

PERSONAL INJURY BULLETIN

ISSUE 3

Welcome to the latest 'Personal Injury Law' bulletin from 3 Hare Court. Our personal injury practice group continues to flourish and Chambers is once again rated in leading guides for expertise in this field. A full list of the members of the group can be found on the back page of the bulletin, together with Chambers' contact details.

In this bulletin:

- Andrew Young has considered the recent developments in mesothelioma claims in 'Mesothelioma: who should pay?';
- Katherine Deal (editor of this bulletin) has looked at the continued confusion in claims arising out of the Animals Act 1971 in 'Never work with animals...'
- Dan Saxby has provided a useful overview of that staple of personal injury practice, the highways accident, in 'Avoiding pitfalls and potholes.'
- Tom Poole has dealt with the controversial topic of low velocity impact claims in 'Not such a big bang.'
- Dan Clarke offers up to date guidance on how to deal with withdrawal of pre-action admissions of liability in 'Taking it back'.
- Clara Johnson comments on the impact of *Horton v Sadler* in 'Walkley overruled: a second bite of the cherry?'

We have extensive experience in dealing with personal injury actions, providing advocacy and advice at all levels. Members of chambers are regularly involved in claims ranging from minor road accidents and the ubiquitous trippers and slippers to claims arising out of injuries of the utmost severity. We act for and against claimants, local authorities, insurers, occupiers, employers, NHS Trusts, flying schools and many more.

Members of the practice group regularly publish articles and provide talks and seminars on various areas of relevance to personal injury practitioners. As ever, please do not hesitate to contact Liz Heathfield (marketing director), James Donovan (our senior clerk) or any member of the clerking team if you would like further information on any aspect of the work undertaken by Chambers.

We hope that you find this bulletin both interesting and informative.

Katherine Deal

MESOTHELIOMA CLAIMS: WHO SHOULD PAY?

by Andrew Young



In the case of *Fairchild v. Glenhaven Funeral Services Ltd* [2003] 1 AC 32, the House of Lords created an important exception to the normal rule governing liability in negligence, the effect of which is that any employer who wrongfully exposes an employee to inhalation of asbestos dust, in breach of his duty to protect that employee from the risk of contracting mesothelioma, is held liable in negligence in any case where the employee has subsequently developed the disease, even though the onset of the disease cannot be attributed to any particular or cumulative period of exposure. This is on the basis that it is enough to found liability that each employer materially increased the risk of the occurrence of the disease. It was conceded that this was a 'modified approach to proof of causation', but the House held that where the limits of medical science made it impossible to prove which of more than one defendant had caused the actual illness, it was justified to hold that liability was established against each defendant on this basis.

It was widely assumed that, as a result of this decision, each employer who wrongfully exposed his employee to risk of injury in this way would be liable for the full amount of any damages claimed. Indeed, all counsel who appeared for the defendants in the Fairhaven appeal expressly conceded this point in their submissions to the House of Lords. More recently, in attempting to summarise the effect of the Fairhaven decision (albeit that certain propositions were said to be 'necessarily tentative'), the editors of the 2006 edition of *Clerk & Lindsell on Torts* stated as proposition 7 (at p.80), 'The claimant is entitled to full compensation from the negligent defendant; there is no question of apportioning the loss.' Similarly, Master Whitaker, who has been in charge of the special mesothelioma fast track procedure in the High Court since its introduction in 2002, stated in an article published in April 2005 in the *Journal of Personal Injury Law* that he did not allow defendants to mesothelioma claims to resist orders for summary judgment for the claimant on the basis that liability might have to be apportioned.

