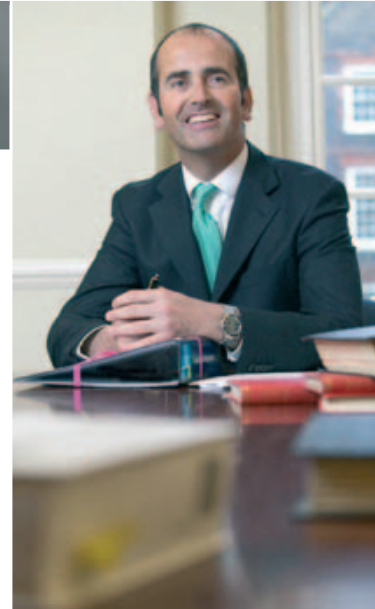


October 2006

NEWS @ 9

9 GOUGH SQUARE



9 GOUGH SQUARE'S NEW LOOK WEBSITE

After several months of headaches and hiccups, it's finally here; 9 Gough Square launches its new website.

Jacob Levy headed up the Chambers development team.

"We needed a brand new look and a healthy new feel. Since the last website was designed Chambers has itself developed and moved on. We wanted that to be reflected in a fresh approach, providing more information to our clients and, heaven forbid, letting them actually see what we look like - with the new look pictures none of us can escape!", says Jacob Levy.

At the same time the new Chambers' logo incorporating 9 squares was unveiled.

Alex Verdan to take Silk

Head of Chambers' Family Team, Alex Verdan will take silk on 16 October 2006. He joined 9 Gough Square in October 1987 and has helped to develop a strong core of family practitioners specialising in children's issues.

"Members of Chambers are delighted that Alex will become a Queen's Counsel", says Head of Chambers, John Foy QC, "His extensive experience in all types of children cases and his public inquiry work ensured that his application would be successful".

Alex specialises in the most complex and serious children's cases often with linked criminal proceedings. He has been in practice for almost 20 years and the majority of his practice is now in the High Court Family Division.

He was instructed by one of the Guardians in the so-called Essex case, a high court care case where the threshold hearing lasted 6 months and where over 132 witnesses were called, making it the longest care case in English legal history. Also instructed by one of the local authorities in the Climbie Inquiry, last year he was appointed Counsel to the Isle of Man Commission of Inquiry.

IN THIS ISSUE

- 2 *Inconsistencies in medial records
Failure to maintain records on
Police National Computer*
- 3 *No sanctuary for first instance
judge hiding behind a finding of fact*
- 4 *Sentencing guidelines-CA call for review
where defendant caught "red-handed"*
- 6 *Fatal accidents, uninsured drivers
& the Motor Insurers Bureau*
- 7 *Police Officer not employee for
purposes of RTA
Myatt & others v National Coal Board*
- 8 *Animals Act successfully appealed
in Court of Appeal
Damages for assault in children's home*

VIDEO CONFERENCING

9 Gough Square now has full Video-conferencing facilities

- Do you need to spend less time travelling to and from conferences?
- Would your clients find meeting you at your office more attractive than coming to London?
- Would you like to reduce your travel costs?

Next time you are organising a conference with a barrister at 9 Gough Square, consider a video conference and save yourself and your client the travel time and travel costs involved in coming to London.

Just arrange for your client to join you in the office then dial in and we'll run the video conference with you. You will need an in house video conferencing facility or to use a local one in your city.

9 Gough Square VC telephone number is: 020 7832 0592

Inconsistencies in medical records

Denton Hall Legal Services v. Fifield

Stuart McKechnie outlines a common situation: A claimant's evidence at trial is contradicted by comments that have previously been recorded in medical records. Sometimes it is the mechanics of the accident in issue (claimant says slipped on a wet floor – accident & emergency records indicate that the claimant tripped over). Other times it might be a contradiction in the timing of symptoms (claimant says back pain started after accident – GP records indicate that claimant had complained of back pain prior to the accident) or maybe just the nature of the symptoms themselves.

Irrespective of the circumstances, the same questions arise: what status do these medical records have and what approach should be taken when dealing with such inconsistencies? These are questions that have recently been addressed by the Court of Appeal in the case of Denton Hall Legal Services & Others v. Fifield [2006] EWCA Civ 169.

