the difficulties posed by a claim in negligence, it has now become commonplace to plead a claim in such cases under the Control of Substances Hazardous to Health Regulations 2002. In November 2006, the BBC ran a story citing a number of recent cases in which claimants had relied on the CoSHH Regulations 2002 and achieved a negotiated settlement. The report quoted a number of legal and medical experts endorsing the use of the 2002 Regulations and suggested that there could now be a flood of successful claims for MRSA using the CoSSH Regulations.

The advantages in bringing a claim under the CoSHH Regulations are plain. The 2002 Regulations, which do not differ significantly from the earlier 1999 Regulations, impose, by regulation 7(1), an obligation to ensure that the exposure of persons to substances hazardous to health is either prevented, or where that is not reasonably practicable, adequately controlled. Further, by regulation 7(3), where it is established that it is not reasonably practicable to prevent exposure, the defendant must establish that it has applied appropriate protection measures including the use of appropriate work systems and equipment. Thus, once exposure is established, the burden of proof is reversed and it becomes incumbent upon the defendant to prove, first, that it was not reasonably practicable to prevent exposure, and second, that appropriate protection measures were applied. Although, as in a claim in negligence, it would be necessary for the claimant to prove that the exposure to the relevant bacteria occurred in the hospital, once that had been established, the claimant would not have the significant problems inherent in trying to prove a causative breach; the difficulties become those of the hospital, which would have to prove compliance with appropriately designed protocols for controlling infection.

It has been argued in a number of published articles that the CoSHH regulations do apply to protect patients against hospital-acquired infection[1]. The starting point of the argument is regulation 3(1) of the 2002 Regulations which provides that: *"where the Regulations place a duty on an employer in respect of his employees, he shall, so far as is reasonably practicable, be under a like duty in respect of any other person, whether at work or not, who may be affected by the work carried out by the employer."*

It is argued that regulation 3(1) is drafted widely enough to encompass patients in an hospital.

In support of this proposition, the argument relies upon regulation 5(1)(c) which provides that the ensuing regulations, "*shall have effect with a view to protecting persons against a risk to their health...arising from exposure to substances hazardous to health except -....where the risk to health is a risk to the health of the person to whom the substance is administered in the course of his medical treatment."*

It is contended that if there is a specific exception for hazardous substances deliberately given to patients as part of their treatment, then it is implicit that the Regulations must protect patients in respect of other hazardous substances to which they are inadvertently exposed.

"Substance hazardous to health" is defined by regulation 2(1) of the CoSHH Regulations 2002 to include *"biological agent", which is itself defined as "a micro-organism...which may cause infection, allergy or toxicity or otherwise create a hazard to human health".* It is suggested that the definition plainly encompasses a bacterium such as MRSA or C. difficile.

The argument, as summarised above, is apparently powerful and there is anecdotal evidence that it has been the key to a number of negotiated settlements. It remains the case, however, that no

MRSA claim pleading a case under the CoSSH Regulations has yet been taken to trial and it is therefore a moot point as to whether or not the 2002 regulations do in fact give rise to a cause of action in such cases.

There is now, however, a decision of the High Court which gives pause for further thought on this issue. In *Ndri v Moorfields Eye Hospital NHS Trust*[2] decided on 24th November 2006, Sir Douglas Brown, sitting as a Judge of the High Court, held that the CoSHH Regulations 1999 did not provide a cause of action for a patient who had contracted an eye infection in hospital. The bacterium in this case was Pseudomanas aeruginosa which had colonised the corneal implant given to the claimant from a dead donor. The consequence was that the claimant lost the eye altogether. Adrian Whitfield QC argued for the claimant that the bacterium was a substance hazardous to health to which the claimant had been exposed by the hospital and that liability followed under the CoSHH Regulations unless the defendant could show that it was not reasonably practicable to avoid the exposure and that appropriate steps had been put in place to avoid such exposure.

Sir Douglas Brown began from the general proposition that a claimant must first show that the damage suffered fell within the ambit of the regulation. In *Fytche v. Wincanton Logistics*[3] (the employee suffering frost bite because of a hole in his steel-capped boots) the House of Lords endorsed the approach that a claimant must show that the damage was of the type which the legislation was intended to prevent and that the claimant belonged to the category of persons the regulations were intended to protect.

