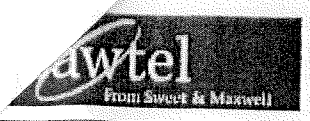

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KEITH THOMAS SOLLITT v (1) D J BROADY LTD (2) T D BROADY INVESTMENTS LTD (2000)

CA (Bingham LCJ, Pill LJ) 23/2/2000

PERSONAL INJURY - CIVIL PROCEDURE - COMPANY

CLAIMANT INJURED BY EXCAVATOR BEING OPERATED BY AN EMPLOYEE : COMPANY RESTRUCTURING : COMPANY SELLING ITS ASSETS TO ANOTHER COMPANY : COMPANY CHANGING NAME : CHANGING NAME TO THAT ORIGINALLY USED BY ANOTHER COMPANY : CLAIMANT COMMENCING PROCEEDINGS AGAINST A COMPANY : TRUE POSITION : COMPANY INSTRUCTING SOLICITORS : SOLICITORS MAKING ADMISSIONS OF LIABILITY : WHETHER COMPANY COULD BE HELD LIABLE : PREJUDICE TO THE PARTIES : COMPANY'S PART IN ALLOWING CLAIMANT TO CONTINUE CLAIM AGAINST IT

Where, following a company restructuring, a claimant had commenced proceedings against the wrong company but (acting with actual or ostensible authority) the company's solicitors had admitted liability and the true position should have been known to the company yet it had not alerted the claimant to it, on balancing the prejudice to the parties the company was not entitled to resile from its admissions.

First defendant's appeal from the order of Mr Recorder Lodge QC made on 18 May 1999 at the Kingston-upon-Hull County Court that it be jointly and severally liable with the second defendant to pay damages to the claimant. On 1 June 1994 the claimant was injured in the course of his employment when he was hit by the bucket of an excavator owned and operated by D J Broady Ltd ('DJBL'). On 6 June 1994, DJBL denied liability. Proceedings were issued by the claimant on 17 May 1996 seeking damages for the injuries sustained. A defence signed by solicitors, Bridge McFarlane, admitted that the claimant had been struck by the bucket of the excavator and that the driver of the excavator had been employed by DJBL. Negligence, causation, and loss and damage were either denied or not admitted. When the summons was received by DJBL, their general manager, Mr Wakefield, had sent the papers to their insurers who had in turn instructed Bridge McFarlane who had acted for the company in a number of other past disputes. In a letter of August 1996 from Bridge McFarlane it was said that DJBL admitted liability to the claimant in negligence. In due course statements were prepared and exchanged. The driver of the excavator stated that he was making his statement on behalf of DJBL by whom he had been employed for two years. The affidavit of Mr Wakeham described himself as the general manager of DJBL. On 10 February 1999 Mr Bridge of Bridge McFarlane swore an affidavit in support of an application for the second defendant ('Investments') to be substituted as defendant. DJBL had been incorporated in 1967. In September 1995 it had sold its assets (though not its liabilities) to a company known as Dreamcast Ltd and had changed its name to T D Broady Investments Ltd. On 15 September 1995 Dreamcast changed its name to D J Broady Ltd ('DJB'). Whilst DJB had substantial assets, Investments would not be able to pay any judgment debt. The recorder refused the application and having found for the claimant on liability held that DJB and Investments were jointly and severally liable. DJB appealed.

HELD: (1) It was clear that at the date proceedings had been issued, the name of the company for whom the driver of the excavator had worked at the time of the injury was borne by a different corporate entity. In law, liability lay with Investments. (2) The first question was whether Bridge

McFarlane had had the authority to have made the admissions of liability which had been made. The answer was yes. The instructions had been sent to them by DJB's insurers following communications with Mr Wakeham who had described himself as acting for and on behalf of DJB. Even if they had not had actual authority they had had ostensible authority having been held out by DJB to have acted on their behalf. (3) The second question was whether the recorder had erred in the exercise of his discretion in refusing DJB's application to resile from the admissions which had been made. On the basis of inescapable assumptions that the claimant had sued DJB when his cause of action correctly lay against Investments, that knowledge of the claimant's error should have been apparent to DJB, that the responsibility to correct the claimant's error lay with DJB and that nothing was done to alert the claimant to the true position, DJB argued that an admission made by mistake could be withdrawn if there was no prejudice (see Gale v Superdrug Stores plc (1996) 3 All ER 468) and that there was no prejudice to the claimant because he was no worse off than had he commenced proceedings against the correct defendant. (4) The decision in Gale (supra) lay down valuable guidance as to how a discretion was to be exercised in such circumstances but it was clear that Waite LJ was not laying down any principle of law. However it was accepted that there was a need to look at the prejudice to each party. (5) If permission to withdraw the admissions was not granted then the prejudice to DJB was that it would be subject to a judgment against it for which it would not have been liable had the correct defendant been sued. But this prejudice was entirely of DJB's own making. (6) It was not true to say that the claimant had suffered no prejudice. Had the proper position been made known to him in time there were various steps he could have taken to have protected himself. He may have settled with the insurers or made arrangements that Investments retain sufficient assets to meet any potential liability. (7) Whilst DJB were entitled to say that the recorder had not performed a balancing exercise it was clear that had he done so he could, and should have come to the same conclusion.

Appeal dismissed.

Peter Edwards instructed by Gosschalks (Hull) for the appellant. K L May instructed by Philip Hamer & Co (Hull) for the respondent.

