Hardwicke Building Espresso News

Hardwicke Civil Injury Team

February 2004

Editorial

Hardwicke News

Jasmine Murphy, called in 2002 and having recently completed a year of pupillage at Hardwicke Building, is the newest member of the Injury Team. Already building up a busy practice specialising in personal injury, Jasmine has written an article in this edition of Espresso News providing an update on credit hire cases. For those of you yet to meet or work with Jasmine, you will find her details on our website. You can see her CV, and the CV of all the team members, at www.hardwickecivil.co.uk/pi/team.

We are also delighted to welcome Michael Powers QC, a clinical negligence specialist, who in November 2003 joined the Injury Team and Hardwicke Building as an associate tenant. His considerable experience will lend strength to our clinical negligence work – which was recently commended in the Legal 500. Dr Margaret Bloom and Steven Weddle were both listed as leading clinical negligence juniors and it was noted *"Hardwicke Building has several junior members involved in sizeable matters. Steven Weddle has developed expertise in matters ranging from cancer misdiagnosis to cosmetic surgery, while the "outstanding" Dr Margaret Bloom joined the set in 2002, bringing with her experience in the profession".*

George Pulman QC was listed as a leading personal injury silk both in the Legal 500 and Chambers and Partners, which also listed Emily Formby as a leading junior noting *"Emily Formby was said to be desperately bright"*.

Espresso News spreads

Proof that Espresso News is read far and wide was recently received from an unusual quarter – Roy K. Anderson, a Puisne Judge in Jamaica. Having read Colm Nugent's article on Withdrawal of Admissions in the June 2002 edition of Espresso News (now archived on our website) Judge Anderson contacted Hardwicke Building for further details about one of the cases cited. He kindly remarked that, *"I found your newsletter timely and useful containing an important area of law. I will certainly now regularly check your site to view your newsletters to keep abreast of new cases"*

The Internet Newsletter for Lawyers produced by Delia Venables contained an article entitled **"Personal Injury Resources on the Web"** by Rebecca Lambert. In her round up of some of the best internet based newsletters she said, *"If you are not happy with just the one daily or weekly update then there are plenty of people out there who will send you another one to mull over. Most, if not all, chambers now do some type of newsletter so I have just included two which I think are particularly good. Hardwicke Civil is home of the informative Espresso News, a great update of the more important recent cases and articles on all areas that affect PI practitioners. The*

quarterly newsletter can be downloaded as a PDF or if you really need to feel the paper between your fingers join their mailing list."

If you would like copies of our Injury Team flier or details of our in-house seminar programme, or would like to add a name to our mailing list, contact Lesley Richardson by email on lesley.richardson@hardwicke.co.uk or by telephone on 020 7691 0012.

What's happening in the wider world?

A pre-action protocol for Occupational Disease claims came into force on 8 December 2003. The protocol can be viewed on the website of the Department of Constitutional Affairs, which remains www.lcd.gov.uk.

A timely reminder of the purpose of the protocols is given in the introduction to the protocol. In his final **Access to Justice Report** of July 1996, Lord Woolf recommended the development of protocols *"to build on and increase the benefits of early but well informed settlement which genuinely satisfy both parties to the dispute"*.

The aims of the protocols are:

- more contact between the parties
- better and earlier exchange of information
- better investigation by both sides
- to put the parties in a position where they may be able to settle cases fairly and early without litigation
- where a claim cannot be resolved to identify the relevant issues which remain in dispute
- to enable proceedings to run to the court's timetable and efficiently, if litigation does become necessary.

The specific aims of the Disease protocol are openness and timeliness.

It is instructive, after five years of the CPR, to recall and note the radical tone of the initial Woolf report, reflected in this protocol, and consider the extent to which injury litigation practice has changed over that time. To what extent have practitioners started to move back to a more rules based litigation with a tactical increase in the number of applications and hearings dealing with procedure, rather than focussing on the swift resolution of disputes, a hallmark of Woolf's intended reforms? Certainly the satellite litigation which has grown around some rules, for example CPR 7.5 and CPR 14, bears a greater resemblance to the old Ord.17,r.11 litigation than Lord Woolf can have anticipated.

And finally …

As from 8 December 2003 CPR 22 PD 1.4 was amended to require a statement of truth be made for *"a schedule or counter-schedule of expenses and losses in a personal injury claim and any amendment to such a schedule or counter-schedule whether or not they are contained in a statement of case."*

Case Law

No contributory negligence for employee falling down hole

The Claimant was working on a building site. He had been directed to pick up and move a large plywood sheet lying on the ground, covering a hole. The Claimant held the board in front of him and walked forwards while the foreman held the other side of the board and walked backwards. The Claimant could not therefore see the hole which the sheet had covered and he fell down it as he walked forwards. There were many of these holes, called service hatches, on the site but the practice on site was to cover them with a scaffold tower or with secure boarding marked "hole below".

At trial the Claimant was found 10% liable for his fall. In making his decision the judge found that the extent of the site and nature of the works meant that the Claimant should have looked under the board before moving off.

This decision was overturned on appeal. The issues, said the Court of Appeal, were whether the claimant had been negligent in his conduct or whether he should have foreseen the danger. The Court of Appeal held that in order to find contributory negligence there would have to be a finding of fact that the Claimant should have looked under the board before proceeding to carry it. As all the holes were covered up, the risk

that a hole was under the board was not proved. It was not reasonably foreseeable that if the Claimant had acted as he did that he would suffer injury.
(*Cooper v Carrillon PLC* – CA – Keene LJ, Scott Baker LJ – 2 December 2003 – [2003] EWCA Civ 1811)

Guidance on costs cap orders
In a clinical negligence case where the Defendant admitted liability for 52.5% of the value of the child claimant's claim, the court gave guidance about the test to be applied when considering making a costs cap order in non-group litigation.
Upon applying for such an order the applicant must be able to show evidence that:-
(1) there was a real and substantial risk that without such an order costs would be incurred disproportionately or unreasonably;
(2) the risk could not be managed by conventional case management and a detailed assessment of costs;
(3) it was just to make such an order.
Further observations were made to assist courts considering such applications:

- Orders were unlikely to be appropriate in the majority of clinical negligence cases
- Evidence supporting the application had to show a prima facie case that the above conditions could be satisfied
- The allocation and pre-trial checklists should include realistic estimates of the likely overall costs
- The hearing of such an application should be comparatively short
- The benefit of the doubt in respect of reasonableness of prospective costs should be given to the party being capped
- The order should include a provision for uplift in certain circumstances.

