

Welcome...

Welcome to the Autumn 2009 Dolmans Motoring News update. In this edition we focus on:-

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Parkes -v- Martin

'P' and 'M' were involved in a road traffic accident, in which they were both injured. 'P' issued proceedings first. The Parties formally agreed that the issue of liability would be determinative of 'P's' claim and of 'M's' intended claim, without the need for 'M' to issue separate proceedings or a counterclaim. At a Preliminary Issue Trial on Liability, the Judge held that 'P' should recover 35% of the value of his claim and that 'M' should recover 65% of the value of his claim. In making submissions on costs, 'M's' Counsel conceded that a counterclaim had not been made, but made reference to "*a claim by the wayside*". The Judge, exercising his discretion under CPR 44.3 (3), determined that 'P' should recover 35% of his costs, in line with the ruling on liability. 'P' appealed, contending that it was not open to the Judge to consider 'M's' notional cross claim as there was no real evidence of it before him, save for 'M's' fleeting reference to having "*a claim by the wayside*" and that, as liability had been established in 'P's' favour, albeit in a reduced fashion, he was entitled to his costs in full.

Held

The Court of Appeal dismissed 'P's' Appeal. 'M' had made it sufficiently clear to the Judge that although he did not have a formal counterclaim, he did have a claim "*standing by the wayside*", thus making the issue of liability relevant to the cross claim. It was clear that the Judge had proper regard to the claim and notional cross claim when making the Order for costs. 'P' had understood the argument advanced by 'M' in relation to the notional cross claim, but failed to make submissions to the contrary before the Judge, despite having ample opportunity to do so. On the facts of this case, the exercise of the Judge's discretion could not be criticised.

Andrew Brown & Others -v- Innovatorone plc & Others

The Claimants' Solicitors purported to serve Claim Forms on the 7th and 8th Defendants by sending them by fax to the Defendants' Solicitors shortly before the expiry of the validity period of the Claim Forms. The Defendants' Solicitors had confirmed that they were acting for the Defendants and had written to the Claimants' Solicitors on paper containing their fax numbers. However, neither the Defendants, nor their respective Solicitors, had been asked to state, nor had they stated, that they were instructed to accept service of the Claim Forms. The Defendants applied for declarations that the Claim Forms were not validly and effectively served.

The Claimants submitted that pursuant to CPR 6.3, and the Practice Direction thereto, a Claimant could serve a Claim Form by fax on a Defendant or his Solicitor if the Defendant or his Solicitor had indicated in writing to the Claimant that he was willing to accept service by fax and, in the case of

a Solicitor, a fax number set out on the Solicitor's writing paper would be sufficient indication. In the alternative, the Claimants applied for an Order that their intended service should stand as good service by an alternative method.



Held

The Judge held that the Claim Forms had not been validly or effectively served. CPR 6.3 deals with methods of service, but not on whom there may be valid service. The fact that a Defendant's Solicitor has a fax number on their writing paper does not mean that the Solicitor could be validly served. CPR 6.7 provides an exhaustive regime. CPR 6.7 provides that a Claim Form must be served on a Solicitor where the Defendant had given notice in writing that it might be so served, or where a Defendant's Solicitor had notified the Claimant in writing that the Solicitor was instructed by the Defendant to accept service on the Defendant's behalf. In this case, the Claimants had not been notified that the Defendants' Solicitors were instructed to accept service in accordance with CPR 6.7 and, accordingly, the Claim Forms had not been validly served.

Further, the Judge held that the circumstances of this case did not justify an Order under CPR 6.15 permitting service by an alternative method. CPR 6.15 expressly required that there be a good reason for the Court to exercise the power. The Court should adopt a rigorous approach to an Application by a Claimant for an indulgence. There was no evidence that suggested a reason why the Claimants should not have served the Claim Form in accordance with the rules. Further, although the Defendants suffered no prejudice as a result of the proceedings being served on their Solicitors, rather than upon them personally, absence of prejudice to a Defendant would not usually in itself be sufficient reason to make an Order.

Tim Knight -v- Axa Assurance

The Claimant brought a claim for personal injury against the Defendant's Insured as a result of a road traffic accident which occurred whilst the Claimant was on holiday in France and was knocked down by a motorist. The French driver was insured by a French Company and the contract of insurance was governed by French law. Liability was admitted and, therefore, the preliminary questions for the Court were whether damages should be assessed under English or French law and, similarly, whether pre-judgment interest should be allowed and quantified and, if so, under which law.

The joint expert evidence provided to the Court stated that in French law, there was a direct right of action against the Insurer in tort and in contract. The Claimant submitted in the first instance that liability should arise in tort. In relation to pre-judgment interest, the Claimant argued that this was a procedural matter, rather than a substantive matter, and, therefore, was subject to English law. In the alternative, the Claimant argued that if the Court did not accept that analysis, then provided that they were able to establish that there was a substantive right to pre-judgment interest under French law, which was evident from the expert's report, then quantification of the same was a matter of procedure to be governed by English law. By contrast, the Defendant Insurance Company stated that the cause of action should be seen as contractual and that the right to any interest should be governed by the law which took

precedence, which, in those circumstances, would be French law.