LTL 23/2/2000 EXTEMPORE (Unreported elsewhere)

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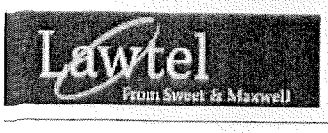

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PAUL LESLIE DANIELS v FREDERICK MARK WALKER (2000)

CA (Lord Woolf MR, Latham LJ) 3/5/2000

CPR - CIVIL PROCEDURE - EVIDENCE - HUMAN RIGHTS - EUROPEAN - PERSONAL INJURY

MEDICAL EVIDENCE : JOINT EXPERT REPORT : CPR PART 35 : CPR PART 1 : CIVIL PROCEDURE RULES 1998 : ONE PARTY DISSATISFIED WITH JOINT EXPERT REPORT : FURTHER QUESTIONS TO JOINT EXPERT : WHETHER DISSATISFIED PARTY COULD INSTRUCT EXPERT TO EXAMINE CLAIMANT : WHETHER QUESTIONS SHOULD BE ANSWERED BY JOINT EXPERT BEFORE EXAMINATION OF CLAIMANT : JOINT INSTRUCTIONS TO EXPERT : UNILATERAL INSTRUCTIONS TO EXPERT JOINTLY INSTRUCTED : CIVIL LIBERTIES : HUMAN RIGHTS ACT 1998 : ART.6 EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS 1950 : RIGHT TO A FAIR TRIAL : RELIANCE ON ART.6 IN CIVIL PROCEEDINGS : ECHR

(1) It was undesirable for the consideration of issues in civil proceedings to be complicated by the injection of arguments based on Art.6 European Convention on Human Rights (right to a fair trial) and it was hoped that judges would be robust in resisting such arguments. It was the responsibility of counsel and those instructing them to take responsibility for when it was appropriate to raise such issues. (2) Where parties had agreed to instruct a joint expert but the parties could not agree the instructions to be given, it was open to the dissatisfied party to give its own separate instructions to the joint expert. Where a party was dissatisfied with the joint expert's report it should be afforded facilities to instruct its own expert to make inquiries prior to questioning the joint expert, and if necessary, applying to call its own expert evidence.

Defendant's appeal from the order of HH Judge Coles QC (sitting as a High Court Judge) on 15 December 1999 refusing permission for him to obtain and rely upon the evidence of his own expert in response to an expert report which had been jointly obtained by the parties. On 16 March 1990, the claimant, then 7 years old, sustained serious injuries when he was struck by a car being driven by the defendant. Liability was admitted, the only issue being quantum of damages. The defendant's solicitors wrote to the claimant's solicitors asking whether they would agree to the instruction of a joint expert suggesting either a consultant occupational therapist ('G'), or the Jacqueline Webb Organisation ('JWO'). The claimant's solicitors agreed to the instruction of the JWO and wrote the letter of instruction. A report was subsequently prepared by 'D' of the JWO. There was no dispute that the claimant would require some form of care for the rest of his life but the defendant was unhappy with D's conclusion that the claimant would require full-time care. The defendant's solicitors wrote asking whether G could examine the claimant but the claimant's solicitors objected, pointing out that it had been agreed that a joint expert be instructed. The defendant applied to the judge for permission to examine the claimant. The judge refused to give the defendant permission to "call" further evidence but did agree that further written questions could be put to D. The defendant appealed on the grounds that: (i) the judge had failed to have regard to the overriding objective in CPR Part 1; and (ii) that the defendant had been denied the right to a fair trial contrary to Art.6 European Convention on Human Rights ('the Convention') and, though not yet in force, the Human Rights Act 1998.

HELD: (1) Dealing firstly with the human rights issue the defendant had said that in reliance upon the decision in (1) Mario Mantovanelli (2) Andree Mantovanelli v France (1997) EHRR 370 the judge's order had conflicted with Art.6 of the Convention. Though the issue had only been raised in supplementary skeleton arguments it had not, correctly, been developed in court as it had not been appropriate to raise it. Quite apart from the fact that the 1998 Act was not yet in force it was essential that the court was not taken down blind alleys. Counsel and those instructing them had to take responsibility for when it was appropriate to take human rights points. The provisions of the Civil Procedure Rules 1998 made it clear that it was the obligation of the court to deal with cases justly. If a party who had agreed to a joint expert report subsequently wanted to call its own expert evidence, and it would be unjust pursuant to the overriding objective not to allow that evidence, then the dissatisfied party had to be allowed to call that evidence. It could not be suggested that the way matters were conducted in civil proceedings could contravene Art.6. It was highly undesirable for the consideration of issues to be made more complex by the injection of Art.6 arguments and it was hoped that judges would be robust in resisting such arguments.

(2) Whilst it was desirable for instructions to be agreed where a joint expert was being instructed, if agreement was not possible it was entirely proper for the dissatisfied party to give its own separate instructions to the expert.

(3) The judge did not seem to have had the issue before him focused by counsel for the defendant who had appeared below. He had considered whether it would be right to allow the defendant to "call" his own expert evidence. He should have focused on whether the defendant should have questioned D before seeking to have the claimant examined by G or whether G should have been entitled to have examined the claimant prior to the defendant putting further questions to D.

(4) Though a party had agreed to a joint report that did not mean that that party should not be afforded facilities to obtain a further expert report. The correct approach was to view the joint expert's report as the first step. If, for reasons which were not fanciful, a party was dissatisfied with the joint report, then it should be allowed to obtain further information before deciding whether to challenge the joint expert's report subject to the court's discretion. In the majority of cases it would be wrong to ask the court for permission to call new expert evidence until the matter could be considered in the round. Where a modest sum was involved the court might hold that it would be disproportionate to so allow. But where, as in the present case, substantial sums were involved, it was perfectly reasonable for the defendant to have sought its own expert to examine the claimant.

(5) In the event that a party obtained its own expert report and the issue arose as to whether that evidence could be called at trial, then no decision should be taken until after a meeting of the experts. It was only as a matter of last resort that oral evidence should be given.

(6) In the present case the judge should have given the defendant the opportunity to have the claimant examined by his own expert.

Appeal allowed.

Anthony Temple QC and Martin Spencer (neither of whom appeared below) instructed by John Stallard & Co (Worcester) for the defendant. Ralph Lewis QC instructed by Russell Jones & Walker (Birmingham) for the claimant.

