



The Court of Protection is a body whose work overlaps with the world of the personal injury lawyer, but is still regarded by many as something of a terra incognita. In this edition, we are delighted to dispel some of the ignorance by including a piece by Martin Terrell on the role personal injury trusts may or may not play in cases in which the Court of Protection is involved. Martin is a partner at Thomson Snell & Passmore with great experience of the principles and practice of the Court of Protection, which he has been kind enough to share on a question of real practical importance for personal injury practitioners. 39 Essex Street has a number of members who specialise in Court of Protection work and who publish a regular newsletter which has been very well received. It makes available material which may be difficult to access otherwise. For previous editions, go to <http://www.39essex.com/newsletters/>. If you would like to be added to the email list for future editions to receive them as they come out, please email [marketing@39essex.com](mailto:marketing@39essex.com).

The edition also contains a discussion of the glut of recent cases in which personal injury claimants who have lied in pursuance of their claims have subsequently been subject to the contempt of court jurisdiction. Interestingly, they do not arise from entirely fabricated cases but from cases in which claimants have suffered a genuine injury and then lied to bolster the damages. The costs section looks at the rule change and latest cases on CPR part 36, where Jackson LJ is again making his mark. We also include our usual summary and analysis of the most important recent cases grouped under the headings of liability, quantum, procedure, and international. Do contact us with feedback.

### Personal Injury Trusts and the Court of Protection – Martin Terrell

Where a person lacks capacity to manage property and affairs the usual process is for the Court of Protection to appoint a deputy. In some cases however, there is an argument that a person's estate can be dealt with more effectively through the creation of a trust. Trusts are often created for

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claimants in personal injury cases to protect an award from being treated as capital when assessing entitlement to means-tested benefits. Prior to the Mental Capacity Act 2005 coming into force such trusts were often created by the Court of Protection for persons who lacked capacity, often on the grounds that a trust would be cheaper and more flexible to administer compared to a receivership.

Since the new Act came into force, there has been some uncertainty as to what the approach of the Court of Protection should be on an application. This has now been considered with great thoroughness by HH Judge Hazel Marshall QC in the case of *Re HM (SM v HM)*.<sup>1</sup> The case was heard by Judge Marshall QC on an application for a reconsideration under rule 89 Court of Protection Rules. The case originated in an application for a personal injury award to be placed in trust. Liability was limited on causation and therefore there was only partial recovery. It was contended by the applicant that a trust, with HM's mother and a solicitor acting as trustees, would be

<sup>1</sup> Court of Protection, Case No 11875043/01, 4 November 2011.



cheaper in the long run as being in the best interests of HM. The application was refused by District Judge Gordon Ashton whose decision recorded the grounds on which a trust would not be in HM's best interests as follows:

- 1) The jurisdiction of the Court of Protection has been established by statute specifically for managing and administering the financial affairs of persons who lack mental capacity to do so for themselves;
- 2) The procedures of the Court of Protection and role of the Public Guardian are for the benefit of the incapacitated person and provide safeguards that Parliament has deemed necessary;
- 3) There would not necessarily be a significant reduction in overall costs in the event of a Personal Injury Trust and the involvement of the Court of Protection would be required in any event upon a change of trustees;
- 4) Any overall financial savings that may be achieved would not justify a departure from the statutory jurisdiction;
- 5) There would be less supervision and diminished protection if [HM]'s funds were placed in a personal injury trust;
- 6) Any future intervention would potentially involve a Chancery Court as well as the Court of Protection and would in consequence be more protracted and expensive;
- 7) The principal benefit of a personal injury trust, namely ring-fencing from means-testing, is likely to be available if the fund is retained in the Court of Protection.

Judge Marshall QC received representations from the Official Solicitor, who supported the original decision, as well as from solicitors specialising in both deputyships and private trusts. She concluded that while every such application had to be considered on its merits, the facts of this case would allow a trust to be created. The judge identified three factors, "without which I would not have been prepared to authorise the creation of the relevant settlement" (at para 172). These were:

- 1) The administration of a trust, based on the evidence in this case, would be cheaper than a deputyship (there would for instance be no security bond premium or Public Guardian supervision fee);
- 2) HM's mother was "a competent, forceful, well-educated and responsible person" (para 169) and her presence as a trustee would provide a

means of monitoring legal costs (in the absence of the procedure for detailed assessment required by a deputy); and

- 3) The proposed professional trustee, had agreed that his firm's costs would be limited to the guideline rates that would be allowed on detailed assessment.

The difficulty with this case is that it was decided on its very particular facts and despite the decision to approve the creation of a trust, it should not be seen as a green light for trusts to be created as a matter of course where there is a personal injury award. A party proposing a trust must complete a detailed analysis of the costs and benefits of a trust compared to a deputyship and show that the former will be more cost effective without prejudicing the safety of the trust assets. Evidence would need to be produced of the professional trustee's charges and commitment to a charging policy as well as to the lay trustee's competence. The Official Solicitor will need to be instructed and there is no guarantee the Court will agree. This process alone will add risk and cost to any application and will deter all but the most determined (and well founded) applications.

## The developing jurisdiction of contempt in personal injury litigation – Sadie Crapper

In the last three years the contempt jurisdiction has been increasingly relied upon by insurance companies in a lonely war against fraudulent personal injury claimants and their witnesses. Recently there have been three interesting cases in which such contemnors have successfully been prosecuted.

