

NEWS UPDATE FOR PERSONAL INJURY PROFESSIONALS

Court Funds Office cash value plummets

Inflation and tax has been blamed for last year's £140m drop in the value of funds deposited with the Court Funds Office.

The office holds £3.3bn in funds and provides banking and administration services for about 140,000 people, most of whom have received personal injury awards and rely on income from these to fund medical care and support.

Wealth management service Investec Wealth & Investment has calculated that inflation and falling interest rates has reduced the value of this money by £140m last year alone.

Richard Fullman, divisional director of the personal injury and court of protection team at Investec Wealth & Investment, said: "The Special Account used to pay 6% as recently as two years ago, but it dropped to 0.5% in July 2009. Sadly many parents and carers charged with the responsibility of managing their dependants' financial affairs have kept the money where it is despite the impact this is having."

Many people, he said, don't realise that the ongoing interest they receive plus any capital gain over their allowances, is taxable.

"Add to this a widespread tendency to underestimate the impact of inflation over the lifetime of an award and you have a situation where many vulnerable people are in danger of running out of money too soon. It's tempting to leave a large sum of cash on deposit, particularly in the current investment climate. But it's not necessarily the lowest risk approach and almost certainly isn't the most tax efficient," he added.

Rise in rogue firms closed down

There was a ten-fold increase in the number of unscrupulous or unauthorised claims management companies shut down by the Ministry of Justice (MoJ) in the last year.

Nearly 350 firms were closed down last year compared to 35 the year before. Some were shut down for serious transgressions, such as fraud, and using misleading marketing and aggressive sales techniques, said Kevin Rousell, who leads the MoJ's claims management regulation unit.

The 349 firms which had their licences taken away in 2010/11 were either found to be in breach of rules or failed to meet the regulator's requirements for authorisation. During the year the regulation unit targeted unsolicited

e-marketing, in particular SMS text messages which some claims companies use to market their services. It also focused on stamping out abuse in the new market of mis-sold payment protection insurance.

The regulation unit says it aims to protect against firms exploiting vulnerable consumers by over-selling expectations of compensation pay-outs.

Rousell said: "We have made it very clear to businesses that we are not going to accept any malpractice or attempts to take advantage of vulnerable people."

He pledged to keep up the pressure on unscrupulous firms next year. "Companies should remain in no doubt that if they breach the rules they

will be closed down."

Preston-based personal injury solicitor Philip H Cuerden, of PHC Law said: "It is disappointing to learn that there are so many companies who are in breach of the regulations on our business which are intended to safeguard the interests of our clients."

The overriding objective of any reputable, genuine firm is to attend to the needs of the person who has sustained an injury as a result of someone else's negligence, he said. "We therefore believe that action needs to be taken against companies which breach the rules and regulations of the MoJ."

APIL warns over RTA process

The streamlined process for road traffic accident cases should not be extended to higher value claims until its ongoing technical problems have been completely ironed out, says the Association of Personal Injury Lawyers (APIL).

APIL has submitted a response to the Ministry of Justice's consultation *Solving Disputes in the County Court; Creating a Simpler, Quicker and More Proportionate System*.

"All problems with the RTA process must be rectified before any thought is given to extending it to higher value claims," said APIL president David Bott.

Complications which often arise in higher value claims, such as the cost of future care, past and future losses and pre-existing medical conditions, make the existing

scheme in its current form inappropriate for extension, he said.

APIL has also asserted that it is difficult to see how the existing process could be applied to employers' liability (EL) and public liability (PL) cases.

"Workplace cases are often difficult by nature because of common issues with liability, causation, apportionment of liability and evidence," said Bott.

"This makes it hard to see how many of them would remain within the scope of a simplified process. Because PL claims are wide ranging, as they encompass cases which do not fall under readily available definitions such as EL or clinical negligence, it is also hard to see how they could work under a 'one size fits all' scheme," he added.

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Happy holidays

When is a holiday a package holiday? Ben Bradley reports

Thousands of British holidaymakers are currently returning from sunnier shores. Some will have hoped for a bespoke holiday of a lifetime; others will have been on a last-minute getaway. Most will have their dreams fulfilled. However, a significant minority will slip, trip, fall, or contract some form of ragingly acute gastric infection. Some unlucky claimants may encounter all of the above and more.

Under reg 15 of the Package Travel, Package Holidays and Package Tours Regulations 1992 (the 1992 regulations), if the hotel (or any component part of the package holiday) causes the claimant(s) to suffer personal injury, loss or damage, the provider of the package holiday (usually a tour operator) is liable for the non/mal-performance of the holiday contract regardless of whether it provided those aspects of the holiday contract or whether it relied on an agent/supplier to provide those services.

However, for reg 15 to bite, the claimant must have been sold a "package holiday" within the meaning of the regulations. This article explores precisely when a holiday is a "package holiday" and when it is not.

