

NEWS UPDATE FOR PERSONAL INJURY PROFESSIONALS

**Ruling on *res
judicata***

Insurance company, Zurich can bring new evidence of fraudulent behaviour by someone it had paid out to for a work injury even though his good faith had already been raised in a prior action, the Court of Appeal has ruled.

In 2001, Colin Hayward had claimed damages of £420,000 for his injury but accepted a £135,000 settlement, effected by a Tomlin Order, after experts assessed surveillance evidence and concluded he had exaggerated his injuries.

In 2009 – after Hayward's neighbours claimed he was faking his injuries – Zurich brought an action against Hayward claiming the settlement had been obtained by false representations.

Judge Yelton struck out the claim but in *Zurich Insurance Company PLC v Hayward* the appeal court reversed the decision, holding there was no estoppel by *res judicata*.

Waiting times

NHS waiting times for X-rays, cardiology tests and ultrasound scans rose sharply in the last year.

The number of patients waiting more than six weeks for such tests at the end of May 2011 was 15,900, up from 12,400 from May 2010, the Department of Health statistics reveal.

The figures show that 2.7% of patients were left waiting for six weeks or longer for diagnosis results, while 1,800 patients waited more than three months – an almost tenfold increase on last year's figure of 217. Average waiting times also rose year on year: the typical wait for diagnosis increased to 1.9 weeks in May 2011 compared with 1.8 weeks a year before.

Clinical negligence reforms attacked

Ministry of Justice plans to end the recoverability of success fees in clinical negligence cases have been attacked by the House of Commons Health Committee.

In a new report, the committee, chaired by former Health Secretary, Stephen Dorrell, warned that the proposals – set out in the Legal Aid, Sentencing and Punishment of Offenders Bill – could “undermine access to justice” and erode compensation for “the most seriously injured or disabled claimants”.

The bill, which implements Lord Justice Jackson's review of civil litigation, would still allow after-the-event legal expenses insurance to be recoverable in clinical

negligence cases, due to the high cost of initial disbursements. Success fees, however, would be abolished.

The Association of Personal Injury Lawyers (APIL) has also attacked plans in the bill which will see legal aid removed from clinical negligence cases, saving about £17 million.

APIL president, David Bott, said: “Cutting legal aid for medical injuries at the same time as restricting ‘no win, no fee’ is a savage blow for patients whose lives may have been shattered by their injuries.”

Although this is an enabling bill and the detail has yet to become clear, the intent behind it is clearly “just as brutal as we had been led to expect”, he said.

He added: “The drive to cut costs by forcing injured

people to give up part of their compensation to pay legal fees is unfair, unjust and unwarranted. People don't choose to be injured, but when negligence happens, the guilty party – the losing defendant – must surely be held fully to account.”

Jackson's report stated that it was “vital” for legal aid to remain available in clinical negligence cases, the committee noted. It also highlighted the finding of Action against Medical Accidents that at least an equivalent amount would be saved for the NHS if legal aid were retained, rather than cases being brought on a “no win, no fee” basis.

Straw unearths “dirty secret”

Motor insurers sell on personal information to claims management firms and personal injury lawyers, a report by former Justice Secretary, Jack Straw, reveals.

Straw, who has called for tighter regulation of whiplash injury claims, was told by a senior insurance executive that it was “the industry's dirty secret”.

His report found that premiums were highest in postcodes with the highest personal injury claims. Overall, the cost of car insurance rose 30% in the past year.

The government has pledged to crack down on Britain's compensation culture with Justice Minister, Jonathan Djanogly, saying it represented “a very serious problem” that would be addressed in the Legal Aid Bill.

French insurer, Axa, which owns the Swiftcover brand, has

confirmed that it will no longer accept referral fees in personal injury claims and called on the government to reform whiplash damages and the “compensation culture”.

Axa's chief executive, Paul Evans, said that although his company had never actively sold client data to claims companies, it did pocket several million pounds a year in referral fees by putting customers in touch with lawyers to pursue valid claims.

Last year the Association of British Insurers, the Law Society and the Ministry of Justice reached an agreement that created a fast-track, fixed-cost process of £10,000 or less for personal injury claims in car accidents, which the Law Society believes will cover 80% of all bodily injury claims. But Evans said this did not put pressure on referral fees because it made it easier to push claims through unwarranted.