The first of the trio is *Nield v Loveday*.<sup>2</sup> Sir Anthony May and Keith J gave judgment in this case on 13 July 2011. This was a classic story of the injured claimant wholly misrepresenting his continued injuries such that following disclosure of surveillance evidence which gave the lie to his account, he accepted an offer of £1,850 for damages plus a £1,500 contribution to his costs which was to be set off against the defendant's £40,000 cost bill. Whilst Mrs Loveday admitted her wrongdoing, Mr Loveday continued to deny that he was in contempt of court all the way to the Divisional Court. He was found guilty of contempt and sentenced to 9 months' imprisonment. The case

<sup>2</sup> [2011] EWHC 2324 (Admin)



became instantly newsworthy when the Sir Anthony May said the following on sentencing:

*“..telling deliberate lies in court proceedings undermines the fabric of justice, which itself is part of the fabric of society....we do take account in sending you to immediate prison today, that it is the court’s direct experience that fraudulent insurance claims of this kind in road traffic cases or personal injury cases are endemic.”*

It would be difficult to find a clearer exposition of the import of the fraudsters’ actions or of the problem now facing insurance companies when dealing with personal injury cases.

In the case of *Brighton & Hove Bus & Coach Co Ltd v Brooks*,<sup>3</sup> (judgment given on 14 October 2011 after a five day hearing) the respondents to the contempt application were the husband and two daughters of a claimant who had suffered a severe brain injury in a road traffic accident for which the defendant was 50% responsible. A preliminary schedule made claims for care and case management in excess of £1.4 million and it was likely the claim would reach a value of several million pounds in total. All three respondents had given accounts to medical experts and in witness statements which supported the level of disability contended for in the claim. However, surveillance carried out by the applicant’s insurer showed, amongst other things, the claimant, who supposedly could not walk without help, spending up to three hours on her feet without walking aids and, with her family, whiling away the time before an appointment with a medical expert instructed by the defendant wandering unaided around the shops in London before retrieving a zimmer frame from a car which the claimant then used to go and see the expert in Harley Street. After the surveillance evidence was disclosed and in the days before trial, the claimant accepted a pre-issue Part 36 offer in the net sum of £40,000. Both the applicant’s case that the whole personal injury claim was grossly exaggerated and claims based on false witness statements failed (and with it the application against one of the daughters) but the Divisional Court (Richards LJ and Davies J) found the husband and older daughter had made false statements and representations about the claimant’s mobility to medical experts and were therefore in contempt of court. In the *South Wales Fire and Rescue Service v Smith* case,<sup>4</sup>

Moses LJ said:

*“Those who make false claims if caught should expect to go to prison. There is no other way to underline the gravity of the conduct. There is no other way to deter those who may be tempted to make such claims, and there is no other way to improve the administration of justice”*,

However, in the *Brooks* case, neither contemnor was sent to prison. Instead, they were given suspended sentences.

The final case of the three is *Lane v Shah*<sup>5</sup> which came before a Divisional Court consisting of Laws LJ and Simon J in October 2011. The claimant’s personal injury claim had been advanced on the basis that she was incapable of returning to work and had high care needs but surveillance evidence showed that she was, in fact, working full time. Her personal injury claim was ultimately settled at £10,000. Contempt proceedings followed against the claimant and her husband and their daughter who had provided supporting witness statements. All three respondents were sentenced to imprisonment (the claimant to 6 months; the husband and daughter to 3 months each). When giving judgment Laws LJ said this: *“It has been stated and repeated in the cases that this species of contempt is a public wrong and needs to be recognised and published as such. Corrupting the stream of public justice is generally more poisonous than the mere telling of a lie by one man to another. Many would think that the litigant who dishonestly perverts the process of litigation should recover nothing through the courts, even if otherwise her case has justice. There is much to be said for that point of view.”*

Given the comments of Sir Anthony May and Laws LJ there can be little doubt that the Courts are increasingly concerned with the number of fraudsters who appear before them. Whilst the weapon of contempt proceedings is a useful tool to have in the armoury, it is a blunt tool. The applicant (usually insurer) faces the costs risk of bringing the proceedings even though the contempt is a public wrong; it is highly unlikely that the contemnors will have sufficient funds to meet any costs order made against them; the two-stage nature of contempt proceedings (permission hearing followed by substantive hearing) and the necessity for contempt hearings to be before the Divisional Court lead inexorably to delay which was, in the case of *South*

<sup>3</sup> [2011] EWHC 2054 (Admin)

<sup>4</sup> [2011] EWHC 1749 (Admin)

<sup>5</sup> [2011] EWHC 2962 (Admin)



*Wales Fire and Rescue Service v Smith*, the sole basis on which the Defendant avoided an immediate sentence of imprisonment.

Practitioners will therefore look out for the case of *Summers v. Fairclough Homes Limited*<sup>6</sup> which is listed for hearing before the Supreme Court in April 2012. The defendant will seek to persuade the Supreme Court that the courts have, and should in the right case exercise, the power to strike out entirely a personal injury claim which is found to be largely or substantially fraudulent. We shall report with interest when the decision is given.

## Liability – Emily Formby and Caroline Allen

**Test for breach of duty in mesothelioma cases** In *Williams v University of Birmingham*,<sup>7</sup> the Court of Appeal confirmed that the correct test for breach of duty in a mesothelioma case was not whether the defendant had taken reasonable measures to ensure that the claimant or victim was not exposed to a material increase in the risk of mesothelioma, as the trial judge had held, but that the duty was to take reasonable care, including measures if necessary to ensure that a person was not exposed to a foreseeable risk of asbestos related injury. There was nothing in the relevant authorities (*Fairchild* and *Sienkiewicz*) to indicate that the breach of duty test had been altered in mesothelioma cases, and the trial judge had simply applied the wrong test.

