Essex CHAMBERS

PERSONAL INJURY NEWSLETTER
April 2015

INTRODUCTION
by Charlie Cory-Wright QC, Head of Civil Liability Group.

We who work in the field know that personal injury practice is particularly rewarding because (more than any other area) it combines two things: very specific and acute real life problems; and complex and often difficult law. Each of these is as important as – indeed neither of them could exist without – the other. The former is of course provided by the clients who bring those problems to us, asking for our help in solving them. The latter is derived from a heady and ever-changing mix of case law, statute and regulation, which may relate to substantive rights and obligations, on the one hand, or to procedural routes through, or roadblocks, on the other. I am very lucky that my first Newsletter as Head of our Civil Liability Group provides a perfect example of this mix for me to introduce.

First, substantive case law: the requirements for informed consent for medical procedures have been re-affirmed, clarified, and indeed unified for all parts of the UK, in the Supreme Court's decision in *Montgomery v Lanarkshire:* Emily Formby gives a careful and thoughtful analysis of this decision in our main article below.

Secondly, substantive statutory change: s.57 of the Criminal Justice and Courts Act 2015, providing that where a Claimant is guilty of fundamental dishonesty, even valid parts of PI claims may be struck out, and thereby extending by statute what the Supreme Court provided for in part in *Summers*, will by the time of publication have come into force. Sadie Crapper and Angela Rainey guide us through the complexities and pitfalls of this new jurisdiction.

Thirdly, significant changes to the CPR: Caroline Allen explains the welcome changes to Part 36, which include (i) provision for the automatic withdrawal of offers after expiry without necessary loss of costs protection under the rules; and (ii) allowing judges in certain circumstances to be told of the fact of, and even in certain cases the terms of, a Part 36 Offer.

Then, procedural rulings from the Court of Appeal: the Court has in *JXMX* codified and enshrined the balance

Contents

to be struck between public justice and the privacy of infants and patients in relation to anonymity orders for court approved settlements.

Then again, significant international developments (including the Court of Appeal's declaration of incompatibility of clause 6(1)(e) of the MIB Uninsured Driver's Agreement) are described by Katie Scott.

Finally, we have overviews of new case law: on liability from James Todd; on quantum from Sadie Crapper and Melissa Shipley.

We hope you all had a happy break, and we wish you all a great summer.

ARTICLE

Informed Consent – a new era?
by Emily Formby

In a powerful, unanimous, 7 member-decision the Supreme Court has resolved, and possibly revolutionised, the issue of consent.

With a lead judgment by Lord Kerr and Lord Reed, and a consenting but additional judgment by Lady Hale, the Supreme Court has in *Montgomery v Lanarkshire Health Board*[1] determinedly embraced the concept of "informed consent". At the same time it has struck a further, if not final, blow to the idea of "Doctor knows best". Medical paternalism – nil: Rights of the patient – 1.

Facts

Mrs Montgomery was a highly intelligent woman who was an insulin dependent diabetic and in 1999 was due to give birth to her first child. Mrs Montgomery's diabetes meant that she was likely to have a baby that was larger than normal, importing a greater risk (accepted to be 9-10%) of shoulder dystocia occurring during birth. Shoulder dystocia (when the baby's head is delivered but the shoulders are too wide to pass through the mother's pelvis without medical intervention) is a *"a major obstetric emergency associated with a short and long term neonatal and maternal morbidity [and] an associated neonatal mortality"*[2] There are additional risks to the baby including the risk of brachial plexus injury (running at 0.2% in cases of shoulder dystocia involving diabetic mothers) and cord occlusion resulting in cerebral palsy or death (a risk of less than 0.1%).

Once shoulder dystocia has occurred, management is at best unpleasant – forcing the mother's knees to her shoulders to widen the pelvic inlet by way of hyperflexion accompanied by attempts to manoeuvre the baby by suprapubic pressure – and at worst involves a surgical procedure whereby the joint uniting the pelvic bone is severed to allow the two halves of the pelvis to be separated to release the baby and allow delivery to occur. If circumstances allow, vaginal birth may be abandoned in favour of an emergency caesarean section. The risk of shoulder dystocia is removed completely if an elective caesarean section is performed[3].

