Essex CHAMBERS

PERSONAL INJURY NEWSLETTER
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INTRODUCTION
William Norris QC

The last time you heard from us it was in the middle of what passed for a summer. As I write these few introductory words we are at the beginning of a season that seems nothing at all like winter. I can, however, tell you that by the time you read this we shall have moved to new and impressive premises half way up Chancery Lane (at no. 81) and we look forward to welcoming readers of the newsletter to our new home.

But I digress. The purpose of the introduction should be no more than to introduce and so I am delighted to draw attention to a series of articles about issues of current importance in the personal injury and related fields of work.

- Stephen Kosmin writes about granular development of vicarious liability. My unfamiliarity with granular concepts probably explains my hitherto limited grasp of this difficult and developing legal principle. Whether *Cox* represents a desirable development of the law may be open to question. For some, it may go against the grain (sorry) that vicarious liability should be extended ('developed') in this way.

- Simon Edwards provides a valuable insight into the often difficult task of establishing whether a claimant has capacity and explains the process of appointing a deputy and litigation friend.

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- James Todd then returns to what to me, at least, is the familiar territory of trying to defeat fraudulent claims, a task which has been made harder over the years by the instinctive disinclination of generations of judges to take a firm and unforgiving line with cheats. The reasons for that historically tolerant approach would be an interesting subject for a thesis.

- Sadie Crapper provides an insightful discussion of the Court of Appeal's recent decision in *Sabir* in which the judges revisited the principles of contributory negligence in RTAs (in a case involving a car and a pedestrian) and looked again at *Froom v Butcher,* an authority that is now over 40 years old.

- Sadie and Quintin Fraser then discuss *Billett* (an important case on disability and the choice of multipliers) and *Reaney,* where the Court of Appeal corrected what seemed to many to be an obvious error in the approach to causation at first instance in a case where, after the actionable negligence of the defendant, the claimant's condition was quantitatively but not qualitatively different.

- Colin Thomann, an acknowledged expert on claims with any international element, has produced a lucid and learned analysis of the Court of Appeal's decision in *SW Strategic Health Authority v Bay Island Voyages,* explaining the effect of the Athens Convention on contribution claims and revisiting the 2 year limitation period under Article 16.

- Romilly Cummerson and Katie Scott conclude this edition with very helpful and thorough discussion of recent developments in the law and practice in relation to questions of procedure and costs.

I hope you enjoy reading this newsletter. Better still, I hope you find it useful.

THE GRANULAR DEVELOPMENT OF VICARIOUS LIABILITY: *Cox v Ministry of Justice* in the Supreme Court

Stephen Kosmin

Introduction

On 12 and 13 October 2015, the Supreme Court heard the case of *Cox v Ministry of Justice*[1]. The central question in the appeal was whether prison authorities should be held vicariously liable for the acts of a negligent prisoner. The Court of Appeal reversed the finding of the first instance judge and held that the appellant was vicariously liable where a prisoner negligently injured a prison employee while working in the prison kitchen. The Court of Appeal reached that conclusion on the basis that the relationship between the prison and the prisoner, when undertaking that kind of activity, was *"akin to employment".*

The Facts

The respondent was the prison catering manager. On 10 September 2007, a delivery vehicle containing kitchen supplies arrived on the ground floor of the prison. Whilst unloading sacks of rice from the delivery vehicle, a prisoner dropped a sack, which burst open, spilling its contents. The respondent instructed the prisoners to stop unloading the sacks until the spillage was cleared and bent down on one knee to prop up the damaged sack of rice to prevent any more spillage. Ignoring the respondent's instruction, a second prisoner attempted to carry two sacks past the kneeling respondent. In doing so he lost his balance, struck his head on an adjacent wall, and dropped a sack onto the respondent's back, thereby causing her injury.

The law on vicarious liability

Historically, a relationship giving rise to vicarious liability was confined to employment: the principal was an employer, who would only be held vicariously liable in respect of torts committed by his employees *"in the course of their employment".* The law has moved on. The Supreme Court adopted the *'akin to employment'* test for the imposition of vicarious liability in *Various Claimants v Catholic Child Welfare Society*[2], building upon a line of authorities concerning sexual abuse of minors.

However, the Court of Appeal's judgment in Cox still represents a significant extension of the law of vicarious liability. No previous case has recognised vicarious liability on the part of the prison authorities for the acts of prisoner workers. The Court of Appeal extended vicarious liability into a context in which public authorities are providing essential public services for the protection of the public. Accordingly, the Supreme Court's judgment will be awaited by all civil practitioners and private law academics with interest but it raises the question: will the expansion of the law of vicarious liability continue, or will its way be blocked by a bag of rice?

Kate Grange and Stephen Kosmin appeared in the Supreme Court for the appellant.

1 The Court of Appeal's decision in the case is reported at [2014] EWCA Civ 132
2 [2013] 2 AC 1, [2012] UKSC 56

CAPACITY IN THE CONTEXT OF LITIGATION

Part 1: The appointment and roles of deputy and litigation friend

Simon Edwards

Introduction

The issue of capacity frequently arises where a claim is brought on behalf of someone who has suffered a traumatic brain injury. Consideration is given to the question of whether the claimant has the capacity to litigate and, separately, whether the claimant has the capacity to manage any award of damages that the court might order. In a substantial personal injury claim, the latter issue is no mere technicality as the award will usually need to make provision for Court of Protection costs and those of the appointment of a professional deputy. Frequently these heads alone exceed £200,000. A defendant may question whether or not a claimant lacks capacity in order to save money.

