



Update On Recent Limitation Cases

Toby Wynn

At the last seminar I made reference trends in Limitation cases following the House of Lords judgments in a series of cases in particular **Adans and Bracknell Forrest Borough Council** and **R v Hoare**. The cases constituted what many of us felt at the time was a decisive double whammy against claimants in that, in very brief summary, they significantly increased the likelihood of a finding of constructive knowledge being made against a claimant and decreased the likelihood of a judge exercising his or her discretion to disapply the limitation period.

Without going into the detail in relation to constructive knowledge where a claimant had suffered a “significant injury”, in other words one which was of sufficient seriousness to justify issuing proceedings against a defendant who admitted liability and was good for the money then, in effect, the authorities seemed to indicate that a reasonable person in such a situation would set about making enquiries as to the cause of his injuries and would therefore shortly thereafter be fixed with constructive knowledge.

That causes problems in two particular kinds of situations namely industrial diseases where medical opinion is that the damage and symptoms are non-progressive after exposure ceases. Eg HAVS claims. Stops working in 1996 and in 2006 gets his diagnosis. If it's bad enough in 2006 to warrant getting it looked into, because the condition is currently believed to be non-progressive defendants argue that it must have been as bad in 1996/7 and thus the claimant should be fixed with constructive knowledge in about 1997/8 effectively whatever his evidence is in relation to when he first became aware of symptoms. Similar problems with NIHL claims although in those cases in modest loss claims you can argue at least argue that age related hearing loss had made the claimant aware of problems caused by his NIHL.

The other type of cases where problems seem to arise from this approach are those involving surgical procedures which do not go as well as expected but the patient either, because of their stoicism or lack of expectation, simply gets on with things and does not investigate what caused the unfavourable outcome. .

In relation to constructive knowledge and the first type of case I mentioned the case of **Field and British Coal Corporation [2008] EWCA Civ 912** at the last seminar. I

want to go into a bit more detail in relation to the judgment of the Court of Appeal which comprised LJ's May, Moore-Bick and Lawrence Collins. The Claimant started work in 1982 and by 1995 his employment with British Coal had ended. He had episodic problems with his hearing related to wax and infections and his gp had treated him for this on a number of occasions. It was never suggested to him that he had any other problems with his hearing. Symptoms of tinnitus and hearing loss were noted by the claimant in 2003. Diagnosed later that year with mild NIHL. The trial took place in Sheffield in front of HHJ Bullimore who accepted the claimant's evidence about when he first actually noticed symptoms but fixed him with constructive knowledge effectively on the basis that as the claimant had objectively significant symptoms in 1998 and should have known they were not explicable by wax or infection he was therefore to be fixed with knowledge.

The Court of Appeal emphasised that the starting point is always to establish what did the claimant know at the relevant time. If he did not have knowledge that he had sustained a significant injury you only add to facts which it would be reasonable for him to have ascertained if there was something to put him on further enquiry. In a reasonable wrong attribution case – in Fields case to wax and infection there has to be something which the claimant was aware of to put him on further enquiry. But it does seem to slightly open the door to resisting the defendant argument of automatic constructive knowledge.

That brings us to a first instance judgment of Mr Justice Griffith Williams in the case of **Jacqueline Anne Rogers v East Kent Hospitals NHS Trust [2009] EWHC 54** which is an example of the second type of problem case. You will probably all be very familiar with the Court of Appeal decision of **Forbes v Wandsworth Health Authority** the stoical gentleman who has an operation to his leg to cure a circulatory problem and it goes wrong and the next day he has his leg amputated. No one tells him there was any problem with the first operation, he has complete faith in his surgeon and he puts it down to one of those things. 10 years later he discovers that the second operation should have taken place sooner. There was no actual knowledge but the Court of Appeal said that a claimant cannot wait to investigate. If like this claimant you lose a leg (or in general a surgical procedure produces a result significantly worse than intended) then you can obviously either investigate or choose not to but if you choose the latter course you will be fixed with constructive knowledge about 3 years after the unfavourable outcome is confirmed. This case marked the decisive turning point away from including subjective characteristics of a particular claimant when considering the issue of constructive knowledge to a purely objective test finally and decisively clarified by the House of Lords in **Adams**. Or so we thought.

