

# Motor news

Quarterly update – Winter 2010/2011



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## News

### Lord Chancellor to review discount rate

Following the threat of a judicial review the Association of Personal Injury Lawyers (APIL) has secured the agreement of the Lord Chancellor Kenneth Clarke QC to review the discount rate (i.e. the rate of reduction applied to multipliers in lump sum settlements to reflect investment return on damages and ensure that claimants are not over compensated).

The current rate of 2.5% was set in 2001 and was based on the yields of index-linked government stock (ILGS). The rate of return has significantly dropped since then raising the question as to whether claimants awarded lump sum settlements are under compensated.

The recent case of *Helmot v Simon* (see October 2010 brief) saw the Guernsey Court of Appeal set a rate of -1.5% for earnings related losses and 0.5% for non-earnings related losses based on their assessment of a realistic rate of investment return for Guernsey. This decision has encouraged the campaign by some claimant solicitors for a reduced rate on the mainland.

An announcement is expected sometime in early 2011.

*Comment: any reduction in the discount rate will greatly increase the level of lump sum awards for claims involving future losses calculated on a multiplier/multiplicand basis. In the case of Helmot v Simon the Guernsey Court of Appeal's decision to reduce the rate from 1% at first instance to a split rate of -1.5% and 0.5% increased damages from £9.3m to £13.75m.*

*The Lord Chancellor appears to be unenthusiastic about a review as according to APIL he did not respond to the request until a judicial review was threatened.*

*A reduction in the rate and a corresponding rise in the value and frequency of lump sum settlements could create serious cash flow issues for bodies such as the NHS Litigation Authority and the Motor Insurers Bureau and would have a significant financial impact on insurers and other compensators.*

*The Association of British Insurers (ABI) have, similar to APIL, submitted representations to the Lord Chancellor's office.*

## Civil Law Reform Bill Dropped

The Ministry of Justice (MOJ) has announced that the government will not proceed with the draft Civil Justice Bill as it “will not contribute to the delivery of the government’s priorities”. The MOJ carried out a consultation on the draft bill between December 2009 and February 2010 which proposed a wide range of changes including reform of fatal accident damages and the basis on which claims for gratuitous care are dealt with.

*Comment: following the demise of this bill any change to the range of persons entitled to bring claims in respect of fatal accidents in England and Wales is unlikely to take place in the foreseeable future.*

*The Damages (Scotland) Bill is still being considered by the Scottish Government’s Justice Committee but will not be enacted prior to the next election scheduled for 5 May 2011. The Bill if enacted would exclude the earnings of a surviving spouse from dependency claim calculations and would significantly increase the number and value of these claims.*

## New injury claims process: so far so good?

The Forum of Insurers Lawyers (FOIL) has reported on the relative success of the Ministry of Justice’s reform of the claims process for low value Road Traffic Accident (RTA) personal injury claims. It reports that despite some early problems with access to the electronic portal (through which claims are notified and the parties mainly exchange information), some 75% of personal injury claims are now captured by the scheme.

The FOIL report, whilst conceding that the statistical data recently released by the RTA portal company has yet to be tested, says that the general consensus of opinion is

“so far so good” with the portal providing quick and efficient exchange of information between the parties and a cheaper fixed costs regime in place.

The report also quotes Tim Wallis, the chairman of the RTA portal company, as warning against the further expansion of the scheme to other classes of claims such as Employers’ and Public Liability (proposed by the Government to take place in April 2012) without “further considered time and thought”. He believes that any new software system will need careful planning to ensure cost effective implementation.

*Comment: the new scheme whilst offering reduced costs has led to insurers having to deploy more resources in order to meet the tight scheme deadlines. Some insurers have already set up direct links between the portal and their own IT systems and whilst this approach saves time, the initial set up costs are significant.*

*There have been complaints about “bad behaviours” such as the multiple reporting of the same claim with associated requests for stage one cost payments which the portal is currently unable to address. Overall there are certainly a number of issues to consider before a successful roll out to other classes of business can be achieved.*



in the circumstances there was contributory negligence on his part of between 25% and 33%.

