

Hardwicke Espresso News

Building

Hardwicke Building Injury Team
March 2007



Editorial.....	1
Case Law	3
Helpful Website.....	8
Closer Look	
o Yes But No But CPR 14.....	8
o Costs and Conditional Fees – An Update.....	11
Team	13

Editorial

Hardwicke News

Hardwicke Building is pleased to note the continued recognition of members of the Injury Team in the legal directories. The 2006 edition of the **Legal 500** names **Dr Margaret Bloom, Emily Formby** and **Steven Weddle** as **“Leading Juniors”**. **Chambers UK 2007** comments that **“solicitors remain impressed by Charles Bagot and Emily Formby of Hardwicke Building”** and ranks both as **“Notable Practitioners”**.

As many of you may know, Emily Formby has been on maternity leave for the past few months following the birth of her son, Algernon, in July 2006. The Injury Team is extremely pleased to have welcomed Emily back to work in February.

As well as these recent acknowledgements in the legal directories, Hardwicke Building was delighted to be a finalist for the **Chambers of the Year award** at **The Lawyer Awards** in June 2006.

The Injury Team is pleased to welcome **Annabelle Lock** to our clerking team. Annabelle is a graduate of Aberystwyth University where she obtained her BA in Law and Business Management making her ideally qualified for her new role as a Junior Clerk. Annabelle is looking forward to

working with all of you over the coming months and years.

Finally, after several highly successful years, our award-winning website has been retired. The new website went live on Monday 12th February 2007. Updated technology has allowed us to add a number of new features that will, we hope, make our website even more user-friendly and informative than it has been in the past. We are extremely happy with the fresh new look and are sure that it will be winning awards of its own in the near future. Judge for yourself at www.hardwicke.co.uk. Please let us know what you think of it.

What’s happening in the wider world?

Perhaps the most significant development will be the coming into force of the Civil Procedure (Amendment No.3) Rules 2006 SI 2006/3435 on 6th April - which make wholesale changes to CPR Parts 14 and 36. The new rules are intended to settle the confusion surrounding pre-action admissions of liability, not helped by the **Sowerby [2005] EWCA Civ 1610** judgment and, following the DCA’s public consultation in 2006, to simplify Part 36. There is some political motivation, with the removal of the absolute requirement of defendants to pay into court which builds on the **Stokes Pension Fund** judgment [2005] EWCA Civ 854, because the DCA intends significantly to reduce the future workload of the Court Funds Office.

The new rules come into force on **6th April 2007**. The changes are significant and practitioners will need to be up-to-speed. Indeed, consideration should perhaps be given as to whether parties are best served by taking steps now under the existing regime or whether it is better to wait. For instance the new rule 14.1A will not apply to any admissions made before 6th April and regulation 7 of the SI provides:

Subject to paragraph (6), where a person has made a Part 36 offer or Part 36 payment less than 21 days before 6th April 2007—

(a) paragraphs (1) to (4) of this Rule shall not apply to the offer or payment; and

(b) the rules of court contained in Part 36 as it was in force immediately before 6th April 2007 shall continue to apply to that offer or payment as if they had not been revoked.

While this brief commentary cannot replace a detailed study of the rules, nor consideration of the implications of each particular case, the explanatory memorandum issued with the SI may provide some assistance stating the purpose of the amendments includes:

- removing the requirements for defendants to make payments into court and creating a new regime for offers to settle. Defendants wishing to offer to settle a claim by payment of a sum of money will now simply make a written offer to settle. The rules then require that an accepted offer must be paid within 14 days, or the claimant will be able to enter judgement and the defendant will lose the costs protection afforded by the rules;
- simplifying and clarifying the process for offers to settle, so that the permission of the court is not generally required to accept an offer or to withdraw it;
- giving admissions (where a party to a case admits the truth of the whole or any part of another party's case)

made before proceedings start equal weight with those made during proceedings;

and, some would say, rather surprisingly:

- introducing provision for applications for drinking banning orders under the Violent Crime Reduction Act 2006.

Other interesting reforms include:

- (i) that the offeror can specify its own period of 21 days or more for accepting its offer, although the offer can not be withdrawn or reduced in that period without permission of the court;
- (ii) the parties can agree (in writing) that a Part 36 offer should be disclosed to the trial judge;
- (iii) reform of the treatment of recoverable benefits, so that any award will be gauged against the offer net of benefit(s) rather than (as before) the gross sum, presumably to alleviate the effects of cases such as ***Williams v Devon CC [2003] EWCA Civ 365***.

Importantly, a Part 36 offer can now be accepted after it has expired without the permission of the court (subject to exceptions) if it has not been withdrawn and costs are agreed (or the court rules on costs).

