39 Essex CHAMBERS

PERSONAL INJURY NEWSLETTER

February 2015

It is some months since the last edition of the 39 Essex Chambers Personal Injury Newsletter. We hope that you are pleased to see this first edition of 2015 with our new look, ahead of our move to a new building in Chancery Lane later this year.

We are pleased to report that Peter Hurst, formerly Senior Costs Judge of England and Wales, has joined chambers as a mediator/arbitrator in the area of costs and funding. We warmly welcome him to chambers.

The last edition featured a long article by Camilla Church on *Mitchell*. Since then the vexed question of rule 3.9 has been back to the Court of Appeal in *Denton v TH White Ltd*[1] and it seems that the plethora of contested applications which *Mitchell* gave rise to has abated – a 3.9 application heard by Senior Master Fontaine in January 2015 was the first she had heard since *Denton* was decided.

But it seems that the QBD Masters' Corridor and the Courts generally are now detained instead with costs management hearings. In some County Courts listing for applications is as long as 12 months, because CMCs where the parties would previously have agreed directions or required only a brief telephone hearing have morphed into CCMCs which take 1.5-2 hours if the budgets are contested, which they almost invariably are. We shall wait to see what happens, but in the meantime we update you in the costs section on the first two reported decisions on appeals from costs management orders, *Havenga* and *Redfern*, and on a High Court decision which gives some guidance on budgeting, *Tim Yeo v Times Newspapers*. Meanwhile as work on this edition is completed the Supreme Court is hearing argument in *Coventry v Lawrence* about whether a party's right to recover a success fee and ATE premium from an unsuccessful opponent under the pre-1 April 2013 regime infringed art.6 ECHR and/or art.1 of the First Protocol to the ECHR, with interventions from the Secretary of State for Justice, the General Council of the Bar, the Association of Costs Lawyers, and the Asbestos Victims' Support Groups Forum UK, to name but some.

The liability update includes the very recent Supreme Court decision (28 January 2015) on the duty (or lack of duty) owed by the police when responding to a 999 call, *Michael & others v The Chief Constable of South Wales Police & anor*.

As usual, other sections consider recent international and quantum cases. Do contact us with comments or suggestions for future editions, or if you want to be added to the circulation list.

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[1] [2014] EWCA Civ 906, [2014] 1 W.L.R. 3926

LIABILITY ROUNDUP

James Todd and Sadie Crapper

The Supreme Court published its judgment in the tragic case of *Michael and others v The Chief Constable of South Wales Police & anor*[2] on 28 January 2015 (in which the charities Refuge, Liberty and Welsh Women's Aid intervened). The family and dependants of Joanna Michael brought a claim against the police force which had incorrectly categorised a 999 call Ms Michael made shortly before her death as non-urgent, although no assurances had been made about when help would arrive. As a result, Ms Michael was without police protection when her ex-boyfriend made good a threat to kill her, stabbing her to death whilst her children (aged 7 years and 10 months) slept in the next room.

The force succeeded on appeal in obtaining summary judgment on the negligence claim but the claimants' article 2 claim was allowed to proceed to trial. The claimants' appeal to the Supreme Court on the negligence claim was dismissed by a 5:2 majority. In an impressive judgment for the majority, Lord Toulson SC considered both domestic and international case law on the imposition of a duty of care on public authorities in the absence of a specific representation and reliance (as was here the case) and concluded that the refusal of the courts to impose a private law duty on the police to exercise reasonable care to safeguard victims or potential victims of crime does not involve giving special treatment to the police. Rather *"it does not follow from the setting up of a protective system from public resources that if it fails to achieve its purpose, through organisational defects or fault on the part of an individual, the public at large should bear the additional burden of compensating a victim for harm caused by the actions of a third party for whose behaviour the state is not responsible. To impose such a burden would be contrary to the ordinary principles of the common law."*[3] The Court was clearly influenced by financial considerations as, at paragraph 122, Lord Toulson said *"the imposition of liability on the police to compensate victims of violence on the basis that the police should have prevented it would have potentially significant financial implications. The payment of compensation and the costs of dealing with claims, whether successful or unsuccessful, would have to come either from the police budget, with a corresponding reduction of spending on other services, or from an increased burden on the public or from a combination of the two."* The force's cross-appeal on the article 2 point failed and will be determined at trial in due course.

Asbestos

There have been three significant cases in asbestos litigation recently.

The case of *McDonald v National Grid*[5] related to a Mr McDonald who, between 1954 and March 1959, regularly visited Battersea power station to collect pulverised fuel ash from an area of the plant which was free of asbestos but, whilst on site, would go (out of curiosity and only as a *"casual visitor"*) into areas where asbestos dust was generated by lagging work. Sadly Mr McDonald contracted mesothelioma in July 2012 and launched proceedings against his employer and the successor body to the occupiers of the power station. He succeeded on appeal in establishing a claim under the Asbestos Industry Regulations 1931 which the defendant promptly appealed (whilst the claimant cross-appealed the dismissal of his claim under s.47(1) of the Factories Act 1937).

The defendant's appeal was dismissed by a narrow (Lord Kerr, Lady Hale and Lord Clarke: Lords Neuberger and Reed) majority on the basis that the 1931 Regulations apply not just to factories engaged in the production of asbestos products but to all factories at which the activities listed in the preamble to the regulations took place. In so doing the Supreme Court affirmed the approach taken by the Court of Appeal in *Cherry Tree Machine Co Ltd & anr v Dawson*[6] (in which Hale LJ gave the lead judgment) and disapproved the approach taken by an earlier Court of Appeal in *Banks v Woodhall Duckham & ors.*[7] This is, of course, a very welcome affirmation of the decision in *Cherry Tree* for claimants who are unlikely otherwise to be able to establish a claim in negligence for early incidental exposure to asbestos given the limited state of knowledge around asbestos exposure in the mid-20th century.

