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Personal Injury Law Newsletter

INTRODUCTION

Welcome to Field Court Chambers' Personal Injury Newsletter.

In our first issue we feature several recent cases we feel may be of interest and importance to practitioners involved in personal injury litigation. These include the extent an insurance company can seek to reopen settlements after fresh evidence of fraud is uncovered; reaffirmation of the extent of driver duties and pedestrian contributory negligence in road traffic accidents from the Court of Appeal; the meaning of criminal acts for the purposes of the Criminal Injuries Compensation Scheme; the approach the court will take to attempts to withdraw pre-issue admissions of liability; the potential to impose obligations on the Ministry of Justice relating to the provision of equipment and training; and some useful examinations from the County Court relating to recoverability of costs in infant settlement cases.

Future issue will aim to keep you updated on recent developments in this field as well as news from Chambers' Personal Injury Team.

Chambers has a large personal injury law team offering experience at all levels of call and providing advice and representation to both Claimants and Defendants. Members are prepared to accept instructions under conditional fee arrangements on a case by case basis.

We hope you find these updates useful and enjoyable.

Mark Baumohl
Personal Injury Team

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For further information on the topics covered and ideas for future issues please contact:

sabina.smith@fieldcourt.co.uk

Tel: 020 7405 6114

CASE SUMMARIES

ZURICH INSURANCE CO PLC v HAYWARD [2011] EWCA Civ 641

Court of Appeal considered whether action alleging that earlier settlement of PI claim obtained by fraud was an abuse of process, and whether issues were res judicata.

Mr Hayward was injured during his employment. His employer's insurers (Zurich) alleged in their defence that he had exaggerated his difficulties in recovery and current physical condition. The claim was settled in October 2003 by a Tomlin order.
In 2005 former neighbours of Mr Hayward approached the employer with evidence which, if accepted, would demonstrate he had made a complete recovery by mid-2002. In 2009 Zurich commenced an action alleging that the settlement had been obtained by false representations.
Mr Hayward applied to strike out Zurich's claim submitting that it was an abuse of process and the issues were *res judicata*. This was refused at first instance, but allowed on appeal.

Zurich's appeal to the Court of Appeal was allowed. Smith LJ and Moore-Bick LJ agreed that this was not a case of *res judicata* or estoppel, albeit for differing reasons.

Smith LJ did not think that there could logically be a difference between a consent order in ordinary form and one embodied in a Tomlin order for the purposes of the creation of an estoppel. There should only be an estoppel if it is clear that the issue has been decided or compromised. There must be congruence between the allegation of fraud determined or compromised in the first action, and the allegation of fraud made in the second action. It was not the same allegation in this case (the first being that Mr Hayward had exaggerated his disabilities; the second being that he had fraudulently concealed that had made a complete recovery by mid-2002). It was not clear exactly what was compromised in the first action and the first allegation did not create an estoppel in respect of the second. As to abuse of process, the public interest in the integrity of the administration of justice and the private interests of Zurich in seeking the investigation of the allegations of fraud outweighed the public interest in the finality of litigation and Mr Hayward's wish to avoid a second action.

Moore-Bick LJ considered that doctrinally a Tomlin order cannot give rise to an estoppel by *res judicata* in the proper sense, although accepted that a consent order may give rise to an estoppel by record. As to abuse of process, Zurich was not seeking to raise issues that ought to have been raised in the first action. To succeed in its action Zurich would have to persuade the court that it was induced to agree to the settlement by fraud on the part of Mr Hayward, which could only be determined after a trial. There was not a tension between the need for finality in litigation and the need to ensure the court was not misled as the court had made no decision on the substance of the dispute that could be regarded as final in nature.

Maurice Kay LJ said that he resisted the temptation to engage in further *obiter* analysis.

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O'CONNOR v STUTTARD [2011] EWCA Civ 829

Where a child playing in the street had stepped back from the kerb and a motorist struck the back of his foot causing personal injury, a judge had erred in finding that the motorist had taken reasonable care and was not negligent.