Held

The Court held that damages arose out of the Defendant's Insured's admitted wrongdoing, which was, therefore, tortious and not contractual. The contractual relationship between the Insured and the Insurer was not relevant to the claim. In relation to the pre-judgment interest, this was also considered to be an issue arising in tort and not a matter of procedure. On that basis, as it was evident from the expert evidence that there was a right to claim interest by way of damages in French law, there was a right to the pre-judgment interest, but its assessment would be procedural and, therefore, governed by English law. Both preliminary issues were determined in favour of the Claimant.



Malcolm William Green -v- Sunset & Vine Productions (1) British Automobile Racing Club (2) Goodwood Racing Co (3)

The Claimant was a driver of historic racing cars and had a substantial amount of experience of racing. On the day of the accident, the Claimant was driving in a trophy race at Goodwood Circuit, when he suffered an accident. The Claimant alleged that because of a kerb cam placed on the grass verge at the apex of the corner of the track, the Claimant's vehicle clipped the edge of the kerb cam, spun out of control, hit the tyre wall and threw the Claimant onto the track, where he was subsequently run over by his own car. It was the Claimant's case that having hit the kerb cam, he was powerless to avoid the crash.

The first, and initially, only Defendant, the production company, alleged that it was, in fact, the manner of the Claimant's driving that had caused the accident in that he had driven too fast and taken the wrong line around the corner. In the alternative, however, the First Defendant argued that if they were liable to the Claimant, that they should receive an indemnity/contribution from the Second Defendant who organised the race and the Third Defendant who owned the race track. Both the Second and Third Defendants agreed with the First Defendant's case that the cause of the accident was the Claimant's own driving.



Held

The Court found that on the evidence, the accident was, in fact, caused by the manner of the Claimant's own driving. The Court held that due to the speed at which he drove and the line he took through the corner, the Claimant's vehicle clipped the kerb, causing him to lose control of the vehicle. The Court further held that the kerb cam was not an important factor in the accident and that, in any event, in the Court's view, had the Claimant known about the kerb cam, he would not have refused to race. Therefore, none of the three Defendants were found liable for the Claimant's injuries.

Direct Line Insurance plc -v- Kenneth Ronald Fox

The Defendant (the Insured) claimed on his home insurance due to a house fire, for which the Insurer paid out in relation to alternative housing and contents. In respect of the building repairs, the Insured and the Insurer's Loss Adjusters agreed that the Insured would do the work himself with his own contractors. The Insured then entered into a written agreement to accept £46,524.00 in settlement of all buildings claims, subject to a term that the Insurer would pay an interim sum with the final payment of the balance being made upon receipt of a VAT invoice in respect of the repairs to the kitchen.

The interim payment was duly made in accordance with the terms of the agreement. The Insured then provided an invoice for the VAT element payable

to a particular company, but withdrew this claim when the Insurers checked with the Loss Adjusters that the work had, in fact, been completed. The Insured's explanation for doing so was that he had obtained a VAT invoice from the specified company in advance of the work being undertaken, but had then, in fact, undertaken the work himself. The Insured alleged that he had thought that it would not matter who, in fact, did the repairs, provided that the kitchen was restored to its former condition. The Insurers sought to recover the full sums paid out in respect of the entire claim relating to the fire. The Insurer argued that the Policy of Insurance was void, in accordance with the policy terms, as part of the claim being made was fraudulent/false. The Insurer also relied on the longstanding principle



that a person making a fraudulent claim under an Insurance Policy should not be permitted to recover anything at all, including any genuine parts of the claim. The Insured argued that he had not made a fraudulent claim, but, rather had relied on a misleading document to satisfy a term of the agreement which did not form part of the Policy itself.

Held

The Court agreed that the settlement agreement was separate from the Policy of Insurance and,

therefore, even where the settlement related to an insurance claim, it was not a contract of utmost faith and, therefore, the principle that fraud extinguishes even genuine parts of a claim would not apply. The Court agreed that the Insurer did not have to make the final payment in relation to the building repairs as a condition of the settlement agreement had not been met by the Insured to provide the relevant VAT invoices, but the Insured did not have to pay back the sums already received in respect of the whole claim. The Judge also indicated that the fact that the Insured had withdrawn the fraudulent document before payment had been made by the Insurer was irrelevant as it did not change the fact that there was an attempt at fraud/misrepresentation.

Whilst this case related to home insurance the same principles are applicable to motor insurance.

Alan Armsden (Executor of the Estate of Rachael Cheesewright, Deceased) -v- Kent Police

This was an appeal brought by the Police against a first instance decision.

Facts

Two Police Officers were travelling in a police vehicle, responding to an emergency, at speed along a main road with their blue flashing lights activated, but no sirens. Having traversed a bend, the Police driver could see a junction to the left up ahead, from which a car (driven by the deceased) then emerged, turning right towards the Police car. The two vehicles collided.