The claimant's cross-appeal on the Factories Act 1937 case also failed (by a majority of 3: 1, Lord Clarke declining to give judgment on the cross-appeal) because in order to establish breach of the duty owed under this section, the claimant needed to establish that *"a substantial quantity of dust"* had been produced in connection with the process carried on. As the judge at first instance had not made a finding to that effect and there was insufficient evidence for the Supreme Court to conclude that there was a substantial quantity of dust, the claim under the 1937 Act failed. This only goes to show how important it is for litigants in similar cases to lead evidence

[2] [2015] UKSC 2
[3] Paragraph 114
[4] [2001] QB 36
[5] [2014] UKSC 1346, [2014] 3 W.L.R. 1197
[6] [2001] EWCA Civ 101, [2001] P.I.Q.R. p19
[7] (unreported, Court of Appeal, 30 November 1995)

on the levels of dust produced during such processes or, as defendants, to bring themselves within the exemptions to the regulations or obtain some evidence of the practicable steps required by section 47(1) of the 1937 Act.

In December 2014 Mr Justice Jay delivered judgment in the case of *Heneghan v Manchester Dry Docks & others*.[8] The issue in the case was narrow but novel: when a worker had been exposed to asbestos by a number of different employers and had lung cancer as a result of his exposure, did the more *"benevolent"* approach to causation in mesothelioma cases established in the case of *Fairchild v Glenhaven Funeral Services*[9] extend to multi-defendant asbestos-induced lung cancer claims (proof of enhancement of risk as opposed to proof of causation of damage). The issue was directly in point because the claimant (the son of the exposed worker and also the Professor of Evidence-Based Medicine at Oxford University) had sued only six of the possible defendants to his claim and their cumulative share of the total exposure was only 32.5% (crucially, far less than 51%). The defendants therefore argued that, whilst liability was admitted and it was accepted that it was more likely than not that the deceased's cancer had been caused by exposure to asbestos, because causation as against any individual defendant could not be proved, *Fairchild* applied. Therefore, each defendant was only liable for the element of total exposure apportioned to them i.e. a portion of 32.5% of the agreed damages rather than the full sum as was contended for by the claimant, who argued that *Fairchild* did not apply and he was entitled to judgment in full against each defendant on the basis they had each made a material contribution to the risk of his father's lung cancer.

The defendants argued successfully before Jay J that epidemiological evidence could not be used in this case to identify which of the defendants was responsible for the culpable exposure. As such, the claimant would be unable to prove his case against any of the defendants on conventional grounds even though they each admitted they had negligently exposed his father to asbestos. In those circumstances, Jay J found that the principle in *Fairchild* had to be extended to lung cancer claims as they are legally indistinguishable from mesothelioma claims. The approach to apportionment set out in the case of *Barker v Corus UK Ltd*[10] therefore also applied and the defendants were only liable to pay in respect of their 'share' of the cumulative exposure.

Jay J gave the claimant permission to appeal and the hearing of that appeal is presently scheduled to take place between 1 June and 2 November 2015.

In *Thompson v Renwick Group plc*[11] the Court of Appeal considered whether a holding company which was a parent company to the claimant's employers could owe a duty of care to employees of its subsidiary. The first matter relied upon by the claimant was the appointment by the parent company of a director of the subsidiary with responsibility for health and safety. Lord Justice Tomlinson dispatched that argument with ease on the basis that the person so appointed was not acting on behalf of the parent group. Secondly, the claimant sought to rely on the decision in *Chandler v Cape plc*[12] and the three indicia[13] given by Arden LJ to assert that there was sufficient proximity between the parent and subsidiary company to justify the imposition of a duty of care upon the parent for negligent exposure to asbestos. The matters relied upon, amongst others, were the use of the livery and trading name of the parent company on the lorries and paperwork of the subsidiary and the close working relationship between the companies' operations which suggested a closer affiliation between the parent and subsidiary companies than the division of legal personality suggested. However, the court found that the facts of *Thompson* were *"far removed"* from *Chandler* where the parent company had employed a group medical advisor, who was responsible for the health and welfare of all employees within the group of companies, and a scientific officer to find ways to suppress asbestos dust, and where the Board of the parent had discussed and authorised the relevant production processes. In the absence of these factors, the Court of Appeal found that there was no evidence the parent company carried on any business at all apart from that of holding shares in other companies and thus the appeal failed at the first of Arden LJ's indicia.

[8] [2014] EWHC 4190 (QB)

[9] [2003] 1 A.C. 32

[10] [2006] 2 A.C. 572

[11] [2014] EWCA Civ 635

[12] [2012] 1 W.L.R. 3111: a case in which the facts were found to justify the imposition upon a parent company of a duty of care to protect employees of the subsidiary company from risk of injury arising out of exposure to asbestos at work.

[13] (1) the business of the parent and subsidiary are in a relevant respect the same; (2) the parent has or ought to have superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew or ought to have known; (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection.