The court found no contributory negligence on the part of the claimant. Case law held that that the court should be slow to find contributory negligence on the part of rescuers who imperilled themselves to try to save others especially where the hazard was not of the rescuer's making. Witness evidence made it clear that the first defendant's car was a hazard to other motorists. The court found that the claimant had checked to see if other cars were approaching before attempting to get in and he could not be blamed for failing to see approaching traffic in the heat of the moment.

*Comment: the judgment is a reminder of the courts' reluctance to make any finding of contributory negligence on the part of a rescuer.*

### **Detritus not part of road fabric: Valentine v Transport for London and Hounslow London Borough Council (LBC) - Court of Appeal (2010)**

The claimant sought damages from the highway authority and the local authority. Her husband had skidded on surface grit whilst driving his motorcycle and had been fatally injured. She alleged that the highway authority Transport for London (TfL) had breached its duty under Section 41 of the Highways Act 1980 to maintain the highway and that the Local Authority Hounslow LBC were negligent either in failing to properly clean and inspect the road and in causing

### **Liability**

#### **No contributory negligence on part of Rescuer: David Tolley v Claire Carr, Helen Johnson and Damian O'Callaghan - High Court (2010)**

The claimant went to the assistance of the first defendant whose car had spun out of control on a motorway and who was sitting in her vehicle, which was broadside on to the carriageway, with the rear of the car protruding into the fast lane.

The claimant persuaded the first defendant to leave her car and to move onto the central reservation. He then went back to the car to try and move it fully onto the central reservation fearing that otherwise it would cause a serious accident.

Unfortunately a car and then a van struck the first defendant's car whilst the claimant was trying to get into it with the result that he suffered serious spinal injuries permanently losing the use of both legs.

The claimant issued proceedings against the driver he had assisted and the drivers of the two vehicles which had struck her car.

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*"...it is my clear and firm judgment that Mr Tolley's actions on the 23 November 2006 fall within the category of the brave and commendable, not the foolhardy and unreasonable. He acted with proper regard for his own safety in all of the circumstances, but, meritoriously, with greater regard for the lives and well-being of others."*

*Hinkinbottom J*

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The defendants accepted primary liability but argued that the claimant's decision to go back and attempt to move the car had been "wholly foolhardy". They questioned whether the car was a hazard to other motorists and suggested that the claimant should have waited for the arrival of the emergency services. They maintained that

or permitting it to be dangerous. At first instance her claim was struck out on the basis that section 41 did not extend to the clearance of surface debris. Permission to appeal was refused but the claimant applied directly to the Court of Appeal to challenge the refusal of the appeal.

The Court of Appeal agreed that there was no duty to remove surface grit and that the claim against the first defendant TFL should be struck out. Grit was not part of the fabric of the road.

The position with regards to the second defendant was different. Although there was no duty on the part of the Local Authority to sweep the road it had done so. The authority had not swept the sliver of tarmac where the claimant's husband had skidded and it was open to the claimant to argue that the authority had made matters worse by sweeping material onto the sliver and effectively creating a trap. The court did not suggest that this argument would necessarily succeed but the claimant was entitled to argue her case at a hearing. Her claim against the local authority was reinstated.

*Comment: the local authority had no legal obligation to sweep the highway and no complaint of omission could succeed but once it elected to do so any negligence in carrying out the sweeping was actionable.*

### **Contributory negligence of pedestrian on pavement: Osei-Antwi v South East London and Kent Bus Company Ltd – Court of Appeal (2010)**

The claimant was standing on the pavement waiting to cross the road when the rear of the defendant's bus, which was making a sharp left turn into a bus depot, struck her and crushed her against some railings.

The judge at first instance found one third contributory negligence on the part of the claimant due to her standing too close to the edge of the pavement and not keeping a proper look out for buses which she knew were turning. The claimant appealed.