The driver of the Police vehicle stated in evidence that he had seen the deceased's car pull up to the junction and stop, and this was why he did not brake immediately upon seeing her. His colleague gave consistent evidence and also confirmed that he had seen the deceased look to her left, but not towards the Police car. Further, the Police evidence was that the Claimant pulled out in front of their vehicle when they were about 30m from her.

The Trial Judge rejected the Police evidence that they saw the deceased stop. However, he did find that she was stationary when they first saw her. The Trial Judge thought it improbable that the deceased stopped and pulled out without looking to her right and left and he rejected the Police evidence that she had pulled out when the Police car was some 30m away, on the basis that there would not have been time for her car to have reached the impact point. The Judge put the speed of the Police car (when coming round the bend) at 93 mph.

The Trial Judge held that the Police driver was negligent in that:

- He should have used his siren when approaching the bend, so as to give warning of its approach to any vehicles in the junction.
- The speed at which he was travelling, coming out of the bend, was excessive and put any driver waiting at the junction at significant risk

Appeal

The appeal was brought on the basis that the Judge had not been entitled to make the findings of negligence that he did. It was admitted that the decision whether to use a siren was a judgement call by the Police driver. It was submitted that the accident occurred in a rural area, late at night, when the traffic was light, and there was no evidence that the deceased would have heard the siren in any event. It was asserted that the Police Officer was entitled to assume that other road users would not ignore his approach.

It was held that the deceased should not have only looked right, and then left before moving off, but that she should have also looked right again, and maintained a look out to her right, to see whether any vehicle had come around the bend. As the Trial Judge had found that the Police Officer had seen the deceased stationary at the junction, it was held that had she been looking to her right before moving off, she would have seen the blue flashing lights and the Police car approaching, and would consequently have remained stationary, unless she had miscalculated the speed at which the Police car was travelling.

It was also held that the Police Officer was entitled to assume that a person at the junction would not emerge from the same without keeping a lookout to the right, and he was therefore right to assume that a person would not move out from the junction without seeing the Police car. However, the Appeal Judge agreed with the Trial Judge that the Police car was being driven at an excessive speed for the bend in question, given the presence of the junction only 100m away.

The decision not to use the siren was not in itself negligent but by not doing so it affected the speed at which it was safe for the Police car to travel. The siren would have given greater and earlier warning of the Police car's approach and because it was not being used it exacerbated the danger to the vehicles using the junction. The Trial Judge had been entitled to deduce that the deceased would have heard the sirens. It was held that the Police Officer was negligent in driving at such a high speed without using his siren and that this was a contributing factor to the accident.

The Appeal Judge, however, considered the deceased to be more responsible for the accident for having emerged into a major road without keeping a lookout to the right, despite the lack of visibility to her right due to the bend. In the circumstances liability was apportioned 60/40 in the favour of the Police.



B Wilkinson -v- K Fitzgerald and Churchill Insurance Company Limited

The Court was required to deal with a preliminary issue of whether or not an insurer, who had satisfied a judgment obtained against an uninsured driver, could then recover against the insured person who caused or permitted the use of the vehicle.

The assertion by the Claimant (namely the person from whom the insurer would look to recover its outlay) was that such a right of recovery was incompatible with the rights of a Road Traffic Act victim and the various EC and EU laws.

Facts

The Claimant's parents bought him a car which was insured through the Second Defendant, with the Claimant's mother as the policy holder, and the Claimant as a named driver. At the material time the Claimant was with a couple of friends, one of them being the First Defendant, who had been drinking. The Claimant had not been drinking, yet allowed the First Defendant to drive his vehicle, knowing that he was not insured to do so. The First Defendant lost control of the vehicle and a

collision occurred with a vehicle driving in the opposite direction. The Claimant suffered severe injuries. The First Defendant was subsequently convicted of dangerous driving, driving with excess alcohol and driving without insurance.

The Claimant sought compensation for his injuries. His insurers informed him that as he had caused or permitted the First Defendant to use his vehicle, they had a right of recovery against the him pursuant to Section 151(8) of the Road Traffic Act 1988. Any claim by the Claimant would therefore be pointless, as whilst the insurers would meet them same, they would then seek reimbursement from the Claimant under the aforementioned statutory provision.

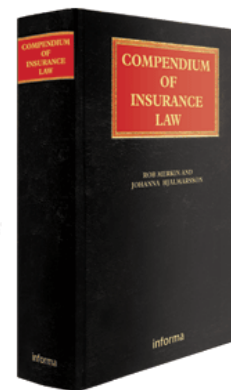
The insurer argued that the Claimant's claim should fail for circuity of action. The Claimant argued that this was wrong as the same would contravene the provisions of certain EC directives, particularly, 84/5/EEC, which dealt with the approximation of the laws of the member states relating to insurance against civil liability in respect of the use of motor vehicles.

The insurers submitted that Section 151(8) is not incompatible with the European directives and that the Claimant's status as 'victim' is completely irrelevant to the right of the insurers to recover under Section 151(8). They submitted that there is

a fundamental difference between an injured person's right to compensation from insurers, which is a benefit of the insured, and the insurers right of recovery from either the tortfeasor or persons insured under the policy, which is a right of the insurers. Finally, it was argued that as the Claimant was the instigator of the First Defendant using the vehicle, when uninsured, there was nothing unconscionable in the insurer being able to recover its loss from him.