This eliminates the anomaly under the present rule whereby a Defendant can force a Claimant to trial by refusing to apply to withdraw a Part 36 Payment which was not accepted at the time but which exceeds any reasonable valuation of the claim by trial, usually because of surveillance evidence of the Claimant that post-dated the payment. The onus will in future be on the Defendant to withdraw an offer before it serves that evidence, lest that offer is accepted.

Full details of forthcoming events together with individual CVs of all team members can

be viewed on the Injury Team section of our new Hardwicke Building website.

In the meantime, if you would like copies of our Injury Team flier; details of our 2007 in-house seminar programme, or would like to add a name to our mailing list please contact Lesley Richardson by email to lesley.richardson@hardwicke.co.uk or by telephone on 020 7691 0012.

Case Law

Duty to maintain highway did not apply to street furniture such as a bollard

As the claimant, a nine year old child, leapfrogged a bollard, the bollard wobbled and the child fell and injured himself. It was established that the bollard was not properly installed and was insecure. The claimant brought his claim under s.41 of the Highways Act and in negligence. At first instance the claimant succeeded in proving the highway authority was in breach of statutory duty, but the court made no finding as to negligence. Both parties cross-appealed and both appeals were upheld. The Court of Appeal found that the bollard was street furniture and did not form part of the highway. Therefore the s.41 duty to maintain the highway did not apply. However, the bollard had wobbled because the hole in which it was set was inappropriate. In the circumstances, the highway authority was in breach of its duty of care and liable in negligence.

(Shine v London Borough of Tower Hamlets [2006] All ER (D) 79)

Apportionment of liability between employer and occupier for employee's injury

The claimant was employed by Plumbase and was delivering radiators to a site occupied by Notaro. Whilst walking over a scaffolding plank walkway, one of the planks gave way and the claimant injured his back. At first instance the claimant was found to be 60% contributorily negligent. The

remaining 40% liability was apportioned two thirds to his employer for not giving training and advice and one third to Notaro as the walkway was not safe. On appeal the apportionment was reversed in favour of Plumbase. It was said that the apportionment at first instance did not represent the justice of the case. Notaro were responsible for the walkway, which was unsafe, while Plumbase's failure, although not just a technical failure, was a lack of training in an area that required little more than common sense.

((1) Smith (2) Notaro Ltd v (1) Notaro Ltd (2) Grafton Group PLC T/A Plumbase [2006] EWCA Civ 775)

Lift in communal office building is work equipment

An employee worked in an office that was leased by the defendant employer on the second floor of an office building. The claimant used a lift in the common parts of the building to descend to the ground floor and exit the building at the end of the working day. She sustained injury when the lift doors closed on her hand. Her employer said that it was not liable for her injury under the Work Equipment Regulations as the lift was not work equipment and the claimant was not at work when she used it. This argument failed at first instance and judgment was given for the claimant. The defendant appealed and the Court of Appeal dismissed the appeal and upheld the first instance findings. However, the Court of Appeal did take the opportunity to note that the circumstances where liability can arise under Regulation 5(1) of the Work Equipment Regulations were legion and these cases were often fact specific.

(Reid v PRP Architects and others [2006] EWCA Civ 1119 [2006] All ER (D) 428)

Limitation: Walkley v Precision Holdings overturned

The claimant issued proceedings for damages arising out of a road traffic accident against the defendant driver and MIB two days before limitation expired. However, the claimant had failed to give notice to the MIB prior to issue. The

claimant therefore issued duplicate proceedings, out of time, giving correct notice to the MIB. The MIB raised a limitation defence and the claimant sought to have limitation disapplied. The judge indicated that had he felt it permissible to disapply the time limit he would have, but he was bound by ***Walkley v Precision Forgings Ltd* (1979) 1WLR 606**. The House of Lords decided to depart from its own decision in ***Walkley***. ***Walkley*** had raised the anomalous situation that a claimant who had not issued proceedings within the primary limitation period was in a better position than one that had issued but failed to serve in time. The House of Lords said that the fact that ***Walkley*** deprives claimants of a right Parliament intended them to have, had driven the Court of Appeal to make distinctions which lacked any principled justification and subverted the intention of Parliament. The discretion under s.11 of the Limitation Act was wide and the question was whether it was equitable or inequitable to override the time bar.

