FARRAR'S BUILDING

Personal Injury Update December 2015

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Farrar's Building News

Nigel Spencer Ley Editor

Anyone who has ever been involved in road traffic claims, will at some stage have encountered arguments over whether appropriate notice under the Road Traffic Act has been given. In force for nearly 30 years, section 152 of the Act continues to cause difficulty for litigants, and to create work for lawyers. One might have thought that all issues on this section had now been resolved. **Tom Bourne-Arton** reports otherwise.

Can a person who lacks mental capacity commit an actionable tort? **David Roderick** provides the answer.

The Case Law Update was prepared by **Joel McMillan.**

Seasons Greetings from all at Farrars.

When do proceedings commence for the purposes of s152 of the Road Traffic Act 1988?

By **Tom Bourne-Arton**

Recently I had to argue a novel point of law in relation to interpreting s.152 **Road Traffic Act 1988**. The case involves a multi car accident with three claimants and six defendants. The case initially involved just the first claimant and the first defendant. In her defence the first defendant sought to blame the second defendant, and so the second defendant was added into proceedings. In his defence the second defendant sought to blame the third defendant, and so the third defendant was brought into proceedings. At the same time the fourth defendant, the relevant insurer of the third defendant, asked to be joined into proceedings by consent. Thereafter the second and third claimants and fifth and sixth defendants were also added into the proceedings.

The fourth defendant put in a defence which included arguing that the Claimant(s) failed to give them proper notice pursuant to s.152(1)(a) of the **Road Traffic Act 1988**, stating that:

1. The proceedings were issued on 27th August 2013.
2. An amended claim form adding the third defendant to the proceedings was filed on 11th June 2014 and served on 13th June 2014.
3. In order to comply with the **Road Traffic Act 1988** the fourth defendant's should have been given notice by all of the claimants by 3rd September 2013.
4. And that therefore the requisite notice had not been provided and the claim against the fourth defendant should be struck out.

The fourth defendant recognised that it would not have been possible for the Claimants to have given notice to the fourth defendant by 3rd September 2013 as they were unaware of the third defendant's involvement at that time. The answer to this, they argued, was that any claimant in the situation where they only learn of involvement of other Defendants after the issue of proceedings should commence separate proceedings, and then apply to consolidate the proceedings, rather than have these defendants added to the current proceedings so that "appropriate notice" can be given beforehand.

The claimants' argument was that notice to the relevant insurer is only required once the insurer's insured is brought into the proceedings, i.e. proceedings against the insurer's insured starts; and that any other interpretation of S.152 **Road Traffic Act 1988** is nonsensical, and contrary to the relevant case law.

S.152 states:

(1) No sum is payable by an insurer under section 151 of this Act—

(a) in respect of any judgment unless, before or within seven days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings, or

(b) in respect of any judgment so long as execution on the judgment is stayed pending an appeal, or

(c) in connection with any liability if, before the happening of the event which was the cause of the death or bodily injury or damage to property giving rise to the liability, the policy or security was cancelled by mutual consent or by virtue of any provision contained in it, and also—

(i) before the happening of that event the certificate was surrendered to the insurer, or the person to whom the certificate was delivered made a statutory declaration stating that the certificate had been lost or destroyed, or

(ii) after the happening of that event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy or security, the certificate was surrendered to the

insurer, or the person to whom it was delivered made a statutory declaration stating that the certificate had been lost or destroyed, or

(iii) either before or after the happening of that event, but within that period of fourteen days, the insurer has commenced proceedings under this Act in respect of the failure to surrender the certificate.

(2) Subject to subsection(3) below, no sum is payable by an insurer under section 151 of this Act if, in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration—

(a) that, apart from any provision contained in the policy or security, he is entitled to avoid it on the ground that it was obtained—

(i) by the non-disclosure of a material fact, or

(ii) by a representation of fact which was false in some material particular, or

(b) if he has avoided the policy or security on that ground, that he was entitled so to do apart from any provision contained in it.