Held

The Claimant's case was upheld and the Court found that to use Section 151(8) as a right of recovery against a Claimant victim was incompatible with the second and third motor insurance directives in that it deprived a victim of a road accident of his right to compensation.



Farrell & Anor -v- Direct Accident Management Services & Anr

Direct Accident Management Services Ltd (DAMS) appealed against a third party costs order made against it in favour of a Local Authority.

Facts

Mr Farrell and Mr Short had been travelling in an Audi car, which was struck from behind by a refuse lorry owned by Birmingham City Council and driven by one of its employees.

That same day, Mr Farrell contacted DAMS and arranged for a vehicle to be provided on credit hire. The car was delivered that same day, and Mr Farrell signed a hire agreement, plus an authority to the relevant insurers to pay any money recoverable by him to his solicitors.

A week later an After the Event insurance policy was brought into effect. The Audi was assessed as a 'write off' (with a value of £10,900) and a claim

instigated against the Council. The claim was brought with the benefit of a Conditional Fee Agreement, with the funder being DAMS.



The Council paid £9,300 in relation to the Audi motor car and were in the process of dealing with the claim brought in respect of hire charges, repairs and miscellaneous expenses. Following investigations, the Council amended its Defence to allege fraud on the part of both Mr Farrell and Mr Short. This caused both men to discontinue their claim against the Council on the morning of the Trial. The Council's counterclaim continued. It was held that the Council had paid the £9,300 as a result of fraudulent misrepresentations. The Court ordered Mr Farrell and Mr Short to pay the Council's costs on the indemnity basis (to be assessed) with an initial interim payment of £10,000. This was not paid and the Council therefore added DAMS as an additional Defendant so that it could apply for an order, under Section 51 of the Supreme Court Act, that DAMS meet the costs liability.

The Judge hearing the Application for the third party costs order found that as DAMS had controlled the litigation, and was "*in a real sense the instigator of the litigation*", it should pay 80% of the Council's costs of defending the claim.

DAMS appealed this decision arguing that it neither funded nor controlled the litigation and should therefore either; not have been ordered to pay any proportion of the costs; or the extent of their liability in respect of the costs should match the extent to which it was commercially interested in the litigation, which was either nil or, at most, 10%.

Held

It was held that whilst DAMS was not a participant in the fraud, the document signed by Mr Farrell

and Mr Short demonstrated that the initiation and prosecution of the claim was a direct consequence of the hire of the vehicle by DAMS to Mr Farrell. The Judge was therefore justified in concluding that DAMS was in a real sense the instigator of the litigation. Secondly, it was held that the claim was brought at the behest of DAMS, as provided by the hire agreement, and the fact that DAMS left the solicitors to "*get on with the claim*" was consistent with it being in control of the litigation. The Collective Conditional Fee Agreement it was held, set out that DAMS had been appointed to manage and pursue the claims on behalf of Mr Farrell and Mr Short and that therefore, in the absence of any evidence to the contrary, the natural inference was that the proceedings were pursued, and later discontinued, with the knowledge and approval of DAMS.

Finally, whilst it was accepted that DAMS did not pay the solicitors from time to time as the case proceeded, it was held that they did not need to because of the Conditional Fee Agreements in place and the fact that they were plainly instrumental in Mr Farrell and Mr Short discontinuing. The Court took the view that if DAMS thought that the After the Event insurers and/or the solicitors should be contributing then it was not up to the Council to bring these parties into the proceedings. This was something that DAMS should have done. In terms of the contribution of 80% of costs, it was held that the Judge might have awarded 100% and that the actual award made was therefore well within the range of the permissible exercise of his discretion.

The Appeal was accordingly dismissed.

Taleb -v- Trina Coaches Ltd



Facts

The Claimant cyclist alleged that she sustained injury in a road traffic accident caused by the negligence of the Defendant's driver.

The Claimant had been cycling along a main road, 1-2m away from the kerb line. The coach driver overtook the Claimant but, in the Claimant's submission, failed to do so at an adequate distance and consequently clipped her handle bars and caused her to fall and sustain injury.

The Defendant argued that its driver had given the Claimant sufficient clearance and that she fell from her bicycle for some other reason. No suggestions as to what that reason might be were provided by the Defendant.

The Trial Judge had the benefit of CCTV footage, which showed the path of the Defendant's vehicle and the Claimant before and after the collision, but not at the time that the accident occurred. There were no eye witnesses to the accident but the Claimant's daughter gave hearsay evidence as to what had occurred.

The Judge disregarded the Defendant's driver's evidence as being inconsistent and inaccurate, and also disregarded the Claimant's evidence due to inconsistencies with her daughter's hearsay evidence. The hearsay evidence was that the Claimant had been cycling in a bus lane, when one did not in fact exist at the material location. The Judge's decision was therefore based solely on the CCTV footage.