The claimant's exposure to asbestos had taken place in 1974 when he had carried out experiments in a tunnel underneath university buildings as part of his degree course. The tunnel contained central heating pipes which were lagged with asbestos lagging. Following *Baker v Quantum Clothing Group Ltd*,<sup>8</sup> the question of what the defendant ought reasonably to have foreseen about the consequences of any exposure to asbestos fibres in the course of the experiments in the tunnel and the reasonable conduct that the defendant ought then to have adopted had to be judged by reference to the state of knowledge and practice as at 1974. Given the limited level of exposure to asbestos fibres that had been found by the trial judge, it had not been

shown by the claimant that on the state of knowledge as at 1974, the defendant ought reasonably to have foreseen that he would be exposed to an unacceptable risk of asbestos related injury. When the correct test for breach of duty was applied, the claimant's claim could not succeed on the facts before the court.

**Precise injury mechanism need not be foreseeable** In *Hadlow v Peterborough City Council*<sup>9</sup> the Court of Appeal upheld the High Court's ruling that, although a teacher who sustained personal injury as the result of the defendant local authority's breach of duty had not been injured in the manner most likely, her injuries were still foreseeable and the judge had been right to award damages for them. The claimant was a teacher in a secure unit. There was a rule against leaving a teacher alone with more than two students. The rule was directed to the risk of harm to the teacher from aggressive behaviour by the students. The claimant was wrongly left alone with some students. In hurrying to get assistance, she tripped and fell. The court followed a line of authorities cited with approval in *Robb v Salamis (M & I) Ltd*<sup>10</sup> in emphasising that it is not necessary to postulate foreseeability of the precise chain of circumstances which lead up to an accident and that too great a degree of precision in the test of foreseeability is not to be expected in circumstances where a risk of injury has been created and there a sufficient connection between that risk and an injured party's accident.

**Foreseeability of harm unnecessary in harassment action** *Jones v Ruth*<sup>11</sup> is concerned with whether foreseeability of harm is a necessary ingredient for recovery of damages for personal injury in a claim for harassment pursuant to the Protection from Harassment Act 1997.

Ms Jones and Ms Lovegrove were subjected to years of nuisance and trespass when the Ruth family carried out extensive and intrusive works to their properties. Life at 105 Lower Thrift Street was made a misery by the noisy and lengthy works and the attitude of Mr Ruth to any complaints raised by the lady neighbours. The judge at first instance, HH Judge Wilcox, found that the building works could and should have been completed within a year and that continued work over a four year period caused

<sup>6</sup> For the decision of the Court of Appeal, see [2010] EWCA Civ 1300.

<sup>7</sup> [2011] EWCA Civ 1242.

<sup>8</sup> [2011] UKSC 17, [2011] 1 W.L.R. 1003.

<sup>9</sup> [2011] EWCA Civ 1329.

<sup>10</sup> [2006] UKHL 56, [2007] I.C.R. 175.

<sup>11</sup> [2011] EWCA Civ 804.



the claimants serious loss of amenity in their enjoyment of 105. He held that there had been nuisance and trespass and that damage had been caused to the structure of 105 due to the manner in which the works were carried out and the removal of a load bearing cross wall. In addition to the actual physical problems caused by the works, the judge found that when required to make good the damage, Mr Ruth acted with bad grace and the quality of repair work was inept. From these findings of nuisance damages were awarded for loss of amenity and enjoyment in the sum of £30,000 and a further sum of £45,000 for the value by which 103 had been enhanced by stealing support from 105 for its extension by way of the unabated nuisance.

The claimants also alleged that they had suffered harassment at the hands of the defendants. Ms Jones sought damages for personal injury based on negligence and harassment. She was at home from June 2002 and witnessed the works as a consequence of which she suffered psychiatric injury and somatoform injury in that her psychological distress manifested itself in physical symptoms of back pain. Her harassment claim relied on the way in which the defendants had behaved towards her during the building work and their aggressive and intimidatory conduct to the claimants. They also threw notes containing derogatory comments and offensive and threatening remarks about lesbians into the garden of the claimants.

The judge found that the defendants had conducted a campaign of harassment against Ms Jones and awarded her £6,000 for harassment but did not in terms award any damages for the personal injury and financial loss which she alleged had been caused by the acts of harassment. The appeal turned on whether foreseeability of harm by way of personal injury was a necessary element of a claim for personal injury based on harassment. Although Patten LJ, giving the only reasoned judgment, referred to both *Majrowski v Guy's and St. Thomas' NHS Trust*<sup>12</sup> and *Thomas v News Group Newspapers Ltd*<sup>13</sup> neither was directly on point. In *Majrowski* Lord Nicholls was simply concerned to demonstrate the ordinary principles such as that of causation were in operation in harassment claims and there was nothing to exclude the doctrine of

vicarious liability which, as he went on to point out, can exist in cases of intentional torts such as assault. In *Thomas* the issue was what was included within the concept of harassment and the reference to actions which foreseeably occurred has to be read in that context. In *Thomas* the publication of articles in a newspaper describing how a "black clerk" had complained about the allegedly racist comments of two policemen was said to have caused the claimant to receive racist hate mail and the Court of Appeal had to consider the type of conduct which had to be proved to bring the case within the statute.