Sir Douglas Brown gave short shrift to the arguments on behalf of the claimant. The Judge held that it was "clear from the whole structure of the Regulations that patients in hospital are not to be included amongst the persons to be protected." When considering the argument, referred to above, that regulation 5(1)(c), by exempting hazardous substances deliberately given to patients, implies that patients are within the general ambit of the regulations, Sir Douglas Brown held that the effect was in fact to exclude patients altogether.

The decision in *Ndri* is of course only a decision at first instance and, until the higher courts have considered the issue, the question of the application of the CoSHH Regulations to claims by patients for hospital-acquired infection will remain a matter of debate. *Ndri* is at least an indication that the argument in support of the application of the Regulations to such claims is not as clear-cut as some have supposed.

John Snell

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[1] See, for example, "MRSA claims: an alternative approach" by Sapna Malik published in Volume 11 of Clinical Risk in January 2005 and "Litigating Hospital Acquired MRSA As A Disease" by Daniel Bennett published in JPIL 2004, part 3.

[2] [2006] EWHC 3652

[3] [2004] UKHL 31

Part 36 offers

Introduction

Part 36 and Part 37 have been overhauled and the new versions came into force on 06/04/07. The most important changes are as follows:

- Payments into court have been abolished. All defendants (whether or not they are "good for the money") can obtain part 36 costs protection by making an offer to settle.
- Part 36 offers can be made at any time, including prior to the issue of proceedings.
- Part 36 offers are open to acceptance, without the permission of the court, until they are withdrawn or amended.
- The court's permission is not required to withdraw an offer providing the period for acceptance has elapsed.

Making the offer

A Part 36 offer may be made at any time *(CPR 36.3(2))*. Both Claimants and Defendants can make a Part 36 offer and it is no longer necessary for the Defendant to prove that they are "good for the money" by backing their offer up with a payment into court. The offer is deemed to be made once served and service must be on the legal representative where there is one *(CPR36PD 1.1)*.

CPR 36(2) contains a stricter and more precise definition of a Part 36 offer. The offer must be in writing, state that it is intended to have part 36 consequences and specify a period of not less than 21 days within which the Defendant will be liable for the Claimant's costs if the offer is accepted. The offer must state the issue to which it relates and whether or not it takes into account any counterclaim. As before, additional details are required in cases involving periodic payments, provisional damages or recoverable benefits.

Accepting the offer

Acceptance is made by service of a written notice of acceptance *(CPR 36.9(1))*. Offers may be accepted at any time, regardless of whether counter offers have been put forward, unless a notice of withdrawal has been served *(CPR 36.9(2))*. The court's permission is still required to accept offers for the benefit of a child or patient, in certain circumstance where there are joint tortfeasors, if the trial has already started and where there is an apportionment of damages between Claimants in proceedings under the Fatal Accidents Act 1976 or *Law Reform (Miscellaneous Provisions)* Act 1934 *(CPR 41(3)A)* Permission is also required where the recoverable benefits have increased since the Part 36 offer was put forward. In all these circumstances the court may still order that the cost consequences set out in CPR 36.10 apply. Further, where an offer which includes an award for periodic payments is accepted the Claimant must, within 7 days of acceptance, apply to the court for this award (CPR 36.5(7)).

Withdrawing a part 36 offer

Prior to the expiry of the relevant period the offer may only be withdrawn or reduced with the permission of the court *(CPR 36.3(5))*. Thereafter the permission of the court is not required *(CPR36.3(6))*. Offers are withdrawn by written notice and withdrawal is effective once served. Part 36 costs consequences do not apply to offers which have been withdrawn *(CPR 36.14(6)(a))*.

Getting the money

Acceptance of a Part 36 Offer has the effect of staying the proceedings upon the terms of the offer. This stay means that the case is effectively over rather than asleep and the court is unlikely to lift the stay simply because one party has failed to comply with their side of the bargain. In such circumstances the offeree should enforce the terms of the compromise. It should be noted that an offer which proposes to make the Claimant wait more than 14 days after acceptance for their money will not be treated as a valid Part 36 offer unless the Claimant accepts it. Where the accepted sum has not been paid within 14 days, or such other period as has been agreed, judgement may be entered for the unpaid sum *(CPR 36.11(7))*.

Costs consequences

Cost consequences under the new rules are similar to those under the old rules. Claimants may now obtain favourable costs consequences where they match or beat their own offer. The practice that a Claimant who belatedly accepted the Defendant's settlement proposal paid the Defendant's costs from the date the offer expired until the date the offer was accepted has now been incorporated into the rules. Where the case includes an element of recoverable benefits the Claimant will be treated as recovering more than the Defendant's offer where he receives a sum greater than the net amount in the offer after recoverable benefits have been deducted.