The "modern era" of holiday booking

When the 1992 regulations coming into force, booking holidays on the internet was virtually unheard of. Package holidays were usually organised by an (often large) tour operator, who mass-booked hotel rooms, flights and transfers, providing them to the consumer at an all-inclusive (and often reduced) price.

Many package holidays are still booked in this way, but the advent of the internet and the closure of several high street travel agents has created a potential problem. Holidays are now often booked in a manner not envisaged when the 1992 regulations came into force. As a result, certain holidays do not fit the "framework" of the regulations, and increasingly, it is often disputed as to whether a holiday is in fact, a package.

So when is a holiday a package holiday?

At first blush the regulations and related case law may seem convoluted; however, in summary, this article seeks to argue

that the "package holiday issue" can be answered by reference to one question:

"Was the claimant informed that he could purchase each individual element of the package holiday separately at the time of booking?"

If the answer to this is "yes", the holiday is unlikely to be a package holiday. If the answer is "no", the holiday is likely to be a package holiday.

The issues to be determined:

Two distinct issues arise when determining whether a claimant has a cause of action under the 1992 regulations.

Firstly, the claimant must consider whether the holiday was a "package holiday" within the meaning of the regulations? If the holiday was not a package any action under the regulations will fail.

Secondly, the claimant must consider who the correct defendant is for the purposes of pursuing an action under the 1992 regulations.

These are distinct issues which often become intertwined by the parties in pre-action correspondence. In fact, each question can and should be determined separately, with the "package holiday" question being determined first.

The meaning of "package holiday" under the 1992 regulations:

A "package" is defined at reg 2(1) of the 1992 regulations which states:

"package" means the *pre-arranged* combination of at least two of the following components when sold or offered for sale *at an inclusive price* and when the service covers a period of more than 24 hours or includes overnight accommodation:

- (a) transport;
 - (b) accommodation;
 - (c) other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package, and
- (i) *the submission of separate accounts for different components shall not cause the arrangements to be other than a package;*

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(ii) the fact that a combination is *arranged at the request of the consumer* and in accordance with his specific instructions (whether modified or not) shall not of itself cause it to be treated as *other than pre-arranged*." [Emphasis added].

Thus "bespoke" packages where the client requests an organiser for a specific itinerary could amount to a package.

Separate accounting for flights, accommodation (and any other elements of the package) does not necessarily render a holiday to be outside the scope of the regulations (although, for the reasons given below, it might have some practical bearing on the overall outcome).

CAA v ABTA

The appeal court's decision in *CAA v ABTA* [2006] EWCA Civ 1356 is the leading authority in determining whether a holiday is a package holiday (it was recently applied in *CAA v Travel Republic Ltd* [2010] EWHC 1151).

The "easy" cases

In determining whether holidays amount to package holidays, said Chadwick LJ (para 25), the "easy" cases are always those where "the price will not be the aggregate of the prices for which the components within the combination would have been sold or offered for sale if each component had been sold or offered for sale as a separate service outside the combination".

In such cases, the tour operator may have negotiated a discount, packaged the various components together, and sold them to the claimant at a discount. This is the "classic" type of package holiday, often organised by well-known tour operators.

The "difficult" cases

Chadwick LJ said (para 26) that the "*more difficult* cases are those in which the price for the whole is equal to the aggregate of the prices for which the components would have been sold or offered for sale separately". [Emphasis added].

A modern day internet/phone retailer may obtain various components of the holiday from different sources (ie, flights from one provider; accommodation from another); they may then "package" these components, quoting consumers one

price for the whole amount, which in fact amounts to the aggregate price for all of the components put together.

Chadwick LJ solves the problem posed by these “difficult” cases as follows. He states (para 27): “...Suppose a customer, in London, who wishes to spend a week at a named hotel in, say, Rome. He asks his travel agent what the trip will cost him. The agent ascertains that the cost of the return flight will be £X, the cost of accommodation will be £Y and the cost of the airport transfers will be £Z. *Without disclosing the individual cost of each service*, the agent offers the customer flights, accommodation and transfers at a price of £(X+Y+Z). *The customer accepts without further inquiry*. In that case there would be little doubt...that the services were sold as a pre-arranged combination and at an inclusive price.” [Emphasis added].

By contrast, (para 28), Chadwick LJ suggests that the following example would not amount to a package holiday: “Now suppose that the agent...has explained to the customer that he can purchase any one or more of those services, as he chooses, without any need to purchase the others... In that case...there would be little doubt that the services are not offered for sale as a pre-arranged combination and at an inclusive price.” [Emphasis added].

The only distinguishing factor between

these examples relates to whether the consumer was informed that he could *in theory, or otherwise purchase each element of the package holiday separately*.

Again the “package holiday issue” usually comes down to “the central question”: “Was the claimant informed that he could purchase each individual element of the package holiday separately at the time of booking?”