Patten LJ was not persuaded that foreseeability of the injury or loss sustained by a claimant in a case of harassment is an essential element in the cause of action. Taking the words of the 1997 Act as the starting point, conduct of the kind described in s.1 is actionable under s.3 in respect of anxiety or injury caused by the harassment and any financial loss resulting from the harassment. There is nothing in the statutory language to import an additional requirement of foreseeability. Nor is foreseeability of damages the gist of the tort. This is a tort arising from statute, not a creature of the common law, and so is defined by that statute rather than long established tortious common law principles. There is nothing in the nature of the statutory cause of action which calls for further qualification in order to give effect to the obvious policy objectives of the statute.

Accordingly the court of appeal allowed the appeal and awarded the claimant the agreed general damages of £28,750. In addition, £115,000 loss of earnings was also allowed. It would seem in principle there is nothing to stop a claim for the usual range of personal injury heads of damage under the harassment umbrella if circumstances allow.

**School does not owe non-delegable duty to pupil** In *Woodland v The Swimming Teachers' Association*<sup>14</sup> Langstaff J dealt with a preliminary issue as to whether a school owed a non-delegable duty to a pupil so as to be liable for the negligence of a swimming teacher who was not an employee of the school.

The then 10 year old claimant went swimming with her class during the school day. She was in the group of better swimmers and so in the deep pool. With her class mates she swam in groups of three

<sup>12</sup> [2006] UKHL 34, [2007] 1 A.C. 224.

<sup>13</sup> [2001] EWCA Civ 1233, [2002] E.M.L.R. 4.

<sup>14</sup> [2011] EWHC 2631 (QB).



or four abreast. They were to dive into the pool at the deep end, swim the length to the shallow end, exit the pool and return down the side to the deep end ready to swim again when it was next their turn. The swimming lesson was supervised by a teacher in the pool and a lifeguard on the side of the pool. While the exact circumstances of the unfolding tragedy are in dispute, at some point the claimant was seen to have stopped swimming front crawl and be hanging vertically in the water. She was pulled from the pool and resuscitation attempted but as a consequence of this day's events the claimant is left with severe hypoxic brain injuries which, if liability is established, will lead to substantial damages.

The preliminary point, therefore, is of critical importance. The swimming pool facilities were run by Basildon Council. The lifeguard and swimming teacher were not employed by the school but were employees of Beryl Stofford (second defendant) who traded as Direct Swimming Services which provided swimming lessons for school children and which organised the arrangements under which the children had their lessons, including the availability of the pool for that use. The lifeguard (the third defendant) was an employee of the second defendant who was an independent contractor to Essex County Council (the fourth defendant) which was the education authority responsible for the claimant's school.

As Langstaff J pointed out:

*“the contracting out of work which public bodies hitherto performed using directly employed labour is liable to create situations which may be said to call for fresh legal examination of the traditional understanding of relationships giving rise to liability and the extent of those liabilities. In the present case, I am asked to determine as a preliminary point whether the liability of a school to its pupils extends beyond the school having vicarious liability for its employees if their actions should adversely affect the safety of children entrusted to their care to the extent that it encompasses a non-delegable duty, such that the school is responsible for the actions of nonemployees who have dealings with children of that school during the course of the school day. Such a non-delegable duty is not a vicarious liability: it does not impose a liability to answer in damages for the failures of school employees to take reasonable care for school children within that care. Nor is it a duty to take reasonable care of the safety of pupils when the school itself is carrying out its functions. It is a duty to secure*

*that reasonable care is taken of children during the school day: a duty which is broken if any harm should, for want of care in any person, befall such a child.”*

The claimant alleged a non-delegable duty of care on the part of the council acting *in loco parentis*. It is alleged the council was directly liable for failing to take reasonable care to ensure the second defendant was an appropriate and competent independent contractor to whom to delegate responsibility for the revision of swimming lessons and life-guarding services, and vicariously liable for the negligence of the second defendant and the life guard herself.

Essex CC accepted that a common law duty of care was owed to the claimant, including obligations both to take such care as would be exercised by a reasonably careful parent and to take reasonable steps to ensure that independent contractors who were engaged to carry out tasks with, or in respect of, the pupils were reasonably competent to perform those tasks, and that the second defendant was an appropriate and reasonably competent contractor for those purposes. Essex CC, however, denied that it was vicariously liable for any want of care on the part of the life guard, or that the duty was non-delegable as alleged. Although many authorities in this jurisdiction hold that a school owes a duty to take such care of a pupil as would a reasonable careful parent, none has gone so far as to hold that a school owes a duty to ensure that reasonable care is taken by others of the child, such that it is responsible for any want of care on their part.

The judge did not conclude that the proposition that a school authority owes a pupil a duty to ensure that reasonable care is taken of him or her whilst on school premises is unarguable in all circumstances and cases. He did, however, come to the conclusion that the claim that the defendant school authority owed a non-delegable duty to the claimant in the pleaded circumstances of the case was bound to fail because he did not accept that any court could reasonably be persuaded on policy grounds to uphold such a duty.

