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NEWS @ 9

9 GOUGH SQUARE

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Diary dates:

- Personal Injury Seminar and Legal Update
17th July 2009
- Clinical Negligence Seminar and Legal Update
15th October 2009

Details of our seminars can be found at [www.9goughsquare.co.uk/CPD Training](http://www.9goughsquare.co.uk/CPDTraining).

Simon Carr Appointed Circuit Court Judge

His Honour Judge Carr was called to the Bar in 1984 and was a member of Chambers from 1994 to 2009 where he specialised in the areas of Personal Injury and Criminal law.

Simon's PI practice concentrated on representing claimants in cases of maximum severity and over the years he has built up expert knowledge in cases involving accidents at work and as a result of industrially contracted diseases. In his Criminal work he was instructed on serious offences, including white collar crime. He has developed considerable expertise in cases involving vulnerable witnesses, in particular the use of video linked evidence in allegations of serious sexual abuse.

Simon has taught legal and advocacy courses in Hong Kong, Malaysia, Tanzania and Sierra Leone and he will be continuing with this area of his work.



Simon is well known and easily recognised around Temple for his 'one of a kind' Porsche, otherwise known as the 'Chimpmobile' which he had spray-painted with pictures of his favourite animal the chimpanzee.

Simon and fellow Member of Chambers Andrew Ritchie QC drove the "Chimpmobile" whilst participating in a rally to raise money for the Jane Goodall Institute, a charity working to prevent the extinction of chimpanzees through conservation, research and education.

HHJ Carr was appointed a Circuit Court Judge on April 27th and is currently assigned to the South Eastern Circuit based at Wood Green Crown Court.





Can You Go Bankrupt and Still Have a PI Claim?



Stephen Glynn

Insolvent Claimants and Personal Injury Claims

Before, and especially since the recent economic downturn, the chances that the claimant in a personal injury claim will either be a bankrupt or become one during the course of the claim have increased considerably with record numbers of people in the UK becoming insolvent (according to the government's Insolvency Service). This article aims to consider the effects of bankruptcy suffered by the claimant in a personal injury or clinical negligence claim and the practical considerations that apply. Since 2002 the standard period before a bankruptcy order is discharged is 1 year.

The Effect of a Bankruptcy Order:

When a bankruptcy order is made, a trustee is appointed to administer the bankrupt's estate for the benefit of the creditors. The general principle in bankruptcy is that, following the vesting of the bankrupt's estate under section 306 of the Insolvency Act 1986 ("the Act") in his trustee when appointed, the bankrupt is divested of, and ceases to have any interest in, either his assets or his liabilities.

What forms part of the bankrupts estate is defined in section 283 and section 436 of the Act. In summary, the estate includes



"all property belonging to or vested in the bankrupt at the commencement of the bankruptcy" save for limited exceptions (tools of trade, etc) and "property" includes money, goods, and "things in action".

What about a Personal Injury Claimant who then becomes Bankrupt?

A claimant who is injured and suffers a loss of earning capacity has one cause of action even though there may be more than one type or head of damage, for example, a claim for pain and suffering as well as for past and future loss of earnings.

If the claimant then becomes bankrupt, what happens to his claim?

Section 436 above clearly refers to a "thing in action" existing at the time of the bankruptcy as forming part of the bankrupt's estate which then vests in the trustee. Does this mean that the injured claimant no longer has any claim? Claims for just pain and suffering have been held not to vest in the trustee because such claims are said to be personal to the body and character of the bankrupt.

What about claims for past or future financial loss, in particular earnings loss as well as for pain and suffering?

This was the position in *Ord v. Upton* [2000] 1 All ER, 193, which concerned a clinical negligence claim when the claimant then became bankrupt. He sought damages for loss of earnings and pain and suffering.

The Court of Appeal found that the entire cause of action fell within the definition of "property" and constituted part of the bankrupts estate unless it consisted solely of a cause of action personal to the bankrupt's, namely a claim only for pain and suffering.

However, the Court of Appeal found that the right to recover the damages which were personal, and any damages recovered, were held in a constructive trust for the bankrupt by the trustee.