By way of brief background, Mrs. Fifield was a legal secretary who claimed that she had developed a work-related upper limb disorder (WRULD) as a result of the failures of her long-term employer, Denton Hall Legal Services. A crucial part of the case related to the temporal relationship between the alleged breach of duty and onset of symptoms. Mrs. Fifield maintained that significant symptoms of WRULD had post-dated an increase in her workload during the early part of 1999 and therefore a causal relationship could be established. Mrs. Fifield's employer disputed this causal link and placed reliance upon contemporaneous medical notes and reports which indicated that Mrs. Fifield had told her treating doctors that the significant symptoms had pre-dated the increase in her workload.

Mrs. Fifield succeeded at first instance, but her employer appealed the decision on the basis (amongst others) that the medical records

contradicted Mrs. Fifield's evidence and the claim should have failed on causation.

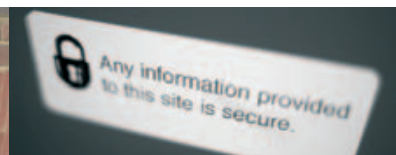
The employer's appeal was dismissed. The important part of the judgment is that delivered by Buxton LJ at paragraphs 75-82, where the evidential position of medical notes and records was considered and guidance was given to parties to deal with such situations.

EVIDENTIAL POSITION

The evidential position was considered at paragraph 75 of the judgment, where Buxton LJ commented as follows:

"What a doctor writes down as having been told to him by the patient, as opposed to the opinion that he expresses on the basis of those statements, is not at that stage evidence of the making of the statements that he records. Rather where, as here, the record is said to contradict the evidence as to fact given by the patient, the records is of a previous inconsistent statement allegedly made by the patient. As such, the record itself is hearsay"

Buxton LJ then set out 2 ways in which it may be proved as evidence that a person did indeed speak the inconsistent words on a previous occasion:



Simon Carr

NEGLIGENCE CLAIM against the Police for failure to maintain records on the Police National Computer

Tilbury v The Commissioner of Police for the Metropolis

Claim in negligence against the police as a result of their failure to ensure that the information stored on the police national computer was accurate. Simon Carr acts for Claimant against Metropolitan Police in Winchester.

Mr Tilbury was a school caretaker who lived in tied accommodation. The school undertook a criminal records search, as they are now required to do, which revealed Mr Tilbury had convictions for armed robbery that had resulted

in a substantial prison sentence. Upon receiving this information the school sacked Mr Tilbury and evicted him from his home. A subsequent investigation revealed the entry on the Police National Computer was erroneous and related to a quite different person.

An action was brought in negligence. Issues arose as to whether a duty of care was owed, whether causation could be established, the assessment of a lost chance and the requirements placed upon Mr Tilbury to

mitigate his loss. There were also issues raised as to the interaction of the Data Protection Legislation as an alternative remedy.

This was the first case brought with regards to the liability of the police for ensuring that the records were accurately kept for the purposes of enhanced criminal record searches.

The case was successfully settled after two days of argument on the preliminary issue as to whether negligence could be established in such cases.

(1) If the statement is put to the witness, he / she may admit to having made it. Alternatively, if the witness does not 'distinctly' admit it, then it may be proved by calling the doctor / practitioner who wrote the words to verify the accuracy of the record (section 4 Criminal Procedure Act 1865)

(2) The previous inconsistent statement can be proved as hearsay evidence under section 6(5) of the Civil Evidence Act 1995

Buxton LJ went on to explain that, even if a court concludes that such an inconsistent statement had been made, it only goes to the credibility of the witness; the statement itself cannot be treated as evidence of its contents. Therefore, if a Defendant is going to attack a claimant on the basis of an inconsistent statement it will be on the basis that their evidence at trial is unreliable.

According to Buxton LJ, the case of Fifield had proceeded in an unsatisfactory manner because, prior to the start of the trial, the Defendant had failed to identify the issues in dispute with the Claimant's account and the material on which the dispute was based. Most importantly, the Defendant had failed to address these issues in its defence and proceeded on the assumption that the medical records were evidence that could be relied upon at trial.

In order to obviate such difficulties in the future, Buxton LJ recommended that a specific procedure be followed when parties found themselves in this position.

