



Welcome to the second edition of **Thirty Nine Essex Street's** domestic and international personal injury newsletter. New cases and legislation continue to pour forth, and there is no shortage of new material. We have roundups of developments in liability, procedure, international cases and costs, with extended discussion of the points of most significance, and an article considering the trends which may be discerned in a number of recent cases in which claims have been brought by people involved in inherently risky activities against those supervising them. We were greatly encouraged by the response to the first edition. Thanks to those who took the time to respond. If you have comments or were not sent a copy of this edition but would like to receive the next, please do email us on [pinewsletter@39essex.com](mailto:pinewsletter@39essex.com)

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## Liability – Caroline Allen

### **Negligence in exercise of public law power**

The Court of Appeal handed down judgment in March in the interesting and important case of *Connor v Surrey County Council*,<sup>1</sup> which explores the circumstances in which decisions taken by a public body acting under statutory powers may give rise to liability in negligence. The claimant was a primary school head teacher employed by the defendant. She claimed to have suffered psychiatric injury as a result of an aggressively conducted campaign waged by some of the school governors and “designed to capture a secular state school for a particular faith.”<sup>2</sup> The claimant said that the defendant was negligent in failing to exercise its powers under the School

Standards and Framework Act 1998 to dismiss the governors and replace them with an interim executive board. The judge held in favour of the claimant. The defendant appealed on the basis that the decisions taken by it lay in the field of its public law functions and as such could not form the basis of a private law cause of action for damages for personal injury. The Court of Appeal dismissed the appeal.

Whilst there is already a significant body of case law considering the circumstances in which a duty in the tort of negligence can be grafted onto a public law power, the particular feature in this case is that as its employee the claimant was owed a pre-existing duty of care by the defendant to safeguard *inter alia* her psychological health. The existence of the duty of care itself, therefore, did not turn on the exercise or non-exercise of the statutory power. The question was whether the fulfilment of the duty of care in negligence could require the exercise by the defendant of a

<sup>1</sup> [2010] EWCA 286.

<sup>2</sup> Laws LJ at [120].



statutory power, where the exercise of that public law power was in practice the only way in which the defendant could fulfil its private law duty to the claimant. Laws LJ answered the question as follows: “The law will in an appropriate case require the duty-owner to fulfil his pre-existing private law duty by the exercise of a public law discretion, but only if that may be done consistently with the duty-owner’s full performance of his public law obligations.”<sup>3</sup> The reach of this qualification is that the exercise of the power would not be unlawful, in the sense that it would satisfy the standard public law tests of legality, rationality and fairness, and further there must be no inconsistency between the private law function (in this case, the fulfilment of a private law duty of care) and the public law’s purpose: in exercising the public law discretion in the fulfilment of the duty of care the duty-owner should in no way undercut his service of the public purpose. It follows that cases in which the court might require deployment of public law powers to fulfil a pre-existing duty of care are likely to be few in number. In the instant case, however, the duty of care and the public law discretion to intervene pursuant to the Act were found to march together and the claimant’s case succeeded.

#### **Vicarious liability for sexual abuse by priest**

In *Maga v Trustees of the Birmingham Archdiocese of the Roman Catholic Church*,<sup>4</sup> the Court of Appeal overturned the High Court’s decision that the claimant was not entitled to recover damages following sexual abuse he had suffered in the 1970s at the hands of an assistant priest, Father Clonan, on the basis that the assaults were on the facts sufficiently closely connected with Father Clonan’s employment by the defendant that it would be fair and just to hold the Church liable (applying the test set down in *Lister v Hesley Hall Ltd*).<sup>5</sup> The defendant had previously paid damages to other claimants as a result of abuse by Father Clonan, but the claimant in the instant case was not a Catholic, had not participated in Church activities (such as services), and Father Clonan had not attempted to engage with him on a religious level. The Court of Appeal held, however, that Father Clonan’s

employment as a priest, with a particular responsibility for youth work, enabled him to hold a special role within the community with trust, responsibility and a degree of moral authority which no other role enjoys. It had also furnished him with both the status and the opportunity to draw the claimant into his sexually abusive orbit by inviting him to events such as a disco held on the Church premises (albeit not one limited to Catholic children) and by paying him to carry out small jobs at the presbytery such as ironing. In particular, the opportunity to spend time alone with the claimant in the presbytery had arisen from Father Clonan’s role as a priest employed by the defendant.

The claim also succeeded on another basis. Allegations of abuse by Father Clonan had been made to another priest living in the presbytery in 1974 by the parents of a different boy. The priest had responded in an inappropriately casual way. This had permitted the later abuse of the claimant to take place. The Court of Appeal firmly rejected the judge’s conclusion that in this respect no duty was owed by the defendant to the claimant.

It was further held that the claim was not time-barred as the claimant had at all times been under a disability (learning difficulties combined with epilepsy) for the purposes of s.28(1) of the Limitation Act 1980.

