2012: PERSONAL INJURY CASE LAW UPDATE

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OFFERS, COMPROMISE & PART 36

PROCTER & GAMBLE v (1) SVENSKA (2) SCA HYGIENE PRODUCTS LTD

[2012] EWHC 2839 (Ch)

Ch D (Hildyard J) 23/10/2012

Facts

After delivering judgment in proceedings brought by the claimant (P) against the defendants (S), the court had to determine costs.

Held

Pt 36 was not confined to money claims, and the offer had been expressed to be Pt 36-compliant.

S's objection was that it did not comply with r.36.2(2)(c) in that it failed to specify a period of not less than 21 days in which S would be liable for P's costs if the offer was accepted.

Pt 36 did not mandate that a claimant had to make the payment of costs a condition of his offer. Rather, it was to be read as requiring a claimant who sought his costs to specify a period of not less than 21 days within which the defendant was liable to pay them.

MOHAMMED BOSTAN v ROYAL MAIL GROUP LTD

CC (Bradford) (District Judge Webster) 08/06/2012

Facts

Road traffic accident pursued via the pre-action protocol for low value personal injury claims.

Liability was admitted and the Claimant made a settlement offer.

Defendant failed to either accept the offer or submit a counteroffer within the time prescribed by the protocol.

The Defendant then tried to accept the offer and applied for a declaration that it had validly accepted a settlement offer made by the claimant.

Held

The protocol was very prescriptive about the circumstances and timing of an offer and also about the timing of any acceptance.

It was designed to tightly control the behaviour of the parties within it.

The ordinary rules of contract formation were not circumscribed in that manner. The protocol was largely a self-contained scheme, not reliant on the CPR, Patel v Fortis Insurance Ltd applied, Gibbon v Manchester City Council [2010] EWCA Civ 726, [2010] 1 W.L.R. 2081 considered.

An offer made pursuant to the protocol had special status and was different from an offer made outside of it. The protocol presented a prescribed opportunity to the parties to settle the claim.

That status affected the ordinary rules of offer and acceptance in that if a defendant did not take the positive steps required to keep its opportunity to settle alive, then it was lost.

The offer then expired when the claim automatically exited the protocol.

Application refused

JOANNE DUNHILL v SHAUN BURGIN

[2012] EWHC 3163 (QB)

QBD (Manchester) (Bean J) 09/11/2012

Facts

Claimant suffered a fractured skull in a road traffic accident.

She started court proceedings against the defendant in her own name, without a litigation friend.

A settlement was been reached at the door of the court immediately before the start of a trial on liability.

The judge had been asked to enter judgment for the agreed sum by consent.

Both parties had been represented by counsel and solicitors and the Claimant had been accompanied by a mental health advocate.

Six years later the Claimant applied for a declaration that she had not had capacity at that time because she had been a patient within the meaning of the mental health legislation in force at the time.

Appeals

The declaration was refused (Dunhill v Burgin [2011] EWHC 464 (QB)) but that decision was reversed by the Court of Appeal (Dunhill v Burgin [2012] EWCA Civ 397, [2012] C.P. Rep. 29) and the claim was referred back to the instant court for case management.

For determination as a preliminary issue was the question whether CPR r.21.10 had any application where a claimant had issued proceedings in their own name, without a litigation friend, and negotiated a compromise of the action in circumstances where she appeared to be asserting that she was not under a disability.

Held

When a claim was issued in the civil courts, the CPR were impliedly incorporated into any settlement agreement, especially where the settlement was embodied in a court judgment.

The CPR therefore took precedence over the general law of contract, Grosvenor Hotel, London (No.2), Re [1965] Ch. 1210 and Vinos v Marks & Spencer Plc [2001] 3 All E.R. 784 considered.

It was clear, as a matter of statutory interpretation, that CPR Pt 21 invalidated a consent judgment involving a protected party reached without the appointment of a litigation friend and the approval of the court, even where the individual's lack of capacity was unknown to anyone acting for either party at the time of the compromise.

Considering the issue in terms of policy considerations would favour the same result; although there was a public interest in the finality of litigation, there was also a public interest in the protection of vulnerable people who lacked the mental state to conduct litigation.

MARCEL BEASLEY v PAUL ALEXANDER

[2012] EWHC 2715 (QB)

QBD (Sir Raymond Jack) 09/10/2012

Facts

Claimant established negligence at RTA liability only trial.

The claimant sought an order for costs against the defendant.

The issue was about the meaning of the words "until the case has been decided" in the CPR r.36.13(2), which provided that the fact that a Part 36 offer had been made had not to be communicated to the trial judge until the case had been decided.

Held

The words "until the case has been decided" had a clear meaning.

It was clear that "the case" was used in the sense of "the action" or "the proceedings".

The reference to "the case" could not be construed as referring to part of a case.

If r.36.13(2) had been intended to refer to liability being decided as well as the case being decided, different wording would have been used.

By reason of the rule, the court could not be told the position as to Part 36 offers, and because of that it could not deal with costs.

MARGARET JOLLY v HARSCO INFRASTRUCTURE LTD

[2012] EWHC 3086 (QB)

QBD (Cranston J) 05/11/2012

Facts

The Claimant's husband had died of mesothelioma.

In April 2012 the Claimant made a Part 36 offer to settle the issue of liability 99 per cent in her favour.

The Defendant did not accept the offer within the 21 days of service specified in CPR r.36.2(2)(c) and r.36.3(1)(c)(i).

The Defendant instead made a without prejudice offer to apportion liability on an 80/20 basis in the Claimant's favour.

The Claimant rejected that offer.

A week later, the Defendant accepted J's 99 per cent offer.

The Claimant sent a draft order confirming the terms of H's acceptance and stating that, pursuant to r.36.14(3)(b), H would pay J's costs on the issue of liability.

The Defendant disputed the application of r.36.14 on the basis that judgment had not been entered.

The Defendant contended that judgment should be entered for damages to be assessed on the basis that the Defendant pay 99 per cent of the value of the claim.

Held

If Part 36 was a self-contained code containing a highly structured and prescriptive set of rules, the Claimant was bound by the terms of that provision if she wished to take advantage of it, Gibbon v Manchester City Council [2010] EWCA Civ 726, [2010] 1 W.L.R. 2081 followed.