PROCEDURE

"First, a party who seeks to contradict a factually pleaded case on the basis of medical records or reports should indicate that intention in advance, either by amendment of his pleadings or by informal notice. Then, the opposite party must indicate the extent to which they take objection to the accuracy of the records. When the area of dispute is identified, a decision will have to be taken as to whether the records need to be formally proved"

PRACTICAL IMPLICATIONS

Two consequences may follow. If the aforementioned procedure is not followed, the trial judge "may be reluctant to permit reference to reports of the patient's statements in the medical records for the purpose of contradicting her evidence". According to Buxton LJ, any such reluctance is unlikely to be criticised on appeal. Alternatively, if the procedure is followed but the claimant unreasonably refuses to admit that previous inconsistent statements were made, resulting in doctors being called to give evidence to prove such statements, then *"such failure of co-operation is likely to be penalised, possibly severely, in costs"*.

Defendant lawyers should therefore be alive to the need to follow the necessary procedure or risk failing to take advantage of such inconsistencies at trial. For their part, Claimant lawyers should be prepared to take advantage of any such failings made by the Defendant. Furthermore, when the Defendant does follow the right procedure, it will be vitally important to provide careful advice to Claimant about the potential cost consequences of refusing to admit the inconsistent statement.

Stuart is experienced in all PI areas of work including road traffic accidents, employers' liability claims, consumer protection law, occupational diseases, holiday claims, occupiers' liability and sporting accidents. His clinical negligence experience includes gynaecological and urological, dental and ophthalmic cases together with general surgical and nursing errors. He also has considerable experience in the coroner's court; including lengthy and well publicised inquests.



Stuart McKechnie



Nick Hillier

NO SANCTUARY for first instance judges behind a finding of fact

Hardisty v Aubrey - Court of Appeal (13th July 2006, sitting in Cardiff)

The Recorder at first instance found that the Claimant's whiplash injury had resolved to such an extent over a nine-month period (commencing one year post-accident) that a recurrence of (identical) symptoms after that nine-month period could not be attributed to the original trauma. The Recorder's finding was based solely upon the fact the Claimant had sought medical treatment before the nine-month period began and after that period expired but not during that period

itself. The Court of Appeal overturned the Recorder's finding of fact because he failed in his judgment to deal properly with all aspects of the evidence relevant to the issue including the Claimant's written and oral evidence (of the symptoms she actually experienced during that nine-month period) and also a written account of her symptoms in a letter to her GP shortly after the end of the nine-month period identified by the Recorder.

The action was remitted back to the County Court for a further hearing of limited issues before a different Judge (and excluding any further challenge to the Claimant's credibility) - the Recorder had failed to deal with two causation issues raised by the Defendants at trial; the Defendants were permitted to pursue only one of those two issues at the remitted hearing. Quantum was also to be reassessed. (Counsel for the Appellant/Claimant: Nick Hillier)



John Foy QC



Sentencing Guidelines: *The Court of Appeal calls for an urgent review of guidelines in relation to the discount available for a guilty plea where a defendant was caught 'red-handed'.*

Attorney General's Reference (No 14 and No 15 of 2006) (Tanya French & Alan Webster) [2006] EWCA Crim 1335

John Foy, Q.C. and Fred Ferguson, instructed by Noble Solicitors, defended Alan Webster in a case that has been at the forefront of a media and political campaign over so called 'unduly lenient' sentences for offenders convicted of serious sex crimes. The appeals were brought by the Attorney General, Lord Goldsmith himself and a five judge Appeal Court was headed by the Lord Chief Justice.

Many legal experts predicted that this hearing would lead to new guidelines in relation to the discount available for an early guilty plea. In the event, the Court of Appeal avoided setting down such guidance. However, the matter of whether discounts of a third for early guilty pleas should equally apply to those caught 'red-handed' or to those facing offences of extreme gravity where the fractional discount itself would amount to a number of years was referred to the Sentencing Guidelines Council for urgent review.

THE OFFENCES AND ORIGINAL SENTENCE

French had become friendly with a woman who had a baby. French used to baby-sit, taking the baby to Webster's house when the mother permitted. Following a police raid on Webster's property, where the police were looking for pornography downloaded from the internet, they discovered an album of photographs which showed acts of abuse being carried out by both defendants on the baby. Webster gave a frank interview and admitted all the offences entering pleas of guilty at the first opportunity.

On the principal indictment Webster pleaded guilty to four counts of rape, five counts of indecent assault, and three counts of either taking or permitting to be taken, indecent photographs of a child (the baby). He alone was charged additionally with a serious indecent assault on a fourteen year old girl. He pleaded guilty to this charge. There was a further Indictment against Webster alone, consisting of counts relating to the images from the internet. Webster also pleaded guilty to those matters.