LTL 3/5/2000 EXTEMPORE : TLR 17/5/2000 : ILR 12/6/2000 : (2000) 1 WLR 1382 : (2000) CILL 1629 : (2000) UKHRR 648 : (2001) HRLR 1

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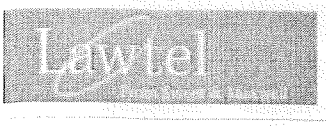

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JOHN SUTTON SMITH (A CHILD BY HIS LITIGATION FRIEND THE OFFICIAL SOLICITOR) v REGINALD DAVID STEPHENS (2001)

QBD Birmingham District Registry (HH Judge Nicholls) 26/1/2001

CPR - CIVIL PROCEDURE - EVIDENCE - PERSONAL INJURY - ROAD TRAFFIC

EXPERT WITNESSES : SINGLE JOINT EXPERTS : JOINTLY INSTRUCTED : CIVIL PROCEDURE RULES 1998 SI 1998/3132 : CPR PART 1 : CPR PART 35 : CPR 35.9 : OVERRIDING OBJECTIVE : LEGAL PROFESSIONAL PRIVILEGE : PREJUDICE : UNFAIRNESS : ATTENDANCE AT CONSULTATIONS : CONFERENCES : EXCLUSION OF ONE PARTY : IMPARTIALITY : ULTRA VIRES : PARA.19.8 CODE OF GUIDANCE FOR EXPERT WITNESSES : INHERENT JURISDICTION

A claimant was prevented under the court's inherent jurisdiction from meeting jointly-instructed experts in the defendant's absence because such a meeting would breach the overriding objective.

Defendant's ('D') interlocutory application to prevent the claimant ('C') holding a consultation with jointly-instructed experts in D's absence. C was claiming damages for serious personal injuries sustained in a road traffic accident on 1 April 1995. The court had approved a liability settlement on the basis that D was 60 per cent liable for the accident but quantum remained in dispute. The parties jointly instructed seven expert witnesses and C's leading counsel advised that he meet C's junior counsel, solicitor and the single joint experts at a consultation on 12 February 2001. D submitted that a consultation with jointly-instructed experts in the absence of one party was contrary to the overriding objective in CPR Part 1 and the entire scheme of CPR Part 35. C submitted in reply: (i) the Civil Procedure Rules 1998 SI 1998/3132 did not affect the adversarial system of justice in England and Wales; and (ii) a party's right to maintain legal professional privilege meant that he was entitled to solicit information and to disclose or refuse to disclose it when it suited his case to do so.

HELD: (1) The single joint experts who had agreed to attend the consultation, had failed to comply with para.19.8 Code of Guidance for Expert Witnesses because they had not informed D of the consultation and had not sought D's written consent to the consultation. For one side to hold a consultation in the other's absence would not accord with the overriding objective. (2) It was clear that CPR 35.9 went behind legal professional privilege in relation to expert witnesses. The court had directed the parties to instruct joint experts and it was inconsistent with that direction for one side secretly to ascertain the strength of the evidence. CPR Part 35 was designed to ensure that both parties knew what an expert would say at trial, which enabled the overriding objective and encouraged early settlement. (3) The normal way to obtain answers from experts prescribed by CPR Part 35 was to submit written questions to which the experts would reply in writing. That should be followed in this case unless the parties could agree some other mechanism. (4) C had sought to obtain an unfair advantage that was liable to prejudice the impartiality of the joint expert witnesses or to at least make it difficult for them to be impartial. The court had a power under its inherent jurisdiction to restrain C from doing that in breach of the overriding objective, even in the absence of a specific power under CPR Part 35.

Application allowed. Permission to appeal granted.

Craig Barlow instructed by Kerwoods (Redditch) for C. Michael Stephens instructed by Barlow Lyde & Gilbert for D.

LTL 16/10/2001 : (2001) CILL 1802

Judgment Approved - 8 pages

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in the affidavit. The relevant disclosure in the affidavit had been voluntary, and so C had been entitled to see the relevant document. Therefore there was no implied undertaking nor was there a fetter on C's use of the document, and (2) as the letter had been mentioned in open court, under the former County Court Rules 1981 Ord.14 r.8A any implied undertaking by C ceased to take effect in any event.

Held, allowing the appeal, that E's disclosure of the letter by referring to it in its affidavit had been voluntary, the subsequent court order simply requiring inspection of the document, and in open court. Therefore C had been entitled to production for inspection, so he was not subject to any implied undertaking not to use the document in an unrelated action, and it was not an abuse of process for C to use the document for other purposes, *Tejendrasingh v Metsons* [1997] E.M.L.R. 597, [1998] C.L.Y. 328 considered, and *Prudential Assurance Co Ltd v. Fountain Page Ltd* [1991] 1 W.L.R. 756, [1991] C.L.Y. 2870 applied.

CASSIDY v. HAWCROFT, Trans. Ref. PTA 2000/0525/B2, July 27, 2000, May, L.J., CA.

48. **Admissions – limitations – attempt to resile from admission of liability – certainty of litigation under Civil Procedure Rules 1998**

[Civil Procedure Rules 1998 (SI 1998 3132) Part 14, r.14.1(5)]

H was involved in a road traffic accident in February 1996 when after braking successfully to avoid a car which had pulled into his path, HLBC's lorry drove into the rear of his vehicle. The offending car was not traced. HLBC's insurer subsequently admitted liability in an open letter and H indicated that he would therefore take no further steps on liability. Negotiations ensued and protective proceedings were issued in February 1999. The admission of liability was relied upon in the particulars of claim. The defence, served April 1999, denied liability on the basis of undetectable brake failure. Directions were given for a preliminary hearing as to whether HLBC should be allowed to resile from its earlier admission. H sought to rely on the admission on the basis that if the brake failure had been raised before the expiry of the three year limitation period for a claim against the Motor Insurer's Bureau, H would have had an alternative avenue, which had been lost. HLBC sought to rely upon *Gale v. Superdrug Stores Plc* [1996] 1 W.L.R. 1089, [1996] C.L.Y. 759 supporting the right of a litigant to change his or her mind. The basis of HLBC's submission was that, according to the law prior to the coming into effect of the Civil Procedure Rules 1998, a claimant had a right to withdraw from an admission unless the person relying upon it was able to establish very significant prejudice.

Held, determining the preliminary issue in favour of H, that *Gale* distinguished, did not survive the coming into force of the Rules as their purpose was to make litigation more certain. Part 14 r.14.1(5) gave the court the power to permit a party to withdraw from an admission, the burden resting upon the party applying. Reference was also made to the PI protocol which indicated that protocol admissions were expected to hold good.

HACKMAN v. HOUNSLOW LBC, December 1, 1999, Judge A Thompson Q.C., CC (Portsmouth). [*Ex rel.* Steven Weddle, Barrister, Hardwicke Building, New Square, Lincoln's Inn, London].

