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Exaggerating costs...is dishonest

As part of a concerted attack on exaggerated claims for costs, Beachcroft acted for the defendants in five cases which were listed together at our request. Howard Dean, Manchester, explains the outcome.

Top-ranked in CHAMBERS

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In *Anthony Ramsay and Others v Instore Plc and Others* (May 2008), the claimant's solicitors, via their costs negotiator agents, submitted 'without prejudice' schedules of costs all endorsed with a certificate that the costs claimed did not exceed the costs that the claimant was liable to pay.

In each case the costs appeared excessive and a formal bill of costs was requested. On comparison with the schedule it was clear that:

• the amounts of time claimed were significantly higher in the schedule than those claimed in the bill, in some cases nearly double;

• the hourly rates claimed in the schedule were higher than those in the bill of costs and in the conditional fee agreements entered into by the claimants.

In reaching his judgment, Regional Costs Judge Duerden considered that, in costs negotiations, the schedule of costs is crucial: it should not be considered as "an opening gambit" to negotiations, which was how the claimant's solicitor described it in his statement before the court. The judge rightly rejected this description, together with the explanation given that a junior fee-earner's lack of experience was the reason for the inconsistencies, saying that the schedule was guesswork and a figment of imagination.

In applying the overriding objective the judge held the following.

• The claimant did not give the defendant the opportunity to deal with the claim justly, because "claiming work which has not been done is dishonest".

• In costs negotiations, the parties are not on an even footing where the schedule of costs is considered as "an opening gambit" to negotiations. The defendant could not know what the position was. "If the claimant has his way on the basis of the schedule, the parties will remain very much on a sloping playing field and unequally armed."

• What should be a straightforward mechanism to save expense has not worked.

• This could not have been dealt with expeditiously and fairly when one party was keeping his cards close to his chest.

In a strongly worded judgment, he stated: "Where a claimant falsely certifies a 'without prejudice' schedule of costs then they waive the privilege afforded to it by the endorsement. It is unambiguous impropriety to attempt to obtain costs which were not due and no court can afford protection to a solicitor who engages in that conduct."

Ramifications

The upshot of this lack of fairness is that the protection ordinarily afforded to 'without prejudice' correspondence is lost. It was a gross abuse of fairness to allow protection to a schedule that might include genuine work, but was tainted by such impropriety. The crux of the decision was the solicitor's signature on the schedule (which should routinely be requested in all cases where exaggeration is suspected) and the substantial discrepancy between the schedules and the bills.

As a result of the decision removing the 'without prejudice' protection, the solicitor withdrew all five bills of costs and discontinued the proceedings. He was ordered to repay the interim payments on account of costs, together with interest, and to pay the defendants' costs on an indemnity basis.

Claimants' representatives should be aware that exaggerating claims for costs will not be tolerated and Beachcroft's Claims Validation Team will actively combat such claims.

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Fighting the cotton-wool culture

The courts have seen sense about the risks of everyday life which cannot be reduced further by schools and local authorities, says Mary Lawrence, Bristol.

The recent Court of Appeal decision of *R v John Porter* (May 2008) should provide comfort to schools and local authorities which face a prosecution based on a risk they foresaw to be inconsequential prior to an accident actually occurring.

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In *Porter*, a headmaster of an independent school with an excellent safety record was prosecuted four years after a three-year-old child jumped from steps in the playground to the ground, losing his footing and suffering a fatal head injury. At the trial at first instance, Mr Porter stated that there had been no complaint about the standard of health and safety at the school over the 29 years it had been in existence, with no accident on the steps despite the number of children using them. He was convicted of failing to protect the health and safety of the child in the playground.

No risk

On appeal, the Court of Appeal overturned the first instance decision on the basis that no reasonable jury could have concluded that the steps posed the type of risk envisaged under s.3 of the Health and Safety at Work etc Act 1974 (HSWA).

Considering the steps in the context of whether they posed a risk of possible danger, the Court stated: "The trivial risk of everyday life was not unacceptable, but rather a simple fact of life."

The Health and Safety Executive (HSE) and other regulatory bodies are empowered under the HSWA to investigate, prosecute and serve enforcement notices on an organisation or individual that fails in its obligation to ensure, so far as reasonably practicable, that employees and those not in its employment are not exposed to risks to their health and safety.

While the *Porter* decision must have also been swayed by the unusual facts that the steps were not found to be inadequate in construction or defective and had never caused injury, it is nevertheless illustrative of the general principle that, as a starting point, the prosecution must prove that a risk exposing a person to injury has, in fact, been created. Only after this hurdle has been overcome by the prosecution does the burden shift to a defendant to prove it had taken all reasonably practicable steps to reduce that risk.

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"...the prosecution must prove that a risk exposing a person to injury has, in fact, been created."

Mary Lawrence

To disclose ...or not?