Stress at work

The news of an Ambassador's peremptory removal from office amid allegations of sexual impropriety was always likely to cause a storm, no more so than in the case of *Yapp v Foreign and Commonwealth Office*[14] where the Ambassador in question sued his former employers inter alia for psychiatric harm for his withdrawal from post without even an investigation into the claims, which later fell away. Significant both for the lengthy factual appraisal and careful analysis given in the judgment of Underhill LJ (this is another stress at work case run in contract as well as in tort, and the judgment deals with the different remoteness tests), the real impact of the case is the very clear adherence to the principle first clearly enunciated by Hale LJ in *Hatton*[15] that psychiatric injury arising from stress at work will not usually be foreseeable unless there were indications, of which the employer was or should have been aware, of some problem or psychological vulnerability on the part of the employee. The claimant had argued that the need for known vulnerability was limited to those cases involving the accretion of pressure at work rather than those in which the stress (and consequential injury) arose from a one-off act of unfairness. The Court of Appeal rejected this aspect of the claimant's argument[16] though stressed that the guidance given in *Hatton* was no more than that and reminded us all that each case turns on its own facts.[17]

Other recent cases of interest

We all eagerly await the next vicarious liability decision from the Supreme Court in the case of *Mohamud v VM Morrison Supermarkets plc*[18] but in the meantime this legal principle has been back before the Court of Appeal in *Graham v Commercial Bodyworks Limited*.[19] Here the claimant was injured when one of his friends and co-worker decided, 'for a laugh', to spray inflammable thinner over his overalls and then set him on fire. Perhaps unsurprisingly the judge at first instance refused to make a finding that the employer was vicariously liable for the co-worker's act. The claimant's rather bold appeal was also dismissed as although Lord Justice Longmore accepted that the employer 'created' the risk of the harm providing thinner to be used in the workplace, that was not sufficient to impose liability.

In *Johnson v Warburtons*[20] the claimant driver went into the back of his lorry to attend to a loose load. Access to the back was gained via some steps which folded out when the door to the load area was opened. As he descended these steps on his return to his cab, he slipped and fell down the embankment next to which he was parked. He alleged that the steps were inherently unsafe and that he should have been trained in their use. The judge found that the steps were safe and the claimant appealed. The Court of Appeal, noting that the appeal would only be allowed if the judge's decision were shown to be perverse, disagreed. It was open to the judge to find that the need to take care was obvious (a matter of 'common sense') and that no training in the use of the steps was needed. It was observed that employers do not usually have to teach their employees how to go up and down staircases. Common sense indeed.

A recent decision of the High Court deals a blow to those who are injured while generously helping their friends with DIY. In *Ford v Silverstone*, the claimant was helping his friend, the defendant, to renovate a new property. They were clearing trees using a wood chipper. The unfortunate claimant used his hand to try to clear a blockage in the chipper and lost three fingers in the process. He claimed that he had watched the defendant successfully clear a blockage by hand on an earlier occasion and had assumed that that was the correct way to do it. On this basis, he alleged that the defendant owed him a duty of care. The judge rejected the claimant's case on the facts and held that no such duty was owed.

In *Dusek v Stormharbour*[22], the dependants of the deceased claimed against his employers after he was killed while taking a helicopter ride in the course of his employment. The route taken by the helicopter was known to be hazardous, passing as it did over remote and inhospitable terrain in the Andes. The deceased's employer chartered the helicopter nevertheless and the trip went ahead with fatal consequences. Hamblen J held that the deceased had been on the flight for the purposes of his employment and that his employer owed him a duty to take reasonable care not to subject him to unnecessary risk. The decision to take the flight, and the way in which the flight was conducted, were not risk assessed, as they should have been. Had a proper assessment been carried out, the employer would have instructed the deceased not to take the flight and he would have listened. The claim succeeded.

[14] [2014] EWCA Civ 1512

[15] *Hatton v Sutherland* [2002] EWCA Civ 76, [2002] ICR 613

[16] Albeit the FCO's appeal was dismissed on other grounds and the question of quantum for breach of contract remitted to the trial judge.

[17] See paragraph 119(3) of the decision

[18] Heard on 28 October 2014 UKSC-2014-0087

[19] [2015] EWCA Civ 47

[20] [2014] EWCA Civ 258

[21] LTL 29/1/2015

[22] LTL 23/1/2015

COSTS

Caroline Allen and Judith Ayling

As we said in the opening paragraph, the first appeal cases from costs management decisions have begun to appear, and so too there are a handful of useful cases dealing with QOCS and Part 36-related matters.

QOCS

Gosling v (1) Hailo (2) Screwfix Direct[23] is a County Court decision, but one of some importance as it is thought to be the first "fundamental dishonesty" decision in which a claimant who was found to have exaggerated the extent of his ongoing symptoms was denied QOCS protection, following discontinuance of the claim upon the disclosure of damning surveillance evidence. It was held by Judge Moloney QC, sitting at Cambridge County Court and determining the issues on a summary basis without witness and expert evidence, that the claimant's dishonesty went to the root of a substantial part of his claims for general damages and future care (amounting to approximately half of the value of the claim), and that it was therefore sufficient to characterise the claim as fundamentally dishonest. "Fundamental dishonesty" was to be interpreted purposively and contextually, and determined whether the claimant was deserving of the protection extended, for reasons of social policy, by QOCS. In light of the findings made, the second defendant was held to be entitled to enforce a costs order in its favour under r.38.6 (following the discontinuance) to its full extent, QOCS notwithstanding.

Wagenaar v Weekend Travel Ltd t/a Ski Weekend (Defendant) & Serradj (Third Party)[24] is a case well worth noting for any defendants contemplating bringing a third party into contested proceedings. The Court of Appeal held that CPR r.44.13 applies the QOCS rules to a single claim against a defendant, but not to the entire action in which a claim for damages for personal injury is made. Consequently – as was the case in *Wagenaar* – a defendant who succeeds in the substantive action but whose additional claim fails is at risk of being, in effect, penalised twice in costs: unable to enforce against the claimant by virtue of the QOCS rules, but liable to pay the third party's costs in full, as the QOCS rules do not apply to additional claims brought within the compass of the main action.