(3) An insurer who has obtained such a declaration as is mentioned in subsection(2) above in an action does not by reason of that become entitled to the benefit of that subsection as respects any judgment obtained in proceedings commenced before the commencement of that action unless before, or within seven days after, the commencement of that action he has given notice of it to the person who is the plaintiff(or in Scotland pursuer) in those proceedings specifying the non-disclosure or false representation on which he proposes to rely.

(4) A person to whom notice of such an action is so given is entitled, if he thinks fit, to be made a party to it.

The Fourth Defendant's argument was premised on the argument that by "*the proceedings*" s.152 relates to the commencement of the claim, and not to the inclusion of the third defendant into the proceedings. The fourth defendant argued that there can only be one time when proceedings commence.

In response the claimants successfully argued that this is an incorrect interpretation of s.152. In doing so I stressed that a purposive interpretation of s.152 should be made, and relied on the following cases.

In **Desouza v Waterlow** [1999] RTR 71 Roch LJ said:

"*The requirement is that the insurer have notice of the bringing of the proceedings. That must be something different from the commencement of proceedings, because Parliament has chosen to use the phrase "the bringing of the proceedings" and the phrase "the commencement of proceedings" in the same subsection.*

…The insurers through their counsel Mr Astor, argue that the interpretation of section 152(1)(a) turns on the use of the word 'the' in front of the word 'proceedings' and therefore what has to be given by way of notice to the insurers is notice of the particulars proceedings brought by the third party. In my judgment, the sub-section is not to be interpreted in that way. As notice of the bringing of proceedings can be given before those proceedings are commenced, that is to say at a time when the proceedings do not exist, the notice that has to be given to the insurers is information that the third party intends to commence an action against the insurers insured. Once the insurers have had that knowledge there is an onus on them to inform themselves of the precise details of the proceedings.

The purpose of the provision is to avoid insurers being asked to satisfy a judgment against their insured in respect of a claim of which they knew nothing obtained in proceedings of which they had no notice or warning."

The key phrase in this quote is towards the bottom: "*the notice that has to be given to the insurers is information that the third party intends to commence an action against the insurers insured.*" I.e. for proper notice to be given the Claimant has to inform the parties insured that he/she intends to bring a claim against their insured.

Desouza was cited and approved in the case of **Wylie v Wake** [2001] PIQR P13. In *Wylie* Kennedy LJ summarised the authorities to reach certain conclusions, as follows:

"*(1) To show that the insured had notice of the bringing of the proceedings there must be more than evidence of a casual comment to someone who at times acted as an agent for the insurers (See Herbert v RPA Company).*

(2) Any notification relied upon must not be subjected to a condition which may or may not be fulfilled (see Weldrick and Harrington) but if the only condition is one which requires action from the recipients which they choose not to take then by making that choice they render the notice unconditional and thus effective (see Ceylon Motor Insurance Association Ltd).

(3) The notice can be oral, and it need not even emanate from the claimant (see Harrington and Desouza). It can be given before proceedings have commenced, and it need not be specific as to the nature of the proceedings (Desouza) or the court (see Ceylon and Harrington).

(4) Whether in any given case it is shown that the insurer had notice of the bringing of the proceedings (as opposed to the making of a claim) is matter of fact and degree (Desouza).

(5) The essential purpose of the requirement of notice is to ensure that the insurer is not suddenly faced with judgment which he has to satisfy without having any opportunity to take part in the proceedings in which that judgment was obtained (Desouza)."

The whole purpose of s.152 is to provide the insurer with an opportunity to complete investigations and reach a decision whether they want to void the policy or not. The insurer could not do that in cases where proceedings are commenced against another insured four months before their insured is added into proceedings.