Along comes **Rogers** case – the claimant was a lady with a deformity of her big toe which caused, amongst other things, a painful bunion. She had an operation in 1995 involving a partial amputation of the big toe which did not cure the problem. In 1997 things got so bad she underwent a procedure to amputate the left second toe and part of her third toe. This made matters no better and her condition continued to deteriorate. She continued actively seeking medical treatment and finally in late 2003 a consultant tells her about alternatives to surgery and other procedures which would have been available to her in 1997. She then consults solicitors and accepts that at that point she had actual knowledge. Proceedings issued in 2006. From 1997

onwards she was very angry about the fact that the two operations had not made her any better and she was plainly well aware, to put it mildly, that things had not gone as well as they might have with her treatment. The trial Judge fixed her with constructive knowledge. **Griffiths J** allowed her appeal and held that she was not to be fixed with constructive knowledge on the following basis :

"[The judge's approach] overlooked the evidence of the claimant to the effect that her health was in the Doctor's hands, that she went along with what they said, that had an alternative to amputation been offered she would have taken it, that she was under the impression that it would take time for her condition to settle, that whilst she was aware the operations had not worked, she had learned to cope with the pain and she was interested in getting resolution for her pain rather than questioning why the previous surgery had not worked. He failed in particular to address how this patient viewed doctors and the advice she was receiving..."

He went on to overrule the judge's finding on constructive knowledge and held that it was only when she received positive advice that the cause of action accrued. He went on to indicate that in any event he would have exercised his discretion under section 33 on the basis of no evidence of prejudice caused to the defendant's ability to defend the proceedings. That latter finding may mean that the defendants will not appeal. I have to say I have great difficulty reconciling the Learned Judge's ruling with *Adams* but it might be a port of last resort in this type of case. Thus for claimants there is perhaps a glimmer of hope.

Potentially more importantly there has been the Court of appeal decision in co-joined appeals in *Stephen Cain v Bernice Francis* and *Shona McKay Stephen Hamrani and Direct Line Insurance PLC*[2008] EWCA Civ 145 which is relevant to the exercise of the section 33 discretion. The appeals each arose from cases where the claims were from RTA and where the claims had been intimated promptly and the defendant's insurers had admitted liability. In each case nevertheless solicitors had failed to issue in time. In one case they were one day late, in which case the judge refused the section 33 discretion and in the other a year late in which case he did. Thus it may be suggested that this was the clearest type of case in which a defendant is getting a pure windfall of obtaining a defence where there was none on merits by Lady Justice's Smith judgment is potentially wider and of general application.

Lady Justice Smith starts off by giving a useful judgment in which she holds that the loss of a windfall defence such as this is not a prejudice to the defendant and that the real issue is the effect that the delay has had on the ability of the defendant to advance his defence. She emphasised in particular that it will always be a relevant factor as to when the defendant had notice of the claim and that the primary purpose of the Limitation Act is to protect defendants from stale claims, that is claims which he never expected to have to deal with. The quote from Lord Hoffman in *Horton v Sadler* perhaps is the best summary :

"...no matter how negligent the claimant's solicitor may have been in the simple skill of keeping a diary, the plea of limitation which the statute confers upon the defendant is, in the absence of forensic prejudice, described as a windfall of which he can properly be deprived."

Lady Justice Smith then went on to try and set out the rationale for the proper approach and analysed the reasons for the existence of the section 33 discretion. She concludes that the real test is simple to state namely is it fair and just to allow the claim to proceed? She points out that all limitation periods are arbitrary and that the purpose of the section 33 discretion is to overcome that arbitrariness and at paragraph 69 states :

“In my view the words of section 33 must be construed against that background. The context is that the claimant had the right to pursue his cause of action which he has lost by the operation of section 11. The defendant, on the other hand, had an obligation to pay the damages due; his right was the right to a fair opportunity to defend himself against the claim. The operation of section 11 has given him a complete procedural defence which removes his obligation to pay. In fairness and justice, he only deserves to have that obligation removed if the passage of time has significantly diminished his opportunity to defend himself (on liability and/or quantum). So the making of a direction, which would restore the defendant’s obligation to pay damages, is only prejudicial to him if his right to a fair opportunity to defend himself has been compromised.”