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Legislation update

<p>Ionising Radiation (Medical Exposure) (Amendment) Regulations 2011</p>	<p>Enactment Citation SI 2011/1567</p> <p>Commencement Date 25 July 2011</p> <p>Legislation Affected SI 2000/1059 amended</p> <p>Enabling Power European Communities Act 1972, s 2(2)</p>	<p>SI 2011/1567: Individuals exposed to medical X-rays for the purpose of health assessments other than part of a national screening programme or for diagnostic purposes to be included in specified legislation. Amend Ionising Radiation (Medical Exposure) Regulations 2000, SI 2000/1059 to make it explicit that asymptomatic individuals exposed to medical X-rays for the purpose of health assessments, other than part of a national screening programme or for diagnostic purposes, are included.</p>
<p>National Health Service (Charges to Overseas Visitors) Regulations 2011</p>	<p>Enactment Citation SI 2011/1556</p> <p>Commencement Date 1 August 2011</p> <p>Legislation Affected SI 1989/306, SI 1991/438, SI 1994/1535, SI 2000/602, SI 2000/909, SI 2004/614, SI 2004/696, SI 2005/2114, SI 2006/3306, SI 2008/2251, SI 2009/1166 revoked; SI 2006/1260, SI 2006/3388, SI 2007/115 amended</p> <p>Enabling Power National Health Service Act 2006, ss 175, 272(7), (8)</p>	<p>Consolidate the National Health Service (Charges to Overseas Visitors) Regulations 1989, SI 1989/306, relating to the making and recovery of charges for services provided under the National Health Service Act 2006 to persons not ordinarily resident in the United Kingdom.</p> <p>Introduce exemptions from NHS hospital charges to:</p> <ul style="list-style-type: none"> ■ failed asylum seekers formally supported under ss 4 or 95 of the Immigration and Asylum Act 1999; ■ children in the care of a Local Authority; and ■ certain members of the Olympic and Paralympic Games family during Games period in 2012. <p>Extend the temporary absence allowed when calculating a period of residence in the UK from up to three months to up to 182 days, and amend the definition of pandemic influenza in the list of diseases for which treatment is free.</p>
<p>Care Quality Commission (Additional Functions) Regulations 2011</p>	<p>Enactment Citation SI 2011/1551</p> <p>Commencement Date 1 August 2011</p> <p>Legislation Affected SI 2009/410 amended</p> <p>Enabling Power Health and Social Care Act 2008, ss 59(1), 161(3)</p>	<p>Abstract</p> <p>Enable the Care Quality Commission to review decisions to withhold post or other items for patients in high-security hospitals, and to review decisions to record and monitor patients' telephone calls in high secure hospitals. The Care Quality Commission will review decisions in these areas where a relevant application is made. The additions functions are to:</p> <ol style="list-style-type: none"> (a) withhold an item delivered or brought to a high-security hospital for a patient; (b) withhold internal post sent by a patient in a high-security hospital to another patient in the same hospital or a member of staff in that hospital; or (c) monitor and record a telephone conversation made by a patient in such a hospital.
<p>Social Security (Industrial Injuries) (Prescribed Diseases) (Amendment) Regulations (Northern Ireland) 2011</p>	<p>Enactment Citation SR 2011/231</p> <p>Commencement Date 18 July 2011</p> <p>Legislation Affected SR 1986/179 amended</p> <p>Enabling Power Social Security Contributions and Benefits (Northern Ireland) Act 1992, ss 108(2), 171(1), (3), (4)</p>	<p>Two diseases added to list of prescribed diseases in legislation on industrial injuries within the area of social security. Amend the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations (Northern Ireland) 1986, SR 1986/179, Sch 1, to include <i>bronchiolitis obliterans</i>, as it relates to work involving the production of diacetyl and carcinoma of the nasal cavity or associated air sinuses (nasal carcinoma), as it relates to work involving hexavalent chrome plating or the manufacture of inorganicchromates, by adding Prescribed Disease C31 and C32 respectively to the list of prescribed diseases in Part 1 of that Schedule.</p> <p>Add:</p> <ul style="list-style-type: none"> ■ prescribed disease "C 31 Bronchoillitis obliterans" to the list of prescribed diseases in SR 1986/179, Sch 1, Pt 1, in relation to people whose work involves the manufacture of diacetyl, food flavourings containing diacetyl, or food to which food flavourings containing diacetyl are added; and ■ prescribed disease "C 32 Carcinoma of the nasal cavity or associated air sinuses (nasal carcinoma)" to the list of prescribed diseases in SR 1986/179, Sch 1, Pt 1, in relation to workers involved in chromate production and chrome plating.

Defendant making a Pt 36 offer

No requirement for a payment into court

The greatest single reform of Pt 36 which came into effect on 6 April 2007, is the abolition of the payment into court for all defendants, not just for certain categories of defendant who are “good for the money” – the phrase used by Dyson LJ in *Trustees of Stokes Pension Fund v Western Power* [2005] 3 All ER 775. Part 36 now has the heading of only “offers to settle”: payment in is no longer required.