Who is the correct defendant?

If the answer to the question above is no, it is likely the claimant has been sold a package holiday. In these circumstances, who do you sue?

The obvious answer is to sue the entity who put all the components together, without telling the claimant they could be purchased separately. These entities often claim they were merely acting as an online agent for the suppliers of the individual suppliers of each element of the holiday. In turn, they were acting as something akin to a “travel agent” or “retailer” within the meaning of the regulations.

The first instance decision of *Hone v Going Places* (QBD) 16/11/2000, (unreported), indicates that a “retailer” can only be sued in two circumstances: where the retailer was acting as a quasi-organiser; or; the retailer acted for undisclosed principals at the time of booking.

There is nothing in *Hone* which is inconsistent with the approach adopted in *CAA*, or the central question above. If a retailer puts together a holiday from various component sources, and quotes the consumer an all-inclusive price (without disclosing the source of the component parts of the holiday), then surely that retailer is acting as a quasi-organiser?

By contrast, if the retailer *informs* the consumer that their holiday is being made up by sourcing different components of the holiday from different sources (and naming those sources), either explicitly or by inference, the consumer would surely know that in theory he could purchase each element of the package holiday separately if he/she wanted to.

This is a grey area in that Chadwick LJ in *ABTA* does not indicate whether the claimant needs to be told *explicitly* that the elements can be purchased separately, but one assumes a claimant could “join the dots” if told that separate providers were providing separate elements to the package.

In turn, if one asks the central question, clients can be advised with some (although not certain) fortitude as to whether the holiday is likely to be a package within the meaning of the 1992 regulations.

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The insurance industry's dirty secret

Why are referral fees so controversial and how are they likely to be reformed? Frances McClenaghan reports

Over 40% of personal injury lawyers pay referral fees to receive work from insurers or claims management firms. However, their continued existence is under threat in light of criticisms by legal regulatory bodies, politicians and the judiciary.

What are referral fees?

Referral fees are defined by the Legal Services Board (LSB) as “any payment made for the referral or introduction of any client or potential client”. Fees may be paid and received by insurance firms, vehicle repairers, credit hire firms, claims and accident management firms, law firms and medical experts. There is even evidence

that some police forces are accepting fees for collecting vehicles which are unfit to drive following an accident.

Barristers are prohibited from paying referral fees by the Bar Standards Board, however in 2004 the Solicitors’ Conduct Rules changed, allowing solicitors to use them. This change followed an Office of Fair Trading report, *Competition in professions*, which considered that banning referral fees would hamper the development of an online marketplace.

Arguments for and against referral fees

The principal argument in favour of referral fees is that they are a legitimate client

acquisition cost. Some firms have not been effective in reaching out to clients and therefore have benefitted from having other bodies, such as insurance companies, directing their clients to them. The question then arises: if firms are benefitting from these referrals, why should insurance companies and claims handling firms not charge for the service? If referral fees were done away with, some solicitors argue that these costs would only be replaced by marketing costs.

The second argument flows from the first, namely that with solicitors firms’ profiles being heightened, clients become aware of their services, and therefore access to justice is improved.

There are three main arguments against referral fees. First, it is argued that they are economically inefficient, that they drive up insurance costs and legal fees, thereby reducing access to justice. Aviva has said that solicitors’ marketing costs, including referral fees, can now total as much as 40% of their base costs.

Second, it is suggested that without referral fees, solicitors firms would have to compete on quality of service and price,

Referral fees/ Legislation

and that would drive up standards. Some smaller firms have complained that claims have been transferred from them to larger firms who pay greater referral fees, who then under-settle claims to achieve a swifter result.

Third, many argue that to trade an individual's legal needs is morally wrong.

Proposals for reform

In Lord Justice Jackson's *Review of Civil Litigation Costs* he recommended that referral fees in personal injury cases should be banned. However in May 2011, following its review of referral fees, the LSB opted against an outright ban in its final decision paper. The LSB's suggested approach was to strengthen transparency obligations and to enhance self-regulation by providing

guidance and assessing implementation in 2013/14.

Politicians were quick to comment following the LSB's decision. On 27 June, Jack Straw called for Jackson LJ's proposed ban to be implemented. However, the next day, the government appeared to take a more ambivalent view of referral fees when Jonathan Djanogly, parliamentary under-secretary of state at the Ministry of Justice, told the Today programme on Radio 4 that the government took the issue seriously but that referral fees were "only a small part" of the no win, no fee system for personal injury claims.

The reaction of the insurance sector has also been inconsistent. The Association of British Insurers has called for a widespread ban and in June, Axa became the first insurer to publicly back

the ban. However last month Admiral confirmed it had no plans to stop taking referral fees. Further, rather than taking a public stance, as Axa has done, there is evidence that other insurers are changing their terms and conditions to prohibit their brokers from accepting referral fees.