Practical Considerations in a Case Concerning a Bankrupt PI Claimant

Assignment: The trustee in whose name the entire cause of action has vested from the date of the bankruptcy order has a duty to account to the bankrupt in respect of any damages awarded for pain and suffering as well as any earnings loss recovered in excess of the debts proved in the bankruptcy.

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So far as the claim for earnings loss is concerned, the trustee's duty here is primarily to the creditors but, it is suggested, he cannot deal with the claim for lost earnings capacity simply by limiting it to the value of the debt provable in the bankruptcy.

However, the trustee is not bound to sue or seek damages arising out of the cause of action of course, but if requested it is suggested that failure to do so would represent a breach of duty in itself, enforceable by the bankrupt after his discharge, if not before, subject to the Court's permission. (See the judgment of Aldous LJ in *Ord* in particular).

The obvious answer then is to seek to persuade the trustee to sell or assign (by deed) the cause of action back to the bankrupt, or at the very least, take over the claim.

The trustee will have obvious concerns including whether he can be assured that the creditors' interests will be pursued properly and that proper account is made to the trustee in due course, so the wording of the assignment will be critical. Absent an assignment though, the trustee will of course incur a potential liability for costs should proceedings be necessary. This factor alone may persuade the trustee to assign/sell the cause of action back to the bankrupt with suitable covenants.

The important point to note though is that if, before or during proceedings for PI damages, the claimant becomes bankrupt then he will no longer have a cause of action to pursue at all, unless the trustee assigns or takes over the claim.

After-acquired property

The property which vests in the trustee is that property which belongs to the bankrupt at the commencement of the bankruptcy. Although a bankrupt who goes on to suffer personal injury or clinical negligence will retain his interest in the claim, under section 333(2) of the Act, he must tell the trustee within 21 days of his cause of action accruing. The trustee can then serve notice to acquire it under section 307, in which event, the cause of action becomes vested in the trustee just as it would if the injury occurred before the bankruptcy. If the trustee, upon being told of the after-acquired cause of action, chooses not to lay claim to it then, the bankrupt can still issue proceedings before discharge and does not need the Court's permission to do so.

If only pain and suffering is claimed then there may be scope for argument that the bankrupt does not have to tell the trustee but given the criminal sanction applied to failure to comply with the duty of disclosure it is probably not safe to assume this.

What about global sum settlements? Where the sum received is not broken down, for example, where settlement in a global sum is received, problems may well arise in distinguishing which part of the damages forms part of the bankrupt's estate. Some sort of pro rata accounting exercise with reference to the schedule might then need to be undergone.

Damages Received before the Bankruptcy

All damages for personal injury, whether for earnings loss or

pain and suffering once paid or ordered to be paid become the property of the bankrupt as his "money" and vest in the trustee once the bankruptcy is made.

It follows then that a would-be bankrupt is better off delaying the settlement of his claim until after the bankruptcy order is made so that at least the claim for pain and suffering is preserved (see *Ord*).


Criminal Injuries Compensation

"Property" in this context cannot refer to a mere hope or possibility of receiving property.

So in *Re Campbell (a bankrupt)* [1997] Ch 14, [1996] 2 All ER 537 the prospect of compensation from the Criminal Injuries Compensation Board under a pending application did not vest in the trustee and there was no right to enforce an award.

by Stephen Glynn

Stephen's Personal Injury practice comprises predominantly industrial disease and employer's liability work for claimants. His experience of asbestos-induced disease, HAVS and deafness work is extensive. His employer's liability practice is mainly union-funded/sourced. He is also instructed by public and self-insured bodies. Stephen is instructed in claimant and defendant Clinical Negligence matters, and his Professional Negligence experience is primarily related to solicitor's negligence arising out of failed Personal Injury claims, accountant's and surveyor's negligence.



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A Claimant's Right to Go Private (Care & Accommodation Costs)



Benedict Rodgers

***Peters v. East Midlands Strategic Health Authority and others* [2009] EWCA Civ 145 addresses the question whether a claimant's care and accommodation costs should be borne by the tortfeasor or by the local authority that has the statutory duty to provide care and accommodation. It is authority for the proposition that such care is not to be deducted from the care claim if the claimant chooses to receive private care.**

The first issue in this case was something of an aside, although it is not without importance for local authorities. It concerned the correct interpretation of a number of pieces of secondary legislation concerning entitlement to local authority accommodation (see the judgment, paragraphs [6] to [27] for the references, which are numerous). This explains the participation of Nottingham City Council in the appeal. The precise issue was whether the local authority is required to disregard, when assessing a resident's capital for the purposes of deciding how much to charge the resident for their accommodation, the whole of a resident's damages for personal injury. Nottingham said it was required to disregard only damages for pain suffering and loss of amenity, and thus take special damages into account. The Claimant said that Nottingham was required to disregard the whole of her damages, including special damages. The Court of Appeal found for the Claimant on this point.

