

PI UPDATE

Gabriel Farmer and Oliver Moore, Guildhall Chambers

Liability for failed sperm storage

Jonathan Yearworth & Others v North Bristol Nhs Trust [2009] EWCA Civ 37

Sperm stored by the Trust on behalf of the Claimants (who were undergoing treatment which threatened their fertility) was lost when the storage equipment failed. The Claimants claimed that they had suffered psychiatric injury or mental distress, together with financial loss in some cases, and brought proceedings in negligence in respect of personal injury and, alternatively, damage to property in the sperm. At first instance the court held on a preliminary issue that the sperm did not amount to the Claimants' property and that the damage to it did not constitute a personal injury to them.

The Court of Appeal held that the Claimants had ownership of the sperm. They had generated and ejaculated the sperm, and the object of their ejaculation was that it might be used for their benefit. s.3 and s.4 of the Human Embryology and Fertilisation Act prevented the Claimants from dealing with the sperm as they wished, but this did not constitute a derogation from ownership. In addition, Sch.3 and s.12(1)(c) of the Act required that the trust obtain the Claimants' consent before doing certain acts with the sperm. Further, the trust required the Claimants' subsisting consent to store the sperm. Finally, the Act recognised in the Claimants a fundamental feature of ownership, namely, that at any time they could require destruction of the sperm.

There was no domestic, Commonwealth or American authority that directly supported the proposition that damage to part of a person's body, including a substance generated by it, could amount to a personal injury if the damage occurred after its removal from his body. Accordingly, the damage to, and consequential loss of, the Claimants' sperm did not amount to personal injury.

However, in addition to the action in tort, the Claimants had a distinct cause of action under the law of bailment. The trust had chosen to take possession of the sperm, to assume responsibility for its careful storage and to acquire exclusive possession of it. It had also held itself out as being able to deploy special skills in preserving the sperm. Breach of bailment was akin to breach of contract, and therefore the measure of any damages would fall under these principles. The law of contract provided for damages for mental distress where contracts had as their object non-pecuniary personal benefits. The object of banking the sperm was to preserve the Claimants' ability to become fathers, notwithstanding the threat to their natural fertility, and so fell within the ambit of non-pecuniary personal benefits. Therefore, the Claimants were entitled to compensation for any psychiatric injury or actionable distress resulting from the breach.

Comment

James Townsend fought and won this case in the Court of Appeal. Having now succeeded in establishing a valid cause of action in the preliminary issue the way is now clear for a number of similar claims based on the failure of sperm freezing equipment in several other locations in the UK.

Work Equipment

Smith v Northamptonshire County Council [2009] UKHL 27

A 3-2 majority decision of the House of Lords upheld the Court of Appeal in deciding that a wooden ramp used by an employee of the County Council in order to access a client's home was not work equipment "provided for use or used by an employee of his at work", albeit that ramp did constitute work equipment.

Lord Mance (with whom Lords Carswell and Neuberger agreed) sought some specific nexus between the work equipment and the employer's undertaking. He took as the test:

"whether the work equipment has been provided or used in circumstances in which it was as between the employer and employee incorporated into and adopted as part of the employer's business or other undertaking, whether as a result of being provided by the employer for use in it or as a result of being provided by anyone else and being used by the employee in it with the employer's consent and endorsement."

The council did not supply or repair the ramp. It had inspected it at an earlier stage, but it was merely being careful of its employees' safety and such care should not give rise to liability which is not otherwise covered by its statutory duty.

Comment

An antidote for Defendants following *Spencer-Franks v Kellogg Brown and Root Limited* [2008] UKHL 46 where the House of Lords favoured a very wide construction of the words "work equipment". The position now is a more restricted one because whatever the nature of the equipment a connection is required between the equipment and the employer's business.

Contributory negligence – seatbelt

***Stanton v Collinson* [2009] EWHC 342 (QB)**

The Deceased had agreed to drive four passengers in his car. The Claimant and another girl had travelled in the front passenger seat, one on top of the other, whilst the two other passengers had travelled in the back. None of them had worn a seat belt. The Deceased exceeded the speed limit and his car collided with another car. The Claimant sustained a serious hand injury and a severe head injury resulting in brain damage. The experts agreed that, had the Claimant worn a seat belt, it would have significantly reduced the severity of his head injury but not completely prevented it.

The Defendant estate submitted that *Froom v Butcher* (1976) QB 286 CA (Civ Div) should be departed from, and a starting point of a 50 per cent reduction should be adopted where the injuries would have been prevented by a seatbelt, and a starting point of a reduction of one third should be adopted where the injuries would have been significantly less severe had a seatbelt been worn.

The Court held that the decision in *Froom* had been made in full knowledge of the relevant research and statistical information and knowledge of the legislative background and the imminent arrival of statutory compulsion. The approach adopted had stood the test of time and continued to do so (*Wilkins, Gawler v Raettig* (2007) EWHC 373 (QB) and *Gawler v Raettig* (2007) EWCA Civ 1560 considered).

In permitting the girl to sit on his lap, the Claimant had obviously been sharing the occupancy of the front passenger seat. That was an unusual feature, but the evidence did not render it a rare and exceptional case such as to justify a departure from the guidance in *Froom*. A negligent driver had to bear by far the greater share of responsibility, his negligence being a prime cause of the damage (*Froom* applied).

It was possible that the Claimant's head injuries and their sequelae would have been less severe if he had worn his seat belt, but the burden of proving that lay upon the Defendant estate and that burden had not been discharged. Furthermore, there was no evidence that the Claimant's hand injury would have been reduced or prevented if he had worn a seat belt. The Claimant was therefore entitled to recover damages in full.

Comment

A full blown attack on *Froom* collides with judicial conservatism. Not such a surprise, perhaps. The background and motivation for these submissions is not known and it may well be that the

Defendant simply considered the facts to be sufficiently extreme to warrant the submissions. It is tempting to ponder the possibility of an appeal – one where permission would need to be founded on “some other compelling reason” rather than “a real prospect of success”?

Assault – vicarious liability

***Maga v Trustees Of The Birmingham Archdiocese Of The Roman Catholic Church* [2009] EWHC 780 (QB)**

The Claimant alleged that he had been abused by a priest over a period of many months in 1976. The Claimant and the priest had become friends, and the priest had paid the Claimant for cleaning his car and doing small jobs in the presbytery. The Claimant alleged that the Defendant trustees were vicariously liable for the assaults committed by the priest, and that they were negligent because they had failed to follow up allegations of sexual abuse concerning the same priest in about 1974.

The Claimant submitted that at all times he had been under a disability within the meaning of s.28(1) of the Act, and so the period of limitation had never begun to run. The Defendant trustees submitted that the assaults were not so closely connected with the priest's 'employment' to render the church liable.

The Claimant did not have the mental capacity to manage his property and affairs. He was likely to be unable to deal rationally with the problems that had arisen or would arise in the course of litigation, and he did not have the capacity to conduct legal proceedings. Accordingly, he was of 'unsound mind' for the purpose of s.38(2), and his claim was not statute barred.

It was the priest's position within the church which had given him the opportunity to abuse the Claimant, but that in itself was not sufficient to render the church liable (*Jacobi v Griffiths* (1999) 174 DLR (4th) 71 and *Lister v Hesley Hall Ltd* (2001) UKHL 22, (2002) 1 AC 215 applied). The priest's association with the Claimant was founded on the fact that he paid the Claimant to wash his car and do jobs in the presbytery. The assaults carried out by the priest on the Claimant were not therefore so closely connected with his employment that it would be fair and just to hold the church liable.

Comment

A useful decision in this area given the inevitable community-based interaction of church employees (often in association with other groups) with complainants. This decision highlights the threshold criteria required to import vicarious liability. Often there is no disputing the fact of an assault so cases are often fought on this issue.

