3PB Personal Injury Update – December 2018

- **Watch this space**

- **Civil Liability Bill**

- On 20 November 2018 the Commons amendments regarding the Civil Liability Bill were considered by the House of Lords.

- Members discussed the duty of insurers to provide information to the Financial Conduct Authority on policyholders, the costs paid by insurers in relation to injuries sustained by third parties and the duty of HM Treasury to report to Parliament on the effects of the Act no later than 1 April 2024.

- A date for Royal Assent has yet to be set (at the date of writing this article). Royal Assent is the final stage of the Bill's passage through Parliament.

- ***Ex turpi causa*: *Wallett and others v Vickers* [2018] EWHC 3088 (QB)**

    - **Facts**: on 16 April 2009 the defendant and the deceased (the claimant's partner) were driving alongside one another along a 40mph dual carriageway in Doncaster at speeds approaching twice the limit in order to be the first vehicle to reach the point where the road narrows into a single lane. The deceased was slightly ahead as they approached the single lane. As the road began to narrow and there was a right hand bend, the deceased lost control of his vehicle and swerved across the central reservation into 2 vehicles on the opposite carriageway. Tragically the deceased sustained fatal injuries.

    - The defendant was prosecuted for causing death by dangerous driving. He was acquitted of this offence, but was found guilty of dangerous driving, and was sentenced to 6 months imprisonment and disqualification from driving for 12 months.

    - **Claim:** the claimant commenced a claim under the Fatal Accidents Act 1976. The quantum of the claim, subject to liability, was agreed. The claim was dismissed at trial. The trial judge accepted the defence of ex turpi causa - that the deceased and the defendant had been involved in a criminal joint enterprise of dangerous driving on a public road.

    - **Permission to appeal was allowed:**

    - *"In giving permission to appeal Langstaff J observed that the case raises a serious issue of law, "whether in circumstances in which, without any pre-arrangement, two car drivers attempt each to outdo the other by driving faster than the other along a stretch of dual carriageway, at speeds which are dangerous, with a view to reaching an area of single carriageway first, it can be said that the fatal loss of control of the one (in the absence of contact with the other) is an event for which the other is in law responsible" (*Mr Justice Males, para 28*).*

    - **Appeal before Mr Justice Males:**

- Advancing a new case on appeal:

- *"54. As already explained, the primary case which the defendant seeks to advance is that the defence of ex turpi causa applies to defeat the claim because the claim is founded on the deceased's own dangerous driving regardless of whether the deceased was party to any criminal joint enterprise. Mr Allen for the claimant objected to that new case, which (as I have shown) was not run below, being advanced for the first time on appeal. If the analysis which I have set out is correct, the new case will fail because of the principle established by McCracken: in the absence of a criminal joint enterprise, dangerous driving by the claimant will not bar a claim pursuant to the ex turpi causa principle.*

- *55. In principle, however, I consider that it would be wrong to allow this new case to be advanced for the first time on appeal. The parties prepared for and conducted the trial on the agreed basis that participation in a criminal joint enterprise was the decisive question so far as the defence of ex turpi causa was concerned. That has remained the position and even now there is no Respondent's Notice. Moreover, the basis upon which Mr Horlock seeks to advance this case is not that the defendant should be allowed now to advance a new case, but that this has always been the way the defendant put the case. As I have indicated, I do not accept that.*

- *56. I consider that it would be wrong on appeal in effect to jettison the way the case was conducted at the trial and to start over again, in effect acting as a court of first instance. To do so would frustrate the parties' reasonable expectations and, moreover, would at least arguably require consideration of the policy questions identified in Patel v Mirza [2016] UKSC 42, [2017] AC 467. It was common ground that these questions do not arise if criminal joint enterprise is the decisive issue. However, they may do so if a broader consideration of ex turpi causa is necessary, at any rate if the defendant's new way of putting the case does not fall foul of the decision in McCracken. However, the Recorder has made no findings about those questions and was not asked to do so."*

- Was there a criminal intent for the purpose of joint enterprise?

- *"64. In my judgment, therefore, the most that can be said is that each man intended to drive in a way which would beat the other to the point where the road narrowed. In relation to an incident that lasted only seconds, that is as far as it is possible to go. Although the Recorder found that this had the effect of encouraging the other to drive dangerously, I conclude that he did not make a finding that this was what the deceased intended and, moreover, that if he had done so such a finding would not have been justified.*

- *65. It follows that the Recorder's finding of a criminal joint enterprise cannot stand and that the appeal must be allowed."*

- However, Mr Justice Males found the deceased bore greater responsibility for the collision, both in terms of blameworthiness and causative potency - 60% contributory negligence. Therefore, judgment was entered for 40% of the agreed damages.

- **Claim, Counterclaim and QOCS: *Waring v McDonnell* [2018] EW Misc B11 (CC)**

  - **Facts**: here both parties suffered personal injuries as a result of a head-on cycling accident on 14 June 2016 in Keymer, West Sussex. Her Honour Judge Venn in the County Court at Brighton gave judgment for the claimant and dismissed the counterclaim. Defendant counsel asserted his client was protected by QOCS and the issue of costs was adjourned by HHJ Venn.