Despite accepting that the Claimant had been cycling between 1-2m away from the kerb, and that the nearside of the coach was approximately 1m away from the kerb prior to the accident, the Judge held that the Claimant had fallen for some other reason, and not due to the coach clipping her handlebars.

The Claimant appealed on the basis that the Judge had failed to provide adequate reasoning when disregarding her evidence.

It was held on appeal that it was the daughter's hearsay evidence that had been incorrect in terms of the presence of a bus lane. The fact was, that the Claimant had been cycling in a bus lane prior to the collision, and it was only at the precise point of the accident that there was none. As the error had occurred in the Claimant's daughter's hearsay evidence it was not even clear as to whether or not the evidence was the Claimant's mistake or the daughter's mistake. Regardless, the Court held that this error did not warrant the rejection of her evidence in its entirety. It was held that rejecting the Claimant's evidence for this minor error, given that the rest of her evidence had been consistent, was an inadequate reason. If there were other reasons for the rejection of the Claimant's evidence, then the Trial Judge had failed to provide the same.

The Judge was wrong to base his decision entirely on the CCTV footage as it did not show the actual accident or its cause, only footage prior to the accident and afterwards.



Prior to the accident the footage showed that the nearside of the coach was 1m outside of the red lines. Having accepted that the Claimant was cycling 1-2m outside of the double red lines, the coach was on a collision course with the Claimant. It was held that the footage was an impossible gauge as to the location of the coach at the time of the accident and the Claimant's evidence was vital in reaching a decision in this respect, due to the fact that it has been predominantly consistent.

Whilst the Claimant may have been wrong, the Judge should have evaluated her evidence in connection with the footage and then either rejected or accepted it as necessary. It was wrong, however, for the Judge to have disregarded the Claimant's evidence, failed to provide an adequate reason for doing so and based his decision purely on the footage alone.

The Appeal was consequently allowed and a Re-Trial ordered.

Articles

Proposed Changes to the Fatal Accidents Act 1976 - The Government's Response to the Consultation Paper 'The Law on Damages'

The Ministry of Justice has published its response to the Consultation Paper 'The Law on Damages'. The intended changes confirmed in the response include changes to the Fatal Accidents Act 1976, which could significantly increase the amount of damages payable in fatal accident cases.

Background

On 4 May 2007, the Government produced a Consultation Paper relating to specific areas of the law on damages, comprising issues highlighted in a series of Law Commission Reports. The time for responses to the consultation closed on 27 July 2007. The Government received 103 responses and has taken a considerable amount of time to produce its response, dated 1 July 2009, outlining the proposals which it intends to take forward.

This article summarises the main changes proposed for the Fatal Accidents Act 1976.

Dependency Claims – Eligible Claimants

The 1976 Act sets out a list of relatives of the deceased who are entitled to claim. People who fall outside these categories are currently unable to claim. The categories currently entitled to claim comprise spouses, former spouses, opposite sex cohabitants who have lived together for at least 2 years immediately before the death, parents or other ascendants (including persons treated by the deceased as parents), children or other descendants (including children who were treated as a child of the family in any marriage to which the deceased was a party), and brothers, sisters, uncles and aunts. The Civil Partnership Act 2004 amended the 1976 Act to give civil partners the same rights as spouses and to allow other same sex cohabitants to claim on the same basis as opposite sex cohabitants.

The Law Commission took the view that this exhaustive list denied a right of action to a number of classes of people who merited being able to claim. The Government agrees and intends to add a residual category to the statutory list of those

entitled to claim for financial loss comprising “any person who was being wholly or partly maintained by the deceased immediately before the death”.



Re-Marriage and Financially Supportive Co-Habitation

Section 3 (3) of the 1976 Act provides that the fact or prospect of a widow's re-marriage shall not be taken into account in the assessment of damages. This provision was originally introduced because of concerns that enquiries into re-marriage prospects could be distasteful and distressing.

The Law Commission highlighted that this constituted an exception to the general rule that damages under the 1976 Act should be assessed so as to compensate as closely as possible for the loss suffered by the Claimant as a result of the wrongful death. If a widow came to be in a financially supportive relationship with another person, the death of her spouse would not have the same ongoing financial impact as it would had she remained single.

However, the Government was concerned that enquiries into the future prospects of re-marriage/entry into a civil partnership or financially supportive co-habitation would involve intrusive and potentially distasteful investigations at what is already a deeply distressing time. Further, any such enquiry would also be speculative in nature and the conclusions reached could easily be wrong.

Following consideration of the responses to the questions it posed, the Government has confirmed that it considers Courts should be able to take into account *“the fact, but not the prospects, of re-marriage or entry into a new civil partnership”* and *“the fact [of a financially supportive co-habitation], but not the prospects of any such new arrangement, when the co-habitation has been of at least 2 years duration”*.

In relation to claims on behalf of eligible children, the Government proposes that the fact of re-marriage, entry into a civil partnership or entry into a financially supportive co-habitation should only be taken into account as far as the Judge thinks it appropriate to do so and should not be determinative.