(Horton v Sadler & Anor [2006] UKHL 27)

Assessment of damages governed by UK law

A road traffic accident occurred in New South Wales. The claimant was British and the defendant was Australian but living in the UK at the time. Liability was conceded but the issue was whether the assessment of damages was governed by UK law or that of New South Wales. The claimant was likely to recover less if his damages were assessed under Australian law rather than UK law. The question that would determine jurisdiction was whether assessment of damages was a procedural or substantive matter. The House of Lords decided that Parliament had intended in s.14 of the Private International Law (Miscellaneous Provisions) Act 1995 that issues relating to the quantification of damages should be regarded as procedural. Damages would therefore be assessed under UK law.

(Harding v Wealands [2006] 4 All ER 1)

Medical Agency Fees Recoverable

Judge Hurst, sitting as a recorder, settled the furor over recoverability of medical agency fees. Judge Hurst ruled that, as CPR 45.10 allowed the cost of obtaining medical reports and medical records, the costs of securing these items are recoverable as a disbursement.

(Wollard v Fowler [2006] Weston Super Mare County Court 24 May 2006 Lawtel Doc No. AC0111176)

Guidance on expert evidence in Low Velocity RTA Claims

Due to policy issues, this appeal found its way to the Court of Appeal on a case management issue. The case concerned a low velocity impact road traffic accident case, in which the defendant insurer had sought permission to obtain its own expert evidence. The Court of Appeal sought to set out guidelines for the management of low velocity cases. Following ***Kearsley v Klarfeld* [2005]** the starting point was that expert evidence on causation was generally not to be allowed as liability would turn on the judge's assessment of the lay witnesses. Instead questions could be put to the medical expert. However the Court of Appeal thought it wise to consolidate the practice of county courts nationwide and provide some further guidance. The court retained its discretion to refuse or grant permission, but if a defendant wished to have a chance at raising causation as an issue it needed to follow this procedure:

- Within 3 months of receipt of the letter of claim, putting in writing its intention to raise causation;
- Raising causation in the Defence;
- Within 21 days of filing the Defence, filing and serving a witness statement which identifies the grounds upon which the issue is raised.

Upon receipt of the witness statement the court could give permission to a defendant to **obtain** its own expert medical evidence if satisfied that the issue had been properly identified and raised. Thereafter, upon receipt of the medical evidence the court could give permission for the defendant to **rely** on the evidence if satisfied that there is

a case on causation with real prospects of success.

(Casey v Cartright [2006] EWCA Civ 1280)

Indemnity costs where one party refused to mediate

The court found against the claimant on almost every issue and assessed damages at less than the defendant's payment into court. The court awarded the defendant its costs on an indemnity basis because almost every ground for making such an award was present in this case including the fact that the claimant had refused two sensible offers of mediation.

(Tonkin v UK Insurance [2006] Judge Peter Coulson QC EWHC 1185 (TCC))

MIB to satisfy judgment of uninsured driver's wife

Mr Phillips was a front seat passenger in a car driven by Mr Rafiq. Mr Phillips owned the car and had allowed the insurance to lapse. Mr Phillips knew that Mr Rafiq was not insured to drive the car. The car was involved in an accident as a result of which Mr Phillips died. Mrs Phillips and her children issued proceedings for damages against Mr Rafiq under the Fatal Accidents Act 1976 and joined the MIB to the proceedings. The MIB sought to avoid liability by arguing that it had no liability to satisfy any judgment against Mr Rafiq because Clause 6.1(e) of the Uninsured Drivers Agreement 1999 excludes claims from Claimants who were voluntary passengers, and who were aware the vehicle was uninsured. Mrs Phillips argued that the exception did not apply, as she was not in the car at the time of the accident. The first instance judge found that the use of the different wording in the 1999 Agreement showed plainly that it was not intended simply to reproduce the same effect as the 1988 Agreement. Under the wording of the 1988 Agreement it was clear that the claims of the dependants would be excluded if the passenger knew the car was uninsured. The changing of that clear wording showed that, for whatever reason, the parties to the 1999 Agreement wished to make different provisions. Thus, it was

irrelevant to the proper construction of the 1999 Agreement that H, had he lived, would have had a claim. So far as the 1999 Agreement was concerned, the sole issue was whether the actual claimant, Mrs Phillips, satisfied the requirements of the 1999 Agreement. In the instant case Mrs Phillips had satisfied the requirements of the 1999 Agreement and her claim was allowed. The MIB appealed this decision but it was dismissed by the Court of Appeal which held that the first instance judge had been correct in his interpretation of the 1999 Agreement.