Mrs Montgomery's diabetes made her pregnancy high risk and she was warned that her baby could be large as a result of her condition. She therefore attended fortnightly antenatal appointments under the care of a Dr Dina McLellan for ultrasound monitoring to assess foetal size and growth. At 36 weeks what turned out to be the final ultrasound was performed from which Dr McLellan estimated that the foetal birth weight would be 3.9kg at 38 weeks, albeit there is a 10% margin of error estimating birth weight by ultrasound. Further, it was actually planned that labour would be induced at 38 weeks + 5 days, and Dr McLellan accepted that the extra 5 days would have pushed her estimate to over 4kg. This was of crucial importance because Dr McLellan had planned to offer Mrs Montgomery a caesarean section if the foetal weight was estimated over 4kg because of Mrs Montgomery's short stature. To compound matters, Dr McLellan decided that Mrs Montgomery should not have a further ultrasound at 38 weeks because she felt Mrs Montgomery was too anxious about the size of her baby and her ability to deliver vaginally.

Albeit she knew of Mrs Montgomery's fears about vaginal birth, Dr McLellan did not tell Mrs Montgomery about the risks of experiencing mechanical problems during labour nor, in particular, of shoulder dystocia because, so Dr McLellan said, Mrs Montgomery had not asked her *"specifically about exact risks"* and *"since I felt the risk of*

1 [2015] UKSC 11

2 According to an expert witness who gave evidence in the proceedings.

3 A procedure which carries its own potential risks and complications.

her baby having a significant enough shoulder dystocia to cause even a nerve palsy or severe hypoxic damage to the baby was low I didn't raise it with her". Dr McLellan felt that it was "fair to allow [Mrs Montgomery] to deliver vaginally" and advised her she should be able to do so, with recourse to an emergency caesarean section if needs be. Notwithstanding this decision making process, Dr McLellan accepted in evidence that if Mrs Montgomery had been advised of the risk of shoulder dystocia she would have elected to give birth by caesarean section.

In fact labour was induced but there was a failure to progress and when the baby's head failed to descend naturally Dr McLellan used forceps. At 5.45pm the baby's shoulder became impacted at a point when half of his head was outside the perineum. Dr McLellan, who had never been in the situation before, decided to try to complete the delivery by manipulation and pulled the baby's head with *"significant traction"* to complete the delivery of the head. To release the shoulders she performed a partially successful symphysiotomy and eventually managed to achieve delivery of a baby boy weighing 4.25kg at 5.57pm.

Unfortunately, in the 12 minutes between the head appearing and delivery, the child's umbilical cord was completely or partially occluded. As a result, Mrs Montgomery's son was deprived of oxygen and after birth was diagnosed as suffering from cerebral palsy of a dyskinetic type which affected all four limbs, and a brachial plexus injury resulting in Erb's palsy. If he had been born by elective caesarean section, Mrs Montgomery's son would have been born uninjured.

At first instance

The Lord Ordinary rejected the claim because, following the approach taken in the *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital*[4] case, he decided that whether a doctor's omission to warn a patient of inherent risks of proposed treatment constituted a breach of the duty of care was normally to be determined by the application of the *Bolam* test. It therefore depended on whether the omission was accepted as proper by a responsible body of medical opinion. He applied Lord Bridge's formulation that if the patient raised specific questions in respect of the risks associated with treatment the medic concerned was duty-bound to answer such questions fully and truthfully. As Mrs Montgomery had not raised any specific questions around the risks associated with mechanical problems during birth, and because the defendant's expert considered that Dr McLellan's failure to warn was reasonable given that the risks of a serious outcome for the baby were so small, the claim failed at first instance and on appeal to the Inner House.

In England and Wales, unlike Scotland, the Sidaway position had been softened by a greater emphasis on Lord Bridge's approach as articulated by Lord Woolf MR in *Pearce v United Bristol Healthcare NHS Trust*[5] noting that, *"if there is a significant risk which would affect the judgment of a reasonable patient, then it is the responsibility of a doctor to inform the patient of that significant risk"* so as to enable the patient to take a more informed view. Nonetheless, the assessment of risk and the determination of information delivery still firmly lay in the hands of the doctors, assessed as reasonable by viewing the practice of other doctors.