But the main issue was the question of whether, when assessing the Claimant's claim for care and accommodation, it was to be assumed that the Claimant would take advantage of care and accommodation provided by the local authority in pursuance of its statutory duty to provide care and accommodation – and so reduce the Defendant's liability to compensate her for privately purchased care and accommodation. In more general terms, the

question is whether, if a claimant has both a right of action against the tortfeasor to recover damages in respect of a head of loss, and a statutory right to have the loss made good in kind by the provision of services by a public authority, the claimant is entitled to recover the loss against the tortfeasor.

The Court of Appeal found (paragraphs [33] to [56]) that the Claimant was so entitled. It held that the Claimant was not required, by the principle that a claimant must mitigate his loss, to choose dependence upon local authority accommodation in preference to privately available accommodation.

This is a very important decision. As their Lordships pointed out (at [36]), there are many cases where the courts have awarded a claimant care costs as of right because local authority care has been ruled out as inadequate, uncertain or unavailable. This case goes further, because the principle applies even where local authority care has not been ruled out as inadequate, uncertain or unavailable.

However it is important to note that this principle is still subject to the rule against double recovery. If the claimant is in fact going to rely on local authority care and accommodation, then to that extent the tortfeasor is absolved from liability to pay for care and accommodation.

It may well be that many practitioners will want to revisit schedules they have drafted in serious cases in the past year in the light of this decision of the Court of Appeal.

Benedict Rodgers

Ben provides advocacy and advice for solicitors and their clients in a wide range of legal areas, including personal injury, landlord and tenant, employment, children law (both public and private), fraud and general crime. As such he appears in a wide range of forums, as well as having a busy paper practice.

Our Senior Civil Clerk, Michael Goodridge, has accepted an invitation to join the Neuberger Monitoring and Implementation Group

Lord Neuberger's Report on widening participation and removing barriers to entry (to the Bar) for those from disadvantaged groups was published in 2007. The Bar Council has decided to establish a Committee to oversee the implementation of its recommendations and Michael has been selected as the barrister's clerk's representative on this Committee



Michael Goodridge



Bad Character: Is It or Isn't It?