Vicarious liability – course of employment

***Ministry of Defence v Radclyffe* [2009] EWCA Civ 635**

The respondent second lieutenant was on an adventure training exercise in Germany when he was injured jumping from a bridge into a lake. He was on his day off and had gone with other members of the group for a swim. On the previous day the captain in charge of the group had encouraged the second lieutenant to make the jump, and on the day of the accident he had allowed him to do so again. The lieutenant was badly and permanently injured after he entered the water with his legs bent.

The Ministry of Defence argued that the second lieutenant was off duty at the material times, that the captain had been acting outside the course of his employment, and that no duty of care was owed. The judge held that the captain had been acting in the course of his employment, that he owed the members of the group a duty of care, and that he had been negligent in giving permission to jump. The second lieutenant's contributory negligence was assessed at 40%. The Ministry of Defence appealed.

The Court of Appeal upheld the judge's decision that the captain was acting in the course of his employment, since the swimming trips took place between organized adventure training exercises and were subject to military discipline. As the officer in charge of the group it was fair, just and reasonable to ascribe to the captain a duty of care. The members of the group had asked the captain if they might jump, and that was also sufficient to establish a duty of care. It was clearly dangerous to make the jump, and the captain should have ordered the second lieutenant and the other members of the group not to do so. As such, the captain was in breach of his duty. There was a sufficient connection between the captain's employment and his breach of duty to render the Ministry of Defence vicariously liable for his breach. The appeal was dismissed.

Comment

A painful case for both sides. It is often argued in MOD cases that "off duty" activities are beyond the scope of employment even when they are organized by the service hierarchy. In the circumstances of this case the mere asking of permission to jump appears a light justification for the imposition of a duty of care.

Animals Act - Horses

Marian Freeman V Higher Park Farm [2008] EWCA Civ 1185

The Claimant sustained an injury as a result of falling from a horse supplied by the Defendant equestrian centre on a hack organised by the Defendant. The horse had a habit of bucking when going into canter. On the day of the accident, the horse bucked as it was about to go into a canter and the ride was stopped; the Claimant stated that she wanted to continue, but as the horse went into a canter a second time it bucked again and the Claimant fell off.

The judge held that the Defendant was not liable under s.2 of the Animals Act 1971 because the requirements of that provision were not satisfied. As regards the second part of s.2(2)(a), the judge held that it could not reasonably be expected that the horse would buck in such a way that the Claimant would fall and suffer the injury that she had. As regards the first limb of s.2(2)(b), the judge held that the characteristic of bucking when going into a canter was not normally found in horses other than the horse in question and that therefore he could not find that the injury was likely because of that characteristic. As regards the second limb of s.2(2)(b), the judge relied on the fact that the horse had never previously bucked in such a way as to cause the rider to fall off or suffer injury. Finally, the judge held that the Defendant was exempted from liability under s.5(2) by the voluntary assumption of risk by the Claimant.

The Claimant submitted that the judge was wrong in his analysis of s.2 and that her assumption that she could cope with the horse's bucking did not amount to a voluntary assumption of the risk that she might be thrown off and injured.

The Court of Appeal held that the judge's approach to the second part of s.2(2)(a) was not correct. The relevant question was whether, if the horse caused physical injury, such injury was likely to be severe. It was reasonably to be expected that, if a horse bucked on going into a canter so that the rider fell off, severe injury would result (*Welsh v Stokes* (2007) EWCA Civ 796, (2008) 1 WLR 1224 applied). The judge's approach to s.2(2)(b) was also not correct. That provision focused on the characteristics of the species of the animal in question, which in the instant case was bucking (as opposed to bucking when going into a canter; considerations of time and circumstances were relevant to the second limb of s.2(2)(b)). Accordingly, the first limb required the judge to consider whether bucking was not a normal characteristic of horses generally. On the evidence, the judge was entitled to find that the Claimant had failed to establish this. The relevant question under the second limb of s.2(2)(b) was whether it was normal for horses generally to buck at particular times and in particular circumstances, including when beginning to canter. There was no evidence that horses generally bucked at particular times or in particular circumstances, (*Clark v Bowlit* (2006) EWCA Civ 978, (2007) PIQR P12 and *Mirvahedy v Henley* (2003) UKHL 16, (2003) 2 AC 491 considered). In the circumstances, the Claimant had not discharged the burden of establishing that the second limb of s.2(2)(b) was satisfied.

Even if the analysis of s.2 was wrong, the judge had correctly concluded that H was excepted from liability under s.5(2) of the 1971 Act by the voluntary assumption of risk by the Claimant (*Cummings v Grainger* (1977) QB 397 CA (Civ Div) applied).

Comment

Despite the relatively clear wording of the statute the Animals Act still presents difficulty. It is easy to misconstrue the various tests to be applied under the Animals Act 1971 s.2, as is clear from the first instance decision in this case. The decision in *Freeman*, whilst it does not add to *Mirvahedy*, (which remains the leading case in the area), nonetheless provides helpful guidance.

Criminal conduct – ex turpi causa

***Gray v Thames Trains Ltd & others* [2009] UKHL 33**

The respondent was a passenger on a train involved in the Ladbroke Grove rail crash, which was caused by the appellant train operator's negligence. He suffered post-traumatic stress disorder as a result of the crash, and while receiving treatment for that condition he stabbed somebody to death. He pleaded guilty to manslaughter on the ground of diminished responsibility and was sentenced to be detained in hospital. Subsequently, he brought an action against the appellant train operator in negligence for special damages, in respect of his loss of earnings, and general damages, arising out of his detention and for feelings of guilt and remorse. The trial judge held that he was prevented from recovering both special and general damages as a result of his criminal act. The Court of Appeal held that he was entitled to recover special damages, but not general damages (*Clunis v Camden and Islington HA* (1998) QB 978 CA (Civ Div) applied). The appellant train operator argued that the principle of *ex turpi causa* prevented the respondent from recovering compensation for losses arising out of his criminal act or out of the sentence imposed on him for that act.

Their lordships held that the trial judge's decision was correct. It was well-established that a person could not recover for damage arising out of a sentence imposed on him for a criminal act (*Clunis* applied). Therefore, the respondent was prevented from recovering both his loss of earnings and general damages arising out of his detention. The wider principle that a person could not recover compensation for losses arising out of a criminal act precluded his general damages claim for feelings of guilt and remorse. The trial judge's decision was restored.

Fraud – phantom passenger claims

***Anita Shah v Wasim Ul-Huq (and others)* [2009] EWCA Civ 542**

In a second tier appeal the Court of Appeal dismissed the Defendant's submissions that the conduct of a husband and wife, in dishonestly supporting a claim by the wife's mother, ought to have resulted in their – modest, genuine – claims being struck out.

The Court made it clear (see especially Smith LJ, para 28; Toulson, para 47-50) that whatever the costs implications of such conduct (which were dire for the Claimant's in this case) it was not appropriate to use the medium of a 'strike out' unless (adopting the dicta of Chadwick LJ in paragraph 54 of his judgment in *Arrow Nominees Inc v Blackledge* [2000] EWCA Civ 200) unless "a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe...."

Toulson LJ did add, as a postscript that "on the judge's findings the claimants were guilty of serious criminal offences....If, as has been suggested, such fraudulent claims have reached epidemic proportions, it may be that prosecutions are needed as a deterrent to others."

Manual handling

Donna Egan V Central Manchester & Manchester Children's University Hospitals Nhs Trust [2008] EWCA Civ 1424

The Claimant nurse sustained personal injuries whilst bathing a patient. She transferred the patient into a mechanical hoist and wheeled it to a bathroom and to the end of the bath, which stood on plinths. She then had to manoeuvre the forks of the hoist under the bath whilst avoiding contact with the plinth, which was not visible from a standing position. As she pushed the hoist forward, it suddenly stopped and she suffered a jerking injury to her back.