Transitional provisions

Part 36 offers or payments made prior to 6th April 2007 will continue to be valid but will have the effect set out in the new rules. The court's permission is still required to accept pre-action offers made before 6th April 2007 after the commencement of proceedings. There is, however, no requirement for Defendants to back up a pre action offer made before 6th April 2007 with a payment into court where proceeding are commenced after the 6th April 2007.

Conclusion

The provisions will greatly reduce the workload of the court funds office. Claimants have less protection insofar as Defendants, be they impecunious or uninsured, no longer have to prove that they are "good for the money" by making a payment into court. Where there is doubt about the Defendant's means the Claimant may wish to consider requesting an irrevocable undertaking that the money to be paid over to the solicitor prior to the offer being accepted. Claimants must beware that Defendants' settlement proposals can be withdrawn with ease and without the permission of the court. Defendant insurers will be pleased that their money will no longer be lurking in the Court Funds' Office earning low rates of interest but must make sure they can meet their payment obligations promptly.

Abigail Stamp

The Impact of the 6th Edition of the "Ogden" Tables

The Government Actuary's Department has published the new Actuarial Tables for use in Personal Injury and Fatal Accident cases (the so-called "Ogden Tables").

This article examines some of the changes in the new 6th Edition Tables and its Explanatory Notes.

It may be that there will be challenges to some of the matters raised in the Explanatory Notes. The basis upon which the Tables and Explanatory Notes are admissible in England & Wales is still a mystery. It had been intended that S.10 of the Civil Evidence Act 1995 would make both admissible without more, but that Section has not been brought into force.

Although it would seem quite difficult to argue that the Actuarial Tables themselves should not be admitted without proof, the same is surely not true of the Explanatory Notes. As will become clear when discussing the new suggested method for dealing with contingencies other than mortality, the research upon which the new methodology is based is not available in the Notes, nor are the calculations used to produce those tables. Thus it is impossible to see whether the methodology, or the information, is correct.

That said, the Civil Evidence Act 1995 apparently had intended that both should be admitted without more; and the impression gained from the House of Lords decision in *Wells v Wells*[1], where the Tables were said to be the common starting point, is that it will be hard to deny their admittance.

Mortality

The 4th Edition Tables were based on the experience of mortality in the years 1990 – 1992 as set out in the English Life Tables No. 15. In other words, the estimation of mortality was based on historical information and did not include any attempt to forecast future mortality. The 5th Edition the Tables were based on the "reasonable estimate of the future mortality likely to be experienced by average members of the population alive today"[2]. Thus, "estimation" had crept in. In those Tables the multipliers were based on what the Committee thought was the likely trend in mortality.

In this 6th Edition the method of estimating life-expectancy used in the 5th Edition has been continued. Once again it applies projected assumptions of the likelihood of death. Previously the information relied upon had come from the 2002 population projections, and, unsurprisingly, in these Tables the same principle is applied but based on the 2004-based projections, themselves published as long ago as October 2005.

Thus, the information on which the projections were based are already out of date but it cannot be said that they are likely to be inaccurate because of it. NO doubt the projections take into account the historical nature of the information.

There is a general assumption that we are all living longer. However, there is a darker side: there are dangers to our life expectancy from such things as obesity, smoking, and diseases such as HIV. It may be that these factors will slow down the rate of increase in life expectancy.

What does the new information on life expectancy show? It is a relatively simple exercise to see that in broad terms life-expectancy has increased.

We can see the impact on life expectancy by examining the 0% column from Table 1 (Male) and Table 2 (Female) of the new 6th Edition and compare them with their 5th Edition counterparts:

Table 1

Age	5th Ed (M)	6th Ed (M)	% Increase
20	63.08	64.87	*2.84*
30	52.97	54.10	*2.13*
40	42.81	43.52	*1.66*
50	32.84	33.40	*1.71*
60	23.37	23.97	*2.57*
70	14.89	15.50	*4.10*
Age	**5th Ed (F)**	**6th Ed (F)**	**% Increase**
20	66.99	68.61	*2.43*
30	56.69	57.74	*1.85*
40	46.39	47.01	*1.34*
50	36.29	36.69	*1.10*
60	26.69	26.88	*0.71*
70	17.45	17.74	*1.66*

It is at once noticeable that the increase in life expectancy in the male age group between 40 and 60 is not as great as in the younger or older generations. It is also apparent that in the female group life-expectancy has not increased as greatly as that for men. Furthermore, for women the smaller increases are spread over a longer period from age 40 through to 70. In the age group 70+ men's life expectancy increases quite dramatically, compared with women.