The Chancellor gave a similar judgment. He also decided that loss of the limitation defence is not in itself a relevant prejudice to defendant. What had to be considered was prejudice caused by the delay on the facts of any particular case. LJ Kay also agreed.

As a point of practice it seems to me that before section 33 cases can properly be decided a far greater degree of scrutiny of the defendant’s ability to defend an action will have to be gone into. At present preliminary trials are often listed and disposed of before full discovery has taken place. You often get a solicitor or claims handler’s statement saying in a couple of paragraphs that it all happened a long time ago, the factory is now closed and the foreman can’t be traced. But is that a true picture of the evidential position? For example in a textile mill case – has that firm always acted for that defendant. Are their noise surveys in existence? Experts reports from other cases. Are there cases which have already decided the effective issues arising out of that place of work.

Disclosure of Electronic Documents / PD to Ord 31

At the last seminar I spoke mainly about the disclosure of electronic documents. Just to highlight some recent cases.

In *Digicel (St Lucia) v Cable & Wireless [2008] W+EWHC 2552* in which a defendant was ordered to redo its keyword search of documents where it had failed to agree the scope of the same with the claimants and the Judge took the view that a more extensive search was required and were further ordered to discuss co-operatively with the claimants how reasonable access could be provided to hundreds of tapes.

In *Abela v Hammond Suddards* a deputy district judge did not accept vague assertions by the defendant as to the difficulties of searching for relevant emails and effectively adjourned the application for further inter-parties discussions with input from IT experts.

Hedrich v Standard Bank [2008] EWCA Civ 905 Is a cautionary tale of a solicitor being pursued for a wasted costs order (unsuccessfully as it turned out in the Court of Appeal) arising out of the firm's failure to get to grips with electronic disclosure and in particular to appreciate that emails damaging to their client's case were in his possession and ought to have been disclosed far sooner.



BREACH OF DUTY

Simon Mallett

Road Traffic:

Smith v Finch [2009] EWHC 53

Cyclists should wear helmets or may be liable to a finding of contributory negligence. Defendant will still have to show that the failure was causative of the injury.

Stewart v Glaze [2009] EWHC 704

Road traffic accident. Primary factual evidence is most important. Accident reconstruction experts function is to furnish the court with necessary scientific criteria and assistance.

Henry v Chief Constable of Thames Valley Police Reading CC Rec Flather QC

Police car pursuing motorcyclist (Claimant) at night. Motorcyclist stopped. Police car made contact with Claimant, fracturing his ankle, when they drove close to contain him. No liability. Claimant should have surrendered in safe place. Furthermore Officer exercised error of judgment in driving too close, but it did not amount to negligence. *Marshall v Osmond* (1983) QB 1034 CA (Civ Div) considered and applied.

HIGHWAYS:

Jones v Rhondda Cynon Taff County Borough Council [2008] EWCA Civ 1497

Fireman injured ankle when stepped into hole on edge of footpath. Defendant had known of hole for three years but not repaired it. No section 41 breach. The standard is that the highway is maintained in such a state of repair that it is reasonably passable for the ordinary traffic of the neighbourhood without danger caused by its physical condition. No need to repair due to the minimal use of the path, the good state of the made up area and fact that erosion on river side was perfectly obvious. Foreseeability of harm not enough there must be the sort of danger which Defendant might reasonably be expected to guard against.

Spencer v Wirral MBC (2008) Liverpool C Ct (HHJ Platts).

Protruding tree root caused Claimant to trip and injure her foot. Tree root was a hazard but may not have been a danger to pedestrians. There was no breach of the duty to maintain or repair under section 41. Danger arose from layout of the highway.

Hall v Holker Estate Co Ltd [2008] EWCA Civ 1422

Transfer of burden of proof. Claimant struck by collapsing portable goal posts. Should have been pegged to the ground. Claimant had proved the accident was caused by a want of safety, i.e. an absence of pegging. Defendant accepted duty to inspect. Onus on Defendant to show that accident did not arise from want of care.

STRESS:

Paterson v Surrey Police Authority [2008] EWHC 2693

Test is that it needs to be reasonably foreseeable that the Claimant would suffer a breakdown as a result of stress at work. Not satisfied in this case. Court did not consider breach of the Working Time Regulations 1998 was an important factor.