49. **Admissions – right to resile from mistaken admission of liability – prejudice**

S suffered an injury in the course of his employment when he was hit by an excavator bucket operated by an employee of DJ. S commenced proceedings for personal injuries against DJ who denied any responsibility for the accident. Upon receipt of the summons, DJ forwarded the proceedings to its insurers, BA. BA instructed solicitors, BM, to act on the company's behalf and BM subsequently wrote to S admitting liability. After the accident, but before the admission had been made, DJ sold its assets, but did not transfer any liabilities, to another company, D, and also changed its name to TD. D later changed its name to DJ, on behalf of which the admissions were later made, although in law any liability to S lay, in reality, with TD which subsequently became insolvent. TD was later added in to S's claim as second defendant and an order made that both DJ and TD were jointly and severally liable to compensate S. DJ appealed, contending that (1) BM had never had actual authority to make an admission of liability, and (2) that the company should have

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been permitted to resile from the admissions made on the basis that S had not suffered any prejudice.

Held, dismissing the appeal, that (1) BM had had actual authority to make admissions, having been instructed by the insurers and having liaised with the general manager of DJ. Even if BM had not had actual authority they would in any event have had ostensible authority to make admissions on behalf of DJ, and (2) there had been serious prejudice to S because in reliance upon the admissions made, S did not avail himself of the opportunity to ascertain the true situation and protect his interests accordingly, *Gale v. Superdrug Stores Plc* [1996] 1 W.L.R. 1089, [1996] C.L.Y. 759 considered.

SOLLITT v. DJ BROADY LTD [2000] C.P.L.R. 259, Lord Bingham of Cornhill, L.C.J., CA.

50. Appeals – fresh evidence – procedure for correction of errors of fact

SG applied for permission to appeal against a judgment on liability for A ([2000] E.M.L.R. 478, [2000] 5 C.L. 126), contending that new evidence materially affected a finding of fact in the decision.

Held, refusing permission, that SG had known about the error pre-trial, but had failed to raise it at the draft judgment stage. Where an error could be rectified by a timely application for review under the court's inherent jurisdiction, an appeal, which was costly, time consuming and uncertain, was not the appropriate procedure.

SPICE GIRLS LTD v. APRILIA WORLD SERVICE BV (LEAVE TO APPEAL), *The Times*, September 12, 2000, Arden, J., Ch D.

51. Appeals – striking out – previous litigation concerning same subject matter but different parties

[Company Directors Disqualification Act 1986 s.6.]

M was managing director of a company which ran into financial difficulties. At the instigation of B, the company went into creditors' liquidation. Three major cases involving M but not B followed. First, claims brought by M against the receivers, were dismissed. Then successful proceedings were brought against him by the Secretary of State under the Company Directors Disqualification Act 1986 s.6. It was held that his misconduct and systematic dishonesty showed that he was unfit to be concerned in the management of a company. In the third case M claimed £3 million for wrongful dismissal against the company. The claim was dismissed on the basis that, where the issue in proceedings between a director and a company had been the subject matter of a finding against the director under the Act, subsequent proceedings could be dismissed as an abuse of process of the court. Shortly before the end of the limitation period, M brought an action against the receivers, their employees and B. An application was made to strike out and M responded by requesting leave to amend his original statement of claim outside the limitation period. The proceedings were struck out and M sought leave to appeal against the finding that the action against the bank alleging the inducement of his wrongful dismissal should be struck out.

Held, granting leave to appeal, that it was arguable that leave should be given on the claim that the bank had induced the wrongful dismissal as that claim was made in the original statement of claim. The judge should have appreciated that, in general, decisions in previous proceedings are binding only between the parties and persons who are privy thereto. On an application for leave, it would not be right to refuse if in so doing the law would be extended, as it might be in this case.

MANSON v. BARCLAYS BANK PLC [1999] C.P.L.R. 825, Henry, L.J., CA.

52. Contribution – third parties – nature of damage alleged against parties

[Civil Liabilities (Contribution) Act 1978 s.1 (1).]

R commissioned major building works at its hospital. After a number of disputes it entered into arbitration with the contractor, T. This was settled with a payment of £6.2 million to T. R had incurred over £2 million in fees and costs. It began the present action for recovery of sums lost in the arbitration against its professional advisors, including the architect, W. W sought a contribution from T under the Civil Liabilities

the hearing then K's solicitors would be requesting K's costs on the basis of S's unreasonable conduct.

Held, refusing costs for both claimant and defendant, that neither K's behaviour nor that of his representatives had been unreasonable and a defendant's conduct must go somewhat further to take it outside the norm of the usual tactics of negotiation. What had happened in this case was typical of cases of this type and usual in the course of negotiation, therefore S's claim for costs on the basis of K's unreasonable conduct was not allowed. Had K wished to protect his position in a fast track manner he would have made a payment into court which would have been valid had it been made 21 days or more before the hearing. This offer was not made 21 days before the hearing and therefore K was not entitled to his costs based on S's unreasonable conduct.

STRINGER v. KORDAN, August 31, 2000, Deputy District Judge Thomas, CC (Birmingham). [*Ex rel.* Andrew Leach, Lee Crowder, Solicitors, 39 Newhall Street, Birmingham].

447. **Costs – small claims – unreasonable conduct – entitlement to assessed costs in place of fixed costs**

[Civil Procedure Rules 1998 Part 27 r.27.14(2)(d).]

T, who had been involved in a minor road traffic accident with KD, appealed against an award of fixed costs in his favour, following his successful small claims action against KD, whose conduct had been found to be unreasonable. T had served a letter of claim and a witness statement, to which KD had failed to reply. T had issued proceedings in the small claims court and had obtained interlocutory judgment in the absence of a defence. The case was listed for hearing. Prior to the hearing, KD indicated a desire to settle and made an interim payment of damages. T requested the balance of the damages and provided details of his costs. T returned KD's subsequent cheque as unacceptable because it provided only for fixed costs. At the hearing, it was found that KD's general conduct had been unreasonable and judgement was awarded for T in the sum of £194.75 together with fixed costs. T appealed, contending that (1) the judge had erred in the exercise of his discretion in ordering the payment of fixed costs after making a finding of unreasonable conduct against KD; (2) pursuant to the Civil Procedure Rules 1998 Part 27 r.27.14(2)(d), T was entitled to have his costs schedule assessed by the summary procedure, and (3) the judge had failed to have proper regard to the unreasonable conduct of KD and their insurers and their failure to settle the claim prior to issue of proceedings.