There is a new and very important factor to note in all of this.

In previous editions the Tables used the experience of England & Wales. The 6th Edition again uses the "reasonable estimate of future mortality"[3] but now the statistical basis covers the whole of the United Kingdom. Thus, both Scotland and Northern Ireland's projected mortality have been included in the multipliers. The sole justification for this appears to be that it is easier to have one set of Tables for use throughout the United Kingdom, rather than creating different Tables for each "jurisdiction". What is the effect of this change?

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1 [1998] 3 All ER p 481

2 see §5 of the Explanatory Notes

3 see §4 of the Explanatory Notes

The up-to-date life expectancy information is unavailable to me, so I cannot be definite; however, it is possible to compare the past information. If one considers the life tables produced at B3 in "Facts & Figures 2006" one can see what impact there might be on expectation of life in England & Wales by introducing life expectation in Scotland and Northern Ireland. In the following table the percentage decreases for Scotland and Northern Ireland are each measured against England & Wales:

Table 2

Age	England & Wales	Scotland	% Drop	Northern Ireland	% Drop
20M	57.26	54.59	*4.66*	56.65	*1.06*
20F	61.50	59.68	*2.96*	61.12	*0.62*
30M	47.66	45.23	*5.10*	47.13	*1.11*
30F	51.67	49.91	*3.41*	51.32	*0.68*
40M	38.15	35.97	*5.71*	37.60	*1.44*
40F	41.96	40.26	*4.05*	41.60	*0.86*
50M	28.94	26.99	*6.74*	28.42	*1.80*
50F	32.53	30.94	*4.89*	32.19	*1.05*
60M	20.36	18.76	*7.86*	19.94	*2.06*
60F	23.57	22.21	*5.77*	23.28	*1.23*
70M	12.95	11.98	*7.49*	12.63	*2.47*
70F	15.43	14.50	*6.03*	15.21	*1.42*

This demonstrates that in the past (I repeat that I cannot say with certainty that this is replicated in the 2004 projected assumptions) for both men and women at all ages, life expectancy in Scotland and in Northern Ireland has been demonstrably lower. If this sort of difference is replicated in the 2004 projected assumptions, then all English and Welsh claimants will be under-compensated, because they are likely to live longer than the Tables allow for.

The Explanatory Notes do not make clear precisely how this change has impacted on the Tables. It is not clear the extent to which the "reasonable estimates" used in the 6th Edition Tables ameliorates this effect, but it does seem more likely than not that, say, a 50 year old male in England or Wales will be awarded less compensation than he ought to be awarded, because the Tables take into account the reduced life expectancy from the experience in Scotland and Northern Ireland.

This difference in life expectancy between England and Scotland was pointed out by Professor Barnes in his article in JPIL[4] where he referred to the differences in Life Expectation by reference to "Area of Residence",

"The Office of National Statistics has also produced a report entitled, "Life expectancy at birth by health and local authorities in the United Kingdom, 1998-2000". In the period from 1998-2000, the highest life expectancy at birth for a male was 79.0 years in the East Dorset Local Authority area. This compares to a figure of 68.7 years in the Glasgow City Local Authority area."

Which is a difference of over 13%.

It is not clear to me whether this incorporation of the whole of the United Kingdom is fair, if the object of the exercise is to achieve full compensation for individual claimants. If one looks at the multipliers for loss of income, taking Tables 9 & 10 (normal retirement age of 65), and applying the 2.5% discount rate, the negative effects on the new multipliers is obvious,

Table 3

Age	T9 5th Ed	T9 6th Ed	% change
20	26.55	26.56	*0.04*
30	22.81	22.78	*(0.13)*
40	18.05	18.01	*(0.22)*
50	12.08	12.06	*(0.17)*
60	4.58	4.59	*0.22*

Age	T10 5th Ed	T10 6th Ed	% change
21	26.83	26.83	*0*
30	23.04	23.04	*0*
40	18.24	18.24	*0*
50	12.22	12.23	*0.08*
60	4.63	4.63	*0*

For male claimants the multipliers for earnings to age 65 have **decreased** in the new Tables, despite the fact that there have been increases in life expectancy **even including Scotland and Northern Ireland**. Compare the information in this table with Table 1 above.