(Phillips v Rafiq & Motor Insurance Bureau [2007] EWCA Civ 74)

Overtaking motorcyclist not guilty of contributory negligence

A motorist (S) was stuck in a traffic jam on a straight single lane road and decided to perform a u-turn to get out of the queue. D, a motorcyclist, was overtaking the stationary queue of traffic. When S pulled out to commence his u-turn D was only 5 car lengths away and would have been visible to S if he had looked. Unfortunately S failed to look to his right before pulling out and he did not see D until he collided with his motorcycle. S accepted that he was negligent but argued that the motorcyclist was contributorily negligent for failing to take evasive action. He contended that 5 to 10 seconds had elapsed between his move to the nearside lane and the collision. S was held to be fully liable and appealed. The Court of Appeal upheld the first instance decision that D was so close to the point of impact that he could not have avoided a collision. In the circumstances there was simply no basis for any finding of contributory negligence.

(Davis v Schrogin [2006] All ER (D) 313 (Jun))

Child 70% to blame for RTA

The child claimant, E, suffered a serious brain injury when she was struck by a truck as she crossed the road. Various witnesses confirmed that the Claimant had walked out from between two cars, the nearest one being a Volvo which had furniture on its roof.

The Defendant, D, had not seen the child prior to the collision and the child had no recollection of the accident. It was found that the D was negligent in failing to see the child. However, the court held that the primary cause of the accident was E walking into the road without looking and, as such, she had to bear the greater responsibility. D had been driving in a way that was beyond criticism except for the momentary inattention that must have occurred. E was 70% liable for the accident and D 30% liable.

(Ehrari (A Child) v Curry & Industrial Cladding and Roofing Ltd [2006] EWHC 1319)

A finding of excessive speed does not require a court to indicate what a safe speed should be

In a case featuring Hardwicke Building's Steven Weddle for the claimant, P, a six-year old boy, was hit by a car driven by H when he ran out into the road from a gap between a car and a van. H was driving down a cul-de-sac where both parties lived when the accident occurred. The passage for her car was narrowed on both sides by parked cars and she had seen children playing a short time earlier. The trial judge found that H had been travelling at a speed of 28 - 30 miles per hour, which was too fast in all the circumstances. The judge further held that if H had been travelling at a safe speed the collision would not have occurred. H appealed and argued that (i) she had not had any opportunity to avoid the collision; (ii) there was no evidence as to where in the gap between the car and the van P had emerged; and (iii) the judge was not entitled to find that the accident would not have occurred if H had been travelling at a safer speed, without indicating what that safe speed should have been. The Court of Appeal found that H's evidence was inconsistent with the agreed expert evidence and that it was clear from the point at which the skid mark began that P must have come into view a considerable distance from the point of collision. In relation to the absence of evidence about the point in the gap at which P emerged, the Court held that the trial judge had to make an assessment

based on all the circumstances. The absence of a judgment on a finding of fact about just one factor did not deter a finding that causation was established. Moreover, the court is not obliged to indicate what a safe speed would have been in order to find that the Defendant's excessive speed was causative.

(Puffett v Hayfield [2005] EWCA Civ 1760, Pill LJ, Keene LJ & Lloyd LJ, CA)

Extension of time for service of claim form

C, a prison officer, suffered an accident at work. Liability was agreed at 80%:20%. C's solicitors issued a claim form but did not serve it within the four-month period allowed by CPR 7.(2). C's solicitors agreed a number of extensions of time with the D. The extensions were agreed orally and noted by each side in file notes. On the first such occasion, C's solicitors wrote to the D to confirm the agreement and D's solicitors made reference to the agreement in a letter to the medical expert a month later. After the claim form had been served, D applied to strike out the claim on the basis that the claim form had been served some days after the expiry of the last extension; and also that there had been no valid extension of time at all because that was not permitted by the rule. The Court of Appeal held that it was open to parties to agree under CPR 2.11 to extend time for service of a claim form under CPR 7.5(2). However, if CPR 2.11 applies there must be a written agreement between the parties. The written agreement did not have to be a single document and could be constituted by an exchange of letters. An oral agreement that was then confirmed in writing by both sides was also within the concept of a written agreement. However, an oral agreement between two solicitors subsequently recorded in a letter sent by one solicitor to the other, but not answered by the other, could not be said to constitute the agreement or to confirm or record the agreement. It was not sufficient for one solicitor merely to communicate to a third party what had allegedly been agreed. Nor was it sufficient for each side to note the oral agreement, unless the notes were

exchanged. In the instant case the agreed extensions did not constitute written agreements within r.2.11 of the Rules.