Starting point

The starting point for issues of capacity in civil litigation is CPR Part 21. Rule 21.2 provides that a *"protected party"* must have a litigation friend to conduct the proceedings on his behalf. A protected party means a party who lacks capacity to conduct the proceedings within the meaning of the Mental Capacity Act 2005. So far as any award is concerned, where a protected party is also a protected beneficiary, namely a person who lacks capacity to manage and control any money recovered by him or on his behalf or for his benefit in the proceedings (again within the meaning of the MCA 2005), then the provisions of PD21, s.10 apply. Those provisions require the appointment of a deputy where the sum exceeds £50,000 unless there is already a person having authority pursuant to a registered power of attorney.

Problems in practice

If there is a possibility that the opposing party lacks capacity and nothing is done about it, should it later turn out that the opposing party did lack capacity any settlement which was not approved by the court will not bind that party. Thus it is very much in the interests of all (lawyers included) to make sure that the issue is determined prior to settlement so that the chance of re-litigation and negligence actions can be avoided.

The rules do not mandate the appointment of a deputy when proceedings on behalf of a claimant who lacks capacity are contemplated. However, if the proceedings are likely to result in a substantial award of damages, then it is probably wise to seek the appointment of a deputy at an early stage in the proceedings. Indeed, if substantial interim payments are going to be sought it will be necessary for a deputy to be appointed to deal with those.

If a deputy is appointed before proceedings are started, then pursuant to CPR r.21.4(2) he has the right to be the litigation friend so long as he has power to conduct proceedings on the claimant's behalf. Frequently, the litigation friend will be a family member and the practice is growing for a joint appointment of a professional deputy and a family member.

The litigation friend, once appointed, would act as the claimant's statutory agent in the litigation, see *B v B*[3] at paras 15 and 30. Thus the litigation friend would be entitled to take all decisions that concerned the litigation process on behalf of the claimant (subject, where necessary, to the court's approval), but he has no authority outside that process. The deputy, or deputies, would be involved whenever a decision needed to be made on behalf of the claimant concerning the claimant's property or affairs, for example, the purchase of a property.

If the claimant is seeking a large interim payment to fund the purchase of a suitably adapted property, it will be necessary for the deputy to decide whether to do so on behalf of the claimant acting in the claimant's best interests and, so far as necessary, obtain the approval of the Court of Protection for the purchase. It would then be for the litigation friend to decide whether the application for an interim payment had reasonable prospects of success. It is possible, although unlikely, that there could be conflict between the views of the litigation friend and the deputy.

The chance of such conflict is by no means merely theoretical. It was illustrated vividly in the case of *Re SK*[4]. At issue was the type of rehabilitation regime that was appropriate for the claimant. The claimant's brother was the litigation friend in the personal injury action and

3 (2010) EWHC 543 (Fam)
4 (2012) EWHC 1990 (CoP)

he, supported by experts who had been instructed in the action, wanted his brother to have an intensive two year-long rehabilitation programme. Those actually treating the claimant, however, considered that he would not benefit from such a programme and his participation was not in his best interests. The issue came before the Court of Protection. The claimant was made a party to the Court of Protection proceedings and the Official Solicitor acted for him as his litigation friend in those proceedings. Thus, in two separate proceedings, the claimant had two different litigation friends. The Official Solicitor submitted to the Court of Protection that the claimant's best interests were served by a less intensive regime of rehabilitation.

The reported decision concerns the question of who was entitled to be heard in the Court of Protection. The result was that the claimant's brother was entitled to be joined in the Court of Protection proceedings simply as his brother, and therefore someone interested in his welfare, but the defendant in the personal injury proceedings, who also applied to be joined, was not entitled to be a party to the Court of Protection proceedings. In his judgment, Bodey J. (at para 48) remarked that the fact that the claimant had different litigation friends holding different views as to what was best for the claimant in different sets of proceedings had led to legal and practical difficulties and suggested that, where there were such parallel proceedings, it would be better, unless otherwise contraindicated, to have the same litigation friend acting in both. He did remark, however, that the claimant's brother could not, for reasons unrelated to the decision about rehabilitation, have been the claimant's litigation friend in the Court of Protection and that the Official Solicitor would be unlikely to accept such an appointment in the personal injury proceedings meaning that, at least in the factual circumstances of this particular case, it would not be possible to have the same litigation friend acting in both.

Often the professional deputy in such cases is a member of the firm of solicitors acting for the claimant. It might be unsatisfactory if such a person were also the claimant's litigation friend as, for example, there would be no outside scrutiny of the firm's actions within the litigation: it would be as if the claimant's firm of solicitors were instructing itself. That is not to take anything away from the independence of professional deputies in firms of solicitors even where the same firm acts for the patient in that patient's personal injury claim. It is simply to accept the reality of matters.

Part 2 of this Article which will address the determination of capacity in practice and other associated topics will appear in our Spring Newsletter.

ARTICLE

Striking out dishonest claims…or not

by James Todd

A few years ago, an article appeared in a legal journal entitled *'Look Out: I've got a power…But I am not going to use it.'*[5] The author's complaint was that the Supreme Court in *Summers v Fairclough Homes*[6] had not been robust enough in its decision as to the availability of the power to strike out an exaggerated or downright fraudulent personal injury claim as an abuse of process. The power existed, it was argued, and it should be used more liberally in order to provide the sort of disincentive that, all agree, should exist to the making of such claims. Restricting its use to exceptional cases was an unnecessary cop-out.

The point has also been made that the use of the power in clear cases at the interlocutory stage could save substantial costs and court time. In a speech to Exeter Law School in November 2013, Lord Clarke, who gave the judgment of the Supreme Court in *Summers*, referred to the use of the power at the *"comparatively early"* stage and said that he thought the correct approach would have to be left to evolve on a case by case basis. At the time, this looked like high level encouragement for the use of the power on an interlocutory basis.