Another case worthy of note is **Cross v British Oak Insurance Company Ltd** [1938] KB 167. In that case a counter-claim was brought by a third party against the Defendant. In that case Mr Baker brought a claim against Mr Fowler. Mr Fowler denied liability and instead sought to blame Mr Cross, and joined Mr Cross into proceedings as a Third Party claiming a contribution and counter-claim against Mr Cross. Subsequently Mr Cross brought a counter-claim against Mr Fowler. No notice of that counter-claim was given to Mr Fowler's insurance company. At trial Mr Cross was successful in his counter-claim against Mr Fowler. He then sought a declaration from Mr Fowler's insurer. The insurer defendant denied liability on the grounds of a failure to provide the requisite notice.

In his judgment Du Parq J held:

"*The question is, When were the proceedings commenced? It may be said that the proceedings were commenced when Baker commenced his action in the county court. Ultimately, Cross was served with a third-party notice, and judgment was given in favour of Cross in those proceedings which Baker commenced when he used his plaint. Alternatively, it may be said that the proceedings in which the judgment was given began when Mr Cross was brought in as a third party, because when Cross was brought in as a third party, it was for the first time possible for any judgment to be given which would affect his rights. When once Cross was brought in as a third party, it was, at any rate, possible that he would counterclaim, and any one receiving notice that Cross had been brought in as a third party would know, if he studied, as he should, the procedure of the county court, that there might be a counterclaim by Cross. In the further alternative, it may be said, and it has been said her, that it was when Cross counterclaimed against Fowler that the proceeding commenced in which the judgment was given.*

I think that I can put aside at once the first possible views to which I have referred. It is of great importance to the person who ultimately recovers judgment that he should be able to recover against the insurers, and, though he is not obliged to give the notice himself, he may give it. It would have been quite impossible for Mr Cross to take any step with a view to giving notice of his claim within seven days after the commencement of the proceedings, if by the word "proceedings" is meant the county court action instituted by Baker. The real question which I have to decide is whether the second or the third of the meanings which I have stated is to be given to the word "proceedings".

…

…Parliament cannot have intended the words "the commencement of the proceedings in "which the judgment was given" to refer to the issue of the writ in the case not complicated by third-party proceedings, or to the service of third-party proceedings, in cases where judgment was given on counterclaim. The principle is exactly the same in each case, if one regards the issue of the third-party notice as analogous to the issue of a writ."

…

Therefore in *Cross* it was held that by "*the proceedings in which the judgment was given*" meant the time that the counter-claim was issued. That case is analogous to the current case. The proceedings that are relevant are the proceedings which are started when a party is added to the proceedings, i.e. when a claim for judgment can be made against another party.

The judge agreed that these authorities establish that in cases such as this when a party is added into proceedings as a second, third, or fourth defendant (for example) that the time to provide notice to the relevant insurer is when the proceedings include a claim against their insured, and not when the initial claim was commenced. In doing so the judge held that the proper interpretation of s.152(1) is that by "*the commencement of proceedings in which judgement is given*" starts at the time that proceedings against an insurer's insured are started, i.e. when that insured is added into proceedings. She dismissed the fourth defendant's contention that the "proceedings" meant the original proceedings (in her words).

Further, that the time to provide notice for the second and third claimants was when they were added into the proceedings.

The judge also agreed that adopting the fourth defendant's interpretation would lead to obviously iniquitous occasions where a party is unaware of the identity of a driver involved in an incident, who is only added into proceedings following another drive blaming them (as in this case), being unable to look to that driver's insurer for satisfaction of any successful claim. This is not the purpose of the statue. The purpose of the statute is to enable insurers and opportunity to investigate the claim before judgment is entered, and to be added into proceedings if they choose to be.

Even further, to argue that the first claimant should have brought separate proceedings against the third Defendant just so that proper notice could be given to the Fourth Defendant would make CPR 19 redundant, and would lead to a considerable waste of the courts time dealing with applications to consolidate proceedings. Again this could not have been the intention of parliament.

Is there a threshold for liability of mentally or physically impaired tortfeasors?