As the Defendant had accepted J's part 36 offer outside the 21-day period specified in r.36.2(2)(c), but before its withdrawal, the applicable regime was r.36.10 and r. 36.11.

Accordingly, the issue of liability was stayed upon the terms of J's offer and the question of costs relating to that issue was postponed to be dealt with under r.36.10(4) and r.36.10(5) or under the general discretion under r.44.3 (see paras 12-14 of judgment).

COSTS

MAUREEN ANN GILES v VEOLIA TRANSPORT LTD

CC (Nottingham) 31/05/2012

Facts

The Claimant had been injured whilst travelling as a passenger on a bus operated by the Defendant.

She entered into a CFA with her solicitors and took out an ATE policy.

Liability was admitted pre-issue.

The Defendant's insurers indicated that since its passengers had the benefit of legal expenses insurance, it would not consider any CFA or ATE premium.

The claim was settled and the costs were paid, except for the ATE premium.

The Claimant issued a Part 8 claim to resolve the question of liability for that premium.

First Instance

The judge held that it was well-known that public transport companies had policies affording before the event (BTE) insurance to passengers injured by the negligence of their drivers.

Since the Claimant had failed to make reasonable enquiries as to whether the Defendant offered BTE insurance, the ATE premium was unreasonably incurred and not recoverable.

Appeal

A solicitor would or ought to have known that the motor insurance policy of the driver of a vehicle in which the Claimant was a passenger might maintain a BTE insurance policy available for the Claimant to use, even in a claim against the driver.

The Defendant's insurer's BTE policy was available for G to use, but she could reasonably have refused to avail herself of it and instead have decided to take out ATE insurance.

The Defendant's insurer's BTE policy was not the sort of independent arrangement that the court contemplated would be necessary in order for it to be reasonable to compel a passenger to use it when bringing a claim against V's own driver; it had the appearance of an arrangement with L that was not independent.

If a claimant could reasonably have rejected any BTE cover available, then the alternative ATE premium would not be unreasonably incurred, Sarwar v Alam [2001] EWCA Civ 1401, [2002] 1 W.L.R. 125 followed.

Enquiring into the existence of BTE insurance was not of itself a prerequisite to reasonably incurring an ATE premium. Accordingly, G's ATE premium was not unreasonably incurred (see paras 11, 16, 23-24 of judgment).

Appeal allowed

JENNIFER SCOTT v IAN DUNCAN

[2012] EWHC 1792 (QB)

QBD (Spencer J) 29/06/2012

Facts

Claimant sustained serious head injuries after falling over a low wall outside a property she rented from the Defendant.

The Claimant's solicitors informed the Defendant they were acting on a CFA.

Sometime later, the Claimant's solicitors incorporated their practice and a new CFA was entered into.

The Defendant disputed that they had ever been served with notice of the second CFA.

The Claim was eventually settled by consent.

D served points of dispute in response to the Claimant's bill of costs, asserting that the Claimant's solicitor were precluded from recovering any success fee for costs as the Defendant had only been served with notice of the first CFA.

First Instance

The master granted S relief from sanctions.

Appeal

The master was correct to identify as the overwhelmingly crucial matter in exercising his discretion the fact that D had known all along that he was in litigation with a claimant who was funded by a CFA.

The fact that a consent order had been negotiated at a mediation hearing without any special order was clearly a matter of great significance.

The master had been entitled to reach the conclusion that it would be wrong to impose a guillotine on costs or to impose a percentage reduction in costs by reason of conduct, on the special facts of the case.

Appeal dismissed

RYDER PLC v DOMINIC JAMES BEEVER

[2012] EWCA Civ 1737

CA (Civ Div) (Etherton LJ, Dame Janet Smith) 21/12/2012

Facts

Liability admitted road traffic accident. Judgment was entered with damages to be assessed.

Despite correspondence between the parties, the Claimant failed to serve a costs schedule.

The Defendant's solicitors wrote to the court complaining that B had not served a costs schedule, but did not copy that letter to B's solicitors.

The court ordered, without giving notice to B, that unless B filed and served a costs schedule by a specific date, his claim would be struck out.

The solicitor in charge of B's file was on holiday from the day after the unless order was made until its expiry.

B's claim was struck out.

First Instance

Claimant's application for relief from sanction, accompanied by a costs schedule, was refused by the district judge.

First Appeal

Claimant successfully appealed against that decision to a second judge, who concluded that the district judge had erred in his assessment of the factors under CPR r.3.9.

Second Appeal

Although some of the second judge's observations could be criticised, they did not undermine his conclusion.

He was entitled to hold that the district judge had erred and therefore that he had to exercise his discretion afresh.

He was right to say that the district judge had not properly balanced the various relevant factors (CPR 3.9)

In particular, no reference was made to the fact that B served the costs schedule with his application for relief. Thus, although R had been prejudiced to some extent by the overall delay in receiving B's costs estimate, the delay after the expiry of the unless order was only eight days.

Whilst the court had the power to make an order striking out an action of its own motion, it was far preferable for an application to be issued, particularly where there was a possibility of a "strike out unless" order, in which case notice of the application would be served on the opposing party.

If a court regarded it as desirable to make an unless order without an application, it should be slow to make such an order without giving the party affected the opportunity to be heard (para.62). (4) Although the second judge had not made it clear that he had taken account of all the relevant circumstances, he had reached the right conclusion.

GEORGE HENLEY BROMLEY v HEWSON

CC (Medway) (District Judge Gill) 06/09/2012

Facts

The court was required to determine costs arising from an agreed claim by a child claimant for damages for personal injury caused by suffered in a road traffic accident.

The claim was dealt with under the Pre-action Protocol for Low-Value Personal Injury Claims in Road Traffic Accidents.

A provisional agreement, subject to court approval, was reached at stage two of the protocol, which was pre-trial.

Quantum was agreed at £850 and the settlement was approved by the court.

However, a dispute arose in relation to B's costs.

B submitted that the question of costs fell to be determined under that regime. H submitted, in reliance on Dockerill v Tullett [2012] EWCA Civ 184, [2012] 1 W.L.R. 2092, that costs ought to be determined under the general provisions for determining costs under CPR r.44.5 as the Part 45 fixed costs regime was reserved for claims where agreed damages exceeded £1000.

Held

Paragraph 2.1 of the protocol made it abundantly clear that there was an expectation of the protocol being used as the best practice in cases to which it applied as defined in para.4.1.