Since *Summers* however, the strike-out jurisdiction has developed in a painfully slow fashion. A full review of that history can be found in an article in last year's Journal of Personal Injury Law[7]. To date, it has been restricted to claims where the 'genuine' value is low such that strike-

5 William Norris QC J.P.I.L 2012, 3, 169. See also 'Court protection from abuse of process – the means are there but not the will.' by Professor Adrian Zuckerman (2012) 31 CLQ, Issue 4, 377, where similar criticisms of the Supreme Court decision in *Summers* were made.

6 [2012] 1 WLR 2004

7 'Combating Fraudulent and Exaggerated Claims: A Review of Developments since the Supreme Court Decision in Summers v Fairclough Homes' J.P.I.L. 2014 Issue 3, 180 (James Todd, Sadie Crapper and David Spencer)

out has not really deprived the miscreant claimant of any significant 'genuine' claim. The last government provided a boost to the defence insurance industry's armoury by introducing s57 of the Criminal Justice and Courts Act 2015, where there is a presumption of dismissal of a personal injury claim where the claimant has acted in a fundamentally dishonest way. As yet, there have been no decisions on the section. This is not surprising, as the section only gives the power to the court where the claim form is issued on or after the date on which the section came into force (13 April 2015). We wait to see whether the lack of judicial enthusiasm for the exercise of the *Summers* power will similarly infect the operation of this section.

A recent case in Bristol County Court exemplifies the difficulty that many insurers are having in persuading judges to take a more proactive stance. Philip Charlesworth is a jobbing local builder who lives near Chippenham in Wiltshire. A few years ago he was involved in a minor road traffic accident in which he may have sustained a blow to his already arthritic knee. If Mr Charlesworth ever saw the news reports of the decision in *Summers*, he did not let them deter him from mounting an utterly dishonest claim. Shortly after the accident, citing a total inability to work on account of his loss of mobility, he stopped working, closed down his business (with its comfortable six figure turnover), ran his business bank account into overdraft and got on with making a claim for a full loss of earnings all the way through to retirement.

Except that the truth was shown to be somewhat different. The other driver's insurer was Zurich Insurance (also the insurer in *Summers*) and they probed and dug into every facet of Mr Charlesworth's life to discover that, in reality, he had continued working as a builder but on an 'off-the-books' basis. Several hours of surveillance were obtained featuring Mr Charlesworth doing all the work that one might expect of a local builder. The choicest part of the filming showed him operating a mini-digger for several hours on consecutive days while reconstructing a householder's drive, a task of a kind that he said several times in pleadings and witness statements that he simply could not do and had not done since the accident. Later investigation with local plant hire companies showed that the enterprising Mr Charlesworth had bought the materials for the job himself, including hiring the digger, and scrutiny of the statements for his personal bank accounts revealed that a large payment (about what one would pay for a job like this) was made into one of them a few days later. He was, to coin a phrase, bang to rights.

In November 2014, the fraud evidence having been compiled and served, Zurich made an interlocutory application to strike out the entirety of Mr Charlesworth's claim on the basis that it was plainly fraudulent. A day of court time was set aside, a 'greatest hits' DVD was prepared to enable the court to see the best parts of the surveillance quickly and Mr Charlesworth, still represented by Solicitors and Counsel at this stage, attended in order to argue that what was seen on the surveillance was not inconsistent with the pleaded and verified case being advanced on his behalf. The court however declined to deal with the matter on an interlocutory basis and directed that there should be a full trial. That trial did not come on for a further ten months, during which interval further substantial costs were spent on both sides. Shortly before trial, Mr Charlesworth's Solicitors came off the record and on what was to be the first day of trial, Mr Charlesworth attended and withdrew his claim, submitting to an order that he pay all of Zurich's costs (by now over £100,000) in the process.

Mr Charlesworth's claim was *par excellence* one where interlocutory strike-out would have achieved what the Supreme Court recognised in *Summers* to be the valuable aim of saving costs and precious court time. As it turns out, Mr Charlesworth (who can afford to pay the costs order against him and will certainly have to do so) would have been as much a beneficiary of that approach as Zurich Insurance and the taxpayer. Yet the court dealing with the application in 2014 did not feel comfortable enough to dispose of the claim in that way. Why not? The reason, it seems, is the judicial preference for allowing a claimant to have his or her full say at a full trial. This is understandable but, if similar reservations are allowed to prevail in cases where the evidence of fraud is similarly compelling, there will be little point in defendants pursuing interlocutory strike out applications

and the Supreme Court's aim that the power be used to achieve costs savings and avoid wasting the precious resources of the court will be lost. Perhaps the time has arrived for courts to be more open to allowing the jurisdiction to evolve as Lord Clarke suggested it might.

LIABILITY

Sadie Crapper

Court of Appeal considers contributory negligence in car vs pedestrian case: The Court of Appeal recently handed down judgment in the case of *Sabir v Osei-Kwabena*[8] where they were required to grapple with the correct apportionment of blame in a car vs pedestrian road traffic collision. At first instance, the claimant pedestrian, who would have been visible to the defendant driver for at least 2.6 seconds (whilst the car travelled 30 metres) when she was struck but who had misjudged the approach of the car and could have quickened her step, bore 25% of the responsibility for the damage. The Defendant, who was driving at the speed limit in a 30 mph area and had not seen the claimant before the accident because he failed to keep a proper look-out, appealed contending that the claimant's apportionment should increase to 50% as the dangerous situation which led to the collision was her decision to step into the road when she did.

In dismissing the appeal Tomlinson LJ reminded the parties that there are two aspects to apportioning liability between a claimant and defendant, namely the respective causative potency of what they have done, and their respective blameworthiness. He considered that the destructive capacity of a driven car, i.e. its potential to do much more damage to a person than a person can do to a car, was a feature to be considered in both aspects of the evaluation. Although the claimant made blameworthy errors by making a slight misjudgement by stepping out, and failing to pay close attention to the approach of the defendant's car, they did not in any real sense place the defendant in danger and he ought reasonably to have seen her in ample time to enable him to take his foot off the accelerator and avoid the collision.