In *Landau v (1) Big Bus Co (2) Zeital*[25] Master Haworth in the Senior Courts Costs Office determined that QOCS does not apply on appeal if it did not apply at first instance, regardless of the fact that a new CFA had been entered into between the hearing at first instance and the appeal, and regardless of whether the second CFA was entered into after 1 April 2013 when QOCS came into effect. The claimant brought a personal injury action against the defendants with the benefit of a CFA dated 16 August 2011. In the standard way that CFA did not cover any appeal he himself brought. He also took out an ATE policy on 10 November 2011. The ATE policy did not cover the costs of any appeal to the Court of Appeal. His claim was dismissed at first instance on 7 October 2013. Permission to appeal was granted and a second CFA was entered into on 23 November 2013. On 4 August 2014 the Court of Appeal dismissed the appeal and ordered the claimant to pay the defendants' costs of the appeal, referring the question whether QOCS applies to the costs order for determination by the SCCO. The costs decision turned, primarily, on the definition of the word "proceedings" in the context of CPR r. 44.17, which stipulates that *"This section does not apply to proceedings where the claimant has entered into a pre-commencement funding arrangement (as defined in Rule 48.2)"*. The claimant argued that "proceedings" should be interpreted as referring separately to trial and appeal, but this interpretation was rejected comprehensively by Master Haworth. He held that the meaning of "proceedings" for the purposes of r.44.17 must be the same as in r.44.13(1) and that QOCS was plainly intended to apply to appeals, which are within the definition of "proceedings" in r.44.13(1). The proceedings in the instant case concerned the same claim. There was only ever one claim for damages arising out of one accident. On any true construction of the relevant provisions of the CPR in this case, QOCS did not apply.

Costs management

Two recent appeals against costs management decisions provide useful insights into the way in which the courts are approaching the process in practice.

In *Redfern v Corby Borough Council*[26] the High Court heard one of the first, if not the first, appeals against a costs management order made by a Master. The claimant seeks damages against his employer for psychiatric injury caused by bullying, harassment and stress at work. The claim was issued after 1 April 2013 and so the new proportionality test applies. On the claimant's own case the claim is worth a maximum of £700,000 and his budget was more than £740,000 net of VAT and any additional liabilities. In making a costs management order, Deputy Master Eyre expressed concern that the claimant's budget was so high, stated that the costs already incurred

[23] (2014) LTL 29/04/2014
[24] [2014] EWCA Civ 1105, [2014] 5 Costs L.O. 803, [2014] P.I.Q.R. P23
[25] Lawtel 20 November 2014
[26] [EWHC] 2014 4526 (QB)

were excessive and unreasonable and took them into account when considering the reasonableness and proportionality of all subsequent costs. Having first proposed an overall budget of £220,000 for reasons of proportionality, he then adopted a phase-by-phase approach and approved a budget whose phases added up to just over £226,000. The claimant contended on appeal that the approach taken had been flawed and that the overall figures were too low. However Judge Seymour QC, sitting as a High Court deputy, found that the approach taken had been entirely in accordance with Practice Direction 3E and that the Master had not sought to approve or disapprove the costs already incurred. He had been bidden to take them into account by PD 3E 7.4 when determining the reasonableness and proportionality of all subsequent costs. He therefore dismissed the appeal. Judith Ayling acted for the defendant. The claimant is seeking permission for a second appeal to the Court of Appeal.

In *Havenga v (1) Gateshead NHS Foundation Trust (2) South Tyneside Hospitals Foundation Trust*[27], a high-value cerebral palsy claim in which liability had already been agreed at 75/25, the claimant appealed against a decision to reduce his costs budget from £769,854 to £463,915, arguing that the District Judge had exceeded the wide ambit of his discretion. It was held on appeal that he had not, HHJ Freedman reminding himself of the very high threshold to be crossed to show that a costs and case management decision is wrong. He held that the revised budget fell within the range of what was reasonable and proportionate, even if he might have been more generous himself. The matter turns on its own facts, but is interesting because of the level of scrutiny that the judges at first instance and on appeal applied to the costs budget, which arguably came close to detailed assessment: amongst other matters, on appeal the court was being asked to vary the time for fee-earners at various stages, and the level of experts' fees. This appears to run contrary to PD 3E 7.3, which expressly prohibits such an approach.

In *Tim Yeo v Times Newpapers Limited*[28] (a libel case which has already been before the court on a rule 3.9 application in relation to a failure to give prescribed funding information[29]) Warby J sought to give guidance for the future on costs budgeting, with particular reference to publication cases. He hoped that as the system becomes established parties will propose and agree to costs budgeting without a hearing (see r3.16(2), where practicable costs management conferences should be conducted by telephone or in writing). In respect of incurred costs it is likely to help the parties reach agreement later on without detailed assessment, that if a budget is reduced for reasons which apply equally to incurred costs or which have a bearing on what should be recoverable, that those reasons are briefly recorded at the time the budget is approved. He said that while the question of whether the totals are reasonable and proportionate will always be the overall criterion, the court may need to consider rates and estimated hours. It is appropriate to have regard to both hours and rates, and this is not the same as conducting a detailed assessment. Work should only be included as a contingency if it is foreseen that it is more likely than not to be required, and if the improbable occurs it can be added to the budget pursuant to PD 3E 7.9 unless the matter involves a significant development within para 7.4, in which case a revised budget should be prepared. Warby J also drew attention to the court's power to give directions for the filing and exchange of budgets at an earlier stage than the CMC, and pointed out that such an early budget need not be for the entire litigation.

Is a Calderbank offer as effective as a Part 36 offer?