That provision contemplated a class of case where it was evident from the outset that the value was obviously less than £1000 and that such a claim was unsuitable for the protocol; on the evidence, it could not be said that at the stage at which the claim was submitted its value was plainly less than £1000.

B could have suffered psychological consequences as a result of the accident; anyone practising in that area was aware that, particularly in the case of children, psychological consequences following accident trauma were common and attracted damages.

The information provided to H had not prompted him to exercise his right to remove it from the protocol on the basis that the claim was worth less than £1000

Accordingly, the claim had been properly submitted and remained in the relevant protocol procedure until removed on either acknowledgement of service or on receipt of the medical report. H had not availed himself of those opportunities.

JEAN EMILY CRAHART v CAERPHILLY COUNTY BOROUGH COUNCIL

CC (Cardiff) (Beatson J) 26/03/2012

Facts

Claimant claimed that she had suffered injuries to her head, cervical spine and wrist when a piece of lighting panel fell on her head at work.

The local authority accepted liability for the accident, but put Claimant to proof of the nature and extent of her injuries.

The recorder noted several inaccuracies in C's account of the accident and resulting injuries, but found that she had not deliberately lied and awarded damages.

He ordered the local authority to pay 85 per cent of her costs, a 15 per cent deduction to reflect her unsustainable claim for gratuitous nursing care that she had abandoned at the last minute.

The local authority submitted that C should not have been awarded her costs, particularly in light of the serious inaccuracies in her evidence, or alternatively that the adjustment was manifestly too low because it should have reflected C's poor conduct in providing inaccurate evidence as well as the abandonment of the gratuitous care claim.

Held

The local authority had not made a Pt 36 offer and Claimant had ultimately succeeded in part.

Accordingly, the starting point was that the Claimant , who had recovered more than the local authority had previously offered to pay, although less than what she was claiming, was, by analogy, to be regarded as the successful party and entitled to her costs, Fox v Foundation Piling Ltd [2011] EWCA Civ 790, [2011] C.P. Rep. 41 followed.

However, the recorder had erred in ignoring C's conduct in giving inaccurate evidence when making the adjustment: even if she had not deliberately lied, certain elements of her account were seriously misleading. In those circumstances, it was appropriate to substitute the adjustment of 15 per cent for one of 30 per cent

TIMOTHY BIRD v MEGGITT AEROSPACE LTD

CC (Nottingham) (Deputy District Judge Hales) 22/06/2012

Facts

Claimant, who employed to carry out manual handling operations, brought a claim against the Defendant, alleging that the ongoing and repetitive nature of his work had resulted in muscle strain and "tennis elbow".

The expert evidence concluded that B's injuries were pre-existing conditions that had been temporarily worsened by his work processes.

The parties later negotiated a settlement and the Defendant agreed to pay the Claimant's reasonable costs.

B's claim had been funded by means of a conditional fee agreement.

B submitted that a fixed success fee of 100 per cent applied on the basis that his claim was a disease claim within the ambit of the CPR r.45.23.

M submitted that the claim was in respect of a temporary exacerbation of symptoms arising from a pre-existing condition, and therefore it fell outside the scope of r.45.23.

Held

The purpose of r.45.23 was not to assist parties whose position had been made worse but to create a clear and certain regime for fixed recoverable success fees so as to avoid satellite litigation over the level of success fees, Law v Balfour Beatty not applied.

The aggravation or worsening of symptoms could not be regarded as a disease.

The disorder and symptoms were pre-existing, and the symptoms were only temporarily worsened.

EXPERT EVIDENCE

SWEET v EUROPEAN UNION INSURANCE CO SA

QBD (MacDuff J) 15/11/2012

Facts

The respondent had been the victim of a road traffic accident whilst on holiday in Greece 5 years ago.

Driver claimed that the Defendant had lurched into the road whilst holding a beer bottle and that he was unable to avoid the collision, but he was above the Greek legal alcohol limit and diazepam was found in his blood.

Permission was given to obtain toxicological and accident reconstruction reports.

The experts were to provide joint reports.

The insurer's accident reconstruction expert was resident in Greece, did not speak English, and wanted to see the toxological reports before preparing his joint report, and the insurer's toxological expert claimed that he was busy with other trials and would not be able to produce a joint report in time for the upcoming trial commencing in three weeks' time.

The applicant insurance company applied to adjourn a trial date.

HELD

Application dismissed

It was possible to produce the joint reports by the required time.

Experts were paid substantial fees for that purpose.

Adjourning the trial at the present stage, when the majority of the necessary material was in place, ran the risk of incurring unnecessary costs.

Once a trial date had been fixed, in the absence of good reasons such as prejudice to one party, the overriding objective required the date to be held.

PETER ANNISON v PAUL NOLAN

[2012] EWCA Civ 54

CA (Civ Div) (Mummery LJ, Richards LJ, Rimer LJ) 31/01/2012

Facts

N had admitted liability for serious injuries caused to X as a result of a road traffic accident.

At the hearing to determine damages, X's schedule of special damages contained two heads of future loss: do-it-yourself and gardening costs calculated at £24,675.76, and utility, maintenance and repair costs calculated at £55,978.04.

A joint expert was instructed as an architect to report on the adaptations to X's house.

However, he reported on areas of dispute other than the adaptations and covered the costings of a whole range of items, including maintenance and repair costs, which were outside the scope of his appointment.

First Instance

The judge awarded £750 for future utility costs but made no mention of maintenance and repairs. An award of £5,276 was made in respect of DIY and gardening costs.

Appeal

There had clearly been a serious procedural irregularity in the proceedings at trial which rendered the decision in respect of the home maintenance and repair costs unjust.

The expert gave evidence on matters outside the scope of his appointment.

The judge made no ruling on the admissibility or relevance of his report and did not refer to it in her judgment.

The evidential position was so unsatisfactory and unclear that the instant court had no option other than to remit the claim for maintenance and repairs for determination at a re-trial.

Appeal allowed

LIMITATION

JOSEPH JOHNSON v (1) MINISTRY OF DEFENCE (2) HOBOURN EATON LTD

[2012] EWCA Civ 1505

CA (Civ Div) (Hallett LJ, Etherton LJ, Dame Janet Smith) 21/11/2012

Facts

For periods of time between 1965 and 1979 the Claimant had been employed by the first and second respondents in jobs where he was exposed to very loud noise. The Claimant indicated that he had become aware of his hearing problem in about 2001, but it did not occur to him that it might have been caused by noise, or that he might have a claim against his previous employers.