Thus the Court of Appeal concluded with relative ease that the causal potency of the defendant's conduct was far greater than that of the claimant and the relative blameworthiness was stark: the claimant's misjudgement of her own safety was *"very substantially"* less blameworthy than the defendant's failure to keep a proper look out when driving at the maximum speed permitted in an area where he could expect pedestrians to cross the road.

Froom v Butcher revisited: Just before the summer break the Court of Appeal turned down the claimant's application for permission to appeal in the case of *Pearson v Anwar*[9] against a finding that he was 25% contributory negligent for his failure to wear a seatbelt. The facts of the case were tragic in the extreme: a young man full of life got into a taxi at the beginning of a night out but failed to put on his seatbelt. Within five minutes of the journey commencing, the taxi skidded on black ice and collided with a car travelling in the opposite direction. Both drivers escaped relatively unscathed but the claimant was thrown forward in his seat such that his head hit the A-pillar of the taxi, causing a fracture dislocation of the spine and instant tetraplegia.

HHJ Platts accepted that the claimant would have suffered a whiplash injury to his spine lasting around 6 months even if he had been restrained, which would usually attract only a 15% reduction for contributory negligence. However, HHJ Platts found that it was just and equitable that the claimant should bear the highest reduction postulated in *Froom v Butcher* of 25% because the whiplash injury he would have suffered was so qualitatively and quantitatively different in terms of nature and impact from the catastrophic injuries that in fact occurred.

This case is an excellent reminder that practitioners should not follow slavishly the guidelines in *Froom v Butcher* and in each case there needs to be a careful comparison of the injuries actually suffered and those that would have been sustained before decisions on contributory negligence are made.

Neil Block QC acted for the successful defendant in the case.

8 [2015] EWCA Civ 1213
9 Unreported, 14 October 2014, HHJ Platts(QB)

Duty of care owed to blind visitors: in *Pollock v Cahill*[10], a blind guest at a private home fell out of a second floor window in the middle of the night, suffering paraplegia and brain injuries. The precise circumstances of and reasons for the fall were not known and, the defendants argued, could not be known, so that blame and liability could not be established against the householder. They also argued that the event was too remote a possibility for the reasonable man (the householder) to have to take account of it. William Davis J disagreed. He found that the most likely sequence of events was that the claimant woke to go to the bathroom and became disoriented as he did so. The duty of care under s2 of the Occupiers' Liability Act 1957 required the occupier to have regard to any known vulnerability of the visitor. The defendants ought to have made sure that the window was closed or warned the claimant that it was open.

QUANTUM

Quintin Fraser and Sadie Crapper

Disability does not always mean adjusted multipliers: In July the Court of Appeal handed down their decision and what looks to be the final instalment of *Billett v MOD*[11]. I (Quintin) commented on the first instance decision of Andrew Edis QC (as he then was) and the prospect of an appeal from that first instance decision in two earlier editions of this newsletter. In the spring newsletter I wrote: *"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 man 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."*

In giving the only substantial judgment of the Court of Appeal, Jackson LJ refused the defendant's appeal against the finding that the claimant was disabled, but allowed the appeal against the use of an adjusted disabled multiplier. He rejected the use of the Ogden multipliers at all in a case in which the claimant, though disabled, had virtually no work-related hindrance from his disability and was likely to be sought after by employers in his new trade. The Court of Appeal instead found that this was a classic example of a case where a conventional *Smith v Manchester* award would be appropriate and substituted an award representing two years' loss of earnings.

The decision gives useful guidance, in particular on how "disability" should be analysed – the clear thrust of Jackson LJ's decision is that it should focus on what daily activities a claimant cannot do rather than what a claimant can do – and on when it will be appropriate to employ the traditional *Smith v Manchester* approach to compensate a claimant for a loss of earnings capacity rather than a multiplicand/multiplier approach relying on the reduction factors in Tables A to D of the Ogden Tables. For this second point Jackson LJ essentially deprecates the use of Tables A to D when a claimant is only on the outer fringes of the broad spectrum of disability and when the disability minimally affects their work.

The decision will no doubt be welcome news for insurers who have for some time been combating claims for loss of earnings which have appeared somewhat divorced from reality. The Court of Appeal bench in *Billett* were told that it was *"an important appeal"* as it was the first in which the Court of Appeal had considered the application of Tables A to D; and so it may yet prove.

Court of Appeal reaffirms the correct approach to additional needs for the already-injured claimant: In *Reaney v University Hospital of North Staffs NHS Trust*[12] the Court of Appeal were required to determine whether the defendant whose negligence had caused a T7 paraplegic to suffer pressure sores was required to pay for all of the claimant's care needs resulting from the pressure sores and their consequences, or for those needs less the needs that the claimant would have had but for the negligence.

At first instance Foskett J found that the defendant made the claimant's position materially and significantly worse than she would otherwise have been and that she was entitled to full compensation of *all* her care,

10 [2015] EWHC 2260 (QB)
11 [2015] EWCA Civ 773
12 [2015] EWCA Civ 1119

physiotherapy and accommodation costs. Facing a £2M+ future care bill the defendant, unsurprisingly, appealed.

In the event, the parties to the appeal agreed that if the defendant's negligence caused the claimant to have care and other needs which were substantially of the same kind as her pre-existing needs, then the damage caused by the negligence was the *additional* needs. On the other hand, if the needs caused by the negligence were qualitatively different from her pre-existing needs, then those needs were caused *in their entirety* by the negligence. As Foskett J did not make a finding that the claimant's post-accident care and other needs were qualitatively different, the appeal succeeded.

