16.9.11

APIL Forum

PI Practice developments – latest on procedure

(1) COSTS: appropriate award where award is much less than C claimed.

1. ***Fox v Foundation Piling Ltd*** *[2011] EWCA Civ 790*
    - FACTS:
        - C claimed against his employer in respect of an accident at work.
        - A split trial was ordered and liability agreed the day before the liability hearing.
        - C then served a schedule claiming £280k.
        - In Sep '08 D offered £23,500k net of CRU.
        - In Oct 2008 C rejected that offer and offered £150k gross.
        - In Nov 2008 D obtained surveillance evidence (showing C only starting to limp and use a stick as he approaches D's expert's clinic!). The video was not disclosed until Mar 09
        - In Sep 09 the experts concluded in their joint report that the accident caused an acceleration of 1 year (Ds expert) or 2 years (Cs expert).
        - Oct 09: Cs updated sch claims £59k
        - Nov 09: D offers £31k net. C accepts. D argues that C should pay its costs from date of Sep 08, as the *gross* Sep offer was more than the *gross* sum eventually agreed.
    - 1ST INSTANCE FINDING: (a) D was therefore successful party so C should pay its costs from the relevant date and (b) even if he was wrong about D being successful party, Cs conduct warranted a departure from the general rule.
    - C/A (Jackson LJ):
        - By the date of appeal D agreed that C was the successful party (**CPR 36.15(8):** the **net** figure must be used when deciding if C has failed to better an offer).

- The remaining issue was whether Cs conduct was such that he should be ordered to pay Ds costs from the relevant date (pursuant to CPR **44.3(4)).**
- The large number of authorities on this point (such as *Carver)* are unwelcome: they thwart the aim of Part 36 being a clear and simple framework. **The effect of *Carver* will be reversed by a new rule 36.14(1A) from 1.10.11.**
- He carried out a useful review of a line of cases on the point, including:
    - *Painting:* C recovered more than the payment in, but because she had greatly exaggerated her claim , CA ordered her to pay Ds costs from date of payment in;
    - *Morgan v UPS:* C recovered more than Ds offer. He had exaggerated his claim, but in contrast to *Painting* he reduced the claim after video evidence was served. D was ordered to pay his costs.
    - *Widlake v BAA*: C recovered more than Ds offer, but much lower than claimed. CA ordered each side to bear own costs.

- He concluded from that line of authorities that where a party achieves a more advantageous result than his offer, 36.14 modifies the court's discretion in respect of costs; where parties make a *Calderbank* offer, the court's discretion is wider. It is common that both parties are over-optimistic: ie C recovers more than D offered, but less than he offered. In such cases, C is the successful party and the starting point is that he should recover his costs from the other side (**44.3(2)(a))**. **(at para 62): There has been a growing and unwelcome tendency by courts to depart from the starting point of r44.3(2)(a).** This incurs additional costs and creates uncertainty. **If a claimant makes an inflated claim, the defendant's remedy is to make a modest Part 36 offer: if it does not, it cannot expect to secure costs protection.** Different considerations may apply where C is found to have been dishonest. (In this case, D was ordered to pay all Cs costs).

2. ***Medway PCT v Marcus*** *[2011] EWCA Civ 750*

- FACTS: claim for delayed diagnosis, leading to amputation of leg. Quantum agreed (STL) at £525k. D2 (the GP) admitted breach of duty in the defence; D1 (the PCT) admitted breach only 2 days before the liability trial). At trial on causation, the judge accepted Ds' experts' evidence: the leg would have been lost anyway. Therefore the main claim failed. Cs Counsel submitted some award was appropriate in respect of the admitted breaches of duty as they led to a short period of additional pain. The court awarded £2k and ordered D to pay C 50% of his costs. D appealed.

- The CA was split: they differed on the starting question of who was the successful party?

- The President of the QBD (Sir Anthony May) and Tomlinson LJ found that Cs 'fall-back' case for extra pain, although technically encompassed within the general pleadings was only addressed by Counsel in closing, as an after-thought, and the real claim had clearly been for the loss of the leg, quantum of which was agreed at £525k. The award of £2k 'was in truth irrelevant to the purpose of the action' and was 'insignificant in the context of the claim' and represent only 0.25% of the agreed value of the whole claim. They considered D to be the successful party: the starting point should therefore have been a costs order in their favour, followed by consideration of whether there should be any reduction (and some reduction would have been appropriate for *inter alia* not conceding breach until a late stage; the fact that C succeeded to a v small extent).The Judge was wrong to attach weight to the fact that D had not made a Part 36 offer: if it had offered £2k and C had accepted, D would then have been liable for potentially the full £100k costs bill. (Jackson disagrees on this point: saying that the costs would have been subject to assessment, and only reasonable costs allowed). **Appeal allowed and D awarded 75% of their costs.**

- Jackson LJ's dissenting view was that C's claim had always encompassed a claim for the extra pain and suffering (worth £2k) and he had therefore succeeded. D had made no offers and C was therefore forced to litigate to obtain even that level of award. If a def does not avail himself of the Part 36 machinery and make an offer, he should not expect to escape the ordinary costs consequences because the cl recovers only a small sum in damages. Part 36 affords protection for defs who have a weak case on liability but strong case on quantum. The judge had not apparently erred in the exercise of his discretion in awarding C 50% of his costs, and the appeal should therefore be dismissed

(2) COSTS: withdrawal / time-limited offers

3. ***C v D*** *[2011] EWCA Civ 646*

- Claim re land purchase. C made offer expressed as: "Part 36 offer..will be open for 21 days from the date of this letter"

- CA (Rix LJ):