Before the Supreme Court

When the matter came before the Supreme Court, they took a different view. Lords Kerr and Reed recognised that the unqualified doctor-centric approach to consent set out by Lord Diplock in the House of Lords in *Sidaway* some 30 years ago was out of date. They explicitly recognised (at para 81) that social and legal developments now point away from a model of the relationship between the doctor and the patient based on medical paternalism, and upon the patient being entirely dependent on information provided by the doctor. Instead, patients are to be considered, as far as possible, as adults able to understand that medical treatment comes with risk and uncertain outcomes and who must accept responsibility for taking those risks which might affect their life or future well-being. Moreover, it was explicitly recognised that most patients now have access to a number of research avenues other than their medical practitioner – a first for Dr Google, perhaps. It was also recognised that patients can make a decision in which non-medical elements play a part but which is no less sensible or cogent a decision according to that patient's value systems.

4 [1985] AC 871
5 [1999] PIQR P53

If patients are to take on this decision-making burden, there must be a duty on the part of doctors to take reasonable care to ensure that a patient is aware of material risks of injury that are inherent in treatment. Accordingly, a doctor's function in advising of the risks associated with different treatment options is no longer to be regarded as a straightforward exercise of medical skill and therefore responsibility for determining the nature and extent of a person's rights in respect of that advice cannot be assessed on the *Bolam* test by looking at what other medical professionals do. Responsibility for determining the nature and extent of a person's rights rests with the courts (see para 82 – 84).

Lords Kerr and Reed acknowledged that some patients may decide that they do not wish to be informed of the risks of injury they face with any given treatment and that a doctor is not obliged to discuss risks with this type of patient. Further there may still be instances where the doctor is not required to discuss risks with their patient if disclosure of a risk may be detrimental to a patient's health, but this *"therapeutic exception"* is not the basis of a general rule.

In the end, their Lordships analysis of the correct position is in fact substantially the same as that adopted by Lord Scarman in *Sidaway*. In relation to risks of injury and consent and in the absence of the *"therapeutic exception"*, an adult person of sound mind is entitled to decide which, if any, of the available forms of treatment they wish to undergo and their consent must be obtained before treatment interfering with bodily integrity is undertaken. When discussing risk, a doctor is therefore under a duty to take reasonable care to ensure the patient is aware of any material risks involved in any recommended treatment and of any reasonable alternative or variant to that treatment. This duty was not likely to be discharged by bombarding a patient with technical information, nor by routinely demanding a signature on a consent form but could be met with an appropriate dialogue during which comprehensible information was shared.

Further, that materiality of risk is to be assessed by a judgment as to whether, in the circumstances of the case, a reasonable person in the patient's position would be likely to attach significance to the risk, or whether the doctor is or should be aware that the particular patient would be likely to attach significance to it; it cannot be reduced to a discussion of mere percentages (see paras 87 – 89).

Insofar as concerns may be raised against this approach, Lord Kerr and Lord Reed give them relatively short shrift. Their view was that if practice must change, so be it. Other jurisdictions have managed and *"respect for the dignity of patients requires no less"*.

The consequence of this analysis was the clear finding that Mrs Montgomery should have been advised of the risk of shoulder dystocia and of the potential consequences of that complication. Dr McLellan's position that she did not warn Mrs Montgomery of these risks because most women in Mrs Montgomery's situation would immediately have elected a delivery by caesarean section received fierce criticism from Lady Hale who said, *"whatever Dr McLellan may have had in mind, this does not look like a purely medical judgement. It looks like a judgement that vaginal delivery is in some way morally preferable to a caesarean section: so much that it justifies depriving the pregnant woman of the information needed for her to make a free choice in the matter."*

Conclusion

On the one hand, this judgment finally confirms what has been happening by way of *"mission creep"* in the lower courts for some time. The struggle to pull issues of consent and risk assessment from the Diplockian view in *Sidaway* so as to more accurately reflect the reality of modern interaction between doctor and patient has finally been clearly articulated. The days of trying to achieve it in practice through adopting the gloss provided by Lord Woolf in the case of *Pearce v United Bristol Healthcare NHS Trust*[6] may now be at an end.

This decision of the Supreme Court brings much-needed and welcome clarity to the issue of consent and clearly places the onus on the doctor to perform an enabling role with a patient – inform them of risks and outcomes, support the decision making process and allow a patient to make a meaningful consent to any procedure.

One would expect digestion of this judgment to lead to

6 [1999] PIQR P53, CA

significant changes being made in the consent process given the need to place the patient at the centre of the decision making process, with discussion of risks tailored in each case to the needs and concerns of the particular patient. It will perhaps be most likely to affect obstetric cases when the development of a baby can lead to changes in birthing plans or ideas throughout pregnancy and into labour. Consent will need to be a dynamic and on-going process.