In fact, Lord Bingham had made it plain in his judgment in Fairhaven, that no argument on apportionment had been addressed to the House. When the issue was recently raised in the case of *Barker v. Corus (UK) Ltd* [2006] 2 WLR 1027, the House of Lords held that liability should be apportioned in mesothelioma cases according to each employer's relative degree of contribution to the risk, which should probably be measured by reference to the duration and intensity of the exposure involved. The decision in *Barker* was wholly logical, but (apart from embarrassing the editors of *Clerk & Lindsell*) it created the obvious difficulty for claimants that it was impossible to recover the full value of their claims, unless they identified and sued all employers who had exposed them to asbestos, and all those employers were either solvent or indemnified by insurers. Since it is in the nature of this insidious illness that it normally manifests itself only many years after a person has been exposed to asbestos dust, the effect of *Barker* was to take away from claimants most of the benefit so recently afforded to them by the decision in Fairhaven.

It was at this point that Parliament intervened to remedy this potential injustice by adding a new section 3 to the Compensation Act 2006, which reverses the effect of the *Barker* decision by making all employers in mesothelioma cases who have exposed a claimant to asbestos jointly and severally liable to the claimant for all damage caused by the disease, subject to a right to claim contribution from their fellow employers. S.16(3) of the Act, which became law on 26th July 2006, provides that section 3 should be treated as having always had effect, so it applies to all

cases of past exposure to asbestos. S.17(2) of the Act provides that the section extends not only to England and Wales, but also to Scotland and Northern Ireland. The overall effect of these statutory provisions is to make any UK employer who has exposed his employee to asbestos at any time in the past, with the result that the employee develops mesothelioma, liable in tort for the whole of the damage caused to the employee by the disease.

While an objective observer may feel some sympathy for counsel who enjoyed the brief triumph of winning their case in the House of Lords in *Barker*, he is likely to feel that the swift reversal of that decision by statute reflects more credit on English law.

NEVER WORK WITH ANIMALS ...

by Katherine Deal



Few statutes in the field of personal injury are less coherent and more an outright invitation to confusion than the Animals Act 1971. The recent case of *Clark v Bowl*t [2006] EWCA Civ 978 demonstrates the traps this Act offers to the unwary, and gives guidance as to the way in which practitioners might avoid falling into them.

Facts of the case

Mr Clark was driving along the A196 in Northumberland when he saw two horses being ridden in the same direction as he was travelling on the verge to his near side. Mrs Bowlt was riding Chance. Mr Clark slowed right down and moved towards the centre of the road. The horses showed no sign of panic but, as he passed them, Chance moved into the road. Mrs Bowlt was unable to control her and Chance hit the front nearside of Mr Clark's car.

At first instance

Mr Clark brought a claim in negligence and under the Act. Mr Bowlt counterclaimed in negligence. Since it was accepted that the horse is not a dangerous species, Mr Clark brought his claim under s.2(2) of the Act. This required him to prove:

- (a) The damage was of a kind which Chance, unless restrained, was likely to cause, or which, if caused by Chance, was likely to be severe.
- (b) The likelihood of the damage or of its being severe was due to characteristics of the animal which are not normally found in animals of the same species OR are not normally so found except at particular times or in particular circumstances.
- (c) These characteristics were known to Mrs Bowlt as the horse's keeper.

The judge concluded that neither had been negligent but that Mr Clark was entitled to succeed under the Act. As to (a), the judge found that, if Chance caused damage, it was likely to be severe because Chance weighed some 600lbs and was being ridden next to an A road with a 60mph speed limit. As to (b), he found that, in particular times or in particular circumstances, horses can (and Chance did) move otherwise than as directed by their rider. As such, this was a relevant characteristic which led Chance to move into the road and cause the accident. It does not appear that there was any dispute as to (c).

Neither party appealed against the decision on negligence but Mrs Bowlt appealed against the claim under the Act.

The appeal

The Court of Appeal found that the judge had not answered the first limb of s.2(2)(a) - was the damage caused by Chance damage she was likely to cause unless restrained? This was not satisfied solely by her weight (which the judge had used as justification for

finding the second limb of that section satisfied). If it was satisfied solely by the weight of the animal, the judge should have gone on to tie her weight in to s.2(2)(b), and to explain why he concluded that her weight was an abnormal characteristic or one found in horses only at particular times or in particular circumstances. Obviously neither criterion was satisfied on the facts of the case. The requirements were linked and a claimant had to rely on the same characteristic for the purposes of s.2(2)(a) and s.2(2)(b). To do otherwise would be effectively to extend the scope of s.2(2) to characteristics that were common to the non-dangerous species involved – the reverse of the situation intended by the Act.