In *OCS v Wells* (May 2008), Nelson J refused to allow an appeal by the defendant for pre-action disclosure of the claimant's medical records. This was on the basis that the defendant could not satisfy CPR 31.16 (3) (d) that disclosure is desirable to dispose fairly of the anticipated proceedings, assist the dispute to be resolved without proceedings, or save costs. Alastair Homan, London, considers the impact.

The defendant in *OCS* faced delay by the claimant in preparing medical evidence and a schedule of loss and applied for disclosure of the claimant's medical records. Nelson J was concerned that the claimant might not know the content of her medical records, that they might contain information which was disturbing to her, or might even cause her to withdraw her claim. He considered that enforced disclosure of the claimant's private medical records could make litigation more likely. Having decided that the court did not have jurisdiction to order disclosure, he observed that he would not have exercised his discretion to order disclosure in any event. OCS is seeking permission to appeal to the Court of Appeal.

Comments made by Nelson J suggest that he does envisage disclosure of medical records once a claimant's medical report has been served and the claim formulated. A defendant faced with a situation in which it requires pre-action disclosure of the claimant's medical records may be able to distinguish this case in those circumstances or on other grounds. Nelson J also indicated that tardy claimants could be sanctioned with costs orders and, if proceedings are issued, defendants should bring his comments to the court's attention.

Costs sanctions, however, may not be enough in cases where the delay is frustrating attempts to settle or pursue rehabilitation.

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Disease update

Barbara Goddard and Alastair Homan, London, update readers on recent developments.

Noise levels

The Control of Noise at Work Regulations 2005, in general force from 6 April 2006, now also apply to the music and entertainment sectors with effect from 6 April 2008. They make several changes to the law, including reducing the lower exposure action level to 80dB(A), the upper action level to 85dB(A) and a limitation on personal noise exposure of 87dB(A).

Hearing aids

In *Coffin & Tarrant v Ford Motor Company Ltd* (May 2008) the trial judge gave useful guidance on how an accelerated need for hearing aids should be assessed and the appropriate quantum of private hearing aids. He also rejected the defendant's argument that there was no loss at all in relation to the need for hearing aids, as these could be obtained on the NHS. This judgment is useful for defendants in arguing for reductions for the sums claimed for privately purchased hearing aids, as claimants should shop around for a reasonably priced hearing aid, given the availability in the market.

Vibration syndrome

Date of knowledge in the tyre fitting industry was considered by the court in *Maxfield v ATS North Eastern Limited* (2008). The court was prepared to apply a more subjective test to the date of knowledge for a specific industry, based on the information available to that industry on the risks of vibration to workers. The judge fixed the defendant with knowledge of the risk in 1989. Defendants should be alive to arguments relevant to their own industry which may put back the date of knowledge.

Limitation

At issue for the House of Lords in the Scottish case of *Bowden and Others v Poor Sisters of Nazareth* (21 May 2008) was the correct interpretation of s.19A of the Prescription and Limitation (Scotland) Act 1973. This gives the Scottish courts discretion to allow a time-barred claim to proceed if it is "equitable to do so".

The claimants had already been refused permission to proceed with their claims for physical abuse between 1961 and 1979 by the court of first instance and the Inner House of the Court of Sessions. The House of Lords upheld the decision of the courts below and, in relation to the limitation aspect, held that the fundamental issue on which the court must concentrate is whether the defendant can show that, in defending the action, there will be a real possibility of significant prejudice. The prejudice to the defendant by the lapse of time in raising the proceedings, including the loss of evidence, was sufficient reason for not allowing the actions to be brought. It is understood that there were potentially several hundred other claims waiting in the wings on which this decision will have an impact.

Two other recent decisions, defended by Beachcroft, have highlighted the value for defendants of limitation arguments in occupational disease claims.

In *Kieron Brady v Cammell Laird* (14 May 2008) the claimant was employed by Cammell Laird between 1977 and 1993, and developed asthma in 1988. On cross-examination the claimant admitted that he "might" have known that his asthma was related to his work. The court held that the defendant was prejudiced in defending the action, as it had closed down its operation in 1993. The court therefore declined to exercise discretion under the Limitation Act 1980 to allow the claim to proceed.

In *Wilson v National Tyre Service* (April 2008) the claimant was employed between 1990 and 1999 as a commercial tyre fitter. Proceedings were issued in 2007. When deciding the issue of the court's discretion, the judge held that, had the claimant brought his claim within three years of his symptoms developing (by 1999/2000), his job would still have been performed by the defendant and investigations could have been carried out. As it was, the defendant had little relevant evidence to defend the claim. Accordingly, the court declined to exercise its discretion under s.33 of the Limitation Act.

This round-up of recent limitation cases demonstrates the importance to defendants of running limitation arguments, particularly in cases where they can demonstrate a clear prejudice if the claim is allowed to proceed.

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Asbestos in schools

Faye Fishlock, Bristol, outlines the current position.

A high proportion of the approximately 24,000 state schools within the UK were built between 1945 and 1974 using asbestos containing materials (ACMs). Subsequent refurbishment gives the potential for further introduction of ACMs. Asbestos may be found in laboratories and home economics classrooms through items as innocuous as worktops and Bunsen burner tape. Only in those schools that have been built since 2000 can it safely be assumed that there are no asbestos materials. It perhaps needs to be borne in mind that, so long as it is properly sealed, asbestos poses no risk to health.