On an immediate level one wonders how the over-stretched NHS will cope if the practice of holding a pre-operative clinic where patients are prepped, given a leaflet or two, consented and written-up for prescriptions in a nurse-led clinic a week before a straight forward day surgery must now be abandoned in favour of a more tailor made consent process. At the very least medical practitioners can no longer rely on their own assessment of "needs to know" basis consent.

PROCEDURE

Angela Rainey and Sadie Crapper

Section 57 of the Criminal Justice and Courts Act 2015 comes into force on 13 April 2015.

Section 57, which introduces the presumption of dismissal in personal injury claims where the claimant has been found to be fundamentally dishonest in relation to a primary or related claim, comes into force on 13 April 2015.[7] The explanatory notes to the Bill for this Act confirm that this provision is designed to extend the power identified in *Summers v Fairclough Homes Ltd*[8] beyond the very exceptional circumstances required thereunder for an abusive claim to be struck out at the end of trial. The reference to a 'related claim' makes it clear that the *Shah v Ul-Haq*[9] style claimant, who dishonestly supports the fraudulent claim of another, will also stand to lose their own (honest) claim.

The provision is not straightforward as the power only exists on an application by the defendant, and those caught by its operation may still be able to preserve their claim if they persuade the court that they will suffer a substantial injustice if the claim is dismissed: thus the grievously injured claimant with significant care needs who would be left relying on limited local authority care provision (and draining the public purse, rather than the defendant insurer's coffers) might avoid the otherwise draconian ramifications of their dishonesty.

Further, subsections 57(4) and (5) require the court to undertake a somewhat artificial and potentially lengthy exercise in assessing the damages which figure is then deducted from the costs which the court would otherwise have ordered the claimant to pay. This novel elision of damages with recoverable costs is presumably intended to tie the operation of s.57 into the QOCS regime but sits uneasily with CPR, rule 44.16 which permits the enforcement of any costs orders to their full extent, with the permission of the court, where the claim in which those orders are made is found on the balance of probabilities to be fundamentally dishonest. One anticipates that the powers that be hope that this will produce a positive result for the defendant in the majority of cases e.g.

> C claims £50,000 but his honest claim is £20,000 and his costs on the honest claim are likely to be assessed at £20,000. D has spent £35,000 on its costs, £20,000 of which were caused by the claimant's fundamentally dishonesty.
>
> In the current regime, absent a strike out for abuse of process and relevant offers, C would recover and D be liable to pay £20,000 damages + £20,000 costs = £40,000. D would recover £20,000 for its costs associated with C's dishonesty but would still have a total net liability of £20,000.
>
> If section 57 applies, D will pay nothing to C and will recover his costs (£35,000) minus the £20,000 damages C would otherwise have received so will receive £15,000.

If only all cases were as straightforward as this worked example and one suspects that the operation of these subsections may become fiendishly complicated if there are liability or quantum Part 36 offers at play.

7 Criminal Justice and Courts Act 2015 (Commencement No. 1, Saving and Transitional Provisions) Order 2015
8 [2012] 1 WLR 2004
9 [2009] EWCA Civ 542; [2010] 1 WLR 616

No doubt section 57 will take some time to bed in and we will all be watching with bated breath to see the first cases under this section emerge in the fullness of time.

Court of Appeal gives welcome guidance on anonymity in approval proceedings: In **JX MX (By her Mother & Litigation Friend AX MX) (Appellant) v Dartford & Gravesham NHS Trust (Respondent) (2) PIBA (3) Press Association (Interveners)**[10] a six-year-old girl suffered very severe injuries as a result of clinical negligence during her birth and would be a protected party and beneficiary throughout her life. Damages were agreed in the form of a 'very significant' lump sum settlement plus periodical payments. The Claimant sought the indefinite protection of her identity but this was refused at first instance.

Moore-Bick LJ, giving the lead judgment, considered in detail the matrimonial case of *Scott v Scott,*[11] which elucidated the principle of open justice and its 'paramount importance', along with a number of more recent cases such as: *Independent News and Media Ltd v A*[12] and *JIH v News Group Newspapers Ltd.*[13] CPR, r.39.2, domestic statute and the ECHR (Articles 14, 6 and 8) were also considered.