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*“...I decline Mr Lazarus's invitation to come to any fixed conclusion on whether Chapman provides a principle in law that a pedestrian who is struck when standing on a pavement can never be held to blame.*

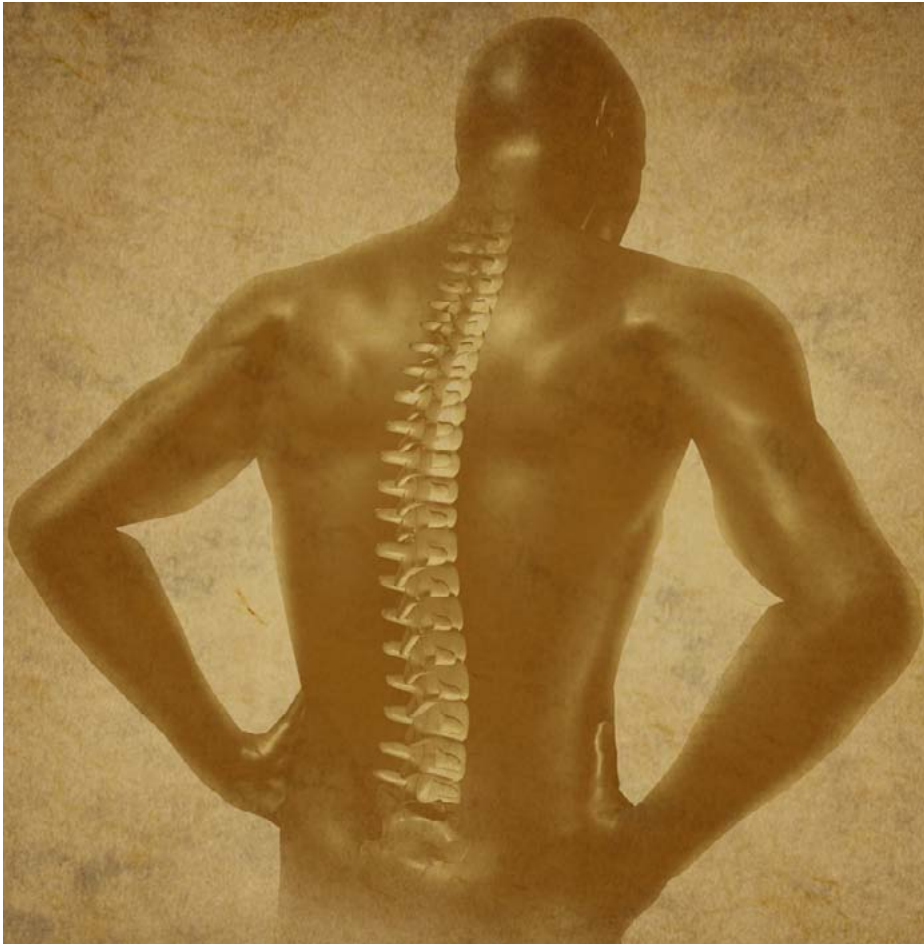
*Lady Justice Hallett*

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The Court of Appeal held that on the facts of the case the claimant was not standing in an inherently dangerous place nor could she have foreseen that the rear of the bus would strike her. There was no contributory negligence on her part.

The Court of Appeal however declined to find that the 1982 case of Chapman v Post Office was an authority for the principle that a pedestrian who is standing on a pavement can never be held to blame despite the claimant's counsel's inviting them to do so.

*Comment: the refusal of the Court of Appeal to rule out contributory negligence on the part of a pedestrian struck on a pavement leaves open the tantalising possibility of successfully arguing this point. Presumably however this would only succeed where the claimant was in an obviously dangerous place and/or should have foreseen that a vehicle was likely to encroach onto the pavement.*



for PCT funding. The principle that the tortfeasor should pay applied. The PCT's duty under the National Health Service Act 2006 was a "target duty" allowing it to take into account the costs of providing services and other demands upon it and the court should not interfere with any decision made unless it was unlawful or irrational as per the Court of Appeal's 2006 decision in *Rogers v Swindon NHS PCT*.

The Court disagreed. The decision not to fund care had been based on the claimant's ability to pay contrary both to Section 1 of the NHS Act 2006 and to the NHS constitution which undertook to provide treatment free of charge at the point of delivery based solely on clinical need. There was no authority to support the proposition that the NHS was entitled to rely on the "tortfeasor should pay" principle as a basis for avoiding the provision of services to a person who would otherwise qualify. The situation here was different to that in *Rogers* where the PCT declined to provide a specific form of treatment to a class of patient because it was a low priority. This decision was made from a desire to avoid funding a particular patient to save funds and that was unlawful.