    - 1st issue was (para 32(1)):*Can a Part 36 offer be made in terms which limit the acceptance of the offer to a stipulated period, such that the offer lapses at the end of that period? (a 'time limited offer').* **Answer: NO.** An essential feature of a Part 36 offer is that it remains on the table until it is formally withdrawn by notice (para 17) (*Gibbon*); (para 40): for a Part 36 offer to have costs consequences, it has to have remained on the table and not been withdrawn. (NB, on this point, although the High Court in *Pankhurst* apparently concluded otherwise – it found that although Cs offer could not be accepted after it expired (the old Part 36 rules applied) it retained its 'costs potency' – this point was not the subject of the appeal to the CA and in *Fox*, Jackson LJ held (para 42 of that judgment) that *Pankhurst* is not authority for the proposition that a party which withdraws its Pt36 offer can reap the benefits of rule 36.14). Unless an offer has been withdrawn by notice (after the relevant period) or

with the permission of the court (during the relevant period), it is open for acceptance and **there is no room for an offer which lapses a matter of its own terms.** The Part 36 scheme encourages offers that are not time-limited: it permits some flexibility in permitting offers to be amended or withdrawn, but that process is strictly regulated in the interests of clarity and certainty. **(para 41): only outside Part 36 does a claimant have full autonomy over the means by which his offer lapses.** (para 68): it should be clearly understood that if a claimant wishes to make a time-limited offer, (ie one that lapses of its own accord at the end of a stipulated period) then it cannot be made as a Part 36 offer.

- *2nd issue: what does 'open for 21 days mean'?* There is an inconsistency between a time-limited offer and a Part 36 offer, but these words are not necessarily a time-limited offer: it is saying that there will be no attempt to withdraw the offer for 21 days but that after that time a withdrawal is on the cards (para 54).

(3) COSTS: pre-issue costs

4. ***Thompson v Bruce*** *[2011] EWHC 2228 (QB)*

- ***FACTS:*** A claim by two minors for damages in respect of their mother's death (she died from breast cancer and it was claimed that but for Ds negligence she would have had a considerably longer period of survival). D made a pre-issue Pt 36 offer, which Cs then accepted. Cs therefore issued only a Part 8 claim for the court's approval of the settlement. As Cs accepted after the relevant period, D argued that Cs should pay Ds costs from the relevant date.
- ***HC:***
  - the 1st issue was whether Part 36.10 could apply where both offer and acceptance occurred before issue. C said it could not: 36.10 referred to the 'cost of the proceedings'. It was common ground that it was a valid

Pt 36 offer, and that when costs are assessed, pre-issue costs are allowed. The Judge held (para 37) that on a purposive construction 'proceedings' in 36.10 should be given a wider meaning, to include steps taken prior to issue that would normally be allowed on assessment, and 36.10 is not confined to post-issue proceedings.

- The 2nd issue was whether discretion should be exercised in Cs favour. (ie whether Cs should be award their costs even though they accepted the offer after the relevant period). Costs incurred between expiry of relevant date and approval hearing included Advice/Conference with Counsel and discussion with experts. The Judge found held that they could: (para 56):the court's approval of any settlement was required and it would have been difficult, if not impossible, for the Cs to decide whether to accept before valuing the claim and considering matters of causation with experts. Further (para 66), D had taken 14 months to respond to the letter of claim: the longer the delay the more stale the claim became and the more it had to be revisited when the response arrived. Therefore he exercised his discretion and awarded Cs all their costs to date of approval hearing.

- ***NB.*** The Judge noted that Cs could have protected themselves by asking for an extension of time for responding to Ds offer.

(4) 'split' quantum trial

5. ***Rae-Cook v Walker*** *[2011] EWHC 1638*
    - FACTS: C's mother was injured in an RTA, whilst pregnant with C. Liability was admitted. As a result C was born early, and suffered *inter alia* internal haemorrhaging. A shunt was fitted, which functioned reasonably until it became blocked when C was about 3 years old. She suffered raised intra-cranial pressure, causing temporal lobe damage and blindness. Medical evidence was obtained but the experts' evidence was to the effect that no accurate prognosis could be given until Cs 16th birthday. C therefore applied

for the trial on quantum to be limited to assessment of losses to her 16th birthday only.

- LAW: the parties were agreed that the court has jurisdiction under 3.1(2) to order a split trial/ stay any part of proceedings generally or to a specific date/ take any other CMC step. The parties were also agreed that there are 4 general principles to be derived from relevant authorities:
  (1) the normal, desirable, rule is that all issues should be resolved at a single hearing where possible;
  (2) the principle of finality is crucial;
  (3) a judge should not be tempted to invent rules to make up for perceived deficiencies in statutory provisions;
  (4) the court's power to postpone some issues for later resolution should be regarded as a rare or exceptional course to take and a tangible reason will be required to justify it.

- HELD: in this complicated case, the long term outcomes for C were speculative and uncertain. The trial judge, faced with competing experts' opinions, may be tempted to award damages half-way between the two parties' positions, resulting in an award that will be either too low or too high. He therefore made the order sought by C and postponed the quantification of the long term loss.
- NB, cp an award of provisional damages

(5) EXPERTS

6. ***Edwards-Tubb v Wetherspoon Plc*** *[2011] EWCA Civ 136*

- FACTS: C injured at work. D admitted liability. C told D in pre-issue correspondence the identity of the expert he had instructed. When proceedings were served, a report from a different expert was relied upon. D applied for disclosure of the first expert's report.
- CA: the party who obtained a report will retain privilege in that report. However, the Court can exercise its power under 35.4 and impose,

as a condition of permission to obtain a new report, disclosure of an earlier report (as it could if a party wanted a new expert post issue). (This power should usually be exercised where the change in expert occurs after the parties had engaged in the PAP – where a party obtains a report at his own expense for pre-protocol advice, the justification for exercising the power did not exist in the absence of unusual factors.)