(Thomas v The Home Office [2006] EWCA Civ 1355, Jacob LJ, Neuberger LJ, Lloyd LJ, CA)

Employer should have foreseen risk of employee falling out of bed

R was working on an off-shore platform which had two-tier bunks. Each bunk had a moveable suspended ladder held in position by retaining bars. R was injured as he attempted to descend from the top bunk using the ladder. R's case was that the accident was caused by breaches of reg. 4 and reg. 20 of the Provision and Use of Work Equipment Regulations 1998. It was accepted that neither the ladder nor its mountings was in any way defective. Rather, the cause of the accident was the fact that the ladder had not been properly replaced onto its mountings. Factual evidence had been adduced and accepted that such ladders were routinely removed and replaced. Sometimes they were not properly replaced within the brackets, in which case they might become dislodged and fall. The trial Judge found that S was not in breach of either of the regulations, since it had not been reasonably foreseeable that an incorrectly placed ladder could cause injury, and that, in any event, the accident had been caused wholly by R. The Appeal Court also found that the accident had not been reasonably foreseeable but concluded that, had R succeeded, he would have been equally to blame for the accident. The House of Lords allowed R's appeal and found that the accident was caused by breaches of regs 4(1) and (20). The aim of regs 4 and 20 was to ensure that work equipment made available to workers could be used by them without impairment to their health and safety. This was an obligation to anticipate situations that might give rise to accidents and an employer was not permitted to wait for accidents to happen. Regulation 4(2) required a general risk assessment. Carelessness in the replacement of the removable suspended ladders was one of the risks that had to be anticipated and addressed before the

employer could be satisfied the ladders were suitable. The House of Lords also found that there was a legal basis for a finding of 50% contributory negligence: R had known the ladders were frequently removed and replaced and he accepted that he ought to have checked because of that.

(Robb v Salamis Ltd (Formerly Salamis Marine & Industrial Ltd) [2006] UKHL 56 13 December 2006)

Limitation - Date of Knowledge - Objective test

Y's claim was based on allegations that as a teenager he had been subjected to physical and sexual abuse while a resident at the two Defendants' institutions. In the three-years following release he had suffered post-traumatic stress disorder, but thereafter had suppressed the memories. He went on to lead a successful and happy life until a chance meeting with one of his alleged abusers triggered the return of significant psychiatric problems. Y did not bring proceedings until he was involved with a police investigation four years later. The Court of Appeal held that the test under s.14(2) of the Limitation Act 1980 was an objective one. The standard to be applied was that of the reasonable behaviour of a victim of child abuse who had suffered the degree of injury suffered by the claimant in question and of which he had knowledge. If a person who had suffered a particular type of injury would reasonably be inhibited by the injury itself from instituting proceedings, that was a factor that should be taken into account in deciding whether he would have considered it sufficiently serious to justify issuing proceedings. The court had to decide the question by balancing the seriousness of the injuries with the inhibiting factor of them. The more serious the claimant knew the injury to be, the less likely were the inhibiting and other consequences of the injury to be grounds for concluding that the claimant was justified in not instituting proceedings. In the instant case, Y had known in the three years following his release that he had suffered serious injuries, but as a result of the suppression of the memories he did not know that his injuries were significant. However, within a short

time of his chance meeting with his alleged abuser Y was aware that he was suffering from a serious psychiatric injury as a result of the abuse. The Court of Appeal considered that a reasonable claimant in Y's position would have turned his mind to litigation. Applying an objective test, Y had the requisite knowledge at that date and accordingly, his claim was statute barred.

(Catholic Care & Home Office v Young [2006] EWCA Civ 1534 Buxton LJ, Dyson LJ Sir Peter Gibson)

Employer negligent for failing to reduce employee's "excessive workload"

C was employed by D as a finance assistant. During her employment she had suffered two episodes of post-natal depression. Sometime after those periods of depression there was a major management re-organisation. C was offered a new role that led to an increase in her workload and responsibilities. C made representations to her managers that there were insufficient resources to deal with the workload, that she was working excessive hours, that her work load was causing her stress, that she suffered mood swings, and that she had "been there twice before". In addition C's manager had found her in tears and had read C's written account of her problems, in which she made reference to her previous episodes of post-natal depression. However, D did not act on C's representations and C subsequently suffered a nervous breakdown. The Court held that a reasonable employer could not be expected to foresee that an employee who had suffered two bouts of post-natal depression was more vulnerable to other forms of depression brought on by stress. However, after C had complained about her excessive workload for several months and, in doing so, made reference to her history of post-natal depression, it should have been clear to the employer that her mental health was being affected. The employer should have taken urgent steps to reduce her workload and to ensure she saw a doctor. The employer's failure to take appropriate steps to prevent psychiatric injury amounted to negligence.