The Lord Chief Justice, giving judgment allowing the appeal, reminded himself that the House of Lords in *Mirvahedy v Henley* [2002] UKHL 16 had decided by a majority of 3 to 2 that s.2(2)(b) provided for two different categories of damage which could lead to liability if the other requirements were satisfied. He doubted whether Chance's occasional propensity to move otherwise than as directed could properly be described as a 'characteristic'. Nor had the judge at first instance explained what he considered to be the particular times or particular circumstances when this characteristic might manifest itself. Instead, he seemed to have come close to accepting that this was a characteristic of horses in general, which would have taken the claim entirely outside s.2(2)(b). In any case, if this propensity to movement were a 'characteristic', the judge had not addressed the question of whether the damage Chance caused was damage which, unless restrained, she was likely to cause. Lord Phillips concluded that Chance was only likely to cause the damage she did if she was given a severe fright, which on this occasion she had not been. Chance was not likely to do what she did, and it was unlikely that she would cause the damage she did in fact cause. Accordingly, it was that rarest of beasts in these litigious times – a true accident. The appeal was allowed.

There is obviously still scope for a claimant injured in an accident caused by a non-dangerous animal to take advantage of the provisions of strict liability under s.2(2). However this will only be where there is some characteristic specific to that animal to which the claimant can point that satisfies the requirements of both s.2(2)(a) and s.2.2(b). Given the somewhat awkward wording of this section, it is surely only a matter of time before further guidance is needed. In the meantime, it is likely that the Animals Act will continue to cause practitioners and judges to bark up the wrong tree.

AVOIDING PITFALLS & POTHOLES

by *Dan Saxby*



The aim of this article is to offer an overview of the principles which apply to perhaps the best loved (or most notorious) species of personal injury claim: the highway tripper or slipper.

Identifying the correct defendant.

The first step is to identify the correct defendant(s). Ordinarily, this is a relatively straightforward process. By s.41 of the Highways Act 1980, the highway authority for a highway maintainable at the public expense is under a duty to maintain that highway, and is liable if breach of that duty causes an accident. Each local council should have available for inspection a list of the roads and pathways it maintains. Different considerations apply to private roads and pathways which are outside the scope of this article.

Statutory undertakers.

Not infrequently, difficulties arise as a result of works carried out

in the highway by statutory undertakers (e.g. electricity, telephone and gas suppliers). The exercise of such functions is governed by the New Works and Streets Act 1991. By s.53 of that Act, the highway authority is obliged to maintain a register, which must be made available for inspection upon request, of the location, nature and duration of the works as well as of the identity of the relevant contractor. The statutory undertaker is under an obligation to provide appropriate traffic signs governing, and to guard and to light, the street works (pursuant to section 65); to carry out the works with reasonable dispatch (section 66); and, to re-instate the highway as soon as is reasonably practicable thereafter (section 70).

Whilst a statutory undertaker's failure to comply with the provisions of the 1991 Act will not give rise to an action for breach of statutory duty, negligent execution or reinstatement of the street works will afford a prospective claimant a cause of action in negligence, if it can be shown that the same caused the accident. Accordingly, in appropriate cases, consideration should be given to joining the relevant statutory undertaker as an additional defendant. It is likely to be only in extremely rare cases that a Claimant should pursue the statutory undertaker alone. Even where street works have been carried out negligently, the highway authority cannot simply rely upon the undertaker's default as a defence to a claim for breach of the statutory duty it owes to users of the highway. By s.72 of the 1991 Act, the highway authority has powers to investigate and inspect any reinstatement and, in appropriate cases, may serve a notice requiring the defaulting contractor to carry out further works. In such circumstances, of course, the highway authority must be taken to be aware that there is a defect in the condition of the highway and would owe users of the same a duty of care accordingly.