Though a commercial case, *Coward v (1) Phaestos Ltd & Others*[30] is worthy of note as the Court of Appeal addresses the fundamental differences between Part 36 and Part 44.2 and the correct approach to be taken by the courts in considering the impact of Calderbank offers on costs. The appellant appealed an order for costs made at the conclusion of an action he had begun against the respondent companies and in which he had been, broadly, unsuccessful. He sought to argue that a Calderbank offer he had made some time prior to trial had given the respondents substantially all that they had recovered at trial. This argument was rejected on the facts at first instance, and the decision upheld on appeal. However the respondents argued that the effect of a Calderbank offer was to be assessed by analogy with the terms of CPR r.36.14(1A), which defined a *"more advantageous"* judgment as one that was *"better in money terms by any amount"* than the relevant order. This approach was rejected by the Court of Appeal, which emphasised that Part 36 and Part 44 of the CPR are separate regimes with separate purposes; specifically that Part 36 is a self-contained code which specifies particular consequences which go far beyond that which might be ordered by way of costs under Part 44. Part 44 contains no rules as to the way in which the court is to have regard to offers. In particular, and most obviously, even in the case of a money claim, there is no provision equivalent to r.36.14(1A), and there is no warrant in the terms of Part 44 for applying, by analogy or otherwise, a similarly rigid test. It was accepted by the Court of Appeal that the very broad terms in which the discretion conferred by Part

[27] [2014] EWHC B25 (QB)
[28] [2015] EWHC 209 (QB)
[29] [2014] EWHC 2853(QB)
[30] [2014] EWCA Civ 1256, [2015] C.P. Rep. 2

44 is expressed come at the price of some uncertainty and some scope for argument as to costs, but it was also noted that the courts are well accustomed to dealing with those cases where it is arguable that the just result was not simply that the unsuccessful party paid the costs of the successful party in full.

Capacity and retainer

In *Blankley v Central Manchester and Manchester Children's University Hospitals NHS Trust*[31] the Court of Appeal held that the loss of capacity by a party to a legal action in the course of the proceedings did not automatically frustrate the CFA with the solicitor or terminate their solicitor's retainer. Whilst the incapacity removed the solicitor's authority to act, it only gave rise to a period of delay pending the appointment of a deputy. Richard Spearman QC and Vikram Sachdeva of chambers acted for the claimant. This is a significant decision for those solicitors retained by claimants whose capacity looks likely to fluctuate.

Common costs

In *Haynes v Department for Business Innovation & Skills*[32] Jay J, sitting with Senior Costs Judge Hurst as an assessor, considered the costs recoverable by a claimant who brought industrial disease proceedings against ten defendants on behalf of her late husband following his exposure to asbestos and subsequent death from lung cancer, and had abandoned her claims against nine of the defendants after one accepted her Part 36 offer of £18,000 plus costs. It should be noted that the claimant put the total value of her claim against all defendants at £195,000 and Jay J observed that liability could only be several, not joint and several. At first instance the defendant government department (BIS) contended that because liability was several, that should follow through into the proportion of costs payable. It won: the first-instance decision on the papers was that BIS was liable only for the costs attributable directly to it and for one-tenth of the non-specific common costs. On re-hearing before Master Simons the decision was upheld. On appeal Jay J dismissed an argument that the claimant had offered to settle all the costs rather than the costs against BIS, found that "the costs of proceedings" within the meaning of r.36.10(1) meant the costs of proceeding against the party against whom the deemed order had been made as any broader definition would achieve obvious injustice and violate the language of the rule as seen in its proper contextual setting. Accordingly the claimant was not entitled to receive from BIS the costs of her action against all ten defendants, but only the costs attributable directly to her action against BIS itself. However common costs fell into two categories: non-specific generic costs which would have been incurred in any event, regardless of the number of defendants, and to which the claimant was entitled on a 100% basis, and specific costs which were, in principle, capable of identification and division. As the claimant had failed to put papers before Master Simons which would have enabled him to carry out any fine analysis of how those specific common costs were to be identified and divided, the 1/10th finding was not disturbed in respect of them. The judgment contains a helpful review of the cases on the vexed question of generic or common costs.

Inquest costs

In an important decision on inquest costs, Master Rowley considered the extent of recovery of substantial costs of representation at an inquest (some £600-700,000) as part of the costs of and incidental to the successful claim in negligence and under Article 2, in *Lynch v Chief Constable of Warwickshire & others*[33]. See *Roach v Home Office*[34] which lays down the principle that inquest costs are in principle recoverable as part of the costs of a civil claim but in which Davis J expressly said that the extent of the recoverable costs depends on the specific facts of each case. In *Lynch* there had been extensive disclosure before the inquest[35]. The claimants were represented at the inquest by a team comprising leading counsel, junior counsel, a partner and a trainee, not all of whom were there for each of the 38 days. The team was being funded by exceptional public funding because this was an Article 2 inquest. The defendants argued that there did not need to be attendance at the inquest for the claimants to plead their case but accepted some attendance on some days. Master Rowley held that gathering evidence at the inquest had been a disproportionately expensive way of doing so. His general approach was to extract from the overall inquest proceedings those aspects which were of and incidental to the civil claim and to allow the reasonable costs for those aspects. Having found that the costs overall were disproportionate he then went on to consider what aspects of the work had been necessary. There is not the space here to set out his findings on each of seven different categories of work, but the judgment on the detail bears careful reading.