**Vicarious liability** *JGE v The English Province of Our Lady of Charity*,<sup>15</sup> provides useful and succinct guidance on the scope and nature of the doctrine of vicarious liability and its development and expansion over recent years post-*Lister*. The High Court determined as a preliminary issue whether the

<sup>15</sup> [2011] EWHC 2871.



second defendant, the trustees of a diocese of the Roman Catholic church, could be held liable for the alleged wrongful acts of a priest, Father Baldwin, working in its diocese. The defendant contended that no relationship akin to employment existed between itself and the priest and that vicarious liability could not attach to the relationship. The case was very similar on its facts to *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church*,<sup>16</sup> but whereas in *Maga* the defendant had conceded for the purposes of those proceedings that the priest could be considered an employee of the diocese, no such concession had been made in these proceedings. Expert evidence was provided on canon law.

Macduff J followed the two stage test approved by the Court of Appeal in *Various Claimants v Institute of the Brothers of the Christian Schools*<sup>17</sup> in determining whether vicarious liability existed, inquiring first into the relationship between the parties and whether it was a relationship to which the principles of vicarious liability might attach, and secondly into the acts in question and whether they were committed within the scope of the relationship. He reiterated that both are fact-sensitive issues involving a “close connection” test, and though the preliminary issue in *JGE* concerned the first stage alone and the second stage would be considered by the trial judge, it could not be considered in isolation and a synthesis of the two stages would be required.<sup>18</sup>

Significantly, Macduff J made it clear that the relationship between the parties need not be one of employment, but that “*it is the nature and closeness of the relationship which is the test at stage one.*”<sup>19</sup> The question for the court was whether, on the facts, it would be just and fair for a defendant to be responsible for the acts of the tortfeasor following close scrutiny of both stages of the test. There would be inevitable overlapping between the first and second stages of the test, but this was inevitable and necessary in light of the need for synthesis. Factors such as the level of control, supervision, advice and support offered by the defendant to the tortfeasor, and the provision of tools, equipment, uniform or premises to assist in

performance of the role, would be of assistance in answering that question, but would not be determinative.

On the facts, Macduff J held that the defendants ought to be made responsible for the acts of Father Baldwin acting within the course of his ministry. Whilst he accepted that there were many significant differences from a relationship of employment between the diocese and Father Baldwin, including the lack of a right to dismiss, little by way of control or supervision and no wages or formal contract, there were also crucial features which tipped the balance in favour of vicarious liability being imposed. Of material significance was the fact that Father Baldwin’s activities had been set in motion by the defendants in pursuance of a relationship which they had entered into with him for their own benefit: by appointing Father Baldwin as a priest, and by clothing him with all the powers and authority that that involved, the defendants had created a risk of harm to others, i.e. that he could abuse or misuse those powers for his own purposes or otherwise. There might not technically be a relationship ‘akin to employment’ between the two, but the principle features of the relationship dictate that the defendants should be held responsible for the actions which they initiated by Father Baldwin’s appointment and all that went with it.

## Quantum – Caroline Allen

**Determining chance for future loss** In *Smithurst v Sealant Construction Services Ltd*,<sup>20</sup> the appellant appealed against a decision determining the basis upon which assessment of damages should proceed in his claim against the respondent construction company. He had suffered a massive disc prolapse whilst moving heavy equipment around a van with a defective rear door which had been provided to him by the defendant, his employer. Liability was conceded. The claimant’s medical expert believed that there was no reason to expect that he would have suffered a similar prolapse in the future but for the accident, but the defendant’s medical expert believed that was likely to have done so within 2 years at the latest.

It was argued on behalf of the claimant that he was entitled to recover in full for all future loss, but that if the judge thought that there was any

<sup>16</sup> [2010] EWCA Civ 256, [2010] 1 W.L.R. 1441 (reviewed in the April 2010 edition of this newsletter).

<sup>17</sup> [2010] EWCA Civ 1106.

<sup>18</sup> Following Hughes LJ in *Various claimants* at paragraph 37.

<sup>19</sup> Paragraph 41.

<sup>20</sup> [2011] EWCA Civ 1277.



significant risk that he would have suffered a similar injury in the future, he should assess that risk and reduce his damages by an appropriate amount. The defendant argued that since the issue was one of causation it had to be determined on the balance of probabilities. The judge followed the defendant's approach and held that the issue was one of causation rather than the assessment of damages; he applied the "but for" test, indicating that the assessment of damages would have to be dealt with later. He preferred the evidence of the defendant's medical expert and held that damages would have to be assessed on the basis that the claimant was likely to have suffered a massive prolapse with similar consequences within 2 years.

Moore-Bick LJ, who gave the leading judgment in the Court of Appeal, held that the judge had been mistaken in the approach that he had taken as he had wrongly thought that he was dealing with a question of causation in the ordinary sense whereas the issue before him concerned the assessment of damages: the distinction between proof of damage and assessment of damages was emphasised. That notwithstanding, the trial judge had been entitled to adopt an acceleration approach to the assessment of damages in the case at hand as his finding fairly reflected the opinion of the expert witness whose evidence he had preferred. Moore-Bick LJ was quick to stress that an excessively analytical approach to the assessment of damages was not to be encouraged in general, and that where the medical experts had not attempted to forecast in statistical terms the chances that a similar injury would have occurred at different times in the future, the judge would not have been provided with the means to carry out a proper assessment of the risks. In those circumstances, provided the judge had been careful to ensure that the cut-off date fairly reflected the medical evidence, the acceleration approach could properly be adopted.