#### **Does householder control the way contractor does his work?**

*Kmiecic v Isaacs*<sup>6</sup> explores the extent to which homeowners exercise control over contractors carrying out works to their property under the Work at Height Regulations 2005 and the Construction (Health, Safety and Welfare) Regulations 1996.<sup>7</sup> The claimant contended that he was owed a duty of care by the defendant as she had assumed control over his work and the way in which it was carried out in refusing to allow him access to the garage roof through an upstairs window. As a result, he had been ordered by his employer (by telephone, as the employer was not on site) to use a ladder from the defendant’s garage. As the claimant climbed the ladder it toppled over and he fell, suffering injury. Doubtless to the relief of many householders, it was held by Swift J that the claimant exercised control only in her capacity as an occupier

<sup>3</sup> [106].

<sup>4</sup> [2010] EWCA Civ 256.

<sup>5</sup> [2002] 1 A.C. 215.

<sup>6</sup> [2010] EWHC 381 (QB).

<sup>7</sup> The 1996 regulations are now revoked but the terminology relating to control of the work lives on in the 2005 and other regulations.



under the Occupiers' Liability Act 1957, and that merely setting rules or limits about which parts of the property the claimant could access could not be taken as meaning that she had assumed control for the defendant and the way in which he carried out the work so that she owed him the extensive array of duties contained within the regulations. Such duties would only be imposed in circumstances where, for example, a householder had played an unusually large role in the planning, management and / or execution of the relevant works.

### **Proving failure to wear a seat belt increased injury**

Finally, *Stanton v Collinson*<sup>8</sup> sounds a warning to defendants wishing to establish contributory negligence for failure to wear a seatbelt to give careful consideration to obtaining medical evidence on the point. The trial judge declined to reduce damages for contributory negligence. She heard evidence from engineering experts with speciality in the workings of seat belts. She concluded that this evidence was insufficient to show that a seat belt, if worn, would have significantly reduced the serious head injuries received by the claimant, an unbelted front seat passenger, and that the question could only properly have been determined with the assistance of expert medical evidence. The Court of Appeal held that she was entitled to reach that conclusion on the facts, though it was emphasised that medical evidence would not be necessary in every seat belt case – even those involving head or brain injury – as each case would turn on its facts and the state of the other evidence. Proportionality would also be a relevant consideration.

## **Procedure – Alexis Hearnden and Rebecca Drake**

### **Fresh evidence and fraud**

The tension in the authorities on fresh evidence revealing potential fraud has recently been addressed and clarified by the Court of Appeal in *Owens v Noble*.<sup>9</sup> The defendant had admitted liability and his insurer had paid the claimant over £3 million in respect of personal injury arising out of a road traffic accident.

After trial, surveillance evidence was obtained which suggested that the claimant was not as disabled as he had claimed. The chief issue for the Court of Appeal was whether the correct approach for a defendant to take in such a case was to appeal the judgment or whether it was rather to commence a fresh action to set aside the original judgment on grounds of the claimant's fraud. Noting its difficulty in distinguishing two different lines of authority, the court concluded that the true principle was as follows. Where fresh evidence is adduced in the Court of Appeal tending to show that the judge at first instance was deliberately misled, the court will only allow the appeal and order a retrial where the fraud is either admitted or the evidence of it is incontrovertible. In any other case, the issue of fraud must be determined before the judgment of the court below can be set aside. Although the traditional way of establishing that a judgment is vitiated by fraud is by issuing fresh proceedings, the Court of Appeal was of the view that the same result could be more efficiently achieved by remitting to a High Court Judge the question of whether the claimant was guilty of fraud. If the judge found that he was, the judge would go on to reassess damages.

In a further decision in the same case,<sup>10</sup> the Court of Appeal held that it was appropriate for the case to be remitted to the original trial judge. The claimant submitted that it would be undesirable for a judge to determine whether or not a fraud had been perpetrated on him personally. The Court of Appeal rejected the argument, however, and held that the situation was more akin to a case being remitted to a county court judge or employment tribunal in the event of an error of law. Remitting to the trial judge would be economical and convenient.

### **Interim payments where real dispute about the appropriateness of purpose of the payment**

In *Brown v Emery*,<sup>11</sup> Teare J considered an application for an interim payment for accommodation where there was a real dispute about the appropriateness of such accommodation which would have to be resolved at trial. The claimant had been seriously injured in a road traffic accident. Liability was admitted. The claimant's brain injury was so severe that she was only capable

<sup>8</sup> [2010] EWCA Civ 81.

<sup>9</sup> [2010] EWCA Civ 224.

<sup>10</sup> [2010] EWCA Civ 284.