By David Roderick

The case of **Terry Dunnage v (1) Randall (2) UK Insurance Limited** [2015] EWCA Civ 673 concerned the important question of whether or not a person suffering from a physical or mental incapacity will be liable in damages to an injured person. The extent of the mental instability in the case was extremely severe, and it had resulted in a man's actions becoming overwhelmingly directed by his deluded and deranged mind.

The decision of the Court of Appeal is a clear reiteration of the objective standard of care in the tort of negligence, rather than any adjustment to that standard to take account of the personal characteristics of the particular defendant. It particularly addresses that issue in the context of the highly specialised, nuanced and complex modern understanding of mental illness.

The Facts

The facts of the case are tragic. The Claimant (T), had an uncle (V), who was suffering from an undiagnosed florid paranoid schizophrenia and who had made, unbeknownst to his family, a number of recent suicide attempts. V went to see T in the latter's home, and became agitated. He made certain allegations against T and his partner and then went out to his car ostensibly to retrieve a magazine. Instead he returned with a petrol can and a cigarette lighter. After further allegations against T and partner, V stated "*tell me the truth or we are all going to go up*", he became

incoherent, spilled petrol on the floor, and toyed with the lighter. He then poured the petrol over himself. T, acting as a rescuer, tried to grab the lighter and drag V away from the petrol, and a struggle ensued during which T was also covered in petrol. V ignited the lighter and both were engulfed in flames. T was badly burned and escaped by jumping from a balcony, but V sadly died at the scene.

The claim

For the purposes of T's action against V's estate (the First Defendant), the claim was founded on the household insurance cover issued to V's widow which provided an indemnity for her family against sums liable to be paid as damages for accidental bodily injury. The Second Defendant insurer therefore took conduct of the defence.

Thus, against the estate, T had to establish that despite the mental illness V owed a duty of care, which was breached (i.e. that his responsibility for the act remained, and was not entirely eliminated by his condition), but also, for the purposes of the policy, T had to establish that the injury was accidental (i.e. that the level of responsibility which remained despite the mental condition did not mean that the act was intended, deliberate, wilful, malicious or reckless).

First instance decision

In essence the issue to be tried was whether those suffering mental illness owe a duty of care and if they do whether it was to be judged by an objective standard. The Judge at first instance formulated the applicable duty of care as being a duty to take reasonable care in respect of one's voluntary actions to avoid creating the risk of causing foreseeable injury to others; and he thus approached the assessment as a determination as to whether or not T's actions had been voluntary. There was no error in principle with that approach.

The Judge decided that a duty of care was owed on the basis of a **Caparo v Dickman** [1990] 2 AC 605 analysis: reasonable foreseeability of harm and proximity were established, and the imposition of a duty was fair, just and reasonable. Again, that part of the decision was treated as unimpeachable by the Court of Appeal.

In determining whether or not there had been a breach of that duty, the Judge was presented with agreed medical evidence from a neuropsychiatrist and forensic psychiatrist, which concluded that V's intensely deluded mind was governing his actions. Unfortunately, the experts had used a plethora of terms to describe not merely the condition V suffered, but the effect of that condition in the context of tortious liability. *Inter alia*, it was said of V that:

1. his delusional state would have been so overwhelming as to render him incapable of formulating any rational alternative action;

2. he was almost certainly incapable of forming a rational intention to carry out a reasoned deliberate act;

3. his state of mind may have encompassed the ability to intend an action in a mechanistic manner but would not have allowed him to form a rational or sane intention;

4. his capacity to make a reasoned and informed judgment was at least grossly impaired and *probably* eliminated (emphasis added), and that;

5. in the absence of his rational mind he was most likely driven by delusions, thus rendering his actions involuntary.