The practitioner may also find some interest in the *obiter* part of the judgment of the Master of the Rolls as he made clear that (a) whether a claimant can recover compensation for loss caused by another person is irrelevant to the question of whether the claimant has suffered loss as a result of the negligence of a defendant who has caused the loss and, to the extent that Foskett J thereby distinguished the decisions in *Performance Cars*[13], *Steel*[14] and *Baker*[15], he was wrong to do so; (b) the decision of Edwards-Stuart J in *Sklair v Haycock*[16] did not support the approach taken by Foskett J at first instance as, properly analysed, it was a decision based on causation in circumstances where the supervisory care the claimant in that case would have needed but for the accident was qualitatively different from the 24 hour personal support he needed after the defendant's negligence; and (c) as there was no doubt on the evidence about the claimant's medical condition before the accident or about the injuries caused by the defendant's negligence, this was not a case in which *Bailey v Ministry of Defence*[17] applied and the concept of material contribution had no part to play in resolving the case.

INTERNATIONAL

Colin Thomann

Contribution claims and the Athens Convention: In *South West Strategic Health Authority v Bay Island Voyages*[18] the Court of Appeal was called upon to consider two important unresolved questions concerning the scope and effect of the *Athens Convention Relating to the Carriage of Passengers and their Luggage at Sea.* The first was whether the Convention governed not merely claims by passengers against carriers, but also those brought by others for contribution. The second issue was whether Article 16 of the Convention, incorporating a two year limitation provision, had the effect of barring the passenger's remedy, or of extinguishing the right of action altogether.

The case concerned serious spinal injuries the claimant had received when on a work outing as a passenger on board a rigid inflatable boat on a one hour boat trip in the Bristol Channel on 28 August 2008. It was assumed, for the purposes of the appeal, that those injuries were caused by the fault or neglect of the carrier. The claim was brought against the claimant's employer three days before the third anniversary of the accident. The employer brought a Part 20 claim against the owners and operators of the inflatable boat as an additional party. It was common ground that the latter was a carrier for the purposes of the Convention. Both at first instance, and on appeal, the carrier had argued successfully that a contribution claim made more than two years after disembarkation of the passenger was limitation barred.

In rejecting the carrier's first argument that Article 16 applied directly to the contribution claim, Tomlinson LJ observed that it was necessary to read the Athens Convention as a whole. It dealt with claims by passengers against carriers, and nothing else. A contribution claim was properly characterised as "autonomous", and derived from an English statutory entitlement provided for under section 1 of the Civil Liability (Contribution) Act 1978.

13 Performance Cars Ltd v Abraham [1962] 1 Q.B. 33

14 Steel v Joy [2004] 1 W.L.R. 3002, [2004] EWCA Civ 576

15 Baker v Willoughby [1970] A.C. 467

16 [2009] EWHC 3328 (QB)

17 [2007] EWHC 2913 (QB) upheld by the Court of Appeal at [2009] 1 W.L.R. 1052 i.e. there was no need to modify the 'but for' test and consider whether the negligence had made a 'material contribution' to the claimant's condition

18 [2015] EWCA Civ 708

The carrier's second argument fared no better. Tomlinson LJ observed that the English text of Article 16(1) provided that an action for damages arising out of a passenger's death or personal injury *"shall be time-barred after a period of two years"*. Unless the Article was to be given a construction other than its natural meaning, the contention that it should be regarded as extinctive of the claim (and with it, a contribution claim) was *"forlorn"*.

The task of searching for a contrary international consensus was rendered more challenging by the failure of major maritime nations, including the USA, France, Italy and Australia, to accede to the Convention. It was nonetheless evident that both the French text, and the language used for incorporation of the Athens Convention into German domestic law was suggestive of a remedy barring effect only. The contribution claim therefore remained available two years after embarkation.

In allowing the Health Authority's appeal, the court of appeal has restored orthodoxy (see *Doherty* Accidents Abroad 1st edition, 2009, page 399) and provided welcome clarity for practitioners. By section 1(3) of the Civil Liability (Contribution) Act 1978 and Section 10 of the Limitation Act 1980 the applicable limitation period for a contribution claim will generally be two years from the date of judgment or settlement.

PROCEDURE

Romilly Cummerson

Challenging judicial criticism: In *MRH Solicitors (Claimant) v Manchester County Court (Defendant) & Apex Hire UK LTD & 5 Ors (Interested Parties)* [19], the Administrative Court found that a Recorder hearing a personal injury claim had been wrong to make findings of fraud against a firm of solicitors and two car hire firms where they were not parties to the claim, where allegations of fraud had not been pleaded against them and where they had been given no opportunity to rebut the allegations. In making that finding, the Administrative Court also took the opportunity to provide guidance as to the correct approach to be adopted by a third party wishing to challenge criticism contained within a judgment.

The proceedings arose out of a road traffic accident. The claimant driver, Mr Yousaf, alleged that he had been approaching a roundabout when the vehicle in front of him braked suddenly. He braked in time, but the car immediately behind his, driven by the first defendant, Ms Mason, did not. Mr Yousaf was represented by MRH Solicitors.

On the first day of the trial, Mr Yousaf substantially amended the amounts which he sought to recover in special damages. Claims for the cost of physiotherapy, the hire of a replacement car and for storage and recovery were all reduced or abandoned.