He did not consult his doctor about his hearing until 2006, when he asked whether there was any wax in his ears during a consultation about another matter. The doctor pronounced his ears to be clear and advised that any hearing difficulty was probably due to his age, which was then 66. The Claimant maintained that it was not until 2009, when he consulted an expert, that he knew that he had a significant injury or that it was attributable to noise exposure. He commenced his claim in June 2010.

The judge found that the Claimant had failed to establish that his date of knowledge was after June 2007 because he had been aware that he had worked in noisy environments which could cause hearing difficulties and had actual knowledge of the onset and development of symptoms in 2001.

Appeal

The judge had erred in concluding that by 2001, without the benefit of expert advice, the Claimant had actual knowledge that his significant deafness might be attributable to noise exposure at work. Knowledge that his deafness was significant coupled with knowledge that he had in the past been exposed to loud noise which he knew was capable of causing deafness did not, of itself, amount to actually knowledge. The judge should have considered whether the Claimant had constructive knowledge (Limitation Act 1980 s.14(3))

Lord Hoffmann's judgment in Adams v Bracknell Forest BC [2004] UKHL 29, [2005] 1 A.C. 76 appeared to say that anyone who had suffered a significant injury had to be assumed to be sufficiently curious that he would seek expert advice. However, it was not certain that that assumption had to apply in every case. Lord Hoffmann must have meant that there would be an assumption that a person who had suffered a significant injury would be sufficiently curious to seek advice unless there were reasons why a reasonable person in his position would not have done. Such a reason might be that the condition was something that the claimant had become so used to that a reasonable person would not be expected to be curious about its cause. However, for good policy reasons, the House of Lords had intended to impose a fairly demanding test on claimants.

In the instant case, J's hearing loss had developed over a period of time and its realisation must have dawned on him. The question of whether a reasonable man in his situation would be curious to know the cause was not easy. Applying the demanding test required since Bracknell Forest, a reasonable man in the 21st century would be curious about the onset of deafness at the relatively early age of 61 and would wish to find out its cause. In the Claimant's circumstances, the reasonable man would have consulted his GP by the end of 2002.

It was probable that if the GP had been asked about the cause of deafness, as an open question, in 2001 or shortly thereafter, he would have considered the possibility of noise deafness and asked about his working history. Claimant should be deemed to have had knowledge, by the end of 2002, that his deafness might be attributable to exposure to noise during his employment. The limitation period had therefore expired by the end of 2005.

DAVIES & ORS v SECRETARY OF STATE FOR ENERGY AND CLIMATE CHANGE

[2012] EWCA Civ 1380

CA (Civ Div) (Mummery LJ, Hallett LJ, Tomlinson LJ) 25/10/2012

Background

Eight representative miners wanted to bring, long after the expiry of the applicable limitation period, actions against the operators of the mines in which they had worked.

They alleged that, negligently and in breach of statutory duty, the operators had exposed them to working conditions which were responsible in due course for the onset and development of osteoarthritis of the knee.

The shortest period of delay between the expiry of the limitation period and the issue of proceedings was 10 years, and the longest was 21 years.

It was impossible to say with any precision when the injury was actually caused.

The date of first diagnosis was therefore in each case bound to be later than the date on which the cause of action accrued and D could not have had the relevant knowledge before first diagnosis of the condition.

On a trial of the preliminary issues, the judge refused to exercise his discretion to disapply the primary limitation period prescribed by s.11 of the Act.

Appeal

What the judge was rightly concerned to identify was the extent to which the enquiry would be hampered by the diminished cogency of the evidence available as a result of the long delay in bringing the claims. The judge's approach to the assessment of the broad merits was careful, conscientious and impeccable.

There was a clear distinction between the industrial disease cases, which concerned continuous exposure to a dangerous state of affairs or toxic substance, and the instant case.

In looking at all the circumstances of the case the judge was entitled to look at the totality of the delay and the impact of the delay, Donovan v Gwentoys Ltd [1990] 1 W.L.R. 472 and Roebuck v Mungovin [1994] 2 A.C. 224 considered.

There was a wholesale failure on their part to initiate an enquiry, to go to see a solicitor, to lobby their unions or to seek expert advice. The situation called out for consideration and enquiry. If any consideration was given the evidence did not reveal it, and the judge was presented with a case in which there was simply inaction on the part of both the Claimants and their unions. Appeal dismissed

CLIFFORD SAYERS v (1) LORD CHELWOOD, DECEASED (2) LADY CHELWOOD

[2012] EWCA Civ 1715

CA (Civ Div) (Arden LJ, Jackson LJ, Kitchin LJ) 19/12/2012

Facts

From 1981, the Claimant had worked for the Defendants as a gardener.

The First Defendant died in 1989 but the Claimant remained employed by the Second Defendant until May 2000. By that time, he was suffering from hearing loss and tinnitus.

In 2002, the Claimant was told by a nurse during an occupational health-check that he might be suffering from noise-induced industrial hearing loss. In April 2005 he consulted his general practitioner. He was reviewed by a specialist in June 2006. He retained a firm of solicitors in October 2006, and was advised in December of that year that he was eligible to bring a claim. A letter of claim was sent in July 2008 and proceedings were started in September 2009.

First Instance

A deputy district judge found that the date of knowledge for the purposes of limitation was December 2006 and that his claim was therefore in time.

First Appeal

The circuit judge allowed W's appeal, concluding that the claim was out of time because the date of knowledge was 2002, when S received advice from the nurse.

He held that the burden on the Claimant under s.33 of the Act was particularly heavy and that it would not be appropriate to exercise discretion to allow the claim to proceed.

Second Appeal

There was a wealth of conflicting authority on the question of what test should be applied under s.33. It should not be necessary for judges in the county court to engage in textual analysis of a series of appellate decisions in order to discern whether a claimant relying on s.33 had a "burden" or a "heavy burden" to discharge.

All that could be said about the general approach to the section was that the burden was on the claimant, because it was he who was seeking to be exempted from the normal consequences of failing to issue proceedings in time.

It was not helpful to discuss in the abstract whether that burden was a heavy one or a light one. Every case was fact-specific.