What does the future hold?

Djanogly said the government will analyse the LSB report before deciding what action to take on referral fees. Those in favour of a ban can take heart from the, admittedly vague, comment by the Prime Minister in PMQs on 13 July that he was "sympathetic" to the idea. However it still remains to be seen whether referral fees are here to stay.

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Legislation Update

<p>Act of Sederunt (Rules of the Court of Session Amendment No 4) (Miscellaneous) 2011</p>	<p>Enactment Citation SSI 2011/288</p> <p>Commencement Date See summary</p> <p>Legislation Affected SI 1994/1443 amended</p> <p>Enabling Power Court of Session Act 1988, s 5</p>	<p>Makes amendments (coming into force on 21 July 2011) to the following provisions in the Rules of the Court of Session 1994, SI 1994/1443, as well as other minor amendments:</p> <ul style="list-style-type: none"> n the rule on restrictions as to caveats; n the rules and table of fees in relation to charges for witnesses and charges for skilled person; n the rules relating to actions of damages for, or arising from personal injuries (in force 7 July 2011); n the rule on inspection and recovery of documents in personal injuries actions; n the rule on admiralty actions in rem.
<p>National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) (Amendment) Regulations 2011</p>	<p>Enactment Citation SI 2011/1706</p> <p>Commencement Date 3 August 2011</p> <p>Legislation Affected SI 2011/704 amended</p> <p>Enabling Power NHS Redress (Wales) Measure 2008, ss 1, 11(2)(d), 11(3)</p>	<p>Amend the National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) Regulations 2011, SI 2011/704, to delay implementation of how redress is to be provided where an NHS Trust in Wales or a Local Health Board in Wales enters into an arrangement for the provision of health services with an NHS body in England, Scotland or Northern Ireland, as well as the cross border redress arrangements</p>
<p>Railways (Safety Management) (Amendment) Regulations (Northern Ireland) 2011</p>	<p>Enactment Citation SR 2011/261</p> <p>Commencement Date 10 October 2011</p> <p>Legislation Affected SR 2006/237 amended</p> <p>Enabling Power Health and Safety at Work (Northern Ireland) Order 1978, Arts 17(1), (2), (3)(a)(c), (4), 43(2), 54, 56(3)(a), Sch 3, paras 1(1)(a)(c), 1(2), 3(1), 4, 5, 6, 7(1), 8, 13, 14(1), 15, 17(a), 19</p>	<p>Transpose certain provisions of Directive 2008/110/EC (the Revised Safety Directive) on safety on the community's railways.</p> <p>Introduces a new reg 16A to the Safety Management Regulations which prohibits a person from operating a vehicle on the railway system unless an entity in charge of maintenance has been assigned to it, such entity having been registered as such on the National Vehicle Register. Regulation 16A does not apply to heritage vehicles. The entity in charge of maintenance must put in place a system of maintenance for vehicles to which it has been assigned.</p> <p>Sets out a revised list of common safety indicators and incorporates new common definitions and methods to calculate the economic impact of accidents.</p> <p>Clarifies that in Pt 4 of the Safety Management Regulations, the definition of "work" includes voluntary work. Amends appeals provision arrangements.</p>

Costs-only proceedings (Pt 8)

When to use the procedure

The costs-only procedure can be used when settlement has been reached between the parties on all issues, without proceedings having been begun, but the parties wish the court to determine the level of costs to be paid. The parties must have decided who is to pay the costs. The agreement should be recorded in writing. (CPR 44.12A(1)).

The Supreme Court Costs Office Guide states that before initiating the costs-only procedure, a proper attempt to reach an agreement should be made. (Supreme Court Costs Office Guide 21.1(c)(iii)).

Costs-only proceedings are, in effect, a prelude to detailed costs assessment, without the preceding action. Parties cannot apply direct to the court for a detailed assessment; they must follow the costs-only procedure first. (CPR 44.12A).

The court will either:

- n make an order for detailed costs assessment; or
- n dismiss the claim (it *must* dismiss an opposed claim).

The CPR PD 44 makes clear that CPR 44.12A does not prevent a person from issuing a claim form under Pt 7 or Pt 8 to sue on an agreement-making provision for costs nor from claiming an order for costs or a sum of costs in that case. If the paying party opposes the costs-only claim then the court will have to dismiss the claim and the receiving party may then start proceedings by way of a Pt 8 claim. (CPR 44.12A; CPR PD 44, para 17.11).

The court will not decide the amount of costs, the detailed assessment proceedings will do that, if ordered. It will only decide whether or not there should be an assessment of costs. (*Bensusan v Freedman* [2001] All ER (D) 212 (Oct)).

There is usually no need for the parties to attend court for a Pt 8 application.

Consent orders

If you and the other parties reach agreement about costs after costs-only proceedings have started, you should file at court a consent order setting out the terms of your agreement. (CPR PD 44, para 17.7).