Dickins v O2 [2008] EWCA Civ 1144

These cases depend on their facts. Psychiatric injury was reasonably foreseeable as the Defendant had notice of her problems and a clear indication of her impending illness. Evidence of stress related illness not just mere stress was necessary. Failure of Defendant made a material contribution to the onset of her illness. Court questioned whether apportionment appropriate in such a case.

WRULD

Goodwin v Bennetts UK Ltd [2008] EWCA Civ 1374

Tenosynovitis from keyboard use. Health & Safety (Display Screen Equipment) Regulations 1992. Pain in wrist aggravated by keyboard work. Defendant should have reduced her work load after onset of symptoms.

WORK EQUIPMENT:

Couzens v McGee & Co Ltd [2009] EWCA Civ 95

Lorry driver used a piece of scrap metal as a makeshift work tool. Driver had scrap metal in his pocket. Could not move foot from accelerator to the brake due to metal in pocket of driver's door. Used metal to scrape mud from tyres. Not "work equipment" under Provision and Use of Work Equipment Regulations 1998 as not supplied by his employer and they had not expressly or impliedly permitted its use.

HOLIDAY:

Anderson v Lyotier and another [2008] EWHC 2790

Tour operator liable. Ski instructor liable for injury sustained when pupil skiing off piste and collided with a tree. Instructor did not assess the Claimant's ability to ski off piste. Likelihood of injury was reasonably foreseeable. Finding of contributory negligence as skier did not raise concerns with the instructor.

OCCUPIERS LIABILITY ACT:

Baldacchino v West Wittering Estate [2008] EWHC 3386 (QB)

14 year old schoolboy climbed navigation beacon and dived into the sea. Paralysed from the neck down. Claim under Occupational Liability Act failed. He was not invited nor permitted to be on the premises. The beacon was not inherently dangerous creating a risk of injury. Even if it was, the Defendant took reasonable precautions

with a system of lifeguards. It would have been obvious that there was a risk of injury and so no warning notice was necessary.

ASBESTOS:

Beddoes v Vintners Defence Systems (2009) Newcastle County Court: HHJ Walton

Damages recoverable for asymptomatic asbestosis? Found there is actionable damage if medical science can identify an effect upon the Claimant before he is aware of a symptoms, that can amount to damage, provided it is more than minimal. Cited Cartledge. But only found actionable damage where there was lung fibrosis and some contribution to breathlessness (respiratory disability 5% of which 1.6% attributable to asbestosis).

Durham v Builders Accident Insurance (Run Off) Ltd [2008] EWHC (QB) 2692

The Employers Liability Trigger Group Litigation. Employers Insurer's liability for mesothelioma triggered at date of exposure. Different to public liability insurance policies in Bolton MBC v MMI [2006] EWCA Civ 50



PI PROCEDURE - AN UPDATE ON THE CASE LAW

Roxanne Frantzis

Part 36

Carver v BAA [2008] EWCA Civ 412

Establishes the correct approach to the new wording of CPR 36.14. The Court of Appeal held that the test of whether an award of damages is “more advantageous” than an offer is a broader one than a simple comparison of the financial value of award as against the financial value of the offer. Therefore a Defendant whose Part 36 offer is beaten by a margin may nonetheless recover its costs on a proper construction of Part 36.

Facts: The Claimant was an airhostess who fell and injured her ankle on entering a lift at Gatwick airport. Liability was not in issue. The claim was initially presented as one of low value for a short term ankle injury but further medical evidence was obtained which ultimately increased the claim’s value. After the Claimant had incurred substantial costs, the claim ultimately advanced at trial as a relatively modest one following agreement between the parties’ medical experts. The Defendant had made Part 36 offers at an early stage which the Claimant rejected without counter offer. The award obtained by the Claimant exceeded the Defendant’s most recent offer by £51.

Points that the Court of Appeal found to be relevant in any consideration of whether an award was “more advantageous”, described by Rix LJ as “an open textured phrase”, were:

- (i) the time consuming nature of litigation and its emotional cost
- (ii) in this case the fact that the additional legal costs of pursuing the action for a further year would have far exceeded the additional award of damages.