Held, allowing the appeal, that it was unreasonable for KD to have waited until after the issue of proceedings before negotiating, especially as they had been in possession of witness statements. The pre action protocol for personal injury claims stated that such matters should be negotiated when reasonably clear. It followed that costs should be assessed, but it was disproportionate for T to claim costs of more than £2,000 in respect of a claim limited to under £500. As there was no guidance available on proportionality, the judge assessed T's costs on the basis of the amount of work carried out by him at the fault of KD. As a significant amount of the initial work would have been required in any event, costs payable by KT were assessed at £950.

TAYLOR v. KD COACH HIRE LTD, June 23, 2000, Judge Marshall Evans, CC (Liverpool). [*Ex rel.* Michael W Halsall Solicitors, 2 The Parks, Newton le Willows].

448. **Costs – small claims – unreasonable conduct – successive offers of settlement**

F's vehicle was stationary at an entrance to a car park behind M's vehicle, when M's vehicle rolled back and hit F's vehicle. F commenced proceedings against M, who entered a defence disputing liability and the matter was referred to the small claims track. M's solicitors initially offered to pay 50 per cent of F's claim. Directions were issued from the court, one of these being to serve statements of evidence. M's solicitors then made a Part 36 offer to settle 50 per cent of F's claim. This offer was rejected by F and M's solicitors then offered to pay 75 per cent of the claim. F

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KATHLEEN FRANCES GALE v SUPERDRUG STORES PLC (1996)

CA (Waite LJ, Millett LJ and Thorpe LJ) 25/4/96

CIVIL PROCEDURE

WITHDRAWING AN ADMISSION IN A CIVIL ACTION

Circumstances in which a defendant who has admitted liability in a personal injury action should be allowed to resile from that admission and withdraw it.

Defendants' appeal against an order striking out their defence in an action brought by the plaintiff for injury sustained in an accident which she suffered whilst in the defendants' employment when she was struck by a door of a delivery van while unloading it and was rendered permanently unfit for for more than sedentary employment. The accident occurred on 4/10/90. By a letter dated the 25/11/91 the defendants' insurers wrote stating they did not intend to dispute liability. However after the plaintiffs commenced the action the defendants admitted the accident but denied liability, blamed a third party and alleged contributory negligence. They then made a payment into court of £1,900. On 2/10/94 this defence was struck out as an abuse of process on the plaintiff's application supported by the letter of 25/11/91.

HELD: Thorpe LJ dissenting: Both sides agreed that the test mentioned by Ralph Gibson LJ that: "when a defendant has made an admission the court should relieve him of it and permit him to withdraw it or amend it if in all the circumstances it is just to do so having regard to the interests of both sides and to the extent which either side may be injured by the change in front" is the correct test but there was disagreement as to how it should be applied. The discretion is a general one in which all the circumstances have to be taken into account and a balance struck between the prejudice suffered by each side if the admission is allowed to be withdrawn or made to stand. The plaintiffs' explanation for the change was that they had received new advice to the effect that they should defend the proceedings. The judge had no evidence before him of any specific matter which rendered it more difficult for the plaintiff to prosecute a claim in liability than it would have been if the admission had never been made. The right order for the judge to have made would have been to have allowed the defendants to resile from the admission.

Appeal allowed.

Nicholas Vineall instructed by Lawrence Graham for the appellants. Michael Soole instructed by Blake Lapthorn, Fareham for the respondent.

LTL 27/4/96 : TLR 2/5/96 : (1996) 1 WLR 1089 : (1996) 3 All ER 468

Judgment Official

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IN THE NOTTINGHAM COUNTY COURT

No NG 704377

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The Law Courts
Canal Street
Nottingham

Thursday, 30th October 1997

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Before:

HIS HONOUR JUDGE MACDUFF QC

C

Between:

D

LINDSEY MARY RODGERS — Plaintiff

-v-

LINDA ELISABETH BUSH — Defendant

E

Counsel for the Plaintiff: MR. COX

Counsel for the Defendant: MISS CHAN

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JUDGMENT
(Approved)

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JUDGMENT
(Approved)

THE JUDGE: This is an appeal by the plaintiff against an order made by the District Judge. The facts are that the plaintiff was injured in a road traffic accident for which liability is admitted, that occurring on 31st October 1996. She was aged 46 at the date of the accident. She was run into from the rear and the defendant very realistically admits liability.

The plaintiff's claim is a modest one. It is limited to a mere £5,000. There is no claim for any continuing loss of earnings or any past loss of earnings and the plaintiff provided with the particulars of claim a medical report demonstrating a modest whiplash injury. The only claim is for pain and suffering. At some stage somebody will have to put a valuation on the plaintiff's claim assuming it is established that the plaintiff's symptoms, as is claimed by the plaintiff's orthopaedic surgeon, result from the injury. That valuation will be significantly lower than the £5,000 limit which is placed on this claim.

The defendant says, "Before we can settle this claim, fight this claim, or deal with this claim, we want to see all the plaintiff's medical records". If they were needed in this case, they would be needed in every case and, it seems to me, that, in very small claims such as this, this sort of application has got to stop.

This is a £5,000 limit claim, and what has happened is that the defendant makes an application to the District Judge saying, "Unless and until they provide the full plaintiff's medical records this action should be stayed". In fact, the

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plaintiff's solicitors made an offer to disclose the plaintiff's medical records to a doctor, instructed on behalf of the defendant. But that offer was not acceptable. In any event, in my judgment, it was unnecessary for the plaintiff to make even that offer. But the defendant's solicitors insisted that they personally should have access to the full medical records.

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The medical records are before me and I have perused them, and I have perused them with care before coming into court. I can assure everybody that there is nothing there at all which any medical adviser for the defendant would find of any use at all.