Factual causation.

It is vital that the relevant alleged defect is identified, photographed and measured at an early stage. Whilst this may sound obvious, it is surprising how often the claimant fails to address such matters adequately (or in some case, at all). It will not be sufficient merely to establish the fact of the slip, trip or fall and to rely upon the generally poor condition of the highway. The relevant question is not whether the road or pavement as a whole was dangerous but rather whether the particular spot where the Claimant's accident occurred was in such a condition, *James v Preseli Pembrokeshire District Council* [1993] PIQR 1114.

Dangerousness.

To succeed in establishing primary liability, the claimant must demonstrate that the defect was dangerous in the sense that 'in the ordinary course of human affairs, danger might reasonably have been anticipated from its continued use by the public' and 'a reasonable member of the public would regard it as presenting a real source of danger', see *Mills v Barnsley Metropolitan Borough Council* [1992] PIQR 291 at pages 293 and 295. The importance of the second aspect of this test was emphasised by Eady J in *Galloway v London Borough of Richmond Upon Thames, CA*, 20/2/2003.

Although it is generally considered that defects of more than an inch on pavements are likely to attract a finding of dangerousness, the courts have consistently refused to apply a tariff or mechanistic approach. The Court of Appeal has, however, warned against imposing 'unreasonably high standards, otherwise scarce resources would be diverted from situations where maintenance and repair of the highways is more urgently needed'. Courts should attempt to 'strike a sensible balance of compromise between private and public interest', see *Mills* at page 295.

The statutory defence.

By s.58 of the Highways Act 1980, in an action resulting from a failure to maintain the highway, it is a defence for the highway authority to prove that it had taken such care as in all the circumstances was reasonably required to secure that the part of the highway to which the action relates was not dangerous to traffic. The onus of proving such matters is on the highway authority.

Subsection 2 provides a mandatory checklist of matters to which the court shall have regard when assessing whether or not the statutory defence has been made out. Insofar as it is possible, the defendant's evidence should specifically address such matters. Importantly, the subsection confirms that 'it is not relevant to prove that the highway authority had arranged for a competent person to carry out or supervise the highway ... *unless it is also proved that the authority had given him proper instructions with regard to the maintenance of the highway and that he had carried out those instructions* (my emphasis)'. It is startling how often the evidence in support of a statutory defence fails to address the issue of training and instruction. The subsection is quite clear as to what the consequence of such a failure should be.

As to the question of whether or not the highway authority can establish that the relevant inspector carried out his instructions, it is often worth considering the totality of the inspection records disclosed (and not just those relating to the immediate pre-accident inspection). If these records show a number of entries at various locations and on different dates, one might well argue that they reflect the work of a conscientious inspector. Conversely, if the records are simply made up of a number of blank pages or ticks (to reflect satisfactory condition) as is often the case, one might legitimately challenge the rigour and quality of the inspections performed.

A conscientious judge, properly directed, will apply the statutory checklist carefully and will be astute to ensure that the defendant highway authority has in fact evidenced each of the matters set out above. From a defendant's perspective, it is vital that cases are prepared with these considerations in mind. From a claimant's point of view, it is worth noting that these basic evidential steps are often missed and can undermine what otherwise appears a sound defence.

LOW VELOCITY IMPACT CLAIMS: NOT SUCH A BIG BANG

by Tom Poole



It is an increasingly common situation: a collision occurs between two vehicles, the claimant claims that he sustained a typical soft tissue whiplash injury, the defendant's insurers contend that the accident involved a low-velocity impact and the force transmitted from the defendant's vehicle to the claimant's vehicle was insufficient to cause personal injury to the claimant. What happens next? The Court of Appeal provided guidance in *Kearsley v. Klarfeld* [2006] 2 All ER 303 and revisited the issue recently in *Debbie Casey v. David Cartwright* [2006] EWCA Civ 1280.