Divorce

The prospect of divorce is currently considered to be a relevant factor and is taken into account when assessing damages. The Government’s response proposes that the Court should only take into account the prospect of divorce, dissolution or breakdown in the relationship between the deceased and his or her spouse or civil partner in three situations; where one has petitioned for divorce, judicial separation or nullity; where one has begun the procedure for dissolution of the civil partnership; or where the couple are no longer living together at the time of the death.



Bereavement Damages

The Government considers that the award of bereavement damages should continue to be available. At present, bereavement damages can only be recovered by the wife or husband of the deceased, a civil partner of the deceased, or where the deceased was a minor who had never married, his parents, (where he was legitimate), or his mother, (where he was illegitimate).

The Government is satisfied that a statutory list of those entitled to claim remains appropriate as it avoids the need for Claimants to prove their grief or the quality of the relationship that they had with the deceased, which would be undesirable, disproportionately costly compared with the level of damages and likely to prolong litigation.

The Government proposes to extend the statutory list of Claimants to include:-

- Unmarried fathers with parental responsibility for the loss of a child under 18;
- Children of the deceased (including adoptive children) who are under 18;
- Co-habitants of at least 2 years duration immediately prior to the accident for the death of a partner.

The current amount of the bereavement award for causes of action arising on or after 1 January 2008 is £11,800.00. This will continue to be the award for most categories of Claimants. The award for the parents of an unmarried child under 18 will continue to be divided equally between them.

In respect of children of the deceased under 18, the award will be £5,900.00 to each eligible child.

The Government intends to increase the bereavement award every 3 years in line with inflation.

Contributory negligence of the deceased will continue to reduce the bereavement award. The Government consulted on whether contributory negligence on the part of the Claimant should reduce the award of bereavement damages. It appears that the majority of responses received were in favour of this, although a number indicated that any legislation should exclude contributory negligence on the part of children under 14, on the



basis that it was submitted that this would reflect current case law. The Government has stated that it is minded to include a general provision in legislation, which the Courts could then apply as appropriate in individual cases, but will give further consideration to this point in drafting the legislation.

Conclusion

The proposed changes will inevitably result in increased claims and greater outlay for Insurers.

Surveillance Evidence - A Question of Ethics and Economics

Surveillance evidence can be a useful tool in the fight against fraudulent and/or exaggerated personal injury claims. However, ensuring that you stay within the boundaries of what is ethical and what is professional can be difficult when entrusting the work to an unknown third party. This is particularly difficult in the case of surveillance evidence as, at present, Private Investigators and Surveillance Operatives are unregulated. Whilst this is shortly to change with the instigation of new regulations requiring Private Investigators to be licensed, it can still be difficult to know who is trustworthy in an area of such sensitivity. The wrong choice could result in serious professional embarrassment for those instructing Surveillance Operatives.

Obtaining Surveillance Evidence

The manner in which surveillance evidence is obtained should be ethical and not breach any of the relevant legislation such as the Data Protection Act and the Protection from Harassment Act. As a first port of call in identifying the right person, social networking sites, such as Facebook and Twitter, can be very useful resources and as the information on these sites is already in the public domain, there is no ethical dilemma in obtaining information in this way. However, when instructing Surveillance Operatives, it is important to ensure that no evidence is obtained in a way that infringes data protection or is in any other way unethical or illegal. If any such conduct is identified when the surveillance evidence is relied upon, this will cause professional embarrassment and will, of course, impact upon the admissibility of any evidence gathered.

The integrity of the end product is equally as important as how it is obtained. The purpose of surveillance evidence is to present an unbiased factual picture of a person's activities. In personal

The Government estimates that the maximum impact on the motor insurance industry of extending the categories of Claimant in bereavement damages cases alone is £2,842,000.00.

The proposed changes will be incorporated into the Civil Law Reform Bill, which is stated to be due for publication later this year.

injury claims, the result that Defendants are looking for is confirmation of a suspicion that a Claimant is capable of more than the pleaded claim suggests. It may, therefore, be tempting for the Surveillance Operatives to edit any unfavourable material to provide those instructing them with the result that they are looking for. As above, if there is any suspicion of editing in this way, the integrity of the entirety of the surveillance evidence will be under question and also the integrity of those relying upon the surveillance evidence.

Responsible use of Surveillance Evidence

As well as ensuring that any video evidence is impartial and purely factual, whilst it is often necessary to obtain written Statements from Surveillance Operatives, the purpose of such Statements is simply to set out what the Operatives did and when. Their Statements should be purely factual to maintain a stance of impartiality in relation to the whole of the evidence. It is not appropriate for Surveillance Operatives to comment upon what they think about a Claimant's capabilities as this is beyond their sphere of expertise.



Invariably, in personal injury claims it will be appropriate to provide the surveillance evidence to any Medical Expert and seek their professional opinion upon the Claimant's capability. However, in order to ensure that no criticism can be made of the Expert or that his or her evidence can be suggested to be biased, it is good practice to allow an Expert to examine a Claimant first, form his or her own opinion based purely on the examination and the medical records and, thereafter, prepare a first report. Only then should surveillance evidence be provided to the Expert and further opinion sought in light of that evidence.