A consent order can be made in terms differing from those set out in the claim form. (CPR 40.6; CPR PD 44, para 17.7).

A court officer cannot enter and seal an agreed order if any of the parties is a litigant in person or if the approval of the court is required. (CPR 40.6(2)(b) and (c)).

Offers to settle

CPR 47.19 concerns offers to settle which are without prejudice save as to the costs of the detailed assessment proceedings.

Where Pt 8 proceedings are commenced to obtain a court order for detailed assessment, the “costs of the proceedings” which give rise to the assessment proceedings within the meaning of CPR 47.19 have been found to relate only to the costs leading up to the disposal of the substantive claim. This overturned the first instance decision that the “costs of the proceedings” included the costs of the substantive claim and those of the costs-only proceedings. The Court of Appeal in *Crosbie v Munroe* [2003] All ER (D) 206 (Mar) found that the “assessment proceedings” covered the whole period of negotiation about costs, through the Pt 8 proceedings, to the ultimate disposal of the proceedings. As a result, the defendant’s offer under CPR 47.19 did not include the costs of those proceedings.

The claim and the court

Since the introduction of the Supreme Court the Supreme Court Costs Office is now known as the Senior Courts Costs Office. The accompanying guide has yet to be reissued and so is still known as the Supreme Court Costs Office Guide.

How to start the claim

Costs-only proceedings broadly follow the CPR 8 procedure. accordingly, either party to the agreement may start proceedings by completing a Pt 8 claim form. (Supreme Court Costs Office Guide, 21.2; Claim form (CPR Part 8) (Form N208) Word Format).

The claim form should be issued in the court in which the main proceedings would have been heard, had they been issued. Accordingly, a claim form should not be issued in the High Court unless the dispute to which the agreement relates was of such a value or type that

had proceedings begun, they would have begun in the High Court.

If the claim would have been heard in the High Court in London, the claim form must be issued in the Senior Courts Costs Office. (CPR PD 44, para 17.2).

The claim form must either contain or be accompanied by the agreement between the parties to pay costs or confirmation of the agreement. (CPR PD 44, para 17.3).

The claim form must:

- n identify the claim or dispute to which the agreement to pay costs relates;
- n set out the date and terms of the agreement on which the claimant relies;
- n set out or attach to it the draft order sought;
- n state the amount of the costs claimed;
- n state whether costs are claimed on an indemnity or standard basis.

If you fail to state the basis on which costs are claimed then they will be treated as being claimed on an indemnity basis.

The evidence filed and served with the claim form must include copies of the documents on which the claimant relies to prove the defendant’s agreement to pay costs. (CPR PD 44, para 17.4; CPR 8.5; Supreme Court Costs Office Guide, 21.2c).

Under the Civil Proceedings Fees (Amendment) Order 2011, SI 2011/586, Sch 1, 1.8(b), a court fee of £45 is payable when issuing the claim form.

All documents apart from the fee must be served on the defendant.

A claimant that does not serve its written evidence at the required time will need the court’s permission to rely on it. (CPR 8.6).

What the defendant should do

The defendant should file *and serve on all other parties* a specific Acknowledgment of Service Form (Form N210A) no more than 14 days after service of the claim and state on that form whether they:

- n intend not to contest the claim for costs (Section A)
- n intend to contest the amount claimed but not the making of the costs order (Section B)

In practice/ case digests

- n intend to (Section C):
 - n contest the order for costs;
 - n seek a different remedy; or
 - n dispute the court's jurisdiction, in which case the court is likely to order that the claim be continued under Pt 7.

The defendant must also file and serve any evidence relied on.

A defendant that does not serve its written evidence at the required time will need the court's permission to rely on it. (CPR 8.6).

When time for acknowledgment has expired

The claimant can make a request by letter that the court make an order in the terms of his claim. (CPR PD 44, para 17.6).

The claimant cannot make such a request of the defendant has filed an acknowledgment of service stating that:

- n he contests the claim;
- n he seeks a different order.

In that case the court must dismiss the claim. (CPR 44.12A(4)(b); CPR PD 44, para 17.9(1)(a)).

What the court will do

The court may either:

- n make an order for costs to be determined by detailed assessment; or
- n dismiss the claim (if, eg, the claimant does not satisfy the court of the existence of an agreement).

If the court makes an order for costs, this is treated as an order for the amount of costs to be decided by detailed

assessment under CPR 47. (CPR 47; CPR PD 44, para 17.8).

The court *must* dismiss the claim if it is opposed. (CPR 44.12A(4) which is subject to CPR 44.1A(4A) and CPR 44.12B):

- n CPR 44.1A(4A) provides that where Section II of CPR 45 applies (road traffic accidents – fixed recoverable costs) the court shall assess the costs in the manner set out there.
- n CPR 44.12B provides for costs in respect of insurance premium in publication cases.