HSE statistics show a number of deaths in the teaching profession from mesothelioma. There is no HSE estimate of how many children have, and will, die from mesothelioma as a result of asbestos exposure at school. The difficulty in assessing the size of this problem is that HSE statistics record the death under the deceased's occupation rather than possible earlier childhood exposure because it is occupational exposure that is normally accepted as being the most likely source to have caused the condition. Whether this changes in the future as a result of far stricter control of asbestos exposure remains to be seen.

Management of asbestos is partly being achieved through the Building Schools for the Future initiative (BSF). The BSF project aims to refurbish or rebuild all secondary schools and half of the primary schools in the UK by 2020. In the interim, every school must implement effective asbestos management plans. Independent schools are not part of this initiative, which means that their asbestos will remain in situ unless the school authorities raise the necessary funds for its removal. In contrast, the Republic of Ireland took the decision to remove all asbestos from schools and significant funds have been allocated to this project. In the USA, as long ago as 1979 a voluntary school asbestos programme was initiated. This became mandatory in 1982. It requires schools to carry out asbestos surveys and notify teachers and parents of potential exposure.

"...in the first schools to be refurbished under the BSF programme asbestos is being found in greater quantities..."

Faye Fishlock

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In the UK there is no mandatory requirement on schools to publish their asbestos management plans, no reporting system, no check via OFSTED reports and few HSE inspections taking place. There is no established body to identify whether a school has an effective asbestos management plan and no one to give guidance on how to correct an ineffective one. Of further concern is that in the first schools to be refurbished under the BSF programme asbestos is being found in greater quantities than originally envisaged. This may extend in the future to a need to evacuate schools and for significant remedial works to be carried out.

Removal?

The NUT wants its members to be free from the threat of litigation and possible HSE prosecution. The BSF programme has already been delayed by the Government to 2020. The TUC is calling for the removal of asbestos from all schools now, as the number of asbestos-related deaths is increasing. In the 1980s there were three member deaths per annum; now there are around 15 deaths per annum.

Insurers of local education authorities and independent schools need to be aware of the risk of future claims for asbestos-related conditions from staff and pupils as a result of past exposure, and possibly future exposure, with organisations having to take more active steps to identify and remove asbestos in schools.

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It ain't fair, Guv

Hot on the heels of the High Court decision in the unfair bank overdraft charges saga have come new regulations aimed at protecting the consumer against unfair practices. Insurers should review their policies, sales literature and procedures to ensure they comply, warns David Gilinsky, London.

The new Consumer Protection from Unfair Trading Regulations 2008, effective from 26 May 2008, apply to "commercial practices" and "any act, omission, course of conduct, representation or commercial communication (including advertising and marketing), by a trader, which is directly connected with the promotion, sale or supply of a product to or from consumers, whether occurring before, during or after a commercial transaction (if any) in relation to a product".

The new regulations are wider in scope than the 1999 Unfair Consumer Contract Terms (UCCT) Regulations (which remain in force) and both consolidate and repeal 23 other pieces of legislation.

The main changes are:

• "commercial practices" are much broader than just contract terms;

• "product" refers to "any goods or service" including immovable property, rights and obligations. This extends to intangibles such as cancellation rights;

• the application of criminal offences; the 1999 UCCT Regulations only provide for injunctions or the supplier giving the OFT (or FSA) an undertaking to amend the term;

• automatically available defences in certain tightly defined situations. These are similar in scope to those in the legislation being repealed such as the Consumer Protection Act 1987, but are now of wider application.

The new regulations include a general prohibition – more informally known as 'the general duty not to trade unfairly'.

"Insurers should be under no illusion that the FSA and/or the OFT could pursue firms and individuals under these new regulations..."

David Gilinsky

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This allows enforcers, such as the OFT and the FSA, to take action against unfair commercial practices, including those that do not fall into the prohibitions of misleading and aggressive practices, or a list of banned practices. In this way, the regulations will enable standards to be set against which both existing and new practices can be judged. The FSA may, however, choose to pursue firms and individuals for breaches of its principles and for failing to treat customers fairly rather than rely on the regulations.

Banned

A total of 31 trading practices are now specifically banned under the new legislation. Of direct relevance to insurers is that the regulations prohibit "requiring a consumer who wishes to claim...to produce documents which could not reasonably be considered relevant as to whether the claim was valid, or failing systematically to respond to pertinent correspondence, in order to dissuade a consumer from exercising his contractual rights." Although this is already prohibited by the FSA in ICOBS 8.1, poor claims management can now be a criminal offence.