On the basis of that expert evidence, the Judge concluded that V's actions were not voluntary, stating "*By reason of the extreme nature of the manifestation of his mental illness,* [V] *was not acting voluntarily*

and accordingly is not within the scope of the duty neither is he in breach of that duty. Furthermore, voluntary or voluntarily informed acts were not the cause of the events that led to the damage. This result is no different than would have been the case had [V] *fallen as a result of a stroke and knocked* [T] *into the flame of the kitchen gas hob or had* [V] *been pushed into* [T] *by a violent third party with the same result*". T's claim therefore failed.

Further, it was found that the injury was accidental (by reference to both the authorities cited in argument and the wording of the policy), and that an exclusion in the policy for liability arising from any wilful or malicious act could not be relied on by the Second Defendant.

The decision of the Court of Appeal

Rafferty, Vos and Arden LJJ agreed that the appeal was to be allowed, and that a defendant will not escape liability in negligence as a result of falling below an objective standard of care due to a mental or physical impairment. A lengthy exegesis of the relevant authorities was conducted by Rafferty LJ, and no support for the moderation of an objective standard of care identified (i.e. to perhaps measure V's actions by the standards of the "*ordinary unwell man*"). She also rejected the notion that there was any difference between physical and mental incapacity for the purposes of the applying the standard of care.

Rafferty LJ stated the problem simply. It was whether, unwell as V was, he breached a duty of care by falling to measure up to an objective standard of care? So stated, the question requires none of the terminology and "*increasingly refined adjectival descriptors*" supplied by the medical experts. The proliferation of terms had not been useful criteria by which the Judge had measured what was "*voluntary*". Rafferty LJ expressed particular concern that the medical expert evidence had used "*involuntary*" and "*irrational*" almost as synonyms.

As assessed by Arden LJ, the assertion in the medical evidence that V's actions were involuntary was a medical expression, and had meant that he did not have rational control over his actions.

Importantly, however, that did not equate to V having no physical control over his actions, which is what would be necessary for his actions to be treated as involuntary for the purposes of determining liability in law in negligence.

If V could be said to have had no part to play in his physical acts of pouring the petrol and igniting the lighter, he would escape liability; just as if he were holding a knife and his arm grabbed and directed by another, or if he were sleepwalking, or in a state of automatism. However, on the medical evidence V's responsibility was not so completely eliminated.

It is the threshold of "*complete elimination*" of responsibility which is necessary for a defendant to establish. Vos LJ reached for the category of cases concerning defendants who had sustained "*unheralded, unexpected and unforeseen physical incapacity*" in illustrating that boundary, deciding that:

> "*only defendants whose attack or medical incapacity has the effect of entirely eliminating any fault or responsibility for the injury can be excused. It is only defendants in that category that have not actually broken their undoubted duty of care. The actions of a defendant, who is merely impaired by medical problems, whether physical or mental, cannot escape liability if he causes injury by failing to exercise reasonable care*" (paragraph 131, per Vos LJ) ...
>
> *"at all intermediate stages where the defendant does something himself he risks being liable for failing to meet the standards of the reasonable man. This approach avoids the need for medical witnesses to become engaged with difficult and undefined terms such as volition, will, free choice, consciousness, personal autonomy and the like. It is only if the defendant can properly be said to have done nothing himself to cause the injury that he escapes liability*" (paragraph 133, ibid)

The Court of Appeal was similarly unanimous in finding that the injuries were however accidental, and that the medical evidence had clearly established that V's actions had not been intended, deliberate, wilful, malicious or reckless.

Conclusions

The critical distinction for practitioners to bear in mind is that between a defendant suffering from a condition which entirely eliminates responsibility for an act or omission, and that which merely impairs their volition. Those defendants in the former category will not have breached their duty of care: they will not, for the purposes of the law of negligence, have actually done anything to cause injury. In the latter category, the defendant will not escape liability if he or she caused injury by failing to exercise reasonable care, measured objectively.