The following do not apply to costs only proceedings:

- n CPR 8.9: these claims may therefore be dealt with without being allocated to a track.
- n CPR 24 (summary judgment).

The court will dismiss the claim as soon as an acknowledgment of service opposing the claim is filed. However, this does not stop the claimant from issuing another claim form under Pts 7 or 8 based on the same agreement or alleged agreement. (CPR PD 44, para 17.9(2)).

The court can order that a claim commenced as a Pt 8 claim should continue as a Pt 7 claim. In doing so, the court may give any directions it considers appropriate. (CPR 8.1(3)).

What the court will not do

The court will not decide the amount of costs. The detailed assessment proceedings will do that, if ordered.

In no circumstances should a district or costs judge hear an application under CPR 44.12A and immediately

embark on a summary assessment, as a summary assessment should only be done by the judge who has decided the substantive issue. The judge must only decide whether or not there should be an assessment of costs. (*Bensusan v Freedman* [2001] All ER (D) 212 (Oct); CPR 44.12A).

The court will not treat the claim as opposed if the defendant states in the acknowledgment of service that he disputes the amount of costs claimed. (CPR PD 44, para 17.9(1)).

Jurisdiction of the judges and cost officers

A costs judge or a district judge has jurisdiction to hear and decide any issue which may arise in a claim issued under this CPR 8 irrespective of the amount of the costs claimed or of the value of the claim to which the agreement to pay costs relates.

A costs officer may:

- n make an order by consent; (CPR PD 44, para 17.7)
- n may dismiss a claim. (CPR PD 44, para 17.9).

When no hearing is required

The court will make an order in the terms sought without a hearing if:

- n the defendant does not file an acknowledgment of service and the claimant has written to the court to request an order in the terms of his claim; (CPR PD 44, para 17.6)
- n the defendant indicates in the acknowledgment of service that the claim is not contested; or
- n a consent order under CPR 40.6.

Case digests

Mutua and others v Foreign and Commonwealth Office **[2011] All ER (D) 200 (Jul); [2011] EWHC 1913 (QB)** **21 July 2011**

Practice – Striking out – Action – Claimants alleging personal injuries deliberately inflicted by Kenyan officers and soldiers while they were in detention in Kenya in varying periods between 1954 and 1959 – Claimants alleging defendant liable as representing

UK government – Claimants bringing action for damages for personal injuries – Defendant applying for orders striking out claims and/or for summary judgment – Whether claimants having viable claim in law against defendant – CPR Pts 3, 24.

The five claimants brought an action for damages for personal injuries in respect of alleged torts of assault, battery and negligence, for which it was alleged the defendant was liable as representing

the UK government. The injuries were alleged to have been deliberately inflicted on them while they were in detention in Kenya, in varying periods between 1954 and 1959, by officers and soldiers of the Kenya police force, the Home Guard and/or the Kenya Regiment. The particulars of the injuries alleged physical mistreatment of the most serious kind, including torture, rape, castration and severe beatings. The claims were presented under five heads, namely that: (i) the former liability of the Colonial Administration in Kenya simply devolved or was transferred, by operation of the common law, upon the UK government at the time of independence in 1963; (ii)

the UK government was directly liable to the claimants, as a joint tortfeasor, with the Colonial Administration and the individual perpetrators of the tortious assaults, for having encouraged, procured, acquiesced in, or otherwise having been complicit in, the creation and maintenance of the "system" under which the claimants were mistreated. Such liability was alleged to arise out of the role of the military/security forces under the command of the British Commander-in-Chief; (iii) that the UK government was similarly jointly liable, through the former Colonial Office, for the acts complained of, because of its role in the creation of the same system under which detainees were knowingly exposed to ill-treatment; (iv) the UK government was liable to the claimants (and to the third claimant in particular) as the result of an instruction, approval or authorisation of particular treatment of claimants given on 16 July 1957; and (v) the UK government was liable in negligence for breach of a common law duty of care in failing to put a stop to what it knew was the systemic use of torture and other violence upon detainees in the camps when it had a clear ability to do so. The defendant applied under CPR Pts 3 and 24 for orders striking out the claims and/or for summary judgment for the defendant against the claimants dismissing their claims. The claimants applied under CPR 17 for permission to amend the particulars of claims.

The principal issue was whether the claimants had a viable claim in law, and on the facts, against the defendant representing the UK government. It was not denied by the defendant that, if the claimants' allegations were well founded, they would have had proper claims at the time against the perpetrators of the assaults and, most probably, also against the former Colonial Administration in Kenya on a vicarious liability basis.

The court ruled:

In the circumstances, save in respect of the first formulation of the claimants' claims, the defendant's applications under CPR Pts 3 and 24 for orders striking out the claimants' claims and/or for summary judgment dismissing the claims would be dismissed. The claimants' application under Part 17 would be allowed.