<sup>11</sup> [2010] EWHC 388 (QB).



of very basic interaction. She was hospitalised at a rehabilitation unit. The claimant sought an interim payment for, inter alia, the purchase of accommodation where she could live with her family when she was discharged from hospital. The defendant submitted that such an application was premature given that no need had yet been demonstrated for such accommodation. Teare J first confirmed that an interim payment did not ordinarily require a “need” to be demonstrated for the payment. He did however note the “uneven playing field” which may arise were he to award money for accommodation, the appropriateness of which was disputed. It was at this point in the litigation unclear whether it was in the claimant’s best interests to remain in publicly funded accommodation or to be cared for by her parents at home. Nevertheless, Teare J noted that there was no dispute that the likely capital sum to be awarded in respect of PSLA would be at least in the order of £220,000, plus damages for loss of future earnings in the region of £175,000. Although it would usually be appropriate to include accommodation costs in the capital sum, it was not possible in this case to proceed on that basis in light of the real dispute as to whether such costs would be awarded by the trial judge. Accordingly, the claimant was entitled to an interim payment of £250,000, which was about 75-80% of the lump sum likely to be awarded at trial, which in the circumstances excluded any allowance for future accommodation costs.

#### **Limitation: objective test under section 14**

In *Whiston v London Strategic Health Authority*<sup>12</sup> the Court of Appeal held, overturning the judge at first instance, that the claimant had constructive knowledge for the purposes of the Limitation Act 1980, but that applying section 33 it was equitable to extend the time limit in s.11 and allow the claim to proceed. The claim was one for negligent forceps delivery in 1974 causing cerebral palsy. The claimant had gone on to achieve impressively academically, culminating in a PhD in maths, but his physical condition deteriorated in his 20s. The evidence of the claimant and his mother was that he had focused on getting on with his life and did not dwell on the past, and thus never acquired the knowledge necessary to start the limitation clock running until the deterioration in 2005. The Court of

Appeal agreed that the judge had been right to conclude that the claimant did not have actual knowledge. The position was different, however, when considering constructive knowledge under section 14(3)(b). The court applied *Adams v Bracknell Forest Borough Council*.<sup>13</sup> The importance of *Adams*, Dyson LJ said, was that it resolved finally in favour of an objective test the inconsistent lines of earlier authority, some of which had favoured an objective test and some a subjective one. On the facts, the claimant was fixed with constructive knowledge from his early twenties. Had he acted with the curiosity of an ordinary claimant, he would at that age have asked the questions which would have elicited answers giving him the knowledge within the meaning of the 1980 Act. However, the court went on to hold that a fair trial would still be possible and on the facts exercised its discretion under section 33 to disapply the limitation period and allow the claim to proceed.

#### **Costs consequences of a part 36 offer once it is no longer available for acceptance**

In *Pankhurst v White & MIB*,<sup>14</sup> the claimant made a part 36 offer of £3.4 million (all sums referred to in this summary are capital values, although there was in fact an element of periodical payments which is irrelevant for present purposes). The offer was made at a relatively early stage, in advance of a liability trial on issues of contributory negligence alone and before much quantum evidence was available. The offer was rejected by the defendant. At the liability trial, no reduction was made for contributory negligence and the claimant sent a letter withdrawing the offer, since he took the view that that damages at 100% would exceed £3.4 million. The claimant nonetheless indicated an intention to continue to rely on the part 36 offer if the final award exceeded £3.4 million. The defendant later made a part 36 offer at £6.8 million which the claimant did not accept. At the quantum trial, damages were assessed at £6.1 million. Thus the claimant had beaten his own offer (subsequently withdrawn) but had failed to beat the defendant’s later offer. There was no real dispute that the defendant’s offer had the usual consequences. However, what of the period between the claimant’s offer and the

<sup>12</sup> [2010] EWCA Civ 195.

<sup>13</sup> [2005] 1 A.C. 76.

<sup>14</sup> [2010] EWHC 311 (QB).



defendant's offer? Should the claimant receive indemnity costs and enhanced interest or should the withdrawal of the offer preclude those remedies? The defendant said not, relying on CPR 36.5(8) (the rule has now been modified) which stated: "If a part 36 offer is withdrawn it will not have the consequences set out in this Part." MacDuff J held that rule 36.5(8) applied only where the offer is unilaterally withdrawn at a time when the offeree could have accepted it, whether within the 21 day period or later with the leave of the court. In the present case, the offer had not been withdrawn within the meaning of the rule. True that it later became unavailable for acceptance (by 21 days expiring, by the defendant rejecting it, by the change in circumstances which the liability trial represented) but that did not mean the offer should not carry usual part 36 consequences. The judge then considered the circumstances of the case and awarded indemnity costs for most of the period from 21 days after the claimant's offer and enhanced interest.

#### **The application of the award of part 36 interest in a compromised claim**

In *Andrews v Aylott*,<sup>15</sup> the trial judge determined that the claimant was entitled to 75% of his damages to be assessed or agreed and in the light of a claimant's part 36 offer made the following order: "Interest shall be payable in due course on 33% of the damages ultimately determined to be payable by the defendant to the claimant at 10% over base rate from 23 November 2007 until 3 April 2009". Damages were finally agreed on the basis of a lump sum and periodical payments in respect of future earnings and care. There was a dispute as to the effect of the order for interest set out above. Some of the lump sum reflected future losses. Should interest be awarded on that? And should it be awarded on the periodical payments? Tugendhat J reminded himself of what interest ordinarily meant in the present context, namely a sum "which reflects the loss to the claimant equivalent to the actual or notional cost of being kept out of the monetary compensation." The claimant had not been kept out of any money the obligation to pay which still lay in the future. He held that the order should therefore be construed as applying to all the lump sum (the part reflecting future as well as past loss

and pain, suffering and loss of amenity) but not to the periodical payments.