The appellant (O) appealed against a decision dismissing his claim for damages for personal injury from the respondent (S). S had driven into a quiet street where a group of children, including O, were playing on the right hand side of the road. He positioned his car very close to the left kerb. O ran across the road in front of him chasing a ball, reached the left hand side and continued playing ball. He moved backwards towards the edge of the pavement and his foot protruded over the kerb. S's car struck the back of O's foot causing serious injury. The judge dismissed the claim and held that S had not been negligent in failing to sound his horn or failing to stop. It was sufficient to proceed slowly as it was only a remote possibility that O would step backwards off the pavement. O contended that the judge had failed to take account of the real danger presented by the developing situation. O submitted that S should have realised that there was a risk that O might act in a foolish way and should either have stopped or sounded his horn.

HELD: The judge was wrong to say that the possibility that O might step back off the pavement was remote. The finding that S had taken reasonable care had to be set aside. On the facts, S was negligent; he knew the street well and it was no surprise that young children were playing there. In effect, he was driving in a playground and the duty on him was high. S was driving slowly and close to the left kerb, which was sensible when the children were on the right side of the road.

However, when O crossed the road in front of him to the left pavement his line of travel was going to take him very close to O. He saw that O continued to play ball and was not looking at him. The movement of O was wholly unpredictable and it was for S to ensure that O was aware of his presence and was keeping still before he proceeded. The onus was on S, as an adult and as the driver of the car, either to sound his horn or stop to ensure O was still while he proceeded. That was not an unreasonable burden to place on a motorist who was driving very close to a young child.

Appeal allowed.

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WALDEMAR BELKA v JOSEPH LAWRENCE PROSPERINI [2011] EWCA Civ 623

Where a pedestrian had taken a deliberate risk of an accident by running across a road in front of a vehicle which had the right of way, the judge had not erred in apportioning causative potency equally between the driver and the pedestrian.

The appellant pedestrian (B) appealed against a decision apportioning liability for a road traffic accident between himself and the respondent driver (P). B was struck by P's vehicle in the early hours of the morning whilst he attempted to cross a dual carriageway at a point where it joined a roundabout. B and a friend had reached a refuge in the middle of the carriageway. Whilst pedestrians could cross at that point they did not have precedence over vehicles. The judge found that as P was entering the dual carriageway from the roundabout, B took a deliberate risk of trying to cross in front of P's vehicle whilst his friend remained on the refuge. P gave evidence that he saw from about 30 meters away only one person on the refuge and only saw B on the road at the last moment. The judge concluded that P should have seen both men on the refuge, and that in any event he should have slightly eased his speed on seeing even one person on the refuge and if he had done that the accident would have been avoided. He held that B was two-thirds and P one-third to blame. With regard to causative potency, the judge found that both the action of B and P's failures contributed equally to the collision. B submitted that (1) the judge should have found P's blameworthiness to have been very high, and certainly more than that of B; (2) when deciding causative potency, the judge failed to take into account the obvious disparity between a pedestrian and a car driver and the fact that P was driving what had been described in the case of ***Lunt v Khelifa*** *(2002) EWCA Civ 801* as "potentially a dangerous weapon".

HELD: (1) The fault of P was not to ease off on the accelerator in anticipation that a pedestrian, whom he had seen or ought to have seen, might decide to cross the road in an untoward way. The fault of B was to take a deliberate risk of an accident in running across the road in front of a vehicle which had the right of way. In the court's view, B was far more to blame than P. (2). On the judge's findings, this was a case where B had suddenly moved into the path of P's oncoming vehicle. B's conduct in deliberately taking the risk of trying to cross the road in front of P's vehicle contributed more immediately to the accident than anything P did or failed to do. It could not therefore be said that the judge was plainly wrong in his apportionment of causative potency, Lunt and *Eagle v Chambers (No1) (2003) EWCA Civ 1107, (2004) RTR 9* considered.

Appeal dismissed.

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JONES v FIRST TIER TRIBUNAL (SOCIAL ENTITLEMENT CHAMBER) & CRIMINAL INJURIES COMPENSATION AUTHORITY [2011] EWCA Civ 400

The Court of Appeal considered the meaning of Criminal Act under the Criminal Injuries Compensation Scheme and the extent to which it had to be directed at the injured party.