Whether to use Surveillance Evidence

Obtaining surveillance evidence is, of course, a costly exercise and may often yield no useful results. As indicated above, the use of information in the public domain, such as social networking sites for preliminary investigations, is inexpensive and may assist in deciding whether or not to go ahead with surveillance evidence.

A number of recent cases have shown how useful surveillance evidence can be in defending fraudulent and/or exaggerated claims, but these cases also demonstrate the limitations of such evidence. In both *Darg -v- Commissioner of Police for the Metropolis (1)* and *Venson Public Sector Limited (2)* and *Kirk -v- Walton*, the Claimants were found to have exaggerated their claims for personal injury. Both of the Claimants claimed significant disability arising out of the index accidents and both were shown to be exaggerating those symptoms, when surveillance evidence showed them partaking in activities which they

claimed to be unable to do. The effect in both cases was to reduce the damages sought, but not to extinguish the genuine parts of the claim. It is, therefore, clear that whilst surveillance evidence has its place in assisting to reduce quantum, it is unlikely to extinguish an entire claim where that claim has been found to be genuine in part.

Given the costs implications of obtaining surveillance evidence and, in some circumstances, the limited benefit, it will always be necessary to consider the economics of such a decision.



The Lost Limitation Defence

One of the first checks to be made by a defendant once proceedings have been issued and served, is whether such proceedings have been issued within the primary limitation period. If a claimant has failed to issue his claim in time, the defendant can plead reliance upon the Limitation Act 1980, in the hope that the claimant will be debarred from pursuing his claim. Unfortunately, in most cases the claimant applies to the court, asking that it exercise its discretion under s. 33 of the Act and allows the claim to be pursued.

In exercising this discretion, the court must have regard to all the circumstances of the case, and in particular to; the length of, and the reasons for, the delay on the part of the claimant, the extent to which, having regard to the delay, the evidence

adduced or likely to be adduced by the claimant or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by s. 11. Regard also must be had to the extent to which the claimant has acted promptly and reasonably once he realised that he had a cause of action.

Historically, the courts tended to accept that they had to take into account the prejudice to the defendant caused purely by the loss of the limitation defence itself. Unfortunately, the situation has now become a lot more difficult for defendants.

In the conjoined Court of Appeal cases of *Cain v Francis / McKay v Hamlani* [2009], it was held that

'The mere fact of losing a limitation defence is not a relevant prejudice which the Court has to consider under section 33'.

The appeals were brought following two inconsistent decisions at first instance in respect of the application of s. 33. In both cases liability had been admitted pre-action, but the proceedings were issued out of time, due to an error on the part of the Claimants' solicitors. In *Cain*, the delay in issuing was one day, and in *McKay*, it was just under a year. Interestingly, the Court in *Cain* refused to disapply the limitation period, whereas the discretion was exercised in the Claimant's favour in *McKay*.

The two first instance judges had reached polar conclusions in cases with very similar facts (both were RTA cases in which liability had been admitted). The opposite decisions were reached due to differing views upon the effect on the defendant of losing the limitation defence.

The Court of Appeal held that there needed to be a consistent approach adopted by the Courts in such cases and that the new test should be whether or not it is *"fair and just in all of the circumstances for the defendant to meet the claim on the merits, notwithstanding the delay in commencement"*.

It seems that the Courts must still take into account *'all of the circumstances in the case'* but that the main focus now is whether it will still be

possible to have a fair trial if discretion is exercised in the claimant's favour. Consequently, in order to defeat an application under s. 33 of the Act, it is vital that a defendant is able to show evidential prejudice caused by the delay. Unfortunately, this is an impossible task for most defendants in RTA cases, where liability has been admitted.

As readers will appreciate, reading s. 33 literally suggests that the fact a defendant has to meet a claim is a prejudice in itself. The recent Court of Appeal comment however, was that Parliament could not have intended the financial prejudice to the defendant to be taken into account, as in reality, once the defendant had been given a fair chance to defend his claim, if found guilty, he would have to pay damages in any event.

If this Court of Appeal authority is followed, the 'windfall' limitation defence is unlikely to benefit defendants any longer, provided of course the claimant takes appropriate action in response to the same.

There is some good news for defendants in so far as the new approach should apply equally to Pt 20 claims, however, they already have the benefit of s. 35 of the Act, which provides that a counter claim (that constitutes a new claim) is deemed to have commenced on the same day as the original action, even if it is not brought until after expiry of the primary limitation period, without the need for the Court to have regard to s. 33.

Ministry of Justice Releases Policy Report for New RTC Claim Process

In light of the significance of the RTC claims process reforms, they have formed a regular feature in previous publications, having first been set out in the Autumn 2008 edition. This month, the Ministry of Justice (MOJ) has produced a further report reflecting policy agreed by the Minister for Justice, which will form the substance of the new rules that are currently being drafted by the Civil Procedure Rule Committee, with the aim for the new process to be implemented from 6 April 2010.

The report sets out the new process in far more detail than has previously been the case and, crucially, details the fees applicable, which had, until most recently, been the subject of hard fought mediation.

