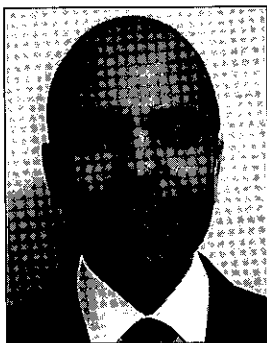


## Karamjit Singh rounds up of some of the PI world's most significant decisions from the first quarter of 2009



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### Occupiers' liability

#### *Hall v Holker Estate Co Ltd* [2008]

In this case the claimant appealed against the decision of HHJ Armitage QC, who had dismissed his claim for damages. The appeal was allowed.

#### Background

The accident happened while the applicant, an 11-year-old boy, was playing on a football pitch at a caravan park. He was in goal and went to pick up the ball that went into the net. As he turned to walk back his foot became caught in the netting, causing him to trip and fall. As he got up the crossbar hit him in the face, causing injury.

The judge at first instance found that the goal had been secured in place by the use of pegs, the risk of the goalposts falling and causing injury was reasonably foreseeable, the defendants had a system of weekly inspection, what happened was an unusual if not unique occurrence, and the defendants knew that the pegs were from time to time interfered with. The judge held that the question was whether the defendant's system for dealing with such interference was adequate.

Critically, the judge found that the goal was not properly pegged down, given that it fell over and hit the claimant in the face. However, the judge dismissed the claim because this situation had not existed for very long. It was wholly unlikely that it had existed for more than a week and most of the time the goals were adequately secured.

He also noted that historically there was no evidence of such incidents, which suggested that what occurred was a most unusual occurrence.

Alongside this was the evidence from the inquiry after the accident from the Health and Safety Executive, which showed that the defendants were aware

of the possibility that caravanners or their children might remove the pegs, and that this had happened on occasions in the past.

Importantly, the manufacturer's literature made it clear that all freestanding goals should be anchored, and the defendant was aware of this.

The judge dismissed the claimant's case on the basis that appropriate equipment had been provided and some effort had been made to deal with the question of interference.

In the Court of Appeal Sir Mark Potter stated at paragraph 35:

... having found (i) that the accident was caused by a want of safety (the absence of pegging) at the time (see paragraph 6 above), (ii) that this was a known risk (see paras 8 and 10-12 above) against which counter measures by way of regular inspection and appraisal were called for (see paras 12 and 16 above), and (iii) that the defendants had accepted (and rightly accepted) a duty of regular inspection during the day to check that the pegs were in place, but had failed to prove that the system was in operation at the time (see paras 16-22 above), [the judge at first instance] *should have gone on to find that (iv) there was no basis for holding that the accident would have been likely to have happened irrespective of the existence of a proper and adequate system.* [Emphasis added.]

At paragraph 41 Sir Mark Potter declared:

In my view, the judge should have approached the case upon the broad basis that assuming the pegs had at some time earlier been properly in place along the frame, in accordance with the manufacturers directions (as to which

there was no direct evidence), but that they had been removed by campers for their own purposes, the probabilities were that the situation had existed at least throughout the day and that, if the daily system of inspection to ensure

the pegs were in place (which the safety inspector regarded as necessary and the defendants purported to carry out) had actually been carried out, then the absence of pegging would have been detected and the pegs replaced.

### Comment

In summary, once the first-instance judge found that the lack of pegs had existed at least throughout the day, the accident could have been prevented by a daily inspection regime.

## Limitation

### *Cain v Francis and McKay v Hamrani & anor* [2008]

Two appeals from different cases were heard at the same time by the Court of Appeal, since both raised similar issues about the exercise of discretion under s33 of the Limitation Act (LA) 1980.

Cain's appeal was allowed and McKay's appeal was dismissed.

#### Issue

The Court of Appeal examined the approach a court should take as to whether the loss of the limitation defence amounts to real prejudice in circumstances where the defendant has no defence to liability on the merits of the case (see paragraph 39 of the judgment).

#### Background

Both cases involved claims for damages arising from road traffic accidents. In both cases liability was admitted. However, it had not been possible to bring the cases to a close. As a result, proceedings were issued. Importantly, in both cases the limitation period had expired before the issue of proceedings. As a result, the claimants sought the exercise of the courts' discretion under s33 LA 1980.

In *McKay* the period of delay before issue of proceedings was just under a

year. The first-instance judge allowed the case to proceed. In *Cain* the delay was only one day, but the first-instance judge refused to exercise his discretion and allow the case to continue.

When considering the issue of prejudice HHJ Faulks in *McKay* was of the view that the loss of the limitation defence should be ignored: it was a windfall and did not amount to significant prejudice. In contrast, HHJ Armitage in *Cain* found that the defendant was significantly prejudiced by the loss of the limitation defence. In his decision he said nothing about the limitation defence being a windfall.