## Quantum

### **Withdrawal of Primary Care Trust (PCT) Support Not Lawful: *R (Alyson Booker) v Oldham Primary Care Trust and Direct Line Insurance Plc – Administrative Court (2010)***

The claimant suffered catastrophic spinal injuries in a road traffic accident. The negligent motorist's insurers admitted liability in full and settlement was agreed with periodical payments covering the cost of the claimant's future care. The periodical payments were however deferred for two years to allow the establishment of a team

of PCT carers who would then act as a template for a privately funded team. The insurers provided an indemnity in the event that PCT funding was withdrawn in the meantime.

Almost a year after the settlement agreement was made the PCT decided to withdraw its support for the claimant prompting the claimant and the compensating insurers to seek a judicial review.

The PCT argued that because the claimant was being compensated by an insurer she did not have a reasonable requirement

*Comment: in arguing that the principle that the tortfeasor should pay effectively provided an opt-out for them, Oldham PCT did not distinguish between cases where compensators were paying in full or in part. Had they been successful with this argument, in cases where liability was split the injured claimant could be left with only partial compensation towards the cost of their care needs with nothing from the NHS to make up the difference.*

*This would make settling claims for catastrophic injury more complicated as claimants would be unwilling to settle without first involving the local PCT in negotiations.*

*The reaffirmation of the principle that NHS services should be provided free at the point of delivery leaves the way open for claimants to obtain double recovery from both private compensator and the NHS unless settlement agreements specifically preclude this.*

*Our thanks go to DWF solicitors who acted for the insurers for their helpful note on this case.*

### **Multiple indices used on periodical payment order: E.A. (A child by her Father and Litigation Friend M.A.) v O - High Court 2010**

Settlement of this claim from a catastrophically injured claimant was agreed between the parties and approved by the court on the following basis:

- A lump sum of £2.189m
- Periodical payments for care and case management of £330k per annum linked to the 90th percentile of Annual Survey of Hours and Earnings (ASHE)
- Periodical payments for loss of earnings of £22k per annum from age 23 to 65 linked to the aggregate ASHE index for females
- Periodical payments for increased cost of holidays, home running costs, private medical expenses and therapies of £23,750 per annum linked to the Retail Price Index.

*Comment: an increasingly common feature of Periodical payment orders is the use of multiple indices for different*

*heads of loss. This reduces the risk of over or under compensation but does make the administration of the payments and the calculation of reserves and overall settlement values more complex.*

### **Court continues to apply current discount rate: Love v Dewsbury – High Court (2010)**

The court was faced with the task of assessing quantum in the case of a severely brain injured minor. The claimant had highly variable care needs which made a Periodical Payment Order (PPO) impractical. Due to this and the fact that the defendant's insurers were in run-off and unable to self-fund a PPO the court decided that a lump sum settlement would be appropriate.

Referring to the Lord Chancellor's pending review of the discount rate the claimant's counsel invited the court to either postpone the assessment of an award pending completion of the review or to calculate an award using the current discount rate but give the claimant the right to reapply for a revised amount in the event that the discount rate was altered.

The defendants argued that there was no guarantee that the rate would be changed and that to hold up the settlement of the claim for what could be a considerable period of time when the current rate was clearly established could not be justified.

The judge agreed that the current discount rate should be applied. It was not for him to change the law and no evidence had been put before him of "exceptional circumstances" sufficient to allow him to depart from the normal rate. The claimants had been well aware of the discount rate throughout the case but had not previously sought an application to adjourn and the judge was not prepared to adjourn it now. He was also not prepared to allow

the claimant to reapply should the rate be changed as this would leave matters unresolved for an indefinite period.

*Comment: it is perhaps unsurprising that claimants would seek to benefit from any reduction in the discount rate. With no time frame yet announced for the review however it seems unlikely that any change will take place in the near future. For the time being at least the courts appear unwilling to put off the assessment of damages or to depart from the current discount rate.*

### **Court refuses request for adjournment pending discount rate review: Kevin Day v Randhawa and Motor Insurances' Bureau (MIB) - High Court (2011)**

Solicitors acting for the severely brain injured claimant applied to the court to have the issue of an appropriate multiplier adjourned pending the Lord Chancellor's review of the discount rate. As in the case of Love v Dewsbury the judge refused to grant an adjournment.