(*Smart v East Cheshire NHS Trust* – QBD – Gage J – 26 November 2003 – [2003] EWHC 2806)

Duty of care owed to individual assisting independent contractors
A two man stunt team were employed by a cricket club to put on a stunt display on the club's premises. The club were held liable for injuries suffered by the Claimant who voluntarily helped the stunt men, even though they were independent contractors of the club. The court found that the club could be vicariously liable for the actions of the contractors as they were engaged in an extra hazardous activity. Further the club was in breach of its duty to select a competent contractor.
An appeal against judgment failed. The Court of Appeal confirmed the club had not exercised proper care in selecting the contractors. The injuries suffered were foreseeable and there was sufficient proximity between the club and the Claimant to make it just, fair and reasonable to impose liability on the club.
(*Bottomley v Todmorden Cricket Club* - Court of Appeal - Brooke LJ, Waller LJ, Clarke LJ - 7 November 2003 - Times Law Reports 13/11/2003)

Important guidance for infant settlements: either party could renege on settlement before approval
Following an accident in which the child Claimant was injured when she was knocked off her bicycle, the Defendant made a Part 36 offer on liability before proceedings were issued. That offer was almost immediately accepted on the Claimant's behalf. About eighteen months later the Defendant reneged on this agreement and alleged a higher degree of contributory negligence.
The Claimant issued and relied on the Part 36 Offer letters as evidence of a binding settlement. The Defendant said that until the agreement was approved there was no valid compromise agreement as the Claimant was a child.
The Court agreed with the Claimant, holding that this was a valid and binding agreement.
The Court of Appeal favoured the Defendant's argument and held that a settlement agreement with a child was only a proposed agreement until approved by the court. The Defendant was entitled to renege on the agreement until it had been approved. In making their decision the Court of Appeal followed the case of ***Dietz v Lennig Chemicals*** *(1969) 1AC 170* which had not been referred to at earlier hearings.
Giving the leading judgment, Lord Justice Simon Brown said that this case and the ***Dietz*** case should be brought to the

profession's attention as it was not referred to in the White Book or Green Book. He also made the following observations:

(1) Those acting for child Claimants may think it prudent to issue proceedings to obtain the court's approval for any partial settlement of the claim so as to avoid the potential problem of the Defendant later seeking to repudiate it.
(2) The doctrine of estoppel may perhaps be available to a party who has acted to his detriment in reliance on a settlement agreement which the other party then seeks to repudiate.

(*Drinkall (a minor) v Whitwood* - CA - Brown LJ, Parker LJ, Thomas LJ - 6 November 2003 - Times Law Reports 13/11/2003)

Failing to ask a driver how much alcohol he had drunk was not contributory negligence

The Claimant was a passenger in a car driven by his friend, the Defendant. The accident was caused by the Defendant losing control of the vehicle. At the time of the accident, the Defendant was more than twice over the drink drive limit.

The Claimant and Defendant had been on a drinking session together. During that time, the Claimant had become very drunk having consumed 10 – 15 pints of lager. He did not know how much the Defendant had drunk, but thought he was someone who could handle his drink. The Claimant's wife gave evidence that the Defendant appeared fine before he started to drive.

At first instance the Defendant argued that the Claimant was negligent in failing to ask the Defendant how much he had drunk before getting into the car. This allegation of contributory negligence was rejected.

The Court of Appeal upheld that decision. Butler-Sloss LJ delivering the leading judgment held the issue to be very much a decision of fact for the trial judge. Although the law requires a passenger to make an assessment of the driver, there was no requirement to interrogate a driver about how much alcohol he or she had consumed. In this case the court had relied on the assessment of the defendant and his condition before he drove made by the claimant's wife to judge whether the Claimant should have known the Defendant was unfit to drive without further enquiry.

(*Booth v White* – [2003] EWCA Civ 1708 - CA – Butler-Sloss LJ, Brooke LJ, Latham LJ – 18 November 2003)

Parking broken down car in inside lane of road not contributory negligence

The Claimant's car had broken down and he came to rest on the inside lane of the A18. His hazard lights were on. There was no hard shoulder. The Defendant wrongly thought that the car was moving and hit the Claimant's car, causing the Claimant injury. The Defendant admitted liability but argued that the Claimant should be held contributory negligent for three reasons: (1) continuing to drive the car when he knew it wasn't working well, (2) failing to park off the road as far as possible and (3) remaining in the car.

The judge found that there was no contributory negligence. It was not unreasonable for the Claimant to continue driving his car or to have remained in it while it was parked. The car was clearly visible and the Claimant had no choice but to leave it in the position it was in.

(*Houghton v Stannard* - [2003] EWHC 2666 (HC) - QBD - McKinnon J - 29 October 2003)

Claimant failed to prove her case that she fell in to a pothole

The Claimant fell when walking along a footpath that ran through a park. She told the park ranger and the hospital that she had slipped on the deteriorated edge of the path. However her pleaded case was that she had slipped in a pothole containing water. Subsequently she amended her claim to state that the pothole did not have any water in it. At trial she did not have a clear recollection of the accident and therefore on the balance of probabilities she did not prove her case that she had fallen into a pothole.

(*Collier v Peterborough City Council* - [2003] EWHC 2925 (QB) - QBD - HHJ Kirkham - 17 October 2003)

Judge must analyse evidence when given two opposing accounts of accident

In a road traffic accident for which the Claimant and Defendant drivers gave completely different accounts of the accident, the judge at first instance held that neither had discharged the burden of proof and therefore dismissed both the claim and the counterclaim.