The Kearsley effect

Kearsley was one of the first major cases to examine the phenomenon of low-velocity cases and the question of causation. The circumstances were very similar to those set out above. The defendant alleged that the claimant was fabricating his symptoms and wished to adduce expert evidence from a consultant surgeon and 'traumatologist', to show that the nature of the collision and of the injury was such that it was unlikely that the claimant had sustained that injury as a result of the collision. On the strength of that and other evidence, the defendant pleaded that the claimant was fabricating his symptoms and that he had in fact sustained no injuries. Initially, the case was allocated to the fast-track. But both parties wished to have it allocated to the multi-track and permission for the experts to give oral evidence. The district judge refused. She considered that the directions being sought were disproportionate: this was a relatively low-value claim and she had to think of the proportionality of the costs and expense. On appeal, the judge took a different view. He said that fairness

dictated in a fraud case that it be investigated properly. The experts should be called to give their evidence orally. He allocated the case to the multi-track with a trial estimate of 2 days. The claimant appealed. His appeal was dismissed.

The Court of Appeal was aware that these types of cases were becoming increasingly common and that concern had been expressed as to a lack of consistency in approach by the courts. It said that the judge had been right to overrule the district judge for the reasons that he gave. The Court of Appeal said that this was not a case which could be justly disposed of by 'paper exercises and questioning' as the district judge supposed (see paragraph 34). Brooke LJ made the following important observations as to how such cases should be handled, 'We hope that consideration may now be given by the designated civil judges on the Northern Circuit, in consultation with the appropriate presiding judge, to the possible value of grouping a number of these claims together before a High Court judge who has expertise in trying personal injuries litigation. At such a series of trials the judge might be able to hear a number of experts on each side of the argument and be able to give authoritative guidance on the appropriate approach to some of the generic issues that feature in these cases.'

Regrettably, no such series of trials has yet taken place and none are yet envisaged. An important reason for this suggested approach was the concern of the appellate courts with the use of experts in what is, by any standards, a developing field of expertise in which there is no consistency of conclusions.

Recent guidance

In *Casey v Cartwright* [2006] EWCA Civ 1280, another low-impact claim to reach the Court of Appeal, the Kearsley effect was examined. The effect of Kearsley on the case was to lead the judge at first instance to the conclusion that extra evidence on causation should not be permitted. His view was that defendants and their insurers would not be put to a significant disadvantage because they could always put appropriate questions to the claimant's medical expert.

The guidance in Kearsley needed amplification and the Court of Appeal provided it in the instant case as follows:

1. In run of the mill road traffic whiplash injury cases, there will be no need for expert medical evidence on the causation issue. The question of whether such evidence should be permitted only arises where the defendant contends that the nature of the impact was such that it was impossible or very unlikely that the claimant suffered any injury or any more than trivial injury as a result of the collision and that accordingly the claimant has fabricated the claim. It is only in such a case that the causation issue arises.
2. If a defendant wishes to raise the causation issue, he should satisfy certain formalities. In this way, the risk of confusion and delay to the proceedings would be minimised. He should notify all other parties in writing that he considers this to be a low impact case and that he intends to raise the causation issue within three months of receipt of the letter of claim. The issue should be expressly identified in the defence, supported in the usual way by a statement of truth.
3. Within 21 days of serving a defence raising the causation issue, the defendant should serve on the court and the other parties a witness statement which clearly identifies the grounds on which the issue is raised. Such a witness statement would be expected to deal with the defendant's evidence on the issue, including the circumstances of the impact and any resultant damage.
4. Upon receipt of the witness statement, the court will, if satisfied that the issue has been properly identified and raised, generally give permission for the claimant to be examined by a medical expert nominated by the defendant.
5. If, upon receipt of any medical evidence served by the defendant following such examination, the court is satisfied on the entirety of the evidence submitted by the defendant that he has properly identified a case on the causation issue which

- has a real prospect of success, then the court will generally give the defendant permission to rely on such evidence at trial.
6. There will be circumstances where the judge decides that, even though the evidence submitted by the defendant shows that his case on the causation issue has real prospects of success, the overriding objective nevertheless requires permission for expert evidence to be refused. Such circumstances might include: (a) the timing of notification by the defendant that he intends to raise the causation issue (if outside the usual 3 month period); (b) if there is a factual dispute the resolution of which one way or the other is likely to resolve the causation issue; (c) where the injury alleged and the damages claimed are so small and the nature of the expert evidence that the defendant wishes to adduce so extensive and complex that considerations of proportionality demand that permission to rely on the evidence should be refused.
 7. Until some test cases have been decided at high court level, judges should be slow to direct that expert evidence on the causation issue be given by a single joint expert.

