12
King's Bench Walk

Seizing the Initiative for Insurers
28th March 2007

12 seminars

12 King's Bench Walk
Seminar Programme 2007

"Seizing the Initiative for Insurers!"

Aims and Learning Outcomes

Keeping claimants under control!
This seminar will give you useful updates and guidance in respect of the following:

- Part 36 - the latest thinking including part 44.3 percentage orders on costs;
- Cost capping;
- The excessive ATE premium;
- Summary judgment/strike out on specific issues – tactics;
- Withdrawal of admissions.

How to handle stress at work
Andrew Hogarth QC, who appeared for the employers in the major stress at work cases of Hatton v Sutherland, Hartman v Southend HA, Barber v Somerset CC and Sayers v Cambridgeshire CC will examine the new ways in which claimants are putting their stress at work cases in an attempt to circumvent the effect of those decisions. Topics covered will include how to deal with claims under the Protection from Harassment Act 1997, claims in which the Working Time Regulations 1998 are relied upon, claims put as breach of statutory duty under the Management of Health and Safety at Work Regulations and claims put as breaches of contract.

Keeping up to speed with credit hire
Cases involving credit hire require timely and effective action from Defendant insurers to limit exposure to often burgeoning hire charges. The purpose of this talk is to enable those dealing with these cases to understand the law, to identify the likely issues and to act effectively to protect their interests. Credit hire law somewhat uniquely extends from its own idiosyncratic set of statutes and regulations, through industry practices to fundamental principles of common law negligence. Without this understanding Defendant insurers go to court at their peril.

Speakers

Andrew Hogarth QC, Head of Chambers, 12 King's Bench Walk
Henry Charles, Barrister, 12 King's Bench Walk
Kweku Aggrey-Orleans, Barrister, 12 King's Bench Walk

Date

Wednesday 28 March 2007, 6.00 – 7.30pm.

Venue

Bristol Marriott Hotel City Centre,
Lower Castle Street,
Bristol BS1 3AD

CPD

1.5 points. Reference: AVV/CHRW

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Programme

Seizing the Initiative for Insurers

Wednesday 28 March 2007

Bristol Marriott Hotel City Centre,
Lower Castle Street,
Bristol BS1 3AD

5.30 pm	**Registration** Tea & coffee
6.00 pm	**Introduction by chair** Andrew Hogarth QC
6.00 pm	**Henry Charles** Keeping claimants under control!
6.30 pm	**Andrew Hogarth QC** How to handle stress at work
7.00 pm	**Kweku Aggrey-Orleans** Keeping up to speed with credit hire
7.30 pm	**Drinks reception and canapés**
8.00 pm	**Close**

To book your place, please complete the attached registration form and return to Amy Hammick, Practice Manager at the address below or by email to hammick@12kbw.co.uk

This is a free event!

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12KBW Seminar: Seizing the Initiative for Insurers
Wednesday 28th March 2007

Keeping claimants under control!

Henry Charles

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KEEPING CLAIMANTS UNDER CONTROL

Henry F. Charles
28th March 2007

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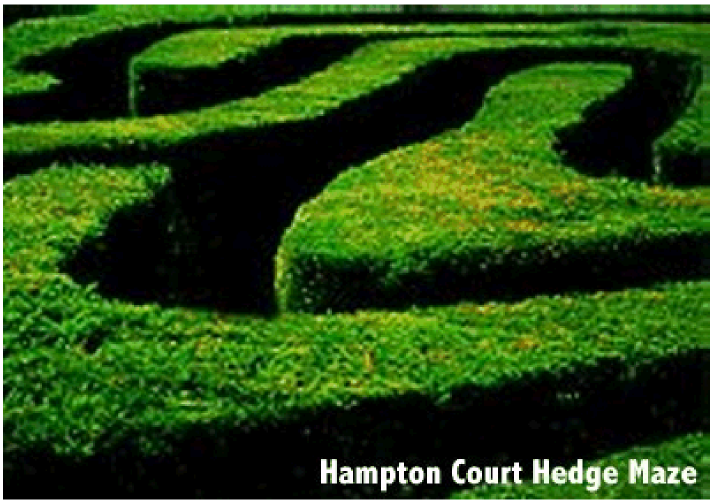
Part 36 and the Blind Alley



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Withdrawal of Admissions

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Withdrawal of Admissions

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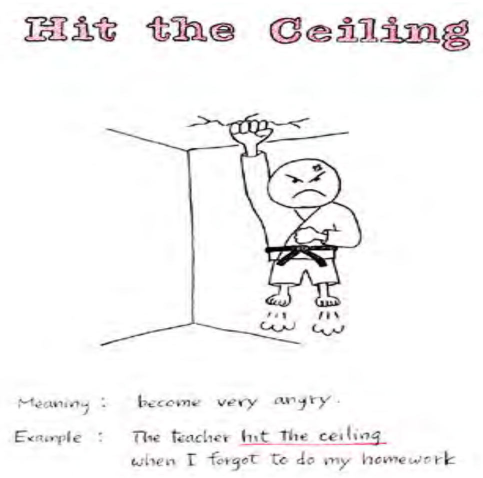
Cost Capping



Costs Capping

- ❑ Ordering Costs Estimates
- ❑ Limitations of costs estimates
- ❑ Group litigation
- ❑ Individual cases
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KEEPING CLAIMS UNDER CONTROL

Some Pointers

Henry Charles

A. Part 36 Offers, Part 44.3

1. Hitherto inadequate use has been made of Part 36 offers. The Douglas v Hello litigation and Stokes v Trustees of Western Power started to change that culture and focus attention on the relationship between Part 36 and Part 44.3. The changes to Part 36 next month will accelerate that process for the canny Defendant.
2. To recap, Part 44.3 provides the mechanism for a Court to make orders that only a proportion of another party's costs are paid, limit the period for which costs have to be paid and make costs orders on specific issues.
3. Here are some practical examples:

(a) The Inflated Claim – or £1,000,000 into £100,000 does not go

Early Part 36 offers with regard to (i) quantum subject to liability (ii) causation on specific issues eg agreeing loss of earnings or a type of care or an amount of care for a specific period or to a specific extent are liable to focus matters and provide costs comeback later. There is another important psychological benefit: however well grounded claimants cannot fail to be influenced by what appears on the schedule of loss and damage. If that figure is unrealistic then the claim is going to take longer to settle or the insurer is going to be`exposed to the risk that a Court or an expert will buy into whatever contentions are being put. An early part 36 or series of Part 36 offers is going to have to be reported to the Claimant and may (i) reduce a Claimant's expectations (ii) or colour the Claimant's solicitor's view of the claimant with consequentially reduced desire to take risks or (iii) disincline a Claimant to take the risk of costs inherent in proving an unrealistic schedule.

(b) Limiting investigation/costs thereof by means of an early offer on liability either as to the entirety or a part of liability issues. For example using a Part 36 offer to produce agreement about the range of speed of a vehicle thereby avoiding expert evidence.

(c) Making a fairly nominal part 36 on a specific issue to stop proliferation of investigation costs of a blind alley.

4. What will change shortly is the way in which Part 36 offers can be accepted. It will be possible to accept Part 36 offers out of time. That is going to mean that cases have to be kept under much close review, so that a Claimant does not suddenly appreciate that the future of the claim or an issue in the claim is bleak and take the money and run. Fortunately the corollary of ability to accept late without court a permission is the ability to withdraw a Part 36. The manner in which a Part 36 offer is withdrawn may reward close examination. Clearly this is a particularly important aspect at the pre-issue stage and it may prove beneficial to have experts available to do desktop assessments o any claim that appears potentially 'difficult'.

B. Withdrawal of Admissions

5. A new rule 14.1A removes the disparity between admissions made prior to commencement of proceedings and admissions made in the course of proceedings. From next week admissions cannot be withdrawn without permission of the other party. The safeguards: any admission must be in writing, must be made after the letter of claim – or if not specifically stated to be made under Part 14.
6. Where it is sought to resile from an admission a Court is going to be looking at what and when it was made and the prejudice arising in terms of both costs and evidentially (and the two may be different sides of the same coin if it would significantly add to costs to resurrect investigation of an issue).
7. An interesting evidential burden may have been added with the decision on 13th March in LES LABORATOIRES SERVIER v APOTEX INC (2007 EWHC 591). Where a party made an application at a late stage for permission to withdraw an admission, there had to be plausible grounds for supposing that the admission made was false in fact. In the instant case, the evidence relied on by the claimant patentees did not throw doubt on the correctness of the admission that they had made.
8. A particular problem in today's PI litigation environment is where it may be argued that withdrawal of an admission may lead to difficulties obtaining insurance cover against the costs of the litigation.
9. An unintended side effect may be a satellite industry in clarifying such admissions as are made.

C. ATE Insurance Premiums

10. This area is still out of hand after the Court of Appeal sent out arguably insufficiently strong signals in the case of J.L. Rogers -v- Merthyr Tydfil County Borough Council, CA (2006)
11. The Court of Appeal had held that in the future a party who had an ATE insurance policy with staged premiums should inform its opponent of

that and should set out the trigger moments when the second or later stages would be reached. If issues arose about the size of a second or third stage premium it would ordinarily suffice for a claimant's solicitor to write a brief note for the purposes of the costs assessment explaining how he came to choose the particular ATE product for his client, and whether the premium was block rated or individually rated.

12. The Court looked at the premium set on the basis of the risk at trial given a defendant intent on fighting and the estimated costs exposure.
13. What is actually happening is that some interesting premiums are being levied, premiums which are a surprise. A recent example: premium of £50,000 four weeks before a 3 day quantum trial involving one expert witness per side. The ATE insurer was willing to negotiate for early settlement, and reduce the premium to £12,500.
14. One way to apply pressure is probably through costs estimates. It is unlikely that a Defendant contesting liability will get far on a risk based analysis: clearly if a decision is made to go to trial following CFA type standard uplifts the courts are going to look at a 50:50 risk type analysis.
15. The other potentially advantageous routes are firstly to build on the pliability of negotiations over the final stage of the premium to debase the premium sought and secondly to draw attention, with suitable correspondence, to the fact that the premium sought to be charged is actually preventing settlement.

D. Cost Capping

16. Some good news for Defendants here. Earlier this month His Honour Judge MacDuff dealt with a costs capping application involving Irwin Mitchell and 151 of their clients bringing proceedings against First Choice arising from illness allegedly contracted whilst staying in a Tunisian hotel. Irwin Mitchell was claiming costs estimated at up to

£2,000,000 whilst seeking damages of £400,000 odd. Costs were capped at £215,000.

17. This is what Irwin Mitchell's Clive Garner has said:

"This is a case where a large number of men women and children became ill, some seriously and we have been using all our skill and expertise to establish their claims against a tour operator who has so far refused to accept liability.

"Cases such as these require considerable investment if they are to be contested and we are disappointed that the court has not given full recognition of that fact.

"We strongly believe all people deserve access to justice and we hope the courts will support our clients in ensuring that costs capping does not fetter that access. We have obtained permission to appeal."

12. The decision is not a surprise, it is part of a gathering storm for Claimants.

13. The Court's power to impose a Cap was initially found in the Costs Practice Direction, paras 6.1 to 6.6. The section set out steps which the parties and their legal representatives must take in order to keep each and every other party informed about their potential liability in respect of costs and in order to assist the Court to decide what, if any, orders to make about costs and case management.

6.2.2 (i) defines "estimate of cost" to mean: -

"An estimate of base cost (including disbursements) to be incurred which a party intends to seek to recover from any other party under an Order for Costs if he is successful".

14. These base costs are defined by para 2.2 of the Practice Direction to include the funding arrangements and a percentage increase.

15. The 2005 amendment to r3.1(2) expressly gives the court the power to order an estimate of costs to be filed. The likelihood is that the costs

capping tool will be increasingly used, particularly in group litigation. In Griffiths v Solutia U.K. Limited (2001 EWCA CIV 736) Sir Christopher Staughton noted that: -

"So surely, case management powers will allow a Judge in the future to exercise the power of limiting costs whether indirectly or even directly so that they are proportionate to the amount involved".

16. However it is worth noting that in Smart v East Cheshire NHS Trust [2003] EWHC 2806, QB Gage J suggested that in cases not involving group litigation the court should only consider costs capping where the applicant shows by evidence that there is a real and substantial risk that without such an order costs will be disproportionately or unreasonably incurred."
17. It is a matter of speculation whether it may be possible to say of particular firms that their track record with regard to costs is appalling, produce some statistics and make an application on a suitable looking case.

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How to handle stress at work

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Stress at work
Winners and losers.

Andrew Hogarth QC

King's Bench Walk

Hatton v Sutherland

Paragraph 43 (2), *"The threshold question is whether this kind of harm to this particular employee was reasonably foreseeable (para 23): this has two components (a**) an injury to health (as distinct from occupational stress)** which (b) is attributable to stress at work (as distinct from other factors)"*

- *"These then are the questions and the possible indications that harm was foreseeable in a particular case. But how strong should those indications be before the employer has a duty to act? (Counsel) argued that only "clear and unequivocal" signs of an impending breakdown should suffice. That may be putting it too high**. But in view of the many difficulties of knowing when and why a particular person will go over the edge from pressure to stress and from stress to injury to health, the indications must be plain enough for any reasonable employer to realise that he should do something about it."*** (No emphasis added).

Bonus points for defendants

- *Dangerous occupations.*
- *"there are no occupations which should be regarded as intrinsically dangerous to mental health".*

- *Apportionment of damages.*
- *Where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered which is attributable to his wrongdoing, unless the harm is truly indivisible.*

Barber v Somerset County Council

- *"This is, I think, useful practical guidance, but it must be read as that, and not as having anything like statutory force. Every case will depend on its own facts and the well-known statement of Swanwick J in Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd [1968] 1 WLR 1776, 1783, remains the best statement of general principle"*

Hartman v South Essex Mental Healthcare NHS Trust

- *"We doubt however whether there is any inconsistency between what Swanwick J and Hale LJ were saying. Hale LJ was simply focussing established principle on a new problem. She referred to the "oft-quoted summary of Swanwick J" just three paragraphs later. Lord Walker was not expressing disagreement with anything Hale LJ said but simply sounding a word of caution that no two cases were the same and that Hale LJ's words should not be applied as it were by rote regardless of the facts. Hale LJ was applying established principles to a new type of situation rather than laying down any new principle"*

Confidentiality

- "If an employer explicitly or implicitly invites an employee to consult the occupational physician, the latter must still regard such consultation as strictly confidential."

Other causes of action

- [a] A breach of the implied term of trust and confidence.
- [b] A breach of the Management of Health and Safety at Work Regulations, and
- [c] Harassment under the Protection from Harassment Act 1997.
- [d] The Working Time Regulations 1998

The objective to be achieved by using other causes of action

- Foreseeability of psychiatric injury.
- Foreseeability
- Foreseeability of stress as sufficient.
- Strict liability.

The trust and confidence term

- *"without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee:"*

The failure of the T and C term

- Two implied terms.
- Clark v Nomura Bank.
- When the duty is fixed.
- Hadley v Baxendale.

Is it the same as negligence?