On each count of rape Webster was sentenced to imprisonment for life, with a minimum term of 6 years. On each count of indecent assault of the baby he was sentenced to 6 years. On each of the indecent photography counts, relating to the baby, he was sentenced to four years' imprisonment. On the count of indecent assault against the fourteen year old girl he was sentenced to four years imprisonment. No separate penalty was imposed in respect of the offences in the second Indictment. The judge stated that the six year minimum term was derived from a starting point of 18 years. The sentences were ordered to run concurrently with each other and concurrently with the life sentence.

THE APPEALS

The Attorney General challenged the sentences in relation to both offenders on the grounds that the starting point of each sentence was too low and a

discount of one third for the guilty plea in each case was excessive. Also raised was the question of whether double jeopardy should continue to apply, to mitigate an otherwise appropriate sentence, in Reference cases.

STARTING POINT

The Lord Chief Justice giving judgment for the court commented that the sentencing judge had taken the right approach to determining the minimum term. The sentencing guidelines had required him to deduct one third from the 18 years, so that the 18 years fell to be reduced to 12 years. The sentencing judge then directed, in accordance with normal practice, that Webster should serve a minimum term of half this figure that is 6 years, before his case could be referred to the parole board for consideration of early release.

In the judgment their Lordships addressed the media misrepresentation of Webster's sentence and stated; "the suggestion, widely made by the media, that Webster would, as a result of the judge's sentence, 'walk free; after six years was a distortion of reality. Webster was given a life sentence. That sentence means that he will remain in prison unless and until the Parole Board is satisfied that he no longer poses a danger to the public. The evidence in this case shows that he is so deeply steeped in sexual depravity that it is questionable whether that day will ever be reached."

Dealing with whether the starting point of 18 years was unduly lenient, their Lordships considered the Court of Appeal's decision in *R v Millberry* [2002] EWCA Crim 2891. In *Millberry* the Court emphasised that the guidelines should not be applied mechanically and that the court should impose the appropriate sentence having regard to all the circumstances.

Their Lordships accepted that the level of offending in Webster's case went beyond that envisaged by the guideline authorities and whilst making it clear that sentencing should not be affected by public pressure accepted Lord Goldsmith's submission that public revulsion over the nature of these offences should be treated as an aggravating feature.

Ultimately, their Lordships considered that in Webster's case; "the extraordinary and abhorrent features of the treatment of this victim called...for a starting point longer than eighteen years". It was held that the indecent assault on a 14 year old and the downloading and storing of indecent photographs, involving sexual abuse of children, were aggravating features, affecting the starting point



Fred Ferguson



and that the appropriate starting point was 24 years so that “the adoption of a starting point of only 18 years had the effect that the sentence in the case of Webster was unduly lenient”.

The court did not consider the starting point of 8 years in relation to French’s sentence, unduly lenient.

REDUCTION IN SENTENCE FOR GUILTY PLEAS

The Criminal Justice Act 2003 section 144 has given statutory recognition to the judicial practice of a reducing a sentence where the defendant has entered a guilty plea.

Definitive guidance in relation to a reduction in sentence for a guilty plea was published by the Sentencing Guidelines Council on 10th January 2005, to which their Lordship’s referred. The guidelines provide for circumstances in which an offender is caught ‘red-handed’ and unequivocally state; “there is no reason why credit should be withheld or reduced on these grounds alone. The normal sliding scale should apply.”

Their Lordships were not persuaded by the Attorney General’s submissions to the effect that because the photographs of the abuse, which the offenders had taken, proved their guilt so conclusively that they had no alternative but to plead guilty, it was inappropriate to grant a reduction of a third. The Court held; “the guidelines clearly indicate that the credit for a guilty plea should not be reduced simply on account of the strength of the case against a defendant.”

The Lord Chief Justice also relied on *R v Gisbourne* [2005] EWCA Civ 2491 in which the Court of Appeal held; “the strength of the prosecution case should not, in itself, be regarded as a reason for reducing the discount otherwise appropriate for a prompt plea of guilty”.

Their Lordships accepted that “guidelines do no more than provide guidance” but found it difficult to see how section 172 of the Criminal Justice Act 2003 could be complied with if “a judge deliberately or inadvertently flouts the guideline by granting less than a full discount on the sole ground of the strength of the case against the defendant”.