At paragraph 73 of the appeal judgment Smith LJ, when considering the approach that courts should take to s33, stated:

It seems to me that, in the exercise of the discretion, the basic question to be asked is whether it is fair and just in all the circumstances to expect the defendant to meet this claim on the merits, notwithstanding the delay in commencement. The length of the delay will be important, not so much for itself as to the effect it has had. To what extent has the defendant been disadvantaged in his investigation of the claim and/or the assembly of evidence, in respect of the

issues of both liability and quantum? But it will also be important to consider the reasons for the delay. Thus, there may be some unfairness to the defendant due to the delay in issue but the delay may have arisen for so excusable a reason, that, looking at the matter in the round, on balance, it is fair and just that the action should proceed. On the other hand, the balance may go in the opposite direction, partly because the delay has caused procedural disadvantage and unfairness to the defendant and partly because the reasons for the delay (or its length) are not good ones.

### Comment

Smith LJ noted that although there was a long line of authorities stating that where the defendant has had early notice of the claim, the accrual of a limitation defence should be regarded as a windfall, they did not speak with the same voice as to the underlying rationale (see paragraphs 22 and 57).

It is apparent from reading the judgment that the loss of the limitation defence was not to be regarded as prejudicial to the defendant when the Court was exercising its discretion under s33.

The essential question for any court is whether the defendant has suffered some forensic or procedural prejudice that will diminish their ability to defend the case. Financial prejudice should not be regarded as relevant (see paragraphs 69-70 and 73).

20% was appropriate in this case. The Court agreed.

#### Background

On 29 July 2000 the claimant, C, was a passenger in a car driven by her brother, Mr W. He lost control of the vehicle and it left the road, crashing into a tree and causing injury to Mrs C.

Mrs C instructed solicitors to pursue a claim on her behalf and on 19 February

## Costs

### *C v W* [2008]

This case concerned the assessment of the appropriate uplift on base costs payable under a conditional fee agreement (CFA) between the claimant and her solicitor when the defendant had already admitted liability.

On a detailed assessment of costs the district judge allowed a success fee of 70%. On appeal HHJ O'Brien reduced it to 50%. The defendant appealed against that decision on the grounds that even that reduced rate was too high. The defendant argued that a success fee of

2001 the defendant's insurers admitted liability. A short time afterwards, Mrs C instructed a new firm of solicitors, Taylor Vinters, with which on 18 May 2001 she entered into a CFA. The CFA agreement provided for an uplift on base costs (a success fee) of 98%, of which 15% represented the cost of funding.

The defendant raised the issue of contributory negligence, arguing that the claimant had failed to wear a seat belt and allowed herself to be driven by her brother, who was unfit to drive through drink. The defendant did not pursue these allegations.

During the appeal, it was common ground that the purpose of a success fee under a CFA was to compensate solicitors for the risk of failing to recover any fee at all. That, however, did not mean that they could recover, if successful, whatever success fee their client was prepared to agree. CPR 44 and paragraph 11.8(1) of the costs practice direction made clear that in deciding whether a success fee is reasonable one of the:

... principal factors to be taken into account (normally the most significant) is the risk that the circumstances in which the costs, fees or expenses would be payable might or might not occur.

As a result, the parties accepted that the success fee must reflect a reasonable assessment of the risks facing the solicitor at the time the CFA was entered into.

The main ground on which defendant argued that the success fee was too high was that, at the time the CFA was entered into, liability had been admitted. In the circumstances, therefore, there was no significant risk that the claimant would fail to

recover substantial damages, even if contributory negligence was established.

The Court of Appeal identified that the real difficulty in assessing the success lay in relation to Part 36 because of the potential that the claimant might not beat the defendant's offer, in which case fees earned after the rejection of the offer might be at risk. Obviously fees earned up to that point would not be at risk. At paragraph 17 the Court commented:

Given that the CFA was entered into before proceedings had been commenced, that called for an analysis of several contingencies, each of which was difficult to assess individually, and which together made the task almost impossible. They included the chance that a Part 36 offer would be made, the chances that it would be made at an earlier or later stage in the proceedings, the chance that they would advise Mrs C to reject it, the chance that she would accept their advice and the chance that, having rejected the offer, she would fail to beat it at trial. Some of these might be assessed with a degree of confidence: for example, one could confidently predict in a case of this kind that a Part 36 offer would be made at some stage. One might also predict, though perhaps not with quite the same degree of confidence, that Mrs C would reject such an offer if her solicitors advised her to do so. The timing of an offer was more difficult to predict, but was potentially of some importance because only fees earned by the solicitors after its rejection would be at risk; fees earned up to that point would be secure. The chance that Taylor Vinters would advise Mrs C to reject an offer which she subsequently failed to beat at trial is difficult to assess, but one would not expect highly

experienced solicitors practising in this field to differ very widely in their assessment of the bracket in which an award would be likely to fall, provided they had access to the same information. That would include access to any evidence of contributory negligence which, if established, would reduce the amount of the award.

The Court made clear that any difficulty assessing the risks should not allow a cost judge to refuse to award a success fee (see paragraph 18). For the avoidance of doubt, the Court made clear at paragraph 19 that there was nothing to prevent a CFA being entered into after liability had been admitted:

... I should make it clear that there is nothing unreasonable in my view in entering into a simple CFA at a time when liability has been admitted provided that the parties make a proper assessment of the inevitably much reduced risk of failure.