In upholding the appeal, the Court of Appeal recognised that approval hearings were not outside the application of the principle of open justice and that the balancing test was, and remained, one of 'necessity'. However, when dealing with an approval application, a court should recognise that it is dealing with essentially private (and often highly sensitive) information; therefore, an anonymity order should *normally* be made in favour of the claimant, without any need for a formal application (thus making it incumbent on any approving court to consider this step), unless it was judged unnecessary to do so.

The court gave detailed guidance at paragraph 35 of the judgment setting out clear principles to be applied:

1) the hearing and party names will be publicly listed unless an anonymity order has already been sought;
2) the press have a right to attend hearings held in public;
3) the press will be free to report the hearing, subject only the terms of any anonymity order made;
4) the judge should invite submissions from the parties and the press before making an anonymity order;
5) unless the judge is satisfied that it is not necessary to do so, he will make an anonymity order for the protection of a claimant and their family;
6) reasons should be given where an anonymity order is considered unnecessary;
7) a brief judgment on the application should be given and made available to the press.

QUANTUM

Melissa Shipley and Sadie Crapper

Permission to appeal granted in Knauer: In the last edition of this newsletter we reported on *Knauer v Ministry of Justice*,[14] a Fatal Accident Act claim in which the claimant unsuccessfully challenged the calculation of the multiplier at the date of death (as established by *Cookson v Knowles*) but was given permission to pursue a leapfrog appeal to the Supreme Court. The Supreme Court considered the claimant's application on 24 February 2015 and permission to appeal has been granted. It is not known when the appeal will be heard but, come what may, the decision of the court is likely to be of enormous significant to all PI practitioners.

Costs of hydrotherapy recovered: The often debated costs of hydrotherapy provision at home were again in issue in *A (A Child) v University Hospitals of Morecombe Bay NHS Foundation Trust*.[15] A had suffered extensive damage during birth with resultant quadriplegic spastic cerebral palsy at the extreme end of the cerebral palsy spectrum. A notable feature of *A's* condition is painful spasms which meant much of her life was spent screaming or crying and which episodes were only reliably relieved by immersion in a hydrotherapy pool. Both parties agreed

10 [2015] EWCA Civ 96
11 [1913] A.C. 417
12 [2010] EWCA Civ 343
13 [2011] EWCA Civ 42
14 [2014] EWHC 2553 (QB)
15 [2015] EWHC 366 (QB)

that A had relief from pain during water-based activities but the defendant submitted that appropriate provision could be made through visits to hydrotherapy pools and by using a Jacuzzi-style bath at home. Recognising that A's circumstances were *"exceptional"*, Warby J found that the costs associated with making hydrotherapy provision at home were proportionate to A's need.

Reading the judgment it is obvious that video evidence obtained of *A* receiving hydrotherapy was of critical importance in persuading the judge of the need for this costly provision and representatives of claimants who are seeking this provision would be well advised to invest in similar evidence to increase the prospects of recovery.

Diffuse Mesothelioma Tariff Payments: *The Diffuse Mesothelioma Payment Scheme (Amendment) Regulations 2015* come into force on 31 March 2015. They increase the tariff payments under the *Mesothelioma Act 2014* to 100%, as opposed to 80%, of the average damages claimants would receive in the courts. They apply to any case where the claimant is diagnosed with diffuse mesothelioma on or after 10 February 2015.

INTERNATIONAL

Katie Scott

Compatibility of MIB agreement with EU directives considered: The Court of Appeal delivered the significant judgment of *Delaney v Secretary of State for Transport*[16] recently. This case concerned whether clause 6(1)(e) of the MIB's uninsured drivers agreement complied with EU directives. Clause 6(1)(e) provides that the MIB's obligation to meet a claim against an uninsured driver is subject to an exception in respect of:

> *"a claimant who, at the time of the use giving rise to the relevant liability was voluntarily allowing himself to be carried in the vehicle and, either before the commencement of his journey in the vehicle or after such commencement if he could reasonably be expected to have alighted from it, knew or ought to have known that –*
>
> *...*
>
> *(iii) the vehicle was being used in the course or furtherance of a crime."*

The Court considered whether this clause was incompatible with article 1(4) of Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability. This is the article which requires the MIB to pay compensation for damage to property or personal injuries caused by an unidentified or uninsured vehicle. Article 1(4) sets out the two bases upon which payment of compensation can be excluded by the MIB. The first exception is where 'persons who voluntarily entered the vehicle which caused the damage or injury when the body can prove that they knew it was uninsured' and the second is 'in the event of damage to property by an unidentified vehicle.'