Comment: the case will be of use to any defendant whose Part 36 offer is beaten only

by a margin. Financial sums themselves will not be determinative. Broader considerations are relevant. The case serves as a reminder that the court will expect both parties to engage in reasonable and realistic dialogue about settlement and the court will not be slow to penalise a party who does not do so. In this case, a clear message was sent to the Claimant who had failed to negotiate with the Defendant after she was forced to drop the amount claimed when the experts agreed.

Multiplex Constructions Ltd v (1) Cleveland Bridge UK Ltd (2) Cleveland Bridge Dorman Long Engineering Ltd [2008] EWHC 2280

Facts: The court had to determine costs following its decision on the claim of the claimant contractor (M) against the defendant subcontractor (B) for breach of contract. M was the main contractor for the construction of the new Wembley stadium. B was the steelwork sub contractor. The overall result of the trial, following a set off of the sums owed by both sides, was that B had to pay M £6.154 million. The subsequent determination of costs was a complicated exercise as there were various claims and counter claims in a number of schedules which had required the court to determine a number of issues on either side.

The court held that *Carver* was authority of general application as to how the court ought to approach costs when one party had made an offer which was nearly but not quite sufficient and the other party had rejected that offer outright without any attempt to negotiate. The entirety of the parties' conduct should be considered. Although in the instant case the conduct of both parties was open to criticism, the overriding reason why the litigation had not settled was that B had never made an offer settle the entire proceedings, even though it conceded after judgment on the first ten preliminary issues that some overall payment would be due to M. There was a heavier onus on the debtor to make a defendant's offer than on the creditor to make a claimant's offer.

Morgan v UPS [2008] EWCA Civ 1476

In this case *Carver* was distinguished and the Court of Appeal upheld a decision that an unsuccessful Defendant to a personal injury claim should pay the Claimant's costs even though the Claimant had beaten the Defendant's payment into court by a narrow margin.

Facts: M was successful as against U in a claim for damages for personal injuries suffered following an accident at work. In the course of the trial the judge found that M had initially not been truthful with the doctors or the court, however, he noted that M had taken account of the evidence against him and had revised his claim substantially. The judge also found that arguments pursued by U had been wholly without merit. The judge concluded that the fact that M had beaten U's offer "only by a whisker" was not a sufficient reason in this case to deprive M of his costs.

The Court of Appeal upheld this reasoning as tenable. This was not a case where M's exaggeration was the sole reason for taking up the time of the court. U's unrealistic stance on certain issues had involved costs being wasted. The margin by which the offer was beaten was a narrow one, however, there had been counter offers which were not unreasonable. The judge was entitled to come to the conclusion that because the payment in to court had been insufficient, albeit by a small margin, M should be awarded his costs.

Martine Widlake v BAA Ltd [2008] EWHC 3311

Where a claimant for personal injuries damages had beaten a CPR Pt36 payment in to court, but had attempted to manipulate the civil justice system on a grand scale by misleading her medical experts as to her medical history in an attempt to exaggerate her claim, it was appropriate for her to pay the defendant's costs.

Facts: W had initially claimed £163,000 but was awarded only £5,800. The payment in to court had been at £4,500. She concealed from two medical experts that she had a history of lower back pain.

The instant case was not one where W had exaggerated her injuries but rather one where she had deliberately withheld material information from her own medical experts in an attempt to manipulate the justice system on a grand scale. She was cynical and dishonest. It was plain that the 'real winner' of the personal injuries trial was B. To contest and lose an issue of exaggeration without having ever made a counter proposal is a matter of some significance in this kind of litigation. It must not be assumed that beating a Part 36 payment is conclusive.

Comment: the court is going to very interested in factors such as a party's willingness to negotiate throughout the course of the proceedings, and aside from financial aspects, who the real winner in the case is.

J Murphy and Sons Ltd v Johnson Precast Ltd [2008] EWHC 3104 (TCC)

The issue before the court in this case was whether the interest payable on a successful Defendant's costs should be enhanced to reflect that a Part 36 offer had been made to the Claimant by the Defendant during the proceedings.

It was held that it should not. The wording of Rule 36.14(2)(b) dealing with interest on costs to a Defendant who beats an offer, is different to the wording of Rule 36.14(3)(c), which sets out the consequences when a claimant beats an offer. The latter talks expressly of enhanced interest on costs whereas the former does not. The express power to award interest on the Defendant's costs at an enhanced rate is not available under the CPR, whereas it is available in relation to the Claimant's costs.