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There are, however, things which the plaintiff might find embarrassing to disclose and, it seems to me, the overriding principle is that medical records need only be disclosed as and if there is something of relevance in them. That there is such embarrassing material may explain, at least to some extent, the plaintiff's reluctance for them to be disclosed. But I make it cleaer that, even if there were no such material, I would not order disclosure in this case.

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These small cases must be run with a sense of proportion. Proportionality is one of the cornerstones of the Woolf Report. It is no longer permissible for lawyers to run up substantial costs, for no good reason, in cases where the final damages are likely to be so small. If this were a very substantial claim with serious injuries and serious financial consequences to the plaintiff which she was seeking to obtain from the defendant then the medical records should be disclosed to see, for example, whether there is some

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underlying condition which might have kept the plaintiff off work in any event. One can see on the authorities that in substantial claims, the norm will be that medical records should be disclosed but in small cases of this sort it seems to me overwhelmingly the case, in the spirit of the Woolf report, in the spirit of the way that minor litigation should be run, that records should not be disclosed unless there is good reason to do so.

The plaintiff's solicitor has assured the defendant here in correspondence and indeed on affidavit that there is nothing in the notes which would assist the defendant. To make matters clear, the ~~defendant~~ plaintiff's orthopaedic surgeon not only refers to the fact in his report that he has perused the records and that there is nothing of relevance but he has confirmed it in a letter of 9th October which is before this court and still this application is proceeded with by the defendant.

What is the result of that? The result is that there is delay in this case and the running up of costs, a case which I emphasise again is of a value less than £5,000. I am old enough to remember the day when this sort of case would be dealt with by the plaintiff and the defendant solicitors speaking on the telephone, the plaintiff's solicitor assuring the defendant's solicitor there was nothing in the medical records, and the defendant's solicitor proceeding on the basis of that undertaking.

In the context of a claim that is limited to £5,000 this sort of expensive application to the District Judge, involving an appeal then to me, involving delay and legal

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costs which ultimately will have to be paid by somebody is, in my judgment, entirely wrong.

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This appeal will, therefore, be allowed and the defendant has the choice of whether to instruct an orthopaedic surgeon or not. I should say this; I have considered the authorities put before me in a very helpful skeleton argument from Mr. Cox but the fact that a skeleton argument has to be involved at all in a case of this size, with all the work and expense involved in dealing with interlocutory skirmishes of this sort, which are wholly unnecessary and wholly unwarranted, only reinforces my view that this appeal should be allowed.

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MR. COX: Your Honour, in addition to allowing the appeal, will you dismiss the application which the plaintiff originally made to the District Judge on 28th July.

THE JUDGE: The application?

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MR. COX: The application where they were seeking a stay.

THE JUDGE: Yes, of course, that follows.

MR. COX: And may I ask that the defendant do pay the plaintiff's costs of this appeal and below?

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THE JUDGE: Yes.

MR. COX: Your Honour, may I ask for a certificate for counsel in respect of today?

MISS CHAN: Your Honour, if I can just make a point: today in fact actually was the first intimation we had ever had that the reason the plaintiff was unwilling to disclose her medical records was because of embarrassing personal reasons. Obviously if they had said so at an earlier point, it may have put a different complexion on it but as far as we were concerned it was simply the plaintiff being stubborn saying, "No, we won't disclose the medical records". They gave no reason whatsoever. I would ask your Honour to consider that on the question of costs and also in terms of your criticism of the conduct in pursuing this appeal.

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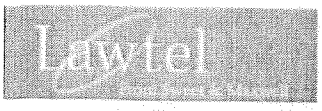
THE JUDGE: The costs of the appeal and below.



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AVENA BENNETT v (1) COMPASS GROUP UK (2) IRELAND LTD & BRITISH CERAMIC RESEARCH (2002)

[2002] EWCA Civ 642

CA (Pill LJ, Chadwick LJ, Clarke LJ) 18/4/2002

MEDICAL - PERSONAL INJURY - EVIDENCE - CIVIL PROCEDURE - CPR

MEDICAL RECORDS : REPORTS : RELEASE OF HOSPITAL RECORDS : GP RECORDS : LUMBROSACAL SPINE : ORDERS FOR DISCLOSURE: AUTHORITY TO DISCLOSE : THIRD PARTIES : CASE MANAGEMENT POWERS : JURISDICTION : EXERCISE OF DISCRETION : EXPERTS : INSPECTION : DOCUMENTS : RIGHT TO INSPECT : ACCIDENTS AT WORK : EMPLOYERS' LIABILITY : BREACH OF STATUTORY DUTY : NEGLIGENCE : DUTY OF CARE : S.2 OCCUPIERS LIABILITY ACT 1957 : CIVIL PROCEDURE RULES 1998 SI 1998/3132 : CPR PART 3 : CPR 3.1(2)(m) : CPR PART 31 : CPR 31.1 : CPR 31.3 : CPR 31.6 : CPR 31.8 : CPR 31.12 : CPR 31.14(e)

The court had jurisdiction to order a claimant to provide the defendant with a signed form of authority for release of her GP and hospital records direct to the defendant, although care was to be taken in the exercise of that jurisdiction.

Claimant's ('B') appeal from a decision of Judge Rubery on 12 October 2001, upholding an order of Deputy District Judge Collis that B provide the defendants with a signed form of authority for the release of her GP and hospital records directly to the defendants. B was employed by the first defendant as a catering assistant at the premises of the second defendant. In 1998 following two accidents at work, B claimed damages for personal injuries. Liability was denied by both defendants. B obtained medical evidence from an orthopaedic consultant ('M'). The defendants contested the report and sought to have B examined by a different expert. For that purpose, the defendants wanted B's GP and hospital records. Therefore, the defendants sent forms of authority to B to allow them to obtain the medical records themselves. B failed to respond to requests and reminders for the forms from the defendants. Subsequently, in August 2001, the defendants sought and obtained the order from the deputy district judge ('DJ'). However, B had indicated prior to the hearing that she would be prepared to supply the details requested. B subsequently supplied that information and was examined by the defendants' expert in October 2001. The issue before the court was whether: (i) DJ had jurisdiction to make the order in the form that he had; and/or (ii) if he had such jurisdiction, whether he had erred in the exercise of his discretion. The judge found that there was jurisdiction to make the order and that DJ had not erred in the exercise of his discretion.