On appeal, Scott Baker LJ delivering the leading judgment held that the judge at first instance erred in failing to analyse the evidence and decide which of the two accounts was the more likely. Thomas LJ added the observation that if a judge has in mind the possibility that he might have to decide the case on the balance of probabilities, this should be raised with the advocates in the case who could remind the judge of the appropriate authorities and a detailed analysis of the facts. Lord Justice Ward said that on the facts the judge had never reached the point where he felt he should "*reach in his pocket for the trusty shilling which the Queen gives to all judges on their appointment*".

(*Cooper v Floor Cleaning Machines Limited & Crompton* - [2003] EWCA Civ 1649 - CA - Ward LJ, Scott Baker LJ, Thomas LJ - Times Law Reports 24 October 2003)

Duty of Highway Authority

The House of Lords in ***Goodes v East Sussex County Council*** *(2000) LGR 465* held that failing to grit or salt a road does not constitute a breach of the Highway Authority's statutory duty to maintain as set out in *s41* of the *Highways Act 1980* .

This case decided whether a residual common law duty of care in negligence existed in such cases.

The First Claimant's husband was killed when his car skidded off a trunk road because the road surface was icy. At the time of the accident the Defendant Authority had in place, a winter maintenance programme, but the road had not been salted prior to the accident.

Newman J held there was no common law duty of care to take steps to remove the ice or prevent ice forming. Whilst frost gave rise to a foreseeable risk of danger the risk was there for all to see and anticipate. The existence of a maintenance manual did not make it reasonable to impose such a duty nor to expect the Highway Authority to pay damages due to a failure properly to implement the maintenance scheme. Further, the maintenance manual did not create a sufficient relationship of proximity between Defendant and deceased. Finally the points raised in ***Stovin v Wise*** *[1996] AC 923* were not met because the danger presented by the ice was a transient hazard not a known danger; the danger was not within the class of dangers anticipated by the *Highways Act 1980* and a common law duty would impose obligations more onerous than that set out in the maintenance manual.

(*Sandhar v Department of Transport, Environment & the Regions* - [2004] EWHC 28 (QB) - QBD - Newman J - 19 January 2004)

50/50 split on liability when motorbike overtook vehicle turning right

The Claimant was riding his motorbike in a line of traffic along a single carriageway. The Defendant was travelling in the same line of traffic, a few vehicles ahead of the Claimant. The Claimant pulled out to overtake the line of vehicles but was hit by the Defendant who was attempting to turn right into a field in order to attend a motorcross event.

At first instance the judge found that the Defendant was wholly liable for the accident. The Defendant appealed.

The Court of Appeal held that the Claimant was 50% negligent. He knew there was a motorcross event taking place in the field and that therefore there was a possibility that vehicles would be turning right into the entrance. In the circumstances the Claimant took a real risk in overtaking when he did.

(*Pell v Moseley* - [2003] EWCA Civ 1533 - CA - Hale LJ, Kay LJ - 21 October 2003)

Defendant not liable for child's fall in community garden

The Claimant child fell while playing in a community garden. She tripped on a stone in a gravel path leading from a gate to the garden, fell on the gate and suffered serious injury.

The Claimant alleged that the Defendant should have used different material on the path or compacted it and relied on *s2(1)* of the *Occupiers' Liability Act 1957*.

The path material was "hoggin" a mix of flint and clay common in large environmental areas used for walking. The Defendant's contract manager, who inspected the path, gave evidence that hoggin was unsuitable for a play area and unsafe as a surface where children played.

The Judge dismissed the claim for negligence and breach of statutory duty and was upheld on appeal to the Court of Appeal. The area of the path was not a playground and while tarmac might have reduced the chance of tripping it was not incumbent on the Defendant to use it. Whether it should have been used was a matter of fact and degree and the Judge's analysis and decision could not be criticised (*Kidd v Portsmouth City Council* [2004] EWCA Civ 46 - CA - Tuckey LJ, Dyson LJ, Jacob LJ - 14 January 2004)

Employer could not foresee position of step would cause harm

The Claimant suffered injury when she went for the first time to the fifth floor of a building recently acquired by her employer, the Defendant. She was told to turn left out of the lift. She did so but opened a door to a room marked Plant Room. She stepped forward, looking for a light, and fell down a six inch step. On other floors similar doors had no steps.

The claim was brought on the basis that the Defendant had given misleading or inadequate directions.

The Judge held that if the Claimant had looked she could and should have seen the step. Therefore, the accident was caused by lack of attention by the Claimant and not by the Defendant's directions. On the basis of a site visit and evidence heard it was established that the step would have been obvious as soon as the door was opened.

The claim was dismissed and the Claimant appealed to the Court of Appeal which upheld the Judge's decision adding that the position and condition of the step was not something that the Defendant should have foreseen as reasonably likely to cause harm to the Claimant.

In a dissenting judgment Arden LJ said that the Judge failed to give sufficient weight to the fact that the Claimant was carrying out her employer's instructions which made it foreseeable that she would not give primary consideration to her own safety.

(*Lovett v Arthur Anderson* - CA - [2003] EWCA Civ 1946 - Auld LJ, Arden LJ, Jacob LJ - 5 November 2003)

Caravan park not liable for twisted knee

The Claimant walked on a grassy area between two caravans. He put his left foot into a hole or hollow covered by grass. He fell and twisted his knee.

The caravan site set in undeveloped natural surroundings. There were some paths and roadways but most of the site was left to grass. The Claimant did not immediately report a hole following his fall.

The Judge held that the Defendant had not breached *s2 Occupiers' Liability Act 1957* because the natural gully was within the range of features one would expect in a caravan site of this type. It would be too onerous a burden on the Defendant to expect the hole to be filled in. Such a requirement would also have destroyed the character of the site. Therefore, there was no breach of statutory duty.

(*Gallagher v Haven Leisure Limited* - QBD - Mott Philip QC - LTL 11/12/2003 unreported elsewhere - 10 December 2003)

Failure to maintain highway cause of accident

The Claimant's car collided with another car and he suffered injury. The claim was brought against the Defendant Highway Authority alleging the road surface was defective, due to the Defendant's failure to maintain the road, and this caused the accident.

The Judge held that the accident was caused by the road surface which was defective, there having been a failure to maintain. Therefore the Defendant could not rely on a s58 defence because the road was in a dangerous condition due to the Defendant's failure to carry out repair works.