(Daw v Intel Corporation Ltd [2006] EWHC 1097, QB)

Helpful Website

If you need help in telling your conversion disorders from your adjustment disorders or are baffled when medical reports refer to ICD-10, take a look at ICD-10 online at:

<http://www.who.int/classifications/apps/icd/icd10online/>

This is the 2006 or 10th Edition of the **International Statistical Classification of Diseases and Health Related Problems** published on the World Health Organisation's website. ICD-10 is the international standard diagnostic classification for all illnesses, diseases and injuries suffered by hospital patients. So when your expert mentions, for example, ICD-10 F32.1 without any further explanation, ICD-10 explains this is the classification for: *"Mild depressive episode: Two or three of the above symptoms are usually present. The patient is usually distressed by these but will probably be able to continue with most activities"*.

Yes But No But CPR 14

Steven Weddle provides a short commentary on the changes to CPR 14 and some initial thoughts as to how admissions should now, and may in the future, be approached.

Since the introduction of the CPR the status of admissions has been a fertile battle ground. By the end of 2005 most of us felt that the situation as to withdrawal was legally quite clear. It was thought that CPR 14 applied to admissions made both before and after commencement of proceedings and that the person seeking to withdraw had to demonstrate with good faith that there was a reason why he or she should be allowed to do so. The burden of proving prejudice was on the applicant. The case of **Sowerby v Charlton [2005] EWCA Civ 1610**, heard in December 2005 and

reported in early 2006, ran a coach and horses through this. The Court of Appeal stated that as the rule makers did not specifically refer to pre-action admissions in the CPR they must have been excluding them. So we now have a more uncertain situation than that which existed before the CPR. Plus, it is now unclear on what basis an application to withdraw an admission can be opposed.

With the speed normally associated with a knee jerk reaction the rules have been amended. We can therefore assume that those drafting and approving the rules now do not agree with the obvious intention of those who drafted and approved them in 1998!

What new rules?

As of **6th April 2007** we have a new Part 14.1A dealing with admissions made before the commencement of proceedings. CPR 14.1 is now restricted to admissions made after commencement of proceedings. This provides a simple code that should make reliance on admissions easier in certain cases.

What's new?

From 6th April 2007 a party may make a **written** admission before commencement of proceedings in actions where the pre-action protocols for personal injury claims, resolution of clinical disputes or disease and illness claims apply.

When can it be made?

The rules apply to admissions made **after receipt of a relevant pre-action protocol letter or**, if one has not been served, if the admission **is stated to be made under Part 14.**

Can they be withdrawn?

Such admissions can be withdrawn pre-action if:

- (i) the person to whom the admission was made agrees; or
- (ii) after commencement, if all parties agree; or
- (iii) **with the permission of the court.**

How?

After commencement of proceedings a party may apply for **judgment on the admission** or the party who made it may **apply to withdraw it.**

On what basis?

The amended Practice Direction provides that the court will have **regard to all the circumstances of the case** including the **grounds for making** the application, whether there is any **new evidence**, the conduct of the parties, **prejudice** either way, **when in the proceedings** it is made, the **prospects of success** if the admission is withdrawn and **the interests of the administration of justice.**

Written

Under the new rules, it will no longer be possible to rely upon an oral admission made between the parties' representatives. However, it may be possible to convert a parole admission into a written one by incorporation in correspondence.

After relevant pre-action protocol

This change in the rules only applies to three kinds of case; those to which the PI, Clinical Negligence and Disease and Illness protocols apply. There is some ambiguity still as to whether the change will apply to PI claims over £15,000. The amendment to the PD suggests it will apply by saying that "... *paragraph 2.2 of the protocol indicates that it generally applies to all claims which include a claim for personal injury.*" At first reading it therefore applies but I am confident someone will try and argue that it does not.

Under Part 14

The reasoning for this change is not clear but it may be that it anticipates early admissions of liability where the insurer/defendant realises that significant time or cost will be saved by such an admission long before a Claimant is able to provide a full protocol letter. An example might be where the insurer wishes to engage in early rehabilitation to minimise the claim.

Withdrawal

There is no longer the uncertainty of who makes an application. The person relying on the admission can apply for judgment. The party withdrawing may either make a cross application to that application or, if it wishes, may make its own application in the normal Part 23 manner.

Basis of application

The Practice Direction does not go far in helping the Court decide where the burden lies in satisfying the Court that an admission should, or should not, stand. Whilst mentioning:

- regard to all the circumstances of the case;
- the grounds for making the application to withdraw;
- new evidence;
- the conduct of the parties;
- prejudice either way;
- when in the proceedings it is made;
- the prospects of success if the admission is withdrawn; and
- the interests of the administration of justice,

there is no guidance as to the relative importance or weight of these factors.