Mr Jones was injured in a road traffic accident which occurred when Mr Hughes ran from the hard shoulder into the path of an oncoming lorry, turned and raised his hands. Mr Hughes was killed instantly and Mr Jones, who was driving a highways agency gritter lorry, was very seriously injured in a subsequent collision which occurred as the lorry driver attempted to take avoiding action.

The Criminal Injuries Compensation Authority (“CICA”) rejected his application for compensation both initially and upon review on the grounds that they could not pinpoint a crime of violence within the meaning of paragraphs 6 and 8 of the Criminal Injuries Compensation Scheme 2001 such as would enable an award to be made.

The First Tier Tribunal considering Mr Jones’ appeal found as a fact that Mr Hughes ran into the path of the lorry with the intention of committing suicide but that there was no evidence that he deliberately intended to harm the users of the road. The tribunal then concluded that this act of suicide could not amount to a crime of violence because it was not a hostile act directed towards a person who suffered injury as a result.

They also rejected Mr Jones' contention that Mr Hughes had committed an offence of inflicting grievous bodily harm contrary to s20 of the Offences Against the Person Act 1861 considering that on the evidence they could not be satisfied that Mr Hughes had the necessary *mens rea* (that he intended to cause harm or was reckless as to whether harm of whatever degree might be cause).

The Upper Tribunal rejected Mr Jones' judicial review concluding that this was a decision open to the first tribunal.

On appeal the Court of Appeal quashed the decision and remitted the matter back concluding:

1) The FTT had erred in the test to be applied and in their finding that there was no evidence from which foresight of harm could be inferred.

2) The question whether a criminal offence has been committed and whether the injuries are directly attributable to the offence are undoubtedly questions of fact for the CICA or the FTT, but the test applied by the FTT (that a crime of violence was a hostile act directed towards a person) was too narrow. A section 20 offence was undoubtedly a crime of violence and did not necessarily need to be directed at the injured person nor did the act necessarily need to involve the infliction or threat of force in order to constitute a crime of violence.

3) Whilst it was for Mr Jones to prove the necessary *mens rea* of the s20 offence, the absence of evidence of Mr Hughes' state of mind did not mean there was no evidence capable of supporting the necessary inference that he must have foreseen the likelihood of harm. It was highly improbable that anyone who runs into the path of traffic on a busy motorway will not at the very least foresee the possibility of an accident and consequential harm.

4) The intention to commit suicide and the existence of some foresight of harm to others were not relevant alternative findings incapable of co-existing as the FTT appeared to view them.

5) There was no admissible evidence before the FTT as to the effect of suicidal intent on what would otherwise be the deceased state of mind and they appeared to have given no weight to the obvious possibility, even likelihood of the risk of an accident.

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WOODLAND v STOPFORD [2011] EWCA Civ 266

The Court of Appeal examined the approach of a High Court Judge to an application to withdraw a previous admission of liability and set out the extent to which it would interfere with such decisions.

The Claimant in this case was a ten year old girl who, in July 2000, nearly drowned in a swimming lesson, resulting in catastrophic brain injuries. She eventually threatened proceedings against her swimming instructors and their professional association, by which they were indemnified. A second HSE investigation at the instigation of the Claimant's father found that the Defendants had not provided adequate supervision and were negligent; and that her condition had been caused by asphyxiation.

After a delay of nearly five years, for which there was no adequate explanation, the Defendants made a pre-action admission of liability in November 2007 (under CPR 14.1A (1)). The Defendant subsequently instructed two firms of solicitors in turn, who requested disclosure of liability documents without success.

In July 2009 the Defendants, without explanation, withdrew their admission of liability. This led to proceedings being issued, an application for judgment and a cross application to withdraw the admission.

Judge Holman (sitting as a Judge of the High Court) allowed the Defendant's application. He took account of each of the seven considerations in the Practice Direction (14PD, at 7.2) dealing with the resolution of such applications: (a) the grounds of the application; (b) the conduct of the parties; (c) the prejudice to any person if the admission is withdrawn; (d) prejudice if the application is refused; (e) the stage in the proceedings; (f) the prospects of success; and (g) the interests of justice.