#### **Road traffic accident rules**

Important and by now widely discussed changes to the CPR have been made. A new procedure and costs structure for personal injury claims in road traffic accidents valued at between £1,000 and £10,000 has been introduced: see CPR 45.27 onwards.


## **International – Bernard Doherty**

#### **Local standards in holiday cases**

In *Gouldbourn v Balkan Holidays Ltd*,<sup>16</sup> the Court of Appeal has again considered the relevance of "local" i.e. foreign standards when judging whether an implied term to take reasonable care and skill in a holiday contract has been breached. The claimant purchased from an English company a skiing holiday in Bulgaria with lessons forming part of the package. The claimant was a complete beginner and was in a novice group, though some members had some skiing experience. On the third day of the holiday, the instructor took the group from the nursery slopes to a slope higher up the mountain. The claimant lost control and suffered an injury to her knee. The judge rejected the contention that the slope was inherently unsuitable for beginners. There was, however, evidence that the claimant was not progressing as quickly as other members of the group and the issue remained as to whether the instructor had failed in his duty to assess, instruct and supervise the claimant personally given her lack of skill, confidence and experience. The system to which the local instructors worked involved every group at the same standard progressing through the same activities over the same time. The expert evidence suggested that this "proceduralised" approach had once been common in Western Europe but had since the 1980s been superseded by a more individual, "client centred" approach. The judge concluded that while the system of instruction would probably not have been acceptable in Western Europe it was acceptable in Bulgaria, and in the absence of any evidence that the instructor had failed to follow the system properly the claim should be dismissed. The claimant contended that the relevant

<sup>15</sup> [2010] EWHC 597 (QB).

<sup>16</sup> [2010] EWCA Civ 372.



standards were international not local, set down by the rules of the Federation Internationale de Ski. These rules, however, are put in very broad terms (“never allow ... pupils to take any risk beyond their capabilities”) and it was held that they provided guiding principles, but that the means by which they were fulfilled remained a matter of local practice. The Court of Appeal dismissed the appeal.

The role which local standards should play in cases of this kind remains a difficult one for practitioners, and the decided cases do not all point in the same direction. The courts sometimes come close to falling into an error, namely that proof of local standards is an element of the cause of action which inevitably needs to be proved by a claimant before he can succeed. In most holiday cases, the claimant must prove that the defendant holiday company (by itself or its agents) breached an obligation in English law to take reasonable care and skill. It is clear beyond doubt that local standards will in some cases be relevant to assessing whether reasonable care and skill were exercised: a Greek hotel need only fit glass compliant with Greek not UK standards.<sup>17</sup> Their potential relevance has been expressly confirmed by Rome II.<sup>18</sup> On the other hand, proof of local standards is not an element which has to be proved in every holiday accident claim.<sup>19</sup> It would surely not avail a defendant to call evidence that in a given foreign country many drivers overtake on blind bends so it was acceptable for its driver to do so. It is not always obvious, however, which side of the line any particular case falls on and as a result claimants’ advisers have to decide whether to spend a good deal of time and money chasing after what may well be elusive evidence of relevant local standards, or whether to face the risk of the defendant at trial persuading the judge that in the circumstances the case cannot succeed without such evidence.

The problems could be minimised by concentrating on first principles. The existence, nature and relevance of local standards are matters of fact, and should

therefore be properly pleaded. If the injured person wishes to rely on them, perhaps because they are higher than UK standards, he must raise them squarely. And likewise the holiday company. Only then will the court be in a position to assess what expert or lay evidence will be necessary or helpful and give directions accordingly. If no detailed averment has been made of relevant local standards, then a defendant should not ordinarily be permitted to jump up at trial and say that the claim must be dismissed because, even though there was clearly a breach if the conduct is measured against UK standards, it has not been established that the same standards apply to the relevant foreign country. If foreign *law* is not adequately pleaded and proved, an English court will ordinarily decide the case according to English law.<sup>20</sup> While the analogy may not be exact, it is suggested that the same approach would usually be appropriate in relation to local standards.

*Gouldbourn*, therefore, is unobjectionable if it is properly understood as deciding that a Bulgarian ski instructor is entitled to teach according to the “proceduralised” system rather than taking the “client centred” approach, since the proceduralised system, while somewhat out of favour in Western Europe, is not beyond the pale as a system of ski instruction. It should not, it is submitted, be understood as requiring a claimant to justify every allegation by reference to local standards in every holiday case.