The judge held that, although the Defendant NHS trust had failed to carry out a risk assessment of the manual handling operation and therefore was in breach of the Manual Handling Operations Regulations 1992, the breach did not cause the injury since it was debatable whether a risk assessment would have said anything about the risk of collision with the plinth. Further, the Claimant knew of the existence of the plinth and had used the hoist on previous occasions without mishap.

The Claimant argued that the judge had failed to consider reg.4(1)(b)(ii) of the Regulations, which required the NHS trust to take all appropriate steps to reduce the risk of any injury arising from the handling operation to the lowest level reasonably practicable, and that once it was established that there was some risk of injury the onus was on the NHS trust to prove that it had taken all appropriate steps to reduce that risk.

The Court of Appeal held that the judge had not given separate consideration to reg.4(1)(b)(ii), which he should have done as the requirements of that regulation were separate from and additional to the requirement to carry out a risk assessment. It was not sufficient for the judge merely to examine whether a risk assessment would have made any difference.

Once the Claimant had shown that the manual handling operation carried some risk of injury, the burden of proof shifted to the NHS trust to prove that it had taken appropriate steps to reduce that risk to the lowest level reasonably practicable. The judge had not referred to the burden of proof and may have placed the burden on the Claimant, which would have been wrong. In practice, if the Claimant alleged that there were steps that could have been taken and the employer said there were none, the evidential burden would be on the Claimant to advance the suggestions, even though the legal burden would remain on the employer.

In the instant case, the Claimants' suggestions about markings on the floor and bringing the plinth forward, which were designed to help the operator guide the forks of the hoist under the bath without snagging on the plinth, would have involved modest costs, were reasonably practicable and would have reduced the risk of injury by collision to a significant degree. Those were appropriate steps. In the circumstances, the NHS trust was in breach of its duty under reg.4(1)(b)(ii) and was liable for the Claimant's injury.

The Claimant, however, had also been careless, and so liability was apportioned equally between the parties.

Comment

This case does not break new ground. However, it is useful insofar as it illustrates the rigors of the Manual Handling Operations Regulations and the heavy burden they place upon defendants. However, remember that it is for the claimant initially to suggest ways in which it was reasonably practicable for the risk to be reduced. It is suggested that herein lies an apparent unfairness in the system: claimants get to perform this exercise after the event whereas defendants are burdened (when performing the risk assessment and deciding how to reduce risk thereafter) with foreseeing all before an event has taken place.

CAUSATION

But for test – impossibility of proof – Fairchild exception

***Grace Sanderson v Donna Marie Hull* [2008] EWCA Civ 1211**

The Claimant had been employed by the Defendant as a turkey plucker. She was provided with gloves and aprons but soon started to work without gloves. Later, she was diagnosed with campylobacter enteritis. She alleged that she had been infected by bacterium during the course of her employment, and that the Defendant had breached its duty in failing to protect her from the risks of infection inherent in handling dead poultry.

The recorder found the Defendant negligent and in breach of several statutory duties, including failing to warn the Claimant of the risks of exposure to the bacterium and to advise her as to the precautions she should take to minimise the risk of infection. On causation, the recorder in his draft judgment found that the Claimant had failed to prove that but for the Defendant's negligence she would probably not have contracted the infection. However, he reconsidered his finding on causation after the Claimant submitted that it was impossible for her to satisfy the "but for" test. He held that the exception to the "but for" test applied and that the Claimant had established the causal link by showing that the breaches of duty had materially increased the risk of infection.

The Defendant submitted that the exception to the "but for" test of causation did not apply, that the recorder had wrongly extended the exception to another disease or condition and that it was not impossible for the Claimant to satisfy the "but for" test.

The Court of Appeal held that great caution was required before allowing any development of the exception to the "but for" test (*Fairchild v Glenhaven Funeral Services Ltd (t/a GH Dovener & Son)* (2002) UKHL 22, (2003) 1 AC 32 and *Barker v Corus UK Ltd* (2006) UKHL 20, (2006) 2 AC 572 considered). The conditions set out in *Fairchild* in relation to mesothelioma were not intended to exclude the application of the exception to other diseases and conditions. In order to extend the exception, it was essential that it be impossible for the claimant to prove enough to satisfy the "but for" test; difficulty of proof would not be enough (*Fairchild* considered).

In the instant case, the recorder had not properly analysed the facts relating to negligence and causation. His difficulties in reaching a conclusion on causation were created not by any impossibility of proof but by his failure to make crucial findings of fact. If these findings had been made, he would have been able to make a decision on the usual "but for" basis. Therefore, the case was not one in which it was impossible for the Claimant to prove causation. Accordingly, the recorder was wrong to hold that the case fell within the *Fairchild* exception.

Comment

Not happy reading for the Recorder. Criticised on his handling of the facts and the law! Nonetheless, this case reinforces the dicta in *Fairchild* and appears clearly to demarcate the application of its principles: only if proving causation is impossible does the exception apply.

Successive causes – contribution not appropriate

***Environment Agency v Ellis* [2008] EWCA Civ 1117**

The Claimant worked for the Defendant as a plant machinery driver. During the course of his employment, he fell from height and injured his back. The Defendant admitted liability. A year or so later, the Claimant had a second accident for which the Defendant was not responsible. Thereafter, the Claimant had a fall at home because his back gave way and sustained a right knee injury. At the time of his accident at work, the Claimant had a degree of symptomless spinal degeneration. The Claimant maintained that the accident at work brought about symptoms in his back 10 years before they would have occurred. The judge held that the Claimant had proved that, but for the accident at work, the fall at home would not have occurred and so there was a direct causative link between the two events. However, the judge also took into account the second accident as a further contributing event to the deterioration of

the Claimant's lumbar spine. The judge attempted to apportion the causation of the Claimant's loss in accordance with *Holtby v Brigham & Cowan (Hull) Ltd* (2000) 3 All ER 421 CA and *Allen v British Rail Engineering Ltd (BREL)* (2001) EWCA Civ 242 and held that the Claimant was entitled to 90 per cent of his loss.

The Court of Appeal held that the judge was wrong to apportion 10 per cent of the Claimant's loss to the second accident, for which the Defendant was not responsible. The judge intended to apply the "but for" test and in the main had done so. However, he gave no detailed reason for the 10 per cent apportionment. Applying the "but for" test would not result in any deduction; a claimant satisfying that test, as the Claimant on the judge's findings had, did not also have to prove that the Defendant's negligence was the only, or the single, or even chronologically the last, cause of his injuries (*Clough v First Choice Holidays & Flights Ltd* (2006) EWCA Civ 15, (2006) PIQR P22 considered). There was no free-standing principle that would give apportioning effect to a contributory intervening event. The Claimant's case was not one where the exception to the general "but for" rule for causation applied. The *Holtby/Allen* principles are an exception to the general rule intended to do justice in cases of industrial disease where there has been successive exposure to harm by a number of agencies, where the effect of the harm is divisible, and where it would be unjust for an individual defendant to bear the whole of a loss when in commonsense he was not responsible for all of it.

Comment

Another case where the judge at first instance erred in his approach to causation. A useful case where one encounters successive causes of injury and where there is a dispute as to causation. The normal rule for causation in personal injury negligence cases is the "but for" rule. The *Holtby/Allen* principles are an exception to the general rule intended to do justice in a particular class of case. It is limited to industrial disease or injury cases where there has been successive exposure to harm by a number of agencies, where the effect of the harm is divisible, and where it would be unjust for an individual defendant to bear the whole of a loss when in commonsense he was not responsible for all of it.

Contributory negligence – sufficiency of cause of damage

***St George V Home Office* [2008] EWCA Civ 1068**

When the Claimant had entered prison aged 29, he had been abusing alcohol and drugs since the age of 16. He informed prison staff that he was a heroin user who drank heavily and had previously had withdrawal seizures. He was allocated a top bunk bed. A few days later, he suffered a withdrawal seizure and fell from the bed, suffering a head wound. The seizure developed into "status epilepticus", and he sustained severe brain damage. The judge held that the Claimant's damages should be reduced by 15 per cent because his injuries were caused partly by his addiction, which was the result of his lifestyle decisions and, therefore, his "fault" within the meaning of the Law Reform (Contributory Negligence) Act 1945 s.1(1).