I suggest that it is likely that the courts will interpret the provisions as follows:

1. The party seeking to withdraw will have to show good reason, therefore the initial burden will be upon that party. This will probably be satisfied by showing that there is an explanation of a genuine mistake, even including ineptitude of an employee, or establishing that something new has come to light that disturbs the basis for making the admission;
2. The party seeking to withdraw will have to show that withdrawal will make a difference. If the overall evidence is overwhelming then the court may decide there is no point, but where there is a genuine issue to be tried, it will probably lean towards allowing the application;
3. The party wishing to rely on prejudice will have the burden of proving that

it will be hurt more than the other party – a balancing exercise;

4. The stage of the proceedings and the interests of justice are probably intertwined. The former rarely seems to be compelling if there is a genuine issue to be tried as the Human Rights considerations of access to justice and right to a fair trial so often tend to over-ride court convenience and cost. The latter is such a nebulous concept it will usually be subsumed in other arguments. It will probably be little more than what feels right to the judge hearing the application!

In the meantime

The changes do not apply to any admission made before 6th April 2007 so:

- ❖ What do we do with admissions made before that date? and
- ❖ What do we do about admissions until then?

Where the Defendant has made a pre-action admission and then seeks to withdraw it after issue of proceedings the Claimant has little chance of opposing the withdrawal unless it can make an application for summary judgment; i.e. it is obvious judgment will be obtained anyway. It follows that any good evidential argument put up to explain why there should be a trial will succeed.

In every case where an admission is currently being relied upon and proceedings have not been commenced the Defendant should be asked:

- a. Whether it intends to be held to its admission; and
- b. Whether it is willing to state in writing that it is intended to be a binding admission for the purposes of any future litigation as if the impending amendments to CPR 14 were already in force.

In any case where the Defendant will not confirm good intention in response to a. and b. above:

- a. The Defendant should be told that investigations into liability are

recommencing and that they will only stop in consideration of assurances as per the above;

- b. In obvious cases proceedings should be commenced with a view to obtaining judgment;
- c. In any case where there is doubt as to the ability to hold the admission, efforts should be made to ensure that enough evidence is obtained to be able to secure liability.

A letter seeking an admission pursuant to CPR 14 should be sent in all admitted but un-issued cases that are still active by 6th April 2007. It follows that these letters should be sent on about 5th April 2007.

Steven Weddle

Costs and Conditional Fees – An Update

Litigation based on Defendants seeking to establish that conditional fee agreements are unenforceable due to non-compliance with the Conditional Fee Agreements Regulations 2000 continues to be a primary focus in the costs arena.

The argument runs that if the agreement between the solicitor and his client is unenforceable then the indemnity principle precludes the recovery of any ‘between the parties’ costs.

The Regulations do not apply to CFAs that have been entered into since 1 November 2005 (see the Conditional Fee Agreements (Revocation) Regulations 2005) but continue to apply to the many CFAs entered into before that date. Nevertheless, thousands of CFAs were entered into before that date.

Solicitors who had acted in breach of the CFA Regulations 2000 faced difficulty in the

cases of **Garrett v Halton BC** and **Myatt v National Coal Board** [2006] EWCA Civ 1017. These cases concerned regulation 4(2)(c), which requires the solicitor to inform the client whether he considers that the client's costs risk is insured under an existing contract of insurance, normally a before-the-event (BTE) policy.

The court gave general guidance as to the scope of the solicitor's duty under regulation 4(2)(c). The court held that there was an implied obligation on a solicitor to take reasonable steps to ascertain what BTE cover the client had. What was reasonable would depend on all the circumstances of the case.

Relevant factors are:

- o the nature of the client;
- o the circumstances in which the solicitor was instructed;
- o the nature of the claim;
- o the cost of the after-the-event (ATE) premium if one had to be purchased; and
- o whether a referring body had already investigated the availability of BTE.

The regulation involved in **Garrett** (one of the conjoined appeals in **Myatt**) was 4(2)(e)(ii), which requires the solicitor who recommends a particular policy of insurance to declare any interest he may have in doing so. A claims management company had referred the case to the solicitor and it was found to have been a term of the solicitors' panel membership that they should recommend the policy of insurance promoted by the claims management company, with exclusion from the panel as a sanction for failure to comply.

The solicitors had declared that they had no interest in recommending the policy on the basis that they got no commission for doing so. They had declared their panel membership, but without saying what that entailed. The court upheld the first instance decisions that the link between recommending the insurance policy and panel membership was an interest that should have been disclosed.