In the instant case the judge had applied the wrong test; he ought simply to have said that the burden was on the Claimant. However, given that he had been faced with an array of inconsistent dicta from superior courts, and had not had the benefit of hearing full argument on the issue, it was difficult to criticise him for applying the wrong test.

A fresh consideration of the factors in s.33 supported a conclusion that it would not be appropriate to disapply s.11 of the Act and enable S's claim to proceed.

The action had been commenced four years after the expiry of the limitation period with no explanation for the delay. That delay made it substantially more difficult for the parties to adduce relevant evidence. Both S and his legal advisers had progressed the claim in a leisurely manner.

RTA LIABILITY

SATNAM REHILL v RIDER HOLDINGS LTD

[2012] EWCA Civ 628

CA (Civ Div) (Ward LJ, Richards LJ, Patten LJ) 16/05/2012

Facts

Claimant had stepped off the nearside pavement onto a controlled pedestrian crossing and started to cross in front of the bus, even though the pedestrian crossing lights were red.

The Claimant was hit by the bus and, by the time it stopped, its front wheel had gone over the Claimant, causing serious injuries.

The bus driver maintained that the speed of the bus had been between 3 mph and 5 mph when the collision occurred.

The recorder held that a reasonably careful bus driver would have noticed the Claimant as he left the kerb. He further found that the speed of bus was 4mph and that, if the driver had braked when he should have, the bus wheel would not have gone over the Claimant, even though it might have touched him.

In coming to that conclusion the recorder had regard to CCTV footage from within the bus in order to calculate the time at which P stepped off the pavement and the time at which the collision occurred, and also made an allowance of 1.5 seconds for thinking time from the moment when the Claimant stepped off the pavement to the moment when he held that the driver should have applied the brakes.

The recorder assessed P's contributory negligence as one-third.

Appeal

There was a clear breach of duty by the driver in failing to brake as quickly as he should have done.

The issue was whether it had been shown that the wheel would not have gone over the Claimant if the driver had braked promptly.

There was nothing wrong with allowing 1.5 seconds for thinking time from the moment that P stepped off the pavement to the moment when the driver should have applied the brakes..

The Claimant’s action in stepping into the road when the red light was showing and the bus was so close was the result of more than his misjudgement or simple failure to check.

The Claimant was seriously blameworthy and his lack of care made the collision inevitable.

However, the really serious injuries arose not from the initial impact but from the wheel of the bus going over the Claimant, which was caused by the lack of prompt braking.

The instant case was not one where the pedestrian should be found more responsible than the driver for his injuries. Overall, the appropriate apportionment for contributory negligence was 50 per cent.

BETHANY PROBERT (A CHILD) v PAUL MOORE

[2012] EWHC 2324 (QB)

QBD (David Pittaway QC) 09/08/2012

Facts

At about 5pm on a December evening the Defendant was driving on a narrow single-lane country road which had a 60mph speed limit and no street lighting.

He had manoeuvred to his nearside to allow oncoming vehicles to pass safely but collided with the 13 year old Claimant who was walking along the road in the same direction as he was travelling.

She was wearing headphones and dark clothing.

P's mother had arranged to pick her up from a nearby stable but she had decided to walk home. She sustained multiple injuries.

Held

A reasonably prudent driver would not have exceeded 40 or 45mph on the relevant section of road.

The fact the Defendant was due to start his shift at 17.00 had contributed to his speed.

The Defendant should have been aware of the presence of other road users, including pedestrians, cyclists and horse-riders.

M's decision to move to his nearside was to ensure that there was sufficient distance between him and oncoming vehicles, but in so doing any possibility of avoiding a collision with the Claimant was lost.

His concentration was focused on the approaching vehicles and he had not seen the Claiamnt before the collision.

In assessing contributory negligence, the applicable standard was the objective standard of an ordinary 13-year-old child.

Such a child should not be expected to consider taking the same level of precautions as an adult, Gough v Thorne [1966] 1 W.L.R. 1387 followed.

It would have been asking too much of the Claimant to say that she should not have started to walk home at all or without a high visibility jacket or torch, or that she should have waited for her mother or accepted a lift.

The Claimant had been walking on the correct side of the road when the accident occurred.

She had taken steps for her own safety: another driver had observed her climb onto the verge as she approached.

Her use of headphones made no material difference.

In any event, M would not have observed P if she had been wearing distinctive clothing because he had conceded that his attention was focused on approaching vehicles. It was not just and equitable to find P contributorily negligent when no positive act on her part had caused the accident: her decision to walk home was ill-advised but not culpable.

FRAUD / EXAGGERATION

SUMMERS V FAIRCLOUGH HOMES LTD

[2012] UKSC 26

SC (Lord Hope (Deputy President), Lord Kerr JSC, Lord Clarke JSC, Lord Dyson JSC, Lord Reed JSC) 27/06/2012

Facts

The Claimant had been injured in an accident at work. At trial the judge found for the Claimant on liability, leaving damages to be assessed.

The Claimant put his claim at more than £800,000, but undercover surveillance subsequently revealed him to have grossly exaggerated the effect of his injuries.

At the trial on damages, the judge found that while he had undoubtedly suffered serious injuries, he had also fraudulently misstated the extent of his claim.

He declined to strike out the claim as an abuse of process, but instead awarded damages of only £88,716.

First Appeal

The Court of Appeal dismissed the Defendant's appeal.

Second Appeal

The issues were

i. Whether a civil court could strike out a statement of case as an abuse of process after a trial at which the defendant had been held liable in damages to the claimant in an ascertained sum; and

ii. If so, in what circumstances the power should be exercised.

Held

The court did have jurisdiction to strike out a statement of case under CPR r.3.4(2) for abuse of process, or under its inherent jurisdiction, even after a trial in which the court had made a proper assessment of liability and quantum (Ul-Haq overruled and Widlake considered).

The fraudulent exaggeration of a claim was an abuse of process. Under the CPR, the court had a wide discretion as to how its powers should be exercised and the position was the same under its inherent jurisdiction.

However the power to strike out after a trial was to be exercised only in very exceptional circumstances.

It was neither just nor appropriate to strike out the action in the instant case.

While there had been a serious abuse of process, S had nonetheless suffered significant injury as a result of F's breach of duty and, on the judge's findings, was entitled to damages of £88,716. To that extent only, the judgment of the Court of Appeal was affirmed (paras 63-64).