Ms Mason alleged that the accident had been staged for the purpose of making false insurance claims. A witness statement prepared by her solicitors (Keoghs) provided details of eleven similar recent collisions that had taken place over the course of a year. In each case one or more of the claimants had been represented by MRH and replacement vehicles had been hired from the same companies (Apex and Pennington). MRH and the hire companies were not parties to the claim and no allegations of fraud had been pleaded against them. The particulars of claim expressly disavowed allegations of fraud against them and Ms Mason's solicitor reiterated that position under cross examination. Nevertheless, when he came to give an ex tempore judgment at the

19 [2015] EWHC 1795 (Admin)

conclusion of the trial, the Recorder found that MRH and the hire companies were party to fraud. In one particularly colourful passage, he described MRH as being, *"elbows deep in a fraudulent claim. Their intention is to profit their referring clients, Apex and Pennington, the credit hirers and storage companies, the only ones who are going to gain out of the storage and credit hire of these two fairly old ("F" registered) vehicles to this claimant."* He went on to say, *"This claim is fraudulent. In my view it is run, primarily, for the advantage of the intermediaries and the car hire and storage company supported by an utterly unarguable schedule which denotes, in my view, more than incompetence but actual dishonesty on the part of MRH Solicitors."*

Shortly after the hearing, Keoghs issued an application to join the hire companies as parties to the proceedings for the purposes of costs. MRH then contacted the Recorder, via solicitors, and asked him not to finalise the transcript of his judgment until they had been given an opportunity to make submissions as to why he should amend the transcript to remove findings of fraud. No formal response was received and the Recorder subsequently approved the transcript without those submissions. When judgment was handed down, it became apparent that the Recorder took the view that he did not have the power to amend the judgment.

MRH and Apex and Pennington issued applications for judicial review to excise or quash those sections of the judgement that recorded findings of fraud against them. The Administrative Court held that: (1) the County Court is one of the inferior courts amenable to judicial review on an application under the Senior Courts Act 1981 s.31. However, the correct course of action for a third party believing itself to have been unfairly criticised in a judgment was to apply to be joined as a party under part 19.2 CPR. If the Judge declined to amend the judgment, the third party could then appeal that decision; (2) it was common practice for a judge who gives an *ex tempore* judgment to refine it when approving a transcript. Ordinarily this would be limited to *"tidying up the language"*, but in principle there was no reason why it could not include more significant changes. If the order of the court consequent on the judgment has been sealed, the changes cannot usually alter that order. Otherwise, it was a matter for the judge's discretion as to what changes are appropriate; (3) although the claimants in this case had not made use of the procedural route to appeal identified by the court, in light of the serious nature of the findings made and the particularly egregious unfair treatment alleged, on this occasion it would not be right to close the door to a judicial review; (4) the court could well understand how the Recorder's suspicions were aroused, but he was not entitled to make a conclusive finding of dishonesty or fraud against MRH, Apex or Pennington. Nicol J stated that, *"in the absence of good reason a judge ought to be extremely cautious before making conclusive findings of fraud unless the person concerned has at least had the opportunity to give evidence to rebut the allegations. This is a matter of elementary fairness"*; (5) it was not open to the court, on an application for judicial review, to rewrite the Recorder's judgment to remove the findings of fraud and dishonesty. They would give judgment to say that the Recorder had not been entitled to make the findings against the claimants and that they should be treated as not having such findings made against them; (6) in spite of the seriousness of the complaint, there would be no order for costs because the claimants in the judicial review could have dealt with their concerns in the County Court in a way which would have avoided the need for the proceedings.

An update on Hayward v Zurich Insurance: In the July newsletter we reported the Court of Appeal's decision in the case of *Hayward v Zurich Insurance Plc*[20], in which the first instance decision to set aside a settlement for deceit was overturned. The Court of Appeal held that Zurich was not entitled to have the agreement set aside, despite the fact that there was new evidence to prove deceit, because the misrepresentations relied upon had formed part of the defendant's case before the claim was settled. It seems there may yet be one more twist in this long-running claim. On 13th August 2015 the Supreme Court announced that it had granted Zurich Insurance permission to appeal. We will bring you further updates when the appeal is heard.

20 [2015] EWCA Civ 327; [2015] C.P.Rep.30

No strike out for delay if a fair trial remains possible: In *Accident Exchange Ltd v Nathan George-Broom & Ors*[21] the Divisional Court reiterated the importance of the availability of a fair trial when considering a strike out application.

AEL, the applicant, was a car hire company that provided replacement vehicles to those involved in accidents. The respondents were rate surveyors, employed by a company (Autofocus) that gave expert evidence on behalf of defendant insurers seeking to reduce such claims. AEL brought contempt proceedings against the respondents on the basis that the checks they claimed to rely on in court to establish spot rates had not in fact been carried out. The allegedly dishonest evidence was thought to have affected something in the region of 30,000 cases, 3,600 of which involved AEL.

AEL was granted permission to bring proceedings for contempt in February 2012. The matter had subsequently been referred to the City of London Police, but they had concluded that the allegations could not be made out and there was no realistic prospect of a criminal prosecution.

The respondents applied to strike out the claim on a number of bases, including:

(i) that the evidence was weak/the proceedings had no real prospect of success;

(ii) that the proceedings were so delayed as to make a fair trial impossible;

(iii) that the proceedings were not in the public interest, and were disproportionate and abusive as being motivated by the private interests of AEL.

Numerous criticisms were made regarding the strength of AEL's evidence and it was submitted that broader evidence of the more general goings on at Autofocus should not be admissible. The court rejected that submission, with Laws LJ expressing the view that it was *"wholly unrealistic and contrary to principle"*. For the purposes of PD81, para 16, it was not sufficient to point to aspects of the evidence that were of doubtful weight/strength. There was considerable force in AEL's submission that the court must consider matters as a whole and not look at each allegation in isolation. This was not remotely a case in which the contempt claim should be struck out for insufficiency of evidence.