The decision of the Court of Appeal therefore illustrates the following:-

1. The long-established principle that the standard of care in negligence is objective is to be upheld, and the standard is not to be determined by the individual characteristics of a defendant (save in the case of children as defendants, an exception which ought not to be extended);

2. That a defendant under a mental or physical debilitation will have to establish the entire elimination of his or her responsibility for an act or omission before a court will find that there was no fault inherent in that act or omission for the purposes of the tort of negligence;

3. That public policy dictates that the civil law of negligence is driven by the aim of compensating victims; an end which requires the application of significantly different principles in comparison to the criminal law objective of punishing wrongdoers (and thus a much stricter threshold applies to a defendant seeking to avoid liability as opposed to a conviction);

4. Cogent and focussed medical evidence will still obviously be crucial in establishing a complete elimination of responsibility and an involuntary act, however;

5. The application of terms such as "*volition*", "*will*", "*consciousness*", "*personal autonomy*" etc., are imported from the rules applicable to the defences of insanity and automatism in criminal law, and not necessarily helpful to the assessment of civil liability;

6. Therefore, an absence of intent is not relevant to a finding of fault;.....but, as in *Dunnage* the absence of intent will be of great relevance to any insurer who has provided cover for accidental injury.

CASE LAW UPDATE

By Joel McMillan

Sabir (By Her Litigation Friend, The Official Solicitor) v. Osei-Kwabena
[2015] EWCA Civ 1213
(Arden LJ, Tomlinson LJ, Lindblom LJ)

Significance: The Court of Appeal considered apportionment in road traffic collisions between motorists and pedestrians. Causative potency and blameworthiness were both factors to be considered, and motorists would generally be found to have higher levels of both because of the destructive potential of their vehicles.

Facts: The claimant (S) alighted from a car parked a few metres beyond a pedestrian crossing on a busy suburban shopping street. She then moved to the rear of the car, checked the road and saw the Defendant's (O-K's) car approaching at normal speed, but she misjudged the car's position and stepped out into its path. O-K had a clear view of the road but did not see S and a collision ensued. The trial judge found that O-K's negligent driving was the primary cause of the accident but that damages should be reduced by 25% for contributory negligence.

O-K appealed, arguing that S's flawed decision to walk out in front of an oncoming car made her more blameworthy than if she had simply walked out without looking, and that the trial judge had therefore significantly understated S's responsibility for the accident.

Held: Blameworthiness and causative potency were both factors that had to be considered when apportioning liability in a road traffic accident. Motorists had a high burden of causative potency

compared to pedestrians given the destructive potential of their vehicles. This destructive potential was also relevant to blameworthiness and it would be unusual for a pedestrian to be found to be more at fault than a motorist. Driving a car without keeping a proper lookout where it was reasonably foreseeable that pedestrians would be present constituted a considerable degree of blameworthiness: **Jackson v. Murray** [2015] 2 All ER 805 followed and **Eagle v. Chambers (No. 1)** [2004] RTR 9 considered.

S was obviously blameworthy in that she had misjudged her own safety but she had not put O-K in any danger. O-K had not only failed to take his foot off the accelerator but had also failed to see S for a significantly longer period of time than would normally be expected of a motorist. The causative potency and the blameworthiness of O-K's conduct was therefore significantly higher than that of S. Further, the apportionment at first instance was not demonstrably out of line with previously decided cases: **Clifford v Drymond** [1976] R.T.R. 134, **Lunt v. Khelifa** [2002] EWCA Civ 801 and **McCluskey v Wallace** 1998 S.C. 711 considered.

Reaney v. (1) University Hospital of North Staffordshire NHS Trust (2) Mid Staffordshire NHS Foundation Trust
[2015] EWCA Civ 1119
(Lord Dyson MR, Tomlinson LJ, Lewison LJ)

Significance: Where a claimant's care requirements were quantitatively but not qualitatively different from his pre-existing needs the tortfeasor was only liable for the additional requirements, but where the care requirements were qualitatively different the tortfeasor was liable for their entirety.