The Claimant appealed, arguing, inter alia, that the damage suffered by him was not the result of any fault on his part, and, alternatively, that it would not be just and equitable to reduce his damages having regard to his share in the responsibility for his injuries.

The Court held that the Claimant's fault in becoming addicted to drugs and alcohol in his mid-teens was not a potent cause of the status and the consequent brain damage that was triggered by his fall. It was too remote in time, place and circumstance and was not sufficiently connected with the negligence of the prison staff to be properly regarded as a cause of the injury. It also held that, if the Claimant's injury had been partly the result of his fault in becoming addicted to drugs and alcohol, it would not have been just and equitable to reduce his damages having regard to his share in the responsibility for his injuries.

Comment

A case confined to its facts but included as a rare illustration of something the court considers not falling within the "just and equitable" criterion of the 1945 Act. The judgment considers a number of authorities on causation and contribution and provides useful analysis in separating

matters amounting to a “potent cause” of damage as opposed to “no more than part of the history” behind the circumstances of the damage.

Clinical negligence – consent – alternative treatment and risks

Birch V University College London Hospital Nhs Foundation Trust [2008] EWHC 2237 (QB)

The Claimant was admitted to hospital displaying atypical symptoms of vascular third nerve palsy. The consultant doctor recommended that she undergo an MRI scan in order to exclude the possibility that she was suffering from either a posterior communicating artery aneurysm or cavernous sinus pathology. There were no available MRI slots available at that hospital so her consultant requested that she be transferred to a neurology ward in a specialist hospital operated by the trust; later, she was transferred to a neurosurgical ward at that hospital. The trust's neurosurgeons decided to perform a catheter angiography, a mildly invasive procedure that had increased risks for people in the Claimant's position. The associated risks of angiography were explained to the Claimant, who then signed the relevant consent form. Subsequently, there were complications with surgery and the Claimant suffered a stroke. The Claimant submitted, inter alia, that the trust had negligently failed to disclose the comparative risks of MRI scanning to her.

The Court held that if there was a significant risk that would affect the judgment of a reasonable patient then the doctor should inform the patient so as to enable her to determine for herself which course she should adopt (*Pearce v United Bristol Healthcare NHS Trust* (1999) ECC 167 CA (Civ Div), *Chester v Afshar* (2004) UKHL 41, (2005) 1 AC 134, *Bolam v Friern Hospital Management Committee* (1957) 1 WLR 582 QBD and *Bolitho (Deceased) v City and Hackney HA* (1998) AC 232 HL applied). By logical extension of that principle, the duty to inform a patient of significant risks would not be discharged unless and until a patient was made aware that fewer or no risks were associated with another form of treatment. In the instant case, the Claimant had been informed of the risks of catheter angiography but not those of MRI. Although there was no requirement that a doctor should disclose comparative risks of other treatments in every case, there were special circumstances in the instant case that justified the imposition of such a duty. The Claimant had entered a neurosurgical rather than a neurology ward under a recommendation that she undergo an MRI and would have selected the option of undergoing the less invasive procedure had she been properly apprised of the comparative risks.

Comment

Whilst clearly dependant upon the relative risks of the proposed and alternative treatments, in cases where the risks associated with the alternative treatment were substantially below those of the treatment proposed then (and not otherwise) there would be a duty to advise of the of the disparity between those risks. This therefore appears to require treating doctors to consider the comparative risks and, if necessary to offer the appropriate advice, even though (as in this case) the alternative treatment was not available at the time.

Wilkinson v (1) Fitzgerald (2) Churchill Insurance Company Ltd (2009) [2009] EWHC 1297 (QB)

An insurer's right of recovery under the Road Traffic Act 1988 s.151(8) could not be applied in such a way as to negate the insurer's obligation under s.151(5) to pay to someone entitled to the benefit of a judgment the sum payable under that judgment, where that would be inconsistent with the provisions of Directive 84/5 art.2.

The Claimant's parents had bought him a car. His mother was the policy holder and he was a named driver. The car was insured by Churchill. The Claimant allowed Fitzgerald to drive the car even though the Claimant knew Fitzgerald had been drinking and was not insured to drive the car. Fitzgerald crashed the car and the Claimant was seriously injured. The Claimant obtained judgment against Fitzgerald and Churchill accepted that it was liable to indemnify Fitzgerald in respect of the Claimant's claim by virtue of the provisions of the Road Traffic Act 1988 s.151(5).

Churchill claimed to be entitled to be reimbursed by the Claimant in respect of its liability to Fitzgerald pursuant to s.151(8) of the 1988 Act, with the result that the Claimant's claim failed for circuity of action.

It was agreed that Churchill had to meet the judgment that the Claimant had obtained against Fitzgerald. The question was whether that obligation was satisfied in circumstances in which Churchill proposed to exercise its statutory right to recover the proceeds. If it was, there would be no compensation from the Motor Insurers' Bureau, since its liability was to meet an unsatisfied judgment. The Claimant argued that a right of recovery against him under s.151(8) was incompatible with his rights as a road accident victim under EC legislation and in particular Directive 84/5 relating to insurance against civil liability in respect of the use of motor vehicles, since there could not be exclusions from cover provided by domestic legislation other than those classes allowed by art.2 of the Directive.

Churchill submitted that there was a fundamental difference between an injured person's right to compensation from the insurer, which was a benefit of the insured, and the insurer's right of recovery from either the tortfeasor or persons insured under the policy, which was a right of the insurer. Churchill further submitted that the judgment in favour of W was satisfied "in the nanosecond before recovery".

HELD:

- (1) There was a difference between an obligation to satisfy a judgment and a right to recover the amount thereby paid out, but in the instant case both arose within the statutory provision that was the means by which the United Kingdom implemented the Directive and the effect of Churchill's proposed exercise of its right of recovery would transgress art.2 of the Directive which avoided certain exclusions from liability which insurers would otherwise be contractually free to impose. One of the aims of the Directive was to ensure that compulsory motor vehicle insurance allowed all passengers who were victims of an accident caused by a motor vehicle to be compensated for the injury or loss they had suffered. The effect of art.2 was that any statutory provision or contractual clause contained in an insurance policy which excluded from insurance the use or driving of vehicles by persons who did not have express or implied authorisation would be deemed to be void in respect of claims by third parties who had been victims of an accident. In that article "authorisation" meant authorisation for insurance purposes, and in the instant case Fitzgerald did not have express or implied authorisation in that respect. The reality of C's case was not that the Claimant would be paid the sum due under the judgment albeit for a nanosecond, but that the Claimant would lose his right to payment altogether. The obligation under s.151(5) to make a payment satisfying a judgment should be applied in a substantive and not just a formal sense. National provisions which governed compensation for road accidents could not deprive those provisions of their effectiveness.
- (2) Churchill's interpretation of the effect of s.151(8) would create an excluded class of victim, being persons who were insured and who caused or permitted the use of the vehicle by somebody else, and that was impermissible in terms of art.2.
- (3) The reference in s.151(8) to recovery from "any person who... is insured by the policy" could not be construed narrowly so that it meant only the policy holder.
- (4) As a matter of the interpretation of the provisions of s.151 as a whole, and applying Community law, the insurer's right of recovery under s.151(8) could not be applied in such a way as to negate the insurer's obligation under s.151(5) to pay to someone entitled to the benefit of a judgment the sum payable under that judgment. Therefore, having indemnified Fitzgerald in respect of the Claimant's claim, Churchill could not recover that amount from the Claimant under s.151(8).