[31] [2015] EWCA Civ 18

[32] [2014] EWHC 643 (QB), [2014] 3 Costs LR 475

[33] Senior Courts Costs Office 14 November 2014

[34] [2009] EWHC 312 (QB) (Davis J)

[35] See the Coroners (Inquest) Rules 2013 which now compel disclosure before an inquest

Wasted costs

A warning to those looking to apply for their wasted costs in *Nwoko v Oyo State Government of Nigeria & Another*[36] where the court stressed the need for a party seeking to obtain a wasted costs order to provide proper evidence as to what costs had been incurred by the deficient conduct in question. Eder J held that it was *"unacceptable"* to expect the court to carry out a summary assessment on a broad-brush basis by awarding a percentage of the costs of the applicant's overall costs schedule, and that it was impossible to deal with a large band of numbers and arrive at a conclusion.

Stage 2 portal

Finally, a useful decision at county court level concerning the costs consequences which flow from the compromise of individual elements of a claim within the Stage 2 portal process. In *Berwicke-Copley v Ibeh*[37] the claimant's low-value claim had initially proceeded via the portal. The defendant admitted liability and accepted various elements of the claimant's claim for damages, but challenged others. The claimant exited the portal and issued Part 7 proceedings for all items of loss, arguing that it was not open to a defendant to pick and choose which individual elements of a claim to settle, and that as there was no agreement in respect of the entire claim, there could not have been settlement of any of its elements. Accordingly, the claimant sought allocation to the fast track and recovery of fast track costs. The defendant argued that elements of the claim had been compromised pre-issue through the portal scheme and sought judgment in respect those elements, with the remainder of the claim to be allocated to the small claims track. It was held by DJ Vincent it was not only possible but *intended* by the provisions of the Protocol that parties might compromise individual elements of a claim within the Stage 2 portal process. Any part of a claimant's offer accepted by a defendant was regarded as an item 'not in dispute' and parties were thereby provided with a mechanism by which issues were narrowed and progress made towards settlement. There was provision within the Protocol for interim payments to be made at this stage. If parties had not resolved matters by the end of Stage 2, Stage 3 proceedings were issued. There was no provision by which interim payments were returned and it would defy logic and the aims and intentions of the Protocol if, at this stage, all items that had previously been agreed were regarded as not agreed. With regard to the issue of costs, the rules clearly provided that any offer made within the portal was deemed to include portal costs. Accordingly there would be judgment for the claimant in respect of the sums already agreed, together with associated Protocol costs. The remaining items would be allocated to the small claims track.

INTERNATIONAL CASES

Katie Scott

In *Allen v Depuy International Limited*[38] Mr Justice Stewart had to determine when the events giving rise to a claim within the meaning of Rome II occurred. The claimants, who at any material times had been resident outside England and indeed outside the EU, brought a claim against the defendant, a company registered in England which manufactured prosthetic hip implants in England, for damages for injuries arising from the implants (in particular adverse reaction to metal debris). Mr Justice Stewart agreed with the claimants that the events giving rise to the damage occurred when the implants were manufactured/circulated, or failing that the date that they were implanted into the claimants. As both of these dates were prior to 11 January 2009 Rome II did not apply to the claims. He was influenced in coming to this view by the importance of the principle of legal certainty. He held that had the defendant been right that the relevant date was the date when the adverse reaction to the implant occurred this date would not be determinable until further evidence had been obtained to establish when this was.

The court went on to determine what the applicable law was pursuant to the Private International Law (Miscellaneous Provisions Act) 1995 ('the 1995 Act'). The court considered first the general rule under section 11(2)(a) i.e. that the applicable law is the law of the country where the individual sustained the injury (variously South Africa and New Zealand), before going on to consider whether the general rule should be displaced pursuant to section 12. The court held there was insufficient reason to displace the general rule and so held that English law was not the applicable law.

Lastly the court went on to consider whether, if the applicable law had been English law, the Consumer Protection Act 1987 would have extended to these claims. The court held that it would not. The Consumer Protection Act had no territorial effect beyond the United Kingdom, European Union or European Economic Area. Consumers who suffered damage outside the EEA and who had no connection with it, and whose claims concerned defective products whose marketing and supply were outside the EEA, did not come within its scope.

[36] [2014] EWHC 4538 (QB)
[37] LTL 26/06/2014 County Court at Oxford
[38] [2014] EWHC 753 (QB)

A further case came before the Courts concerned with choosing the applicable law pursuant to the 1995 Act - *Donkers v Storm Aviation Ltd*[39]. In this case an accident had occurred in England and so it was agreed that the general rule under section 11(1) applied. The third party (the claimant's employer) submitted that the general rule should be displaced by section 12 on the basis that it was substantially more appropriate for German law to determine the issues. This was because (i) the claimant was German, (ii) he was employed by a German company and engaged in work at the time the accident occurred, (iii) the claimant was therefore only temporarily in England, (iv) the loss and damage is and will still be suffered in Germany. The court held that the tort was strongly connected with England and refused to displace the general rule.

The court went on to hold that the defendant's claim against the third party for an indemnity in respect of the claim was also governed by English law. The contract provided no choice of law clause and so pursuant to the Contracts (Applicable Law) Act 1990, the applicable law is governed by article 4 of the Rome Convention. The court held that as the defendant is registered in England, the contract was to be performed in England and the indemnity clause was not severable from the agreement between the defendant and the third party, the applicable law was English.

The Supreme Court in the case of *Cox v Ergo Versicherung AG*[40] had cause to consider whether the Fatal Accidents Act 1976 had extra-territorial effect and would apply to a claim brought in England against a driver's German insurers in respect of a road traffic accident in Germany in which the claimant's English husband was killed. The applicable law was determined pursuant to the 1995 Act. Pursuant to section 11 of the 1995 Act the general rule was that the applicable law was German. Section 14(3)(b) of the 1995 Act however provides that matters of procedure (including the assessment of damages where this is procedural and not substantive) are to be determined pursuant to the law of the forum. The question for the court was whether the damages fell to be assessed pursuant to the German rules or pursuant to the Fatal Accidents Act 1976. The Court held that the relevant German damages rules are substantive because they determine the scope of the liability. The Court further found that the Fatal Accidents Act only applies to an action brought under it. An action to enforce a liability whose applicable substantive law is German law is not an action under the Fatal Accidents Act. The Supreme Court went on to hold that the procedural rules of assessment that must be applied by the English court were its own rules of the assessment of damages so as to put the claimant in the same financial position as she would have been if her husband had not been killed.