The Court, in deciding to reduce the success fee to 20%, stated at paragraph 24:

For the reasons I have given, I am not satisfied that that is a fair reflection of the risk Taylor Vinters had assumed. There is no doubt that they had assumed a risk of some kind, but in the circumstances I am not persuaded that it was equivalent to more than a 15% risk of failure overall. I would not myself add much for the general risks of litigation since they must be taken to have been subsumed in the basic assessment, but in any event to increase the risk by a factor of 10% would add little. Again, I would not add anything significant for

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the size of the claim, nor, for the reasons I have already given, would I make any allowance for the risk that Mrs C might decide not to pursue the claim. However, taking all these factors into account I should be prepared to accept that a reasonable assessment of the risk in overall terms would be 17%. That would lead to a success fee of 20% which I think is fair in the circumstances of this case. I would therefore allow the appeal and substitute for the judge's order an order that the success fee in this case be assessed at 20%.

### Comment

The Court noted that the difficulty in the case was created by Clause 5 of the CFA agreement between Mrs C and Taylor Vinters, which stated:

**What happens if you win at Court but fail to beat an offer of settlement or payment into Court?**

If we advise you to reject an offer of settlement or payment into court and the case goes ahead to trial where you are awarded damages which are equal to or less than the offer or payment in:

- you do not have to pay any of our basic costs or percentage increase for the work done after we receive notice of the offer or payment in.

Readers will recognise this as a term appearing in many of their own agreements. The Court suggested that it will be necessary to assess the particular risk to which Clause 5, or its equivalent, gives rise. This will be the case whether or not liability has been admitted.

## Credit hire

### *Copley v Lawn and Maden v Haller* [2008]

**H**HJ Langden QC, sitting at Leeds County Court, considered the implications of the defendants' direct offer to provide the claimant with a substitute car, which was not accepted.

#### Background

In *Copley*, the claimant claimed the costs of 71 days of hire. At first instance, the district judge reduced the recoverable hire period to seven days on the basis that she could have obtained a replacement car for the balance of the period at no cost. Mrs Copley appealed.

In *Maden*, the claimant claimed the cost of three days' hire. The district judge rejected the claim on the grounds that a replacement vehicle had been offered at no cost to Mr Maden. Mr Maden appealed.

The issue before HHJ Langden QC was summarised in the following way at paragraph 29:

Can it be said that the judges below were wrong in taking the view that the claimants acted unreasonably in failing to pursue the respective offers made to them by KGM?

The appellants submitted that they should not be criticised for refusing to accept the offer due to its lack of particularity. In the view of HHJ Langden QC the question that should have been asked was what a reasonable response to the offer would have been. He confirmed that it would have been

to investigate and clarify the offer. At paragraph 31 he stated that it was:

... unreasonable for Captain Maden to sign up to the expensive agreements with Helphire without, metaphorically, lifting a finger to see what he could obtain from KGM. Making a telephone call in response to an offer of a car free of hire charges is not an unduly burdensome step to expect a claimant to take by way of mitigation.

In Ms Copley's case, she was already in a Helphire vehicle when she received the defendant's offer. If she had decided to take up the offer, she would have had to return Helphire's car. At paragraph 32 HHJ Langden QC stated:

I do not think that the relatively minor inconvenience of switching vehicles excused Mrs Copley from investigating KGM's offer.

In terms of the effect of the offers, the Court had to consider whether the direct offer would have extinguished the claim for credit hire or abated it. HHJ Langden QC was clear that it would extinguish it, declaring at paragraph 37 that:

The KGM offer, if investigated and found to be acceptable, would have cost a claimant nothing. On accepting the Helphire offer, a claimant incurred liability to pay the hire charges to Helphire.

He also noted at paragraph 38 that:

It was simply of no concern of the claimants and irrelevant to the issue of mitigation what the cost to KGM would have been.

#### Comment

Practitioners involved in credit hire cases will be familiar with the issues in this appeal. This is an important case as it is unlikely either party will risk a further appeal to avoid the risk of an adverse judgment by the Court of Appeal.

It is clear from the decision of HHJ Langden QC that the effect of the offer was to extinguish the claimant's claim rather than to reduce it to what it would have cost the defendant to provide the vehicle. HHJ Langden QC is clear that the cost to the defendant is irrelevant to the claimant. This is a classic *Steadman v TNT* [2008] versus *Evans v TNT* [2007] situation. HHJ Langden QC approved *Steadman* and rejected *Evans* on the basis that the defendant's offer amounted to restitution, which was a more convincing argument than the approach in *Evans*, which amounted to an abatement (see paragraph 47). ■

*C (a patient acting by her litigation friend J Fox) v W* [2008] EWCA Civ 1459

*Cain v Francis and McKay v Hamrani & anor* [2008] EWCA Civ 1451

*Copley v Lawn and Maden v Haller* (Unreported, 4 November 2008, Leeds CC)

*Evans v TNT* [2007] Lloyd's Report IR 708

*Hall v Holker Estate Co Ltd* [2008] EWCA Civ 1422

*Steadman v TNT* (Unreported, 19 June 2008, Dudley CC)