Another new rule deals with misleading omissions e.g. providing insufficient information about a product. This can be simply failing to give consumers the information they need to make an informed choice. This occurs when practices "omit or hide material information, or provide it in an unclear, unintelligible, ambiguous or untimely manner, and the average consumer takes, or is likely to take, a different decision as a result." Clearly, COBS 4.2 of the FSA Handbook already includes the rule on fair, clear and not misleading communications in financial

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promotions, and s.397 of the Financial Services and Markets Act 2000 (FSMA) also provides a criminal offence for misleading statements and practices. The existing offence can lead to seven years' imprisonment. The offence under the new regulations carries a lower maximum prison sentence, but convictions may be easier to obtain, as the new offence for omissions does not require intention, whereas the offence under FSMA does.

Criminal offences

Breaches in five areas will attract a criminal offence, for which both companies and relevant staff can be liable, punishable by up to two years in prison or a fine of up to £5,000. These are:

- intentional breaches of the requirements of the general prohibition;
- misleading actions;
- misleading omissions;
- aggressive practices; and
- specified unfair commercial practices.

The OFT and FSA may also obtain a court enforcement order prohibiting further infringements, with breaches of an order attracting penalties of up to two years in prison or unlimited fines.

In their joint action plan published in May, the OFT and the FSA made it clear that they will be setting out the division of responsibilities between them regarding these regulations. Although the FSA claims it will prefer to use its powers under FSMA 2000, insurers should be under no illusion that the FSA and/or the OFT could pursue firms and individuals under these new regulations, should any commercial practices be deemed to be unfair. As we have seen in the case of insider dealing, in practice we expect the authorities will use the offence that gives them the better chance of a high conviction rate.

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Follow the settlements

Julian Miller, London, reflects on the Court of Appeal's controversial ruling in *Wasa v Lexington* (February 2008) which held that reinsurers were bound to follow the settlement of the reinsured.

"This is a questionable conclusion, given the evidence before the court, and an appeal may be made to the House of Lords."

Julian Miller

The underlying policy covered property damage by the Aluminium Company of America (Alcoa). Alcoa was ordered to clean up various sites which had been polluted over periods stretching from 1942 to 1986. Lexington had insured Alcoa for just three of these years, from 1 July 1977. Adopting Pennsylvanian law as a basis for establishing its claim against Lexington, Alcoa recovered for damage caused throughout the period in which the sites were polluted and not just for the three years Lexington was on risk.

Lexington purchased facultative reinsurance from Wasa and AGF in London. This was intended to be back-to-back with the original policy. The reinsurance was subject to English law. Under English law, a policy would only provide cover for damage which occurred during the policy period.

Norwegian case

In reaching its conclusion, the Court of Appeal relied on the Norwegian fish farm case, *Vesta v Butcher* (1989). In that case a warranty in the reinsurance contract placed in London was given the same meaning as in the underlying policy which was governed by Norwegian law. As a result, reinsurers were unable to reject liability, even though there had been a breach of the warranty by the original insured.

The Court of Appeal decided, in this case, that the period clause in the reinsurance should be given the same meaning as in the policy issued by Lexington to Alcoa. If that policy provided cover for damage before or after the policy period, then the reinsurance should be construed in the same way.

Some commentators have observed that it is the purpose of facultative reinsurance to cover the risk of an unexpected ruling in the US courts on coverage issues; reinsurers should not escape liability when the courts gave a wider meaning than intended.

Controversially, Longmore LJ decided that it was predictable that the original policy would be interpreted in accordance with Pennsylvanian law. This was Alcoa's principal place of business. This is a questionable conclusion, given the evidence before the court, and an appeal may be made to the House of Lords. This is an important decision with potentially far-reaching implications. If the appeal goes further it will be sure to attract a lot of attention.

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The paperless office

A move to a purely electronic environment can raise unexpected problems, writes Robin Fry, London.

Any move to the paperless office, whether as part of an off-shoring operation or simply for greater efficiency, is driven at first by technology constraints. How will incoming mail be captured? How will recordings of telephone calls be stored? And what levels of access can people have across the business? But, separately, there are numerous legal questions beginning to be asked – and these can be critical.

Legal admissibility

A key issue is whether scanned copies can be used in court cases and, if so, whether such copies are somehow 'not as strong' as the originals.

In fact, photocopied or scanned materials are regularly put before the court as evidence. The issue is whether print-outs can be guaranteed to be uncorrupted copies of the original; the system must be structured so that every access to a document is recorded and every altered document has a separate reference. At a minimum, any system should comply with the British Standard Institute's codes of practice (BIP 0008-1:2004 and 0008-3:2005) on legal admissibility and linking electronic identity to documents).

Should all originals be kept or can they be destroyed? The paradox is that it may be better – and more economic – for the insurer to have a fixed policy of destruction of all original documents (subject to limited exceptions) rather than running parallel systems.

There needs, however, to be some exceptions.

- Once any litigation has been contemplated, then no relevant documents should be destroyed.

- All scanning should be of the best quality (in colour, copied both sides and be able to recognise any pencil annotations).

- The system should be robust with detailed records maintained of all scanning and destruction (and importantly the dates, by whom and in what capacity the destruction of each document took place).