**Assessing damages for pain, suffering and loss of amenity** In *Sadler v Filipiak*,<sup>21</sup> the Court of Appeal considered the proper approach to be taken when assessing general damages for multiple injuries. The trial judge's approach to valuation had been firstly to form an overall impression and award a figure, and then to break it down in respect of each separate injury. The Court of Appeal held that this was incorrect, and that the judge should have had separate figures in mind for the various injuries and

then stood back to see whether the amount awarded overall was the appropriate figure for the totality of the injuries. Whilst the court would only interfere in exceptional cases (applying *Santos v Eaton Square Garages Ltd*),<sup>22</sup> as the wrong approach had been adopted in this case, the Court of Appeal could look at the facts and substitute its own figures.

**Deferring assessment of damages** Finally, in *Cook v Cook*<sup>23</sup> Eady J took the unusual step of directing that where the long-term outcome for the 10 year old claimant was uncertain and speculative, the assessment of damages should be completed on a staged basis, postponing a final resolution until a point some years in the future when it was anticipated that quantum in respect of the claimant's adult needs could be meaningfully assessed. The judgment provides a useful summary of the legal issues to be taken into consideration in applications of this nature, though each case of course turns entirely on its own facts.

## Procedure – Rebecca Drake

**Fresh evidence on appeal** The case of *Anglo Irish Asset Finance Ltd v Flood*<sup>24</sup> concerned an appeal against a decision not to order security for costs in circumstances where one party to the appeal sought to rely on fresh evidence which had not been advanced before the judge at first instance. The Court of Appeal made clear that the principles governing permission to adduce new evidence on appeal are more flexible in the case of appeals against procedural decisions than those against final judgments. Pererhaps unsurprisingly Sir Nicholas Wall P also made clear that the appeal court is likely to be more willing to allow the introduction of fresh evidence in cases where there is reason to think that there has been a material change of circumstances of a kind that calls into question the basis on which the discretionary relief was granted or refused.

**Interim payments** Further light has been shed on the occasionally complicated world of interim payments by the recent Court of Appeal decision of *Berry v Ashtead Plant Hire Co. Limited*.<sup>25</sup> There had been a workplace accident at a music event, for which four different defendants were potentially

<sup>21</sup> Court of Appeal (Civil Division), 10 October 2011.

<sup>22</sup> [2007] EWCA Civ 225.

<sup>23</sup> [2011] EWHC 1638 (QB).

<sup>24</sup> [2011] EWCA Civ 799.

<sup>25</sup> [2011] EWCA Civ 1304.



responsible, which resulted in the claimant suffering devastating and life-changing injuries with high care needs. At first instance the court ordered two of the defendants (both insured and potentially the claimant's employers) to make interim payments totalling £250,000. The appeal largely turned on the fourth defendant's uninsured status which, so the employer suggested, precluded an interim payment being made under the Rules. This approach was rejected by the Court of Appeal and the appeal upheld on other grounds but perhaps of more interest to defendant practitioners was Lord Justice Longmore's indication that:

*"it will not be often that an interim payment can be made with respect to a [contested] claim in negligence at common law. It may be obvious that the defendant owes a duty to the claimant but it will not always be obvious that he was in breach of his duty because that will depend on the facts."*

## International – Bernard Doherty

**Temporal scope of Rome II (*Homawoo v GMF Assurances SA (C 412-10)*).**<sup>26</sup> The commencement provisions of Rome II have been clarified by the ECJ, which has held that national courts must apply Rome II only to events giving rise to damage occurring after 11 January 2009. So for accidents up to and including that date, choice of law in tort is governed by the Private International Law (Miscellaneous Provisions) Act 1995. The reasoning of the ECJ is incidental.<sup>27</sup> Everyone involved in international personal injury litigation is simply relieved to have an answer to this practically significant question. We can finally give definite advice to our clients.

**The Fatal Accidents Act and foreign accidents (*Cox v Ergo Versicherung AG*).**<sup>28</sup> The deceased was a British Army officer posted in Germany when in May 2004 he was killed in a road traffic accident by a German motorist. His widow sued the insurer of the motorist in the English courts (as she was entitled to under the decision in *Odenbreit*).<sup>29</sup> The accident was the fault of the German motorist. There

was no dispute that liability for the tort was governed by German law. The issue between the parties was whether the damages should be calculated using the principles of German or English law, the English law principles being those of the Fatal Accidents Act 1976 ("the FAA"). The claimant widow had before trial found a new partner and had a child. Under German law, that fact would be taken account in diminution of her claim. Under the FAA, it would be ignored.<sup>30</sup> There were other differences as well which would make the claim more valuable if damages were assessed under FAA principles than under relevant principles of German law. The claimant's case was that the FAA was essentially a procedural statute and thus it should be applied to the assessment of damages in any case brought in an English court and falling within the FAA's scope. Reliance was placed on obiter dicta of Waller LJ in *Roerig v Valiant Trawlers Ltd*,<sup>31</sup> where he said: "Procedurally an action on behalf of a person killed in an accident is only available in the English courts by virtue of what is now sections 1 and 2 of the [FAA]." For the defendant, it was contended that under ordinary principles the concept of an actionable tort embraces both the wrong and the scope of the consequent liability. There was no dispute that liability was to be ascertained according to German law. Accordingly, German law would also govern the heads of damage available and the rules governing such matters as mitigation. Once German law is identified as the applicable law, it was argued, there is no room for the FAA. The judge accepted the argument of the defendant. The FAA is no merely procedural statute and has no application where liability is governed by a foreign substantive law.