Tim Godfrey

1. Bad character applications are now an everyday feature in criminal trials. Part 11, Chapter 1 of the Criminal Justice Act 2003 governs the admissibility of so-called bad character evidence: the common law rules are expressly abolished by section 99 of the Act.
2. It is important not to lose sight of the statutory definition of bad character, because evidence falling outside it will not engage the 2003 Act at all. Bad character is defined in section 98 as evidence of, or of a disposition towards, misconduct on a person's part, other than evidence which (a) has to do with the alleged facts of the offence with which the defendant is charged, or (b) is evidence of misconduct in connection with the investigation or prosecution of that offence. Section 112(1) defines misconduct as the commission of an offence or other reprehensible behaviour.
3. In *R v Edwards and Rowlands* [2006] 2 Cr.App. R. 4, Scott Baker LJ said (at para. 1 (i)): "Often the first enquiry is whether it is necessary to go through the "bad character" gateways at all ... While difficult questions can arise as to whether evidence of background or motive falls to be admitted under those exclusions in section 98 or requires consideration under section 101(1)(c) [important explanatory evidence], it does not follow that merely because the evidence fails to come within the section 101 gateways it will be inadmissible. Where the exclusions in section 98 are applicable the evidence will be admissible without more ado."
4. This is a boon to prosecutors and, possibly, co-defendants. Of course, the court's general power to exclude prosecution evidence under section 78 of PACE 1984, and generally to exclude evidence at common law, remains.
5. Cases where the offence alleged cannot be proved without establishing the defendant's bad character will fall within paragraph (a) of section 98, for example cases of driving while disqualified.
6. In *R v Tirnaveanu* [2007] 2 Cr.App. R. 23 the Court of Appeal considered the ambit of section 98 (a). Thomas LJ reviewed the authorities, "In *R v Machado* [2006] EWCA Crim 1804, the defendant charged with robbing a victim wished to use evidence that the victim had taken an ecstasy tablet shortly before the attack and immediately before the attack had offered to supply him drugs. This court held that the matters were in effect contemporaneous and so closely connected with the alleged facts of the offence and so were "to do" with the facts of the offence. In *Edwards and Rowlands*, this court observed at paragraph 23 that the term was widely drawn and wide enough to cover the finding of a pistol cartridge at the home of one of the defendants when it was searched in connection with the drugs offences with which the defendants were charged. In *McIntosh* [2006] EWCA Crim 193, this court held that a matter immediately following the commission of the offence was "to do with the offence". In *Watson*, an assault committed was held to do with the charge of rape committed upon the same person later in the day. Professor J R Spencer, QC in his useful monograph, *Evidence of Bad Character* at paragraph 2.23 suggested that it clearly covered acts which the defendant committed at the same time and place as the main offence and presumably covered acts by way of preparation for the main offence and an earlier criminal act which was the reason for the main crime." He concluded: "It seems to us that the exclusion must be related to evidence where there is some nexus in time between the offence with which the defendant is charged and the evidence of misconduct which the prosecution seek to adduce."
7. As was said in *Edwards and Rowlands* there is potential overlap between evidence which might be admitted as falling within section 98 (a), and background or motive evidence which might be admitted through gateway (c) as important explanatory evidence. However, in *Tirnaveanu* the court brushed this aside, stating that in practice it is of no significance whether evidence comes in via the one route or the other.
8. There is also potential for overlap between exclusions (a) and (b). The terms of exclusion (b) are narrower: It envisages situations such as defendants lying to the police in witness statements made before they became suspects, offering violence when arrested and so on. Bad character applications are not required for such evidence.
9. In conclusion, it is apparent that the present law allows for certain, potentially prejudicial evidence to be admitted without having to get through any of the 2003 Act's admissibility gateways. It is important to be aware of the situations in which this will apply.

by Tim Godfrey

Tim has a busy criminal practice prosecuting and defending. He is a London CPS grade 3 prosecutor; is instructed by the SFO and the CPS fraud prosecution service. He also prosecutes serious sexual and violent offences for the CPS. He has experience of defending cases of money laundering, drugs smuggling, serious sexual offences and armed robbery. He has prosecuted and defended numerous confiscation proceedings.



‘Last In, First Out’ – Length of Service and Redundancy Selection

Can an employer rely on length of service as a criterion for redundancy selection?

In the recently decided case *Rolls Royce plc v Unite the Union* [2009] EWCA Civ 387, the Court of Appeal has upheld the High Court ruling that the use of length of service as a criterion for redundancy is in certain circumstances a proportionate means of achieving a legitimate aim. This is a crucial ruling for employment lawyers who in the current climate are spending a significantly increasing amount of their time advising on redundancy procedures and particularly the compilation of redundancy selection matrices. The decision offers some welcome clarity on the issue of whether the old adage “first in, last out” can have any application given the present age discrimination legislation.

The Facts

Rolls Royce and the union entered into two collective agreements relating to redundancy, one for staff and the other for works employees. Both agreements, the terms of which were substantially the same, provided that redundancy selection would involve a points scoring system, under which employees were assessed in various categories such as expertise and versatility. An individual could score between 4 and 24 points in each category and, as part of the process, each employee was to receive one point per year of continuous service. A dispute arose over whether this length of service criterion complied with the Age Regulations. The parties asked the High Court, under Part 8 of the Civil Procedure Rules, to settle the matter instead of an employment tribunal. In an unusual reversal of roles, it was the employer that was arguing that use of this redundancy selection criterion was unlawful, while the union sought to have the collective agreements upheld as lawful under the Regulations. The High Court held that while the criterion was age discriminatory, it was objectively justified under Regulation 3 of the Employment Equality (Age) Regulations 2006. The collective agreements were a compromise between the parties designed to enable them to carry out any redundancies ‘peaceably’ and in a way perceived to be fair. In the High Court’s view, this was a legitimate aim. Rolls Royce appealed.