- *" To trigger a duty to take steps, the indications of impending harm to health arising from stress at work must be plain enough for any reasonable employer to realise that he should do something about it.*
- *that **where knowledge of special circumstances is relied on as enhancing the damage recoverable that knowledge must have been brought home to the defendant at the time of the contract and in such circumstances that the defendant impliedly undertook to bear any special loss referable to a breach in those special circumstances**.*

The Management and Health and Safety at Work regulations.

- 27th October 2003
- Is the lack of a civil cause of action fatal to this claim?
- Do they require some form of foreseeability?

The authorities

- **Cross v Highlands and Islands**. Outer House Lord Macfadyen.
- **Millward v Oxfordshire County Council**. Hughes J
- **Cowley v Mersey Regional Ambulance Services NHS Trust** Douglas Brown J
- **Martindale v Oxfordshire County Council.** HH Judge Harris
- **Sayers v Cambridgeshire County Council.** Ramsay J

Foreseeability?

- In Cowley's case, Douglas Brown J dealt with the argument that foreseeablity was not required very shortly. He said*: "(Counsel) submitted that the directive does not require a claimant to establish foreseeability in terms of risk. In my view that argument is plainly wrong. The Directive refers to "measures necessary" and "risk". Article 5(4) refers expressly to foreseeability."*

The Protection from Harassment Act 1997-1

- ***1.***--(1) *A person must not pursue* ***a course of conduct***
- *[a] which* ***amounts to harassment*** *of another, and*

  [b] which he knows or ought to know amounts to harassment of the other.
- *(2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a course of conduct amounted to harassment of the other*
  - *(3) Subsection (1) does not apply to a course of conduct if the person who pursued it shows –*
- *[a] ……..,*
- *[b]………, or*

  [c] that in the particular circumstances the pursuit of the course of conduct was reasonable.

The Protection from Harassment Act 1997-2

- ***3.***--*(1) An actual or apprehended breach of section 1 may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question.*
-
- *(2) On such a claim, damages may be awarded for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment.*
- **7** (2) provides:
-
- *"References to harassing a person include alarming a person or causing the person distress"*
-

Why there is a problem for defendants.

- Damages.
- Strict Liability

Is foreseeability required?.

- Sharma v Jay (2) Wells (3) Medico Legal Investigations Ltd
- Majrowsky v St Thomas' and Guy's Hospital NHS Trust.
- Banks v Ablex Ltd
- *In my judgment there was no evidence from which the judge could safely have concluded that prior to 14th October 1998 the defendants ought to have foreseen significant injury to the mental health of the claimant as a possible consequence of misconduct in the form of aggressive behaviour by Briggs."*

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The probable end result.

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Working Time Regulations

- 48 hour week.
- Sayers v Cambridgeshire County Council

Intel (UK) v Daw

- Counselling?
- What exactly is the employer's duty?
- Safe to dismiss?
- Disability Discrimination.

Would you do this on a CFA?

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STRESS AT WORK CLAIMS
THE WINNERS AND THE LOSERS

Andrew Hogarth

1. Introduction.

1.1 The application of established legal principles to a new class of case invariably leads to a period of uncertainty; a period of time will pass before the manner in which those principles should be applied becomes more certain, before it is possible for a lawyer to identify the cases which a claimant will win and the cases which a claimant will lose with any degree of confidence.

1.2 There have now been over 20 reported stress at work cases and the judgments in many more are available from the numerous on-line legal reporting services. This shortish paper attempts to determine whether it is now possible to identify which cases will succeed and why and to consider which ones are unlikely to succeed and why. As the number of cases has increased it is now clear that new issues are starting to emerge, some of which I hope to be able to look at. Because stress at work cases are new and result in many appeals than other types of personal injury claims the result is that a number of new developments of more general interest have come from these decisions. Again, I hope to be able to deal with some of these new developments.

2. The early cases.

2.1 Before the decision of the Court of Appeal in **Hatton v Sutherland**[1] there had been a number of stress at work cases heard and reported. Of these the decision of Colman J in **Walker v Northumberland County Council**[2] was the best known and most important. The judge in Walker's case did no more than to apply established principles to new factual circumstances. However, the decision was of the greatest significance in making clear that claims for psychiatric injury arising from overwork could be made against employers. The result was a rapid increase in the numbers of claims made. Many of these claims were far from the facts of the Walker case, a case in which the employer knew that his employee would have a further breakdown unless he was provided with assistance. The only common features of the mass of cases being brought were that the employee had suffered a psychiatric injury as a result of his work and that the employee was winning most of the cases brought.

2.2 Hatton v Sutherland and others

As a result of the widespread dissatisfaction on the part of defendants evident from the number of appeals being lodged, the Court of Appeal decided to hear four appeals at the same time and to take the opportunity to review how the law was developing. This review of stress at work cases led to a long and very careful single judgment from the Court of Appeal. Their judgment was seen as sufficiently important and newsworthy for it to become the lead story in most of the quality newspapers the following day, suggesting that the Court of Appeal were adopting some new and very restrictive policies to prevent stress at work claims being made. The reality was rather different and the judgment is best seen as a careful judgment in which existing legal principles were carefully applied to a new set of circumstances.

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[1] [2002] ICR 613, [2002] IRLR 263.
[2] [1995] ICR 702, [1995] IRLR 35.

2.3 However, the judgment did result in two major changes; not changes to existing legal principles, but changes to the manner in which many first instance judges had approached the stress cases they were hearing.

2.4 It was apparent to the Court of Appeal that judges regarded foreseeability of stress as being the same as foreseeeability of injury. The Court of Appeal did not agree with this view concluding that foreseeability of injury was required and that foreseeability of stress alone was not sufficient. Hale LJ was not prepared to accept that "stress" by itself constituted an injury and preferred the view that forseeability of stress alone was insufficient, and that the courts should consider only foreseeability of actual injury. In paragraph 43(2) she said *"The threshold question is whether this kind of harm to this particular employee was reasonably foreseeable: this has two components (a)* ***an injury to health (as distinct from occupational stress)*** *which (b) is attributable to stress at work (as distinct from other factors) "*.

2.5 The second area in which the Court of Appeal concluded that judges were applying existing principles incorrectly was in the assumption that foreseeability of injury on its own was not just a necessary criterion for liability, but a sufficient criterion for liability. The test of foreseeability has two parts, the second of which is often overlooked. There has to be a foreseeable risk of injury against which the employer should protect his employee, the second part of the test permitting wider policy considerations to be introduced. Drawing on the important distinction between the degree of control an employer has over the physical state of his premises and the intimate knowledge he has or should have of the physical consequences of what happens within it, and the lesser degree of control and knowledge he has over the minds of the employees working within the business, the Court of Appeal concluded that the standard of care was only breached when an employer knew clearly that his employee was suffering from a fairly obvious risk of psychiatric injury as a result of his work. Hale LJ said *"(counsel) argued* *that only "clear and unequivocal" signs of an impending breakdown should suffice. That may be putting it too high.* ***But in view of the many difficulties of knowing when and why a particular person will go over the edge from pressure to stress and from stress to injury to health, the indications must be plain enough for any reasonable employer to realise that he should do something about it.***[the court's emphasis].

2.6 Barber and Hartman

Of the four cases heard by the Court of Appeal under the name of Hatton v Sutherland, one case, that of **Barber v Somerset County Council**[3], was appealed to the House of Lords. At the hearing of that appeal only one of the guidelines was challenged to any extent by the appellants. It has been suggested by many that the speech of Lord Walker made some important changes to the guidelines in Hatton. That some change was made was supported by the dissenting judgment of Lord Scott who accepted that there was a difference between the view of Lord Walker and that of Hale LJ in respect of at least one of her guidelines.

2.8 Whether there had been any real change made to the Hatton guidelines by the decision in Barber was considered by the Court of Appeal in a further series of appeals under the name **Hartman v South Essex Mental Health Trust**[4]. The appeals were heard sequentially by the same three judges, (ord Phillips MR, Tuckey and Scott Baker LJs.) Delivering the judgment of the Court Scott Baker LJ said at paragraph 10: "

"We doubt however whether there is any inconsistency between what Swanwick J and Hale LJ were saying. Hale LJ was simply focussing established principle on a new problem. She referred to the "oft-quoted summary of Swanwick J" just

[3] [2004] 1 WLR 1089, [2004] ICR 475, [2004] IRLR 475.
[4] [2005] IRLR 293 [2005] ICR 782

three paragraphs later. Lord Walker was not expressing disagreement with anything Hale LJ said but simply sounding a word of caution that no two cases were the same and that Hale LJ's words should not be applied as it were by rote regardless of the facts. Hale LJ was applying established principles to a new type of situation rather than laying down any new principle"

2.9 The result is that whatever the House of Lords did or did not intend the position to be, the Court of Appeal have decided that the Hatton guidelines remain unchanged by the decision in Barber.

3. The search for a way round Hatton.

3.1 As we will see Hatton did not decide that most let alone every stress at work case should fail. All it did was to prevent many of the more marginal claims from succeeding. However, Hatton's requirement for there to be a foreseeable risk of injury, rather than a foreseeable risk of stress, and the raised standard of care has led some to seek a cause of action which does not depend upon foreseeability of psychiatric injury in order to establish a breach of duty.

3.2 In pleadings it is now common to see the claimant's case put not just as a breach of the duty of care on the part of the defendants, but also as a breach of a variety of additional duties. There seem to be four preferred additional causes of action:

[a] A breach of the implied term of trust and confidence.

[b] A breach of the Management of Health and Safety at Work Regulations[5],

[c] Harassment under the Protection from Harassment Act 1997.

[d] A breach of the Working Time Regulations 1998.

[5] Currently the 1999 regulations, but in cases prior to 29.12.1999, the 1992 regulations apply.

3.3 The purpose of seeking an alternative cause of action is to remove the requirement that the psychiatric injury must be a foreseeable consequence of the defendant's actions which they ought to have taken steps to prevent. If these alternative causes of action do not have this effect, then no useful purpose is served by having two causes of action rather than just one, the tort of negligence.

4. The breach of contract fallacy.

4.1 A non employment lawyer has vaguely heard of the trust and confidence term; that an employer shall not behave to his employee in a manner calculated or likely to destroy the mutual bond of trust and confidence between employer and employee. They point to some action or inaction by the employer and suggest that it is a breach of the term of trust and confidence. It all looks very easy; all one has to ask is whether the employer's action is a breach of the mutual bond of trust and confidence. Employment law cases are frequently reported and it is easy to find examples of pretty minor misbehaviour by an employer which has been categorised as a breach of the mutual trust and confidence term. My favourite is the employer who said to an employee, "*You can be an intolerable bitch on Monday mornings."*[6] The danger of using this series of decisions is that they are almost all employment tribunal claims in which the tribunal is considering whether the employee has been constructively dismissed. In those circumstances the tribunals have adopted a liberal approach to the question of breach of contract as that allows them to accept jurisdiction. Having accepted jurisdiction, they will then consider the merits of the case.

4.2 In the context of psychiatric injury claims arising from work the obvious example of a case which was put as a breach of the trust and confidence term is **Gogay v Hertfordshire County Council** [7], a case which involved a flawed disciplinary

[6] The facts of Isle of Wight Tourist Board v Coombes [1976] IRLR 441.
[7] [2000] IRLR 773. Court of Appeal per Hale LJ.

procedure. Rather worse than flawed really; a wholly unjustified allegation of child abuse. The difficulty in relying on Gogay is that it is not clear why the case was put as a breach of the implied trust and confidence term at all and the test to determine whether a breach of the implied term has been breached is not set out. As a result the decision does not establish that there is any material difference between the criteria for success in a claim put in contract and one put in the tort of negligence.

4.3 The overwhelming probability is that there is in fact no material difference and that a case will not succeed if put in contract rather than in tort. There are four reasons for thinking that this is the correct conclusion:

[a] It should be remembered that there is already an implied contractual term dealing with an employer's obligation to take reasonable care to ensure his employee's safety, and whether it is necessary to imply a term which imposes a stricter form of liability in respect of psychiatric injury must be very doubtful.

[b] In the recent decision of Burton J in **Clark v Nomura Bank**[8], the judge, who was subsequently President of the Employment Appeal Tribunal, reviewed all of the relevant cases and concluded that an employer would only be in breach of the implied term if his action could be categorised as perverse. This makes it clear that the employer's behaviour has to have been close to unacceptable before he will be in breach of the implied term. Interpreted in this way the test becomes very similar to, and probably exactly the same as, the test set out in Hatton. In Hatton Hale LJ described the circumstances in which an employer would be held to be in breach of its duty in tort in these terms, " *To trigger a duty to take steps, the indications of impending harm to health arising from stress at work must be plain enough for any reasonable employer to realise that he should do something about it*. Put in this way the behaviour of an employer is invariably going to fail the contract test if it also fails the tort test.

[8] [2000] IRLR 776

[c] It seems to be assumed that foreseeability is not required before damages may be recovered in contract. This is, of course, nonsense. In **Victoria Laundry v Newman**[9] the Court of Appeal summarized the rule first outlined in Hadley v Baxendale[10] in this way:

"In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably forseeable as liable to result from the breach.

What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.

For this purpose, knowledge "possessed" is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the "ordinary course of things" and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the "first rule" in Hadley v Baxendale. But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the "ordinary course of things," of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the "second rule" so as to make additional loss also recoverable."

In addition it is worth making a comparison between the Court of Appeal's summary of the Privy Council decision in **British Columbia Sawmills v**

[9] [1949] 2KB 528
[10] 9 Exch. 341

Nettleship[11] and the Court of Appeal's decision in Hatton. In Hatton, Hale LJ said:

" *To trigger a duty to take steps, the indications of impending harm to health arising from stress at work must be plain enough for any reasonable employer to realise that he should do something about it*.

In Victoria Laundry the Court of Appeal said:

"British Columbia Sawmills v. Nettleship annexes to the principle laid down in Hadley v Baxendale a rider to the effect that ***where knowledge of special circumstances is relied on as enhancing the damage recoverable that knowledge must have been brought home to the defendant at the time of the contract and in such circumstances that the defendant impliedly undertook to bear any special loss referable to a breach in those special circumstances****. "*

[d] The employer is entitled under an employment contract to subject employees to considerable risks of injury. The duty is qualified by the words "without reasonable and proper cause". An employer may dismiss, the employer may reorganise his business, the employer may change working practices, all of which carry with them a foreseeable risk of psychiatric injury, but none of which give rise to a claim for breach of contract.

4.4 In short it seems unlikely that a stress at work claim advanced on the basis of the breach of the implied term of trust and confidence will succeed in circumstances in which the claim in tort fails.

[11] (1868) L. R. 3 C. P. 499.

5. The Management of Health and Safety at Work Regulations 1992 and 1999.

5.1 Summary of the legislation.

The Management of Health and Safety at Work Regulations 1992 imposed a requirement that a risk assessment be carried out. However, Regulation 15 provided that, *"Breach of a duty imposed by these Regulations shall not confer a right of action in any civil proceedings."*

The Management of Health and Safety at Work Regulations 1992 repealed the 1992 regulations with effect from the 29th December 1999. Again there is a provision, this time in regulation 22, which precluded a civil cause of action. This time the exemption does not apply to expectant mothers or to young persons, but is otherwise in identical form.