The new claims process will apply to all RTC's post 6 April 2010 where the value of the claim is



between £1,000.00 and £10,000.00, subject to the same containing an element of personal injury in excess of £1,000.00 (i.e. not being caught by the small claims process).

In valuing a claim for the purposes of establishing whether or not it falls within the new claims process, both General Damages and Special

Damages are taken into account, however, damage to vehicles and hire costs are excluded (albeit that they can be included within the claim but not for the purposes of calculating the value of the claim to establish whether or not it falls within the new claims process). Any disbursements incurred as part of the claims process, e.g. medical reports, engineers' reports, etc, are excluded, however, the value of a claim will include any deduction for seatbelt contributory negligence.

There are a number of specific situations that are excluded from the claims process, being:-

MIB untraced drivers' agreement cases.

Claims where the Claimant or Defendant is deceased and/or a protected party.

Claims where the Claimant is bankrupt.

A provision has been made for claims which subsequently fall within the criteria and/or cease to fall within the criteria.

It is estimated that approximately 80% of all motor personal injury claims will fall within the new process.

Readers will be aware that the new process essentially consists of three stages, being:-

- Stage 1 – notification of a claim via a claim notification form (CNF).
- Stage 2 – applies where liability has been admitted and includes the Claimant obtaining medical evidence and produces a settlement pack, including an offer to settle and evidence for the Special Damages claimed.
- Stage 3 – applies where the parties have been unable to agree a settlement, such that the Court needs to adjudicate on the same.

All forms used in the process, including the CNF and settlement pack, are to be submitted electronically and in accordance with the templates annexed to the policy report.

Whilst all claims falling within the relevant criteria must be dealt with under the new process, claims can exit the process at various stages, including where liability cannot be agreed at stage 1, or where the 15 day time limit for considering and responding to the Claimant's settlement pack is not adhered to. In circumstances where a claim exits the process, it will be dealt with under the

existing rules, both with the progression of the claim and in respect of costs.



The Minister has now confirmed the fixed costs agreed at mediation between Claimant and Insurer Representatives as:-

- Stage 1 - £400.00
- Stage 2 - £800.00
- Stage 3 - £250.00 for a report hearing or £500.00 for an oral hearing.

The comparison of these new fixed costs against the existing predictive costs scheme should produce costs savings of between 33% and 53%, depending on the progression of the case.

The new scheme envisages that, in most cases, it will only be necessary for there to be one medical report, although, in certain circumstances, a second medical report can be obtained (i.e. – from another discipline). Any additional medical evidence should only be obtained on the recommendation of the existing Medical Experts.

There are also fixed costs for Infant Settlement Hearings, the same being set at £500.00. This is in addition to the fixed recoverable costs payable at stage 2 (£800.00). If a Judge does not approve the settlement, the claim will exit the process, however, the £500.00 for the Approval Hearing and the fixed costs payable under stage 2 of the process will still be payable. We will have to see if this process is abused with a view to maximising costs.

Success fees have survived the reform and are payable at 12.5% for stages 1 and 2 and on Infant Approval cases. The stage 3 success fee is 100% where the claim is concluded at trial, reducing to 12.5% where the claim concludes in stage 3 prior to trial.

All payments are due within 10 business days of the end of each stage.

Special provisions are in place in relation to seatbelt contributory negligence. Where contributory negligence is alleged in respect of issues other than a failure to wear a seatbelt, the claim will leave the process. In terms of seatbelt contributory negligence, it is envisaged that the Claimant's Solicitors will establish whether or not a seatbelt was being worn and fill out the relevant section of the CNF. If liability is accepted, subject to the seatbelt contributory negligence, then the medical report obtained under stage 2 should provide the parties with enough information to calculate the amount of deduction according to existing case law principles. Any settlement pack should include the suggested percentage reduction, however, where the same is not agreed and a dispute ensues, that issue will be resolved at a stage 3 Hearing, unless the dispute is one of fact which requires evidence from the Defendant and possibly a Medical Expert, in which case the claim will exit the process.

Claimants could be precluded from bringing claims for vehicular damage and hire charges if not

brought within the main proceedings and, as such, the process envisages that the same will be included within the claim, but will not count towards its value for determining whether or not the claim falls within the process. It is envisaged that all relevant details will be provided at stage 1, with the parties seeking to negotiate agreement of those issues during stage 2, but if not, the matter will fall to be included at a stage 3 hearing. Such disputes will include hire rates and periods of credit hire etc. However, if the disputes are more significant, such as challenges to the validity of a hire agreement or a technical argument not directly related to quantum, then the claim would leave the process.

The MOJ report also sets out provisions for Claimants in person and the steps to be taken when Claimants' Solicitors are instructed shortly prior to limitation.

The foregoing is a summary of the new claims process. Readers are encouraged to read the full MOJ report, which is available at:-

<http://www.justice.gov.uk/about/docs/personal-injury-claims-road.pdf>



If there are any topics you would like us to examine, or if you would like to comment on anything in this update, please e-mail the editor:

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