The Court of Appeal upheld the decision to exclude the expert evidence.

Practice points

The causation issue must be raised by the defendant in writing within three months of receipt of the letter of claim. Failure to do so will almost certainly prejudice any subsequent attempt to adduce expert evidence on the issue.

Within 21 days of serving a defence raising the causation issue, a defendant should serve a witness statement identifying the grounds on which the issue is raised.

The county courts will remain reluctant to allowing expert evidence on causation until such time as the High Court has had a full opportunity of properly scrutinising test cases and reaching instructive conclusions.

Given the increasing number of low-impact claims, practitioners should consider carefully the guidance given in these cases.

TAKING IT BACK

by Dan Clarke



There have been several significant developments in this area this year. First, two recent Court of Appeal authorities (*Sowerby v Charlton* [2006] 1 WLR 568 and *Stoke-on-Trent City Council v Walley* [2006] EWCA Civ 1137) considered the important practical question of the status of pre-action admissions of liability in multi-track claims. Dissatisfaction with the narrow scope these decisions afforded such admissions then precipitated reform of the relevant provisions of the Civil Procedure Rules, CPR Part 14. Two different regimes now apply to the withdrawal of admissions in multi-track cases, depending on whether the admission was made before or after the new CPR rules come into force on 6 April 2007.

The pre-CPR position

Both pre- and post-action admissions of liability made before the CPR came into force could be the basis of an application to the court under RSC Order 27, rule 3, which provided that, where admissions of liability were made, a party could apply to the Court for judgment provided that proceedings had begun and the party that had made the admission was a party. A party needed the court's permission to withdraw any admission. The judge would

have to balance the prejudice to the defendant of being deprived of his right to withdraw against the (specifically established) prejudice to the claimant if the withdrawal were permitted.

Sowerby v Charlton, Stoke-on-Trent City Council v Walley

The position was significantly changed as a result of the two Court of Appeal decisions in Sowerby and Walley. The former was a multi track claim where the claimant had been rendered paraplegic as a result of an accident at the defendant's house. The defendant's solicitors admitted breach of duty in pre-action correspondence in an open letter but subsequently denied liability in the defence. The claimant successfully applied to strike out parts of the defence relying on the admission. The defendant appealed on the basis that CPR Part 14, which governs admissions, did not embrace pre-action admissions of liability.

The Court of Appeal upheld the strike out on the ground that, on the facts, there was no real prospect of the Defendant resisting a finding of primary liability. This rendered it unnecessary for the Court to express a definitive view on the arguments concerning the admission. Nevertheless, Brooke LJ, delivering the judgment of the Court, delivered an important obiter judgment on the point, reasoning that the judge had been wrong to hold that CPR Part 14 applied to pre-action admissions. The CPR is a new procedural code, principally concerned with the regulation of cases after actions are commenced. CPR 14.1 provides that 'a party may admit the truth of the whole or any part of another party's case'. But until a claim form or particulars of claim are prepared the 'case' would not have been formulated nor would it ordinarily be meaningful to describe somebody as a 'party' until legal proceedings had been commenced. Furthermore, it was clear that the personal injury pre-action protocol did not intend the presumption expressed in para 3.9 that pre-action admissions would be binding for all claims up to a value of £15,000 to apply to multi-track cases. The status of pre-action admissions, in multi-track cases at any event, was therefore purely evidential. Further, a party did not need the permission of the Court to resile from them and such admissions could not, without more, allow a judgment to be entered.