In *Winrow v Hemphill*[41] the claimant was injured when a rear seat passenger in a car driven by an English national (the first defendant) which collided with a vehicle driven by a German national. The second defendant was the first defendant's insurer, a company incorporated in England and Wales, and conceded liability. The claimant was living in Germany at the time of the accident and had been for 8 years but intended to return to the UK at the end of her husband's posting. By the time her claim was issued she had returned. She submitted that German law was displaced under Article 4(2) or 4(3) of Rome II and that English law applied. The court disagreed. The fact that the claimant intended to return to England did not affect the fact that at the time of the accident she was habitually resident in Germany, for the purposes of Article 4(2). In looking at Article 4(3) the court could look at the fact that she had been habitually resident in Germany but was habitually resident in the UK at the time of the claim, and the court also proceeded on the basis that the link of the consequences of the tort to a particular country was a relevant factor for the purposes of Article 4(3) but the law indicated by Article 4(1) had not been displaced and German law applied.

In *Lougheed v On The Beach Limited*[42] the Court of Appeal considered again the question of local standards in a case under the Package Travel, Package Holidays and Package Tours Regulations 1992. The claimant booked a holiday in Spain through the defendant company. She slipped and fell on a patch of water on polished granite steps. At trial there was no expert evidence as to cleaning standards. The claimant won. On appeal it was re-affirmed that the standards by which the hotel was to be judged in its performance of unregulated tasks had to be informed by local standards of care as applied by similar establishments. There had been no enquiry as to the general practice in establishments of the same sort in Spain concerning the monitoring and cleaning of spillages, and it was not possible to draw an inference of want of care without sufficient evidence of Spanish standards. Further, the judge had not been justified in concluding that the accident would not have happened if the hotel management had used proper care. An evidential burden should not be imposed upon a party such as the defendant unless it was at least shown that the party for whose performance it was liable, namely the hotel, knew of the likelihood of the presence of a hazard such as a spillage, and of the danger to consumers posed by that hazard if not dealt with promptly.

[39] [2014] EWHC 241 (QB), [2015] 1 All E.R. (Comm) 282

[40] [2014] UKSC 22, [2014] A.C. 1379

[41] [2014] EWHC (QB)

[42] [2014] EWCA Civ 1538

QUANTUM UPDATE

Quintin Fraser and Angela Rainey

Upon the publication of the 6th edition of the Ogden Tables, many practitioners were sceptical about whether the courts would be willing to apply the scientific approach suggested for the valuation of damages to compensate an injured and "disabled" party for a disadvantage on the labour market. Whilst the threshold for a claimant to be classified as "disabled" (currently defined by the Equality Act 2010) is low, the impact of the classification on the calculations of future loss, if the Ogden 6 methodology is applied, is significant. Potential damages far exceed those which would usually be awarded following the traditional *Smith v Manchester*[43] approach, because the reductions applied to the multipliers for residual earnings are very high.

Practitioners' scepticism proved prescient, and there have been a number of cases where judges have been reluctant to apply the reduction factors of Tables A-D of the Ogden tables for a disabled claimant without further adjustment (see, for instance, *Conner v Bradman*[44], and *Clarke v Maltby*[45], where no Ogden reduction was applied at all because the reduced multiplicand for residual earnings was held to give the claimant fair compensation) and the case of *Billett v MOD*[46] provides another example of the court's approach. The claimant suffered a non-freezing cold injury while deployed on service with the army. He subsequently left the army (not because of the injury). He suffered ongoing symptoms of pain and loss of sensation in his feet when they became cold, but the symptoms, whilst preventing him from working or doing anything else outside in cold conditions for any appreciable time, did not prevent him from working as a Heavy Goods Vehicle driver. The "disability" status of the claimant was in issue between the parties, and Andrew Edis QC, sitting as a High Court judge, found that the claimant was disabled: his ongoing symptoms substantially limiting his ability to carry out normal day-to-day activities. The judge, however, also said that he found it "hard to conceive of very many people who could be classified as 'disabled' who are as able and fit as is this claimant".

In submissions on the assessment of the claimant's loss, the judge was referred both to the explanatory notes of the 7th edition of the Ogden Tables and to two articles from Dr Victoria Wass (an academic economist who joined the Working Party for the 7th edition of the Ogden Tables) in which she criticised previous decisions involving judicial interference with the reduction factors in cases of lesser disability. Andrew Edis QC noted the "real divergence of view between Dr Wass and the judiciary about the way in which the Tables should be used" but held that the citations to which he had been referred in Dr Wass's 2013 article in fact demonstrated exactly why a court is unlikely to apply unadjusted reduction factors to multipliers without evaluating the result and adjusting it if necessary - he concluded that to do so might lead to a correct overall level of damages across all cases but no individual claimant would himself get the right sum.

Billett does not raise any novel issue, but the case is worthy of consideration for a number of reasons: the perhaps generous classification of the claimant as disabled; the adjustment of the reduction factor to a mid-point between the applicable factors for a disabled and non-disabled person which appears now to be the de facto adjustment; and the well-reasoned endorsement of the hitherto common judicial approach in cases where ongoing disabilities are relatively limited.