Accordingly, the first formulation of the claimants' claims would be struck out.

O'Connor v Stuttard
[2011] All ER (D) 161 (Jul); [2011]
EWCA Civ 829
19 July 2011

Negligence – Duty to take care – Foreseeable harm – Duty to take care to avoid injury to persons who might foreseeably suffer injury from want of care – Driver of motor vehicle – Claimant child playing in street – Defendant motorist striking claimant – Defendant being found not negligent by county court – Whether judge had erred in holding that the defendant had taken reasonable care .

The claimant, who was a child at the time of the incident, was struck by a car being driven by the defendant. The claimant commenced proceedings against the defendant in the county court. The judge found that the defendant had been returning to his workplace after lunch. Knowing that the road where his work was situated was an area where children frequently played, he had driven quite slowly, at around 10 miles per hour. He saw a group of children playing at the right hand side of the road, so he slowed further and positioned his car very close to the left hand kerb. As he was doing that, the claimant ran across the road in front of him, from right to left, chasing a ball. Although the claimant denied that he had seen the car, the judge found that he must have. The claimant reached the left hand pavement and continued to play with the ball. The defendant, thinking that the claimant would not leave the pavement, continued his way forward very close to the kerb. However, the claimant moved backward towards the road and the car struck the back of his foot, causing a fracture of the lower ends of the tibia and fibula. The judge held that the actions of the claimant, who had been a child, had not been negligent, although his actions would have been negligent in an adult. The judge, in considering the actions of the defendant, reminded himself that a driver's duty was to take reasonable care for a pedestrian's safety, not to guarantee it. The judge rejected the submission that the defendant should have sounded his horn on the basis that the claimant had probably been aware of the advancing car and because the defendant's belief that the claimant had seen him had been reasonable. He rejected the submission that the

defendant should have stopped as going well beyond the duty to take reasonable care. In the circumstances, it had been reasonable for the defendant to have continued his course at a slow pace and the claim was dismissed. The claimant appealed.

He submitted that the judge had erred in his conclusion that the defendant had not been negligent because: (i) he had failed to take account of the real danger that had been presented by the developing situation; and (ii) his reasoning had been inconsistent.

The appeal would be allowed.

The judgment had contained an inconsistency. If the judge had been right to say that it would have been folly for an adult to have carried on kicking a ball on the pavement when there was a car approaching because he should have foreseen the risk that the ball might go out of control, it was hard to see why the approaching motorist should not have foreseen the same risk. That risk had been one which any reasonable adult would have been aware of as a matter of common sense and experience. On the basis of the facts as found, the defendant had been negligent. It had behoved the defendant to have ensured that the claimant had been aware of his presence and had kept still before he proceeded. In the circumstances, the onus had been upon him as an adult and as the driver of the car to have sounded his horn or stopped or both so as to have ensured that the claimant kept still while he proceeded. That was not an unreasonable burden to place on a motorist who was driving very close to a young child. The judge had erred in holding that the defendant had taken reasonable care and the appeal would be allowed.

Nield and another v Loveday and another
[2011] All ER (D) 139 (Jul)
13 July 2011

Contempt of court – Civil contempt – Committal – First claimant and first defendant being involved in motor accident – First defendant bringing claim for personal injury – First defendant and second defendant wife giving witness statements verified by statement of truth – Second claimant motor insurance company doubting extent of first defendant's injuries – Insurers and first claimant bringing proceedings for

Case digests

committal – Whether defendants guilty of contempt of court.

In April 2006, a road traffic accident occurred between the first claimant and the first defendant. The first claimant drove out of a petrol station forecourt into a collision with the side of the first defendant's vehicle. The second claimant, motor insurers for the first claimant, subsequently admitted breach of duty. Causation of injury and consequential loss remained in issue. In March 2009, the first defendant issued proceedings in the county court seeking damages for his injuries. He submitted that he had sustained significant soft tissue injuries to his neck and lower back, possible traumatic brain injury and consequential psychiatric injury. In support of his claim for loss of earnings he produced a letter, purportedly from his employer, giving details of his salary and confirming that he had started work on the date of his accident. The insurers carried out covert surveillance of the first defendant which showed that he was not a housebound individual as he had contended to be. The insurers also obtained disclosure of records kept by the first defendant's general practitioner. It issued a counter-schedule and counter-claim in which it set out various allegations of dishonesty. The insurers acknowledged that the first defendant might have sustained a temporary soft tissue injury and an offer for payment was accepted by the first defendant. An application was brought jointly by the first and second claimant for an order for committal for contempt of court against the first defendant and his wife,

the second defendant, under CPR 32.14 and RSC Order 52.