### **Rome II’s difficult commencement provisions**

In the last edition, we noted the uncertainty as to when Rome II began to apply and mentioned a decision of the German courts to the effect that Rome II applied only to events occurring from 11 January 2009. The English courts have now begun to consider the same question. Early indications are that the view here may be different. In *Bonsall v Cattolica Assicurazioni*,<sup>21</sup> the district judge held that Rome II applied to cases in which the tort took place after 19 August 2007 as long as the question comes before the court after 11 January 2009. He rejected a contention that it should apply only if proceedings were issued after 11 January

<sup>17</sup> *Wilson v Best Travel* [1993] 1 All E.R. 353.

<sup>18</sup> Article 17 states: “In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability.”

<sup>19</sup> *Evans v Kosmar Villa Holidays plc* [2007] EWCA Civ 1003, [2008] 1 W.L.R. 297.

<sup>20</sup> *Bumper Development Corp v Commander of Police of Metropolis* [1991] 1 W.L.R. 1362.

<sup>21</sup> Winchester County Court, 13 January 2010, District Judge Ainsworth; reported in the Travel and Tourism Lawyers’ Association Newsletter, February 2010.



2009. In *Jacobs v MIB*,<sup>22</sup> the accident happened after 19 August 2007 and proceedings were issued before 11 January 2009. The issue of whether Rome II applied in point of time could therefore have been raised. Although there were other issues relevant to the applicability of Rome II, the claimant (represented by leading counsel) did not take the point that Rome II should not apply on the basis that the claim form was issued before 11 January 2009. Practitioners will remember the glut of claim forms issued just before 11 January 2009 to avoid the application of Rome II. The hurry may have been in vain.

### Foreign limitation periods

In *Harley v Smith*,<sup>23</sup> English divers were injured in Saudi Arabia. They sued in England just under three years later. The defendants relied on a twelve month limitation period in Saudi labour law. The Court of Appeal held that there was no adequate evidence that the Shari'ah courts would not have retained jurisdiction in Saudi Arabia, and if they had the claim would not have been time barred since Shari'ah courts would not have applied the twelve month period. The point of more general interest was in the consideration of the public policy provisions in section 2 of the Foreign Limitation Periods Act 1984, which permit the English court to refuse to apply a foreign limitation period if its application would cause "undue hardship." The judge had held that the application of the one year period would in the circumstances have caused undue hardship so that he would have refused to apply the one year period had the point fallen for decision. The Court of Appeal held he was wrong. The judge was not entitled to rely on any erroneous legal advice which may have been received by the claimants. If a limitation period was missed because of erroneous legal advice, then it was not the limitation period which caused the hardship. There was no evidence that the claimants could not have issued within a year of limitation starting to run had they chosen to do so. The matter was academic since the claimant succeeded on other grounds, but the Court of Appeal reminds us that a foreign limitation period is not lightly to be disapplied on public policy grounds.

<sup>22</sup> [2010] EWHC 231 (QB); see last edition of newsletter for discussion of the broader issues in the case.

<sup>23</sup> [2010] EWCA Civ 78.

### Injuries in the air

The Warsaw Convention (Carrier Liability) Bill has been withdrawn and will not become law. The Bill had the aim of broadening the type of injury for which compensation could be claimed. As well as injury, compensation would also be payable for "detriment to health or psychological well-being." The aim was in effect to reverse certain decisions of the court which have held that the Warsaw Conventions provide no compensation for illnesses arising in flight, such as deep vein thrombosis, or for psychological damage which is not the result of a bodily injury. The Bill was rather quixotic. The UK government obviously cannot unilaterally amend an international treaty, so the Bill merely provided that the Secretary of State was to propose the amendment. The chance of persuading the rest of the world that the Conventions should be so revised must have been very slender indeed. What is interesting about the Bill, however, is that its proponents appear to acknowledge that the Montreal Convention, in the process of superseding the Warsaw Conventions, bars claims for illness and psychological injury in the same way that the Warsaw Conventions do. That is something which is probably correct, but has not yet been tested in the courts.

## Costs – Judith Ayling

### Can costs in multi-track cases be reduced to small claims or fast track levels?

In two very recent cases the Court of Appeal has had to consider the question of costs where cases have been allocated to the multi-track but have in the end concluded at levels of damages which would have meant allocation to the fast or even small claims track.

In *Drew v Whitbread*<sup>24</sup> the questions of general importance were:

- (a) how far, where the trial judge has ordered costs in a multi-track action to be paid on the standard basis, a costs judge is free to rule that in reality the case was a fast track case and to assess trial costs on a fast track basis;

<sup>24</sup> [2010] EWCA Civ 53.



- (b) when such a question should be raised (i.e. should a ruling be obtained from the trial judge);
- (c) and what the effect would be on the actual assessment.

Mr Drew fell off a ladder in the course of his employment. He brought a claim for personal injury. He alleged injury to his spine with ongoing symptoms and pleaded that the value of his claim exceeded £15,000. He also claimed a *Smith v Manchester* award. On the basis that the Schedule totalled £30,309.41 the defendant's solicitors consented to allocation to the multi-track. Liability was denied, and the defendant's counterschedule asserted on the basis of the joint statement of the medical experts that there was no claim for future loss.