On appeal, the Defendant argued that the Judge had failed to understand the evidence, had attributed too much

significance to a history of accidents on the road and therefore failed properly to consider the s58 criteria.
The appeal was dismissed. The Court of Appeal held there was evidence that when wet the road was liable to cause skidding. The Judge was entitled on the evidence to make the findings he did and hold that the Defendant had not responded to the defective condition of the road with promptness. The findings of fact made on the evidence were ones the Judge was entitled to make, therefore the appeal was dismissed.
(*Rogers v National Assembly for Wales* - CA - Judge LJ, Laws LJ, Charles J - 30 January 2004 - unreported)

Duty of care owed by motor racing venue

The deceased, an experienced driver taking part in rallies and races in the UK, was killed when his car crashed into a tyre-faced earth bank during an amateur track day.
The track, owned and run by Goodwood, had been inspected by the national body with power to award licences to motor racing venues. Experts had advised on the track, approved safety changes and awarded a current licence. An international body for motor racing had also provided experts to advise on track safety.
The Claimant contended a breach of the common duty of care under the *Occupiers' Liability Act 1957* or at common law against Goodwood. It was alleged that the governing bodies had failed to exercise proper skill and care in their inspection of the track, advice given to Goodwood and issuing of licences and that this duty of care was owed to the deceased as user of the track.
Goodwood agreed it owed the deceased a duty of care, but that this had been discharged. The governing bodies denied they owed the deceased a duty of care. They also pleaded contributory negligence and volenti non fit injuria.
The claim failed. The judge held that while Goodwood owed a duty of care to the deceased it had discharged that duty. While the national governing body owed a duty of care to Goodwood and the deceased, that too had been discharged. The tyre wall and the design and construction of the barriers at the crash site met a reasonable standard of safety. The international licensing body did not owe the deceased a duty of care.
Therefore the claim failed. As to volenti, since the deceased's consent to take part in the event was based on an assumption that the course was safe, it could not succeed as a defence. The deceased would have been 20% liable for the accident due to his handling of the car prior to the collision.
(*Wattleworth v (1) Goodwood (2) Royal Automobile Club (3) Federation Internationales de L'Automobile* - [2004] EWHC 140 (QB) - ABD - Davis J - 4 February 2004)

No damages awarded when psychiatric illness not foreseeable

The Claimant alleged victimisation and bullying by senior members of staff over a two year period. The bullying related to long letters about the Claimant's performance and threats of disciplinary action. The Claimant said these caused emotional distress and psychiatric injury. There was agreed medical evidence that the Claimant suffered a moderately severe depressive episode.
Alternatively, the Claimant said he had been exposed to such stress at work he developed a stress-related illness which prevented him working.
However, the claim was dismissed on the grounds that the actions of the Defendant and its employees did not give rise to a foreseeable risk of injury. The guidelines in ***Sutherland v Hatton*** *[2002] 2 All ER 1* applied. Causation need not, therefore, be considered. The Defendant could not reasonably have known or foreseen the conduct complained of by the Claimant would cause him harm nor did his behaviour at the time suggest or give cause for concern that he might be at risk of psychiatric illness
(*Barlow v Borough of Broxbourne* - QBD - [2003] EWHC 50 (QB) - Gray J - 24 January 2003)

Duty to monitor workers for vibration white finger

Between 1970 and 1999 the eight Claimants had worked in the Defendant's

factory. All had contracted vibration induced white finger in the course of their employment. However, the judge held the Defendant did not have actual knowledge of the risk of VWF. The Claimants alleged there was constructive knowledge from 1976 but this was dismissed by the Judge who held the Defendant's duty to assess tools used and monitor its workers only arose in 1991/2. Since no damage had been suffered due to failure to act after 1991, the claims failed.

On appeal the Court of Appeal held that while the information available in 1975 was not sufficient to trigger the alleged duty, by 1991/92 there was sufficient information to trigger the duty and so from that date the appeals succeeded. From that date the employees should have been asked questions so as to elicit details of any symptoms of VWF. Had such questions been asked, the Defendant would have been aware of the Claimants symptoms and would have been negligent to allow them to work with vibrating tools at all thereafter. The duty of care was wider than simply a duty to ensure the Claimants did not work with vibratory tools for longer than the recommended maximum periods.

(*Doherty v Rugby Joinery (UK) Ltd* - [2004] EWCA Civ 147 - CA - Auld LJ, Hale LJ, Wilson LJ - 17 February 2004)

Compromise made under common mistake was void ab initio

The Claimant was involved in long running dispute alleging personal injury due to carbon monoxide exposure. She issued proceedings against the Council, landlords of her flat, and her former solicitors. A claim form, issued on 7 June 2001 but not served until 6 October 2001 was struck out by the recorder following the cases of ***Godwin v Swindon Borough Council*** *[2001] 4 All ER 641* and ***Anderton v Clwyd County Council*** *(2002) EWHC QB 161*.

Following the strike out, a compromise was agreed whereby the Claimant discontinued her action with no order as to costs. This compromise was later drawn up as a consent order, but not signed. In July 2002 in the light of the Court of Appeal decision in ***Anderton v Clwyd County Council*** *[2002] 3 All ER 813* the Claimant withdrew her consent.

It was held that the compromise was based on a common mistake of law. This was a fundamental basis for and precondition of the compromise agreement which would therefore be set aside and declared void. While the courts should be very slow to set aside compromise agreements, even if the compromise was in a consent order, if the doctrine of common mistake of law applied, the contract of compromise would be void ab initio.

(*Brennan v (1) Bolt Burden (2) Islington London Borough (3) Leigh Day & Co* - [2003] EWHC 2493 (QB) - QBD - Morland J - 30 October 2003)

Absolute duty relates to identified risk

The Claimant was employed by the Defendant as an HGV driver. He wore steel capped boots. Unknown to anyone, there was a tiny hole at the sole of the boots. This allowed water into the boots and the Claimant suffered frost bite.

The Court of Appeal considered the duty imposed by the ***Personal Protective Equipment at Work Regulations 1992***. The duty imposed was an absolute duty on the employer. The question was whether the breach of duty in relation to repair referred to the risk in relation to which the protective equipment was provided or to any risk that may arise if the equipment was not in good repair.