Why a defendant would make an offer

A party makes an offer under Pt 36 with a view to settling the dispute. A defendant might make a Pt 36 offer because:

- if the claimant accepts the offer or payment, the dispute ends with the defendant paying a single sum (although see below: this sum must be paid within 14 days of acceptance) plus a contribution towards the claimant’s costs which will be less than if the matter goes to trial (CPR 36.4(1), (2));
- if the claimant rejects the offer, he/she/it risks the court awarding it nothing or the same or less than the defendant’s offer, which has costs and interest implications for the claimant from the date the period for acceptance of the offer expired (CPR 36.14(1)–(3)).

Costs

To decide whether to make an offer, the defendant needs to understand the general rule as to costs and the consequences of the claimant accepting or rejecting the offer.

The general rule regarding costs is that the unsuccessful party pays the costs of the successful party. This is generally on the standard basis, which means a party will recover only a portion (generally 60–70%) of the costs incurred.

Court is not told of offer

The court will not be told about the defendant’s offer during proceedings: it will be treated as “without prejudice save as to costs” (CPR 36.13(1)).

Part 36 offers before proceedings start and in appeal proceedings

A Pt 36 offer may be made before proceedings start. It is no longer necessary to get the court’s permission to accept an offer which was made before proceedings

started after they have commenced, unless permission is required in any event, for one of the reasons set out in CPR 36.9(3); CPR 36.3(2)(a).

A Pt 36 offer may be made in appeal proceedings. It is always advisable to make a fresh offer for the purpose of the appeal proceedings (CPR 36.3(2)(b)).

Where a party to proceedings attempts to vary a Pt 36 offer with a follow-up letter, the variations contained in the letter, unless stated to be a Pt 36 offer, will not attract the costs consequences of a formal Pt 36 offer (*PGF II S.A v Royal and Sun Alliance* [2010] All ER (D) 318 (Jul)).

Types of settlement

A party may make an offer to settle by any means whatsoever but if the offer is not made in accordance with r 36.2, it will not have the consequences specified in rs 36.10, 36.11 and 36.14. It can still be an effective *Calderbank* offer, as the court must have regard to non-Pt 36 offers brought to its attention when making an order as to costs.

What happens if the claimant accepts the defendant’s offer?

Accepting without court permission

If the claimant accepts the defendant’s offer within the relevant period specified in the offer (usually 21 days after the offer was received), the defendant pays the claimant’s costs up to the date of service of the notice of acceptance. Costs are paid on the standard basis, unless otherwise agreed (CPR 36.10(1)).

If the claimant accepts the offer after the end of the relevant period and the parties cannot agree costs, then the court is likely to order costs (CPR 36.10(4)(a); CPR 36.10(5)):

- the defendant to pay the claimant’s costs until the end of the relevant period;
- the claimant to pay the defendant’s costs from the end of the relevant period until the date of acceptance.

There is no presumption that the defendant will be entitled to indemnity costs for the period from the expiry of the relevant period to the date of acceptance. Generally standard costs apply although the defendant is entitled to seek indemnity costs in the conventional way by reference to CPR 44.3 (*Fitzpatrick*

Contractors v Tyco Fire and Integrated Solutions [2009] EWHC 274 (TCC)).

The defendant must pay the single sum offered in settlement within 14 days of the claimant’s acceptance. If the sum is not paid within this time the claimant can apply to enter judgment for the unpaid sum. A defendant making an offer must be certain that the funds will be available in time if the offer is accepted eg, an individual’s funds must not be tied up in an investment or limited access bank account and a corporate client’s internal accounts department must be able to process the payment in time. A defendant who is dependent upon an insurer or other outsider for the provision of settlement funds must take great care that he/she/it can comply with this provision (CPR 36.4).

Once the claimant accepts the defendant’s offer, the claim (or the part of the claim relating to the offer) will be stayed (CPR 36.11(1)).

Accepting with court permission

The claimant will need the court’s permission to accept the defendant’s offer in limited circumstances. If the claimant accepts the defendant’s offer with the permission of the court, unless all the parties have agreed costs, the court will make an order regarding costs and may order that the costs consequences set out in r 36.10 will apply (CPR 36.9(4)).

Once the court has granted permission, the claim will be stayed (CPR 36.11(4)).

What happens if the claimant rejects the defendant’s offer?

If the claimant rejects the defendant’s offer and secures a judgment (at trial or by summary judgment) which is more advantageous than the defendant’s Pt 36 offer, the court will probably follow the general rule and order that the defendant, as the unsuccessful party, pays the costs of the claimant, as the successful party (CPR 44.3(2)).

If the claimant rejects the defendant’s offer and fails to secure judgment (at trial or by summary judgment) which is more advantageous than the defendant’s Pt 36 offer, the court will, unless it considers it unjust to do so, order that the defendant is entitled to his/her/its costs from the end of the relevant period plus interest on those costs (CPR 36.14(1)(a); CPR 36.14(2)).