The trial lasted for two days. Mr Drew established liability but was found 25% contributorily negligent. The claim for future care failed entirely. Overall his damages, net of the contributory negligence reduction, came to £9,291.56. The bill lodged was in the sum of £78,458.65 including a 100% success fee.

The Court of Appeal considered CPR 25.5 and 25.6 about the allocation to track, CPR 46 (fast track trial costs) and CPR 44.3 and 44.5. CPR 44.3 and 44.4 fulfilled different functions, and rule 44.3 governed the orders to be made at the end of trial:

- (a) It was common ground that a judge could, using CPR 44.3, make an order that costs be restricted to fast track costs in a multi-track case. But under CPR 44.5 when assessing costs the costs judge must have regard to all the circumstances including conduct. If a factor had been raised before the trial judge and she had ruled on it that would bind the costs judge.
- (b) The notion that if a party had not raised a matter before the trial judge he could not raise it on assessment under CPR 44.5 did not sit easily with the express provisions, and *Aaron v Shelton*<sup>25</sup> was too prescriptive insofar as it laid down laid down such a general principle as the defendant contended for, namely that if a question of conduct had not been raised before the trial judge it could not be raised on assessment.

- (c) The effect of the approach advocated by Lord Woolf in *Lownds v Home Office*<sup>26</sup> at 29ff would be reduced if there were any general principle of the kind advocated by the defendant. What was said by Dyson LJ in *Lahey v Pirelli Tyres Ltd*<sup>27</sup> as to the powers of the costs judge (he could disallow costs post-issue or disallow the costs of an issue, for example) would be inconsistent with any such principle.
- (d) There were some circumstances in which an order should be sought from the trial judge so that the costs judge should not have to re-try the action (e.g. that a witness should not have been called because the evidence was irrelevant) and some in which an indication from the trial judge might be helpful, but generally CPR 44.3 and 44.5 were intended to work in harmony and the parties' conduct might have to be considered under both.
- (e) In this case the fact that exaggeration had been raised before the trial judge and he had declined to make a special order did not mean that the question could not be raised on assessment and that the costs judge could not consider what would have happened if the claimant had instructed his lawyers properly.

Thus in this case it was open to the defendant to raise on assessment that this should have been a fast track case and in particular that the case should have been concluded in one day. The costs judge was not though entitled to assess the costs as if this were on the fast track; what she was entitled to do was to assess costs on the standard basis but taking into account the fact that the case should have been allocated to the fast track. Often that would be a distinction without a difference.

The Court of Appeal handed down judgment on the same day in *O'Beirne v Hudson*.<sup>28</sup> The same provisions of the CPR were in play. The question for decision was whether, in a case which had settled before allocation with a consent order that costs be paid on the standard basis, the costs judge was entitled to take the view that the case would have been

<sup>25</sup> [2004] EWHC 1162 (QB).

<sup>26</sup> [2002] 1 W.L.R. 2450.

<sup>27</sup> [2007] 1 W.L.R. 998.

<sup>28</sup> [2010] EWCA Civ 52.



allocated to the small claims track and thus that the paying party should pay costs on the small claims track only.

The claimant was in a stationary car which was hit from behind by the defendant's car at a roundabout. Before allocation the claim was settled for £400 general damages and £719.06 hire charges, plus costs. Settlement was recorded in a consent order which provided that the defendant would pay the claimant's costs on the standard basis to be subject to detailed assessment if not agreed.

On second appeal Waller LJ, giving the lead judgment, held that the consent order provided for costs to be assessed on the standard basis and the judge could not hold that costs could be assessed on the small claims track basis. But in making the assessment the court was entitled to have regard to all the circumstances, under CPR 44.5(1), including the fact that if the case had been allocated it would have been allocated to the small claims track, and the costs judge would have regard to what could or not be recovered if the case were so allocated. Provided the costs judge did not seek to vary the original order or seek to tie herself to assessing costs on the small claims basis, it was quite permissible to seek to give effect to what Lord Woolf had said in *Lownds*: there is a real distinction between directing at the outset that nothing but small claims costs are awarded and giving items on a bill very anxious scrutiny to see whether costs were reasonably or necessarily incurred, and thus whether it was reasonable for the paying party to pay more than would have been recoverable in a small claims track case.

In both *Drew* and *O'Beirne* it is evident that strong policy considerations are in play. In *O'Beirne* in particular it is on one view startling that a defendant who expressly agrees to pay costs on the standard basis can then effectively hold a claimant to small claim track fixed costs. But why, on the other hand, should a claimant's solicitors take advantage of the fact that a case has not yet been allocated to slip out of the small claims track's reach?

#### **Hourly rates: how far does *Wraith* apply?**

In *Higgins v Ministry of Defence*<sup>29</sup> the Court revisited the question of recoverable hourly rates, considering the familiar authority of *Wraith v Sheffield Forgemasters*.<sup>30</sup> The claimant, who brought a claim for asbestos-related disease, recovered Central London rates even though at the time of his claim he lived in Kent and there were solicitors outside London who could competently have conducted his claim. He was very elderly and very ill at the time he chose his solicitors and the name of his solicitors had been mentioned to him by his treating consultant. The decision to allow Central London rates was affirmed on appeal. The factors listed in *Wraith* were matters relevant to that case and were not an exhaustive list. The claimant's age and the great urgency of his case were not factors which featured in *Wraith* but were rightly taken into account in the present case.