Esther has mixed civil and family law practice, encompassing personal injury and employment law. She advises on a range of personal injury matters, including road traffic accidents, employer’s liability and occupier’s liability claims. In the employment field she represents Claimants and Respondents from the public and private sector with respect to unfair dismissal, redundancy, discrimination, harassment, victimisation, breach of contract and stress at work claims. In addition to the ET and EAT she has appeared before the Central Arbitration Committee.



Esther Maclachlan

The Decision

The Court of Appeal considered the following questions:

1. Is the length of service criterion in the collective agreement indirectly discriminatory within regulation 3(1)(b)?
2. What is meant by “benefit” in regulation 32?
3. Is the use of the length of service criterion a proportionate means of achieving a legitimate aim within regulation 3(1)?
4. Does it reasonably appear to the company that its use of the length of service criterion fulfils a business need of the company’s undertaking (the proportionality point in relation to regulation 32)?

Dismissing the appeal, the Court of Appeal agreed with the High Court that the approach was justified because it rewarded the loyalty and experience of older workers. It also found that the points for service come within the exception for service-related benefits awarded by reference to a length of service criterion of up to five years.

Lord Justice Wall held that it was a proportionate means of achieving a legitimate aim, the legitimate aim being “the reward of loyalty, and the overall desirability of achieving a stable workforce in the context of a fair process of redundancy selection.

In this case length of service was only one of a substantial number of criteria for measuring employee suitability for redundancy and was by no means determinative. Utilising a length of service criterion was considered consistent with the overarching concept of fairness and was plainly capable of constituting a “benefit” within regulation 32.

The effect of this decision for employers is to endorse the use of length of service criterion in a redundancy selection matrix only where it is one of several criteria and not the determinative factor. The High Court did note, that its conclusion might have been different had the policy operated on a simple ‘last in, first out’ basis and a conservative reading of the Court of Appeal judgment indicates that this must be right. Nevertheless, whilst ‘last in, first out’, remains a dangerous policy to adopt, it is clearly not necessary for employers to deliberately exclude length of service from their criteria for fear of being in contravention of the age discrimination legislation. Length of service criterion respects loyalty and experience and protects the older workforce from being made redundant, at a time when finding alternative employment is for many getting harder and harder.

by Esther Maclachlan



Making Your Bed and Lying In It: Falling Out of Love In a Recession

The recent economic downturn has prompted a flurry of interest by clients who feel aggrieved by being held to the terms of consent orders, concluded before the dark clouds of recession began to gather.



Ed Lamb

This article focuses on the ability of parties to vary or set aside agreements in response to a change in circumstance and by implication, a perceived sense of injustice on either side. This difficulty has been highlighted recently, with a flurry of press interest following the Court of Appeal's decision in *Myserson v. Myserson* [2009] All ER (D) 05 April, a case that underlines the limited circumstances in which consent orders can be appealed.

s.31 MCA 1973 allows the variation of certain orders listed at s.31(2), including any periodical order but not (save for a few exceptions) capital orders. The principles that govern the Court's discretion to make such variations are contained at s.37(7) MCA 1973. It is an entirely different proposition where a party seeks to vary or set aside a consent order made in ancillary relief proceedings that relates to capital provision, as discussed below.



An application to set aside a consent order containing capital provision or property transfer is by nature an application to dispute the fundamental basis on which the original order was made. An order can be challenged by alleging a) a fundamental failure to disclose; b) fraud; c) supervening events (i.e. a 'new event') or d) undue influence. The application can be made in one of two ways: either, by an application for leave to appeal out of time or, by an application to set aside the order, made to the Court where the order was made.

Barder v. Caluori [1988] AC 20 established the principles on which the Court may properly exercise its discretion to allow an appeal out of time to vary an order for financial provision or property transfer. In *Barder* the Court indicated that 3 conditions would have to be met to challenge an order on the grounds of 'new events': first, that the new event(s) have challenged the fundamental assumption on

which the order was made, so that if leave to appeal was granted, the appeal would be certain, or very likely to succeed; second, the new events should have occurred close to when the order was made and third, the application should be made promptly.