Their Lordships rejected also the Attorney General’s submission that the principle relating to the discount which can be applied where there has been a guilty plea in a case involving a mandatory life sentence for murder (namely a maximum discount of one sixth of what otherwise would have been the minimum term, or five years, whichever is the shorter), should apply to sentences for other serious offences. The Sentencing Guidelines state that the lesser reduction for a guilty plea in murder cases reflects the special characteristic of the offence of murder.

Furthermore, at the police station, Webster was told he would receive a third discount on his sentence if he admitted guilt in interview. This message was reinforced by printed material which was given to him at the time. This fact also was taken into account by their Lordships when concluding that neither Webster nor French should have received any less than a one third reduction.

However the concept that where the evidence is overwhelming, a defendant should not receive full credit for an early guilty plea, was not entirely rejected by

their Lordships. The Lord Chief Justice acknowledged that the sentencing guidelines are not without critics and referred the issue to the Sentencing Guidelines Council for review “as a matter of urgency”.

DOUBLE JEOPARDY

Their Lordships considered whether a reduction should be made to reflect the fact that Webster had been subject to ‘double jeopardy’. Initially the Attorney General had sought to argue that because the Attorney General’s Reference is now a well established fact of life, known to the general public and the criminal fraternity, the principle should no longer be applied. However by the time of the final hearing this argument became limited to serious cases where long terms of imprisonment were to be served in any event.

The practice of giving a discount to reflect double jeopardy is well established in this jurisdiction and their Lordships identified “the range of discount [as being] wide, generally lying between 12% and 30%”.

The Attorney General submitted that the principle of double jeopardy should have no application to a minimum term set within a discretionary life sentence and little or no application to significant custodial sentences. He argued further that the principle should not be permitted to have the effect of requiring the Court of Appeal to substitute a sentence which is itself unduly lenient.

Their Lordships stated that in cases where originally no custodial sentence was employed, or where a custodial sentence had been completed, or where a defendant was young and immature or where a defendant was about to be discharged from prison, the anxiety caused by a Reference, is likely to be particularly great. Lord Goldsmith’s submission that double jeopardy should not be considered in such circumstances was rejected. It was held that the matter should be left to the discretion of the Court. On the facts of Webster’s case their Lordships held that it was not appropriate to make a discount to reflect double jeopardy.

REVIEWING THE GUIDELINES

Prior to Webster’s case coming before the Court of Appeal the Sentencing Advisory Panel had published proposals to review the discounts regime. However in light of their Lordships’ comments in this case, these proposals will now go to the Sentencing Guidelines Council and things are expected to move swiftly.

Undoubtedly the more recent sentencing of Craig Sweeney has fuelled the media frenzy and renewed pressure for an overhaul of the guidelines.

The media’s campaign against alleged “soft sentences” has been rightly criticised by numerous leading criminal practitioners including sentencing expert David Thomas, Q.C. who has firmly rejected claims that judges are failing to mete out adequate punishment.

At present the Sentencing Advisory Panel is circulating a consultation paper reviewing the guidelines for a reduction in sentence for a guilty plea. This paper looks specifically at the significance of defendants caught ‘red-handed’. It remains to be seen whether this “urgent review” will amount to a change in the guidelines or whether once reviewed any proposals for change will be confidently set aside.



Andrew Ritchie

FATAL ACCIDENTS, uninsured drivers and the Motor Insurers Bureau

By Andrew Ritchie, 9 Gough Square, London, General Editor Kemp Law Practice and Procedure.

Summary: When a working parent (provider) is killed as a result of a tortfeasor's negligence the dependents have the right to claim loss of dependency under the Fatal Accident Act 1976. In the last 20 years, in road traffic accident cases, the right to satisfy the judgment has been denied by the MIB where the driver-tortfeasor was uninsured and the deceased was a passenger who knew as much.

In a recent decision by a deputy High Court Judge, the dependents were awarded damages where the provider passenger with knowledge was killed by an uninsured driver. The decision was made on the plain words of the Uninsured Drivers Agreement 1999 which is different from the wording of the previous 1988 Agreement.