BASHARAT HUSSAIN v (1) ADIL HUSSAIN (2) AVIVA UK INSURANCE LTD

[2012] EWCA Civ 1367

CA (Civ Div) (Lord Neuberger (MR), Davis LJ, Treacy J) 23/10/2012

Facts

Y had an insurance contract with D2 which offered seven days' free insurance under a specified scheme.

The accident happened two days after the Claimant took out the policy and consulted a doctor three months after the accident to assist him to pursue his claim.

The doctor's report stated that he had consulted his GP about ten days after the accident and had returned a couple of weeks later but the medical notes showed that no mention was made of H having been involved in an accident.

D2's defence was that the purported accident was a staged collision.

D1 did not participate in the trial and was found to have been engaged in a fraudulent campaign of insurance claims and to have collided with H's car shortly after he had obtained the free insurance for his car.

In para.21 of his judgment, the judge concluded that the Claimant had been party to attempted fraud on the basis that (i) the rule "follow the money" applied, which made economic sense only if the two drivers were in concert (ii) H's credibility was seriously damaged by the absence of reference to the collision in his medical records and by what he had told the doctor about his visits to his GP.

Appeal

The judge was wrong to draw the inference that the Claimant had been a party to the attempted fraud in the way that he did.

The judge had not duly balanced the various points against the Claimant being fraudulent and made no reference to them.

The point about the medical records could not have the conclusive weight that the judge ascribed to them in support, in effect, of a total adverse credibility finding and a conclusion of fraud by the Claimant.

OLA / EL LIABILITY

HASSAN V GILL

[2012] EWCA Civ 1291

CA (Civ Div) (Lloyd LJ, Morgan J, Sir Stephen Sedley) 24/07/2012

Facts

H had slipped on a grape which was on the ground in the Defendant's shop and fractured her wrists.

In a claim brought over two years later, she alleged that the accident had been caused by the Defendant's negligence in causing or permitting the grapes to be on the ground, causing a danger.

The Defendant said that there had been a reasonable system in operation to ensure that the premises were safe.

The system included staff instructions to watch for and remove spilled produce.

The judge described that as a purely reactive system, and held that on the relevant authorities it was not sufficient; a sufficient system would have been periodic checks for spillages, a system of "walking inspections".

Appeal

G argued that the judge had erred in holding that his system had been insufficient as a matter of law.

HELD: It was not the law that anyone in charge of retail premises had to have a proactive system of walking inspection or the like. The judge had not meant that that was the law.

The precautions required depended on the circumstances of the particular premises. The judge had been saying that, given the circumstances of the particular premises, the likelihood of fruit being dislodged from the tables and display boxes and causing a tripping hazard, and the relatively small number of staff, there had not been enough by way of reasonable precaution to see that a slippage hazard did not remain in place for too long.

Tellingly, there had been no evidence from staff as to the effectiveness of the system despite there having been at least two staff members present on the day of the accident.

Nor, remarkably, had there been any evidence of any attempt by the Defendant to identify or trace any staff who might have remembered the incident.

The defendant was not under a strict liability but it was incumbent on the defendant to adduce evidence of what the system was and how it operated at the relevant time.

A claim notified late could pose forensic problems for the defendant, but even in such a case it was likely to be wise for the defendant to attempt to identify and trace relevant members of staff and, if unable to find any such person, to say so, in order to be able to rely on indirect evidence of the system which would have been in operation.

Appeal dismissed

BILLY MORROW v DUGANNON & SOUTH TYRONE BOROUGH COUNCIL

[2012] NIQB 50

QBD (NI) (Gillen J) 06/07/2012

Facts

The Plaintiff claimed damages for personal injury and other losses arising from squat-lifting weights at a leisure centre operated by the defendant local authority.

There was a dispute over whether the Claimant had received an induction.

The Claimant argued that the accident was a result of excessive load bearing and poor technique. He argued that he had not been given any proper instruction; that he had been encouraged to lift an excessive weight that he was not used to, which was far too great in terms of his capabilities and physique and outside the range of safe practice; and that there was a failure to identify the risk of injury to him.

Held

Any physical exercise or sport carried a certain level of risk.

Injuries could occur that were unpreventable and simply part of the risk of the exercise itself.

A person agreeing to participate was considered to have consented to that natural level of injury risk.

Gymnasiums and workout rooms presented a risk area for weightlifters, particularly while still learning proper techniques.

Local authorities providing such facilities owed the same duty of care to lawful visitors as to any occupier, and were governed by the same Donoghue v Stevenson negligence principles, with a need to provide proper instruction, supervision and warning.

The local authority needed to urgently review its policy on written documentation for use by persons attending the leisure centre. However, the inadequacy of its documentation systems had played no role in M's accident given the care, instruction and attention that the Defendant had given to the Claimant both before and on the day in question.

JEAN PALFREY v WM MORRISONS SUPERMARKETS PLC

CA (Civ Div) (Sir John Thomas (President QBD) , Moses LJ, Black LJ) 13/11/2012

Facts

The Claimant tripped over a trolley in the Defendant's store.

Trial

The Judge found the trolley was not in itself dangerous and had been left in the centre of an aisle in a clearly visible position.

However it did present some risk of tripping or a degree of hazard (it had no 'business being there') – but there was nothing to say it would have been left dangerous left at the side.

The Judge concluded that the Defendant was in breach for leaving the trolley unaccompanied but found the Claimant 50%.

Appeal

The judge erred in concluding that the trolley's design was safe.

There was no evidence that the relevant type of trolley was used widely because Y could only comment on its use in his own store.

It was dangerous to use such a low-lying trolley in circumstances where the attention of customers was foreseeably diverted to a higher level, to the goods on the shelves, and the judge should have made such a finding.

The notion that supermarkets were under an obligation to station someone by a trolley to warn customers of its presence was absurd, and so the fact that the trolley was unaccompanied was not a failure for which M was liable.

Accordingly, although the judge was correct to find that the Defendant was liable for P's injuries, he should have based that conclusion on a finding that the combination of the trolley's design and positioning constituted a reasonably foreseeable cause of injury.

The court replaced the judge's finding of contributory negligence with its own finding of 20 per cent.