Costs

A v Chief Constable of South Yorkshire [2008] EWHC 1658

A litigant who had instructed a solicitor based outside of his local area, who charged a higher hourly rate than local solicitors, had not acted as a reasonable litigant would have acted and it had therefore been correct to assess his recoverable costs at the rate which would have been charged by an experienced local solicitor.

Facts: The Claimant alleged that he had developed psychiatric injury in the form of schizophrenia from the wrongful actions of police officers. The Claimant initially instructed solicitors in Sheffield who issued proceedings in London. The proceedings were thereafter transferred to Sheffield. The Claimant opted to change solicitors and instructed a firm in London with particular and extensive experience in suing the police.

The High Court, upon reviewing on application the decision of the Deputy Costs Judge, held that the case could have been brought to a satisfactory conclusion by instructing a solicitor in Sheffield with experience of bringing claims against the police and who would be able to instruct counsel with experience of proving

psychiatric damage and causation. This would be available at substantially less expense than the firm instructed in London.

Alex Sherrard (A Child) v David Carpenter [2009] CC (Taunton) 5th March 2009

In a straightforward case relating to the determination of quantum following the admission of liability in a personal injury case, where there was no legitimate reason for counsel to attend, it was been wrong to include counsel's attendance fee in an order that the Defendant pay the Claimant's costs.

The question in each case was whether there were features to the case that made it necessary to instruct counsel. In this case liability was admitted for a whiplash injury. There was a subsequent hearing to determine quantum at which counsel, who had provided an Opinion on the matter, attended. The court found that I was not necessary in this case to go to additional expense of instructing counsel. The case was straightforward and without complication.

Barbara Stables v York City Council [2008] Ref: LTL 17/4/2009 (Unreported elsewhere)

A judge was correct to determine costs based upon a Statement of Costs where a claimant had substantially departed from the statement in the Bill of Costs without explanation. The judge was also correct to order disclosure of the time sheets of the claimant's solicitors as they were not privileged, and were simple records of the time spent on each item claimed on the bill of costs.

Facts: This personal injury claim was initially allocated to the fast track. It was reallocated upon receipt of further medical evidence. There was at least a 40% difference between the statement of Costs (prepared for summary assessment purposes) for the aborted fast track trial and the costs set out in the Bill covering the same period submitted for detailed assessment following settlement on day 2 of the multi track trial. The judge at first instance held that any costs incurred over and above those included in the original Statement of Costs for the relevant period were incurred unreasonably. The judge also ordered disclosure of the Claimant's solicitor's time sheets.

It was held on appeal that the judge's approach was correct. The Statement of Costs contained the required certificate "the costs estimated do not exceed the costs which the Claimant is liable to pay in respect of the work which this estimate covers." A Statement of Costs, prepared for summary assessment purposes, states the limit of the costs claimed. There was no explanation for the difference. Furthermore, time sheets as simple records of time spent on each item claimed in the Bill of Costs without any reference to advice given by solicitor to client are not privileged.

Kingdom Thenga v Elsa Louise Quinn [2009] EWCA Civ 151

In circumstances where the only matter at issue in a road traffic claim had been the assessment of costs, the conduct of a summary assessment at a hearing without the judge having heard any part of the substantive claim, did not constitute a final contested hearing within the definition of a 'trial' under CPR r45.15(6)(b) for the purpose of determining the applicable percentage uplift on costs under CPR r45.16.

Facts: In the instant matter the Respondent had admitted liability and damages had been agreed. A country court hearing, originally fixed to determine the quantum of damages was used by the district judge to conduct a summary assessment of costs. The issue was whether the district judge was right to award a 100% increase in the Claimant's solicitor's fees on the basis that the claim had not concluded before trial and that the judge had conducted a final contested hearing within the meaning of Rule 45.15(6)(b).

The Court of Appeal held that if the Claimant's contentions were valid they would provide a strong disincentive to agree costs and the strongest incentive to proceed to a hearing referable to costs in order to secure an uplift of 100% rather than 12.5%. It was plain that in drafting the Rule, the authors had not disregarded the conventional notion of a trial and that a 'final contested hearing' related to a substantive claim.