Of course, the increases in life expectancy for an English or Welsh claimant may have been even greater if Scotland and Northern Ireland had not been included.

It remains to be seen whether there will be a demand for separate Tables for claimants in England & Wales.

Contingencies other than Mortality

We are all familiar with the concept that when the "gross" multiplier is taken from the appropriate loss of earnings Table some deduction is usually made to take into account that, even absent the accident, the claimant probably would have had periods of not earning through change of employment, redundancy and sickness, anyway.

The 5th Edition Explanatory Notes dealt with this at § 31 and following. The discounts were computed by reference to "economic activity", itself related to the country as a whole, and by reference to age. Typically, the largest discounts would come in periods where economic activity was "low" and when the Claimant was older. There were further discounts of very small order for the geographic region in which the claimant would be seeking work, and for the risk involved in his/her occupation.

There has been a sea-change in approach. The Working Party has obtained new research which has used information derived from Labour Force Surveys. Based on this research the new "discount tables" approach the discount for "other contingencies" by reference to the educational qualification of the claimant and their age. The discount tables also split up claimants between those who were employed and those who were unemployed at the time of the accident, and those who were able-bodied or disabled at the time of the accident.

The 3 educational categories are "D" which relates to holders of a degree or equivalent, or to a professional without such a qualification; "GE-A" which relates to good GCSE and A-levels or equivalent; and "O" which relates to the rest below that level.

The Explanatory Notes emphasise that the discount tables provide a useful "starting point". They point out that there may be factors which are not reflected in these statistics, for example the Claimant's work history. That seems to imply that work history might have a material

[4] June 2004 P131, @133

bearing on what discount to use. If, for example, a claimant, prior to the accident, had been unsettled with significant movements between employments and periods off from work – should the discount be greater?

I harbour concern that if a discount greater than that advocated in the tables were made in this sort of situation, there could be an element of double-discount, because the information on which the discount tables have been formulated must have already included employees with such backgrounds.

Another example given in the Notes is in relation to the type and extent of the claimant's pre-accident disability. The Notes are at pains to emphasise that the definition of the word "disability" has been broad (see §35 of the Notes). Accordingly the suggestion is that it encompasses both severely disabled persons and those with more minor disability. However, the discount tables take into account both. Without knowing how many severely disabled persons were included in the age group of your claimant how are you to approach increasing or decreasing the discount given in the table? Without a greater understanding of the statistics and the methodology used in reaching the discount figure, how are you, or the Judge, to know what sort of qualitative adjustment is needed to make a fairer assessment for any particular claimant?

Some general comments in relation to the discount tables can be made:

A man in work at the time of his accident will attract a smaller discount than one who was out of work. The following table seeks to show the difference between a claimant who was in work at the time of the accident, as against one who was not.

Table 4

Age	D In work	D Out of work	+/-
20-24	0.92	0.89	3
30-34	0.92	0.87	5
40-44	0.88	0.82	6
50	0.83	0.72	11
Age	**GE-A In work**	**GE-A Out of work**	**+/-**
20-24	0.92	0.88	4
30-34	0.91	0.86	5
40-44	0.88	0.81	7
50	0.83	0.72	11
Age	**O In work**	**O Out of work**	**+/-**
20-24	0.87	0.83	4
30-34	0.89	0.81	8
40-44	0.88	0.78	10
50	0.83	0.70	13

For a male person employed at the time of the accident, the discount is at the same level, whatever his qualifications, when he reaches the 40-44 age bracket; and in the 35-39 bracket it is only those in the "O" category (very few, poor, or no, qualifications) who suffer a discount which is 1% greater. Thus, the greatest impact of these new "other contingency" discounts is on younger claimants.

In general terms, for men the discount tables recommend a discount of 15% to 11% for an employed "O" category youngster (aged 16 – 39 years); in the same age group the "D" category youngster can expect a discount of 10% – 7% (but note that the discount decreases from 20-29, and then creeps back up).

The unemployed claimant fares worse: the discount for the "O" category claimant is 18% - 20% for ages 16 – 39 years, whereas the professional person will attract a discount of 15% at 16, then reducing to 11% to age 29, then rising from 11% to 15% by 39.