QUANTUM

Accommodation claims – defendant must pay

Chantelle Peters V (1) East Midlands Strategic Health Authority and another (Defendants) and Nottingham City Council (Part 20 Defendant) [2009] EWCA Civ 145

The Defendant health authority appealed against a decision that there should be no reduction in the accommodation and care element of damages awarded to the Claimant to reflect the local authority's statutory duty to provide accommodation and care for her. The Part 20 Defendant local authority appealed against the finding that the Claimant's damages were to be disregarded for the purposes of determining whether it had a duty to provide her with accommodation and care.

The 20-year-old Claimant was severely disabled, having been born with congenital rubella syndrome. The health authority had been ordered to pay damages to her on the basis of negligence. A sum of almost £4 million had been awarded in 2000 in respect of future care and accommodation. In 2007, the Claimant had been moved from a local authority care home to a private care home pursuant to a contract between the care home and the local authority. The cost of the accommodation was shared equally between the local authority and the health authority. The broad question was whether the cost of the care and accommodation should be borne by the health authority as the tortfeasor or by the local authority charged with the statutory duty of making arrangements for providing care and accommodation. Specific issues for determination included whether the judge had been correct to rule that the Claimant was fully entitled as a matter of law to pursue the tortfeasor and whether the judge had been correct to find that it was reasonable for the Claimant to opt for her care accommodation to be self-funded rather than provided by the local authority.

The Court of Appeal held that a claimant who wished to opt for self-funding by way of damages in preference to reliance on the statutory obligations of a public authority should be entitled to do so as a matter of right, provided there was no double recovery. In assessing whether a person had the means to pay for or contribute towards their care costs, the disregard in respect of "damages for personal injury" applied to all damages received and not just those for pain suffering and loss of amenity (*Firth v Geo Ackroyd Junior Ltd* [2001] PIQR Q4 affirmed). Regarding double recovery, where the court had ordered a tortfeasor to pay 100 per cent of the care costs necessary to meet a claimant's needs, there was no duty on a case manager to seek full public funding. An effective way of dealing with the risk of double recovery where a claimant's affairs were being administered by the Court of Protection was to provide that court with a copy of the judgment of the personal injuries claim and seek an order that no application for public funding of the claimant's care under the National Assistance Act 1948 should be made without further order. There should also be provision for the defendants to be notified of an application for permission to apply for public funding. Therefore, the risk of double recovery could not justify rejection of the judge's decision to award the Claimant the full cost of care and accommodation in her damages.

Comment

The conclusion to a long-running debate about whether a defendant may avoid liability for housing costs based upon the claimant's ability to rely upon state provision and a significant victory for claimants. The Court of Appeal held that, provided the risk of double recovery is guarded against and provided it is reasonable to do so, claimants may claim the cost of future care from the tortfeasor notwithstanding the state's obligation to provide such care. So, from now on, if a defendant seeks a s.47 assessment (an assessment of accommodation need carried out by the local authority) a claimant may simply refuse and require the defendant to pay the costs of private provision. Whereas guidance is provided in respect of a claim administered by the Court of Protection it is less clear how a defendant can protect itself against double recovery in other cases.

PPO's - precedent orders

Thompstone v Tameside Hospital Nhs Foundation Trust
Corbett v Yorkshire & Humber Strategic Health Authority
Rh v University Hospitals Bristol Healthcare Nhs Foundation Trust
Bb v National Health Service Litigation Authority
Adam v Royal Free Hampstead Nhs Trust
[2008] EWHC 2948 (QB)

The Court of Appeal had considered periodical payment orders in the three instant cases and had found that, when providing for the recovery of future care costs, reference should be made to the annual survey of hours and earnings for the occupational groups of care assistants and home carers (ASHE 6115) rather than to the retail price index. Orders giving effect to that judgment were drafted and approved. However, the orders were later redrafted. The instant court was required to consider model schedules to be incorporated in orders in the instant cases and also unrelated pending and future cases.

The model schedules did no more than offer practitioners a precedent for adaptation to meet the particular nature of an award of damages. However, the terms represented the best current expertise and departure from them in any future draft order would have to be justified to secure court approval.

Periodical payments as ordered were immediate or deferred. In each instance, the order would specify a multiplicand. Immediate payments were indexed from inception and thereafter annually. When deferred payments took effect, the multiplicand would reflect indexation as applicable as from the making of the order and, once used, would be subject to the same annual indexation. With both types of payments, the order could provide for future enlargement of the multiplicand on a specified date.

The draft orders sought to anticipate reclassification and revision of ASHE 6115. Despite the uncertainties as to the occurrence and the nature of reclassification, there was no reason to negate the parties' efforts to deal with those problems which might be successful or help promote agreement as to a resolution.

Comment

Essential reading in any periodical payments case. The model orders can be found at <http://www.lawtel.com/content/display.asp?ID=AC0119222QBD.pdf>

Credit hire – mitigation of loss

Copley v Lawn; Maden v Haller [2009] EWCA Civ 580

The Appellants' cars had been damaged in separate accidents caused by the Respondents' negligence. Both Appellants had refused offers of a replacement car paid for by the Respondents' insurers and instead hired replacement cars on a credit hire basis. C had already hired a car by the time she received the insurer's offer; M had not. In C's case the judge allowed only seven days' hire on the basis that at the end of that period she should have cancelled the hire agreement and accepted the insurers' offer. In M's case the judge dismissed his claim in its entirety on the basis that he should have accepted the insurers' offer.

On appeal, the judge held that the rejection of the Respondents' insurers' offers was unreasonable and that the hire costs incurred were irrecoverable. The Appellants argued that they had not acted unreasonably, and in the alternative that they could nevertheless recover damages in line with the rate that the insurers would have had to pay.

The Court of Appeal held that the Appellants had not acted unreasonably. Any offer made by the insurers had to contain all relevant information to allow the claimants and their advisers or representatives to make a reasonable response, including the cost to the insurers of hiring the cars. A claimant only had to take reasonable steps to mitigate his loss, and he could not be said to act unreasonably if he made or continued his own car hire arrangements unless he was

made aware that such arrangements could be made more cheaply by the insurer. On the alternative argument, the Court held that if a claimant did unreasonably reject such an offer of a replacement car then he was nonetheless entitled to recover at least the cost which the defendant's insurer would have incurred.

Comment

A difficult case for those with interests in credit hire. Insurers are at very long last getting their act together and offering a hire car up front to the victims of accident damage. Whilst such offers do not defeat hire claims completely I fear there is a danger that they may make credit hire generally an unprofitable business?

PROCEDURE

Interim payments – guidance in PP cases

Cobham Hire Services Ltd V Benjamin Eeles [2009] EWCA Civ 204

The Defendant appealed against an interim payment order for £1.2 million. The Claimant, an 11- year-old boy, had suffered a serious head injury causing difficulties were with cognition and intellect. Liability was not disputed and judgment for damages to be assessed was entered.

The Claimant's legal team maintained that it was not possible to quantify his claim until about 2010, and the Claimant received interim payments amounting to £450,000. His parents decided to buy a family home to meet his needs and subsequently requested a further interim payment of £1.2 million to pay for the purchase price and refurbishment costs. The judge concluded that the application for a further £1.2 million would bring the total interim payments to just under one half the estimated value of the claim and so would not exceed a reasonable proportion of the likely amount of the final judgment as per CPR r.25.7(4). The judge rejected the Defendant's argument that such an interim award might tie the hands of the trial judge who might want to make a substantial periodical payments order.

The Court of Appeal held that the discretionary power to order an interim payment was limited by r.25.7(4) to no more than a reasonable proportion of the likely amount of the final judgment. The judge had taken the full capital value of the claim as the basis for his consideration of an interim payment. In a case in which a periodical payments order might be made, that was not the correct approach (*Braithwaite v Homerton University Hospitals NHS Foundation Trust* (2008) EWHC 353 (QB) approved). The judge had also misunderstood and underestimated the importance of not fettering the trial judge's freedom to allocate the heads of future loss and had not carried out the essential task of estimating the likely amount of the final judgment.