Peakman v Linbrooke Services Ltd [2008] EWCA Civ 1239.

A judge should have penalised a party in costs for bringing an unmeritorious counterclaim which led to the case being allocated to an inappropriate track.

Facts: The Claimant's total claim against the Defendant was for £2,232. The

Defendant contested the claim in its entirety and submitted a counterclaim for lost profits of over £30,000. Both were successful in part, resulting in a balance of £265 due from the Claimant to the Defendant. It was argued on behalf of the Claimant that the case would have been allocated to the small claims track but for the Defendant submitting a hopeless inflated counterclaim. This should be reflected in the costs decision.

Held: The Defendant's conduct was a relevant consideration to be taken in to account. Without the counterclaim the matter would have been allocated to the small claims track with substantially less costs being incurred. The Defendant was ordered to pay 50% of the Claimant's costs from the date of allocation.

Comment: An example of the courts penalising exaggerated claims. Lord Justice Goldring noted that the case represented "much that is wrong with our civil justice system. The costs involved dwarf the damages."

Carol Walton v Joanne Kirk [2009] EWHC 703

[Also relevant to cases on the consequences of exaggeration]

In a personal injury claim, discrepancies between a statement verified by a statement of truth and video surveillance evidence would not automatically give rise to a contempt of court; what mattered was the degree of exaggeration and/or the circumstances in which it was made. Further, knowingly filling out false claims for state benefit and subsequently verifying them in litigation amounted to a contempt of court.

Facts: the Claimant asserted following a road traffic accident that she was unable to walk more than 10 paces "on a good day" and had to give up work. She claimed damages in the region of £800, 000. The Defendant's insurers applied for permission to bring Contempt of Court proceedings, after video evidence was uncovered, showing the Claimant walking, driving and shopping.

The High Court stated that gross exaggeration and dishonesty would not be tolerated. It was in the public interest that personal injury claimants pursued honest claims before the courts and that they did not exaggerate those claims for financial gain. In filling out an 'Incapacity for Work' questionnaire dishonestly and in making a blue

badge application dishonestly and thereafter verifying the contents of those applications in litigation, the Claimant was guilty of Contempt of Court. The Claimant was ordered to pay her own legal costs of £125,000, a fine of £2,500 for the contempt and half the Defendant's legal costs.

CFA's

C v W [2008] EWCA Civ 1459

[Also relevant to Part 36]

The Court of Appeal had to consider the assessment of an appropriate success fee under a CFA entered in to between the Claimant and her solicitors at a time when the Defendant had already admitted liability.

It was common ground that the purpose of a success fee under a CFA was to compensate solicitors for the risk of failing to recover any fee at all. The court noted that the case demonstrated the real difficulties that face both solicitors and the court in attempting to fashion a CFA in cases where liability is admitted, in particular where as in this case a Part 36 Offer lies in the hands of the defendant insurers.

The Court of Appeal held that the risk of losing in these circumstances was clearly very small and this should have been reflected in the amount of the success fee. The Court allowed the appeal and ordered that the success fee be properly assessed at 20% instead of 50%.

The critical aspect of this appeal was the difficulty in assessing the risk (when calculating the success fee) that the solicitors might lose the right to recover their fees as a result of their client's failure to beat a Part 36 Offer which he had rejected on their advice. The Court noted that there may not be any reliable way of making that assessment. The best therefore, that solicitors can do is to make a broad assessment of the different risks which interact with each other based upon their own experience.

Disclosure/Medical Records

OCS Group v Davinia Wells [2008] EWHC 919

A claim for a workplace injury was intimated in a letter before claim and liability was admitted at an early stage. It was agreed that W could and would obtain a report from an orthopaedic surgeon. There was a delay of over one year before any examination took place. Faced with a potential claim for continued loss of earnings, the Defendant sought pre action disclosure of W's medical records.

On appeal the High Court held that the judge did have jurisdiction under Rule 31.16 to make an order for pre action disclosure of the medical records. It was necessary to look ahead and see what would happen if proceedings were started and the records would clearly become disclosable once proceedings were commenced. The records would also either support the claimant's or the defendant's potential cases as to injury and the consequence of that injury. However, it was held not to be necessary or desirable within the meaning of Rule 31.16(3)(d) to order disclosure given the interests of privacy and confidentiality coupled with the fact that the significance of the records was not clear as the claim had not yet been precisely delineated. In any event, the Court did not consider it necessary to dispose fairly of the anticipated proceedings for the Defendant's insurers and solicitors to see her medical records. Such should be disclosed, initially, to a medical expert as envisaged by the protocol.