By The Management of Health and Safety at Work and Fire Precautions (Workplace) (Amendment) Regulations 2003 Regulation 22 of the 1999 Regulations was amended with effect from the 27th October 2003. The new regulation 22 does not exclude a civil cause of action for breach of the regulations. It provides:

*" **22.** Breach of a duty imposed on an employer by these Regulations shall not confer a right of action in any civil proceedings insofar as that duty applies for the protection of persons not in his employment."*

Both sets of regulations have a European origin.

5.2 The end result is therefore :

[a] That it is only worthwhile delving into these regulations in the event that they potentially impose a liability on a defendant which differs from a defendant's liability in negligence.

[b] If it does differ, then for all breaches which occur after the 27th October 2003, there is a civil cause of action.

[c] For claims arising before the 27th October 2003 it is necessary to consider whether the 2003 amendment is retrospective. The answer to this question may differ according to whether it is a cause of action under the 1992 regulations or the 1999 regulations.

[d] If the defendant is a state body then it may be necessary to consider whether the underlying directive is enforceable against it.

[e] If the defendant is not a state body,then it may be necessary to consider whether the regulations should be interpreted in such a way as to confer a cause of action, a conclusion that seems to fly in the face of the wording of regulations 15 and 22 calls for no further mention.

5.3 These points have been considered five times by the courts and on each occasion one or more of these points have been decided in favour of the defendants. There are no decisions in a claimant's favour on any of these arguments. The cases are:

Cross v Highlands and Islands[12]. Outer House Lord Macfadyen.
Millward v Oxfordshire County Council.[13] Hughes J
Cowley v Mersey Regional Ambulance Services NHS Trust[14] Douglas Brown J

[12] [2001] IRLR 336
[13] (Unreported 20.2.2004) EWHC 455 QB
[14] (Unreported 16.2.2001)

Martindale v Oxfordshire County Council[15]**.** HH Judge Harris
Sayers v Cambridgeshire County Council (High Court Ramsay J) [16]

5.4 Foreseeability and the regulations.

Unless the regulations impose a responsibility to carry out a risk assessment when there is not a foreseeable risk of injury, then the remaining interesting points become somewhat academic as the right conferred seems to add nothing to the employer's duty at common law. In Cowley's case, Douglas Brown J dealt with the argument that foreseeablity was not required very shortly. He said*: "(Counsel) submitted that the directive does not require a claimant to establish foreseeability in terms of risk. In my view that argument is plainly wrong. The Directive refers to "measures necessary" and "risk". Article 5(4) refers expressly to foreseeability."*

5.5 This conclusion, if it continues to be supported by authority, ends the debate about the usefulness of the 1992 and 1999 regulations in stress at work claims. Logically the contrary conclusion would be bizarre; a risk assessment would be required if there was no foreseeable risk of injury!

5.6 In addition it should be pointed out that the risk which is being dealt with is not a risk of stress, but a risk of injury, a psychiatric injury.

5.7 Retrospectivity and the 2003 regulations.

It is very difficult to see how the 2003 amendment regulations can have the effect of amending the 1992 Regulations, a statutory instrument repealed some four years earlier and to which they do not refer at all.

[15] (Unreported 6.8.2004)
[16] [2007] IRLR 29

5.8 More difficult is their effect on the 1999 regulations. If all that is removed is bar to actionability, it is arguable that a breach of the regulations which predates the breach may be relied upon. However the amendment regulations are not phrased in a manner which suggests that this is their effect. They seem to do no more than substitute a new regulation 22 from the 27th October 2003 and to leave the original version of regulation 22, which bars a civil cause of action, in place for the period prior to that date. This was the conclusion reached by Ramsay J in Sayers v Cambridgeshire County Council.[17]

5.9 Is the Directive capable of having direct effect?

In **Gibson v East Riding of Yorkshire** [18]the Court of Appeal summarised the circumstances in which a directive is capable of being relied upon as having direct effect. They said:

(1) A provision of a Directive may have direct effect in Member States if it is unconditional and sufficiently precise. This is a matter of interpretation of the relevant provision in the context of the whole directive, having regard, in particular, to its purpose. It is necessary to examine the nature, general scheme and wording of the provision in question.

(2) A provision of a directive is sufficiently precise, even if it would require the Court of Justice to answer a difficult question on its interpretation.

(3) In the employment field a provision in a directive is sufficiently precise if it identifies (a) the beneficiaries of the right; (b) the persons under a duty to give effect to the right; and (c) the nature and extent, or content, of the right.

(4) The fact that the directive permits precise derogations from its terms by Member States does not of itself render the directive conditional. A provision is unconditional if there is no need for further action by Community institutions or by Member States in order to define its content.

[17] [2007] IRLR 29
[18] [2000] IRLR 568 [2000] ICR 890

(5) The fact that some articles of a directive may lack sufficient precision and be incapable of having direct effect does not prevent others which are sufficiently precise from having direct effect standing on their own.

5.10 Applying this test the Courts have considered whether the underlying directive satisfies these criteria. In **Cross v Highlands and Islands, Millward v Oxfordshire County Council**, and **Martindale v Oxfordshire County** the courts have rejected this submission after a detailed examination of the provisions of the directive.

5.11 Causation and the Regulations.

Even if any of this is wrong, a claimant will always face very considerable difficulties in establishing that a breach of the regulations has had any causative effect. The claimant will always find it difficult to deal with the question of whether he would have mentioned any risk of psychiatric ill health to a manager carrying out a risk assessment, if he had not mentioned it to the same manager on other occasions. If he had mentioned it to a manager the claim in negligence is likely to succeed anyway.

5.12 Conclusion on the impact of the Management of Health and Safety at Work Regulations 1992 and 1999.

Although reliance on these regulations seems to be very common it is probable that they will not provide a solution to the claimant's difficulties.

6. The Protection from Harassment Act 1997.

6.1 It is not quite so easy to say whether the same is true of the provisions of the Protection from Harassment Act 1997.

6.2 **The statutory provisions**.

1.--*(1) A person must not pursue a course of conduct—*

[a] which amounts to harassment of another, and
[b] which he knows or ought to know amounts to harassment of the other.

(2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a course of conduct amounted to harassment of the other

(3) Subsection (1) does not apply to a course of conduct if the person who pursued it shows—

[a] that it was pursued for the purpose of preventing or detecting crime,

[b] that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
[c] that in the particular circumstances the pursuit of the course of conduct was reasonable.

3.--*(1) An actual or apprehended breach of section 1 may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question.*

(2) On such a claim, damages may be awarded for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment.

7 (2) provides:

"References to harassing a person include alarming a person or causing the person distress"

7 (3) provides*:*

course of conduct" must involve conduct on at least two occasions.

6.3 Basically, the law under this statute is in a mess. A statute that is intended to control anti-social behaviour should be interpreted very widely as such behaviour should be stopped. However, if it is interpreted very widely and is combined with a provision granting a civil cause of action, then almost anything can give rise to liability. The result is that courts, having enthusiastically used the act to prevent all sorts of miscellaneous bad behaviour, now find themselves confronted with the problem of deciding how to deal with the civil clams they have also apparently created, because there is no need to prove that an injury was foreseeable in order for damages to be recovered under the statute; all that has to be proved is a course of conduct amounting to harassment.

6.4 Three things about the statute are clear:

[a] The civil standard of proof is that applicable. See **Hipgrave v Hipgrave** [19](Tugendhat J) 8/12/2004.

[b] Only two incidents can be a course of conduct. (Section 7) That does not mean that only two incidents will be sufficient as the Act speaks of a course of conduct; it is only for threats of violence that two instances is certain to be sufficient.

[19] [2004] EWHC 2901 (QB)

[c] An employer can be vicariously liable for harassment by his employee. See. **Majrowski v St Thomas' Hospital NHS Trust**[20].

6.5 What amounts to harassment is not at all clear. What is needed in order to decide whether claims pleaded in this way will succeed is some form of guidance on how serious some form of activity has to be before it amounts to harassment. Put another way, "Is foreseeability of injury a necessary requirement?"; if it is, then only serious misbehaviour will amount to harassment.

6.6 It is quite easy to find examples among the criminal cases in which really pretty trivial incidents have been regarded as harassment.

6.7 For instance, in **Tafurelli v DPP** QBD (Admin) (**<u>Leveson J</u>**) 25/11/2004, the appellant father and son (G and L) appealed by way of case stated against their convictions for harassment. G and L had been neighbours of the complainants. Their convictions followed evidence of a course of conduct comprising an incident of a joint attack by them on the complainants and several further incidents where dogs controlled by L and G had been incited by them to bark in the night. L and G argued that a failure to control dogs could not form part of a course of conduct within the meaning in the Protection from Harassment Act 1997 s.1(2). It was argued that whilst a deliberate act of omission could in some circumstances form such conduct it was not within the power of a person with custody of a dog to control it at all times.

The court was not prepared to state that the incitement of a dog to bark could not form part of a course of conduct within the meaning in the Protection from Harassment Act 1997 s.1(2). In any event, the magistrates' court had found as a fact that L and G had deliberately failed to control the dogs by inciting them to bark.

[20] [2005] QB 848, [2005] ICR 977, [2005] IRLR 598.

6.8 The issue which the courts have to face is whether types of behaviour which are normally considered to be too trivial to create a foreseeable risk of injury, give rise to a civil cause of action under the 1997 Act.

6.9 So far the courts have not provided clear guidance on whether foreseeability is a requirement of this statutory tort, although the Court of Appeal has had at least one opportunity to do so. What is reasonably clear is that the Courts are unwilling to accept that anything apart from really quite serious misconduct is capable of amounting to harassment under the 1997 Act.

6.10 In **Sharma vJay (2) Wells (3) Medico Legal Investigations Ltd**[21], when dealing with an application to strike out the claim , Gray J defined what amounted to harassment in these terms at paragraph 22:

> *"(i) that in order to constitute harassment the conduct must be calculated (ie* ***likely****) to produce the consequence that the claimant is alarmed or distressed;*
>
> *(ii) that the conduct must in addition be oppressive and unreasonable;*
>
> *(iii) as to reasonableness, that it is incumbent on the claimant in his Pleading to allege conduct which is arguably unreasonable;*
>
> *(iv) that the mere fact that the conduct complained of has* ***foreseeably*** *caused distress to an individual is not enough: the requirement to establish an arguable case of oppression and unreasonableness must also be satisfied if the claim is not to be struck out. "*

6.11 If this is the correct test then it inevitably means that there is little difference between the circumstances in which a claimant will succeed at common law and under the 1997 Act.

[21] [2003] EWHC 1230 (QB)

6.12 In **Banks v Ablex Ltd** [22]Kennedy LJ , Longmore LJ , Maurice Kay LJ had to face the question of whether foreseeability of injury was required under the 1997 Act before a claimant had a civil cause of action. The trial judge in this case had decided that foreseeability was required under the 1997 Act. As one would expect, the issue arose because the serious allegations made by the claimant against a fellow employee were rejected by the judge, and that only left the claimant with some incidents of what one may term vulgar abuse, which were said to amount to harassment.

6.13 The Court of Appeal's judgment delivered by Kennedy LJ is not a masterpiece and it is very difficult to work out what it was that they actually decided. It is reasonably clear that they thought that foreseeability was a necessary requirement, but there is no real hint as to why they took that view. After reviewing the evidence to see whether the claimant had established the existence of more than one episode of harassment he said of all the earlier incidents of vulgar abuse:

"38. In my judgment there was no evidence from which the judge could safely have concluded that prior to 14th October 1998 the defendants ought to have foreseen significant injury to the mental health of the claimant as a possible consequence of misconduct in the form of aggressive behaviour by Briggs."

6.14 It is possible that this is what Kennedy LJ also said earlier in the judgment. In a passage in which he was discussing an earlier case he said:

In Thomas v News Group Newspapers Ltd [2002] EMLR 78 Lord Phillips MR said at paragraph 30 -

"The Act does not attempt to define the type of conduct that is capable of constituting harassment. 'Harassment' is, however, a word which has a

[22] [2005] ICR 819, [2005] IRLR 819

meaning which is generally understood. It describes conduct targeted at an individual which is calculated to produce the consequences described in section 7 and which is oppressive and unreasonable. The practice of stalking is a prime example of such conduct."

Mr Gore submitted that the conduct did not have to be "calculated to produce the consequences" if that is understood to mean that the alleged offender must be shown to have intended to achieve the consequences. ***I agree, but the words used by the Master of the Rolls seemed to me to mean no more than that the conduct must be such as is liable to produce those consequences.”***

6.15 In between these two passages is a long summary of the foreseeability parts of the judgments in Hatton, Barber and Hartman.

6.16 All this suggests that the Court of Appeal did in fact conclude that foreseeability of injury had to be established. It is just a pity that if that is what they were saying, then they did not make the point more clearly.

6.17 The third case is the Court of Appeal’s decision in **Majrowski v St Thomas and Guy’s Hospital NHS Trust.** [23](Auld LJ , May LJ and Scott Baker LJ). The trial judge had heard argument on a preliminary issue, whether or not the employer could be vicariously liable for harassment under the 1997 Act. Auld LJ and May LJ decided that the employer could be vicariously liable. Scott Baker LJ disagreed in the main as a result of his view that the Act conferred rights which effectively circumvented all the guidelines in Hatton, Hartman etc. May LJ expressed sympathy with this view but then went out of his way to set out why he thought Scott Baker’s concerns were not valid. In essence he said that a very high level of misconduct was necessary before a claim could be advanced under the Act.

[23] [2005] IRLR 340. This case was subsequently appealed to the House of Lords who reached the same conclusion on vicarious liability but they did not discuss the nature of the liability.

6.18 May LJ said at paragraph 82:

"…in my view, although section 7(2) provides that harassing a person includes causing the person distress, the fact that a person suffers distress is not by itself enough to show that the cause of the distress was harassment. The conduct has also to be calculated, in an objective sense, to cause distress and has to be oppressive and unreasonable. It has to be conduct which the perpetrator knows or ought to know amounts to harassment, and conduct which a reasonable person would think amounted to harassment. What amounts to harassment is, as Lord Phillips said, generally understood. Such general understanding would not lead to a conclusion that all forms of conduct, however reasonable, would amount to harassment simply because they cause distress. Employees may be distressed, and understandably so, by managerial conduct which, for instance, being properly and reasonably critical of an employee's poor performance, is entirely within the proper and reasonable scope of the manager's functions and duties.