With regard to delay, it was asserted that relevant telephone records had been deleted by the holder of the records, although it was not submitted that the proceedings needed to have been heard before those records were deleted in order for there to be a fair trial. Laws LJ commented that *"clearly no such submission could be made"*. The processes of investigation and preparation of issues to be litigated in a case of any complexity would inevitably take some time. Delay could not support a strike-out unless the respondents could demonstrate that a fair trial was no longer possible. It was not sufficient to demonstrate that the passage of time had caused some difficulties for a party.

On the question of abuse/proportionality, the court rejected the argument that, on the basis of the decision of the police/CPS not to pursue a criminal prosecution, the court ought to conclude that there was insufficient public interest in the continuance of the proceedings and that they would represent a disproportionate use of judicial resources. Laws LJ noted that the court and the prosecuting authorities serve a different purpose and apply different evidential tests.

The application for strike out the claims was, therefore, dismissed.

21 [2015] EWHC (Admin)

COSTS

Katie Scott

Civil costs regime compatible with article 6 ECHR: The Supreme Court handed down judgment in *Coventry v Lawrence*[22] in July. Regular readers of the newsletter may recall that the defendant had been ordered to pay 60% of the claimant's costs. This required them to pay 60% of the claimant's success fee and ATE premium. The defendant argued that the costs regime introduced by the Access to Justice Act 1999 infringed their article 6 and protocol 1 article 1 rights under the ECHR.

The case was heard by seven judges, five of whom determined that the regime was not incompatible with those ECHR rights. Instead, they concluded that the regime was a rational and coherent scheme for providing access to justice to those to whom it would probably otherwise have been denied, and it was subject to sufficient safeguards, such as the requirement for costs to be proportionate.

Part 36 offers: The case of *Dutton v Minards*[23] was determined in July 2015 by the court of appeal. The defendant had (deliberately) accepted the claimant's CPR 36 offer one minute out of time so as to ensure that the automatic costs consequences set out in CPR 36.10 did not come into play. The court therefore had to determine (on an application from the defendant) whether it was just for the presumption that the claimant recover his costs to apply (see CPR 36.10(5)). The defendant's argument was that it would be unjust for them to pay all the costs of the proceedings because they had made a higher part 36 offer some 15 months earlier (which the court found had never been withdrawn) which the claimant should have accepted.

At first instance the judge had held that at the time that the earlier offer was made by the defendant, and in the period for accepting it, the claimants were not able to evaluate the offer realistically as a result of the defendant's reluctance to provide information on the value of their counter claim. The Court of Appeal upheld this exercise of the court's discretion (calling it a *"value judgement"*). The Court of Appeal went on to find that the claimant had, in a way, beaten the defendant's earlier Part 36 offer as although the claimant's offer (accepted by the defendant) meant they recovered a lower sum in damages, if the default costs consequences in Part 36.10(5) applied, they were in a much more advantageous position financially. Further, the Court held that the primary focus of Part 36.10(5) insofar as it enables a court to dis-apply the presumption that the claimant recover its costs, is the costs incurred since the expiry of the relevant period. In this case the defendant was seeking to obtain advantage from the late acceptance of a Part 36 offer and, moreover, an advantage that related to a period before the relevant period even began. The defendant's appeal was therefore dismissed.

Fixed recoverable costs scheme applies to multi-track claims: In *Qader & Ors v Esure Services Ltd*[24] and on appeal from a decision of a District Judge, HHJ David Grant found that the fixed recoverable costs scheme in Section IIIA of Part 45 applies whenever a claim is started under the Road Traffic Accident Protocol by operation of CPR rule 45.29A even if the claim is allocated to the multi-track. Thus the only costs which could be allowed are the extremely restricted costs provided for in the Tables in Section IIIA unless the court is satisfied that there are exceptional circumstances making it appropriate for the court to consider a claim for a greater amount: see r.45.29J. As similar wording is used in respect to claims under the employer's liability and public liability protocol then the same reasoning would apply.

This decision could have significant ramifications for the current practice of claimant solicitors who seem to put all of their claims (regardless of value) through the claims notification process in the protocol to try and get an early admission of liability. All litigators will need to check their current caseload to determine whether this decision affects their files and watch this space for the outcome of the appeal to the Court of Appeal which has already been lodged.

22 [2015] UKSC 50
23 [2015] EWCA Civ 984
24 Unreported, TCC, 15 October 2015

AND IN OTHER NEWS... There have been a number of first instance county court decisions on qualified one-way costs shifting or QOCS. The only one of note is the case of *Casseldine v Diocese of Llandaff Board for Social Responsibility (A Charity)*[25] determined by DJ Phillips (the regional costs judge) in the Cardiff County Court. He determined a dispute as to whether QOCS applied where (a) the claimant had entered into a pre-commencement CFA with a set of solicitors who had then terminated the CFA (by which termination the solicitors gave up any right to claim additional liabilities under that agreement) prior to issuing proceedings, and (b) had then entered into a second CFA with different solicitors post-LASPO pursuant to which proceedings were issued and costs incurred. The Court held that as the success fee under the first CFA was never payable by the claimant in the proceedings (so never recoverable from the defendant), the first CFA did not meet the definition of a pre-commencement CFA set out in CPR 48.2. The result of this finding was that the claimant had the protection of QOCS. It remains to be seen whether other judges faced with similar facts will be persuaded that this is the correct analysis of the rules.

There has been also been a first instance decision on **what amounts to misconduct within the meaning of CPR 44.11** which we mention here because such decisions are so thin on the ground. DJ Griffiths in the case of *Kerins v Heart of England NHS Foundation Trust*[26] found that the deliberate failure to disclose the existence of relevant BTE insurance and a second CFA during detailed assessment proceedings amounted to misconduct and disallowed 50% of the claimant's costs.