Ebden v Richardson [2008] EWCA Civ 1589

Although a judge had been misled in a significant respect, which meant that he might otherwise have allowed an adjournment of a quantum hearing to enable disclosure of the claimant's DVLA medical records, the absence of the records had not impacted upon the amount of damages awarded and the judge had been entitled to assess the claimant's future care needs in the way that he had.

Facts: E had been struck on the head by a piece of timber by R. There was evidence that he had suffered some brain damage leading to personality change (he was more forgetful, less focused and found it difficult to multitask). In a claim for damages for personal injury, two months prior to the quantum hearing R learnt that E had returned to his prior occupation as a taxi driver. R's solicitor's twice requested disclosure of

E's successful DVLA application and the associated medical assessment. R sought an adjournment of the hearing to obtain the records but E represented that R had never pursued this issue with his solicitors. The adjournment request was refused.

It was held on appeal that the judge had been seriously misled into believing that R's then solicitors had not pursued E's disclosure of the DVLA records. In the circumstances, however, had disclosure been achieved it was unlikely that it would have made any difference. In context, E's role as a part time taxi driver did not inhibit or undermine the need for his future care and management. The absence of the records had not impacted upon the amount of damages awarded.

Comment: the Court at the time of the appeal had still not had sight of the DVLA medical assessment records. Was the course adopted therefore the proper one? Would not the best evidence have been that which E himself gave to the DVLA?

PI QUANTUM - AN UPDATE ON THE CASE LAW

James Denis Henry Pitcher (by his litigation friend) v (1) Headstart Nursery Ltd (2) Caroline Gooding (3) Mayday Hospital NHS Trust [2008] EWHC 2681

It was appropriate to assess the amount of a further interim payment to be made in a personal injury claim by reference to the likely amount of a lump sum award for pain suffering and loss of amenity, past losses and expenses, and for future losses that might be capitalised, and on the basis that future costs of *care* and case management would be provided for by way of periodical payment order.

Facts: A child suffered severe brain damage at the hands of the Defendant who admitted liability. There was a dispute as to the life expectancy of the child: the Claimant said 15 the Defendant 12 years of age. On a conventional award basis the total claim put was for £5,054,526. The total value of the claim as calculated by the Defendant was £1,859,477. The trial on quantum is due to take place in December 2009. The Claimant had made a further application for an interim payment (to date the Claimant had received £1,022,471 in interim payments)

The High Court noted that some of the future losses and in particular the cost of future care and case management would be by way of periodical payments. The High Court assessed, for the purposes of calculating the interim payment only, the likely award for PSLA, all past losses to trial and future capitalised expenses at £1,718,630, this left a balance of £696,159 when considered in light of the previous interim payments made. The Court rejected the submission that that trial judge may capitalise some or all of the year 1 case and case management plan and proceeded on the basis that all of the future costs of the care plan would be provided for by way of periodical payment order. To do otherwise would be to fetter the discretion of the trial judge.

Beverly Kirk (Executrix) v Vic Hallam Holdings Ltd [2008]

The Court assessed damages to be paid by an employer for the PSLA suffered by a deceased former employee who had contracted mesothelioma as a result of exposure to asbestos during the course of his employment. The pain and suffering caused by an unsuccessful operation exacerbated the level of damages.

Broad consideration was given to the factors to be taken in to account when considering PSLA for this condition: when did the person in question 'start to suffer' from the illness? The High Court relied upon authorities which took this from when the patient was "looking ill". Ten months of suffering on this basis was well in excess of the three months envisaged by the JSB Guidelines as "short". Reference was made to the previous judgment of *George Smith v Bolton Copper Ltd (10th July 2007)* when considering the after effects of invasive surgery: radical surgery is something which exacerbates the level of damages. This was an extremely unpleasant procedure which involves taking out the lung on one side together with the lung lining. It was held by the Court that the pain and suffering caused by the unsuccessful surgery exacerbated the level of damages.