83. There are other features of the 1997 Act which, in my view, tend to confine what a reasonable person would think amounted to harassment. Section 2 provides that a person who pursues a course of conduct in breach of section 1 is guilty of an offence punishable by imprisonment or a fine or both. This should colour any appreciation of conduct which amounts to harassment. It would, I think, reinforce the view of a reasonable person that harassment is serious conduct calculated to produce the consequences described in section 7(2) and which is oppressive and unreasonable. The reasonable person should also understand from section 3 that an actual or apprehended breach of section 1 can sustain, not only a claim for damages, but also an injunction, granted in the High Court or county court, restraining the defendant from pursuing any conduct which amounts to harassment. Alleged breach of an injunction may lead to arrest and, if the breach is established, the defendant is guilty of an offence. This again colours, so as to confine, any appreciation of conduct which amounts *to harassment. Of course, a person who alleges harassment can pursue a civil claim for damages without recourse to criminal or injunctive remedies. But the same conduct sustains the criminal and injunctive remedies. In the civil context, the court will be alive to this fact when considering whether what is alleged really does amount to harassment. These considerations may not readily enable a court to strike out a claim without hearing evidence, but they do circumscribe the possible ambit of such claims."*

6.19 **Conclusion on the validity of claims under the 1997 Act.**

The early indications seem to be that the courts are likely to seriously restrict the circumstances in which a claimant will be able to use the 1997 Act to bring a claim which would otherwise fail.

7. The Working Time Regulations 1998

7.1 In their current form the 1998 regulations impose a maximum working week of 48 hours, although the employee is currently able to waive this limit. The regulations also include provisions dealing with the minimum periods of rest between working days.

7.2 It probably does not need to be said but if an employer requires his employee to work very long hours each week he may well be creating a foreseeable risk of injury actionable at common law without the need to rely upon the 1998 regulations. The case of **Hone v Six Continents** [24]is an example of a case in which the employee was required to work so many hours in each week that a foreseeable risk of injury was virtually assumed. However, the number of hours worked was so far over the norm that any other result would have been surprising. The real issue is whether the regulations allow a claimant who has a claim which would fail at common law to recover damages if they have worked

[24] [2006] IRLR 49

rather more than 48 hours each week and have suffered a psychiatric injury as a result.

7.3 The argument is in two stages. Firstly, it is said that the decision of the ECJ in **United Kingdom v Commission** [25]decided that the WTR were Health and Safety Regulations and that as such a breach of them should give rise to a claim for damages. That decision of the ECJ was given as a result of a challenge mounted against the validity of the underlying Directive. The Directive had been passed by a qualified majority of the member states and not been passed unanimously. The qualified voting procedure could be used if the Directive was a "Health and safety" measure.

7.4 Secondly, having concluded that the WTR are Health and Safety regulations it is said that the European law principle of equivalence means that the remedy of damages for personal injuries must be afforded to claimants as it is given to them for the similar breaches of domestic statutory Health and safety regulations passed under the health and Safety at Work Act 1974.

7.5 The ECJ have recently provided a helpful summary of the principle of equivalence in their decision in Adeneler v Ellinikos[26] where at paragraph 95 they say:

"While the detailed rules for implementing such provisions fall within the internal legal order of the Member States by virtue of the principle of procedural autonomy of the Member States, they must, however, not be less favourable than those governing similar domestic situations (principle of equivalence) or render impossible in practice or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see, inter alia, case C-312/93 Peterbroeck [1995] ECR I-4599, paragraph 12, and the case law cited).

[25] [1997] ICR 443, [1997 IRLR 30.
[26] [2006] IRLR 716

7.6 This looks very plausible, but is almost certainly not going to provide a solution to the difficulties claimants face in marginal cases. The reasons are:

[a] The underlying assumption upon which this claim is based is the assumption that the words "health and safety" in the Health and Safety at Work Act means the same as "health and safety" when the term is used in the Treaty. In fact the Advocate general and the ECJ in their judgment in the United Kingdom v Commission make it clear that health and Safety when used in a European context means something very different and covers all aspects of social policy. It is therefore doubtful whether the premise upon which the whole argument is based can be established.

[b] It seems implausible that a remedy in damages is required in order to comply with the Working Time Directive when the Directive itself contains a large number of exemptions, including for the moment an unconditional right to opt out of its provisions.

[c] The Regulations themselves contain their own enforcement procedure.

[d] the High Court has concluded on two occasions that the WTR do not allow for a civil cause of action . see **Barber v RJB Mining (UK) Ltd** [27], and **Sayers v Cambridgeshire County Council.** [2007] IRLR 29[28]

8. The claims that remain.

8.1 It may look as if the claimants cannot win any stress at work case. That isn't the situation at all. What seems to have happened is that the many stress at work cases which are reported are the ones which raise esoteric, if not downright

[27] [1999] ICR 679, [1999] IRLR 308.
[28] [1999] ICR 679

eccentric, causes of action and are reported and commented upon because of their novelty. Over the years claimants have won a number of cases, **Walker v Northumberland, Barber v Somerset CC, Garrod v North Devon Primary Care NHS Trust**[29], among them. The latest reported case **Intel UK v Daw** [30] is also one which was won by the claimant.

Intel UK Limited v Daw

8.2 Ms Daw was employed by Intel and was responsible for regularising the payroll status of employees who joined Intel when their previous employer was taken over. She had suffered from post natal depression but had not suffered any previous episodes of psychiatric illness as a result of her work. After a series of informal complaints about her workload and the confused management structure under which she was required to work she was asked by her manager to set out exactly what her complaints were. She did so, and in that document made clear to her employers that she was overburdened with work and heading for a breakdown unless something was done to alleviate the difficulties she encountered at work. She made clear that her symptoms were similar to those she had suffered during her earlier periods of post-natal depression. The contents of her memo were discussed with her manager and he pointed out to her that a transfer to another job, or moving to part time working was likely to damage her career prospects. She was also told that an additional employee was to be recruited and that this would lighten her workload. As a result Ms Daw decided to remain in her present job. However, the employers failed to recruit the additional staff member so her workload continued at the same level and the breakdown she had warned against occurred.

[29] [2006] EWHC 850
[30] [2007] EWCA civ 77

8.3 If this set of facts seems familiar it is because they are very similar to those of the original stress at work case of **Walker v Northumberland CC** [31]and the recent decision of the High Court in **Garrod v North Devon Primary Care NHS Trust**[32], in both of which the employers had promised assistance, but had failed to provide it. The decision in Daw viewed at its basic level therefore establishes nothing that was not already dealt with quite clearly in earlier authorities; if the employer knows of a foreseeable risk of injury, if the employer knows the steps which are necessary to prevent it, but then fails to take those steps, liability will be established.

9. The future for the mentally disabled?

9.1 The Court of Appeal also dealt with the argument that their earlier decision in Hatton v Sutherland had held that the provision of counselling services by an employer was sufficient to discharge the duty they owed to their employees. This somewhat simplistic view came from guideline 11 in Hatton, a guideline that has been viewed by most as an unsatisfactory summary of the relevant parts of the main judgment. In Daw, Pill LJ disagreed with the defendant's reading of Hatton and said, *"the reference to counselling services in Hatton does not make such services a panacea by which employers can discharge their duty of care in all cases".*

9.2 However, the decision in Daw may also be seen as one which serves to make clear that there is a way in which an employer may be able to minimise the risk of paying damages. Lord Rodger in his speech in **Barber v Somerset County Council** [33]was concerned about the obligations on an employer who learns of its employee's psychiatric vulnerability. As he pointed out the case advanced on behalf of a claimant can often be viewed as an assertion that an employer is under a duty to either allow, or to compel, the claimant to perform their contract in

[31] [1995] IRLR 35
[32] [2006] EWHC 850
[33] [2004] 1 WLR 1089

a different manner to that envisaged when the contract was made. This right and obligation presupposes that an employer is free to act in this manner. Can an employer compel an employee to accept demotion? Can an employer compel an employee to move to a different job? Can an employer compel an employee to work part time?

9.3 The High Court of Australia dealt with the same point in the only stress at work case they have decided, **Koehler v Cerebos (Australia) Ltd**[34]. In a robust and uncompromising decision the judges of the High Court of Australia unanimously concluded that an employer was not under a duty in tort to reduce the amount of work the employer had contracted to do.

9.4 In Intel v Daw the employer had considered a range of options, including making Ms Daw work part time and transferring her to other work, as well as recruiting an additional member of staff. The employer chose to take the last of these three options, but the decision contains no suggestion that the employer would have been in breach of duty by reducing the employee's hours of work, and thus her pay, or transferring her to other duties.

9.5 So far as the law of tort is concerned this is the correct position, an employer is free to act in any of these ways; the dismissal, which in the absence of agreement from the employee is required before an employee can be demoted or moved to other duties, does not give rise to a claim for damages for personal injuries.

9.6 So far as the law of contract is concerned a reduction in hours, a demotion or a transfer to other work will, in the absence of a contractual mobility clause, require a consensual variation of the contract of employment or will require an employer to terminate the old contract and replace it with a new one. Termination of the contract requires notice to be given, but otherwise the employer is free to take the

[34] [2005] HCA 15

decision to dismiss rather than to run the risk of paying damages to an employee if they fall ill.

9.7 Potentially this is not a satisfactory state of affairs as it suggests that the sensible and cost free course will always be to dismiss an employee who has psychiatric difficulties.

9.8 Lord Rodger in Barber's case seems to have felt that some form of short term assistance may well be reasonable, although he was unable to identify the source of a duty to provide even that level of help to a psychiatrically ill employee.

9.9 In England, if not in Australia, there is probably a duty to provide some form of short term assistance to help an employee back to work. Sometimes the origin of the duty will be in the contract of employment. Some contracts will incorporate collective agreements dealing with return to work procedures, some contracts will contain other contractually enforceable procedures requiring an employer to provide some form of short term assistance to help an employee return to work. More significantly, many persons absent from work as a result of psychiatric illness will be persons under a disability and able to bring claims against their employers under the Disability Discrimination Act 1995. The employer faced with a claim under the 1995 Act, which will almost always be outside the scope of the cover under an employer's liability insurance policy, will find the employment tribunal looking carefully at whether he has made the reasonable adjustments required by the statute. What is and what is not a reasonable adjustment will vary from case to case, but a failure to assist an employee in returning to work on a graduated return to work programme is very likely to be in breach of an employer's duty to make reasonable adjustments. On the other hand an employer who acts in accordance with advice from its occupational health practitioner will almost always be safe from a claim under the act, even if the result is demotion or moving the employee to part-time working.

9.10 However, subject to this statutory right, the employer is still free to decide not to continue to employ employees who are unable to perform fully the obligations under their contracts of employment. The unfortunate result of the spate of stress at work claims may be to place all psychiatrically ill employees at risk of dismissal or demotion.

10. Conclusion.

If a claimant has to rely upon some peculiar cause of action it is almost always because there is otherwise no case, and the claim will eventually fail, even if it requires a long and tedious contest before it fails. If the claimant has a claim which fits comfortably within the Hatton guidelines, or at least somewhere near to them, the claim may succeed. However, we can anticipate that the end result of the current plague of stress at work cases is that employers will become less sympathetic to psychiatrically ill claimants.

Andrew Hogarth QC

March 2007

12KBW Seminar: Seizing the Initiative for Insurers
Wednesday 28th March 2007

Keeping up to speed with credit hire

Kweku Aggrey-Orleans

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King's Bench Walk

Keeping up to speed with credit hire

Kweku Aggrey-Orleans
28th March 2007

King's Bench Walk

Coming up…

Topics for tonight

- Court of Appeal considers impecuniosity – Binns v TNT
- Offering replacement cars – Bee v Jenson (1)
- Insured hire – open to challenge? Bee v Jenson (2)
- Savings for Defendant Insurers – useful tips

1 - Impecuniosity

Lagden v O'Connor (2003, House of Lords)

- It is only when C is impecunious that C can recover the credit hire rate as opposed to the spot hire rate
- Mr Lagden's personal circumstances such that no real doubt that he passed the test.
- But what is the test?

3

1 - Impecuniosity

Lagden

- Lord Nicholls – "…inability to pay car hire charges without making sacrifices the plaintiff could not reasonably be expected to make."
- Lord Hope – "In practice the dividing line is likely to lie between those who have, and those who do not have, the benefit of a recognised credit or debit card."

4

1 - Impecuniosity

Binns v TNT (2006, Court of Appeal)

- D's application for permission to appeal (second appeal) refused.
- "My means were such that I would have been unable to pay for a hire vehicle in advance, as I have a wife and two children to support along with a mortgage. I have therefore no available cash to pay for a hire vehicle. In any event, I am unfamiliar with hire companies …".

1 - Impecuniosity

Mistakes that were made

- Not reading the directions.
- Not putting C's means in issue by:
  - Filing an amended defence
  - Asking Part 18 questions
  - Asking for disclosure
  - Getting C there to be cross-examined

1 - Impecuniosity

What to do next time

- Read the directions
- Put impecuniosity in issue if C raises it
- Avoid just relying on the point that C's evidence is not very strong
- Avoid telling C how to prepare his case

2 - Offering replacement cars

Bee v Jenson (1) – the background

- Claimant has pre-accident policy with DAS to pay hire costs after no-fault accident
- DAS have arrangement with Helphire
- C has accident with D (RSA insured)
- DAS provide car through Helphire
- ABI equivalent rates charged to DAS
- RSA dispute liability for the charges (£610)

2 - Offering replacement cars

The pre-accident "offer"

- 8 months before C's accident
- Pre-emptive global offer from RSA to DAS
- RSA offer to provide free replacement cars when RSA insured to blame
- RSA say that failure by DAS to notify clients of offer will mean that RSA not liable for hire charges
- DAS reject offer

2 - Offering replacement cars

RSA's arguments

- DAS was C's agent for obtaining replacement car
- C fixed with DAS's knowledge of RSA's offer
- C should have taken free car offer from RSA rather than hire from Helphire through DAS
- Failure to mitigate loss, no charges recoverable
- Alternatively, 55% maximum (effective cost to RSA of supplying car to C)

2 - Offering replacement cars

The decision

- DAS was C's insurer, not C's agent
- C had no choice but to accept DAS's choice of car hire company, car and period of hire.
- C had no imputed knowledge of RSA's offer
- Global offer wasn't an offer of free car to C anyway

3 - Insured hire

Bee v Jenson (2)
RSA's remaining arguments

- DAS should give credit for any commission from Helphire
- Damages should be limited to corporate rates to reflect DAS's "bargaining power"

3 - Insured hire

RSA's arguments

Issue 1

- In a subrogated claim, DAS could not recover more than its outlay
- Therefore DAS had to give credit for commission received

Issue 2

- DAS should have been able to hire at better rates than ABI rates
- Therefore DAS should be limited to such rates

3 - Insured hire

DAS's arguments

- DAS paid Helphire £610 and should recover £610
- C was not entitled to any payment from Helphire and did not have to give credit for it
- If DAS has made a profit, that is irrelevant and DAS do not have to give credit for this to RSA
- As it is C's claim, not DAS's claim, the reasonableness of the rates claimed is judged from C's perspective

3 - Insured hire

The decision

- RSA's arguments rejected
- "Simply wrong and apparently misunderstand the nature of subrogation…"
- This was a contractual subrogation claim, not subrogation to prevent unjust enrichment
- If charges were reasonable, RSA had to pay them whatever C's insurance arrangements were and whatever arrangements DAS made
- C's claim, not insurers'. Rates good value for money and recoverable in full.

