

## PERSONAL INJURY - ADOPTED HIGHWAY

*Michael Floyd v Redcar & Cleveland Borough Council - 2009 (CA)*

The claimant tripped on an uneven area of paving close to the corner of a paved quadrant. He claimed that the paving was the responsibility of the local authority and that they were in breach of their statutory duty under the Highways Act 1980. The defendant argued that the paved area did not form part of the adopted highway and that they did not have a duty to maintain it. The claimant contended that the local authority had adopted the relevant part of the highway under a section 38 agreement which stated that they would adopt the footways as marked on a map annexed to the agreement. The map showed a footpath where the accident happened but the footpath was never made. A later memo also suggested that the land had not been adopted by the local authority. The judge at first instance found that the local authority had intended to adopt a footpath but as the land was not a footpath they could not have adopted it and the claim failed.

On appeal it was decided that the later memo had little relevance. The section 38 agreement showed considerable detail of the works including the footways which were to be adopted. Although a footpath had not been constructed, the paved quadrant served as a footpath and covered the area marked on the agreed plan as part of the highway. The agreement had been substantially complied with and, whilst there may be situations where the finished landscape was so different from the agreement that statutory adoption could not have occurred, this was not one of those cases. The judge had been wrong to dismiss the claim for damages and the matter would be remitted for reconsideration.

### Comment

*Some highway tripping claims are not completely straightforward and this case shows the level of investigation and history of the location that was required to be obtained, in addition to the usual inspection and maintenance records, to enable the court to arrive at the correct decision.*

## SUCCESS FEE - WHETHER CASE SETTLED AT TRIAL

*Richard Hosking v Raymond Smallshaw - 2009 (HC)*

The claimant had been seriously injured in a road traffic accident and brought a claim for substantial damages, under a Conditional Fee Agreement with his solicitors, against the defendant. Liability had been admitted and by the morning of

the trial a settlement had been agreed and a consent order was made. Subsequently, the parties were unable to agree whether the periodical payments were to be made monthly or annually so that, following an application by the claimant, the court had to determine the matter. The claimant's solicitors subsequently argued that they were entitled to a 100% success fee because the matter went to trial rather than the 12.5% that would have applied before trial. The court held that the claim had been settled before the trial had commenced and the matter of the frequency of the periodical payments was simply the fine tuning of an agreed settlement. It would be absurd for solicitors and counsel, who had charged justifiably high basic fees totalling over £150,000, to be entitled to double those fees simply as a result of seeking clarification from the court in respect of one aspect of an agreed order when there was never any risk of them not being paid their basic fees. Therefore, as the claim was settled before trial, the success fee was limited to 12.5%. However the judge gave a clear indication that if the claimant's solicitors sought permission to appeal then his provisional view was that this would be granted.

### Comment

*Although this judgement was given in March it is interesting to note a recent comment in relation to the MOJ motor claims process review that whereas approximately 70% of a solicitor's basic costs represents the costs of running the office, so that only about 30% represents actual profit, a success fee of any percentage is entirely profit. On that basis it could be argued that a 100% success fee is actually 300% of the profit element of basic costs.*

## DAMAGES - CARE AND CASE MANAGEMENT

*C (Protected Party) v J A Dixon - 2009 (QBD)*

Liability was admitted in this case and the issue was the extent of the claim for care and case management which it was agreed should be settled by way of periodical payments. The claimant had suffered a serious head injury in a road traffic accident causing severe and permanent frontal lobe brain damage resulting in cognitive and behavioural problems. He had received extensive rehabilitation and it was agreed that he had made a remarkable recovery, particularly in his ability to walk and to carry out most activities of self care. Despite his disabilities he had met and was still cohabiting with a partner by whom he had fathered a child but it was accepted that the claimant's challenging behaviour would result sooner or later in his partner leaving him.

What was interesting in this case was that the claimant had been set up in his own home with a considerable amount of care and support which the defendant argued was overprotective and actually impeding his ability to become more independent. Furthermore, he was not in the category of the most serious brain injury cases and did not need such an extensive and consequently, expensive care regime. The claimant's case was put largely on the basis of the existing provision. The judge accepted that he had to take the existing regime as his starting point but his assessment had to be on the basis of the claimant's future care needs rather than whether the current provision was within the range of reasonable options. He accepted that there was force in the defendant's argument that the claimant's entitlement to independence had to be taken into account but this had to be balanced against the risks of frustration arising from the lack of support leading to alcohol abuse which in turn was likely to lead to further behavioural problems.

The court carefully assessed each element of the care and case management claim finally assessing the periodical payments on a composite basis at £122,500 per annum. This was within the defendant's Part 36 offer of £140,000 resulting in the claimant having to bear the entire costs of the 11 day trial.

#### **Comment**

*This was an interesting case on how the court assesses claims for serious brain injuries and, whilst there is insufficient space here to record the finding on each head of claim, the case report certainly repays careful reading, particularly in relation to how the judge dealt with the conflict between the provision of adequate care and the claimant's wishes in "demanding his freedom" from an overprotective care regime.*

#### **AMENDMENTS TO THE CIVIL PROCEDURE RULES** *Clift v Slough Borough Council & Kelleher – 2009 (QBD)*

The 50th update to the CPR by the Ministry of Justice comes into effect on 1st October 2009 and includes a number of changes the most significant of which relates to Part 35 dealing with experts. In small claims track and fast track cases permission will normally only be given to call expert evidence on a particular issue from one expert. The questions that a party may put to another party's expert or to a joint single expert must now be proportionate. This will be relevant to lower value claims to restrict the extent to which the expert can be questioned.

There is also an amendment to the statement of truth which experts are required to sign. This will now read "I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinion on the matters to which they refer."

There are also amendments to the rules on the notification of ATE insurance premiums in defamation and similar cases. Any references to the House of Lords are amended to the Supreme Court to take account of the change in title because the Supreme Court will also commence on 1st October.

#### **SCOTLAND - NEW RULES IN THE SHERIFF COURT**

New rules are to be introduced in the Sheriff court from 2nd November 2009 for personal injury and fatal cases with a value of more than £5000. These rules are, to all intents and purposes, identical to the Chapter 43 procedure introduced into the Court of Session in April 2003 and will set up a timetable from when defences are lodged including the allocation of a date for proof (trial) within 9 months. The timetable will set dates by which third party notices must be served, pleadings adjusted, statements of valuation by both sides lodged, witness statements and lists of productions lodged and by when the pre-proof conference must have taken place. These changes should enable cases in the Sheriff Court to be settled more quickly than at present although it will inevitably lead to more front-loading of costs.

#### **List of abbreviations used:**

CA	Court of Appeal
CC	County Court
Ch D	Chancery Division of the High Court
ECJ	European Court of Justice
HC	High Court
HL	House of Lords
MOJ	Ministry of Justice
QBD	Queen's Bench Division of the High Court
SCCO	Supreme Court Costs Office
TCC	Technology and Construction Court

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