FSA requirements

There are, of course, stringent FSA requirements in relation to record keeping. Interestingly, however, the FSA does not appear to be concerned about how the records are kept: its concern is simply that firms should be able to provide complete information on any aspect of its business (e.g. all the information in connection to an advised sale) within a reasonable timescale.

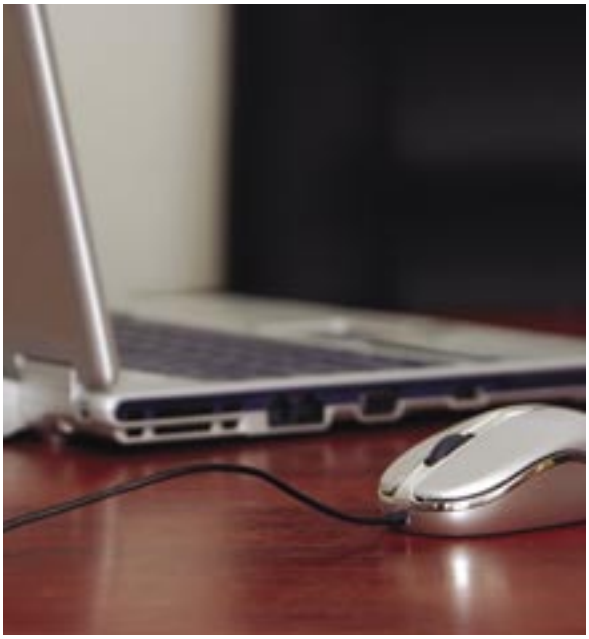
If this may be done via a paperless system faster and more efficiently than on a classic paper filing system, then there may be advantages in this.

Insurers must still be stringent in terms of restrictions on access to personal information (Nationwide Building Society, for instance, was fined £980,000 for information security lapses in February 2007).

Copyright

Any scanning of materials automatically moves the system into an unexpected arena: copyright. Yes, it is correct that you may own the copyright of many of your print materials (such as an Annual Report or direct financial promotions). But, within them, there may well be third party content such as photography or graphics where clearances may only have been given for incorporation in hard copy form.

Where there are externally developed documents then it is likely that copyright is never owned by the insurer: even policy wording may not be your copyright if it has been sourced from outside legal advisers or external product developers.



Data protection

Questions to ask are whether any manual filing systems will be retained and how you will be dealing with any notices and requests under the Data Protection Act 1998.

Of vital significance is the inevitable possibility of cross-border data transfers. Access to an electronic filing system can easily be made from overseas and so will inevitably involve a transfer of personal data outside the European Economic Area.

There is no barrier to moving to a wholly electronic environment. But it is essential that issues as to admissibility, document identity, data protection and, indeed, copyright are all addressed in advance and that all access controls on users properly reflect these concerns.

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Adding it up

One year on from their publication, Dominic Kemp, Birmingham, examines how the courts have applied the new Ogden Tables in practice, when calculating damages for future loss of earnings.

The sixth edition of the Ogden Tables, the actuarial tables used in personal injury and fatal accident cases, was published on 3 May 2007. It introduced a new methodology that requires judges to calculate base multipliers for both earnings and residual earnings and then to apply a discounting factor.

The tables can produce some startling results where the claimant is disabled, has a low educational attainment and is out of work at the date of the trial or assessment. The guidance, however, is not prescriptive and the courts have shown a willingness to adjust the reduction factor where a claimant:

• ought to be back in work;

• is 'disabled' but there is some certainty about their future career path;

• has unrelated ill-health;

• may have been largely reliant on state benefits in any event.

Practical application

In the Northern Ireland case of *Hunter v MOD* (May 2007), the claimant was a 36-year-old corporal in the Royal Irish Regiment who had suffered a knee injury on an adventure training course. The judge found that he ought, on the medical evidence, to have taken up work as a van driver by the date of trial.

It was agreed that he was 'disabled' and fell into educational attainment category 'O'. It was accepted that his future earning capacity, if the accident had not occurred, amounted to £268,290. To reflect the medical evidence, the reduction factor in the second part of the calculation was increased from 0.2 to 0.6. As illustrated below, this resulted in a saving of £120,000 for the defendant:

20.05 x 0.20 x 15,000 = £ 60,150
20.05 x 0.60 x 15,000 = £180,450

In *Conner v Bradman & Co* (November 2007), the claimant was a Saab mechanic who seriously injured his left knee. He had returned to the same work but it was agreed that he would have to change occupation in 12 to 18 months when he would need a total knee replacement. In the three years before trial he had done some part-time evening work as a taxi driver to pay off his debts.

The judge found that the claimant was 'disabled' but adopted a halfway point between the 'disabled' and 'non-disabled' reduction factors (0.82 and 0.49 respectively) given the evidence that after surgery the claimant would probably continue his work as a taxi driver.