Returning to *Myserson*: whilst the facts of this case are unusual due to the size of the available assets, it serves to highlight the problems encountered by many former spouses who, having consensually agreed to divide their assets, find that their fortunes or circumstances change, such that they seek to vary the original consent order. *Myerson* concerned a rich couple who had compromised the ancillary relief proceedings in March 2008. From overall assets of £25.8 million, W would receive £11 million (43%) to be paid as follows: £9.5 million of that £11 million was to be in cash with an initial lump sum of £7 million to be paid in April 2008 and the remainder £2.5 million, being paid in four equal annual instalments. H's assets consisted of share holdings in PCH, a fund, of which he was a manager; and other properties. Following the order, PCH's share price plummeted. H applied, inter alia, to vary the payment of the £2.5 million lump sum by instalments. H further applied to appeal the order (generally).

H argued that the collapse in share price had rendered the order unfair and unworkable. In supporting this contention he argued that at the appeal hearing, he was financially worse off to the tune of £539,000. In short W contended: first, H made the agreement knowing that a large part of his wealth was subject to fluctuation as they consisted of shares; second, H had decided to pay a lump sum; third, in light of the pending application to vary the order, the appeal was superfluous; fourth, a successful appeal would open the floodgates for similar cases and fifth, the facts of the case did not reveal any specific event or series of event that constituted a 'new event' as was established in case law, so that an appeal out of time could be granted.

In his judgment Thorpe LJ accepted that whilst the appeal 'had its dramatic features' it was bound to fail, on a number of bases: not least on the principles established in *Barder*. Furthermore because the lump sum was ordered over 5 payments, H had the statutory power of variation, which he had invoked. As the remaining payments totalling £2.5 million were subject to the application to vary, 'more than token relief' would be available to H. Therefore an appeal directed to the majority of the lump sum already paid and/or transfer of property order would have uncertain prospects of success and would fail to satisfy the first limb of *Barder*.

Thorpe LJ re-iterated the general view of Hale J in *Cornick v. Cornick (No 1)* [1994] 2 FLR 530 that

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Andrew Ritchie Appointed to Silk

Andrew Ritchie became a QC on the 30th March this year. Andrew joined Chambers in 1997. He was awarded “PI Barrister of the year” in 2008 by the Barker Brooks pan industry panel and was nominated as “PI Junior of the year” in 2007 and again in 2008 by Chambers & Partners.



Andrew's practice is 2/3rds personal injury and 1/3rd clinical negligence. Covering occupational health and employers liability generally, he has extensive experience in cases involving brain damage, spinal injuries and Motor Insurers Bureau claims. He is a leading practitioner in Clinical Negligence (in particular Hypoxia at birth, Urology, Cardiology and neurosurgery).

Andrew will continue to represent the injured victims of tortious industrial accidents, road traffic accidents and victims of clinical negligence. He looks forward to working with solicitors up and down the country who serve the injured.

Andrew sits on the Executive Committee of the Personal Injuries Bar Association. He was a member of the Legal Service Committee Appeal panel from 1999 – 2002 and sat on the Executive Committee of the Association of Personal Injury Lawyers from 1996 – 1999."

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the power to set aside a consent order on *Barder* principles would bite in cases that were 'very few and far between' and that the case law taken as a whole 'does not suggest that the natural processes of price fluctuation, whether in houses, shares or any other property, and however dramatic, fall within the principle'.

The above serves to highlight the importance of advising clients fully when negotiating consent orders. The case re-iterates the basic point: price and asset fluctuation is not a sufficient condition for the set aside of an order. Clients would be well advised, save in the most extreme circumstances, to avoid applications to re-open consent orders. However it should be remembered that the power for statutory variation pursuant to MCA 1973 remains a useful tool for an aggrieved party, particularly relevant in today's uncertain times.

by Ed Lamb

Ed is a committed common law practitioner with a wide civil practice that includes: personal injury, employment, landlord and tenant, cohabitation and general contractual work. Ed also practises family law with an emphasis on ancillary relief and has appeared in both the Magistrates' and Crown Court in criminal cases. Ed shall be returning to Chambers full time this summer having worked for 6 months on the Guantanamo Bay civil claims.

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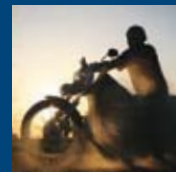
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