4 – Savings for Defendant Insurers

- Early analysis of the issue of liability after the accident.
  - Replacement vehicles hired on credit are usually taken out by non-fault drivers. In the vast majority of cases it will be easy to make a decision on liability early.
- Identify and quantify the risk of C going to a CHO: No access to public transport, nature of job, hours kept, need for a replacement car i.e children, location, availability of other vehicles.
- Where the C's vehicle has been written off and liability is not disputed, send out the cheque for the total loss of the vehicle quickly. Once that cheque has cleared the Claimant's entitlement to a hire car on the D's tab ceases.
- Where the Claimant's vehicle is being repaired, chase up the repairers if the repairs are taking longer than usual.

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4 – Savings for Defendant Insurers cont'd

- Offer the C a courtesy replacement vehicle. This allows D to control expense and the type of car that is hired. The offer of a suitable but cheaper alternative car delivered to C would be hard for C to resist on the basis that it was not a like for like. Where possible the car must be made available to C from a location close to his home or work to cause the least inconvenience and prevent C from arguing either that he/ she could not collect the car or that the offer was not specific.
- Where C impecunious, direct the C to a credit hire company that is party to the ABI agreement.
- Where a vehicle has already been hired on credit – to challenge the rate – obtain evidence of spot hire rates of the same or similar car as hired in the C's area, from known car hire companies and evidence as to the availability of vehicles. Pre-litigation reports (may be expensive) where it becomes clear that the rate is going to be a sizeable issue.
- Note delays by C before repairing the vehicle.
- Challenge C's evidence through Part 18 questions.
- Plead the points in the Defence – do not simply put C to proof in the Defence.
- Make a testing payment into court.

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And finally…

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12
King's Bench Walk

KEEPING UP TO SPEED WITH CREDIT HIRE

Kweku Aggrey-Orleans

This paper provides a basic introduction (or a "refresher") to the credit hire field. The talk will concentrate in more detail on some recent developments.

Introduction

1. Credit hire organisations (CHOs) provide a replacement car to someone whose car had been damaged in a no-fault accident (C), and then they charge the insurers (D) of the driver at fault. Without CHOs, many drivers would not bother to hire, not would they trouble the courts with a small claim for compensation for having to manage without a car during repairs.

2. This market is now worth millions of pounds every year to the CHOs. It has also been the subject of major legal battles, going to the House of Lords on three occasions[1]. Insurers had several notable victories. However, CHOs have refined not only their terms and conditions of agreement but also their methods of operating in the light of these decisions.

3. The ABI agreement (2005 version) provides the day-to-day method of operating between many (not all) insurers and CHOs. Where the agreement does not apply, or the parties go outside the agreement, the common law / statutory principles apply.

Common law principles of tort

4. Here are some basic points to bear in mind when looking at a credit hire claim:

[1] Giles v Thompson, Dimond v Lovell, Lagden v O'Connor – all mentioned later in the paper

(a) C is entitled to be put back into the position he was in, as if the accident had not happened (e.g. damaged car: cost of repair / written-off car: pre-accident value)

(b) If C loses the use of his car in an accident, and has to make do without a car, then C is entitled to general damages for loss of use.

(c) If C has hired a substitute car, C is *prima facie* entitled to the cost of that substitute.

(d) However, C has to act reasonably in hiring – he cannot recover damages for losses which he reasonably could have avoided incurring. If C hires unnecessarily, C will not get the cost of hire; if C hires at unreasonable cost, C will only get a reasonable cost. C is said to have a "duty to mitigate" his losses, although this is potentially misleading terminology. What must be remembered are these two points:

(i) the burden of proving that C has not take reasonable steps to minimise his losses is on D (so it is up to D to provide evidence of this); and

(ii) the court will generally be sympathetic to C in such circumstances, since C is only in this situation because of an accident that was not his fault.

(e) If there is no loss to C, C does not get damages. So if C is not liable to pay for the hire, because the hire agreement is unenforceable, C has suffered no loss and D therefore does not have to pay C for the hire: Dimond v Lovell[2]. The unenforceability of the agreement was not *res alios inter acta*. Nor could a trust mechanism[3] be judicially developed to create another common law exception[4] to the principle that C must give credit for benefits received from third parties.

The usual points to consider

5. These are:

(a) Is credit provided to C?

(b) If so, is the agreement enforceable?

(c) Did C reasonably need to hire at all?

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[2] [2000] QB 216, Court of Appeal; [2002] 1 AC 384, House of Lords

[3] Compare where C obtains damages for gratuitously provided care: C then holds them on trust for the carer (Hunt v Severs [1994] 2 AC 350)

[4] The other two being the fruits of insurance policies and benevolence of third parties

(d) Did C reasonably need to hire for as long as he did?

(e) Did C reasonably need to hire the type of car that he did?

(f) Is the rate of hire too high?

(g) Is C impecunious?

6. Some comments on each point follow.

(a) Is credit being provided to C?

7. The Consumer Credit Act 1974 only applies if credit is being provided. There are various formulations or definitions of "credit" in the leading cases, in particular Dimond v Lovell, but they all effectively get to the same point. Payment for the car would have been due, normally, at the latest by the end of the hiring but C was allowed to defer payment until a later date (in the old days, until the conclusion of the litigation; more recently for a period of normally no more than 51 weeks, for reasons explained in a moment). That will amount to credit and thus the agreement will be within the scope of the Act.

8. However, some hire agreements are drafted in such a way as to say that no credit is being provided, but payment is due on return of the car; any subsequent delay in asking for payment is merely (it is said) a "non-contractual / discretionary indulgence" rather than a contractual entitlement to credit, so the CCA mechanism does not apply.

9. These arguments usually fail. The scheme will usually have been explained to C in such a way as to reassure him that he will not be expected to pay and that D will pay. If pressed in cross-examination, C will usually say that he would not have hired a car if he had been expected to pay for it straightaway at the end of the hire, and he understood before taking the car, on the basis of the explanation given to him, that he wouldn't be asked for money at that stage. From this, it should not be too difficult for a judge to say that there was an agreement for credit[5].

(b) Is the agreement enforceable?

10. These days, if credit is being provided, the agreement is almost certainly enforceable. CHOs have learnt from experience.

[5] See e.g. Evans v Herrington Haulage (HHJ Hammerton, 10th February 2006, Lawtel)

11. There are various types of credit agreement with complicated definitions[6]. The type of credit agreement involved is only likely to be an issue where it is alleged that a "consumer hire" agreement is involved (see later).

12. CHOs can legitimately escape the Act's requirements if the agreement is an "exempt" agreement under Article 3(1)(a)(i) of the Consumer Credit (Exempt Agreements) Order 1989. For credit hire agreements, that means having:

    (a) An obligation to pay "<u>within</u> a period <u>not exceeding 12 months</u> <u>beginning with</u> the date of the agreement";

    (b) Payment in no more than 4 instalments.

13. After a few trips to the Court of Appeal on what this meant[7], CHOs finally learned how to make their agreements exempt, or went bust and sued their legal advisors for poor drafting.

14. If the agreement is regulated, then there are various technical requirements imposed by the Act, most notably the Consumer Credit (Agreements) Regulations 1983 and the prescribed terms set out in Schedule 6. If an agreement does not comply with these requirements, it is "improperly executed", in the words of the Act. Breach of these technical requirements can be divided into two categories: serious breaches that make the agreement irredeemably unenforceable against C and lesser breaches, where the agreement can only be enforced against C with a court order.

15. One possible area where the type of credit agreement involved is still a potential issue arises in these circumstances. In long periods of hire, C sometimes signs two (or more) hire agreements, or that the length of hire has exceeded the maximum period stated in the agreement. Does this affect recoverability? First, a quick reminder of part of the definitions section of the Act. Section 15(1):

    "A consumer hire agreement is an agreement made by a person with an individual (the "hirer") for the bailment … of goods to the hirer, being an agreement which—

    (a) is not a hire-purchase agreement, and

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[6] <u>Dimond v Lovell</u> [2000] QB 216, Court of Appeal; [2002] 1 AC 384, House of Lords decided which categories of agreement defined in the Act credit hire agreements fall into.

[7] E.g. <u>Ketley v Gilbert</u> [2001] 1 WLR 986 (payment due on or after the period expires – not exempt); <u>Zoan v Rouamba</u> [2000] 1 WLR 1509 (credit period for 12 months "after" the date of the agreement, not "beginning with" the date of the agreement – not exempt)

(b) is capable of subsisting for more than three months, and

(c) does not require the hirer to make payments exceeding £25,000."

16. The phrase "capable of subsisting for more than three months" has been interpreted (by the Court of Appeal in Burdis) as referring to the period of hire only, and not to the rest of the obligations under the agreement (which, in the case of the time to pay, can extend for nearly 15 months post-agreement). Hence virtually all credit hire agreements limit the period of hire to less than three months.

17. What happens if this is not what actually happens? Two potential situations, often caused by delays in repairs:

    (a) Situation 1: the hire agreement specifically states that it cannot last for more than 89 days. In fact, it lasts for 97 days with no second agreement being signed.

    (b) Situation 2: under the same terms of hire, C hires for 89 days and then signs another agreement which lasts for 20 days. It is the same car.

    (c) Situation 3: as situation 2, but different cars

18. Does section 82(2) of the Act apply?

    "Where an agreement (a 'modifying agreement') varies or supplements an earlier agreement, the modifying agreement shall for the purposes of this Act be treated as:

    (a) revoking the earlier agreement, and

    (b) containing provisions reproducing the combined effect of the two agreements,

    and obligations outstanding in relation to the earlier agreement shall accordingly be treated as outstanding instead in relation to the modifying agreement."

19. Surprisingly, there is very little authority on this point[8]. Colleagues in chambers report that they have not successfully run this argument on a defendant's behalf, but it does seem to be a point which worries some CHOs. Modifying agreements are horribly complicated in terms of compliance with the technical requirements of the Act: they are also likely to go into "consumer hire agreement" territory, with

[8] Goode Consumer Credit Law and Practice, the "bible" of consumer credit commentary, says "The phrase 'variation of an agreement' is not free from ambiguity." (How true…)

added levels of complications. If the section applies, then the result should be that nothing is recoverable as the agreement(s) will be fatally unenforceable.

20. Some thoughts:

(a) Where there is no second agreement and the hire just runs on (Situation 1), there may have been an oral agreement to extend the hire – in which case, the CHO is in difficulty. However, it can be argued (and I have seen this argument put forward in a Schedule of Special Damages as one alternative route to recovery) that C was in breach of contract in not returning the car earlier and so is liable to pay damages for breach at the contractual rate of hire, which he can recover in turn from D. Will this work? Or is this too remote a consequence from the tort?

(b) Does a written further hire agreement for the same car (Situation 2) amount to an agreement which "*varies or supplements an earlier agreement*"? My own view is that there is a good argument that it does "supplement" the earlier agreement by allowing C to have the same car for longer; but this is by no means clear-cut. A judge that is tempted to find in C's / CHO's favour will say that each agreement can and does stand separately; in which case, the trigger for operating s.82(2) is not pulled.

(c) Situation 3, with different cars, is much less likely to be caught by s.82(2).

(d) Where the amount of credit at the end of agreement 1 <u>exceeds</u> the limit of CCA regulation (£25,000) – which may well happen when the car in question has a very high daily rate[9] – then any modifying agreement would provide credit over the statutory limit and so be unregulated anyway.

(c) Did C reasonably need to hire at all?

21. Going back into "ancient history", Lord Mustill (giving the only speech) said this in <u>Giles v Thompson</u>[10] (emphasis added)

> "<u>The need for a replacement car is not self-proving</u>. The motorist may have been in hospital through the accident for longer than his vehicle was off the road; or he may have been planning to go abroad for a holiday leaving his car

[9] E.g. £250 per day plus VAT for 89 days would be £26,143.75 – before CDW, delivery charges, etc.

[10] [1994] 1 AC 142, at 167

> behind; and so on. Thus, although I agree with the judgments in the Court of Appeal that it is not hard to infer that a motorist who incurs the considerable expense of running a private car does so because he has a need for it, and consequently has a need to replace it if, as the result of a wrongful act, it is put out of commission, there remains ample scope for the defendant in an individual case to displace the inference which might otherwise arise".

22. As he anticipated, in practice it takes very little for C to prove that he reasonably needed a replacement car whilst his own was being repaired. That said, there will occasionally be cases where C does not need to hire – e.g.

    (a) Where C has another car that he can use instead without difficulty;

    (b) Where C cannot drive a car because of his injuries even though not in hospital – medical reports sometimes provide useful material.

23. The test of reasonableness applies: would a reasonable person have hired in the circumstances at all / for the whole period?

24. Where C is entitled to a courtesy car under his insurance policy, can insurers run this line of argument? "C has a duty to mitigate his loss; C can get a car free from his insurers under his policy; this is a benefit of his policy for which C has already paid; a reasonable person would use this benefit rather than put himself under an obligation to pay hire charges to CHO, however theoretical that obligation might be".

25. The argument is superficially attractive but runs head-long into an established principle of compensation that you do not take into account insurance policies that C has in calculating what his loss is (Parry v Cleaver etc) and so most courts now will reject this argument.[11]

(d) Did C reasonably need to hire for as long as he did?

26. C is entitled to hire for a reasonable period, which will usually be until repairs are complete or (where a write-off) until D pays the pre-accident value. Often there are delays. Can D refuse to pay some of the hire on the grounds that there were avoidable delays?

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[11] See Rose v Co-operative Group (HHJ Meston QC, 7th February 2005, Lawtel).

27. At one stage, the general approach of the lower courts was to say that if the repairs were estimated to take 5 working days, but took 10 working days, then D would only have to pay for the 5 working days. The Court of Appeal rejected this approach in Burdis v Livsey[12] (also known as Clark v Ardington). D can only successfully reduce the length of hire where C or C's agents are to blame. Delays at the garage because of lack of parts etc are entirely foreseeable and should not be held against C, it was decided. The judgment makes it very difficult for D to reduce the recoverable hire period. There is a suggestion by the Court of Appeal that D should seek contribution from those responsible, although this would not be straightforward and rarely (if ever) happens.

28. Under the ABI agreement, where a CHO is hiring to C, there are various provisions on how often the CHO should keep in contact with the garage about how the repairs are coming along, and how often the CHO needs to report to D.

29. Where insurers are in control of the hire, clearly it is in their interests that the hire is for as short a period as possible – chasing the garage is one area where some economic muscle may be useful. Again, insurers should be encouraged to keep good notes.

30. Making liability decisions quickly and getting cheques out in settlement of total losses are two further key areas where delays can be cut. Where the insured is failing to respond promptly to letters on issues of liability, the prospects of the insured being blameless but tardy are probably low.

(e) Did C reasonably need to hire the type of car that he did?

31. A frequent thorny issue is when C has an expensive sports car / prestige car etc. Hire of a replacement is normally very expensive. Can D get away with only paying for a less expensive vehicle?

32. The overall question is whether C has acted reasonably. The burden is on D to show that C is acting unreasonably. Judges, many of whom will have very pleasant cars given their high salaries, tend to be sympathetic to claimants. Our experience in chambers is that arguments that C has not acted reasonably in type of car are very hard to win as a defendant. C's arguments go along the lines of:

[12] [2002] EWCA Civ 510

(a) "I choose to drive an expensive car, and I was paying for this luxury pre-accident. Why should I have to use a less expensive car to keep D's bills down?"