Setting aside the order the Court of Appeal held that the correct approach when considering whether to make an interim payment in a case in which the trial judge may wish to make a periodical payments order was as follows:

- (a) assess the likely amount of the final judgment, leaving out of account the heads of future loss which the trial judge might wish to deal with by a periodical payments order;
- (b) assessment should comprise only special damages to date and damages for pain, suffering and loss of amenity, with interest on both;
- (c) as the practice of awarding accommodation costs (including future running costs) as a lump sum was sufficiently well established, it would usually be appropriate to include accommodation costs in the expected capital award;
- (d) the assessment should be carried out on a conservative basis;
- (e) save in certain circumstances, the interim payment would be a reasonable proportion of that assessment (and a reasonable proportion may well be a high proportion, provided that the assessment had been conservative);

- (f) the judge need have no regard as to what the claimant intended to do with the money; if he was of full age and capacity, he could spend it as he wished, and if not, expenditure would be controlled by the Court of Protection;
- (g) additional elements of future loss could be included in the judge's assessment of the likely amount of the final judgment when the judge could confidently predict that the trial judge would wish to award a larger capital sum than that covered by general and special damages, interest and accommodation costs alone;
- (h) before taking such a course, the judge had to be satisfied by evidence that there was a real need for the interim payment requested; if the judge was satisfied of that, to a high degree of confidence, then he would be justified in predicting that the trial judge would take the course indicated and in assessing the likely amount of the final award at such a level as would permit the making of the necessary interim award.

Negative declarations

Jewel Ahmed Toropdar V D (A Minor By The Official Solicitor As His Litigation Friend) [2009] EWHC 567

The Claimant claimed a declaration that he was not liable for personal injuries sustained by the Defendant child in a road traffic accident. On the facts the court concluded that the Defendant's driving fell below the standard expected and that he was liable. However, in addition the court considered (as an obiter point) the question of negative declarations:

There was no valid reason for taking an adverse view of negative declarations. The court was endorsing the practise of insurers seeking a negative declaration in personal injury actions. Such a course was and should be unusual. It was for the would-be Claimant to decide whether or not to make a claim or to start an action against the alleged wrongdoer and to run the risk of an adverse costs order. If an attempt to seek a negative declaration gave rise to an injustice the court would not countenance it. A court was unlikely to be sympathetic to a claim for a negative declaration where a claim had never been seriously canvassed. Whilst a declaration was always a discretionary remedy, in most cases where an action for a negative declaration had been allowed to proceed, there should not be a further round of argument at the hearing as to whether the court should be entertaining it at all.

Comment

This is litigation in reverse. However, one can understand the motivation to bring the liability aspect to trial in the case of a young child. The alternative was simply the driver to wait. However, in the case of a young child proceedings might not be brought for 15 years or more in which time the driver's ability to defend the issue might have suffered prejudice. The important point to note, despite the driver losing on the facts, is that, in appropriate circumstances, the court would permit a negative declaration to be sought.

CONTEMPT

Carol Walton v Joanne Kirk [2009] EWHC 703 (QB)

The Applicant's insurers applied to commit the Respondent for contempt of court. The Respondent had claimed substantial damages against the Applicant arising out of a road traffic accident. During the course of those proceedings, the Respondent claimed to have suffered significant and long-term disability as a result of the accident. The Applicant's insurers believed that the Respondent was exaggerating her disability and her claim for damages. They paid a small sum into court and engaged a surveillance company to film the Respondent. The videos were disclosed to the Respondent, who accepted the sum paid into court.

At trial, the Applicant's insurers relied on various documents, including an "Incapacity for Work" questionnaire and an application for a disabled parking blue badge, both verified by a

statement of truth, and on the contents of the videos. The Respondent gave evidence herself and called her doctor as well as family members and friends to give evidence on her behalf. The Applicant's insurers submitted that the videos showed that the Respondent's descriptions of her symptoms were untrue and dishonest.

The Court held that the Respondent had been injured to some extent by the accident and was therefore entitled to bring her personal injury claim. The majority of the allegations as to contempt were not, in the circumstances, made out. In respect of the Respondent's "Incapacity for Work" questionnaire and blue badge application, however, the Court found that the Respondent had not honestly believed in many of the answers she had given and that those answers were irreconcilable with the video evidence and the evidence of her own witnesses. In making those claims for state benefit and in verifying the documents in the litigation, the Respondent was guilty of a contempt of court.

Comment

The impact of this decision is not to be underestimated. Yes, *Walton* offers clarification of the circumstances which may give rise to a contempt of court in personal injury claims. It will no doubt spawn a raft of sabre-rattling on behalf of defendants where they suspect dishonesty. But, given that the headlines have been achieved, does the case mark an increased willingness on behalf of insurers to seek prosecutions in other contempt cases?

COSTS

Inquest costs recoverable in civil claims

***Roach and Roach v Home Office* *Frances Matthews v Home Office* [2009] EWHC 312 (QB)**

The Respondents both had children who had died in police custody. They both obtained exceptional funding from the LSC for solicitors and counsel to attend the subsequent inquests. As a result of the inquest findings, they both issued civil proceedings for damages. Offers were made and accepted in both cases, it being agreed that the Home Office would pay reasonable costs to be assessed if not agreed. The Home Office objected to the proportion of the costs that related to the attendance of counsel and solicitors at the inquests, and the matter went before the costs judge. The costs judge held that the role of legal representatives at an inquest fell into two equal parts: (1) assisting the coroner and (2) obtaining evidence necessary to pursue any civil claim. The costs judge awarded the Respondents 50% (Roach) and 100% (Matthews) of their costs.

The Home Office appealed the decision of the costs judge on the basis that the costs of one set of proceedings were never recoverable as costs of and incidental to another set of proceedings. It submitted that there was no exception to that rule and therefore there was no jurisdiction to award such costs. It also argued that there were no costs in coroners' proceedings, and therefore such costs were not subsequently recoverable. Roach appealed against the decision to award only half of their costs.

Held: It was common ground that the courts were entitled to award the costs of and incidental to civil proceedings, pursuant to the Supreme Court Act 1981 s.51. There was also no doubt that costs incurred prior to proceedings were capable of being recoverable as costs in the proceedings. From the wording of s.51, it was impossible to extract a rule as asserted by the Home Office. In fact, the wide wording of s.51 was inimical to such a rule. Therefore, there was no reason why the costs of attending the inquest should not be allowed as incidental costs. Also, Parliament had not decided that there were no costs in coroners' proceedings. A coroner himself had no power to award costs, but it was clear from s.51 that all costs of and incidental to civil proceedings could be recovered.

It was not appropriate to divide the costs of an inquest by reference to the dual role of the legal representative in attendance. It was necessary to have regard to considerations of relevance where the costs of attendance at an inquest were claimed, in whole or in part, as costs

incidental to the subsequent civil proceedings. Accordingly (subject to remission to the costs judge to decide questions of proportionality and reasonableness) each claim was entitled to 100% of the costs of attending the inquest.

Comment

Reluctance on the part of Claimants fully to participate in an inquest on account of the risk of incurring irrecoverable costs should now be a thing of the past. That said, it is difficult to justify as either reasonable or proportionate a decision to participate where there is an admission of full (as opposed to primary) liability. Accordingly, this decision should provide incentive for (a) defendant's to admit liability in full early in fatal cases and (b), in cases where contributory negligence is alleged or liability denied, for claimants fully to participate.

Success fee claimable in BTE insured cases

Jane Kilby v Donald Gawith [2008] EWCA Civ 812

The Claimant was involved in a road traffic accident for which the Defendant admitted liability. The Claimant possessed before-the-event insurance yet entered into a CFA with her solicitor and the solicitor sought a 12.5% uplift in accordance with fixed recoverable costs scheme of CPR r.45.11(2). The success fee was awarded and the Defendant appealed (to the circuit judge and then to the Court of Appeal).