Appeal dismissed, cross-appeal allowed

RICHARDS v BROMLEY LONDON BOROUGH COUNCIL

[2012] EWCA Civ 1476

CA (Civ Div) (Sir Maurice Kay (VP CA Civ), Munby LJ, Tomlinson LJ) 16/11/2012

Facts

The Claimant was a pupil at a school for which the local authority was responsible for four years.

She suffered a cut to her heel requiring five stitches when exiting a school building through a pair of swing doors which opened outwards and had a self-closing mechanism.

The doors had been in place for 30 years and the Claimant had safely negotiated them many times before.

There were no previously recorded incidents in which anyone had been injured when using the doors.

However, there had been one incident four months previously. Another pupil had suffered a minor injury, also to her heel, when using the doors.

The site manager recommended that work be carried out to alleviate the risk of future incidents but the work could only realistically be done during a school holiday and had not been carried out when R's injury occurred. R claimed that the investigation into the Claimant's incident had been inadequate, and that had it been recorded it would have been more fully investigated, the cause of the injury understood, and appropriate steps taken to prevent a recurrence.

Trial

The judge concluded the accident was impossible to predict.

Appeal

Closer investigation of the earlier incident would have revealed that a pupil had carelessly pushed the other door open without regard to the presence of C's leg resting on the step in front of it.

It would have revealed that the door banged into the back of C's heel and broke the skin, causing a very minor cut which required the application of a sticking plaster.

Essentially, his conclusion was that had the school authorities elicited the same description of the incident from C, they would in all probability have reacted in exactly the manner they had, which would have been a reasonable response.

The injury suffered by the Claimant four months later occurred in very different circumstances and without the careless intervention of a third party.

Although the injury to R was not impossible to predict, the injury to the Claimant did not render the more serious and very different injury to R reasonably foreseeable.

Sympathy was an insufficient basis on which to subvert the law of tort. It had to be understood that not every misfortune occurring on school premises attracted compensation.

CLINICAL NEGLIGENCE

HANI HUSSAIN v KING EDWARD VII HOSPITAL

[2012] EWHC 3441 (QB)

QBD (Eady J) 30/11/2012

Background

Claimant, who had been diagnosed with bladder cancer, underwent a cystoscopy.

He was in his early thirties at the time. When he awoke after the operation, he found that he was experiencing severe pain in his left shoulder. He had not been aware of any shoulder problem before the operation. The pain and discomfort had been continuous since the date of the operation.

The parties' medical experts agreed that there had been an acute exacerbation of a chronic underlying degenerative condition.

Claim was based on the proposition that one or more members of the Defendant's staff must have done something, or omitted to do something, during the period while he was anaesthetised; he invited an inference that one or more of them had "pulled hard" on his left arm, left it "hanging off the side of the operating table or the trolley for an extended period", dropped him or allowed him to be knocked or to fall off the trolley.

Held

The evidence, when properly analysed, did not give rise to a prima facie case of negligence.

It indicated that the underlying degenerative changes in H's left shoulder meant that when the unremarkable relaxation of the muscles took place under anaesthesia, there was a realignment in the biomechanical environment of the joint which, in itself, triggered the onset of the acute arthropathy.

The Defendant’s evidence demonstrated convincingly that all reasonable care had been taken and that the operation had taken place routinely and without any untoward incident.

Although there had been a realignment of the musculature at some point while under anaesthetic, that had occurred without anyone present being aware of it. No one knew, or could reasonably have been expected to know, of the unusual degenerative condition in the Claimant's shoulder.

JD v MELANIE MATHER

[2012] EWHC 3063 (QB)

QBD (Liverpool) (Bean J) 01/11/2012

Background

The court was required to determine causation in a clinical negligence claim after the defendant general practitioner admitted breach of her duty of care to the claimant in failing to diagnose a malignant melanoma.

C had consulted the Defendant in March 2006 concerning a growth in his groin, which itched, bled when scratched, and seemed to be getting bigger.

M wrongly diagnosed a seborrhoeic wart and told the Claimant that there was no reason to worry.

The Claimant returned to the surgery more than seven months later and was examined by a different doctor who, realising that the lesion was probably malignant, removed it.

Malignance was confirmed, and it was discovered that the cancer had spread to the lymph nodes. It subsequently spread to C's lungs and, by the instant trial, the prognosis was very poor.

Held

Determining causation involved determining the stage of Claimant's cancer in March 2006.

The American Joint Committee on Cancer (AJCC), to which all the expert witnesses referred, used four predictive factors to assess the staging of melanomas: the thickness of the primary tumour; whether it was ulcerated; whether it had reached the lymph nodes; and whether there had been metastatic spread.

On the evidence, the tumour was likely to have been 3-4mm thick in March 2006. The clinical history regarding ulceration was inconclusive and equally consistent with either side's case.

However, on a balance of probabilities, the tumour had, in March 2006, already become ulcerated and had already spread to one lymph node.

That being so, the Claimant’s chances as at March 2006 of surviving a further 10 years were already less than 50 per cent, had the tumour been detected at that time. His principal claim therefore failed.

However, on a balance of probabilities, taking into consideration the AJCC's survival curve table for patients with stage III melanomas, the failure to diagnose the tumour in March 2006 had caused C's life expectancy to be reduced by three years.

Judgment for claimant

VICARIOUS LIABILITY

RICHARD WEDDALL v BARCHESTER HEALTHCARE LTD

WALLBANK v WALLBANK FOX DESIGNS LTD

[2012] EWCA Civ 25

CA (Civ Div) (Pill LJ, Moore-Bick LJ, Aikens LJ) 24/01/2012

First Claim

In conjoined appeals, the first appellant (X) and the second appellant (Y) appealed against decisions that their respective employers, the first respondent (B) and the second respondent (W), were not vicariously liable for assaults inflicted by employees who were deemed not to be acting in the course of their employment.

X, who had worked at a care home operated by B, had been on duty and was required to replace an employee on the nightshift who had called in sick. X telephoned another employee for assistance. That employee was drunk at the time and refused. Twenty minutes later, he attended the care home and assaulted X.

The judge held that B was not vicariously liable for the employee's acts as he was acting on a frolic of his own.

Second Claim

Y had been the managing director of W, a manufacturing company and worked in a factory. Y noticed that an employee had only loaded one piece of furniture through an oven, wasting a substantial amount of fuel. Y raised it with the employee and told him to "come on". The employee assaulted Y.