(b) "If D hadn't hit me, I would be in an expensive car. Putting me back in my pre-accident position means that I should be entitled to hire such a car."

33. One argument often raised by C / CHO is C's desire to have a prestige vehicle to maintain his business reputation. Again, it will not take much for a judge to decide that this is a sufficient reason to have a similar replacement. (NB if it is a business car, C's employers may have other fleet cars that he can use, or the VAT may be reclaimable by the business and so not chargeable to D.)

34. Attempts to say that C should have hired a Mini to replace a Ferrari are doomed to failure. However, if D has a good argument that C could have hired an *equivalent* car (e.g. high-spec BMW for high-spec Mercedes) for less, then this may reduce the damages. However, D should get decent evidence not only of the rates (see below) but also evidence to show that the cars really are comparable. *E.g.* in Berg v Loftus Road plc (2001 Current Law) C's car was a Porsche 911. He spot-hired a Mercedes SL320. D said that C should have hired a cheaper but still prestigious car. The judge said that the test of reasonableness was not high and was satisfied on the facts. However, he said that if it could be shown that the amount of use that C wished to make of the car was small, C would not be entitled to the full claim.

35. This is one area where "getting to C first" and making a reasonable offer can pay dividends for insurers. Each insurer has to make a decision about where to draw the line. Insurers will need to get as much information from C as possible about why that particular car is needed, in order to make a speedy decision and a reasonable offer. The same points apply when considering what to allow as a counter-offer to the CHO's rate. The shorter the proposed period of hire and the lower the proposed amount of use, the more reasonable it would be for C to accept / to have accepted a substitute. However, each case will turn on its facts.

36. Where working under the ABI agreement, D should be consulted by the CHO in the event of a dispute about the class of vehicle to which C is entitled.

37. For a cautionary tale about making offers clear, see Player v Rowe (2006 Current Law).

(a) R's insurers wrote twice to P within 2 weeks of the accident: (1) offering P the use of an approved repairer scheme, including a free courtesy car; (2) admitting liability and giving the address of the garage, saying that P should ask the garage about a free car and if no car was available to get in touch.

(b) P hired from a CHO, apparently thinking the CHO was connected with the garage / insurers.

(c) Cost of hire allowed: P had not refused a car; his actions were reasonable; the offer from R's insurers was not a final and definitive offer; there was in any case no evidence from the insurers to show that a comparable car would have been available, or what the terms of use would have been.

(f) Is the rate of hire too high?

38. Ordinarily, the recoverable amount of hire will not be credit hire rates but "spot hire" rates i.e. what C would have had to pay a traditional hire company for hiring that car for that length of time in that area. These are generally lower than credit hire rates. The reason for the reduction is that the credit hire rates include payment for services by the CHO for which D is not liable to compensate C (including the claims service, provision of credit, control of the litigation, bearing risks of costs etc) – Lord Hoffmann in <u>Dimond v Lovell</u> (at 401):

> "My Lords, I would accept the judge's finding that Mrs Dimond acted reasonably in going to 1st Automotive and availing herself of its services. I am sure that any of your Lordships in her position would have done the same. She cannot therefore be said not to have taken reasonable steps to mitigate her damage. But that does not necessarily mean that she can recover the full amount charged by 1st Automotive. By virtue of her contract, she obtained not only the use of the car but additional benefits as well. She was relieved of the necessity of laying out the money to pay for the car. She was relieved of the trouble and anxiety of pursuing a claim against Mr Lovell or the CIS. She was relieved of the risk of having to bear the irrecoverable costs of successful litigation and the risk, small though it might be, of having to bear the expense of unsuccessful litigation. Depending upon the view one takes of the terms of agreement, she may have been relieved of the possibility of having to pay for the car at all.
> My Lords, English law does not regard the need for any of these additional services as compensatable loss."

39. He said that these additional services had to be taken into account in the assessment of damages (at 402, emphasis added):

> "How does one calculate the additional benefits that Mrs Dimond received by choosing the 1st Automotive package to mitigate the loss caused by the accident to her car? The hiring contract does not distinguish between what is attributable simply to the hire of the car and what is attributable to the other benefits. But I do not think that a court can ignore the fact that, one way or another, the other benefits have to be paid for. 1st Automotive have to bear the irrecoverable costs of conducting the claim, providing credit to the hirers, paying commission to brokers, checking that the accident was not the hirer's fault and so on. A charge for all of this is built into the hire.
>
> <u>How does one estimate the value of these additional benefits that Mrs Dimond obtains? It seems to me that prima facie their value is represented by the difference between what she was willing to pay 1st Automotive and what she would have been willing to pay an ordinary car hire company for the use of a car</u>. As the judge said, 1st Automotive charged more because they offered more. The difference represents the value of the additional services which they provided. I quite accept that a determination of the value of the benefits which must be brought into account will depend upon the facts of each case. But the principle to be applied is that in the *British Westinghouse* case [1912] AC 673 and this seems to me to lead to the conclusion that in the case of a hiring from an accident hire company, <u>the equivalent spot rate will ordinarily be the net loss after allowance has been made for the additional benefits which the accident hire company has provided.</u>"

40. After <u>Dimond</u>, some judges used to agree to make a deduction of 30% or so from the credit hire rate to strip out the offending element. This was a superficially attractive solution, but it was entirely vulnerable to CHOs increasing their rates by 42% to end up in the same position. When reviewing the matter in <u>Burdis</u>, the Court of Appeal said it was a matter for evidence.

41. The burden is on D to show that reasonable spot hire rates are less than the credit hire rates being claimed – see paragraphs 147 and 148 of <u>Burdis</u>:

"147. The fundamental principle is that a person whose car has been damaged is entitled to compensation for the loss caused. In a case where such loss includes loss of use and he establishes a need for a replacement, he is entitled to the cost of hiring a replacement car. He can go round to the nearest car hire company and is prima facie entitled to recover the amount charged whether or not the charge is at the top of the range of car hire rates. However the basic principle is qualified by the duty to take reasonable steps to mitigate the loss. What is reasonable will depend on the particular circumstances.

148. We do not anticipate that the application of the correct legal principles will lead to disproportionate costs in small cases. The claim will be based on evidence as to the rate charged by a car hire company in the relevant area. Perhaps the rate will be at the top end of the range of company rates. Thereafter the evidential burden passes to the insurers to show that it would not have been reasonable to use that particular car hire company and that the reasonable course would be to use another company which charged a lower rate. What is reasonable and whether a loss is avoidable are questions of fact, not law, which District and County Court judges regularly decide."

42. This needs good evidence, otherwise C will romp home. Someone printing off a few quotes from the internet is rarely good enough. Nor can the ABI rates be used: the Court of Appeal said in Burdis (paragraph 150) that the ABI scheme rates "cannot be taken in hostile litigation as being the appropriate figures of loss. They reflect a compromise agreed between the parties rather than an assessment of loss."

43. The investment in a proper report on rates will often pay results. As the burden of proving alternative rates is on D, beware false economies. Rates are more persuasive:

(a) the closer in time they are obtained to the period of hire – so insurers should be getting reports pre-litigation wherever possible, as soon as it becomes clear that rate is going to be a sizeable issue;

(b) the more local they are to the place of hire;

(c) the more alternative rates that are obtained;

(d) where they are for the same car as was hired, rather than alternatives;

(e) the easier such rates would have been find for C at the time (e.g. national companies / Yellow Pages, rather than obscure companies).

44. Beware of "inequality of arms" at trial. If C has a CHO director giving "factual" evidence about rates or who comments (or can be expected to comment) on D's expert report, consider getting permission from the court for oral expert evidence so that the CHO's comments do not go unanswered.[13]

45. Where a report identifies a range of possible lower spot rates, consider making offers based on the highest rate rather than the average, since some judges will use this rate as being the "highest non-unreasonable" rate (in which case, an offer based on the average will have been beaten by C). Consider allowing for interest (see below).

(g) Is C impecunious?

46. Credit hire rates can still be recovered in some circumstances. Where C is "impecunious" and so would not be able to hire from traditional hire companies such that credit hire is his only option for hiring a replacement vehicle, a majority of the House of Lords (3:2) said in Lagden v O'Connor[14] that C can recover the full credit hire rate in such circumstances. Obviously, therefore, there is a considerable advantage to CHOs in establishing impecuniosity.

47. In Lagden, there was no real agreement between the Law Lords as to how to define impecuniousity. It was thought that this issue would not lead to increased litigation.

48. Lord Nicholls said (paragraph 9):

> "Lack of financial means is, almost always, a question of priorities. In the present context what it signifies is inability to pay car hire charges without making sacrifices the plaintiff could not reasonably be expected to make."

Lord Hope said (paragraphs 36, 42):

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[13] E.g. in one case, the director served a supplemental witness statement saying that he had never heard of two of the companies approached and his enquiries showed they didn't exist, and two of the other companies borrowed luxury cars from his company to hire out as they didn't have any anyway! The judge preferred this evidence to D's written report.

[14] [2003] UKHL 64, [2004]1 AC 1067

> “The full cost of obtaining the services of a credit hire company cannot be claimed by the motorist who is able to pay the cost of the hire up front without exposing himself or his family to a loss or burden which is unreasonable.”
> “In practice the dividing line is likely to lie between those who have, and those who do not have, the benefit of a recognised credit or debit card. It ought to be possible to identify those cases where the selection has been made on grounds of convenience only without much difficulty.”

49. What about those with high incomes but high outgoings (school fees, mortgages, etc) and poor cashflow (e.g. a stubbornly high aged debt) who have accidents at a financially inconvenient time of the year? On Lord Hope’s version, they would not be impecunious; on Lord Nicholls’s version, they may be able to say that car hire charges would have required an unreasonable sacrifice. Lord Scott, dissenting, foresaw the problems the majority’s approach would cause (paragraph 87):

> “What is to be the test of sufficient impecuniosity? The suggestion has been made that lack of possession of a credit card or a debit card might be taken as an indication of sufficient impecuniosity. But there are still many people in this country who keep cash in their houses, would be accounted quite well-off by most standards, but who do not have credit or debit cards. Some people have bank accounts and overdraft facilities. Their accounts may be consistently overdrawn but within the facility. They have no spare cash but the facility to borrow. How, sensibly, can their position be distinguished from that of those like Mr Lagden who, similarly, have no spare cash but have no bank overdraft facility? If Mr Lagden is to be entitled to reimbursement of Helphire's financing charge, why should the others not be entitled to re-imbursement of their bank's financing charge?”

50. Where rates are being contested, particularly high rates, insurers should get confirmation in good time before trial as to whether impecuniosity is an issue. Preferences differ, but my practice at the moment is to add a paragraph to the section in the defence along the following lines:

> “The Claimant is reminded that the burden of proving impecuniosity is upon the Claimant. If that argument is to be advanced, the Claimant should file and serve a Reply to this Defence, setting out the matters upon which he relies.

The Claimant should then give full disclosure of relevant documents and proper details of his impecuniosity in his witness statement."

51. That should provide some protection against the issue being raised late in the day.

52. If impecuniousity is in issue, then get some information from C about his C's income / availability of credit cards and overdrafts. Ask for supporting documents e.g. bank statements. If there is a lack of co-operation, be prepared to seek court orders. Do not leave this too late. The aim is to avoid being "bounced" at the hearing with evidence and little time to consider it.

53. But beware "overkill" in requests for information and documents. It is for C to prove impecuniousity, not for D to prove that C is not impecunious. It is not for D to tell C how to prove his case and "shopping lists" of documents and information required by D may just help do that. Excessive requests for information risk being rejected wholesale by C and risk being seen by the court as "oppressive insurer tactics".

54. The Court of Appeal refused permission to appeal[15] in Binns v TNT [2006] EWCA Civ 1468 in the following circumstances. C's witness statement said *"My means were such that I would have been unable to pay for a hire vehicle in advance, as I have a wife and two children to support along with a mortgage. I have therefore no available cash to pay for a hire vehicle. In any event, I am unfamiliar with hire companies …"*. C hired from Helphire. The case was listed for 30 minute disposal hearing, with the direction that if D wanted to dispute the claim on substantial grounds relating to amount, a Defence had to be filed. D did not do this, or ask Part 18 questions or seek a longer hearing with cross-examination. D simply asserted that this did not discharge the burden of proof on C. Whilst the DJ agreed, the CJ disagreed, saying that D had not made impecuniosity an issue and C's assertion was sufficient to discharge the burden of proof in the absence of it being an issue. Hughes LJ said:

> "I am inclined to agree that there is scope for two views about whether an assertion in this form is sufficient to prove impecuniosity, if impecuniosity be put in issue. It seems to me likely that some short assertions probably would be. For example, a claimant who says that he is out of work, disabled and has been

[15] And therefore the decision can't be cited in court: Practice Direction on Citation of Authorities

living on benefits for 20 years might find that his assertion is taken as sufficient. Some might take the view that this claimant's assertion raised more questions than it answered. On the other hand, unless and until an issue is made of the point it really is not and cannot be the law that a claimant has to put in a full affidavit of means of the kind that he would have to in a case of matrimonial ancillary relief."

55. Leave was refused because, although Hughes LJ said that these issues may be suitable for the CA if a suitable collection of cases was assembled, D hadn't made impecuniosity an issue and so no important principle sufficient to justify a second appeal was at stake. Watch this space.

Interest

56. C is not entitled to County Courts Act interest (currently 6%) where proceedings have not been issued. Nor should C be given County Courts Act interest where the credit hire charges have not been paid, since C is not out of pocket – Giles v Thompson again. However, Lord Mustill did note that there was no contractual term for interest in the agreement he was considering.

57. CHOs have taken the hint and some have added contractual interest clauses into the agreements, e.g. interest at 2% over bank base rate from 14 days after the end of the hire period. This is then claimed as damages, on the grounds that C is liable to pay this to the CHO and so D should pay this to C. In my view, this interest charge is a naked charge for credit which would not be recoverable if it was included as an element in the hire charge (for reasons given in Dimond) and so it should not be recoverable separately in this way. Some judges will award it anyway (perhaps because, although his view predates Dimond, Lord Mustill seemed to think that this would make a difference; perhaps on the grounds that if the hearing has got this far, most of D's arguments have been rejected and so this one can be rejected too…)

The ABI agreement

58. This is an agreement (latest version 1st July 2005[16]) between various insurers and various credit hire companies to try and provide a workable arrangement for providing (and paying for) hire cars, partly no doubt in an effort to limit costs on

[16] Previous version 26th November 2001, both available at http://www.abi.org.uk/tphire

both sides as well as attempting to curb what each side would see as its opponents' "bad habits".

59. In return for insurers co-operating and paying claims quickly, CHOs agree to abide by certain standards of behaviour and limit their rates to agreed levels (below their normal charges). The ABI agreement has schedules of maximum rates in various categories of vehicle. If insurers pay late, there are penalty charges. Outside 90 days, then the CHO can claim at its full non-ABI rate in litigation.[17]

60. The ABI agreement provides comprehensive but voluntary guidelines.

> "3.1 The overriding principle for the GTA is that whoever is first to a customer and obtains their agreement should provide the service and all subscribers should not seek to intervene. All subscribers must, therefore, not seek to transfer a customer who has agreed to accept a vehicle into an alternative replacement vehicle.
>
> 3.2 First to a customer is defined as the receipt by the customer of a suitable offer that they can understand. All subscribers communicating an offer solely by letter stand the risk of it not having been received, understood or being sufficient for the customer."