In deciding whether it would be

In practice

unjust to order the claimant to pay these sums, the court will take into account all the circumstances of the case including the terms of any Pt 36 offer, when the offer was made (in particular how long before trial), the information available to the parties at the time the offer was made and the conduct of the parties concerning the supply of information (CPR 36.14(4)).

In making any order as to costs, the court must have regard to all the circumstances, including the conduct of the parties, whether a party has succeeded on part (if not all) of its claim and any admissible offer to settle brought to the court's attention (CPR 44.3(4)).

In *Walsh v Singh* [2010] EWHC 1167 (Ch), although the defendant was largely successful in his defence and made a well judged Pt 36 offer, the judge taking into account "all the circumstances of the case" as used in CPR 44.3(4), made no order as to costs on the basis that the defendant had conducted his defence in an unjust and insensitive manner.

The Court of Appeal has considered the meaning of "more advantageous" in two recent cases. In *Morgan v UPS* [2008] All ER (D) 100 (Nov), it was held that the judge has a discretion in determining whether, taking into account all the facts and circumstances of the case, the judgment is more advantageous than the offer. In *Carver v BAA* [2008] All ER (D) 295 (Apr), the judge had found that the additional £51 gained in the judgment was more than offset by the vast irrecoverable costs

incurred by the claimant in contesting the claim for as long as she did. The judge therefore exercised his discretion not to award costs to the claimant. The Court of Appeal held that the judge was entitled to exercise discretion in this way.

However, the decision in *Carver* has been criticised for creating uncertainty in the Pt 36 regime, as regards what amounts to a judgment being "more advantageous". Jackson LJ in his final report "*Review of Civil Litigation Costs*" has recommended that the effect of *Carver* should be reversed, either judicially or by rule change.

In *Gibbon v Manchester City Council* [2010] All ER (D) 218 (Jun), the Court of Appeal agreed with Jackson LJ and, while recognising that it was bound by the decision in *Carver*, added clear direction and made recommendations regarding the approach that should be adopted in future:

- it recognised that what may be more important than the factors to be taken into account is the weight that is to be attached to them and that remained a matter for the judge in each case;
- when deciding how much weight to attach to any particular factor it was important to see things from the litigant's perspective rather than to be too ready to impose the court's view of what is and is not to his advantage;
- in most cases obtaining judgment for an amount greater than the offer was likely to outweigh all other factors.

Cost consequences of defendant making a Pt 36 offer

Points to bear in mind:

- Irrecoverable costs are not relevant when determining whether a Pt 36 offer was more advantageous.
- A party who makes a well judged Pt 36 offer and is substantially successful might not recover its costs in circumstances where its conduct of the case was insensitive or unjust.

Broadly, the cost consequences of a defendant making a Pt 36 offer are outlined in Box 1 (below).

Practical tips

Choose a 21-day "relevant period"

In any offer made 21 or more days before the start of trial, the defendant must state a "relevant period" of a minimum of 21 days from the date the offer is served on the claimant. A defendant will generally opt for the minimum relevant period of 21 days because (CPR 36.2(2)(c)):

- the defendant will need the court's permission to withdraw or reduce the offer at any time within the relevant period. If facts come to light during the relevant period which improve the defendant's case (or adversely affect the claimant's), then there is a risk that the claimant will accept the offer before the defendant has the opportunity to withdraw it (CPR 36.3(5));
- if the claimant accepts the offer after the end of the relevant period and the parties cannot agree costs, the court will probably order (CPR 36.10(5)):
 - (a) the defendant to pay the claimant's costs up to the end of the relevant period; and
 - (b) the claimant to pay the defendant's costs from the end of the relevant period until the date of acceptance
- if the claimant rejects the offer, the offer is not withdrawn and then the defendant beats the offer when judgment is entered, then the court will (unless it considers it unjust to do so) award the defendant his costs plus interest from the end of the relevant period. This will be so even if the claimant was successful in obtaining a judgment in its favour, just lower than the defendant's offer (CPR 36.14(2)). The requirement to specify a minimum

Box 1: Cost consequences of a defendant making a Pt 36 offer

Claimant accepts offer within the "relevant period" (generally 21 days from the date of the offer)	Defendant pays claimant's costs (on a standard basis unless otherwise agreed) up to date of serving notice of acceptance
Claimant accepts offer after the expiry of the "relevant period"	If parties cannot agree costs, the court will generally order defendant to pay claimant's costs up to the end of the relevant period, and the claimant to pay the defendant's costs from then until the date of acceptance
Claimant rejects offer. Case goes to judgment (summary or trial), where claimant obtains a more advantageous judgment than the offer	General rule applies: unsuccessful party (defendant) pays costs of successful party (claimant) on a standard basis
Claimant rejects offer. Case goes to judgment (summary or trial), where claimant fails to beat offer or only secures judgment as advantageous as the defendant's offer	Unless the court considers it unjust, claimant pays defendant's costs from the date on which the relevant period expired together with interest on those costs

21-day period set out in CPR 36.2(2)(c) must **not** be confused with, or expressed as, a time-limit for accepting the offer, since, in *C v D* [2011] EWCA Civ 646, the Court of Appeal has confirmed that a time limited offer cannot be a Pt 36 offer.