The Court of Appeal upheld Jay J's first instance decision that clause 6(1)(e) is indeed incompatible with EU law. They also upheld his conclusion that damages should be paid to Mr Delaney applying *Francovich* principles.

The need for proof of foreign law: Also worth reading is the case of *Bianco v Bennett*[17] which reiterates the importance of pleading and proving foreign law. In that claim the Italian claimant brought two subrogated claims based on Italian law which were not recoverable under English law. Italian law had been neither pleaded nor proved as a fact by expert evidence. In the absence of satisfactory evidence of Italian law the court held that it had to apply English law. The subrogated claims as pleaded could not therefore succeed.

16 [2015] EWCA Civ 172
17 [2015] EWHC 626 (QB)

COSTS

Caroline Allen

Changes to Part 36: The imminent changes to Part 36 are dominating the costs landscape at present as further new version of Part 36 is coming into being on 6 April 2015 and will apply only to offers made on or after 6 April 2015: see the Civil Procedure (Amendment No. 8) Rules 2014. The Rules merit careful consideration as many of the changes are highly technical in nature, but the key changes are as follows:

- New r.36.9(4)(b) allows a Part 36 offer to be withdrawn automatically after expiry of the relevant period in accordance with its terms, thereby removing the anomaly which exists under the current rules whereby a "time-limited" offer is not capable of being a Part 36 offer and does not carry the costs sanctions associated with Part 36, though a Part 36 offer can be withdrawn, and still considered valid, after expiry of the initial offer period by sending a separate notice (i.e. two letters must be written, rather than one). However since r.36.17(7) provides that the Part 36 costs consequences do not apply to an offer that has been withdrawn, it is difficult to see any advantage in making a Part 36 offer if it is to be automatically withdrawn in this way.

- New r.36.16 allows the trial judge to be told of the existence, though not the terms, of a Part 36 offer in circumstances where any part of, or issue in, the case has been decided, and to be told of both the existence and terms of a Part 36 offer if it relates to the parts or issues that have been decided. This is designed to address the difficulties that exist under the current rules, whereby the fact that a Part 36 offer has been made cannot be communicated to the trial judge *"until the case has been decided"* and there is no carve-out for split trials, resulting in situations where, following a trial of preliminary issue(s), the court may have to determine whether to make a costs order in respect of the preliminary issue in ignorance of whether or not a Part 36 offer has been made, unless the parties agree to disapply the provision. This rule will apply where the split trial starts on or after 6 April 2015, even if the Part 36 offer was made before it.

- The new rules attempt to address the perceived problem of claimants being able to obtain the costs benefits of Part 36 where they have made very high offers by adding an additional factor for the court to take into account when deciding whether it would be unjust to order the Part 36 costs consequences: at r.36.17(5)(e), *"whether the offer was a genuine attempt to settle the proceedings"*. Satellite litigation centring on the interpretation of "genuine attempt" seems inevitable.

- Confusion over the operation of Part 36 in respect of counterclaims is addressed at r.36.2(3) which states expressly that a Part 36 offer may be made in respect of a counterclaim or an additional claim. It cross-refers to CPR 20.2 and 20.3 which provide that counterclaims and other additional claims are treated as claims and that references to a claimant or defendant include a party bringing or defending an additional claim. This should reduce the scope for confusion, and reinforce the ability of defendants/counterclaimants to take advantage of the more favourable costs consequences of claimants' Part 36 offer, including an entitlement to costs if the offer is accepted. The court will, however, apply close scrutiny to the reality of the situation, in determining whether an offeror may sensibly be considered the "real" claimant.

- R.36.4 deals expressly with the application of Part 36 to appeals (and is self-explanatory). A Part 36 offer made in the initial proceedings has costs consequences only in those proceedings, and a new Part 36 offer made be made in relation to an appeal.

- R.36.9(5) provides that where an offeror changes the terms of an offer to make it more advantageous to the offeree it is to be treated as a new offer with time running from the date of service of the new offer, rather than as a withdrawal or a variation of the original offer. *Burrett v Mencap Ltd*[18] is thereby overturned.