There is even more dramatic information for the young female non-disabled claimant, aged 16 - 39. If she was employed prior to the accident, and in category "D", her discount ranges from 13% down to 11%; but rising to 36% to 22% if she is in category "O". If she was not employed at the time of her accident, the discount increases from 16% to 20% if in category "D", up to 41% to 37% if in the "O" category.

These are truly significant discounts.

I have taken some recent or notable cases to see how these discounts, if taken straight from the tables without adjustment, would compare with what was actually done:

In *Page* (1998) the House of Lords[5] restored the trial Judge's discount of 8.65% for a 28 year old, able-bodied male, in employment at the time of his accident. He had left school at 16 to join the army – we can surmise that he would have fallen into category "O". On the 6th Edition approach the starting point discount would be 11%.

In Parkhouse (2001)[6] Gage J made a discount of 5% for a male claimant who was 10 at trial having suffered dystonic cerebral palsy at his birth. There was an issue as to whether he would have worked until 65 or 60, so the Judge split the difference. The claimant had advocated a 2% discount, which may have been a reference to the 4th Edition Explanatory Notes. On the basis of the modern (6th Edition) approach from Table A the discount would be 15% if it was assumed that the Claimant would have achieved high qualifications, or 18% if it had been assumed he would have had no, or very few, qualifications.

In *Stuart* (2001)[7] Owen J made a discount of just over 12%[8] for a female claimant who suffered severe head injuries in a road traffic accident when aged 18; she was 23 at trial. She was in employment as a receptionist and had 8 GCSEs (pass levels not mentioned) and had spent some time on a NVQ course. The Judge discounted her multiplier to age 65 to take into account other contingencies ("in particular maternity and child rearing"). Under Table C, assuming she fell into the category "GE-A", the starting point discount should be 18%.

In *Godbold* (2005)[9] Mitting J was dealing with a 58 year old claimant, in employment as a road sweeper at the time of the accident, who would have worked until 65. His multiplier would have been 6.23, and his award was based on a multiplier of 5.73, i.e. a discount of 8%. Whilst the 6th Edition tables only go to age 54, it is probably a reasonably safe approach to assume category "O" at age 54; the discount now would be 21%.

In *Herring* (2004)[10] the claimant was 35 at trial and probably fell into category "GE-A". Under the 5th Edition approach he was likely to attract a 3% discount. The Court of Appeal made a discount of

5 [1998] 3 All ER @ p 499 h and following

6 (2002) Ll Rep Med 100

7 Lawtel 26/10/01

8 Applying the multipliers from the 4th Edition Tables

9 [2005] EWHC 1002 (QB)

10 [2004] 1 All ER 44, CA

(all but) 10%. Applying the 6th Edition approach the starting point discount would be 10% as well[11].

In general terms, therefore, there is now a "starting point" which is relatively much higher in some instances than existed under the old regime.

However, in my opinion there is a danger in applying these new discount tables other than as a starting point, particularly in the light of the approach to loss of future earnings as advocated in *Herring* and "explained" in *Brown v MOD*[12]. If the appropriate method of assessing loss of future earnings is to find the appropriate "model" of earnings (apparently on the balance of probabilities) and then to factor in only significant anticipated increases (or, presumably, decreases) in earnings which might occur through promotions or change of employment, then there is a danger that all possible good influences on a claimant's future prospects are ruled out.

For example, in an interesting article on "Methods of Calculating Damages for Loss of Future Earnings"[13] Professors Lewis and McNabb and Miss Victoria Wass looked at the way such damages are assessed in the USA. They pointed out that one factor which the Americans take into account, but which we do not, is economic growth. Those familiar with the debate raging about the correct index to be applied to periodic payments will know that that there is good evidence to show that earnings are increasing faster than the RPI, and that this has been the case for many years. The article points out that wage increase comes from two components: the first is individual, age-related, productivity, and the second from the economy-wide productivity growth. Thus, if there is good economic growth it is likely that the claimant's earnings will increase above inflation (where "inflation" is measured by RPI, where that inflation only is taken into account in setting the discount rate of 2.5%).

The seminal decision on discounts other than mortality is *Bresatz v Przibilla*[14], recently cited approvingly by Potter LJ in *Herring*. I quote,

"All 'contingencies' are not adverse: all 'vicissitudes' are not harmful. A particular claimant might have had prospects or chances of advancement and increasingly remunerative employment. Why count the possible buffets and ignore the rewards of fortune? Each case depends on its own facts."