Serve by fax before 4.30pm for quick service

A defendant serving a notice of withdrawal or change of terms of offer (after the relevant period has expired) should serve the written notice quickly to avoid the risk of the claimant accepting the offer before the defendant's notice is deemed to be served. The quickest way to serve an offer or notice is by fax. Where service of the offer or notice is within the UK then service by fax, where the fax transmission is completed by 4.30pm on a business day, is deemed served on that day (CPR 6.26).

Making more than one offer

The defendant can make multiple offers. If the defendant wants a subsequent offer to replace a previous offer, they must expressly

withdraw the earlier offer by serving a written notice of withdrawal (after the expiry of the relevant period) (CPR 36.3(6)).

Making an offer to settle an intended counterclaim

A defendant can make an offer to settle a counterclaim, even where that counterclaim has not yet been pleaded. The proposed counterclaim must be genuine and identifiable and the form and content of the offer letter must also comply with Pt 36 in all other respects.

In *AF v BG* [2009] All ER (D) 249 (Jul) in a letter headed "without prejudice save as to costs" and "Part 36 Offer", the defendant's solicitors wrote to the claimant's solicitors on terms that: the defendant was intending to amend its pleading to include a counterclaim for a particular sum, that the defendant contended the claimant's claims did not have any reasonable prospect of success and that the defendant was prepared to accept payment of a specified sum, smaller than that identified as the subject

of the intended counterclaim, "in full and final settlement of the whole of [the defendant's] claim and the whole of [the claimant's] claim against [the defendant]". The letter also made express reference to particular consequences of Pt 36 taking effect in respect of the offer.

The Court of Appeal held that the offer was valid as a Pt 36 offer, even though the defendant's counterclaim had not yet been pleaded and permission to amend to include the counterclaim had not yet been sought.

Receiving a counter offer

A counter offer by the claimant will not affect the validity of the defendant's offer, and the claimant is free to accept the original offer provided it has not been withdrawn (CPR 36.9(2)).

Upon receipt of a counter offer, it is advisable to review the defendant's offer and consider whether any tactical advantage could be gained by withdrawal or amendment of the offer.

Who is the successful party?

Kate Edwards analyses the implications of the Court of Appeal's decision in (1) Medway Primary Care Trust (2) Ashiq Hussain v Sebastian Marcus

In court "success" is the ultimate goal. For the injured party it usually means a long-awaited award of damages. For the lawyers, success usually leads to recovery of costs.

The general rule is that, where the court decides to make an order for costs, the unsuccessful party will pay the costs of the successful party (CPR Pt 44.3(2)). Many claims are funded by conditional fee agreements (CFAs) between client, solicitor and counsel. These usually provide for a percentage uplift to be payable in the event of a "win" (often defined as the recovery of damages). After the event insurance is taken out to protect the claimant's potential costs liability in the event that the claim is "lost". For all these reasons, success is critical to several different parties involved in any given claim.

So what happens when a claimant wins

a tiny fraction of the damages claimed? Has the claimant been successful? Should the defendant pay the costs of the action, given that, on one view, the defendant has successfully defended most of the claim?

These questions were considered by the Court of Appeal recently in *(1) Medway Primary Care Trust (2) Ashiq Hussain v Sebastian Marcus* (CA 29/06/2011). The claimant had undergone a leg amputation in June 2005 after contracting an unusual medical condition. He alleged that the first and second defendants had failed to correctly diagnose and/or refer him and that by the time treatment was received it was too late to save his leg.

The second defendant admitted breach of duty in his defence, which was the first practical opportunity to do so (there having been no pre-action protocol letter). The first defendant denied breach of duty until

a few days before trial. Both defendants denied causation and argued that the claimant's arterial blockage had existed for too long, making amputation inevitable despite the admitted breaches of duty.

The claimant's pleaded claim was £731,255 plus general damages although quantum was agreed at £525,000 shortly before trial. Although not expressly pleaded, there was an alternative minor claim for pain and suffering caused by the ischemia between the date of breach and the date of the amputation.

Thus, even if the defendants succeeded on causation and the claimant could not prove that the delay caused him to lose his leg, there was an alternative route open to him to claim modest damages. This alternative case was never the focus of the trial, although it was touched on in the agendas from which the experts had worked at the joint meeting and briefly in evidence.