In *Lane v Personal Representatives of Lake deceased* (May 2007) (unreported), the claimant had a pre-accident history of high blood pressure and a family history of heart attacks. The judge acknowledged he would have been sympathetic to an argument that the multiplier should be reduced. The defendants, however, had failed to provide medical evidence to show that the risk of illness was greater than that allowed for in the Ogden Tables.

"The guidance...is not prescriptive and the courts have shown a willingness to adjust the reduction factor..."

Dominic Kemp

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Finally, in *Peters v East Midlands Strategic Health Authority & Others* (May 2008), the judge was prepared to apply a factor of 0.50 rather than 0.68 to the likely pre-accident earnings in circumstances where the claimant came from a dysfunctional family background and would have been largely reliant on state benefits. The case has been more widely reported on the issue of local authority funding.

Where, on the facts of a particular case, there is a need for an adjustment, the tables should not be taken as inviolable. Close scrutiny of the evidence can lead to some appreciable savings for insurers.

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Death is different

Two recent Court of Appeal decisions illustrate that ordinary principles of quantification in personal injury claims do not always apply to claims for compensation following a death. Duncan Rutter, Winchester, outlines the differences.

A Train & Sons Ltd v Fletcher (May 2008) deals with interest on damages for financial dependency and touches on the method for calculating multipliers in fatal claims. *Arnup v M W White Limited* (May 2008) deals with the deduction of benefits accruing as a result of death.

The trial judge in *Fletcher* awarded interest at the full special damage rate on the whole of the award for financial dependency from the date of death. He reasoned that, since the multiplier was fixed at death, the damages accrued in full at death and the claimant was entitled to interest at the full rate on the whole amount, even though most of the award for financial dependency covered a period after trial.

The Court of Appeal allowed the defendant's appeal, finding that the judge was bound by the House of Lords' decision in *Cookson v Knowles* (1978): interest should be awarded at half the special damage rate on that part of the claim for financial dependency which covers the period from death to trial.

The Court discussed the merits of fixing the multiplier at death rather than at trial as in personal injury claims. It acknowledged that this approach often leads to injustice – a point previously made by the Law Commission and by the Ogden working party – but indicated that it was bound by *Cookson v Knowles*. Both Sir Mark Potter and Lord Justice Hooper expressed the hope that the House would reconsider this decision but nevertheless *Cookson v Knowles* is still valid and there is no justification, at present, for the approach recommended by the Ogden working party in the explanatory notes to the Ogden tables.

"...causation is no longer important in determining whether benefits should be taken into account."

Duncan Rutter

Discretion

The trial judge in *Arnup* deducted a payment of £129,600 from the defendant's death in service benefit scheme when assessing damages under the Fatal Accidents Act. The scheme was secured by means of an insurance policy and the premiums were paid by the defendant employer. The payment had been made to the deceased's widow by the trustees of the scheme in exercise of a discretion to make such payments. The judge found that the payment had been made not as a result of death but as a result of the exercise of that discretion, thus avoiding the usual effect of s.4 of the Fatal Accident Act 1976 (as amended) which provides that benefits accruing as a result of death shall be disregarded.

The Court of Appeal held that the judge's interpretation of s.4 was wrong. The trial judge had been persuaded that it was necessary to analyse the causal link between the death and the payment. This led him to make what was described by Smith LJ as an artificial distinction, apparently thinking that because the death was not the only cause of the payment, it could not be a cause of it.

In reaching this conclusion the trial judge overlooked the more basic point that if the payment was not connected with the death, it could not be taken into account in any event.

In a short but authoritative judgment which includes an analysis of the statutory history of the relevant provisions, Smith LJ explained that causation is no longer important in determining whether benefits should be taken into account. By 1982 the position was that all benefits (including gratuitous payments) as a result of death were to be disregarded. There are no exceptions. If a benefit accrues for some other reason, unconnected with the death, it is irrelevant in any event and if it is paid as a result of the death it must be disregarded under s.4.

These decisions demonstrate how easy it is to fall into error by wrongly applying to fatal accident claims general principles which apply to injury claims.

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In court

Recent professional risks cases reviewed by Mike Willis, Leeds.

Dog-leg claims

Gregson v HAE Trustees (8 May 2008) is the latest in a line of cases where a corporate trustee, as owner of shares of a failing company, is targeted by the beneficiaries for failing to sue its directors. The beneficiaries tried to show that:

• there was a cause of action available to the corporate trustee against its own directors (for fiduciary breach) of sufficient viability to constitute an asset of the trust which it was duty-bound to the beneficiaries to exploit; and

• the trustee was also duty-bound to have hedged against the disaster of the company's collapse by investing in other assets additional to the shares in it.

These beneficiary-trustee-directors stratagems for recouping lossses from corporate trustees (or more particularly their dirctors), when their primary trust assets fail, have become known as 'dog-leg' claims and the *Gregson* case has attracted a lot of City interest as to whether it would be allowed to progress.

It has not. The court summarily dismissed the action on both counts, because:

• there is no duty on trustees to sue their own directors in this way (at least absent fraud), the appropriate route anyway being that such claims, if viable, are brought by the company's liquidator, not the beneficiaries; and

• although there is statutory power to do so, there is no compelling duty to diversify trust investments.