It is worth noting that if a claimant seeks a periodic payment order for loss of future earnings, there is a very good chance that he will obtain an index which will reward him over and above inflation simpliciter[15]. That suggests that a claimant seeking periodical payments may end up better off than a claimant who seeks a lump sum, because an index such as ASHE is likely to register the impact of economic growth.

Smith v Manchester

At §31 of the Explanatory Notes it says,

"The methodology also provides for the possibility of valuing more appropriately the possible mitigation of loss of earnings in cases where the claimant is employed after the accident or is considered capable of being employed. This will in many cases enable a more accurate assessment to be made of the mitigation of loss. However, there may be some cases when the *Smith v Manchester Corporation or Blamire*[16] approach remains applicable or otherwise where a precise mathematical approach is inapplicable."

This is a reference to discount tables B and D.

In those cases where the claimant has lost the ability to carry out his pre-accident employment but is still capable of some (usually lower paid) work, then it is still possible for the claimant to seek damages under the *Smith v Manchester*[17] rubric, in relation to his residual earning capacity.

One way of evaluating his/her 'disadvantage on the open labour market' would be to use a smaller multiplier in relation to the residual earnings multiplicand than used for his full loss of earnings claim. Tables B and D will assist practitioners who wish to make such a claim. Tables B and D will enable the claimant to demonstrate how much more vulnerable he/she will be on the open labour market. If one examines those tables it can be seen that the discount is significant.

For example, if you compare a 30 year old with very few or no qualifications (category "O"), and assume he would have retired at 65, then his "gross" multiplier will now be 22.78. If the "starting point" discount is used from Table A then that multiplier will suffer a discount of 11%, making the "net" multiplier 20.27. Assume that in this case the claimant has a residual earning capacity, and assume he can still work to 65, then his gross multiplier for his residual earnings will be the same. However, under the new regime the discount for "other contingencies" now will come from Table B and will be 60%, equating to a net multiplier of 9.11.

How many discounts for *Smith v Manchester* which were made in this way in the past were anything like as significant? I suspect very few.

I am skeptical of the value of these tables in the situation where the Claimant has remained in his pre-accident employment but his injury would, if he was placed on the open labour market, disadvantage him. True, he will be able to show the disparity in the discount given between Table A and B if he is male, or C and D, if she is female. He/she will have a strong argument for saying that the historical awards for this head of damage can be seen to be palpably too small – if this research and its consequences are accepted by the court.

What the discount tables do not show is the variation between a minor injury which still qualifies for an award, and a very significant injury. The definition in §35 of the Notes is very broad. The Notes make clear that the discount tables are a starting point and that, *"in many cases it will be appropriate to increase or reduce the discount n the tables to take account of the nature of a particular claimant's disabilities."*[18]

However, without access to the underlying information and the method of calculating the discount tables, it is difficult to know how to make that increase or reduction.

A "*Smith v Manchester*" award is aimed at the extra amount of unemployment which the claimant may suffer and which is

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[11] However, it must be said that the actual basis for the discount of 10% is not at all clear from the judgment of Potter LJ at §29 to §38

[12] [2006] EWCA Civ 546

[13] [2002] JPIL 151

[14] (1962) 36 ALJR 212, Windeyer J.

[15] A good example being *Sarwar v (1) Kamran Ali (2) MIB* [2007] EWHC 1255 (QB), Lloyd Jones J. where ASHE Aggregate @ 90th percentile was applied to a periodical payments order for loss of future earnings.

[16] Although 'lumped' together here, in fact these are two very different types of award, the former related to disadvantage on the open labour market, the latter being an inadequate method of evaluating loss of future earnings.

[17] *Smith v Manchester Corp* (1974) 17 KIR 1, CA

[18] §31.

caused solely by the Claimant's injury. Factors such as mortality, discounting for accelerated receipt, and discounting for the chance that the extra time off from work caused by the new disability will not happen, must be factored-in. The discount which appears in the discount tables is the product of analysis of the overall movement from employment to unemployment of non-disabled people and disabled people. The difference between the two shows that there is a disadvantage in being disabled. The discount is much greater. That does not demonstrate what any particular injury of a particular claimant will cause by way of extra time off from employment as a result of his/her injury. The glass through which the judge must look darkly is still just as opaque, except that the tables do give a more graphic demonstrate of the difference, as the next table shows:

Table 5

Age (M)	D able	D disabled	+/-
20	0.92	0.61	(0.31)
30	0.92	0.59	(0.33)
40	0.88	0.57	(0.31)
50	0.83	0.53	(0.30)

Age (M)	O able	O disabled	+/-
20	0.87	0.38	(0.49)
30	0.89	0.40	(0.49)
40	0.88	0.39	(0.49)
50	0.83	0.40	(0.43)

A male disabled claimant will be over 30% worse off than his able-bodied counterpart if he has a degree or equivalent, and nearly 50% (until he reaches 50 when it drops to 43%) if he is unqualified.