Lower court decision

At trial, the claimant's case on causation failed. He could not show the delay caused him to lose his leg. However, the

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Who is the successful party?

judge held that the modest alternative claim for pain and suffering between breach and amputation succeeded and awarded him £2,000 in damages.

On the question of costs, the judge decided that the first question for him to determine was “who is the successful party”? He held that it was the claimant. He considered that, in a commercial context, the most important thing was to identify the party who is to pay money to the other. The damages were not nominal and, although he had lost on the causation claim, the claimant had reasonably proceeded with that claim on the basis of supportive expert opinion. There had been no offers made by the defendants at any stage. To reflect the fact that the defendants had succeeded on the most important issue in the claim, however, the judge awarded the claimant only 50% of his costs.

The costs decision was appealed. The claimant’s legal team were acting on a CFA and the total bill was around £480,000. Yet the claimant’s “win” was only £2,000 as against an agreed value of £525,000. It is not difficult to see why the defendants sought to better this position on appeal.

Court of Appeal decision

The Court of Appeal concluded by majority (Jackson LJ dissenting) that the judge had erred and that the claimant should be considered the unsuccessful party. The appellants were instead awarded 75% of their costs.

The rationale for this decision was, in effect, that the claimant had lost on the central issue in the claim. The claim was fought on the question of causation. Most of the costs were incurred litigating that issue.

Sir Anthony May, with whom Tomlinson LJ agreed, stated:

“...the deputy judge was wrong in principle to conclude that the respondent was the successful party. The award of £2,000 was insignificant in the context of the claim and the action as a whole, and, although it was technically within the pleaded claim, it was in truth a last minute addition to salvage something (0.25%) from an action which the respondent lost. The whole action was about the cause of the need for the respondent to undergo a leg amputation...” [para 17].

Both May LJ and Tomlinson LJ held that £2,000 was more than “nominal”, although in the context of the claim

it was an insignificant sum and of no value to the claimant in meeting the financial needs imposed upon him in consequence of the loss of his lower leg [paras 17 and 47].

There was a further attempt to define the line between “success” and “failure” with reference to percentage recovery. Relying on *Oksuzoglu v Kay* [1998] 2 All ER 361 (a case similar on the facts), May LJ cited the view of Brooke LJ that:

“In this line of cases, where the plaintiff recovers between 1% and 3% of his original claim (sometimes, but not always, after a late amendment) the court is entitled to ask itself: ‘who was essentially the winning party?’ It will not be distracted from making a just order as to costs by the absence of a payment into court which the plaintiff obviously would not have accepted... Although all these cases are different, in the present case the substantive issue between the parties on the trial of the preliminary issues related to the big claim on which the plaintiff wholly failed” [para 58].

May LJ also referred twice in his judgment to the fact that recovery of £2,000 from an agreed claim of £525,000 amounted to only 0.25%.

There was discussion by all three judges as to what effect, if any, the failure to make a Pt 36 or *Calderbank* type offer should have on their decision as to costs. May LJ thought the failure to make any offer was irrelevant, concluding that if a low Pt 36 offer had been made at an early stage the nearly £100,000 costs liability which would have followed would have been both disproportionate and unjust [para 17]. Tomlinson LJ said such an offer would undoubtedly have been rejected by the claimant and would therefore have been “...a matter of mere ritual” [para 51]. Jackson LJ (dissenting) thought the defendants should not be in a better position having made no Pt 36 offer at all than they would be had they made an inadequate Pt 36 offer: “The defendants made no Part 36 offer in this case and in my view they should accept the consequences. I would dismiss this appeal” [para 42].

Discussion

This is an extreme case. The defendants faced an enormous and disproportionate costs order when the claimant lost the claim on the central argument. As pointed out by Tomlinson LJ, the difficulty of the

question is highlighted by the fact that the four judges who have considered the point so far in this claim were evenly divided as to who was the “successful party”.

But awarding costs against the claimant in these circumstances is problematic for several reasons. First, no offers were made. Damages were more than nominal. The claimant did not exaggerate or act improperly and there was no other route for him to recover the money to which he had an entitlement. As Jackson LJ stated:

“The blunt fact is that the claimant had a good claim for £2,000 and the defendants were refusing to pay anything. The only way the claimant could recover the £2,000 due to him was by issuing proceedings and pressing on until the defendants agreed or were compelled to pay (a) £2,000 damages and (b) costs assessed on the standard basis” [para 28].

Second, assessing success on a percentage recovery basis is arbitrary. Why should the cut-off point between “success” and “failure” be at 1–3% of damages (as suggested in *Oksuzoglu*) rather than 4% or 10%? Is the situation different where a claimant recovers 1% of a £10m claim (£100,000 – potentially a life-changing sum) to that where the claimant recovers 3% of a £250,000 claim (£7,500)? Putting quantum aside, does success at a liability trial on an alternative (rather than a primary) case – however late in the day it may have been advanced – mean that a claim is “unsuccessful” from a costs perspective?