A Court of Appeal decision six days previously in *Cook and M&S Tarpaulins Ltd (in Liq) v Green and DTE Ltd* (2 May 2008) is an example of a successful claim by a liquidator against directors. In that case, the directors had contrived to transfer their operation to a new corporate vehicle in a transaction funded by loans by M&ST, backed by misleading and inadequate financial documentation, which the court found to have been contrary to the company's interests and the directors' fiduciary duties to it. The company's auditors, DTE, were also liable to repay to M&ST the excess of money over the true value of the company at the date of the transaction.

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A bank's word is its bond

In the current economic downturn, the number of cases arising from creditor-debtor negotiations is set to rise, putting institutional lenders on their mettle to avoid making unintended commitments. The latest Court of Appeal result is *Royal Bank of Scotland v Luwum* (15 May 2008), in which a bank employee offered oral reassurances to the effect (as found by the court) that, if the debtor contrived to keep his borrowings within agreed overdraft limits, the bank would keep the matter "under review" and reconsider again after three months.

The trial judge's finding that this was not a binding legal commitment was overturned by the Court of Appeal, which held it was an undertaking relied on by the debtor, who procured funds from friends and family to control the borrowings, by which the bank was estopped from commencing proceedings for repossession of the security property within that three-month period.

Scope of duty

The issue of scope of duty, and the fairness of attributing losses to the professional adviser in the context of their instruction, continues to occupy and be developed by the courts.

In *Hibbert Pownall & Newton v Whitehead* (April 2008), the Court of Appeal had the unenviable task, in a tragic case, of analysing the contextual range of responsibilities of health-injury solicitors who under-settled an action brought by a mother for care costs

following the birth of her disabled child. When the mother died by suicide, the action was taken up by the child's father, but the mother's self-inflicted demise curtailed the time period for which costs of care were recoverable. The Court had to consider whether those costs now payable by the father were recoverable as within the ambit of the loss-recovery opportunity which the solicitors had mishandled. The CA held that they were not. The father had never been the defendant's client and protection of his interests, which were neither actual nor apprehended while they had conduct of the original claim against the health authority, was outside the scope of their duties.

Part 36 offers

In *Carver v BAA plc* (CA) (22 April 2008) the claimant beat the defendant's Part 36 offer by just £51. The Court of Appeal has recognised that the recent changes in the language of Civil Procedure Rules Part 36 has resulted in a change of approach in deciding whether the judgment was worth the fight. The same questions arise for both purely monetary and non-monetary claims whether the trial result was "more advantageous" than, or "at least as advantageous", as the relevant offer and permit a more wide-ranging review of all the facts and circumstances in deciding whether the litigation was worth the fight. The judge was thus entitled to look at the case broadly and to find, on the facts, that the extra £51 gained was more than offset by the irrecoverable costs incurred by the claimant in continuing to contest the case for as long as she did.

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New consumer legislation for 2009

On 28 May 2008, the Law Commission published its summary of responses to their Consultation Paper in relation to consumer insurance law. Due to the level of support for urgent reform from all quarters of the market, draft legislation covering consumer pre-contract information is being given priority, with a draft bill now planned by next summer.

The Consultation Paper dealt with misrepresentation, non-disclosure and breach of warranty by the insured for both business and consumer insurance. It was published in July 2007 and over 100 responses were received by January 2008. The summary of responses reports the arguments raised. The Law Commissions have not yet formulated their final recommendations. It would appear, however, that the reforms will enshrine into law the approach already taken by the Financial Ombudsman Service.

A paper summarising the responses to the proposals for business insurance will follow shortly. Thereafter, issues papers covering the topics of fraud and late payment of claims will be published this autumn.

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Giving away intellectual capital

Insurers and financial services businesses may be neglecting basic legal protection for their innovations, according to a new report published by Beachcroft.

The report, *A Careless Attrition: IP in Financial Services*, analyses US and European patent and trademark filings by the world's largest financial services businesses, and shows a gulf between those which are investing in intellectual property (IP) protection and those which appear to be willing to ignore such measures.

According to the report, the leader, CitiGroup, has some 143 patent applications filed within Europe and 158 filed in the USA, but many leading UK financial institutions have none. For example, London Stock Exchange has no patent filings, but in contrast Chicago Mercantile Exchange, Deutsche Börse and Tokyo Stock Exchange are each prolific in their focus on protecting their IP.

The evident lack of interest by many UK and European-based financial businesses to intellectual property in this sector means that new financial products, many with international applications, can be easily copied by competitors. By comparison, the US financial sector is highly aggressive in filing for all possible patent protection in those countries where such protection is possible and enforcing these rights – and their trademarks and copyrights – worldwide.

The report is available as a free download from www.beachcroft.co.uk

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Personality change

Catherine Webb, Winchester, reviews some recent cases involving personality change.