#### **Issue-based costs and indemnity costs**

In *Webster v Ridgway Foundation School*,<sup>31</sup> the claimant unsuccessfully sought damages following an assault that took place on the defendant's premises.<sup>32</sup> The Court was required to determine whether the defendant's costs should be paid on the standard or indemnity basis. It held that the Human Rights Act claim was hopeless and that the defendant's costs of defending it should therefore be paid on the indemnity basis, but that the other claims could not be described as hopeless, and although they failed their pursuit did not cross the boundary into unreasonable conduct such that indemnity costs were appropriate. Further, there was sufficient clarity as to which costs were attributable to it to allow those costs alone to be assessed on the indemnity basis with the remainder to be assessed on the standard basis. It should be recalled that in general issue-based costs orders are deprecated because they are very difficult to implement.

<sup>29</sup> [2010] EWHC 654 (QB).

<sup>30</sup> [1998] 1 W.L.R. 132 (CA).

<sup>31</sup> [2010] EWHC 318 (QB).

<sup>32</sup> For the judgment in the main action, see [2010] EWHC 157 (QB).



### **Solicitors: beware how you bill!**

In *Bilkus v Stockler Brunton*<sup>33</sup> the Court of Appeal repeated in strong terms that it was only in exceptional circumstances that a solicitor could withdraw or amend a bill that he had delivered to a client. It was implicit within sections 69 and 70 of the Solicitors Act 1974 that the only bill that could be taxed was one delivered in accordance with the statutory requirements and that the client had a right to have that bill taxed rather than any later bill delivered without his agreement in relation to the same work and disbursements. The Court did have an inherent jurisdiction to permit the solicitor to withdraw or amend an incorrect bill but the jurisdiction was to be sparingly and carefully exercised. On the facts the bill delivered contained an impermissible charge, and so unless the solicitors could withdraw that bill and justify the charge or amend the bill so as to justify it, the charge could not be recovered. It is essential that a solicitor record the terms of his charging in writing and that in all but exceptional circumstances a client should be able to rely on the accuracy of the bills delivered. The Court of Appeal also examined the difference between contentious and non-contentious business for the purposes of the Solicitors Act 1974, a matter on which there is a surprising dearth of case law, and the judgment is worth reading for this discussion too.

### **Standard of care in supervision of inherently risky activities – *Emily Formby***

When answering the question “was harm foreseeable by the person owing the duty of care,” to what extent does the degree of likely harm make a difference? The courts have grappled with this issue in a number of recent cases in which claimants were engaged in activities carrying with them an unavoidable risk of injury, but were nonetheless under some degree of supervision or control by another. The *Uren* case summarised in the last edition was the most recent, but we begin with two cases from 2008.

*Harris v Perry*<sup>34</sup> was a case that sent a chill through many a parent and attracted wide press comment. The “bouncy castle” case seemed, at first instance, to underline the extremes of the nanny state, highlighting what is perceived to be wrong with the much derided “health and safety culture.” Why should parents trying to give their daughters an exciting birthday party be liable for an accident sustained on a bouncy castle, terrible and regrettable though it was? The facts were stark in their ordinariness. Mr and Mrs Perry hired a bouncy castle and bungee run for the party. They were set up behind their house on a playing field – effectively space open to the public. Several children, including Samuel Harris, the claimant, were permitted by the defendant to play on the bouncy castle. The permission imported a duty of care to the claimant. While he was on the bouncy castle, he performed a somersault and was struck on the forehead by the heel of another older, larger boy also performing a somersault. The injuries suffered by the claimant were catastrophic.

At first instance the court held that duty of care owed by the defendant was to give uninterrupted supervision to the bouncy castle and its users. By diverting attention to the other activity, the defendant breached that duty. This lack of attention caused harm, it was held, because the defendant did not prevent children of different sizes being on the castle at the same time and turning somersaults.

The Court of Appeal, however, overturned the judge of first instance and held this duty of care to be too high. Children will engage in risky activities and should do so as part of their learning and playing as children. Parents cannot and should not be required to keep their or other children under constant supervision. Sometimes, children will engage in activities that are unusually risky and carry an unacceptable level of risk unless subject to adult supervision – at times that supervision may indeed need to be constant. However, with regard to the bouncy castle, the duty of care owed was that which a reasonably careful parent would show for her own children. What positive steps, therefore, would a reasonable parent take for the child’s safety? In terms of foreseeability, the parent would foresee that boisterous behaviour might result in

<sup>33</sup> [2010] EWCA Civ 101..

<sup>34</sup> [2008] EWCA Civ 907



children colliding and some sort of injury – similar to contact sports – might ensue. However, the Court of Appeal held that it was not reasonably foreseeable that such injury would be serious, nor as severe as the injury actually sustained. So, in this instance, the duty of care owed was to foresee risk of physical harm. Crucially, that harm fell short of serious injury and so the claim failed.