The problem, as always, is exactly where to draw the line. Costs matters are highly fact-sensitive and a vast array of factors may be taken into account by the court when exercising its broad discretion. Yet the parties (and their insurers) must have some certainty as to the potential liabilities they face and the starting point is to determine who is successful.

Jackson LJ’s suggestion was for the following principle to apply:

“...in a personal injury case where (a) the claimant has pursued his claim in a reasonable manner, (b) the claimant recovers damages (other than nominal damages) and (c) there is no or no sufficient Part 36 offer, the starting point should be that the claimant recovers his costs” [para 30].

From there, he suggested, adjustments could be made to that award if the

claimant had lost major issues at trial. Although this may seem unfair to defendants at present, it is likely Jackson LJ had one eye on the issue of funding reforms and CFAs. With restriction on success fees on the horizon, future

defendant costs liability is likely to be less dramatic than in this claim.

In the meantime, however, and pending any appeal, the majority view presides. Was the claimant the successful party after the trial? Probably

not. Was the claimant the successful party after the appeal last week? Definitely not.

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Case digests

Macintyre v Ministry of Defence
[2011] All ER (D) 05 (Jul); [2011] EWHC 1690 (QB)
30 June 2011

Negligence – Duty to take care – Breach of duty – Causation – Claimant seriously injured in climbing accident in Bavarian alps in course of formal army adventurous training exercise – Claimant claiming damages for personal injury – Whether any breach of duty on part of defendant – Whether any such breach causative of claimant’s accident.

On 19 July 2006, the claimant, a second lieutenant, was seriously injured in a climbing accident in the Bavarian Alps in the course of a formal army adventurous training exercise. He and another young officer, Lieutenant LC, were taking part in a day’s climbing expedition on the Alpspitze mountain, led jointly by their commanding officer, Lieutenant Colonel DR and by Captain AW. They had successfully climbed a steep section of the mountain following recognised routes. All four members of the party were looking forward to tackling the final ascent to the summit. In order to reach the foot of that ascent they had to cross an area of rugged terrain known as the Herzl Terrace. The climbing was technically less difficult, but because the mountain here was less steep there was a much greater quantity of loose rock which presented a potential hazard. The claimant and Lieutenant LC were standing on a relatively wide rock ledge, each roped to his or her respective leader, waiting for the leaders to complete the next pitch so that they in turn could climb that section. The claimant’s position on the ledge gave him some protection against rock falls from above. As he stood and waited there was a minor rock fall from the area where the leaders had just completed the pitch. He heeded the leaders’ warning shouts of “Below!”, and took the precaution

of pressing himself as close to the rock face as possible. Despite that, the claimant was struck on the head by a falling rock. He suffered skull fractures resulting in a severe traumatic brain injury. As a consequence, he developed epilepsy and permanent hearing loss in the right ear. He was discharged from the army in April 2009 on medical grounds. His earning capacity was profoundly reduced. He claimed damages for personal injury against the defendant.

An issue of liability arose as to whether there was any breach of duty on the part of the defendant and, if there was, whether any such breach of duty was causative of the claimant’s accident.

The court ruled:

On all the evidence, there had not been any breach of duty on the part of the defendant towards the claimant. The accident had not been caused by the defendant. The claim therefore failed (see [120], [123] of the judgment).

Accordingly, the claim would be dismissed.

Woodham v JM Turner (trading as Turners of Great Barton)
[2011] All ER (D) 133 (Jun); [2011] EWHC 1588 (QB)
21 June 2011

Negligence – Contributory negligence – Collision between vehicles on road – Collision between claimant’s motorcycle and coach driven by defendant’s employee – Claimant sustaining serious personal injury – Whether defendant liable – Whether claimant contributory negligent.

In October 2007, the defendant’s employee, T, drove a mini coach south along School Road in Great Barton. School Road joined the single carriageway A143 road in Great Barton at a T-junction almost directly opposite a T-junction with East Burton Road. The

A143 ran approximately northeast to southwest. At about the same time the claimant rode a motorcycle northeast along the A143 road, along the offside (the right hand side as viewed from the driving position) of a queue of stationary or slow-moving traffic in the northeast bound lane. T started to turn her coach right from School Road onto the A143 road through a gap in the traffic in the northeast bound lane in front of a large tractor and trailer. The motorcycle ran into and struck the front offside corner of the coach, as a result of which the claimant sustained serious injuries.