HELD: (Pill LJ dissenting on the issue of the judge's exercise of discretion)
(1) M's report was an expert's report within the meaning of CPR 31.14(e). Therefore, the defendants were entitled to inspect the documents referred to in that report, namely B's GP and hospital records. (2) The defendants also had a right to inspect the records under CPR 31.3. The combined effect of CPR 31.3, CPR 31.6 and CPR 31.8 was to give the defendants a right to inspect the records. Further, the combined effect of CPR 31.3 and/or CPR 31.14 was to confer a right to inspect. (3) The effect of CPR 31.12(3) and CPR 3.1(2)(m) was to give the court power to order the relevant party, in this case B, to permit a defendant to inspect any document that the defendant had a right to inspect. Civil Procedure Rules 1998 SI 1998/3132 contemplated that ordinarily the appropriate order would be one ordering the party concerned to permit inspection of relevant documents. The wide terms of the Rules including CPR 3.1(2)(m) gave the court jurisdiction to make such an order. Dunn v British Coal Corporation (1993) PIQR 275, although decided on a different juridical basis, showed that there was nothing wrong in principle with an order in those terms. The appeal should therefore be dismissed on the jurisdiction point. (4) Where an order was made requiring a claimant to authorise a third party to disclose medical records to an opposing party in litigation, the order had to be carefully worded to ensure that the claimant's rights were not infringed. A defendant should only see such records in clearly defined circumstances and the precise nature of what was to be disclosed had to be delineated and made clear. (5) The order, when read in context, left no doubt that it referred to the limited purpose of being submitted to the defendants' experts in relation to the examination of B. It could not be said that DJ was plainly wrong in the exercise of his discretion. The appeal was accordingly dismissed on this issue. (6) Pill LJ stated that there was no justification for DJ's order. A claimant was entitled, except in exceptional circumstances, to have the organisation and management of disclosure in the hands of her solicitor. The Rules contained ample penalties for non-disclosure. It was wrong to put control of a claimant's disclosure in the hands of the defendant. An order that gave the defendant the right to go to a claimant's GP or hospital and have authority to arrange the disclosure of the claimant's medical records should only be allowed in very rare cases.

Appeal dismissed.

Mr Cliff instructed by Wooliscrofts (Stoke-on-Trent) for B. Matthew Brunning instructed by Beachcroft Wansboroughs (Birmingham) for the defendants.

LTL 18/4/2002 EXTEMPORE : (2002) ICR 1177

Judgment Official

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RICHARD THURBER CARLSON v KAREN TOWNSEND (2001)

[2001] EWCA Civ 511

CA (Simon Brown LJ, Brooke LJ, Mance LJ) 10/4/2001

PERSONAL INJURY - CIVIL PROCEDURE - CPR - EVIDENCE

PRE-ACTION PROTOCOL FOR PERSONAL INJURY CLAIMS : LEGAL PROFESSIONAL PRIVILEGE : EXPERTS : MEDICAL REPORTS : DISCLOSURE : PARTIES : JOINT INSTRUCTION : SELECTION : CARDS ON THE TABLE : SETTLEMENT : SANCTIONS : NOMINATED : SINGLE JOINT EXPERT : SPIRIT : INTENTION : FAST TRACK : MULTI TRACK : CASE MANAGEMENT : BEHAVIOUR : PRACTICE DIRECTION : (CIVIL PROCEDURE PRE-ACTION PROTOCOLS) (1999)

Where a medical expert was jointly selected pursuant to the Pre-Action Protocol for Personal Injury Claims, whilst the Protocol itself contemplated and encouraged the disclosure of that expert's report by the claimant, it neither specifically required disclosure in every case nor overrode the substantive law regarding privilege.

Second tier appeal raising an important point of practice about the disclosure of medical reports under the Pre-Action Protocol for Personal Injury Claims ('the Protocol'). The claimant ('C') brought a personal injury claim against the defendant ('T') in respect of a back injury which he alleged he had suffered as a result of caring for T's disabled adult son, in particular through repeatedly having to lift and move him. Prior to issuing proceedings, C proposed three consultant orthopaedic surgeons for the purposes of obtaining expert medical evidence. T objected to one of the experts only. Accordingly, C instructed one of the experts ('E') to whom T had not objected. T was of the view that E was instructed on a "joint instruction basis" and that she would be entitled to disclosure of the report once it was completed. In the event C disclosed a report prepared by a consultant anaesthetist and specialist in spinal pain relief and not the report prepared by E. T applied for disclosure of E's report. On 14 July 2000 District Judge Dickinson ruled that on a proper construction of the Protocol there was no distinction between "joint selection" and "joint instruction" of a medical expert and that E should be regarded as jointly instructed. Accordingly, both parties had an equal right to see the report. C appealed and on 21 September 2000 HH Judge Geddes concluded that C alone had instructed E and that there had been no waiver of the privilege that ordinarily attached to a medical report prepared for the purposes of litigation. Further, the judge found that the Protocol imposed no requirement for the expert to be jointly instructed and that nothing.in it required disclosure of a report merely because it was provided by a "mutually acceptable expert". T appealed and two central questions arose for decision: (i) whether C's refusal to disclose E's report constituted a failure to comply with the protocol; and (ii) assuming that it did, whether the court could properly order the report's disclosure.