Judge Holman found that the absence of new evidence was not determinative in favour of the Claimant; nor was the delay. His judgment took particular account of the shortcomings in the HSE investigation, the fact that a fresh assessment of the evidence had been carried out and the desirability of avoiding satellite litigation against the Defendants' original solicitors. He also found that the Defendants had some prospect of success.

The Court of Appeal held that they would only interfere with judgments that weighed all the above factors where no reasonable judge could have come to that decision. The judgment was upheld and the Defendants permitted to defend the claim.

[NB: upon subsequent trial of a preliminary issue Langstaff J has decided in favour of the fourth defendant in this case (the local authority) holding that a school did not owe the Claimant a non-delegable duty of care so as to make the

school liable for the acts of a non-employee lifeguard – see [2011] EWHC 2631 (QB)]

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SMITH & OTHERS v THE MINISTRY OF DEFENCE [2011] EWHC 1676 (QB)

The High Court has considered at the summary stage and rejected as unsustainable various joined Claims by soldiers injured or the families of soldiers who died while serving in Iraq. However, the MOD's applications were only allowed in part, and that part will need to be reconsidered by the Court of Appeal after a recent Strasbourg decision.

There were two sets of Claimants. In the "Snatch Land Rover Claims" soldiers died in different incidents when improvised explosive devices (IEDs) were detonated beside the vehicles in which they were travelling. The Claims were for breaches of Article 2 of the European Convention on Human Rights ("ECHR") (the right to life) and in one Claim in negligence. Essentially the complaints were that the Government should have provided better armoured vehicles which were available for purchase (the systems duty) and that the planning of the various operations was defective thereby failing to do all that was reasonably necessary to avoid the risk to the life of the soldiers (the operational duty).

In the "Challenger Claims", two soldiers were injured and one died in a friendly fire incident between tanks. The Claims alleged breaches of a common law duty of care namely (i) the failure to ensure that the tanks were properly equipped and (ii) the failure to ensure that there was proper vehicle recognition training for the troops.

The MOD applied to strike out the Claims or alternatively for summary judgment.

The Snatch Land Rover Claims based on a breach of Article 2 were struck out on the jurisdictional basis. Under Article 1 ECHR the UK is obliged to secure the rights and freedoms to everyone *within the jurisdiction*. The Claimants had argued that the soldiers were under the authority and control of the UK. However this argument was rejected by the House of Lords in ***R (Al-Skeini) v Secretary of State for Defence*** **[2008] 1 AC 153** and by the Supreme Court in ***R (Smith) v Oxfordshire Assistant Deputy Coroner*** **[2010] UKSC 29** and the High Court were bound by those cases.

[Note: On 7 July 2011 the European Court of Human Rights published its judgment in ***Al-Skeini and Others v the United Kingdom*** **(Application 55721/07)** – a case in which Iraqi prisoners died whist in captivity. The judgment found in favour of the applicants on the jurisdictional issue, thereby reversing the conclusion of the House of Lords, on the basis that the exceptional circumstances of the UK Government acting as if it were a sovereign state. Appeals have been lodged in ***Smith & Others*** with a decision on permission expected shortly].

Importantly however, the Court did not find that there was no real prospect of success on one aspect of the substantive issue. The MOD had argued that there was no substantive obligation under Article 2 ECHR in relation to the supply of equipment. Although issues concerning the procurement of equipment may lead to questions that were political rather than legal in nature, in light of authority (***R (on the application of Gentle) v Prime Minister*** **(2008) UKHL 20, [2008] 1 AC 1356**) there might well be circumstances in which a positive systems duty could arise. The Court accepted there was no prospect of success on the operational duty argument – there was no reason to extend the scope of the implied positive obligation under Article 2 so as to include decisions made during military operations.

The majority of the Claims based on negligence were similarly held to have a real prospect. The argument centred on whether the principle of combat immunity applied. Under that principle soldiers do not owe other soldiers a duty of care in tort when engaging the enemy in the course of hostilities. Equally there is no duty on the MOD to ensure a safe system of work. See ***Bici v Ministry of Defence [*****2004] EWHC 786 (QB)** and the first emergence of the principle in ***Mulcahy v Ministry of Defence*** **[1996] QB 732**. Again, although the claims based on equipment were likely to give rise to issues of procurement and allocation of resources (political issues), that of itself did not mean it would be not be fair, just or reasonable to impose a duty of care.