Case: *Louise Phillips (Administratrix of the estate of Neville Phillips deceased) v. Mohammed Rafiq (D1) and the Motor Insurers' Bureau (D2)*

In the High Court, Queens Bench Division, London, His Honour Judge Seymour QC sitting as a deputy High Court Judge. 11 May 2006

Facts: The Claimant was widowed when her husband died from injuries sustained in a road traffic accident in August 2002. He had been travelling as a passenger in his own car which was being driven by Rafiq. Rafiq had insurance on his own car but was not covered to drive other cars third party.

The widow claimed damages under the Law Reform (Miscellaneous Provisions) Act 1934 and the Fatal Accidents Act 1976 against Rafiq. The Motor Insurers Bureau (MIB) was joined as second defendant under the Uninsured Drivers Agreement 1999.

Arguments: Although the MIB accepted that the accident had been caused by Rafiq's negligence, it denied that it was liable to satisfy any judgment entered against him. The MIB maintained the Claimant was barred because her husband was the owner of the car and had allowed Rafiq to drive it, so he was deemed to know that the car was being driven by an uninsured driver (see Clause 6.3(a) of the Uninsured Drivers Agreement 1999). This meant that he fell within exclusion, set out in Clause 6.1(e) of the Agreement, which debar passengers with knowledge from recovering compensation.

The MIB alleged that, as a result of the deceased's knowledge the Claimant was also unable to obtain satisfaction from the MIB of any judgment she obtained it under the Fatal Accidents Act 1976.

The Claimant submitted that the widow was entitled to judgment against Rafiq. She was also entitled to satisfaction from the MIB because the whole purpose of the MIB agreement was to satisfy outstanding judgments. The exclusion clauses in the Agreement should be construed in the light of the purpose. Further that the EEC directives governing the Uninsured Drivers Agreement did not require the MIB to exclude the widow and the express terms of the exclusion clause only excluded "claimants" with knowledge. In a straight forward case of a live injured passenger, the Claimant would be barred. In a Fatal Accident Act case the Claimant was the widow and she had no such knowledge and hence would not be barred.

The MIB responded by seeking to assert that the word 'claimant' in the Agreement should be construed in accordance with the context in which it was used, relying on the preface to the definitions of the Agreement which contains a proviso that the expressions have the set meanings 'unless the context otherwise requires'. The MIB relied on Clause 6(1)(e) of the old 1988 Motor Insurers' Bureau Agreement which clearly excluded claims where "the person suffering death or bodily injury was allowing himself to be carried in a vehicle which he knew, or ought to have known, was not insured for such use".

In the 1999 Agreement the words "the Claimant" were substituted for the words 'the person suffering death or bodily injury'.

The MIB argued that if the old agreement excluded the Claimant then the new one should too. The MIB relied on a first instance county court decision *Sheldon v Goldstraw* a decision of HHJ Tetlow in Altrincham County Court in 2005

Judgment: His Honour Judge Seymour Q.C. sitting as a deputy High Court Judge: ruled that in interpreting the Agreement it was correct to look both at what the Agreement says and also at the circumstances surrounding it. The words of the exclusion had a clear meaning. The parties to the agreement were likely to mean what they said. Accepting the Claimant's submissions that the meaning of the Agreement was clear and that on a plain reading of the exclusion in Clause 6.1(e) of the Agreement, it could not apply to the Claimant because she was not a passenger in the car and did not have the relevant knowledge.

In construing the Agreement, it was right to keep in mind that there had been previous such agreements. Different wording had been used in the exclusion clause 6.1(e) of the 1999 Agreement from that used in the 1988 Agreement and that showed that it was intended to have a different effect. The 1988 Agreement excluded widows. The 1999 Agreement did not exclude them.

The Defendant's argument that the Claimant should be barred because the Claimant's husband would have had no entitlement to compensation from the MIB under the Fatal Accidents Act. The MIB claim was not derivative. The FAA only dealt with the Claimant's right to obtain judgment not the right to obtain satisfaction from the MIB. The Claimant's husband did have knowledge of Rafiq's lack of insurance, but the question to be answered was whether the Claimant herself was excluded.

A declaration was made that the MIB would be liable to satisfy any judgment obtained by the Claimant against Rafiq. Permission to appeal was denied. Costs against the Defendants.