*Comment: given that there is as yet not even any time frame in place for a review any decision to adjourn cases would likely lead to the build up of a substantial backlog.*



to be an unreliable witness, had erred in preferring the defendants' expert's evidence (specifically that the judge had no basis on which to find that the expert had relied on the claimant's own evidence and that the judge relied on the defendants' counsel's notes of the medical expert's evidence at trial) and had failed to deal with the exacerbation case.

The appeal was dismissed. The judge had been entitled to find that the claimant was an unreliable witness and this was not something with which the Court of Appeal would interfere unless it was plainly wrong, which it was not. The judge had also been entitled to prefer the defendants' medical evidence which was reasoned and had no obvious flaws.

The claimant had told his medical expert that the fatigue he felt post accident was different to that he felt before. The expert had relied on this information as the trial judge had found. The judge had not acted improperly in referring to the defendants' counsel's notes on the evidence; these were the only ones available. The judge had understood the exacerbation case and indeed had made an award in respect of it.

*Comment: claims in respect of chronic pain or chronic fatigue conditions arising from relatively minor injuries are all too common and often raise difficult questions of causation and exaggeration.*

*As in this case the outcome of a hearing is often a question of whether the claimant is a credible witness and which evidence the judge prefers. The Court of Appeal has made it clear that it will not interfere unless such findings are plainly wrong.*

## Causation

### Chronic fatigue syndrome: Masood v Kerr and Pal-Ker (Administrators of the Estate of Forrester, deceased) – Court of Appeal (2010)

The claimant was injured when his vehicle was struck in the rear by a van. The van driver later died and the claimant brought a claim against his estate alleging that the accident had caused him to develop Chronic Fatigue Syndrome (CFS). An alternative case advanced at trial was that if the accident had not caused the CFS it had exacerbated it or brought forward its onset.

At first instance the judge was unimpressed with the claimant's evidence and preferred the evidence of the defendants' medical

expert to that of the claimant's. He held that the claimant already had the syndrome at the time of the accident and that any exacerbation was mild. He awarded the sum of only £1,000 against a pleaded claim of roughly £295,000.

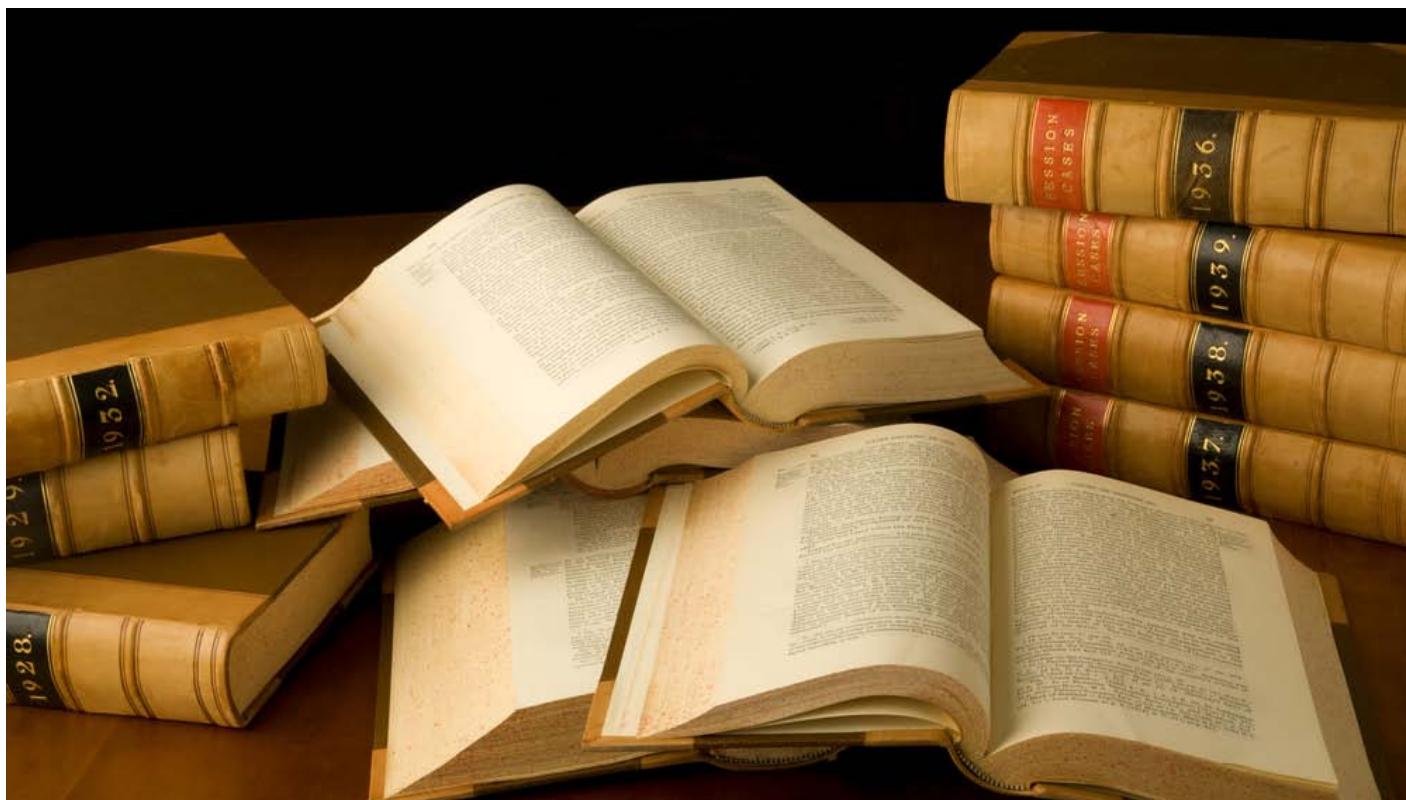
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*"I have already said that the judge did not form a favourable view of Mr Masood's evidence. That is particularly the province of a trial judge and this court will not interfere with such an assessment unless it is plainly wrong.*