Other recent cases of note include *Knauer v Ministry of Justice*[47] in which the High Court has given permission to the claimant to pursue a leapfrog appeal to the Supreme Court to enable her to argue that the decision in *Cookson v Knowles*[48], in which it was established that for Fatal Accidents Act cases multipliers should be assessed at the time of death, is wrong. Mr Justice Bean indicated that he would have departed from that approach had he not considered himself bound by the *Cookson* decision. Whatever the outcome of the appeal on that point, Mr Justice Bean's actual assessment of damages also deserves some mention given that he was prepared to award to the widower, who had no dependent children, a multiplicand of £18,140 to represent the loss of services he had suffered through the death of his wife: this is high in the context of previous awards for this head of damage.

Another case of a High Court judge voicing disagreement with binding authority is *Totham v King's College Hospital NHS Foundation Trust*[49]. Mrs Justice Laing was dealing with a case in which the minor's life expectancy had been reduced following a serious brain injury: she considered that the decision of

[43] (1974) 17 K.I.R. 1
[44] [2007] EWHC 2789 (QB)
[45] [2010] EWHC 1201 (QB)
[46] [2014] EWHC 3060 (QB), [2014] All E.R. (D) 181 (Sep)
[47] [2014] EWHC 2553 (QB)
[48] [1979] AC 556
[49] [2015] EWHC 97 (QB)

Croke (A Minor) v Wiseman[50], whereby an injured young child cannot make a claim for their earnings for the "lost years", was inconsistent with the principle of full compensation. It is too early to know whether an appeal will be pursued.

Finally, and on a rather different note, the issue in *R (on the application of) ZYN v Walsall Metropolitan Borough Council*[51] was whether a local authority, in assessing whether an injured person can be required to contribute to the cost of her care, was permitted to take into account capital derived from a personal injury settlement and managed by a deputy appointed by the Court of Protection. The claimant was severely disabled and was in receipt of a substantial care package which was in part provided by the local authority. She had substantial assets of around £550,000 which were derived from compensation received in a claim for personal injuries. The settlement offer was accepted in March 2003 on the basis that she could expect to be cared for when the need arose without the settlement monies being touched (in line with the relevant law at the time). The Court of Protection had appointed a receiver in March 2002 to manage the claimant's affairs. By a court order in 2008 the receiver's functions were transferred to those of a deputy under the Mental Capacity Act 2005. The deputy was permitted to withdraw £50,000 from the fund each year, without the need to make an application to the Court of Protection.

With effect from April 2011, the authority had sought to charge the claimant for the full cost of the care package (£271.84 per week) that it provided, in line with its own policy. She contended that the policy was unlawful because it had factored in her personal injury compensation to its means assessment and that, under the relevant legislation, the council was required to disregard such capital. The legal framework surrounding charging for community care services (see paragraphs 11-27 of the judgment) is complex and beyond the scope of this summary. Mr Justice Leggatt held that the defendant's policy was unlawful and that the settlement monies should not be taken into account when assessing the claimant's care contributions. He further rejected the authority's submission that, since the deputy could dispose of £50,000 without a court order, the deputy administered property on behalf of the claimant, rather than on behalf of the court and that £50,000 could be taken into account.

[50] [1982] 1 W.L.R. 71

[51] 2014] EWHC 1918 (Admin), [2015] 1 All E.R. 165

CONTRIBUTORS

James Todd

james.todd@39essex.com

James' practice covers all areas of civil claims. Personal injury and clinical negligence cases make up the greater part of his work, acting for claimant and defendants. His defence work is received from all of the major insurance firms and solicitors. James' areas of expertise include disease claims, product liability claims, animals claims and claims involving the emergency services. In addition, his Insurance experience includes all aspects of motor and material damage claims, as well as non-payment of policy due to fraudulent claim or non-disclosure. To view full CV click here.

Judith Ayling

judith.ayling@39essex.com

Judith undertakes a wide range of personal injury work, and acts for both claimants and defendants. She also has a substantial practice in the law of costs and often advises and acts in cases which combine both areas of expertise. In addition she practices in clinical negligence. To view full CV click here.

Katie Scott

katie.scott@39essex.com

Katie represents both claimants and defendants in a variety of personal injury claims. She has a particular interest in claims with an international aspect to them and is co author of the book 'Accidents Abroad'. She also practises in the related field of costs.
To view full CV click here.

Sadie Crapper

sadie.crapper@39essex.com

Sadie is a personal injury and clinical negligence barrister with experience across the range of such claims. She has a special interest in defendant fraud work having secured the first strike out under Summers v Fairclough and she is an experienced practitioner in contempt. Sadie's clinical negligence practice encompasses both claimant and defendant work with a particular emphasis on obstetrics.
To view full CV click here.

Caroline Allen

caroline.allen@39essex.com

Caroline undertakes a wide variety of personal injury work, regularly providing advice and representation in high value actions. Workplace claims form a significant proportion of her practice, including stress, industrial deafness and work-related upper arm injuries. She appears at inquests and for claimants before the CICAP and also has a specialist costs practice, advising and acting regularly in costs-related matters.
To view full CV click here.

Quintin Fraser

quintin.fraser@39essex.com

Quintin practises in personal injury and clinical negligence, acting for both claimants and defendants. His work includes RTA fraud matters, workplace claims and industrial disease, and he has acted and advised in multiple high value cases. He has a particular interest in highways claims and acts frequently for a number of local authorities.
To view full CV click here.

Angela Rainey

angela.rainey@39essex.com

Angela joined chambers in 2011 following successful completion of her pupillage. She practises across the range of chambers' areas of work, specialising in insurance, personal injury, professional indemnity, product liability and clinical negligence.
To view full CV click here.