The decision in Sowerby was subsequently applied in Walley. This was another multi-track personal injury claim where the defendant local authority's loss adjusters informed the claimant in correspondence that liability would not be in issue. However, the employee of the loss adjusters who made the admission was later dismissed as incompetent and, when the claimant issued proceedings, the defendant entered a defence denying liability. The defendant's application to withdraw the admission was refused and the claimant's application to strike out the defence under CPR 3.4(2) as an abuse of process or otherwise likely to obstruct the just disposal of the case was upheld. The defendant appealed.

The Court of Appeal allowed the appeal on both points. First, it was common ground that the Court was bound by the decision in Sowerby. CPR Part 14 applied only to admissions made in the course of proceedings and a defendant who wished to withdraw a pre-action admission did not need the permission of the court to do so. Secondly, the court confirmed that the correct approach for a claimant seeking to challenge the withdrawal of a pre-action admission would be for the claimant to apply to strike out the defence pursuant to CPR 3.4(2). However, establishing abuse of process would usually require proof of bad faith on the defendant's part. That could not be said in this case. Further, obstruction of the just disposal of the case would require the claimant to demonstrate prejudice affecting the fairness of the trial. This was a high hurdle and one which had not been overcome.

Reform of CPR Pt14

The decisions in Sowerby and Walley were controversial because they gave defendants effectively a free hand to withdraw pre-action admissions in multi-track claims, even some considerable way down the line. Dissatisfaction with the narrow role given to

pre-action admissions was reflected in comments of two of the judges who sat in the cases. Brooke LJ (who sat in both cases) said in *Walley*, ‘the issues highlighted both in this judgment and in the earlier judgment in *Sowerby v Charlton* warrant the early attention of the Civil Justice Council... there would, in my judgment, be great force in giving the status of an admission of liability in response to a pre-action protocol letter before action in a multi-track claim more powerful effect than it presently enjoys’, sentiments echoed by Smith LJ in her judgment.

From 6 April 2007, CPR Part 14 will be amended to insert a new CPR 14.1A covering pre-action admissions. This is designed to create a more level playing field when it comes to resiling from earlier admissions. CPR 14.1A(3) provides that a party may, by giving notice, withdraw a pre-action admission before commencement of proceedings if the person to whom the admission was made agrees and after the commencement of proceedings if all the parties consent or with the permission of the Court. CPR 14.1A(5) expressly excludes application of the new provisions to admissions made before 6 April 2007.

Comment

The position with regard to the withdrawal of admissions is now complex. Pre-action admissions made in multi-track claims before 6 April 2007 will still be governed by the regime set out in *Sowerby* and *Walley*. Pre-action admissions made after that date will be governed by the new provisions in CPR 14.1A. Pre-action admissions in small and fast track cases remain governed by the presumption in paragraph 3.9 of the personal injury pre-action protocol that they are binding for all claims up to a value of £15,000.

Further, CPR 14.1A gives no guidance on the criteria that the Court should apply in deciding whether to grant permission under CPR 14.1A(3). In *Sowerby* (at paragraph 45) the Court considered that Sumner J in *Braybrook v Basildon & Thurrock University NHS Trust* (Unreported, 7/10/2004) had given valuable guidance on the exercise of the Court’s discretion to grant permission to withdraw post-action admissions, ‘In exercising its discretion the court will consider all the circumstances of the case and seek to give effect to the overriding objective... Amongst the matters to be considered will be: (a) the reasons and justification for the application which must be made in good faith; (b) the balance of prejudice to the parties; (c) whether any party has been the author of any prejudice they may suffer; (d) the prospects of success of any issue arising from the withdrawal of an admission; (e) the public interest, in avoiding where possible satellite litigation, disproportionate use of court resources and the impact of any strategic manoeuvring.’ It may be that the same principles will be held to apply here.