Counsel: Andrew Ritchie for the Claimant, instructed by Messrs Field Fisher Waterhouse, London. James McKeon for the 2nd Defendant, instructed by Messrs Weightmans, Liverpool

Conclusion: For years now the MIB have refused claims by widows where the deceased passenger had knowledge or worse was deemed to have knowledge under the strict deeming provision of the 1999 Uninsured Drivers Agreement. Now Claimants can obtain satisfaction. The Agreements should only exclude those guilty of taking part in the uninsured journey, not their innocent offspring. This decision is in line with the justice of the case.

Andrew Ritchie practices in Personal Injury, Clinical Negligence and Professional Negligence, with a special interest in brain damage cases, spinal injuries and Motor Insurers Bureau cases.

POLICE OFFICER not employee nor to be treated as such for the purposes of RTA

Guy Miller v (1) Ricky Hales (2) QBE International Insurance Ltd (3) The Motor Insurance Bureau [2006] EWHC 1529 (QB)

A police officer was run down by a criminal who stole his police car. The Claimant was very seriously injured. He sued the criminal and sought satisfaction from the Road Traffic Act insurer of the police car. The insurer refused to satisfy the judgment asserting that as an employee of the insured he was excluded from RTA cover which meant that the Claimant would not be entitled to satisfaction of his judgment. There was no employers' liability cover for the criminal's acts. Mr Justice Jack entered judgment for the Claimant holding that, in law the Claimant as a police constable holding a public office was not an employee; hence he was entitled to satisfaction. Andrew Ritchie and Perrin Gibbons won the case at first instance.

The Claimant, a police officer, was injured when following arrest the 1st Defendant escaped, gained control of the Claimant's police car and reversed over him causing serious injury.

Judgment was obtained against the 1st Defendant, but the issue that arose was whether the 2nd Defendant insurers who had issued a policy in respect of the car to Kent Police Authority were liable to satisfy judgment pursuant to s.151 of the Road Traffic Act 1988 ("the Act").

s.143 of the Act requires 3rd party cover in relation to the use of a motor vehicle on a road. s.145 sets out the conditions which a policy must satisfy. s.151 provides for a judgment to be honoured by the insurers as if the policy insured all persons, so in this case, it did not matter that the 1st Defendant was not a permitted driver and to all intents and purposes was a thief. The question as to whether the 2nd Defendants had to satisfy the judgment against the 1st Defendant depended upon 2 points that arose on the application of s.145.

s.145(3)(a) provides that there must be cover in respect of injury to any person. s.145(4)(a) provides for an "employee exclusion" to that requirement such that employees of a person insured by the policy did not have to be covered in relation to injury or death suffered in the course of their employment. s.145(4)(A) provides a proviso to the "employee exclusion" clause, so that an employee "carried in or upon a vehicle or entering or getting on to, or alighting from a vehicle" does have to be covered under the Act unless they were in fact given cover under their employers liability insurance.

The first point that arose was whether a police officer is or is to be treated as an employee for the purposes of s.145(4)(a). The Court answered this question in the negative and as such the Claimant was entitled to a declaration that the 2nd Defendant had to satisfy judgment against the 1st Defendant. A police officer is an office holder and not an employee. The 2nd Defendants' submission that s.145(4)(a) should include "quasi-employees" as well as employees strictly defined was rejected.

The second point arose out of s.145(4)(A). The Claimant's alternative submission was that if a police officer was an employee to which the exclusion applied, then he was still entitled to recover against the 2nd Defendant because at the time of injury he was "entering or getting on to" the police car in as much as he was attempting to get in. The 2nd Defendant conceded that the word "entering" was wide enough to include "attempting to enter". The Court found on the facts that the Claimant's intention was to get the car open in order to get the 1st Defendant out or at least prevent him driving away. As such the Claimant was not in the ordinary sense entering the vehicle or attempting to enter the vehicle, as he wanted to get the doors open but did not want to get inside it. The Court held that an attempt to enter must be an attempt to enter to be a passenger in order to come within the subsection.

Andrew Ritchie

Perrin Gibbons



Myatt and Others v National Coal Board

John Foy QC has been instructed by APIL to make submissions on behalf of its members on relevance of before the event legal expenses insurance.

The Court of Appeal gave guidance on the steps which a solicitor should take to investigate whether there is relevant before the event insurance available to a claimant, to ensure that a conditional fee agreement is enforceable. The case was reported in The Times on 25th July 2006.