Facts: The claimant (R) contracted transverse myelitis at the age of 61, which left her paralysed below the mid-thoracic level. She would initially have required a few hours of care each week rising to 31.5 hours by the time that she was 75. In the event, she developed a number of deep

pressure sores during hospitalisation as the result of the defendants' negligence. The sores led to osteomyelitis, hip dislocation, serious contractures of the lower limbs and increased lower limb spasticity, and, consequently, her seating posture was permanently damaged, she was unable to use a standard wheelchair safely and she required 24 hour care from two carers. At first instance the judge awarded R the cost of the care in its entirety. The defendants appealed, arguing that they should only be liable for the additional care required as a result of the negligence.

Held: A claimant could only recover the cost of care to the extent that it was increased by the defendant's tort: **Performance Cars v. Abraham** [1962] 1 QB 33, **Baker v. Willoughby** [1970] AC 467 and **Halsey v. Milton Keynes General NHS Trust** [2004] 1 WLR 3002 followed. Where a claimant had pre-existing care requirements and the tort made a quantitative but not qualitative difference to those requirements, only the additional care was recoverable, but where the tort made a qualitative difference the care in its entirety was recoverable. The judge's findings in the lower court did not support a conclusion that R's care requirements were qualitatively different as a result of the defendants' tort and as such she could only recover the cost of the additional care.

Gavin Edmondson Solicitors Ltd v. Haven Insurance Co Ltd
[2015] EWCA Civ 1230
(LJ Laws, LJ Elias, LJ Lloyd Jones)

Significance: A solicitors firm was entitled to recover its costs under the principle of equitable intervention from an insurer which had settled claims directly with the firm's clients in order to avoid paying their legal costs. It did not matter that the clients had no liability for their costs to the firm.

Facts: The claimant solicitors firm (G) entered into CFAs with six clients in a claim that proceeded under the **Pre-Action Protocol for Low Value Personal Injury Claims in Road**

Traffic Accidents (the Protocol). The CFAs incorporated a Law Society document which provided that a successful client would be required to pay G's costs but would be able to recover them from the defendant. However, a client care letter explained that G would recover its costs from the defendant if the client were successful and that G had a right to bring an action in the client's name against the defendant.

The insurer (H) settled the matter directly with the six on an inclusive basis thereby depriving G of its costs. G brought the instant claim seeking equitable intervention and claiming that H had wrongfully prevented it from establishing a lien on the settlement sums for their costs.

Held: The principle of equitable intervention set out in **Khans Solicitors v. Chifuntwe** [2014] 1 WLR 1185 could only operate where a defendant had notice of a lien. It was clear from telephone transcripts that H had sought to settle the matter with the six directly in order to avoid paying G's costs and, as a participant in the Protocol, it was well aware of G's interests in receiving its costs: **Khans** applied.

The provisions in the Law Society document appeared to make the clients directly liable to G for their costs but no such liability could arise from the client care letter. The provisions in the client care letter had to prevail as the letter was stated to be for the avoidance of doubt. This meant that G had no right to pursue its clients for the fees and therefore had no lien over funds received by its clients. However, G would normally have a right to recover its costs under the Protocol scheme and this was either an entitlement of G itself or, alternatively, an entitlement to bring proceedings in the name of its clients to recover the sums. Either way, G had an interest which equity could protect and which was deserving of equity's protection.

The Protocol was not mandatory and was open to H to reach agreements with the clients outside of it but this was not what happened. Each of the clients authorised G to start the Protocol

process on his behalf and H had voluntarily entered the Protocol process. Neither the clients nor H had formally exited the Protocol process before entering into the compromise agreements. H entered the compromise agreements with notice of G's entitlement. The principle of equitable intervention required it to pay to G the sums payable on settlement under the Protocol scheme.