HELD: (1) The use of the Protocol was not limited to fast track cases. The spirit, if not the letter of the Protocol, was equally appropriate to some higher value claims. In accordance with the sense of the civil justice reforms, the court expected to see the spirit of reasonable pre-action behaviour applied in all cases, regardless of the existence of a specific protocol. (2) There was no doubt that the Protocol plainly encouraged and contemplated the voluntary disclosure of a claimant's expert's report in the vast majority of cases, and certainly where the report had been obtained from an "agreed expert". Such a course plainly reflected the modern and highly desirable "cards on the table" approach and best facilitated settlement of claims, ideally before but failing that after the issue of proceedings. However, that was not to say that the Protocol specifically required disclosure in every case and still less that its effect was to override the substantive law with regard to privilege (see Causton v Mann Egerton (Johnsons) Ltd (1974) 1 All ER 453). (3) C's withholding of E's report did not constitute non-compliance with the Protocol although the instruction of the second consultant without first giving T an opportunity to object plainly did. However, T conceded that if C had gone on to instruct the other consultant orthopaedic surgeon to whom T had not objected after instructing E, C would not have had to disclose E's report. (4) Paragraphs 2.1 and 2.3 Practice Direction : (Civil Procedure Pre-action Protocols (1999) (Unreported, 11/3/99) provided the court with ample and various sanctions, in particular with regard to directions, costs and interest, for non-compliance with a Protocol. However, one sanction not available to the court in this case was to override C's privilege in E's report, although C still had to obtain the court's permission to call the consultant anaesthetist and T would almost certainly be permitted to call her own expert. (5) In truth this appeal could only have succeeded if T had established that, on a true understanding of the Protocol, her non-objection to a nominated expert of itself transformed E, once instructed, into a single joint expert whose report was accordingly available to both parties. That was not an argument that was acceptable either in principle or on the scheme or language of the Protocol.

Appeal dismissed.

Mr D O'Brien QC and Mr C Taylor instructed by Metcalfes for T. Mr J Corbett QC and Mr A Rai instructed by Broadhursts for C.

LTL 10/4/2001 : (2001) 3 All ER 663 : (2001) 62 BMLR 50 : (2001) 1 WLR 2415

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PRACTICE DIRECTION - PROTOCOLS

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GENERAL

1.1 This Practice Direction applies to the pre-action protocols which have been approved by the Head of Civil Justice.

1.2 The pre-action protocols which have been approved are set out in para 5.1. Other pre-action protocols may subsequently be added.

1.3 Pre-action protocols outline the steps parties should take to seek information from and to provide information to each other about a prospective legal claim.

1.4 The objectives of pre-action protocols are:

(1) to encourage the exchange of early and full information about the prospective legal claim,

(2) to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings,

(3) to support the efficient management of proceedings where litigation cannot be avoided.

COMPLIANCE WITH PROTOCOLS

2.1 The Civil Procedure Rules enable the court to take into account compliance or non-compliance with an applicable protocol when giving directions for the management of proceedings (see CPR rules 3.1(4) and (5) and 3.9(e)) and when making orders for costs (see CPR rule 44.3(a)).

2.2 The court will expect all parties to have complied in substance with the terms of an approved protocol.

2.3 If, in the opinion of the court, non-compliance has led to the commencement of proceedings which might otherwise not have needed to be commenced, or has led to costs being incurred in the proceedings that might otherwise not have been incurred, the orders the court may make include:

(1) an order that the party at fault pay the costs of the proceedings, or part of those costs, of the other party or parties;

(2) an order that the party at fault pay those costs on an indemnity basis;

(3) if the party at fault is a claimant in whose favour an order for the payment of damages or some specified sum is subsequently made, an order depriving that party of interest on such sum and in respect of such period as may be specified, and/or awarding interest at a lower rate than that at which interest would otherwise have been awarded;

(4) if the party at fault is a defendant and an order for the payment of damages or some specified sum is subsequently made in favour of the claimant, an order awarding interest on such sum and in respect of such period as may be specified at a higher rate, not exceeding 10% above base rate (cf. CPR rule 36.21(2), than the rate at which interest would otherwise have been awarded.

2.4 The court will exercise its powers under paragraphs 2.1 and 2.3 with the object of placing the innocent party in no worse a position than he would have been in if the protocol had been complied with.

3.1 A claimant may be found to have failed to comply with a protocol by, for example:

(a) not having provided sufficient information to the defendant, or

(b) not having followed the procedure required by the protocol to be followed (e.g. not having followed the medical expert instruction procedure set out in the Personal Injury Protocol).

3.2 A defendant may be found to have failed to comply with a protocol by, for example:

(a) not making a preliminary response to the letter of claim within the time fixed for that purpose by the relevant protocol (21 days under the Personal Injury Protocol, 14 days under the Clinical Negligence Protocol),

(b) not making a full response within the time fixed for that purpose by the relevant protocol (3 months of the letter of claim under the Clinical Negligence Protocol, 3 months from the date of acknowledgement of the letter of claim under the Personal Injury Protocol),

(c) not disclosing documents required to be disclosed by the relevant protocol.

PRE-ACTION BEHAVIOUR IN OTHER CASES

4 In cases not covered by any approved protocol, the court will expect the parties, in accordance with the overriding objective and the matters referred to in CPR 1.1(2)(a), (b) and (c), to act reasonably in exchanging information and documents relevant to the claim and generally in trying to avoid the necessity for the start of proceedings.

INFORMATION ABOUT FUNDING ARRANGEMENTS

4A.1 Where a person enters into a funding arrangement within the meaning of rule 43.2(1)(k) he should inform other potential parties to the claim that he has done so.

4A.2 Paragraph 4A.1 applies to all proceedings whether proceedings to which a pre-action protocol applies or otherwise.

(Rule 44.3B(1)(c) provides that a party may not recover any additional liability for any period in the proceedings during which he failed to provide information about a funding arrangement in accordance with a rule, practice direction or court order).

COMMENCEMENT

5.1 The following table sets out the protocols currently in force, the date they came into force and their date of publication:

Protocol	Coming into force	Publication
Personal Injury	26 April 1999	January 1999
Clinical Negligence	26 April 1999	January 1999
Construction and Engineering Disputes	2 October 2000	September 2000
Defamation	2 October 2000	September 2000
Professional Negligence	16 July 2001	May 2001
Judicial Review	4 March 2002	3 December 2001

5.2 The court will take compliance or non-compliance with a relevant protocol into account where the claim was started after the coming into force of that protocol but will not do so where the claim was started before that date.

5.3 Parties in a claim started after a relevant protocol came into force, who have, by work done before that date, achieved the objectives sought to be achieved by certain requirements of that protocol, need not take any further steps to comply with those requirements. They will not be considered to have not

complied with the protocol for the purposes of paragraphs 2 and 3.

5.4 Parties in a claim started after a relevant protocol came into force, who have not been able to comply with any particular requirements of that protocol because the period of time between the publication date and the date of coming into force was too short, will not be considered to have not complied with the protocol for the purposes of paragraphs 2 and 3.

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