The Court of Appeal (Lindsay J dissenting) held that the obligation to provide protective equipment only related to an identified risk. Therefore the absolute duty was in relation to such risk. In the present case, the condition of the Claimant's boots and the failure of repair did not affect the protection afforded to him against the risk for which they were provided. Therefore, the failure was not a breach of the absolute duty and fell outside the strict liability imposed by the regulation.

(*Fytche v Wincanton Logistics Plc* - [2004] PIQR P2 - CA - Waller and Kay LJJ and Lindsay J - 25 June 2003)

Top Tip

Did you know that as from 1 November 2003 the *Highways Act 1980* has been amended to include a new statutory provision under *s41*?

The amendment reads:
s41*(1A) In particular a highway authority are under a duty to ensure so far as is reasonably practicable that safe passage along a highway is not endangered by snow or ice*

This is in response to the House of Lords ruling in ***Goodes v East Sussex County Council*** *(2000) LGR 465.*

Closer Look

Structured Settlements

Steven Weddle and Robert Leonard consider current developments

Significant changes are afoot in the personal injury world. Following the publication of the Master of the Rolls' **Working Party Report** of August 2002 on **Structured Settlements** the Practice Direction at 40C PD has been amended with effect from 6th October 2003, the main aims being to require parties to give thought to structuring at an early stage in claims for substantial future loss and to make much more detailed provision as to the contents of counsel's advice and the written report for the approval hearing where a child or patient is involved. Meanwhile, the Courts Bill is proceeding through Parliament and may well become law by next April. If it maintains its draft form it will enable the court to impose a structured settlement irrespective of the parties' wishes, to make secured periodical payments orders and, in circumstances yet to be defined, to vary such payments at a later stage.
Paradoxically, however, at the same time as these initiatives towards structured settlements and periodical payments are advancing, the market for the products which enable them to be underwritten is contracting and other impediments to the matching of income to needs and losses have emerged.
In this article we consider the nature of a structure, the principal changes in approach now required by the new practice direction and examine the market and other forces against which it falls to be implemented. Then we concentrate on the practical problems which lawyers will face in trying to comply with the practice direction before turning to a consideration of the further conflicts likely to be raised if and when the Courts Bill becomes law.
A structured settlement involves payment by instalments over a specified period, which may be for the claimant's life, and which are either funded by an annuity from an insurance company or, where the paying party is a government body, by direct payments. The advantages for the claimant are that such payments are free of tax, disregarded for the purposes of means-tested income and housing benefits, and secure in the sense both that they have statutory guarantees and that, in most cases, they are linked to the RPI. Despite this, there has not been a huge take-up in the 15 years or so of their availability and this is variously attributed to the conservatism of lawyers and the desire of claimants of capacity to have control of their own money.

Structures are either Top Down or Bottom Up. The first is where a lump sum for future loss and expense is reached by use of the traditional tools of multiplier and multiplicand. It is then a question of determining what periodical payments that sum will purchase and how to fashion the structure so that particular needs and losses are met.
The second proceeds straight from the need/loss to the periodical payments which meet it and the structure is shaped accordingly. However, orders for periodical payments under s. 2 of the Damages Act 1996 may only be made by consent. Thus,

because the court has at present no power to impose a structure, a Bottom Up will only appeal to a defendant if it is cheaper than a conventional lump sum.

With, for the most part, minor drafting alterations the new Practice Direction follows the recommendation of the Working Party, which felt that, in practice, insufficient consideration was given to cases where a structured settlement would be to the benefit of the parties, in particular the claimant. So an important change is represented by **paragraph 2.1**, which provides that, in all cases where future loss is likely to equal or exceed £500,000 or in any other case where a structure might be appropriate, the parties should raise the question of structuring during case management and that the court may explore the issue of its own initiative.

In child and patient cases advice about the appropriateness and desirability of a structure must be put before the court (**paragraph 2.4**). The reasonable costs of financial and relevant medical and legal advice become costs in the litigation and therefore, at least in theory, recoverable by the claimant.

The other important change lies in the provision for approval hearings in relation to claims by a child or patient. Under the former 40C PD counsel's or the legal representative's opinion was quite limited in the matters to which it had to be directed. The requirements of the new paragraphs 4 and 5 are now much more specific. Consideration must be given to the general desirability of entering into a structured settlement (**paragraph 4.2 (1)(a)**), which will, in practice, require a comparison between the effects of a conventional lump sum award and a structured settlement. The written advice or report must also specifically address a number of matters, including: whether or not the sum payable in compensation is sufficient to fund payments which will fully meet anticipated annual and recurrent losses occasioned by the injury (**paragraph 5(1)**); where there is continuing care the periodic payments should aim to cover the anticipated costs, unless there is good reason to depart from this benchmark, while leaving an appropriate sum to allow for unexpected contingencies, and a proposal that the sums payable should in either respect be less than these benchmarks will require justification (**paragraph 5(2)**); and whether and if so on what events there should be stepped increases and when such increases should be, e.g. the child/patient becoming unable to care for himself in certain respects or gratuitous carers can no longer continue to care or to provide for loss of increased pay following promotion in lost employment (**paragraph 5(4)**). Advisers should also consider other means of meeting future income needs, e.g. provisional damages, an indemnity or personal injury trust (**paragraph 6**).

It will be noted that both paragraphs 5 (1) and (2) proceed on the assumption that it will be possible to match payments to needs and losses and to do so for the whole of the period for which provision is made, usually for life.

Addressing many of these questions will present formidable difficulties in the current state of the market. Particularly challenging are the requirements in **paragraph 5(1)** that periodical payments should fully meet anticipated needs and losses and in **paragraph 5(2)** that, where there is care, the periodic payments should aim to cover the anticipated cost. We will identify three particular problems.

Firstly, it is well known that medical costs and wages, both a feature of large claims on behalf of seriously damaged claimants, have risen well above the rate of inflation. That medical costs rise above the RPI was recognised in ***Houghton v Drayton*** [16.12.92] unreported, of which, more below.