The issues raised by the case are interesting and have not before been decided. It has until now not been clear the extent to which a case which could conceptually fall within the FAA could be brought under foreign law. Holding that all claims arising from death have in an English court to be brought within the scope of the FAA could have created serious problems in certain cases. The class of those with a right of action under the FAA is limited by the definition of a dependant and by the requirement that the dependency arise out of a family type relationship with the deceased. Not all

<sup>26</sup> ECJ, 17 November 2011.

<sup>27</sup> Anyone with an irresistible desire to acquaint themselves with how the problem arose can look at the article in the November 2010 edition of this newsletter.

<sup>28</sup> [2011] EWHC 2806 (QB).

<sup>29</sup> *FBTO Schadeverzekeringen NV v Jack Odenbreit (C-463/06)* [2007] ECR I-11321.

<sup>30</sup> Section 3(3).

<sup>31</sup> [2002] 1 W.L.R. 2304 at paragraph 20.



legal systems contain similar limits. French law, for example, allows a person to claim for losses caused by the death of a business partner. Subject to public policy considerations, there is no reason in principle why English courts should not give effect to such wider (or as the case may be narrower) rights under foreign law. A requirement that any claim arising from death should have to fit within the FAA or else be refused would be an arbitrary denial of foreign law rights.

**State immunity (*The Federal Republic of Nigeria v Ms S Ogbonna*)**<sup>32</sup> A claim for compensation for psychiatric illness caused by unlawful discrimination is a claim for “personal injury” within the meaning of section 5 of the State Immunity Act 1978. It was contended for Nigeria that in international law the phrase “personal injury” is limited to physical, bodily injury and does not extend to psychiatric injury. That argument was rejected. The Tribunal held that no such limited meaning of the phrase was clearly established in international law and that it would be a retrograde step to limit the phrase and give it a significance different to the one it has in domestic law.

**Where is England? (*Saldanha v Fulton Navigation Inc*)**<sup>33</sup> An Indian national was injured in an accident on a Marshall Islands registered ship while the ship was in UK territorial waters some distance off the coast of England. No other vessel was involved. The Admiralty Registrar held that the damage arose in England for jurisdictional purposes.

## Costs – Simon Edwards

**Part 36** This edition, we focus on part 36, which continues to cause problems. Those problems will be somewhat reduced by the amendment to part 36 that came into effect on 1 October 2011.

There is a new 36.14(1A). It states:

*“For the purposes of paragraph (1), in relation to any money claim or money element of a claim, ‘more advantageous’ means better in money terms by any amount, however small, and ‘at least as advantageous’ shall be construed accordingly.”*

That reverses the effect of *Carver v BAA Plc*<sup>34</sup>

and takes part 36 back to the pre CPR days where a payment in was beaten and costs determined by the simple question of £1 more or less. This amendment may also be a signal that courts should be careful before departing from the general rule that a successful party is entitled to his costs and from the default provisions that apply under part 36 where a case goes to trial and the result is, in the case of a claimant’s part 36 offer, better than that offer or, in the case of a defendant’s part 36 offer, worse than that offer.

In *Trevor Michael Fox v Foundation Piling Limited*, Jackson LJ (with whom the other two members of the court agreed) said this about part 36:<sup>35</sup>

*“A large number of authorities have accumulated around the provisions of part 36 and their interrelationship with rule 44.3. This is not a welcome development, since part 36 is intended to provide a clear and simple framework within which parties can settle litigation.”*

Then at paragraphs 44 to 49, having reviewed the authorities, Jackson LJ set out a number of conclusions. In summary, they were as follows:

- 1) Where one party makes a part 36 offer and then achieves a more advantageous result, rule 36.14 modifies the court’s general discretion in respect of costs and this is important because parties using part 36 need to have a clear understanding of the legal effects of making, accepting and rejecting offers under part 36.
- 2) Where a party has made a *Calderbank* offer outside part 36, the court’s discretion is wider but it might, in appropriate circumstances, make a party who has rejected such an offer and not beaten it pay all costs since the date of expiry of that offer.
- 3) Where both parties have made offers and the award is in between those offers, the claimant will normally be regarded as the successful party and entitled to his costs.
- 4) The starting point is that the successful party should recover his costs and then the court goes on to consider what adjustments should be made either in respect of issues lost or conduct or other circumstances.
- 5) In a personal injury claim, the fact that the

<sup>32</sup> Underhill J, Employment Appeal Tribunal, 12 July 2011.

<sup>33</sup> [2011] EWHC 1118 (Admlty).

<sup>34</sup> [2008] EWCA Civ 412; [2009] 1 W.L.R. 113.

<sup>35</sup> [2011] EWCA Civ 790 at paragraph 36.



claimant has won on some issues and lost on others is not normally a reason for depriving the claimant of part of his costs. Indeed, the fact that the claimant has deliberately exaggerated his claim may, in certain circumstances, also not be a good reason for depriving him of part of his costs as a defendant who has obtained video surveillance evidence is perfectly well able to protect his position on costs by making a modest offer under part 36.

- 6) Nevertheless, there will be cases where failing on particular issues may constitute a good reason for modifying the costs order and this is commonly achieved by awarding the successful party a specified portion of his costs.