They submitted that the defendants were guilty of contempt of court pursuant to RSC Order 52.1.16(l) and CPR 32.14 in that both defendants had verified statements of truth on court documents containing statements of fact and, or, made representations through the first defendant's legal representatives to the court in which: (i) the statements of facts had been untrue; (ii) they had been untrue in such a way that the untruth interfered with the course of justice in a material respect; and (iii) they had been made in the knowledge of the defendants that they were untrue. When assessed by a psychiatrist, the first defendant explained that his mental state meant that he had not read the draft witness statement through before signing it. The psychiatrist's report concluded that he was suffering from mild depression and post traumatic stress disorder and that his explanation was consistent with his diagnosis. The first defendant subsequently submitted that eight handwritten annotations made to the draft witness statement had been his and the solicitor who prepared his witness statement had misunderstood his instructions. He had been talking about the past and she had not appreciated that there had since been considerable improvement in his condition. The second defendant admitted that her witness statement had been untrue in certain respects at the date it was signed.

The court ruled:

The defendants had been guilty of contempt of court. Both defendants had

signed as being true, witness statements in the proceedings which they had known perfectly well to be untrue. They had known that the statements had been intended for use in the personal injury claim and that their actions were likely to interfere with the course of justice. On the evidence, the court had been satisfied that the letter purportedly written by the first defendant's employer had been a forgery. However, it did not follow that he had never worked for that employer or that he had not started to work again on the day of his accident. Many of the claims in the first defendant's witness statement had been false. The court had been satisfied that he had read his witness statement and had read it sufficiently carefully to make the amendments that he had. Further, when the first defendant had read through his witness statement he had known that what it said was false. His depression and post traumatic stress disorder had not affected his capability to know whether what he was signing had been true. The first defendant had known how important the statement of truth was. It was clear that the statement had been referring to his current infirmity. The alleged misunderstanding by the solicitor would have been quite a serious mistake and, on the evidence, it did not look like the sort of mistake she would have made. It followed that he had known that, by making a false statement, it had been likely to interfere with the course of justice. He had signed the statement of truth when he did not have an honest belief in a series of false assertions.

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<p>Act of Sederunt (Rules of the Court of Session Amendment No 4) (Miscellaneous) 2011</p>	<p>Enactment Citation SSI 2011/288</p> <p>Commencement Date See summary</p> <p>Legislation Affected SI 1994/1443 amended</p> <p>Enabling Power Court of Session Act 1988, s 5</p>	<p>Makes amendments (coming into force on 21 July 2011) to the following provisions in the Rules of the Court of Session 1994, SI 1994/1443, as well as other minor amendments:</p> <ul style="list-style-type: none"> n the rule on restrictions as to caveats; n the rules and table of fees in relation to charges for witnesses and charges for skilled person; n the rules relating to actions of damages for, or arising from personal injuries (in force 7 July 2011); n the rule on inspection and recovery of documents in personal injuries actions; n the rule on admiralty actions in rem.
<p>National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) (Amendment) Regulations 2011</p>	<p>Enactment Citation SI 2011/1706</p> <p>Commencement Date 3 August 2011</p> <p>Legislation Affected SI 2011/704 amended</p> <p>Enabling Power NHS Redress (Wales) Measure 2008, ss 1, 11(2)(d), 11(3)</p>	<p>Amend the National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) Regulations 2011, SI 2011/704, to delay implementation of how redress is to be provided where an NHS Trust in Wales or a Local Health Board in Wales enters into an arrangement for the provision of health services with an NHS body in England, Scotland or Northern Ireland, as well as the cross border redress arrangements</p>
<p>Railways (Safety Management) (Amendment) Regulations (Northern Ireland) 2011</p>	<p>Enactment Citation SR 2011/261</p> <p>Commencement Date 10 October 2011</p> <p>Legislation Affected SR 2006/237 amended</p> <p>Enabling Power Health and Safety at Work (Northern Ireland) Order 1978, Arts 17(1), (2), (3)(a)(c), (4), 43(2), 54, 56(3)(a), Sch 3, paras 1(1)(a)(c), 1(2), 3(1), 4, 5, 6, 7(1), 8, 13, 14(1), 15, 17(a), 19</p>	<p>Transpose certain provisions of Directive 2008/110/EC (the Revised Safety Directive) on safety on the community's railways.</p> <p>Introduces a new reg 16A to the Safety Management Regulations which prohibits a person from operating a vehicle on the railway system unless an entity in charge of maintenance has been assigned to it, such entity having been registered as such on the National Vehicle Register. Regulation 16A does not apply to heritage vehicles. The entity in charge of maintenance must put in place a system of maintenance for vehicles to which it has been assigned.</p> <p>Sets out a revised list of common safety indicators and incorporates new common definitions and methods to calculate the economic impact of accidents.</p> <p>Clarifies that in Pt 4 of the Safety Management Regulations, the definition of "work" includes voluntary work. Amends appeals provision arrangements.</p>