One can also see that difference between being well qualified and being unqualified is significant, ranging from 13% to 23% better off is the holder of a degree or equivalent.

The figures for females are very similar when one compares a disabled but well qualified claimant against an unqualified counterpart. Overall the difference is smaller than for males in a similar position.

Table 6

Age (F)	D able	D disabled	+/-
20	0.89	0.64	(0.25)
30	0.89	0.62	(0.27)
40	0.89	0.60	(0.29)
50	0.86	0.60	(0.26)

Age (F)	O able	O disabled	+/-
20	0.68	0.25	(0.43)
30	0.75	0.30	(0.45)
40	0.80	0.38	(0.42)
50	0.81	0.47	(0.34)

It shows the enormous advantage in having qualifications.

Perhaps now Defendants will want to encourage a Claimant with significant disability to undergo some form of training for a high level of qualification or vocational work.

Impaired Lives

In the Explanatory Notes at §20 advice is given about the way to apply the tables where life expectancy of the claimant has been foreshortened.

The Note suggests that if the expert opinion is that the claimant should be treated as being older than their chronological years, then Table 1 or 2 of the Ogden Tables can be used safely, but if the opinion is to the effect of a given number of years of life expectancy, and that is applied to Table 28 to give the multiplier for accelerated receipt, then this 'is likely to give a multiplier which is too high since this approach does not allow for the distribution of deaths around the expected length of life'. It is important to understand that the Notes are referring to converting a figure of life expectancy into a multiplier. "Life expectancy" is an actuarial calculation of the chance of a person living to a certain age, absorbing the chance of an earlier or later death. The suggestion in the Note being that if the opinion suggests that the claimant has a fixed number of years left, then the chance of him/her dying before that time, or after that time has not been taken into account.

It is undoubtedly true that taking a multiplier from Table 28 for a fixed period of life expectancy will not allow for the chance of the claimant dying before or living longer than the fixed period. If Table 1 or 2 is used then the multiplier will be smaller than that obtained from Table 28.

This topic was visited by the House of Lords in *Thomas v Brighton Health Authority*[19] where they condemned the defendant's submission that the figure of a fixed number of years of life expectancy given by the expert required another discount to take into account the chance that he might die sooner. The House thought that would be a double discount. There the life expectancy figure was the subject of agreed evidence. Lord Lloyd made the clear point that the figure used must be taken to have included the risks of mortality. To discount the figure provided by the clinicians further would be to deny the claimant the opportunity that he might live longer (in general terms life expectancy is increasing).

In addition the same argument was rejected in *RVI and Associated Hospitals NHS Trust v B (a Child)*[20].

From a practical point of view it is important now to ensure that the expert who is providing his opinion on the life expectancy of the claimant takes into account the assumed "reasonable expectation of life" figures applied by the Government Actuary, so that his estimation will be seen against the modern backdrop. If he refers to those statistics in reaching his opinion, then the court may accept that he will have taken into account the general distribution of death for a person of similar age and gender to that of the claimant. If he states that this claimant will live for "x" years less, then the general risk of dying has been taken into account. The Authorities cited above will support a submission that then no further discount should be permitted.

I suspect that an Actuary will disagree with the logic applied by the Court of Appeal and the House of Lords, and it may be that this topic will be revisited in a case where the difference in the multiplier is significant enough.

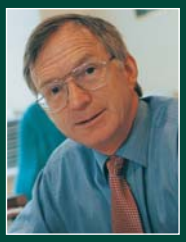
I anticipate new debate over some of the aspects of the new Tables.

Adam C Chippindall

[19] See *Wells v Wells* [1998] 3 All ER p481, Lord Lloyd at 496 j onwards

[20] [2002] EWCA Civ 348; [2002] PIQR Q10. Please note however, the admission by Tuckey LJ at P Q144 §24 that he did not "fully understand" the argument.

The Personal Injuries Team



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