In the instant case, the claimant claimed £280,000 plus general damages for pain, suffering and loss of amenity but recovered only just over £31,000. There was also video surveillance evidence showing the claimant to be less disabled than he alleged. The judge who decided the issue of costs, however, declined to make any finding that the claimant was guilty of misrepresentation and the Court of Appeal felt bound by that finding. In those circumstances, the court would not depart from the usual order that the claimant, as successful party, was entitled to his costs and Jackson LJ concluded, at paragraph 62 and 63, saying that there had been a growing and unwelcome tendency by first instance courts (and the Court of Appeal) to depart from the starting point set out in rule 44.3(2)(a) too far and too often. He said that the amendment to rule 36.14 should point the way to a more clear-cut approach to the costs rules in future. He concluded:

*“In the context of personal injury litigation where the claimant has a strong case on liability but quantum is inflated, the defendant’s remedy is to make a modest part 36 offer. If the defendant fails to make a sufficient part 36 offer at the first opportunity, it cannot expect to secure costs protection. Different considerations may arise in cases where the claimant is proved to have been dishonest, but (on the judge’s findings) that is not this case.”*

The above case is to be contrasted with the somewhat different facts of *Sebastian Marcus v Medway Primary Care Trust*.<sup>36</sup> In that case, a claim relating to alleged clinical negligence, the trial

proceeded on the causation of an amputation. Quantum had been agreed at £525,000. At the trial, the issue of causation was decided in favour of the hospital but the claimant still received £2,000 for damages for pain and suffering over a limited time, relating to the admitted breaches of duty. There was no part 36 offer and, therefore, the trial judge awarded the claimant half his costs. The hospital appealed. The Court of Appeal allowed the appeal and awarded the hospital 75% of its costs. Jackson LJ, however, dissented, emphasising the “*acute need for clarity and certainty in the field of part 36*”. On the basis that the defendants had made no part 36 offer in the case, he held that they should accept the consequences and he would dismiss the appeal.

Lastly, in *Lumb v Hampsey*,<sup>37</sup> Lang J held that where a claimant accepts a part 36 offer late, the test to be adopted under CPR 36.10(5) for exercising the discretion to depart from the usual costs consequences that the claimant pays the defendant’s costs after the expiry of the time for acceptance, is the same as that which applies where there has been a judgment and the considerations set out in CPR Rule 36.14 applied, namely whether it would be unjust in the circumstances so to order. The case reiterated the point that the mere fact that the claimant is a protected party makes no difference in itself. The decision of the court was that there were no sufficient grounds for departing from the usual costs order as, by the time of the settlement meeting, the claimant’s advisers were in possession of sufficient medical evidence to be able to assess the defendant’s offer.

<sup>36</sup> [2011] EWCA Civ 750.

<sup>37</sup> QBD, 11 October 2011.

# CONTRIBUTORS



**Bernard Doherty** edits this newsletter. He undertakes all kinds of personal injury work for claimants and defendants, and has for some years been recognised as a leader in the field in the main directories. He has a particular speciality in international cases and is the lead author of *Accidents Abroad: International Personal Injury Claims* (Sweet & Maxwell, 2009). He appeared in *Saldanha v Fulton Navigation Inc*, featured in this edition. View full CV at: <http://www.39essex.com/members/profile.php?id=49>



**Simon Edwards** has been doing personal injury and clinical negligence cases for many years. For claimants he has recently brought to a successful conclusion several cases involving serious brain injury and beat his own part 36 offer in a neck injury case involving the oft debated question of acceleration. He also has a substantial costs practice and has just successfully argued for no order for costs on discontinuance in a mesothelioma case. View full CV at: <http://www.39essex.com/members/cv.php?id=35>



**Emily Formby** specialises in catastrophic personal injury and clinical negligence litigation. She is a Recorder of the Crown Court and a member of the PIBA Executive Committee. She is a contributor to Kemp & Kemp Personal Injury Law, Practice and Procedure, has contributed to the PIBA Personal Injury Handbook and writes and lectures widely on personal injury, clinical negligence and practice related topics. View full CV at: <http://www.39essex.com/members/cv.php?id=96>



**Sadie Crapper** practises in personal injury and clinical negligence, acting for both claimants and defendants. She has particular expertise in claims involving the police, stress at work and in fraud cases. Sadie is regularly instructed in medium to high value personal injury claims and is adept at ADR. She is currently second junior in the case of *Summers v Fairclough Homes Limited* to be heard by the Supreme Court in April 2012. View full CV at: <http://www.39essex.com/members/cv.php?id=95>



**Caroline Allen** 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 also appears at inquests and for claimants before the CICAP. View Full CV at: <http://www.39essex.com/members/cv.php?id=77>



**Rebecca Drake** was a pupil at Thirty Nine Essex Street from 2008-9, during which time she was awarded a distinction in her LLM, in which she specialised in insurance law. She joined Chambers as a tenant in October 2009 and now does personal injury cases for claimants and defendants and already has experience of international litigation. View Full CV at: <http://www.39essex.com/members/cv.php?id=89>

**David Barnes** Chief Executive and Director of Clerking  
david.barnes@39essex.com

**Ben Sundborg** Practice Manager  
ben.sundborg@39essex.com

**Alastair Davidson** Senior Clerk  
alastair.davidson@39essex.com

**Graham Smith** Assistant Practice Manager  
graham.smith@39essex.com

For further details on Chambers please visit our website: [www.39essex.com](http://www.39essex.com)

**London** 39 Essex Street, London WC2R 3AT Tel: +44 (0)20 7832 1111 Fax: +44 (0)20 7353 3978  
**Manchester** 82 King Street, Manchester M2 4WQ Tel: +44 (0)161 870 0333 Fax: +44 (0)20 7353 3978

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