Contrast the very low chance of major injury with the court's approach to a more risky activity. In the case of *Anderson v Lyotier (t/a Snowbizz) & Portejoie*<sup>35</sup> the court was concerned with a skiing accident. In this case a group of skiers were taken on their last day down an off piste slope by their group instructor. The claimant, on the descent, failed to make a turn and lost control. He collided with a tree and suffered injuries rendering him a complete tetraplegic. The first instance judge found, having carefully analysed all evidence of the previous week's skiing, the relative experience of the group and the claimant's difficulty in skiing off piste, that the slope was not suitable for the claimant to ski and that the ski instructor was in breach of his duty of care in asking him to ski the slope.

Having established a breach of duty, the judge went on to consider the foreseeability of harm. Reference was made to the Court of Appeal's judgment in *Harris v Perry* discussed above. What level of risk ought the instructor to have in mind? The defendant argued that it would be imposing too high a standard of care on the instructor to expect him to protect the claimant from the kind of harm suffered because it was not reasonably foreseeable that such harm could occur – that is the *Harris v Perry* argument was employed. Not so, said the judge. While there was no evidence of the level of risk of injury actually associated with bouncy castles, in the case of skiing there is all too clear evidence of risk. The potential for serious injury is clear. The potential for serious injury when colliding with a tree at speed is also clear. The foreseeable risk was of major injury so the claim succeeded. While there was an apportionment whereby the claimant bore 1/3 responsibility for his injury, this serves, when analysing risk, only to highlight the foreseeability of serious harm – the claimant should readily have recognised the risk and chosen not to take it.

Finally, the case of *Uren v Corporate Leisure (UK) Ltd & Ministry of Defence*<sup>36</sup> falls to be considered. A senior aircraftman in the RAF, he was engaged on a military "fun day" in which a number of obstacle type races took place. While racing, Mr Uren made a sliding head first leap into a shallow pool and suffered spinal fractures rendering him tetraplegic. The judge said "*enjoyable competitive activities are an important and beneficial part of the life of the very many people who are fit enough to participate in them... A balance has to be struck between the level of risk involved and the benefits the activity confers on the participants and thereby on society generally. The pool game was an enjoyable game ... the risk of serious injury was small. In my judgment, neither [defendant] was obliged to neuter the game of much of its enjoyable challenge by prohibiting head first entry.*" He held the risk of serious injury was small. Indeed, given the nature of the game, the risk of any injury was very low. A trade-off between risk of serious injury and benefit of the activity should be made, and in this instance fell in favour of the activity. It was not foreseeable that injury would occur, and certainly not serious injury, so Mr Uren's claim failed.

So, in answering the question posed, from these cases it can be seen that, while all claims turn on their own facts (a point forcibly made by Mr Justice Foskett in the *Anderson* case), the degree of likely harm readily foreseeable is an important consideration when looking at whether the defendant should have taken steps to guard against the particular risk. A very small risk even of major harm may not need to be guarded against, but a significant risk of major harm will.

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<sup>35</sup> [2008] EWHC 2790 (QB).

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<sup>36</sup> [2010] EWHC 46 (QB).



**Bernard Doherty** edits this newsletter. He undertakes all kinds of personal injury work, 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 the recently published *Accidents Abroad: International Personal Injury Claims* (Sweet & Maxwell, 2009).  
View Full CV at: <http://www.39essex.com/members/profile.php?id=49>



**Emily Formby** is highly regarded for her personal injury work on behalf of both Claimant and Defendant. With particular expertise in employer liability and sporting (particular cycling) injuries she is often asked to analyse liability issues and questions of risk.  
View Full CV at: <http://www.39essex.com/members/profile.php?cat=2&id=96>



**Judith Ayling** undertakes a wide range of personal injury work, and acts for both claimants and defendants. She also has a substantial practice in the law of costs and often advises and acts in cases which combine both areas of expertise. In addition she practices in clinical negligence. She is a member of the Attorney-General's B panel.  
View Full CV at: <http://www.39essex.com/members/profile.php?cat=2&id=63>



**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/profile.php?cat=2&id=77>



**Alexis Hearnden** undertakes a wide range of personal injury work. She has a particular interest in employers' liability cases and regularly acts for employers and employees. Clinical negligence now represents a growing part of Alexis' practice.  
View Full CV at: <http://www.39essex.com/members/profile.php?cat=2&id=79>



**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>

**Michael Meeson** Chambers Director  
[michael.meeson@39essex.com](mailto:michael.meeson@39essex.com)

**Alastair Davidson** Senior Clerk  
[alastair.davidson@39essex.com](mailto:alastair.davidson@39essex.com)

**David Barnes** Director of Clerking  
[david.barnes@39essex.com](mailto:david.barnes@39essex.com)

**Ben Sundborg** Practice Manager  
[ben.sundborg@39essex.com](mailto:ben.sundborg@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