- Where a Part 36 offer is accepted late, the new r.36.14(5) makes it clear that the court must make the usual order (that the delaying party pays the costs

18 Unreported, 14 May 2014

for the period of delay) unless it would be unjust to do so, thereby codifying the existing position under case law (cf *Lumb v Hampsey*[19]).

- New r.36.23 governs the situation where the offeror's costs have been limited to court fees (generally where there has been a failure to file a costs budget in time), and provides a strong incentive to defendants to make competitive Part 36 offers in good time, when such incentive might otherwise be lacking. In such circumstances, the defaulting party's recoverable costs for the purposes of Part 36 will be 50% of the costs that would otherwise be recoverable, but will not be limited to court fees. It should be noted, however, that this provision only applies to costs from expiry of the relevant period onwards, and that where it is the claimant who is in default and the offer is accepted within the relevant period, the new rule does not allow the clamant to avoid the limitation to court fees.

Failure to mediate resounds in costs: Despite successfully defending proceedings, the defendant in *(1) Laporte (2) Christian v Commissioner of the Police of the Metropolis*[20] was awarded only two-thirds of his costs following a finding that he had failed, without adequate justification, to have engaged in the alternative dispute resolution process. Whilst the court's findings on inadequate justification inevitably turn on the particular facts of the case, they are worthy of consideration by parties considering refusing an invitation to participate in ADR, as they include issues common to litigated proceedings in general and provide clear guidance as to the approach the courts are looking to adopt.

In summary, the findings were (i) that the case was not one in which the nature of the dispute (a claim for damages for assault, battery, false imprisonment and malicious prosecution) made it unsuitable for mediation, nor would it have delayed the trail of the action; (ii) there were issues of fact to be resolved in respect of which both parties ran the risk of adverse findings; (iii) there was no continuing commercial relationship between the parties and no real risk of any settlement having a potential impact on police powers or policing tactics; (iv) the commissioner never excluded the possibility of making a money offer and the claimants never insisted that such an offer was a precondition to settlement; (v) the commissioner was not entitled to regard the claimants' approach to ADR as purely tactical as it had been on their agenda from the outset and was pursued with appropriate vigour; (vi) the commissioner had never categorised the case as one which was so self-evidently unfounded that it had to be fought regardless of the risk of incurring disproportionately high costs, nor was the defence perceived to be so strong as to justify a refusal to engage in ADR, as was evidenced by the commissioner's acceptance that he was prepared to mediate until it became apparent that there was no scope for narrowing the issues; and (vii) that there was a reasonable chance that mediation would have been successful in whole or in part.

LIABILITY

James Todd

Contributory negligence of a child injured in an RTA: Some rare high level guidance on an issue that personal injury practitioners have to grapple with regularly is to be found in the Supreme Court decision in *Jackson v Murray*.[21] The injured appellant was a 13 year old girl who stepped out from behind her school minibus into the path of a driver proceeding at what had been found to be an excessive speed (50mph in a 60mph limit) that he did not modify to take into account the obvious potential danger presented by the minibus, which had its hazard lights on. At first instance, the Lord Ordinary found for the pursuer but reduced damages by 90% for her 'recklessness' in attempting to cross the road without proper care. On appeal, this was reduced to 70% but the pursuer pressed on to the Supreme Court. There, a five judge court found by a majority of 3:2 that the correct apportionment was 50/50. The court recognised that a 13 year old girl would not necessarily have the same level of judgment and self-control as an adult. Also, that the level of danger created by the speed of the car pointed to a very considerable degree of blameworthiness on the part of the driver. Perhaps the most memorable expression of juridical wisdom from the Supreme Court's

19 [2011] EWHC 2808 (QB)
20 [2015] EWHC 371 (QB)
21 [2015] UKSC 5

judgment is that no court in a case like this can reach an apportionment that is 'demonstrably correct'. However, the dissenting minority struggled with the notion that the decision at the first appeal had been the reverse of that and hence susceptible to alteration.

Standard of care when supervising child swimmers: In *Woodland v Maxwell & Essex County Council*,[22] Blake J had to consider whether a teacher and a lifeguard failed in their duty of supervision when a 10 year old child almost drowned during a school swimming lesson at a local authority pool. In what was clearly a highly fact sensitive decision, the judge found that neither had been paying sufficient attention and as a result both had failed to observe the claimant in difficulties within a reasonable time and rescue her. The child's treatment when rescued was not the subject of criticism; it was the fact that the claimant was in the water in difficulty for at least 50 seconds and that no good explanation was given for the failure to recognise that for as long as 30 seconds, those seconds, sadly and crucially, having been causative of the claimant's brain damage.