9 GOUGH SQUARE'S Giles Mooney successfully appeals Animals Act case in the Court of Appeal

On 26th June 2006 Lord Chief Justice Phillips, Lord Justice Buxton and Lord Justice Sedley gave Judgment in *Clark v Bowl* (2006) CA, the first Animals Act 1971 case to reach the Court of Appeal since the House of Lords Judgment in *Mirvahedy v Henley* (2003) UKHL 16.

The case concerned an appeal from a first instance decision in the Newcastle-upon-Tyne County Court where Mrs Bowl was found liable to Mr Clark when the horse she was riding along the road suddenly and unexpectedly moved into the path of Mr Clark's car causing a collision and injuries to both parties.

The trial Judge found that neither party had been negligent but found liability against Mrs Bowl under Section 2 (2) of the Animals Act. He found that the three stage conjunctive test set out in Section 2 (2) was made out on the basis that (a) the damage was likely to be severe as the horse was a heavy animal and that (b) the damage was caused by a characteristic not normally found in

horse save in certain circumstances, namely a propensity to move otherwise than as directed by the rider (c) this characteristic was known to Mrs Bowl.

On appeal their Lordships found that a propensity to move otherwise than as directed by a rider could not amount to a characteristic for the purposes of Section 2 (2) (b). Moreover and importantly when considering the scope of the Animals Act their Lordships found that subsections (a) and (b) were linked to the extent that the characteristic identified when considering subsection (b) must be the reason why damage was likely or likely to be severe when considering subsection (a). In other words

the likelihood of damage or of its severity must be due to the abnormal characteristic.

This decision will have a huge impact on the fairly common cases where riders and motorists find themselves in conflict on the roads. The perceived wisdom that *Mirvahedy* carries the day for the Claimant in these cases no longer applies.

Giles Mooney



9 GOUGH SQUARE'S - 14 NOV 2006

7th Annual Clinical & Legal Update:

- **The Future of NHS Litigation** - Steve Walker, NHS Litigation Authority
- **Urological Negligence - Percutaneous Treatment** - Mr R A Miller MS FRCS FRGS, Consultant Urological Surgeon
- **LSC Funding Clinical Negligence Claims** - Colin Stutt
- **Professional Negligence Claims arising from Clinical Negligence Cases** - Grahame Aldous/Christopher Stephenson, 9 Gough Square
- **Experts' Immunity** - Laura Begley, 9 Gough Square
- **Periodical Payments in Brain Damaged Cases** - Andrew Ritchie, 9 Gough Square
- **DVT Claims: Venous thrombo-embolism - the silent threat** - Professor CV Ruckley, Edinburgh University
- **Inquests** - Perrin Gibbons, Barrister, 9 Gough Square
- **Statistics & Epidemiology: Understanding their implications** - Professor Jane Hutton, University of Warwick, Mathematics and Statistics.

Grahame Aldous

K v Birmingham City Council

QBD, Birmingham District Registry, Mrs Justice Dobbs
13th March 2006 Damages for assault in Children's home assessed at £1.2 million

The Claimant, who since birth had been microcephalic (abnormally small brained) with mental and physical handicaps and severe learning difficulties, was assaulted, at the age of 16, by another child in a local authority care home. Liability for lack of adequate supervision was admitted. Her eyesight had been impaired from birth but in the assault she was stabbed in her good eye rendering her effectively blind. As a result of the assault her mother refused to let her return to local authority care and cared for her at home.

The claim for damages included the cost of caring for the Claimant at home, rather than receiving care from the local authority in a residential home. The Defendant contended that they were only liable for any additional cost as a result of the increased blindness and that a) the Claimant would have gone home in any event, which was denied, and b) that in any event the decision to care for the Claimant at home was

an independent cause for which they were not liable as they had not caused the Claimant's pre-accident condition or the underlying need for care. Before trial the Defendant refused to accept any arguments on causation of the cost of care.

At trial the Defendant agreed to settle to claim for £1.2 million, a realistic assessment of the damages including the cost of care without any discounting for the Defendant's arguments on causation. The award was approved by the trial judge, Mrs Justice Dobbs, and the Court of Protection.

William Norris QC of 39 Essex Street, London and Grahame Aldous of 9 Gough Square, London instructed by Phil Storey of Bailey Wright & Co, Birmingham for the Claimant.

Christopher Kennedy of 9 St John's Street, Manchester instructed by Steven Warburton of Putsmans, Birmingham for the Defendant.