Clifford v. First-Tier Tribunal (Criminal Injuries Compensation) [Defendant] **& Criminal Injuries Compensation Authority** [Interested Party]
Court of Appeal (20/10/2015)
(Moore-Bick LJ, Davis LJ, Sharp LJ)

Significance: Compensation for multiple minor injuries was only recoverable under the **Criminal Injuries Compensation Scheme 2008** (the Scheme) where two visits had actually been made to or by a medical practitioner within six weeks of the incident. The word *'necessitated'* in the Scheme was to be construed as resulting in actual visits and not as merely warranting such visits.

Facts: The claimant (C) was assaulted and the police recorded that he suffered scratching and bruising to his head, but he did not seek medical attention. He applied for compensation from the Criminal Injuries Compensation Authority (CICA) under the Scheme, Note 1 of which provides, *'Minor multiple injuries will only qualify for compensation where the applicant has sustained at least three separate injuries ... at least one of which must still have had significant residual effects six weeks after the incident. The injuries must also have necessitated at least two visits to or by a medical practitioner within that six-week period.'* CICA rejected C's application as he had not sought medical attention on two occasions and upheld its decision on review. C appealed to the First-Tier Tribunal and subsequently to the Upper Tribunal. The latter allowed his appeal and held that C would qualify for compensation under the Scheme if his injuries were sufficiently serious to warrant two visits to a medical practitioner in the six week period, even if those visits had not actually been made. CICA appealed.

Held: The natural meaning of the wording of Note 1 required two actual visits to or from a medical practitioner. The word *'necessitated'* clearly indicated that attendance was required and not merely that it would have been appropriate or justified. This interpretation made sense on policy grounds to ensure that there was a clear minimum threshold for compensation. The alternative interpretation would give rise to real uncertainty in the application of the Scheme as CICA would be required to compensate in the absence of any contemporaneous medical evidence. CICA's appeal was duly allowed.

Joshi & Welch Ltd v. TAJ Foods Ltd

Queen's Bench Division (02/12/2015)

Green J

Significance: When considering an application for relief from sanctions that has been made to prevent default judgment being entered the court should have regards to the factors in **CPR r.13.3** on setting aside or varying default judgment, including a consideration of the merits of the case.

Facts: The claimant (J) brought a claim for unpaid fees for intellectual property services it said that it had performed for the defendant (T). T counterclaimed for what it said was an overpayment of fees for J's services. J failed to file and serve a defence to the counterclaim in time but did serve a witness statement addressing the points in the counterclaim seven days after the deadline for the defence. T sought judgment in default on the counterclaim and J applied for relief from sanctions / an extension of time to serve a defence.

The judge dismissed J's application and entered default judgment on the counterclaim. He accepted that the breach of the rules had minimal effect on the proceedings but found that it was nonetheless serious and significant for the purposes of the test in **Denton v. White** [2014] 1

WLR 3926. He rejected the submission that he should consider the merits of the claim. J appealed.

Held: (1) There were sound policy reasons for there being a *prima facie* reluctance to consider the merits of the case in determining an application for relief from sanctions under **r.3.9** and such considerations would be *'generally'* irrelevant: **Prince Abdulaziz v. Apex Global Management Ltd** [2014] 1 WLR 4495 followed. Nonetheless this reluctance was not unshakeable. **Rule 13.3** gave expression to a principle that default judgment would not normally shut out a party who might succeed on the merits. It would make no sense for there to be a different test for substantively the same application depending on whether judgment in default already been entered or not. The merits, although not the decisive factor, should be taken into account: **Albesher v. Ryan** [2015] EWHC 3058 (Comm) considered. J had provided solid evidence that it had a *prima facie* defence to the counterclaim.

(2) In any event, the judge below had been wrong to conclude that the breach had been significant and serious within the meaning of **Denton**. There was a minimal effect on the proceedings, and T had clear notice from the witness statement of the nature of J's defence to the counterclaim and it proceeded as if a defence had been served. Whilst robustness in ensuring an adherence to the Rules was important, in this case the judge should have adopted a more nuanced approach. J's appeal was duly allowed.

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