WALKLEY OVERRULED: A SECOND BITE AT THE CHERRY?

by Clara Johnson



In *Horton v Sadler and another* [2006] UKHL 27 the House of Lords overruled the much criticised former decision of that House, *Walkley v Precision Forgings Ltd* [1979] 1 WLR 606. *Walkley* was an early decision under s.2D of the Limitation Act 1975 (now s.33 of the Limitation Act 1980) which confers on the court a discretion to disapply the three-year limitation period in respect of claims for personal injury. In *Walkley* it was decided that, where a claimant has brought an action within the 3 year time period but, that action having been discontinued or otherwise struck out on, brings a second action in respect of the same accident but out of time, he is not entitled to rely on s.33 to pursue the second action.

The rationale underlying Walkley was that, having regard to the wording of s.33, which directs the court to consider whether the claimant has been prejudiced by the operation of the limitation provisions, such a claimant could not logically be said to have been prejudiced by the limitation period since he had managed to bring the first action in time.

However, the effect of Walkley has been to create a distinction between a claimant whose solicitor issued proceedings within the 3 year time period but failed to pursue the claim, and a claimant whose solicitor had failed to issue proceedings at all. This distinction could be easily justified since there is no rational ground for concluding that a defendant should be vulnerable in the latter case, where the prospect of successfully establishing that the claimant's solicitor was negligent was that much greater, but not in the former. Furthermore, in their eagerness to get round the often unpalatable effect of Walkley, claimants and judges were finding grounds for distinguishing Walkley which were often as indefensible as they were ingenious.

Further, although s.33 directs the court to consider the prejudice that will be suffered by the defendant if the limitation period is disapplied, there are many situations where no real prejudice is suffered by the defendant and the 3 year time limit acts simply as a windfall.

Horton was just such a case in which it was found that the defendant would suffer no prejudice by s.33 if discretion were exercised in the claimant's favour. The claimant was involved in a road traffic accident for which an uninsured defendant was responsible. The Motor Insurers' Bureau nominated insurers to act and made an interim payment to the claimant six months after the accident. Proceedings were issued but the claimant's solicitors failed to give the bureau notice as required under the Compensation of Victims of Uninsured Drivers Agreement 1988. The bureau denied liability on the basis of non-compliance with the notice condition and sought the return of the interim payment. The claimant issued a second action, which was out of time, and the bureau raised the defence of limitation.

In dismissing the claimant's application, the trial judge held he was bound by Walkley even though had he not been so limited, he would have exercised his discretion the other way. The delay after the 3 year period was short and caused only by the technical (albeit vital) requirements of the notice condition; the bureau had notice of the claim and had no evidential difficulties; and were simply losing the windfall of a limitation defence.

Both the trial judge and their Lordships considered the issue of the claimant's remedy against his solicitors for negligent conduct of the case and MIB's argument that, as between the claimant's solicitors' professional indemnity insurers and the MIB, the loss should fall on the former who had received a premium, and not on the MIB, who had not. The House of Lords did not accept the matter as to which insurer should bear the cost as being as cut and dried. Despite the public policy argument that not applying the Limitation Act strictly would be inimical to good order and discipline in the solicitor's profession, a claimant will plainly suffer some prejudice if forced to make a new claim, against a new tortfeasor, in respect of which he would have to instruct new solicitors.

In a straightforward case where the delay was short and understandable and caused the defendant no discernible prejudice, their Lordships thought it right that the motor insurer remained the primary source of compensation and not the claimant's professional indemnity insurer.

Although those defendant motor insurers will undoubtedly mourn the loss of Walkley and claimant solicitors breathe a sigh of relief, the effect of the decision is not to give claimant solicitors' liberty to issue proceedings out of time. The court has the power to exercise its discretion either way under s.33. Horton shows it will usually only be willing to exercise its discretion in the claimant's favour of the claimant where delay has been short and has not caused the defendant to suffer any discernible prejudice with the preparation of its defence.

Personal Injury Group at 3 Hare Court

The following members of 3 Hare Court undertake personal injury work. For CV details of individual members, please contact our Marketing Director, Liz Heathfield. To instruct a member of Chambers or to discuss fees, please contact our Senior Clerk, James Donovan, or a member of the clerking team.

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