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COUNTY COURT DECISIONS ON COSTS:

Although not binding the following are useful indicators of the County Court's continued approach to the limits of costs recoverability in low value personal injury claims:

(1) ***Dockerill & Healey v Tullett***, unreported 7 April 2011

A decision of HHJ McKenna sitting in the Birmingham County Court on appeal from the decision of a district judge on the costs to be awarded to the Claimant. The claimant and defendant agreed to settle a personal injury claim for the total sum of £750. As the Claimant was a child an infant approval hearing was required. Overturning the costs assessment of the District Judge which followed the approval hearing, HHJ McKenna considered that when assessing costs pursuant to CPR 44.5 in a case involving an infant approval hearing issued using the Part 8 procedure the judge should look

at each item of costs and ask whether that item was, on the facts of the case, necessarily incurred, having regard to the fact that the claim would have been allocated to the small claims track had it not been settled but bearing in mind the particular feature that approval to the settlement would have to be obtained from the court.

The decision supports the conclusion that there are only very limited costs outside of those allowable in small claims (such as court fees for example) that will be recoverable. This would include the costs of producing an advice on quantum (although not necessarily from counsel – see *GW* below). Whether the costs of a medical report would be recoverable is likely to depend upon the nature and degree of the injuries and whether the court considers a report necessary. Query whether the costs of drafting the application would be allowed given that the costs of drafting a claim form would not be allowed in a small claim.

(2) **GW v BW, *Unreported 22 July 2011***

HHJ Platt sitting in the Romford County Court, provided some guidance on what should be filed to assist the court in deciding whether to list the matter for an infant approval hearing or deal with it on paper; factors the court should consider when deciding upon the type of investment; and reaffirmed the position in line with previous County Court decisions as to recoverability of counsel's fees in situations where the fixed cost regime set out in CPR Part 45.7 to 45.14 applied.

(1) Solicitors may wish to provide information above and beyond that required by PD21 paragraphs 5.1 and 2 so as to enable the court to make a reasoned decision whether to hold a hearing. For example, a witness statement from the litigation friend or *Gillick* competent child confirming that they have made a full recovery in line with the prognosis in the medical report (or stating when they had fully recovered); or where the case concerns trivial scarring: good quality, up to date photographs.

(2) A short statement or letter should also deal with the views of the litigation friend or the *Gillick* competent child in relation to any investment proposals or immediate payment out;

(3) Where there was no information in the application about investment proposals, or where the only information was a draft order providing for investment in the special investment account the district judge was entitled to direct a hearing as it seemed solicitors had simply not addressed their minds to other ways in which the damages might be dealt with;

(4) Whilst previous practice was to order investment of modest amounts of damages (typically below £5000) into the special investment account, given the current low interest rate (0.5%); the current situation with inflation; the unconditional guarantees against loss of up to £50,000 now given by the government to savers; and the availability of savings accounts with higher interest rates the special investment account should now be the place of last resort for investment of children's damages.

(5) Although there may be exceptional cases where for example the litigation friend cannot be trusted with the damages, a judge should not simply order investment in the special investment account without considering alternatives including payment out to enable investment on the high street.

(6) Agreeing with a line of decisions on appeal to Circuit Judges, and rejecting the contention that the cost of attendance at an infant approval hearing was necessarily incurred simply because the court had ordered a hearing: counsel's fees for attendance at such a hearing and advice would not be allowed in a straightforward case falling within the fixed regime under CPR Part 45.7 to 45.14 as they were not "necessarily incurred" within the meaning or CPR Rule 45.10(2)(c) unless the court could be persuaded of some exceptional feature of the case.

It is also worth noting that the judge, whilst accepting that none of the cases mentioned in respect of costs were strictly binding, noted with disapproval that claimant's solicitors' seemed to be running this same point on costs repeatedly often without drawing the judge's attention to those previous decisions against them and effectively venue shopping for a positive decision. He granted permission to appeal challenging them to put up or shut up on this point.

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