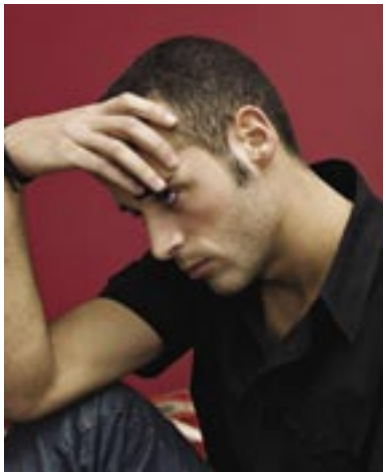
Personality change arises frequently in head injury cases, but also in a variety of other types of claims, such as those involving chronic pain, psychiatric injury or even tinnitus. The JSB Guidelines make specific reference to personality change in relation to brain injuries and severe back injuries.

Personality change often has debilitating effects on claimants and their families. But in rarer cases, a person might become more outgoing, more reliable, or less aggressive. The sometimes dramatic effects of personality change can be an important factor when the court assesses damages.

Tame v Professional Cycle Marketing Ltd (2006)

The claimant, aged 24, suffered a serious head injury from a fall at work. He made a recovery which was described as "miraculous", but remained severely disabled and suffered a personality change.

Prior to the accident he had been a regular churchgoer and a faithful husband. As a result of the injury he became sexually uninhibited, watched pornographic videos and websites and "misbehaved" around women. He was



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unfaithful to his wife. An important issue in the case was whether he should be awarded damages resulting from his change in behaviour. The judge found that the claimant's marriage would not survive and took into account the fact that he had some awareness which made his situation still worse, because he was reminded of the life he might have had if the accident had not occurred.
General damages: £150,000

L v Portsmouth City Council (2006)

The claimant, aged five, fell 15 feet over a balustrade. He was aged 20 when damages were assessed. He suffered a fractured mandible and PTSD was initially diagnosed, causing changes in personality, impairment of educational progress, rebelliousness, anger and anti-social behaviour. Organic personality disorder resulting from brain injury was later diagnosed.

The claimant had little insight into his own mental state and was incapable of managing his own affairs. He had difficulties with cognitive processes of language processing. He required a support worker, a counsellor and a speech and language therapist. In his future career he was likely to be restricted to patchy employment, interspersed with periods of unemployment.
General damages: £75,000

Gray v Thames Trains Limited & Network Rail Infrastructure Limited (2007)

The claimant was a train passenger involved in the Ladbroke Grove train crash in October 1999. His physical injuries were relatively minor, consisting of lacerations to his left eyelid and left hand. He had difficulty walking and was unable to drive for a while.

The psychological impact was far more significant. He developed severe PTSD and underwent a significant personality change, becoming socially withdrawn and anxious, suffering angry outbursts and shunning physical contact. Prior to the crash he had lived a healthy and uneventful life, but in August 2001 he stabbed and killed a drunken stranger who had punched the windows of his car. He pleaded guilty to manslaughter on the grounds of diminished responsibility and was ordered to be detained in hospital under s.37 of the Mental Health Act 1983. The claimant's claim for damages included loss of earnings from the date of the manslaughter. The

court found that the claimant could not recover damages after the date of the offence, based on public policy reasons. Such losses were dependent on the commission of a serious criminal offence and the court would not permit the recovery of damages based on criminal conduct.
Damages: restricted to losses sustained before the commission of the offence

Clossick v Keith Walton Brickwork Limited (2007)

The claimant, aged 39, sustained severe head injuries in a fall. He underwent surgery and part of his frontal lobe was removed. He later suffered a stroke and his intellectual capacity deteriorated. His personality changed and he displayed obsessive characteristics and was irritable and bad tempered. He suffered from weakness in the right side of his body and post-traumatic epilepsy which would require medication. He was incapable of managing his own affairs and would not work again. He needed 24-hour care.
General damages: £150,000 (estimated by the claimant's solicitors)

Clark v Trelleborg Automotive (2006)

The claimant, aged 57, developed permanent hearing loss and tinnitus as a result of noise exposure at work. He suffered from reactive depression and his personality underwent a drastic change. He became short-tempered and easily frustrated. He became easily distracted by the tinnitus.
General damages: £15,500 (estimated by the claimant's solicitors)

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Six partner promotions

Beachcroft appointed six new partners and 22 new associates from 1 May 2008, taking the total partner numbers to 144. The appointments, which were across the country, reflected the firm's continued ambitions for growth in core business areas.

The new partners are:

Kate Archer, Dispute Resolution, Birmingham

Ben Nicholson, Dispute Resolution, London

Alan Pratt, Commercial Services, Bristol

Dan Preddy, Dispute Resolution, Bristol

Owen Rees, Dispute Resolution, Leeds

Sakis Tombolis, Real Estate, London

Commenting on the appointments, Trevor Chamberlain, said: "Beachcroft is continuing to implement a planned programme of targeted growth in our key business areas. As a firm, our business is evenly spread across dispute resolution – especially in the financial services sector – and commercial legal advice, and these promotions support that."

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