The decision of DJ Lumb in *A & Anor v Royal Mail Group*[27] on the **recovery of additional liabilities from the damages of minors** is intended to give guidance in this area given the lack of higher authority. This low value (portal) claim came before the court on an infant approval. The court approved the agreed figures damages for both claimants and the defendant agreed to pay fixed costs. The court then had to consider (on a summary assessment) whether to approve the deduction of (a) 100% of the success fee and (ii) an ATE premium from the minor claimants' damages. The court ultimately concluded that if the solicitor wished to pursue the deductions from damages they would need to apply for detailed assessment. The court however also made a number of observations and comments on the deduction application which, while obiter, have wider application:

(i) The solicitors had not carried out a risk assessment before setting the success fee at 100%. The judge held that given the terms of PD 11.2 and 11.3 of CPR 21 it is likely that such a risk assessment is at least highly desirable and possibly required, to justify a reduction from a minor's damages.

(ii) The prospects of success in this case were high. The judge held therefore that on a detailed assessment he would be very unlikely to be persuaded that a 100% success fee was reasonable.

(iii) In any event the solicitors had failed to quantify the costs owed to them by the litigation friend so the success fee could not be quantified. There could be no assumption that it would exceed 25% of general damages and so be capped at that.

(iv) A competent solicitor charging a success fee should advise a litigation friend that many other solicitors would do the case without charging a success fee.

(v) The solicitor had not properly advised the litigation friend about the additional liabilities and it was not reasonable given that QOCS applied, to incur the costs of ATE insurance.

Master Rowley in the SCCO has also handed down two decisions on **the reasonableness of a claimant moving from a public funding certificate to a CFA** with the result that the defendant is met with a claim for additional liabilities (comprising a success fee and an ATE

25 Unreported 3 July 2015
26 Unreported 31 July 2105
27 [2015] EW Misc B24 (CC) (14 August 2015)

premium). The first *Hyde v Milton Keynes Hospital NHS Foundation Trust*[28] establishes that where a claimant had reached the limit of her funding certificate (the Legal Aid Agency having refused to extend it) she could establish a discharge of that certificate by conduct, by entering into a CFA (the claimant having failed to make a request of the LAA to discharge the certificate). The notification by way of N251 to the defendant that a CFA had been entered in to was sufficient notification that the claimant no longer had costs protection.

The second decision, *Kai Surrey v Barnet & Chase Farm Hospitals NHS Trust*,[29] is one in which Master Rowley found that the decision to discharge the claimant's legal aid certificate in favour of a CFA and ATE premium (thus incurring over £109,000 in additional liabilities) was not a reasonable one. This was largely because the solicitor's advice to the claimant about the post-LASPO landscape was not sufficient, thus it was not possible to say that the claimant made a reasonable choice to change funding arrangements. For this reason, the additional liabilities were disallowed.

And finally practitioners should be aware of the decision of *BP v Cardiff & Vale University Local Health Board*[30] a decision of Master Gordon Saker that in any case involving proportionality it is *"convenient and necessary"* for the bill to be split into two parts to distinguish between work carried out before and after 1 April 2013. This is to reflect the fact that the new post-Jackson test on proportionality is a different test to the old one.

28 Unreported 1.7.15
29 Unreported 10.8.15
30 [2015] EWHC B13 (Costs) (Sen Cts Costs Office)

CONTRIBUTORS

William Norris QC

william.norris@39essex.com

William Norris QC is a well-known expert in the field of personal injury and product liability. He is a past chairman of the Personal Injuries Bar Association, lectured to the JSB on damages for many years and is the current Editor of Kemp and Kemp. To view full CV click here.

Simon Edwards

simon.edwards@39essex.com

Simon has extensive experience of all aspects of personal injury work, including asbestos related claims, serious brain injury cases and complex loss of earnings claims for the self-employed. On the personal injury front he has acted for defendants in VWF cases, stress cases and accident cases. Recent cases include acting for a severely brain damaged child, one of the issues was whether compensation should be made through periodical payments or a lump sum and whether it should be indexed to average earnings or RPI. 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.

Romilly Cummerson

romilly.cummerson@39essex.com

Romilly is an established insurance practitioner, specialising in clinical negligence, personal injury, and related insurance issues. She has developed an extensive practice acting for both claimants and defendants in all types of injury-related litigation, including professional indemnity claims arising out of the negligent handling of injury litigation. To view full CV click here.

Colin Thomann

colin.thomann@39essex.com

Colin has a wide practice spanning personal injury law and European law. He is a co-author of Accidents Abroad – international personal injury claims. He has extensive experience of acting for the MoD in actions against British troops stationed in Iraq, and is a member of the Attorney General's A Panel of Counsel. Colin has a particular interest in holiday claims, and acted as Junior Counsel in the Court of Appeal and Grand Chamber in *Owusu v Jackson and Horizon Holidays Case C-281/02,* (whether a PI action arising from a Jamaican holiday rental was caught by the Brussels Convention or Regulation EC 44/2001). Previously, he completed a stage at the European Court of Human Rights. He is bilingual in English and German.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.

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.

Stephen Kosmin

stephen.kosmin@39essex.com

Stephen is experienced in civil liability disputes, representing both claimants and defendants. He has recently appeared in the Supreme Court in *Cox v Ministry of Justice,* and has been instructed for the Government in the *Kenyan Emergency Group Litigation.* Stephen also assisted in *Fairclough Homes v Summers.* To view full CV click here.

Chief Executive and Director of Clerking: David Barnes
Senior Clerks: Alastair Davidson and Michael Kaplan
Practice Manager: Ben Sundborg

clerks@39essex.com · 39essex.com

LONDON
81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER
82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE
Maxwell Chambers,
32 Maxwell Road, #02-16
Singapore 069115
Tel: +(65) 6634 1336

KUALA LUMPUR
#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur, Malaysia
Tel: +(60)32 271 1085