61. Insurers can most easily control events if they get to C first. However, CHOs will usually be at a considerable advantage in this respect and generally can get C into a hire vehicle before insurers even know that an accident has happened!

62. Where insurers do get to C first, then ideally:

(a) Insurers should make C as good an offer as reasonably possible – one that C cannot reasonably refuse. The alternative to D providing C with a car will be a CHO providing C with a car, probably at greater cost and with the additional problem of D losing control over the hire process.

(b) Insurers should remember Paragraph 3.2 of the ABI GTA: letters can be misunderstood. They should telephone wherever possible. However, they should take very good notes of telephone conversations and confirm the

[17] NB there are some individual deals between insurers and CHOs. In one case I saw, the agreement provided that "like for like" cars would be provided by the CHO (unless C was retired or a housewife) and paid for by insurers and set out schedules of rates. Insurers' scope for objection to like-for-like hire or these rates in an individual case was therefore limited…

conversation in writing. These notes may need to be disclosed at a later date, possibly backed up by a witness statement.

(c) Offers should be to C personally, not general offers to claimants' insurance companies, since otherwise it will be difficult to prove as a matter of fact or law that C had knowledge of the offer (see Bee v Jenson, discussed below).

63. There is nothing to prevent insurers intervening where the ABI agreement does not apply in order to offer C a car even when a CHO is already involved. However, in such circumstances, the insurer will have to tread carefully and will have to ensure that the offer of a replacement car is extremely reasonable not only in terms of what the car is but also in terms of how the logistics of delivery / collection will be arranged.

64. Whilst paragraph 3.1 of the ABI agreement prevents one side attempting to swap the hirer into their vehicle from the other side's car, there is in theory nothing to stop an insurer trying to swap a hirer into one of their cars when the ABI agreement does not apply. However, judges will probably be reluctant to say that the hirer acted unreasonably in refusing a swap offer. At the very least, insurers would have to sort out all the logistics with no inconvenience at all to the hirer. Even then, why should the hirer move from one car to another just to lower the insurer's bill? Effectively, it's free for him either way – although it could be argued that C should mitigate his loss by taking a genuinely free car from the insurers rather than carry on hiring at £x per day, however theoretical the prospect of him actually be called upon to pay this is.

Further topics

(1) "Insured hire"

65. Some motor insurance policies include payment of vehicle hire costs post-accident as one of the additional benefits available. Can insurers challenge hiring costs under such policies?

66. The question was recently considered twice by the Commercial Court in Bee v Jenson – once on C's strike-out application[18] and then again at trial[19]. D lost on

[18] [2006] EWHC 2534 (Comm) Cresswell J.

[19] [2006] EWHC 3359 (Comm) Morison J

both occasions. The case is a useful discussion of general principles of subrogation.

67. C was a CIS policyholder with legal expense and assistance insurance provided by DAS. The policy contained terms such as:

- DAS will pay C's vehicle hire costs following a non-fault RTA;
- C has to accept DAS's choice of vehicle, hire company and conditions of hire;
- C has to agree to DAS using C's name to recover the hire charges.

68. Since 2003, DAS have used Helphire to provide cars at ABI rates and so C was provided with a Helphire car.

<u>The strike-out application</u>

69. Before C's accident, D's insurers (RSA) had made a pre-emptive offer to DAS to supply free replacement cars to DAS customers involved in a non-fault accident with an RSA insured, saying that if DAS failed to pass on the offer to its customers then RSA would argue that claimants had acted unreasonably in hiring. DAS rejected the scheme and did not bring it to their customers' attention.

70. RSA argued that C had a duty to mitigate his loss; he had delegated choice of replacement vehicle to DAS, who were his agent for these purposes; DAS knew that RSA would provide a free car; therefore C was fixed with this knowledge and should recover nothing.

71. C said DAS was not his agent but his insurer and C was simply using his contractual right to have a hire car post-accident. C did not know of RSA's offer.

72. Cresswell J struck out the relevant paragraphs of D's defence, saying:

- C did not have the choice that D contended for, as C was contractually obliged to take DAS's choice of hire company. His choice was that or arranging himself for hiring on the open market.
- C was never told about RSA's offer to DAS and he should not be taken as knowing about it; in any event, there was no <u>offer</u> of a free car to C (whereas there was some evidence that RSA had made direct offers to some other DAS insureds).

The trial

73. At trial, RSA's remaining case was that:

(a) DAS had to give credit for commissions paid by Helphire – this, it was said, would prevent DAS recovering more than its true outlay and would ensure that collateral benefits were taken into account in the assessment of damages.

(b) DAS could only recover a corporate rate of hire, representing the reasonable cost to DAS of providing hire cars – this would have been somewhere in the region of £16 to £19 per day, instead of the £29 per day charged by Helphire.

74. Both these arguments were rejected:

(a) Any payments by Helphire to DAS were *res inter alios acta* and irrelevant in quantifying C's loss. C did not benefit and did not have to give credit. There was no reason why the court should be interested whether DAS were making a profit or loss on their insurance arrangements, and no reason why any profit should be transferred to D or his insurers.

(b) The claim was C's, not DAS, and the reasonableness of the rates charged had to be judged from C's perspective. Helphire in this instance provided no additional benefits such as credit or the like.

(c) C was entitled to a replacement car at a reasonable rate and for a reasonable period. D was only concerned with the reasonableness of the charges: if they were reasonable, D had to pay them, whatever insurance arrangements C had and whatever arrangement C's insurers had.

(2) The curious case of the non-existent or dormant companies

75. One CHO group of companies operates the following scheme:

(a) The claimant hires a car from company 1. He agrees to pay company 1 on a spot hire basis (agreeing to make payment at the end of the hire, so apparently no credit being provided).

(b) To save C personally having to make the payment at the end of the hire, C also enters an agreement (a finance deal) with company 2 at the outset – company 2 will pay company 1 and C will repay company 2 at the end of the credit period or conclusion of the litigation, whichever is shorter.

(c) To guard against the possibility of the hire charges not being recovered within 51 weeks, he also enters an agreement (an insurance deal) with company 3 at the outset that, in return for the premium paid, company 3 will pay company 2 if the hire charges are not recovered within the specified time. The claim would then be pursued as a subrogated claim.

(d) The agreements are all contained on the same piece of paper but are expressed as being separate agreements with each company.

76. The twists are these:

(a) in some versions of the agreement, “company 2” and “company 3” do not exist;

(b) in other versions of the agreement, “company 2” and “company 3” do exist, but are “dormant companies” within the meaning of the Companies Act.

77. Will either scenario mean that C cannot recover damages?

78. The matter was due to be heard in a Birmingham CC test case called Merc late in 2006 but the case collapsed. Further test cases are due for hearing in the next couple of months.

(3) The Consumer Credit Act 2006

79. The distinction between unenforceable agreements that can be enforced by a court order and the more seriously unenforceable agreements that cannot be enforced even by court order was mentioned above. However, when section 15 of the Consumer Credit Act 2006 comes into force, the category of irredeemably unenforceable agreements will be abolished.

80. This is notwithstanding that the House of Lords decided[20] that irredeemable unenforceability would not be a breach of credit companies’ rights under Article 6(1) ECHR / Article 1 of the First Protocol (fair trial / peaceful enjoyment of property rights).

81. The consequence will be that all defective agreements will potentially be enforceable by court order. In theory, at least, it would matter less to CHOs if they entered defective agreements with hirers, since they could seek the court’s permission to enforce the agreement and rely strongly on the point that there was no prejudice to the hirer, since the tortfeasor would be paying the damages in any

[20] Wilson v Secretary of State for Trade & Industry [2003] UKHL 40, [2004] 1 AC 816

event. In practice, of course, CHOs will be more likely to continue using unregulated forms of agreement rather than risk using regulated but potentially unenforceable terms of agreement.

82. What about when the agreement can be rescued by court order, but it has not been rescued at the time of the assessment of C's damages? This was not considered in Dimond since in that case the agreement was irredeemably unenforceable. There has been little judicial consideration of whether present unenforceability of the agreement is a bar to damages being awarded when the agreement could be rendered enforceable at a later date, but those indications that there are so far[21] lean in favour of recoverability.

83. One further change is that the current statutory limit of £25,000 (above which the Consumer Credit Act 1974 does not regulate agreements) will be abolished when section 2 of the Consumer Credit Act 2006 come into force. This will have little effect on the credit hire field, but it will (for example) remove an argument against the application of s.82(2) when there are "back to back" hire agreements of a very expensive car.

By Tim Petts
February 2007

[21] Hatfield v Hiscock (1998, Current Law) NB the reasoning in other parts of this decision is suspect, which may affect the weight to be given to the decision on this aspect. Also MacLachan v Ace Cabs HHJ Hammerton 7th July 2006 unreported

12KBW Seminar: Seizing the Initiative for Insurers
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Additional Paper

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CLAIM FORMS: EXTENDING TIME AND DISPENSING WITH SERVICE

NIGEL LEWERS

1. A claim form in a personal injury action will usually be served by first class post or through the document exchange. The rules governing such service are set out in CPR Part 6 of which history shows it is only too easy to fall foul. As the Court of Appeal has said:

   "The consequences of failure to comply with the rules governing service of a claim form are extremely serious for a claimant and for his legal advisers. The situation becomes fraught with procedural perils when a claimant or his solicitors leaves the service of a claim form, which has been issued just before the end of the relevant statutory limitation period, until the last day or two of the period of four months allowed for service by rule 7.5(2) or, even worse, almost to the end of an extension of time granted by the court."[1]

2. At the heart of these perils lie two particular problems. First, when does service take place? If the correct date of service is not understood, the greater is the likelihood that it will be missed. Second, if the date is missed, when can time be extended or service dispensed with?

When does service take place?

3. CPR 6.7 deems the date of service to be the second day after the claim form was posted or left at the document exchange.

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[1] Anderton v Clwyd CC [2002] EWCA Civ 933 paragraph 2.

4. In *Godwin v Swindon Borough Council*[2] the claimant suffered a back injury while employed by the defendant on 26th February 1997. His claim form was issued on 17th February 2000, just before the expiry of the limitation period. Time for service was extended to 8th September 2000. On 7th September 2000 the claim form and particulars of claim were posted to the defendant by first class post. The defendant received them on 8th September 2000 but contended that because they were deemed to be served two days after posting they were served on 9th September 2000 and were out of time. The District Judge agreed and struck the claim out. The Circuit Judge reinstated it, saying that it was open to the claimant to prove an actual date of service other than that deemed by the rules.

5. The Court of Appeal upheld the conclusion of the District Judge. May LJ, giving the leading judgment, stated that clarity and certainty required the deemed date of service to be fixed. Rimer LJ was a little more flexible, stating that in some cases it was open to the intended recipient to rebut the presumption imposed by rule 6.7 and show that the document was received later or not at all, but that it was not open to the party serving the document to rebut the presumption and prove that the document was served earlier. He did not find that an odd result, because it would be rare for the serving party to try and show that actual service pre-dated deemed service, and this situation would only arise through the negligence of the serving party anyway. Pill LJ agreed with May LJ, but did not think the deeming provision conclusive for all purposes. He thought a defendant could still apply under CPR 13.3(1)(b) to set aside a default judgment if he can show that he did not receive the claim at all.

6. The issue arose again in *Anderton v Clwyd CC (No 2)*[3]. The claim form in that case was issued on 5th July 2000, the day before the end of the limitation period. Time for service therefore expired on 5th November 2000, a Sunday. It was served by first class post on Friday 3rd November 2000

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[2] [2001] EWCA Civ 1478
[3] [2002] EWCA Civ 933.

and received by the defendant on Tuesday 7th November 2000. It has to be remembered that CPR 2.8 excludes a Saturday and Sunday from calculations of periods of five days or less when calculating the time for doing an act which is specified by the Rules. Master Ungley held, applying this provision with CPR 6.7, that the claim form was deemed to have been served on Tuesday 7th November and therefore was out of time. The claimant's appeal was dismissed by McCombe J but for different reasons.[4]

7. It was argued on behalf of the claimant in the Court of Appeal that the purpose of the deeming provision of CPR 6.7 is to prevent a defendant from seeking to prove that a claim form had not come to its attention within the time for service, either because he had not received it at all or because it was late. It was not to prevent a claimant from proving that the claim form was in fact received by the defendant prior to the deemed date and was therefore within time. Reliance was placed on section 3 of the Human Rights Act 1998 and article 6 of the Convention, namely that by preventing the claimant from asserting an earlier date of service, which occurred before the end of the period for service, than the deemed date he was precluded from access to the court and the very essence of the civil right he was asserting was thereby impaired.

8. This argument was rejected. The Court of Appeal held that if the claimant is debarred from access to the court, it was not because of strict procedural rules which violate a fundamental right of access to the courts; it was a result of the claimant, or his legal adviser, waiting until almost the end of the period allowed for issuing and serving the claim form and then using postal service without regard to the provisions as to when such service is deemed to be effective.

9. The Court of Appeal also held that CPR 2.8 did not exclude Saturdays and Sundays from the calculation of the day of deemed service. That rule applied to the time for doing an act specified by the rules. CPR 6.7 does

[4] McCombe J held that the claim form had not been served by first class post so service was therefore defective anyway.

not relate to the doing of an act but is a deeming provision identifying the day on which an event is deemed to take place and the language of rule 2.8 was not applicable. In this respect the Court disagreed from certain remarks made *obiter* in *Godwin.*

10. However, it followed the *ratio* in *Godwin*, holding:

"The aim of rule 6.7 is to achieve procedural certainty in the interests of both the claimant and of the defendant. Certainty in the time of service of a claim form is an important requirement for the efficient performance of the case management functions of the court. It is legitimate to promote that aim by settling a deadline of four months from issue for the service of the claim form by one of the permitted methods and by using the legal technique of deemed service to bolster the certainty."[5]

11. So as the law stands a claim form is deemed to have been served two days after it was posted first class or left at the document exchange. Saturdays, Sundays and public holidays are included. The deemed date is not rebuttable.

12. In reaching this conclusion the Court of Appeal did not comment on the references to CPR 13.3(1)(b) by May LJ and Pill LJ in *Godwin*, namely to a defendant still being able to establish that it had never received a claim form when seeking to set aside a default judgment.[6] Presumably it would have done if it had considered these remarks to be incorrect. Subsequently, in 2004, the Court of Appeal quoted the relevant passage in May LJ's judgment in *Godwin* in *Akram v Adam* without disapproval.[7]

Extending time for service

[5] See paragraph 36.
[6] May LJ at paragraph 49 and Pill LJ at paragraph 76.
[7] [2004] EWCA (Civ) 1601

13. An application for extension of time in which to serve a claim form should usually be made during the four-month period for service or within any period of service specified by an order of the court: CPR 7.6(2).