Construing CPR 45.11 by reference to its ordinary natural meaning in the context of the rules as a whole the Court of Appeal held that the success fee was recoverable. The purpose of the rules was to provide fixed levels of remuneration, *Nizami v Butt* (2006) 1 WLR 3307 and *Lamont v Burton* [2007] EWCA Civ 429 applied. The approach to before-the-event insurance in *Sarwar v Alam* [2001] EWCA Civ 1401 did not lead to the conclusion that r.45.11(2) should be construed any differently.

Comment

A 2008 case that escaped our radar. It is included now given the very significant effect it may have upon the recoverability of costs and the attraction of cases where a Claimant benefits from BTE but where a "non-panel" firm wishes to pursue the claim.

Part 36 offers – ambit – indemnity costs

Fitzpatrick Contractors Ltd V Tyco Fire & Integrated Solutions (Uk) Ltd (Formerly Wormald Ansul (Uk) Ltd) (No.3) [2009] EWHC 274 (TCC)

The Claimant contractors made a Part 36 offer to the Defendant company to settle the litigation. The relevant period for acceptance expired and there was a trial of preliminary issues on which the Claimant was successful. The Defendant company then wrote to the Claimant accepting the Part 36 offer. The Claimant argued that, had there been a trial and had damages been recovered equivalent to the Part 36 offer, it would have been entitled to indemnity costs, unless the court concluded that it was unjust to make such an order, by analogy with r.36.14. In the alternative, the Claimant argued that it was entitled to seek indemnity costs under r.44.3.

The Court held that since there had been a valid acceptance of a valid Part 36 offer the starting point was r.36.10. There was no reference in r.36.10 to a presumption that, unless it was unjust to do so, the court would order a defendant who accepted a Part 36 offer late to pay a claimant's costs on an indemnity basis. If there was an entitlement to seek indemnity costs then that was expressly spelled out in the CPR. A party could seek indemnity costs in one of two ways: (1) because there was a presumption that such costs would apply, for example under r.36.14; and (2) because it could demonstrate evidence of the conduct required by r.44.3. Therefore, the Claimant's claim for indemnity costs failed as a matter of principle. An indemnity costs presumption should not be imported into r.36.10; and, in all the circumstances, it was impossible to say that there was any basis on which the Claimant could be entitled to have its costs assessed on an indemnity basis under r.44.3.

Comment

Not a surprising result; the award of indemnity costs (and other benefits) derives from Part 36 and unless you can get within the letter of the rule the benefits do not apply. Given that 36.14 states that a claimant must obtain judgment “at least as advantageous to the claimant as the proposals contained in the claimant’s Part 36 offer” presumably it was open to the claimant in this case to offer (a) a sum of money in settlement and (separately) (b) a finding in its favour on the preliminary issue? In that event 36.14 would be engaged and indemnity costs might flow.

Success fees where liability admitted

C v W [2008] EWCA Civ 1459

The Defendant admitted liability for injuries to the Claimant whereafter the Claimant instructed solicitors and entered into a CFA which provided for a success fee of 98 per cent (of which 15 per cent represented the cost of funding). The CFA (the Law Society’s standard form of agreement) provided that in the event that the Claimant was advised to reject an offer of settlement and damages were subsequently awarded that were less than or equal to the offer, the Claimant would not have to pay any of the solicitors’ basic costs or percentage increase for work done after notice of the offer was received. The claim was subsequently settled. When assessing costs, the district judge allowed a success fee of 70 per cent and the Defendant appealed to the circuit judge. On appeal, that was reduced to 50 per cent.

The Defendant appealed to the Court of Appeal and contended that the success fee was too high because at the time of entering into the CFA liability had already been admitted and so there was no significant risk that the Claimant would fail to recover substantial damages. The Defendant submitted that it was wrong to calculate the success fee in the way that would have been appropriate if liability had been in doubt.

The Court of Appeal held that, since there was no evidence that the accident had been caused by anything other than the Defendant’s negligence, and since liability had been admitted, it was difficult to see how the Claimant would have failed to recover substantial damages. Therefore, the chance of success was very high. The difficulty lay in assessing the risk that the solicitors might lose the right to recover part of their fees as a result of the Claimant’s failure to beat an offer which she rejected on their advice. The chance that the solicitors would so advise the Claimant was difficult to assess, but it was unlikely that highly experienced solicitors practising in that field would differ widely in their assessment. A costs judge could not refuse to award a success fee on the basis that the difficulty of assessing the risks made it unreasonable to enter into a CFA at all. There was nothing unreasonable in entering into a simple CFA at a time when liability had been admitted, provided that the parties made a proper assessment of the much reduced risk of failure. In the circumstances, the success fee allowed by the judge was too high and a success fee of 20 per cent was allowed.

Comment

It is important to remember that this case was not one which fell into the fixed uplift regime of Part 45 (it was a RTA but one which fell before the inception of CPR 45.15 –fixed uplifts in RTA cases). No doubt points of dispute will now make repeated reference to this decision in liability admitted cases that subsequently settle. However, it is important to bear in mind that here liability was admitted before the CFA was executed, which distinguishes this case from the norm. In any event, 20% seems relatively generous given that an identical case which fell with 45.15 would garner only 12.5%.

Retrospective CFA held to not be contrary to public policy

***Birmingham City Council v Forde* [2009] EWHC 12 (QB)**

The local authority appealed against a decision on preliminary issues about litigation costs in relation to F, one of its tenants. Ms Forde had entered a CFA agreement with her solicitors in relation to proceedings against the local authority for failure to repair her property. Just before

the proceedings were compromised the local authority had challenged the validity of similar CFA's and her solicitors wrote to her asking her to sign a second CFA. The letter explained that the legal costs up to that date would be dealt with under the second CFA unless the court ruled it invalid, in which case they would revert to the first CFA, and that the second CFA contained a success fee, whereas the first did not. The consideration expressed in and for the second CFA was that the solicitors would continue to act for F.

In costs proceedings the master decided that the letter formed part of the second CFA, that the solicitors' agreement to act was adequate consideration, that the presumption of undue influence did not arise, that a retrospective success fee was not permissible but that that did not invalidate the second CFA and that accordingly it was enforceable.

The local authority appealed on a number of grounds including that the CFA had been procured by undue influence and that a retrospective CFA was abhorrent and unenforceable. The appeal was dismissed on all grounds. In particular it was held that there was no prohibition on CFA's being retrospective and no reason per se why a retrospective success fee was contrary to public policy, (*Adam Musa King v Telegraph Group Ltd* Unreported disapproved). The court had the ability to disallow or reduce retrospective fees that were unreasonable and in any event there was no reason why the court could not delete the success fee leaving the obligation to pay unaffected. There was nothing in the statutory provisions requiring a retrospective CFA to comply with the notice requirements in reg.4 of the 2000 Regulations and no reason to conclude that the second CFA was invalid because the retrospection extended back to before the 2005 Regulations (which removed the rigors of the 200 Regulations) had been introduced.

Comment

A resounding success for the Claimant's solicitors (who, no doubt, had hundreds of other cases based on the same CFA contingent upon this result). Since the passing of the 2005 CFA (revocation) Regulations attacks on the enforceability of CFA's has dwindled but this decision remains of relevance to cases involving CFA executed before 1st November 2005.

LIMITATION

Limitation – delay – loss of windfall not amounting to prejudice

Stephen Cain V Bernice Francis

Shona Mckay V Stephen Hamrani and another

[2008] EWCA Civ 1451

In both sets of proceedings (RTA's where liability had been admitted) the Claimant's solicitors negligently issued the claim outside the primary limitation period. s.33 Limitation Act 1980 applications (to disapply the relevant time limits) were made in each case. SC's case had been issued one day late and the judge refused to disapply the limitation period. SM' case had been issued one year late and the judge disapplied the time limits.