T’s visibility of the motorcycle and the claimant’s visibility of the mini coach would have been restricted severely by the stationary tractor and trailer. The first part of the coach visible to the claimant would have been its front nearside corner because of the angle at which it entered the major road. The claimant would have been able to see the front of the coach before T would have been able to see the motorcycle. The sightlines available to the claimant and T would have depended on the positions of their respective vehicles relative to the stationary tractor and trailer. Both drivers would have had a sightline to the other’s vehicle over the top of the tractor’s offside front wheel and mudguard but all other parts of the tractor would have blocked their views. Sightlines from a range of positions were shown in figures produced in the reports of the respective experts.

The impact was to the coach’s front offside wing, slightly forward of the front offside wheel. The claimant’s head probably struck the windscreen close to the base of the offside A pillar. The small apparent lateral offset between the impact from the motorcycle and the impact from the claimant’s head was consistent with the coach moving forward at the moment of impact. It was likely that the coach, at impact with the motorcycle, was close to the road’s centre line markings, as indicated by the final position of the motorcycle’s front wheel. There was no positive physical evidence of the motorcycle’s precise position at the moment of impact. The coach

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moved forward from the give way line by approximately six metres to its position at impact. It continued to move forward after the collision, before it came to rest, by between about 0.5–one metre between impact and coming to rest. The claimant issued proceedings against the defendant claiming damages for personal injury.

The issues were:

- (i) whether the defendant had been in breach of its duty of care towards the claimant;
- (ii) whether the claimant had failed to exercise reasonable care for his own safety, and did any such failure contribute to the collision; and
- (iii) what was the correct division of responsibility. The claimant had no recollection of the accident.

The court ruled:

On the evidence, the defendant had been liable to the claimant in negligence. However, the claimant had failed to exercise reasonable care for his own safety and had contributed to the accident. T bore the greater share of responsibility. She had been emerging from a minor to a major road, where she was obliged to give way to traffic moving from both directions on that road. She had emerged from School Road at an angle that had significantly reduced her ability to see traffic on the far side of the obstructing tractor, and she had advanced beyond her sight line, creating a real risk of collision with an oncoming and overtaking motorcyclist, however slowly such motorcyclist might have been travelling. She had the obvious alternatives of approaching the A143 closer to the perpendicular or of waiting for a more favourable opportunity to exit from School Road. She had been emerging very slowly and had been looking, as best she could, to right and left. But in the

circumstances that was not sufficient. On the other hand, the claimant's lack of due heed for his own safety had made him substantially responsible for the collision. He was not following the strictures of the Highway Code, and the risk of a vehicle emerging, even at very low speed, from School Road was obvious and foreseeable to any careful motorcyclist. Weighing those factors, T should bear 70% liability for the collision, and the claimant contributed to his own injuries to the extent of 30% (see [30], [31]-[33] of the judgment).

Accordingly, apportionment of responsibility for the damage would be 70% to the defendant and 30% to the claimant.

Kotula v EDF Energy Networks (EPN) plc and others
[2011] All ER (D) 109 (Jun); [2011] EWHC 1546 (QB)
17 June 2011

Damages – Personal injury – Provisional damages – Chance of serious deterioration in claimant's physical condition – Settlement of claimant's personal injury claim providing for gross lump sum payment and periodical payments for future care and case management and future loss of earnings – Whether provisional damages award and order permitting application to vary periodical payments appropriate – Supreme Court Act 1981, s 32A.

The claimant, who was born on 12 February 1982, was a T6 paraplegic having sustained spinal cord injury in a road traffic accident on 28 September 2006. Liability and contributory negligence were dealt with by way of preliminary issue, in a trial. The judge held there was no contributory fault and the defendants were therefore 100%

liable for any relevant damages. The defendants appealed the trial judge's finding on contribution but the appeal was subsequently withdrawn on a conditionally compromised overall settlement. The terms of the conditional settlement were contained in a Tomlin Order. The settlement provided for a gross lump sum payment and periodical payments for future care and case management. Periodical payments were also agreed for future loss of earnings. The parties were, however, unable to agree one issue. It was accepted that the claimant had a risk of suffering post-traumatic syringomyelia. The claimant had been pressing for a provisional damages award and an order permitting variation of the periodical payments, should the contingency arise. The defendants resisted. The parties agreed to stipulate in the Tomlin Order that the settlement figures and payments set out in the Tomlin Order would be treated as provisional or variable or otherwise, dependent upon a ruling as to whether a provisional damages award and an application to vary the periodical payments were appropriate. The parties were agreed that the claimant should either be permitted the opportunity in the future to claim further lump sum damages and variation of the periodical payments, or to claim neither. The proceedings concerned the determination of that issue.

The issue was whether a provisional damages award and an order permitting an application to vary the periodical payments were appropriate.

The court ruled:

On the evidence, the claimant would be permitted to treat his lump sum award as being provisional, and would have the right to seek to vary his otherwise agreed periodical payments, if in due course he came to develop serious consequences as a result of acquired syringomyelia.



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