14. If a claimant waits until the time for service has passed before applying to extend time, CPR 7.6(3) severely limits the circumstances in which the court may make such an order. It can do so "*only if* -

(a) the court has been unable to serve the claim form; or

(b) the claimant has taken all reasonable steps to serve the claim form but has been unable to do so; and

(c) in either case, the claimant has acted promptly in making the application."

15. These provisions have been the subject of an evolving body of case law.

16. In *Smith v Probyn*[8] the Claimant served the claim form invalidly on solicitors who had not been nominated to accept service. Rule 7.6(3)(b) was not satisfied.

17. In *Vinos v Marks & Spencer*[9] the claim form was served a week late. He could not satisfy rule 7.6(3) but relied on the general discretion under rule 3.10 (power to rectify matters where there has been an error of procedure). The Court of Appeal held there was no power to extend time for service if rule 7.6(3) was not satisfied.

18. In *Kaur v CTP Coil Ltd.*[10] the claim form was served a few days late. *Vinos* was followed and the Court of Appeal applied the same reasoning to CPR 3.9 (relief from sanctions) as it had applied to rule 3.10 in that case.

19. In *Elmes v Hygrade Food Products plc*[11] the claimant's solicitors sent the claim form on the last day of the four month period for service to the

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[8] The Times, 29th March 2000
[9] [2001] 3 All E.R. 784
[10] CA, 10th July 2000, transcript number 1328 of 2000

defendant's insurers instead of to the defendant itself. So it was served in time but on the incorrect person. The Court of Appeal declined to rectify the error under rule 3.10 (rectifying errors of procedure) and rule 6.8 (service by an alternative method).

20. *Nanglegan v Royal Free Hampstead NHS Trust*[12]the claim form was sent to the defendant rather than his solicitor in contravention of CPR 6.5(4). The claimant sought to rely on rule 6.8 but was unsuccessful.

21. *Hashtroudi v Hancock*[13] was a case under CPR 7.6(2) because the application for an extension of time was made just within the four month period for service. The failure to serve the claim form in time was wholly attributable to the incompetence of the claimant's solicitors for which there was no explanation. The Court of Appeal applied the overriding objective and had no difficulty in deciding that time for service should not be extended.

22. The difficulties posed by CPR 7.6(3) have spawned the argument that rather than extend time for service, it should be dispensed with. This has had some, but limited, success, as will now be shown.

Dispensing with service pursuant to CPR 6.9

23. In *Infantino v MacLean*[14] it was agreed that the claim form would be placed in the DX system by a certain date. On that day it was mistakenly sent to the DX number not of Medical Protection Society, but of the Medical Defence Union. Douglas Brown J held that he could use CPR 6.9 (power of the court to dispense with service) and allow the matter to proceed.

24. In *Godwin's* case, discussed above, May LJ giving the main judgment disagreed with Douglas Brown LJ in *Infantino* and held that CPR 6.9 could

[11] [2001] EWCA Civ 121
[12] [2001] 3 All ER 793
[13] [2004] EWCA Civ 652
[14] [2001] 3 All ER 802

not be used to dispense with service in circumstances where what would be done was that which rule 7.6(3) forbids. If a claimant could not avail himself of rule 7.6(3) then rule 6.9 would not help him.

25. This was softened somewhat by the Court of Appeal in *Anderton*, also discussed above, where they said that rule 6.9 was sufficiently widely drafted to entitle the court to dispense with service of a claim form. The vast majority of such applications will be for prospective orders sought before the end of the period for service and as a general rule retrospective applications would be caught by the reasoning in *Godwin.* It was only in exceptional cases that rule 6.9 should be used to validate late service of a claim form. The court distinguished between two categories of case. First, where a claimant has not even attempted to serve by a permitted methods. He would be caught by rule 7.6(3) and *Godwin's* case. Second, where the defendant or his legal adviser has in fact received the claim form within the four month period albeit not served in compliance with the rules. Here the claimant is not applying to serve out of time, but to be excused from the need to prove service of the claim form in accordance with the rules. There was no point in making the claimant achieve in law what he had already achieved in fact.[15]

26. This second principle was applied to dispense with service in two of the *Anderton* cases, *Dorgan v Home Office* and *Chambers v Southern Domestic Electrical Services Ltd*. In *Dorgan*, the period for service expired on Saturday, 11th August 2001. At 4.02 pm on 10th August the claim form was faxed to the defendant's solicitor who received it at 4.03, read it and spoke to the claimant's solicitor on the telephone soon afterwards. The claim form was deemed served on Monday, 13th August because the fax was sent after 4pm. These were exceptional circumstances which justified dispensing with service. The claim form had come to the attention of the defendant's solicitor, the application for relief was prompt and there was no

[15] See paragraph 57 and 58

prejudice to the defendant.[16] In *Chambers* the claim arose out of a fatal accident for which liability had been admitted, expert evidence on quantum had been exchanged and the defendant had offered £400,000 to settle. Time for serving the claim form had been extended to Friday, 13th July 2001. It was sent by first class post on Thursday 12th and arrived on the next day. Service was deemed to have occurred on Saturday, 14th July. The Court of appeal considered these facts spoke for themselves and were exceptional noting in particular that the claim form had come to the defendant's attention within the prescribed time and that the prejudice to the claimant would be very serious.

27. *Anderton* was refined in *Wilkey v British Broadcasting Corpn.*[17] The claim form was delivered to the defendant's legal department on 28th February 2001, the last day for service. By CPR 6.7 service was deemed to be 1st March. Simon Brown LJ giving the leading judgment considered it to be an *Anderton* category 2 case and dispensed with service under rule 6.9. He went on to indicate in category 2 cases occurring prior to *Anderton* the dispensing discretion should ordinarily be exercised in the claimant's favour unless the defendant could show prejudice. In post-*Anderton* cases however the dispensing power should ordinarily not be exercised in the claimant's favour because they fall foul of the passage in *Anderton* quoted at the beginning of this article. *Wilkey* therefore confined the *Anderton* category 2 exceptions to pre-*Anderton* cases only save in exceptional circumstances.

28. *Cranfield v Bridgegrove*[18] was a series of appeals concerning failure to serve proceedings. They provide useful practical examples of the kinds of problems with service of proceedings which can occur and how such cases are likely to be resolved in future.

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[16] See paragraph 84
[17] [2003] 1 WLR 1
[18] [2003] EWCA Civ 656

29. In the first case (*Cranfield*) the court failed to serve the claim form. In the second case (*Claussen v Yeates*) the court failed to serve the claim form in time. The issue was whether these failures came within the words "unable to serve" in CPR 7.6(3)(a). It was held that they did and that those words included all cases where the court has failed to serve including oversight on its part and where the cause was court neglect it will be appropriate to grant an extension of time if the claimant acted promptly in making the application. But where the real cause was conduct of the claimant or his legal representative the court would often decide not to exercise its discretion to extend time.[19]

30. The third case was *McManus v Staples.* The claimant sent an unsigned and unsealed copy of a claim form to the defendant's insurers where it was received on the last day for service. A signed and sealed claim form was served personally on the defendant a week later. The issue was whether service should be dispensed with under CPR 6.9. The Court of Appeal confirmed that *Anderton* and *Wilkey* showed that the basic rule is that the power to dispense with service should not be used to undermine the principle in *Godwin* that service should not be dispensed with retrospectively to circumvent the restrictions in CPR 7.6(3). However, it went on to state:

"In Anderton's case, the court did not have to consider whether the exception might also apply in a case where there has been some comparatively minor departure from the permitted method of service. An example of what might fairly be described as a minor departure is where the claim form has been sent by second class post (instead of first class post), and has been sent to the right person at the right address and has been received within the four-month period. We do not think that we are bound by Anderton's case and Wilkey's case to hold that a court could not properly exercise its discretion to dispense with service in such a case. In our view, it is not appropriate to attempt to provide an exhaustive guide to

[19] See paragraph 30

the circumstances in which it is proper to dispense with service of a claim form retrospectively under rule 6.9, whether in pre-Anderton cases, or in post-Anderton cases."[20]

31. The Court of Appeal took the firm view in *McManus'* case that an order under rule 6.9 should not have been made. First, only a draft copy of the unsigned and unsealed claim form was sent, not the claim form issued by the court. Second, the claimant's solicitors did not believe they were serving the claim form when they sent it to the insurers. Third, the insurers did not have authority to accept service. Fourth, the claim form was not sent to an address for service which had been given. The Court reiterated that the power to dispense was an exceptional one.

32. The fourth case in *Cranfield* was *Murphy v Staples Ltd*. The claimant's solicitors were informed by the defendant, a company, that its solicitors would accept service on its behalf. The solicitors, however, issued the claim form the day before expiry of limitation and sent it with the particulars of claim, medical reports and schedule of loss by first class post to the defendant's registered office. They sent copies of all these documents to the defendant's solicitors, informing them of service on the defendant.

33. The Court of Appeal held that service on the company direct was valid pursuant to section 725(1) of the Companies Act 1985 but nevertheless went on to consider whether they would have dispensed with service under rule 6.9. Copies of the right documents were sent to the right person at the right address (the defendant's solicitors) and service would have been deemed to occur within the four month period; the defendant's solicitors had been informed of the service of the original documents on the defendant and the only flaw in the process was sending the defendant's solicitors a copy of the claim form instead of the original. It was pointed out that had the claimant's solicitors sent the issued claim form by fax to the defendant's solicitors it would have been good service. So in these

[20] See paragraph 32

exceptional circumstances the Court of Appeal said it would have dispensed with service under rule 6.9.

34. Mackay J has recently considered the application of CPR 6.9. In *Jon Olafsson v Hannes Holmsteinn Gissurarson*[21] the claimant was an Icelandic businessman suing the defendant, an Icelandic professor of political science, for libel. Proceedings were issued on 4th August 2004. They were personally served on the defendant in Reykjavik but the defendant did not sign a written receipt as required under Icelandic law. Judgment was entered in default and damages assessed. The defendant applied to Master Turner to set aside the judgment. The Master declined to do so, relying on CPR 3.10 to correct the error in respect of service. The defendant appealed. Mackay J allowed the appeal and set aside the judgement, applying *Elmes* and *Vinos* (discussed above).

35. The claimant then applied for relief under CPR 6.9 for service to be dispensed with, alternatively for an extension of time under rule 7.6(3).[22] Dealing with rule 6.9, Mackay J referred to *Godwin, Anderton* and *Murphy* and said that *"any deployment of rule 6.9 in such circumstances is either exceptional or very unusual"*. He went on to exercise his discretion in the claimant's favour, saying:

"The failure to achieve valid service was for want of the merest of technicalities, in circumstances where the fact of service is accepted. The only defence was as to evidence of service, and the best evidence is now available in that the defendant accepts and has always accepted that he did indeed receive all the relevant documents in appropriate form at the appropriate time."

36. In the circumstances Mackay J did not make any findings on the application under rule 7.6 but commented that the provisions were different and it did not follow that the result would have necessarily been the same.

[21] [2006] EWHC 3162 (QB)
[22] Reported at [2006] EWHC 3214 (QB)

37. In *Dorgan, Chambers, Wilkey, Murphy* and *Olafsson* the claim form issued by the court or a copy had actually been received by the defendant or his solicitor within the permitted time for service and service was dispensed with under rule 6.9. This was not the position in *McManus* where service was not dispensed with. It might therefore be thought that this was a crucial factor in deciding whether service will be dispensed with.

38. This would not be a safe assumption to make. In *Kuenyehia and Ors v International Hospitals Group Ltd.*[23]*,* not a personal injury action, the claimant's solicitors had been in correspondence with the defendant and then the defendant's solicitors. They had asked the defendant's solicitors whether they had instructions to accept service. This was not answered. Proceedings were issued on 19th December 2003. The last day for service was 19th April 2004. On that day the claimant's solicitors telephoned the defendant's solicitors to ask whether they had instructions to accept service. There was no reply as the solicitor acting was out of the office. So the claimant's solicitors sent a copy of the claim form to the defendant's solicitors by courier and faxed a copy to the legal department of the defendant, to whom faxes of letters had previously been sent. No permission to serve by fax had been given by the defendant as required by CPR PD6 paragraph 3.1. The defendant challenged the service of the proceedings. Both Master Eyre and Crane J dispensed with service under rule 6.9. In particular, Crane J held that the faxed claim form was received by the defendant within the four month period and that there was no prejudice suffered by the defendant as a result of the breach of the Practice Direction.

39. The Court of Appeal allowed the defendant's appeal. It stated:

"Firstly, it requires an exceptional case before the court will exercise its power to dispense with service under r 6.9 where the time limit for service

[23] [2006] EWCA Civ 21

of a claim form in r 7.5(2) has expired before service was effected in accordance with CPR Part 6. *Secondly, and separately, the power is unlikely to be exercised save where the claimant has either made an ineffective attempt to serve by one of the methods permitted by r 6.2, or has served in time in a manner which involved a minor departure from one of those permitted methods of service. Thirdly, however, it is not possible to give an exhaustive guide to the circumstances in which it would be right to dispense with service of a claim form."*[24]

40. Applying those principles to the facts of the case, the Court held that failure to comply with paragraph 3.1 of the Practice Direction was not a "minor departure" from the provisions of the rules. Further, the facts of the case were not exceptional and the absence of prejudice to the defendant was not a reason for dispensing with service:
"While there may be exceptional cases, we consider that prejudice is only relevant in this sort of case to assist a defendant, where the court would otherwise think it right to dispense with service. In other words, prejudice to the defendant is a reason for not dispensing with service, but the absence of prejudice cannot usually, if ever, be a reason for dispensing with service."

41. From the transcript is does not appear that Mackay J was referred to *Kuenyehia* in *Olafsson* when giving his judgment nearly twelve months later. However, his conclusion that the failure to achieve service in that case was "*for want of the merest technicalities"* would probably not have been effected by the more serious nature of the breach in *Kuenyehia.*

42. In conclusion, as the Court of Appeal said itself (see paragraph 39 above), other than applying the principles set out in *Godwin, Anderton, Cranfield* and *Wilkey*, it is not possible to give a definitive guide as to when service will be dispensed with pursuant to CPR 6.9.

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[24] Paragraph 26

Future developments

43. In *Horton v Sadler*[25] the House of Lords reversed the rule in *Walkley v Precision Forgings Ltd.* Therefore, where a claimant in a personal injury action has initially issued proceedings before expiry of the limitation period but brings a second action in respect of the same injuries after expiry, the court can now use its discretion under the Limitation Act 1980 s.33 to disapply the three-year time limit.

44. This decision may well have a significant impact on the number of cases arising out of CPR 7.6 and 6.9 in personal injury claims. By definition these problems tend only to arise where a claimant leaves it until the last minute to issue the claim form. While *Walkley* reigned, if a defendant succeeded in preventing a claimant from extending time for service he defeated the claim. After *Horton*, if the claimant cannot obtain an order extending time for serving the proceedings or dispensing with service, he can issue afresh and apply for relief under section 33 of the Limitation Act 1980. The test under section 33 is very different from the requirements of CPR 7.6(3) and the exercise of the discretion in the claimant's favour is not confined to situations which are "exceptional" or "very unusual".

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[25] [2006] UKHL 27