Life Offices making indexed payments under structured settlements are required to match their funds to their liabilities over the period of the structure. Yet the only available index-linked gilt is ILGS which is based on the RPI. There is no gilt which is linked to the National Average Earnings index or the rise in medical costs (and no doubt if there were there would be little demand for ILGS)*. So it is just not possible for periodical payments under a purchased structure to rise by anything other than the RPI. A With Profits structure will provide an annuity which increases in

accordance with the bonus declared but while there is the statutory guarantee against the failure of the provider, there is none in relation to the performance of the fund.

There are other drawbacks to ILGS - the price on the market to the provider varies according to conditions and it is not available beyond 2035. There are practical limits to the efficacy of provisional damages awards and indemnities, as pointed out by the Working Party. Nor are these problems confined to the purchased structure – NHSLA structures do not generally contain escalation beyond RPI and recent alterations in the Treasury's "value for money" criteria are likely to mean that structures are offered less frequently.

*Secondly, the running yield on ILGS is rather lower than the 2.5% discount applied to the multiplier for future loss or expense in a traditional lump sum calculation, as is illustrated by the following example, which is based on an actual case**. The agreed conventional multiplier was 14.6 and with an assumed (for illustrative purposes) multiplicand of £200,000, the value of the claim for future loss would be £2,920,000. RPI-linked quotations for what £1m would purchase were obtained as follows:*

Provider	*Price*	*Annuity*	*Equivalent multiplier*
NFU Mutual	*£1m*	*£66,522.60*	*15.03*
Windsor Life	*£1m*	*£65,436.00*	*15.28*
Standard Life	*£1m*	*£39,629.52*	*25.23*
Scottish Widows	*£1m*	*£30,300.00*	*33.00*

The cheapest cost of providing £200,000 per annum is therefore NFU Mutual at £3,006,497.04 – but it is almost £86,500 more expensive to the defendant than a lump sum award.

Thirdly, the market is contracting. The vast majority of structured settlements in recent years have been provided by NFU Mutual and Windsor Life. Windsor Life is withdrawing from the market at the end of the current year. NFU is writing no further policies for this year and although it may write new business as from January there may well be a premium cap of £200,000, a sum which scarcely scratches the surface of the larger cases and is even well below the level at which the Practice Direction specifically requires consideration of a structure. If the quotations from other providers continue in line with the above illustration, the effect of the contraction of the market and any NFU cap at £200,000 can be demonstrated by adapting the figures given earlier.

Provider	*Price*	*Annuity*	*Multiplier*
NFU Mutual	£200,000	£13,304.52	
Standard Life	£4,711,020.47	£186,695.48	
TOTAL	**£4,911,020.47**	**£200,000**	**24.56**

The cost to the defendant's insurer would rise by £1,904,020.47 or over 63%**

The consequence of these developments is that structures of any size are likely to become significantly more expensive for defendants who have to purchase the structure in the market. A further likely consequence is that, at least in cases of substantial future loss over a significant period, defendants will simply refuse to structure, thereby defeating some of the purpose behind the new Practice Direction. It may be, as suggested by the Working Party, that a judge on an approval hearing could withhold approval to a conventional award, thereby in effect forcing the parties into a structure. However, claimants of full capacity would not be affected and whether a judge would take that approach if faced with evidence that the cost to the defendant of a structure was very much greater than a traditional lump sum award must at least be open to doubt.

We now turn to examination of some of the questions raised and the way practice may develop.

Costs of researching a Structure

Defendants have traditionally resisted bearing the cost of financial and legal advice as to whether or not a structured settlement might be appropriate in any case. **Paragraph 2.1** specifically states that the reasonable cost of such advice will be regarded as a cost in the litigation.

However, it is interesting to note that **paragraph 2** could be interpreted to mean that, in cases where the Claimant is of full capacity, this is so only where the Court has approved such investigation in advance of it being undertaken by an order made by way of Case Management. (**Paragraph 2.1**) Therefore claimants' advisers may risk the cost of investigating what is appropriate only to be challenged by defendants that such costs were unreasonable. In cases of doubt (which in view of the wording of **paragraph 2.1** will probably be frequent) it will be prudent to agree with the defendant that a structure might be appropriate before incurring the costs of investigation or obtaining the Courts approval prior to investigation.

Cases under £500,000

The requirement in **paragraph 2.1** that structures be raised during case management covers not only cases where future loss is likely to equal or exceed £500,000 but *"any other case where a structured settlement might be appropriate"*. These words were not in the Working Party's draft and the parties thus have little or no guidance as to how to identify those cases for which a structure might be "*appropriate*".

The NHSLA consider a structure in all cases with a likely value higher than £250,000, but of course this was not the figure chosen for the Practice Direction. Structures involving smaller sums may produce advantages in terms of tax and state benefits to the claimant and any of these may suffice to make a structure "*appropriate*". The facts of each case would require examination but it might be, for example, that a structured settlement to provide specifically to fund the payment of a wage to a support worker would be beneficial. The salary could be paid entirely out of the tax-free income from the annuity and would be ignored for the purposes of benefits.

Children and patients

Read literally, **paragraph 2.4** appears to require a structure to be considered in every child or patient case, irrespective of the value. This cannot be the intention, and it is only sensible that the requirement is construed as being limited to those cases where a structure is required to be considered in the case of a claimant of full capacity under **paragraph 2.1**. However, there will be some cases where it certainly should be considered below that level. In case the wording is construed strictly it would probably be wise always to consider structured settlements in cases where the damages include, or are likely to include, an element for long term income replacement, care, or provision of equipment or aids.

Paragraph 5 of the PD

How, then to address **paragraphs 5 (1) and (2)** where there is a substantial ongoing claim for future care and medical expenses? **Paragraph 5(1)** requires the legal advice to state whether the sum payable in compensation is sufficient to fund periodical payments which will fully meet the anticipated annual and recurrent losses occasioned by the injury.

For Top Down structures with a substantial future care or treatment requirement the answer will have to be in the negative for the present. In the appeals of ***Warriner v. Warriner*** *[2002] 1WLR 1703* and ***Cooke v. United Bristol Health Care and Others*** *[2003] EWCA Civ 1370 (CA)* the Court of Appeal would not move away from the rate of return set by the Lord Chancellor despite substantial evidence that the rate he had set would not be adequate to compensate the future claims fully.