This decision can, for now, be confined to those CFAs entered into before 1st November 2005. After that date, when the 2000 Regulations are revoked, primary responsibility for client care is focused on solicitors and the Law Society's professional Rules of Conduct, supporting costs guidance and proposed new model CFA agreements. It is open to argument whether a paying party can rely on a breach of Solicitors Practice Rule (provision of information about costs) in an attempt to strike down the agreement, but it is clear that the intention of shifting the 'consumer protection' aspects from a statutory footing to the professional conduct rules is that it will be less likely that minor failures fully to comply will result in disproportionate sanctions.

There are two other noteworthy recent cases, both of which relate to the way in which success fees are calculated. The first case is **Oyston v Royal Bank of Scotland [2006] EWHC 90053 (Costs)** in which the matter was funded by way of a CFA which provided for a success fee of 100%. Mr Oyston suggested that his solicitors could have a bonus of £50,000 if they succeeded in recovering over £1,000,000 for him. The CFA was amended accordingly.

In the event, Mr Oyston won his claim but he recovered less than £1,000,000. As a result, the bonus was not payable. The paying party argued that the CFA was unenforceable because the success fee was over 100%, i.e. potentially it was 100% plus £50,000. Master Hurst found for the paying party. He rejected Mr Oyston's argument that the time to examine unenforceability was at the date of assessment rather than at the time the CFA was entered into. He found that the CFA was in clear material breach of s.58(4) of the Courts and Legal Services Act 1990 (as amended). It was, therefore, found to be unenforceable.

In the second case, **Brennan v Associated Asphalt Limited [2006] EWHC 90054 (Costs)**, the paying party took the point that the amount of the postponement charge was not specified in the CFA and that this was a breach of regulation 3(1)(b) of the

Conditional Fee Agreements Regulations 2000 (SI 2000/692). Master Hurst made the following comments:

"In my judgment reg 3(1) of the 2000 Regulations is perfectly clear. The CFA must specify how much of the percentage increase relates to the cost of postponement. In my view the words 'if any' do not mean that if the deferral element is nil there is no need to mention it. Those words are there to ensure that the client is left in no doubt as to the position, even if the deferral element is nil. In those circumstances I find that there has been a breach of the regulation."

However, the Master went on to find that the failure to specify a postponement element meant that nothing in respect of this would ever be recoverable from the client, and that as a result, the breach was of no material effect. The CFA was held to be enforceable.

The significance of both **Oyston** and **Brennan** is that the receiving party deployed a retrospective deed of rectification to overcome the supposedly defective elements of a CFA (although in **Brennan** the point was abandoned at the hearing). In each case the court did not need to decide the enforceability of the CFA solely on the basis of deeds of rectification, and whilst in **Brennan** Master Hurst was sceptical (*"Nor is there any need for me to come to a concluded view about the deed of rectification... it is clearly open to severe criticism, and may indeed not be effective to bring about its intended result, certainly so far as the paying party is concerned..."*), the issue is certainly not closed. The prospects of costs draftsmen carrying a sheath of signed deeds of rectification to be deployed at will at a costs hearing is bound to be greeted with customary scepticism by costs judges (see **Oyston** para 59), but the legitimate deployment of a retrospective deed of rectification is a point that may receive closer judicial consideration. The issues are likely to be enforceability of a deed that pre-dates the costs order and evidence of the lay client's true intentions in entering into the deed of rectification.

The recent case of ***Rogers v Merthyr Tydfil*** [2006] EWCA Civ 1134 supported the way that after-the-event (ATE) insurance operates. This was the first occasion on which the reasonableness of an ATE premium had been considered authoritatively since ***Callery v Gray (No 1 and No 2)*** [2001] EWCA Civ 1246. In ***Rogers*** damages were agreed in the sum of £3,105 plus interest. The DDJ allowed an ATE premium of £5,103, being £4,860 premium plus premium tax. In this case there was a three-stage premium (£450 at outset, a further £900 when proceedings were issued and a further £3,510 sixty days before trial). The Defendant appealed the order. The Judge on appeal reduced the premium to £900 and said that was a more reasonable sum to pay.

The main issue for the court was: what is the proper approach to proportionality in a low value personal injury case where the ATE premium may appear large in comparison to the amount of damages? The Appeal Court held that the question of proportionality should not be determined by the level of damages. The real question is, whether it was necessary to incur the premium. The fact that the premium was large in comparison to the agreed damages did not necessarily mean it was disproportionate. It was said that it is not legitimate to compare the total premium payable at the third stage of a three-stage premium model with the single premium, because a three stage premium might be cheaper at the first stage than a one stage overall. The vast majority of cases settle pre-issue and thus it would be cheaper overall to the Claimant

This type of litigation is likely to continue. November 1, 2005 has not brought an end to technical costs litigation but has simply changed the arguments to be deployed.

Katrina McAteer

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