The judge held that W was not vicariously liable for the employee's acts as the assault took the employee outside the course of his employment.

Appeal

In relation to X, the judge's conclusion and reasoning had been correct.

The employee's attendance at the care home and attack 20 minutes after their conversation was an independent venture which was separate and distinct from his employment. The instruction was no more than a pretext for violence wholly unconnected with his role.

In Y's, the violence was closely related to the employment in time and space, and it was a spontaneous and almost instantaneous response to an instruction. Reactions to instructions, normally by carrying them out, was a part of employment.

It would be unwise to treat any of the expressions within the authorities as a definitive test for whether an employee's wrongful conduct was committed during the course of their employment. Each case was to be determined on its facts and by reference to the broad test in Lister, which involved an element of value judgment.

CATHOLIC CHILD WELFARE SOCIETY & ORS v (1) VARIOUS CLAIMANTS (2) INSTITUTE OF THE BROTHERS OF THE CHRISTIAN SCHOOLS

[2012] UKSC 56

Background

The appellant (C) appealed against a decision ([2010] EWCA Civ 1106) that the respondent Institute of the Brothers of the Christian Schools (the Institute) was not vicariously liable for alleged physical and sexual abuse perpetrated by brother teachers at a residential school for boys in need of care between 1958 and 1992.

Held

Vicarious liability involved a two-stage test.

First, it was necessary to consider the relationship between the defendant and the tortfeasor to see whether it was one that was capable of giving rise to vicarious liability.

Second, regard should be had to the connection that linked the relationship between the defendant and the tortfeasor and the act or omission of the latter.

The relationship between the teaching brothers and the Institute was sufficiently akin to that of employer and employees to satisfy the first stage of the test.

As to the second stage of the test, the precise criteria for imposing vicarious liability for sexual abuse were still in the course of refinement by judicial decision, but a common theme arose from the authorities. Vicarious liability was imposed where a defendant, whose relationship with the abuser put it in a position to use the abuser to carry on its business or to further its own interests, had done so in a manner which had created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse.

The essential closeness of connection between the relationship between the defendant and the tortfeasor and the acts of abuse thus involved a strong causative link.

MISCELLANEOUS

ANIMALS ACT **KARA GOLDSMITH v ROBERT BRADLEY PATCHCOTT** [2012] EWCA Civ 183

Horse buckled violently. Evidence that Claimant foreseen the risk of it bucking but not accepted risk could not defeat the s.5(2) defence that she had voluntarily accepted the risk.

CREDIT HIRE **ACCIDENT EXCHANGE LTD v NATHAN JOHN GEORGE BROOM & 6 ORS** [2012] EWHC 207 (Admin)

It was appropriate to grant a car-hire company permission to bring proceedings for contempt against seven individuals who it claimed had given false evidence about car-hire rates..

EXPERTS **(1) CAPITA ALTERNATIVE LTD (2) MATRIX-SECURITIES v DRIVERS JONAS)** [2012] EWCA Civ 1417

While a judge had to have a reasoned or rational basis for a decision, on issues of quantum as on other issues, he was not confined to the figures contended for by the experts. Indeed, the figure arrived at by a judge in a valuation case might well lie somewhere in between two figures proposed by opposing experts.

FRAUD **LIVERPOOL VICTORIA INSURANCE CO v (1) SAMINA ETC.** [2012] EWHC 895 (Admin)

Individuals who had admitted bringing a fraudulent personal injury claim in a contrived road traffic collision were committed to six weeks in prison for contempt of court.

FUTURE LOSSES **WARD v ALLIES & MORRISON ARCHITECTS** [2012] EWCA Civ 1287

Judge had been entitled to hold that he had insufficient evidence on a personal injury claimant's likely future earnings and to follow the Blamire v South Cumbria HA [1993] P.I.Q.R. Q1 approach.

ROBERT DEAN HARRIES (A CHILD) v ALAN DAVID STEVENSON [2012] EWHC 3447 (QB)

Discount rate - The decision in **Warriner v Warriner [2002] EWCA Civ 81, [2002] 1 W.L.R. 1703** as to the approach to be adopted in relation to the **Damages Act 1996 s.1(2)** remained good law.

INFANTS **CORBY DOCKERILL (A MINOR) v TULLETT ETC.**[2012] EWCA Civ 184

Where claims by minors for damages for personal injury would ordinarily have been allocated to the small claims track by reason of their value, the fact that the court's approval for compromise of such claims was sought under CPR r.21.10(2) did not characterise them as Part 8 claims whose costs ought to be calculated in accordance with the fixed costs regime; they remained subject to detailed assessment in accordance with CPR r.44.5 by reference to the small claims track.

INSURANCE **AXN & ORS v (1) JOHN WORBOYS (2) INCEPTUM INSURANCE CO LTD** [2012] EWHC 1730 (QB)

The victims of a taxi driver, who lured women into his taxi, sedated and sexually assaulted or attempted to assault them, could not claim against the driver's motor insurer. Their injuries did not "arise out of the use of a vehicle on a road".

IAN STYCH v (1) ANTHONY MALCOM DIBBLE (2) TRADEX INSURANCE [2012] EWHC 1606 (QB)

At the time of a road traffic accident in which the passenger of a car were injured, he had not known or had reason to believe that the vehicle had been stolen or unlawfully taken within the meaning of the **Road Traffic Act 1988 s.151(4)**. The vehicle's insurer was therefore liable.

CHURCHILL INSURANCE CO LTD v (1) FITZGERALD (2) WILKINSON ETC. [2012] EWCA Civ 1465

The court determined costs in conjoined appeals concerning the issue of whether the insurer had a right of recovery against the insured after he was compensated for injuries in a road traffic accident in which he had been a passenger of an uninsured driver.

JURISDICTION **KATERINA COX v ERGO VERSICHERUNG AG** [2012] EWCA Civ 1001

An assignment to the Ministry of Defence of some of a widow's claims against a German insurer in respect of her husband's death in a road traffic accident while serving with HM Forces in Germany was to be construed under German law.

NON-P COSTS **CLAIM ON TIME LTD v MOHAMMADI & ANOR (2012) QBD (Leggatt J) 07/11/2012**

Where a costs order had been made against a non-party to road traffic accident proceedings it had been wrong for the judge to make the order without first having given that party an opportunity to review the case against it and be heard.