If that expert accountancy evidence was factually correct, then the rate will always be inadequate until such time as the Lord Chancellor introduces a new rate. For this reason alone a top down structure is likely to be substantially cheaper for the Defendant than a bottom up structure. It is perhaps simplistic to criticise the Court of Appeal for appearing to be unwilling to accept as unfair a rate of return that is designed as a '*one size fits all'* response to a wide and varied problem. It is important to remember the exercise of statutory interpretation that must be undertaken by the Court.

However, the decisions are inconsistent with an important part of the philosophy behind the new Practice Direction, which is

predicated on the need for income to match loss and expenditure through the whole period of the loss. As a consequence, many Top Down structures are likely to fail to satisfy the new Practice Direction; and in many cases Bottom Up structures will be so much more expensive to Defendants that they will have little incentive to enter into them. Hence the importance of the Courts Act 2003.

Courts Act 2003

The Courts Bill received Royal Assent on Thursday 20th November 2003 containing a substitute **paragraph 2** to the Damages Act 1996 which will permit a judge to order that damages in respect of future pecuniary loss for personal injury be paid by way of periodical payments. The new **sections 2A and 2B** set out powers for rules to be made under the CPR and making conditions for variation of periodical payments. We cannot know how a judge will be expected to exercise his or her discretion until rules are published but the first impression is that the provisions could be expensive for Defendants.

The Regulatory Impact Assessment published on the website of the Department for Constitutional Affairs attempts to deal with some of the issues. Under 'Issue and objectives' it is said that '*The Government considers that it is generally preferable for claimants to receive periodical payments, rather than a lump sum, where significant damages are awarded for future care costs and loss of earnings.'* and '*It hopes an order for periodical payments will become the norm in larger cases.'*

It continued by stating that *'the objective of the proposal is to make the system for compensating seriously injured accident victims more accurate in reflecting the amount and nature of the claimant's loss and so fairer as between claimants and defendants; while enabling defendants to fund awards in the most cost-effective way. It does this by removing the risks associated with life expectancy and investment from recipients of damages and placing them on defendants, who are better placed to manage them'*. Some may argue this leaves the Defendant with excessive control.

If the Government's professed desire is to be achieved, then the balance of the rules must be in favour of Structured Settlements however much more expensive they may be for Defendants. It is perhaps unfortunate that the substantial additional costs of structures which do aim to match income to losses and expenditure throughout the period of loss is not specifically addressed in the Assessment, especially in the light of the recent decision in ***Cooke***.

Contrast

In the examples set out above it was demonstrated that a claim valued on a traditional basis would be £2,920,000 yet, as a structure, it could cost £4,911,000 which is nearly 2/3rds more. Faced with such substantial differences there can be no doubt that there will be early attempts to narrow the scope of the application of these changes.

Uncertainty

The potential for future variation creates uncertainty for Defendants. In order to be able to plan its business, an insurer needs to have reasonable certainty for the future. Contingent or potential claims are traditionally thought to be a fetter on this ability. That is why Defendants are so unwilling to agree to awards for Provisional Damages. They first were available in 1981 yet their use is very limited because of the way the Courts have interpreted the words *"develop some serious disease or suffers some serious deterioration in his physical or mental condition".*

Conversely, it may be that the Defendant will have the opportunity to benefit from significant changes in some circumstances. The early death of the Claimant within a certain time may be a consideration as may a degree of recovery which was not expected or even hoped for at the time of the earlier order. One hopes that the *"specified circumstances"* will be clear and not too restrictive for either party.

Present situation

The fact that there may be a shortfall does not yet need to prevent the Court from approving a proposed settlement with a

structure. A practical way around the problem in many cases is for the structure to include a substantial contingency fund in order to provide for the additional escalation of care and medical costs over the period in question and for any care beyond 2035. **Paragraph 5(2)** already requires a sum for "*unexpected contingencies*". So the "*justification"* for the failure of the periodical payments to cover the anticipated costs will be that the current market in gilts does not permit this to be done; and the total cost to the insurer may be substantially greater than a traditional lump sum.

There has been some discussion that it might be possible to develop an annuity product linked to the rise in cost of care and medical expenses. It would need to have a higher than average rate of return to take into account the objections but then it would potentially be very popular leading to the need to have restricted market access.

Other forms of damages

Paragraph 6 of the PD reminds practitioners that there are other forms of damages than lump sum and structured settlements. It states that other means should be considered including provisional damages, an indemnity or an appropriate form of trust. It is to be hoped that most practitioners will be alive to these in any event but perhaps it is not a wasted reminder. We have already mentioned that the use of provisional damages is restricted.

a. It may be worthwhile trying to include an award of provisional damages to cover situations, for example, where a specific condition degenerates such that independent mobility is lost prior to a specific date.
b. It is to be hoped that whenever any adviser looks at Structured Settlements a Personal Injury Trust will be considered as a more flexible alternative.
c. Indemnity for a specific item that may or may not be needed can be a useful tool but one should look not only at the desirability of an indemnity but also at its value; What is the prospect that the Defendant will still exist and be good for the indemnity in X years time?

Check list

1. Is the case worth more than £500,000 or do factors exist to make a structured settlement potentially appropriate?
   If Yes –
   Read PD40C
   Claimant of full age and capacity – Agree that structured settlement should be investigated or, in default of agreement, seek an order at the next case management hearing (or apply for an order)
   Child or Patient – Start to investigate.
   If No – Advise as briefly or as fully as seems necessary for the instant case.
2. Obtain Part 35 expert independent financial advisers' report in accordance with paragraph 2. It must be on an independent fee paying basis for a child or patient and should normally be so. A Claimant of full capacity may make other arrangements for payment but it is possible that it will be more expensive and therefore may cause the cost to be challenged by a Defendant. This is something to be considered carefully where a Conditional Fee Agreement exists and the Claimant is responsible for disbursements.
3. The legal advisers must then consider the financial advice, all facets of the case, and advise on the merits taking into account all matters in paragraphs 5 and 6.
4. If the Court of Protection is involved then approval must be obtained from the Master before judicial approval is given.
5. If the Defendant will not agree to structure then an application under the Courts Act will be necessary (when the Rules are in force).
6. If settlement includes a structure no final judgment should be entered until such time as the parties have agreed, or a judge has ordered, a final order incorporating that structure and a firm quotation exists and can be accepted.
7. Court approval should be sought in principle first and, once up to date quotations are available which can be put into place immediately, final approval can be sought.