The cases were joined on appeal. In both cases the s.33 applications were successful on appeal. Although a judge's discretion is unfettered, there should be consistency of approach between judges on this issue. In a case where the defendant has had early notice of the claim, the accrual of a limitation defence should be regarded as a windfall and the prospect of its loss, by the exercise of the s.33 discretion, should be regarded as either no prejudice at all or only a slight degree of prejudice. The length of the delay cannot be the deciding factor (although reasons for the delay should be considered). The key point was whether the Defendant had suffered any evidential or other forensic prejudice as a result of the delay. The financial prejudice to D of having to pay damages was not something that Parliament had intended to be taken into account in the exercise of the discretion. The fact that C has a possible claim against his solicitor would not necessarily mean that the time limit should not be disapplied. The basic question to be asked is whether it was fair and just in all the circumstances to expect D to meet the claim on the merits, notwithstanding the delay.

Comment

Not a surprising decision and one which rightly focuses attention to s.33(3)(b): “the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11”. From the Defendant’s standpoint it is essential in such cases to consider whether the delay has prejudiced the Defendant’s ability to investigate quantum but, again, this is often difficult to establish.

Date of knowledge – extension of time

There have been a run of limitation cases of late – the majority finding favour with Claimants. The following cases are fact based but are worthy of report given the periods of delay in question and for their illustrative value.

AB and others v Ministry of Defence [2009] EWHC 1225 (QB)

The Claimants were veteran servicemen who had suffered exposure to radiation as a result of nuclear tests carried out by the British Government in the 1950s. They alleged that the Defendant had negligently failed to protect them from exposure and that the negligence was causative of numerous illnesses since suffered by them.

The Defendant contended that the claims should be struck out. It argued that the Claimants had conceded that there were a number of possible factors that could have caused the subsequent illnesses and as such the claims were bound to fail on causation. In respect of limitation, it argued that time started to run as soon as the Claimant had knowledge of the first significant injury, even though he might learn of other injuries much later, and that a claim for the later injuries could only be brought if the limitation period was disapplied under s.33; since the Claimants had known the material facts relevant to their cause of action for longer than three years before proceedings were issued their claims were statute-barred.

The Court declined to strike out the claims. The causation issue needed to be dealt with at trial, and on the limitation point the court should be allowed to consider what was alleged to be the injury in question. In this particular case, a veteran could only have acquired the requisite knowledge upon being made aware of the findings of the Rowland study in 2007 which provided the first credible evidence that radiation exposure above background level could cause the kind of illnesses complained of by the veterans. However, that approach could not apply where there was a sufficiently strong belief that radiation had caused the illnesses to amount to knowledge (*A v Hoare* (2008) UKHL 6, *Spargo v North Essex DHA* (1997) PIQR P235 CA (Civ Div) and *Sniezek v Bundy (Letchworth) Ltd* (2000) PIQR P213 CA (Civ Div) followed). Applying the latter approach, five of the claims were statute-barred.

In the circumstances, however, the s.33 discretion should be exercised in each case that was statute-barred. It was essential to consider whether there could be a fair trial of the factual issues despite the delay, and in this case a fair trial remained possible. It was also significant that although the general claim in respect of fall-out radiation could have been advanced earlier, it would have been largely incapable of proof until the Rowland report.

Raggett v (1) Society of Jesus Trust 1929 for Roman Catholic Purposes (2) Preston Catholic College Governors [2009] EWHC 909 (QB)

The Claimant brought a personal injury claim arising out of sexual abuse allegedly committed by a teacher at the second Defendant’s school which he had attended during the 1970s. In 2005, the Claimant stated that he had suddenly remembered a number of incidents of sexual abuse. committed by S upon him, including fondling and examination of his genitals. Following a course of therapy, he remembered further incidents of abuse. He commenced proceedings in 2007.

The school argued that the claim was time statute-barred because it had not been brought within three years of the Claimant's 18th birthday in 1976. The Claimant maintained that it had been commenced within three years of his date of knowledge, which was 2005, and argued in the alternative that it would be equitable to disapply the limitation period under s.33.

The Court held that the Claimant had not acknowledged to himself that he had been the subject of sexual abuse until 2005, but that applying the "practical and relatively unsophisticated approach to the question of knowledge" (*A v Hoare* (2008) UKHL 6, (2008) 1 AC 844) he had to be taken to have "known" the nature and extent of the sexual abuse from the time it was committed. Therefore, his claim became statute barred in 1979.

However, it was not until 2005 that the Claimant had recognised the teacher's behaviour for what it was: serious sexual abuse. Delay was not uncommon in cases of sexual abuse, and the Claimant had to some extent suppressed his memories of the nature and the extent of the abuse. Furthermore, the school's ability to defend the claim was not materially affected by the delay and a fair trial remained possible. In these circumstances, it would be equitable to disapply the limitation period and allow the action to proceed.

***Albonetti v Wirral Metropolitan Borough* [2009] EWHC 832 (QB)**

The Claimant brought a claim arising out of alleged sexual abuse while he was resident in a children's home over thirty years previously. The claim fell outside the limitation period but had been allowed by assessing the Claimant's date of knowledge by means of a subjective test. The Court of Appeal held that an objective test was required, following the decision in *A v Hoare* (2008) UKHL 6, and that the Claimant had had the requisite knowledge from the time of the alleged abuse. The issue was remitted for determination of whether the limitation period should be disappplied under s.33.

The Defendant's local authority argued that it would be unsafe for the court to make any meaningful assessment of the nature and extent of any alleged abuse so long after the event, and that the chances of a fair trial were therefore remote.

The Court held that the delay was understandable and that the Claimant had acted reasonably in not issuing proceedings earlier. However, the delay of almost 40 years was decisive owing to the prejudice to the Defendant. The perpetrator of the alleged abuse had died many years ago, no complaint was made at the time of the alleged abuse, and the claim had come out of the blue. It was impossible to hold a fair trial as to whether the alleged abuse had in fact occurred. Therefore, it was not appropriate to exercise the court's discretion under s.33 not to apply the limitation period.

CODE OF CONDUCT

Referrals – conflict of interest

***Chantal Ann-Marie Reed v George Marriott (on behalf of Solicitors Regulation Authority)*[2009] EWHC 1183 (Admin)**

The appellant solicitor entered into an agreement with an insurance company whereby personal injury claims were referred to her firm. The insurance company set up two subsidiary companies (B and E). B referred claims to the solicitor, who then subcontracted work on those claims to E. It was alleged that the solicitor had breached the Solicitors' Practice Rules 1990 and the Solicitors' Introduction and Referral Code 1990 in relation to referrals and fee-sharing. The solicitor argued that the scheme avoided the Rules and the Code because B was not paid for the referral of work, and the payments to E were not referral fees but payment for work done. She also argued that the mere existence of the agreement between herself and E did not establish that the services provided were not in the client's best interests. The tribunal found against her. The solicitor appealed.

The Court held that the scheme only notionally separated the introducer (B) from the person receiving payment (E). In reality, the solicitor was paying one wholly owned subsidiary for

another wholly owned subsidiary to refer clients to her. The true introducer and the true person receiving payment was the insurance company, and the scheme was merely a device to obscure that. Referral fees created a commercial link of reliance between the solicitor and the referrer, and this was contrary to the solicitor's independence, the client's freedom to instruct a solicitor of its choice, and the solicitor's duty to act in the client's best interests. As a result of the scheme, the solicitor had become overly reliant on a single client to the detriment of her independence. Her appeal was dismissed.

Comment

A tawdry tale of referral fees, obvious conflicts of interest, front companies, million pound overdraft facilities and, er, a well known insurance company. The transcript is worth a read. The Claimant was obviously a financial wiz – she managed to run a profitable firm notwithstanding a referral fee in each case amounting to two thirds of her recovered fees!

**Gabriel Farmer
Oliver Moore
Guildhall Chambers
October 2009**