*Lord Justice Longmore*

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The claimant appealed on the grounds that the judge had erred in finding him



## Procedure

### **Insurers unable to rely on Contribution Act: Jubilee Motor Policies v Volvo Truck and Bus – High Court (2010)**

Jubilee Motor Policies (JMP) had satisfied a judgment for damages for personal injury suffered by a claimant in a road traffic accident caused by their policyholder's negligence. JMP had declined indemnity but was still obliged to satisfy the judgment under the terms of the Road Traffic Act 1988.

JMP considered that the poor maintenance of their policyholder's vehicle had been a contributory factor to the accident and brought proceedings under the Civil Liability (Contribution) Act 1978 against Volvo Truck and Bus alleging that they had been in

breach of contract in respect of the vehicle's maintenance.

Volvo successfully applied to have the proceedings struck out. The Contribution Act requires liability for the "same damage". Volvo argued that JMP as an insurer were not liable for the claimant's injuries but had been required to satisfy a judgment by virtue of statutory duty and were not therefore liable for the "same damage". The judge agreed holding that the definition of "same damage" had to be construed narrowly and that to successfully obtain a contribution from a defendant a claimant such as JMP must show that the genesis of the liability for damages was the same.

*Comment: Where an insurer is declining indemnity but has statutory obligations to satisfy court judgments it may find itself dealing with litigation in its own name rather*

*than the policyholder's and on the basis of this judgment it will now be prevented from bringing contribution proceedings against other wrongdoers.*

*Proceedings brought directly against insurers are increasingly common and not just in motor cases. The question arises as to whether insurers will now be barred from seeking contributions where they are sued directly?*

*Ian Sinho Claims Manager at Jubilee, who kindly provided us with some background on this case, believes the judge's findings to be flawed but Jubilee will not be appealing due to other (unspecified) issues with this claim.*



## Credit Hire

### Consumer Regulations made Credit Hire Agreement unenforceable: *Chen Wei v Cambridge Power and Light Ltd – Cambridge County Court (2010)*

The claimant's car was damaged in an accident caused by a vehicle owned by the defendants. The claimant took his car to a Mercedes garage for repair which put the claimant in touch with the credit hire company Accident Exchange. Accident Exchange delivered a replacement car to the claimant's home where he signed the credit hire contract.

At first instance the credit hire claim was dismissed as unrecoverable. The judge held that as the contract had been made at the claimant's home the Cancellation of Contracts made in Consumer's Home or Place of Work etc Regulations 2008 applied. The regulations required the hirers

to supply the claimant with written notice of his right to cancel the hire contract within seven days. No such notice had been given rendering the agreement unenforceable.