8. Efficient practice dictates that where there is time between agreement subject to court approval and the hearing all efforts should be made to have all dealt with in one final hearing.

Comment

There is no doubt that the above can only be an educated guess at the way the use of periodical payments will develop in personal injuries practice once the Courts Act comes into force. One thing is certain; there is no room for us to be complacent and assume we need do nothing. The arguments involve very substantial sums of money. If the increased costs to a Defendant translate to the smaller case then the additional cost of a 63% increase to a £200,000 future loss claim is over £120,000. We must learn to understand the issues, and advise on them properly, or risk exposing ourselves to satellite litigation.

*It would be possible for the government to issue a gilt linked to the NAE index and restrict its availability to Life Offices or self-funding insurers; whether it could do the same for medical costs would depend upon the availability of a suitable index.
**Example and illustrations provided by courtesy of Richard Cropper of Personal Financial Planning Ltd.

Steven Weddle & Robert Leonard
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Credit Hire - an update

Jasmine Murphy answers your questions on credit hire cases

So what's the latest?

The House of Lords delivered judgment on 4th December 2003 in five test cases: ***Clark v Tull; Dennard v Plant; Sen v Steelform Engineering Ltd; Lagden v O'Connor; Burdis v Livsey*** *[2003] TLR 5/12/2003.* This marked another step forward for Claimants involved in road traffic accidents who use credit hire companies for car hire after the accident.

What did it say?

That if a Claimant can show he was impecunious, or unable to hire a car from an ordinary car hire company, he can recover the full cost of hiring a car through a credit hire scheme.

What has happened to Dimond v Lovell[1]. Wasn't that the House of Lords' last word?

You will remember that the principle in ***Dimond v Lovell*** was that the value of additional benefits resulting to Claimants as a result of using credit hire schemes were held to be irrecoverable.
Instead, their Lordships recommended that spot hire rates should be used. Almost overnight, the issue of credit hire appeared to be dead.
However, the House of Lords has distinguished ***Dimond v Lovell*** by upholding the Court of Appeal's decision in the fourth test case, ***Lagden v O'Connor***.

What were the facts?

Mr Lagden was unemployed, in poor health, had little money, no overdraft facility and could not afford to hire a car after the accident without using a credit hire company. The judge at first instance held that Mr Lagden could recover the reasonable costs of the credit hire scheme, including, as it did, certain sums which would not normally be recoverable. The insurers appealed on the basis that, as in ***Dimond v Lovell***, the part of the credit hire charges which did not equate to cost of repair and car hire had to be stripped out.

What happened next?

The Court of Appeal upheld the Judge's first instance decision and reinforced the principle that you take your victim as you find him. They reasoned that in light of Mr Lagden's limited means, there was no reasonable alternative to a credit hire scheme. This was the best way in which he could mitigate his loss. Therefore he was entitled to recover the full cost of the

[1] [2000] 2 WLR 1121

scheme. The House of Lords upheld this decision.

Is there a test for impecuniosity?

Defendants will pounce on Lord Hope of Craighead's words at paragraph 42 of the judgment "*in practice the dividing line is likely to lie between those who have, and those who do not have, the benefit of a recognised credit or debit card*."

I can see difficulties ahead when applying this test …

So could Lord Scott of Foscote in paragraph 87. He referred to people who keep large quantities of cash in their houses but do not have credit or debit cards who would benefit under this test. On the other hand he described those with bank accounts and overdraft facilities who have no spare cash but the facility to borrow who would not be viewed as impecunious under the test.

But, as almost everyone has credit/debit cards these days, what hope is there for Claimants hoping to benefit from this case?

The Lords only said that it was "*likely*" that this would be the test in practice. The criterion that must be applied is "*whether he had a choice – whether it would have been open to him to go into the market and hire a car at the ordinary rates from an ordinary car hire company".*

Lord Hope then narrowed this down to the test encapsulated above when he said *"it is reasonably foreseeable that there will be some car owners who will be unable to produce an acceptable credit or debit card and will not have the money in hand to pay for the hire in cash before collection. In their case the cost of paying for the provision of additional services by a credit hire company must be attributed in law not to the choice of the motorist but to the act or omission of the wrongdoer. That is Mr Lagden's case. In law the money which he spent to obtain the services of the credit hire company is recoverable."* (paragraphs 35 – 37).

Lord Nicholls of Birkenhead said in paragraph 9 that what is meant by impecunious is *"inability to pay car hire charges without making sacrifices the plaintiff could not reasonably be expected to make."* So there is still scope for making out a case for impecuniousity even if the Claimant does not fall within the stricter credit/debit card test Lord Hope favoured.

My practice is mainly Claimant based – what steps do I have to take in the light of the judgment when I have a credit hire case?

- Obtain instructions about your client's finances: whether they had credit card/debit card/overdraft facilities at the time. A new section in your standard witness questionnaire could be inserted to cover this.
- If you have a client with a credit card or debit card you still may be able to argue that they are impecunious e.g. if their credit card or overdraft limit was reached at the time.
- Make sure that if there is going to be a dispute over credit hire in court this information is in your client's witness statement.

I do Defendant work, what does this judgment mean for me?

- If you are taking issue with the credit hire rates, challenge the claimant's financial circumstances at the time of entering into the contract.
- If the claimant's solicitor claims that its client was impecunious ask to see the claimant's statement to that effect.
- Make sure you ask if the Claimant has credit -by credit or debit card - and that they are required to explain their financial situation in detail.

Where can I find out more?

The Court of Appeal judgment in the five test cases ([*2002] 3 WLR 762*) is very useful and sets out all the relevant points on credit hire, what is/is not recoverable etc. The leading judgment of Lord Nicholls is the most digestible.

Jasmine Murphy

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