Using a vehicle as a weapon, even in supposed self-defence: In a case that brings to mind scenes from an action film, the claimant in *NA v Notts County Council*[23] was injured when he was thrown from the bonnet of a moving car which, on the defendant driver's account, he had been clinging to while also punching the windscreen and screaming abuse at the driver after an argument. The claimant had been drinking and had a history of aggressive behaviour (albeit one that was unknown to the defendant). He had been responsible for starting the altercation. The defendant claimed that he was in genuine fear of his life and was trying to dislodge the claimant from the bonnet of his car. Edis J rejected that part of the defendant's account, finding that it was the claimant, hanging on to the bonnet of a moving car that was trying to shake him off, who was in real danger. The claimant may have started the confrontation with his aggressive conduct, but he had proved that he had been injured by the defendant's deliberate acts. That amounted to a battery that was actionable subject to any justification on the grounds of reasonable self-defence. At the outset, the defendant could have just reversed away, rather than drive towards the claimant and force him onto the bonnet. That was not a defensive action and it was not reasonable for the defendant to believe that he needed to use force to defend himself. The claimant's actions were no justification for the defendant's actions and a party who responded to provocation to a degree that was far in excessive of what was reasonable (and amounted itself to a crime) could not be absolved from liability on public policy grounds. The claim succeeded.

Causation in a six-pack breach case: Lastly, some light relief in the form of a common sense decision on the Management of Health and Safety at Work Regulations 1999. The claimant in *Fuller v West Sussex County Council*[24] was a receptionist who was asked to deliver post around the office. No risk assessment of this potentially dangerous task was carried out and, in the course of making her deliveries, the claimant tripped up a staircase and fell, spraining her wrist. She alleged that the failure to risk assess the task was a breach of duty and that as a result she suffered her injury. The trial judge felt compelled to allow the claim on that seemingly logical basis. The Court of Appeal disagreed, finding that there was no causal link between the breach and the injury. Tripping up some stairs was an accident that could have happened to the claimant at any time while in the offices and it was not a risk that fell within the ambit of the duty. Appeal allowed.

22 [2015] EWHC 273
23 [2015] EWHC 4005
24 [2015] EWCA 189

CONTRIBUTORS

Charlie Cory-Wright QC

charles.cory-wright@39essex.com

Charlie has specialised in injury and clinical negligence claims throughout his career. His work is evenly split between claimants and defendants. Prior to taking silk in 2006, he was on the Attorney General's A Panel, and dealt with many fatal accidents and other injury and clinical negligence claims for the Government, as well as for insurers. He continues to do both. However since then, his work has been increasingly for claimants as well – both in catastrophic physical or psychiatric injury and in clinical negligence. He also has a particular interest in secondary victims. He was Chair of the Personal Injuries Bar Association from 2012-14. To view full CV click here.

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.

Emily Formby

emily.formby@39essex.com

Emily specialises in high value and catastrophic personal injury and clinical negligence litigation acting for claimants and defendants across the full range of accident and injury type. She is well known for her medical knowledge. She often appears at Inquests. She is a Recorder of the Crown Court and a member of the PIBA Executive Committee. She is an editor of Kemp & Kemp: The Law of Damages and Kemp & Kemp: Law of Personal Injury Law, Practice and Procedure. She writes and lectures widely on personal injury, clinical negligence and practice related topics. 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.

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.

Melissa Shipley

melissa.shipley@39essex.com

Melissa practises across all areas of chambers' work, with a particular interest in regulatory and public law, commercial and construction, environmental and planning, and general common law. Melissa has represented claimants and defendants in a wide range of county court hearings, including: fast track trials; small claims hearings; Stage 3 hearings; and Costs and Case Management hearings for multi-track cases. To view full CV click here.

Nicola Kohn

nicola.kohn@39essex.com

Nicola practises across the range of chambers' Civil Liability work, specialising in: personal injury cases, clinical negligence, insurance and regulatory work. She is a contributor to the new, 8th edition of Harris on Disciplinary and Regulatory Proceedings. Nicola appears frequently in County Courts and the High Court, and undertakes a range of pleading and advisory work. To view full CV click here.