The claimant appealed arguing that the regulations did not apply because the contract had effectively been made by telephone prior to the delivery of the replacement car and because the claimant had affirmed the contract and abandoned the protection of the regulations.

The appeal was dismissed. Whether there was indeed a pre-existing contract in place prior to the delivery of the car was a matter of fact and of law to be decided by the original trial judge. Even if the court should find that a pre-existing contract was in place prior to delivery there was an express condition of the hire agreement signed at the claimant's home to the effect that it revoked all previous agreements. The judge at first instance had been correct to find that the regulations applied. The hire agreement

was therefore unenforceable against the claimant and consequently not recoverable from the defendants.

Despite the claimant's contention that he had waived his rights under the regulations there was an important public policy point that consumers should be protected from traders who failed to apprise them of their rights. Even if the claimant did not take the point on the regulations the court had a duty to do so.

*Comment: on the face of it this is an encouraging decision suggesting a means by which defendants may successfully challenge credit hire agreements. Where hire charges have actually been paid however arguments about enforceability are likely to be ineffective.*

Plaintiff cost  
 Wilson v Lovering

Writ	_____	.67
Serwin	_____	.94
Entry	_____	.50
Travel	_____	.25
Attendance	_____	.25
Adjournment		.17
Travel	_____	.25
Attendance	_____	.25
Issue	_____	.50
Witnesses		
Joseph Robie		
Travel 14 <sup>th</sup> day		.96
John Merrill		.96
John Moore		.96
Subpoena King		.61
<del>Travel to London</del>		<del>.67</del>
		<hr/>
		\$7.77

allowed by me

Elizabeth Hunt just Deane

**Costs**

**Conditional fee agreements distort Part 36: James Pankhurst v Lee White and Motor Insurers Bureau: Court of Appeal (2010)**

The claimant was seriously injured by an uninsured motorist and brought proceedings against him and the Motor Insurers Bureau (MIB). He signed a Conditional Fee Agreement (CFA) to finance the action. The CFA had two stages with a success fee of 22.5% if the case settled short of a hearing rising to 100% if the case went to trial.

The claimant obtained summary judgment against the uninsured motorist but with contributory negligence to be determined. At the liability hearing the claimant was successful in persuading the court that the defendant was 100% liable. Prior to the liability hearing the claimant had made a Part 36 offer of £3.4m which had been rejected and was withdrawn after the hearing.

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*"... I regard the arrangements made by the claimant's solicitors in this case as grotesque. In addition to their base costs (i.e. their proper costs for conducting the litigation regard the arrangements) they are extracting from MIB a "success fee" of some £100,000 for running a risk which simply did not exist."*

Lord Justice Jackson

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Eventually the amount of periodical payments was agreed but not the lump sum element and the case went to a hearing on quantum. The MIB made an overall Part 36 offer valued at £6.8m which the claimant failed to beat and the claimant agreed to pay the MIB's costs from the last day that the Part 36 offer could have been accepted. The judge then ruled that the MIB must pay the claimant's costs on an indemnity basis from the date of the liability hearing until the end of the MIB's Part 36 offer but with no award of enhanced interest on future loss damages or costs.

The claimant appealed. He argued that if claimants were not entitled to enhanced interest on future losses then they would have little incentive to make a Part 36 offer in respect of them. In addition to have to pay the defendant's costs and to fail to recover their own costs of the quantum trial amounted to a double penalty.

The defendants countered that to say the claimant was out of pocket was misleading. The defendant had been obliged to refund to the claimant a substantial premium for an After the Event (ATE) insurance policy which covered the claimant's full liability to pay the MIB's costs so that in reality the claimant would not pay the MIB a penny.

The Court of Appeal dismissed the appeal. The claimant had paid nothing for failing to beat the MIB's offer whereas the MIB were out of pocket for failing to beat the claimant's earlier offer. The ATE had distorted the normal operation of Part 36. The claimant's solicitors were being paid a success fee of £100,000 when in reality they were at no financial risk.

The judge at first instance had taken the view that it would be unjust to order the MIB to pay interest on top of indemnity

costs and there were no grounds on which this decision should be disturbed.

With regards to enhanced interests on future damages, the court was bound by the decision in *McPhilemy and Times Newspapers* and could not award enhanced interest on items that did not already warrant interest. Even if the rules of Part 36 were unfair to claimants the court could not re-write them. The issue was already the subject of government consultation and at the end of that process the Ministry of Justice and the Rules Committee would decide if Part 36 needed reform.

*Comment: the very strong condemnation of the current CFA system by the Court of Appeal demonstrates that senior judiciary understand the way in which it unfairly impacts on defendants and increases the cost of litigation.*

*Lord Jackson in his report on Civil Litigation published last year called for an end of the recoverability of both success fees and ATE premiums from defendants and it appears that he has strong judicial support for these proposals.*

*Our thanks go to Berryman's Lace Mawer Solicitors who acted for the MIB for telling us about this case.*



## Fraud

### Exemplary damages awarded against fraudsters: *Hussain and others v Yaqoob and Ensign Insurance and Ensign v Hussain and Others – Derby County Court (2010)*

Three claimants sought damages for personal injury and vehicle damage arising from two alleged accidents. Both defendant drivers were insured by Ensign (part of QBE). The claims' handlers dealing with the claims became suspicious when one of them recognised a storage account on one claim file that was similar to another he had seen on the other claim.

Subsequent investigation and engineering evidence revealed that the claimants and defendant drivers were well known to each

other, that the damage to the vehicles involved could not have been caused as alleged, and that there were numerous inconsistencies in the claimants' and defendant drivers' versions of events.

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*"...I was quite unable to rely upon evidence given in an attempt, as it seemed to me, to brazen out the exposure of a dishonest scheme pursuant to which the accidents which I was asked to consider had been faked, or staged, or exaggerated."*

*Mr Recorder King*

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At a conjoined hearing the judge was convinced by the weight of evidence that both alleged accidents were fraudulent.

As a result the judge ordered the claimants and defendant drivers to pay damages to Ensign in respect of the tort of deceit plus exemplary damages equivalent to the monies they would have obtained had their fraud been successful. They were also ordered to pay Ensign's costs on an indemnity basis.

*Comment: the successful exposure of this attempted fraud led to the conspirators being heavily financially penalised although the judge stopped short of a referral to the Director of Public Prosecutions.*



The Court of Appeal agreed holding that different EU regulations could apply to different areas of law involved in the same claim. Thus whilst “Rome II” determined that Spanish law governed liability, damages should be assessed in accordance with British levels of damages in accordance with regulation 13(2).

*Comment: this will be a disappointing decision for the MIB who will be faced once more with paying UK levels of damages to UK residents injured by citizens of other EU countries abroad. The MIB should be able to recover the money from the equivalent body in the country where the uninsured vehicle is usually based but this is not always a straightforward matter.*

*The decision creates an interesting anomaly whereby a UK citizen injured in another EU country by an untraced or uninsured foreign driver could be financially better off than one injured by an insured driver. This and other anomalies arising from “Rome II” are only likely to be resolved if and when the European Court of Justice rules on them.*

## Jurisdiction

### **Motor Insurers Bureau damages not determined by “Rome II”: Clinton David Jacobs v Motor Insurers Bureau – Court of Appeal (2010)**

The claimant who normally resided in England was seriously injured whilst on holiday in Spain. He was run over by a car driven by a German national who was uninsured and was obliged to seek compensation from the UK Motor Insurers Bureau (MIB).

The High Court was asked to rule as a preliminary issue whether the claim for damages should be assessed by reference to English or Spanish law or a combination

of the two. Damages assessed under English law would be far higher than Spanish.

At first instance the High Court held that EU Regulation 864/2007 (known as “Rome II”) applied and that damages should be assessed by English law as stipulated by that regulation.

The claimant appealed arguing that regulation 864/2007 should not apply to the assessment of damages because the mechanism whereby the claimant was seeking compensation was regulation 13 (2) (b) of the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003 and this regulation required the MIB to compensate the claimant as if the accident had occurred in Great Britain.

Completed January 2011 – Copy  
Judgments and/or source material for the  
above items can be obtained from Chris  
Gaydon (contact no: 01245 272480, e-mail:  
chris.gaydon@uk.qbe.com).

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