  - It was submitted by defendant counsel that a wide meaning must be given to the word *"proceedings"* in CPR 44.13; that it includes a counterclaim for damages for personal injury brought by a defendant. The effect of this is that the defendant has the benefit of QOCS protection in respect of his unsuccessful counterclaim and his unsuccessful defence of the claimant's claim.

  - The county court decision of *Ketchion v McEwan* [2018] 6 WLUK 625 was relied upon. In that case a defendant was unsuccessful in their defence of a claim and unsuccessful in their counterclaim for personal injury. Deputy District Judge Thorn refused the claimant permission to enforce an order for costs against the defendant on the basis that QOCS applied. HHJ Freedman also refused the claimant permission to appeal:

  - *"In my judgment, therefore, the proper interpretation of CPR 44.13 is that the reference to proceedings is to both the claim and the counterclaim; and that since it is expressly stated that a Claimant includes a person who brings a counterclaim/additional claim, it follows that the Defendant/Part 20 Claimant has the protection of QOCS. For the reasons advanced by Mr Lyons, I reject the submission that to interpret the provisions in this way will encourage spurious or hopeless claims for damages for Personal Injuries."* (para 23 of *Ketchion*)

  - **Judgment:** in conclusion HHJ Venn held:

  - *"46. The defendant in this case was not an unsuccessful claimant in the claimant's claim for damages for personal injury (he was not a claimant at all in the claimant's claim for damages for personal injury); he was an unsuccessful defendant (and an unsuccessful claimant in his counterclaim for damages for personal injury). He only has the protection of the QOCS regime in respect of his claim for damages for personal injury and does not benefit from it in the claimant's claim for damages for personal injury."*

- **Expert Evidence: *Obi v Pater & Anor* [2018] 10 WLUK 141 *ex tempore***

  - **Facts**: In August 2013 the claimant had been the victim of a road traffic accident. She had been walking on the pavement when she was struck by a vehicle, causing her to suffer very serious injuries to her legs. Proceedings were issued in July 2016 and liability was accepted by the defendant. The matter proceeded on the issue of quantum alone and two case management conferences took place in 2017. In April 2018, the claimant's rehabilitation documents were disclosed to the defendant, and in July 2018 the defendant applied to the Court to rely on expert evidence at trial.

  - This related to three experts' reports: one dealing with the claimant's employability; one dealing with the claimant's physiotherapy needs; and one dealing with the claimant's life

expectancy. Two orthopaedic surgeons stated that the claimant would be compromised in the job market, but that she could do part-time work of a sedentary nature. The defendant had not however put the claimant on notice that he intended to get expert reports, instead remaining silent at both case management conferences.

- **Judgment:** In refusing the appeal, HHJ Judge Cotter QC held that the Defendant's conduct had gone against the spirit of modern litigation. The Court had to be able to identify what expert evidence was needed, which would give the Court the opportunity to decide to instruct a single joint expert if necessary. However, the defendant had deprived the court of that opportunity. It was clear that he had considered the expert evidence but had chosen to remain silent until the last moment.

- In relation to the claimant's employability, the court had numerous statistics on employment and in appropriate cases employment evidence might help. Such matters were usually dealt with by instructing a single joint expert. Where there were specific features, factual evidence was used. In relation to the report on physiotherapy, that expert deferred to the surgeons on the level of physiotherapy necessary. The expert on life expectancy, who had also expressed a view as to the claimant's employability, had not met the claimant and that was not his area of expertise. That report would therefore require further exploration.

- However, the need for clarification and equality of arms between the parties would mean a loss of the trial date if the expert evidence were allowed. The defendant's service of the expert evidence had been unexpected would place the claimant in a difficult position if allowed. There had been delay in the defendant stating his intention to obtain expert evidence and a further delay once the reports had been received. The claimant had been inconvenienced for tactical reasons and the court was not convinced that there was any need for experts in the disciplines the defendant had proposed.

- The argument that the prejudice to the claimant could be removed by interim payments was not viable. The claimant had prepared for trial and that long process was nearly over. The Judge stated that the effect of losing the trial date should not be underestimated. Further, the High Court would have to find a new trial window whilst trying to fill the postponed one at very short notice, whereas the case could be properly run on the existing evidence. Any dispute between the surgeons as to the level of physiotherapy necessary could be resolved by the trial judge; the life expectancy issues were fairly straightforward.

- Whilst the evidence the defendant sought to rely on might have a significant impact on the value of the claim, HHJ Cotter QC held that an experienced trial judge could deal with the matter based on the existing evidence. Further, such applications had to fit with the overriding objective. They could not just be allowed where it would encourage non-compliance with the rules or it would mean a case would not be dealt with expeditiously or fairly. There had been no justification for the delay save a tactical approach.

- **Best Interests:** ***EXB (A Protected Party By His Mother & Litigation Friend DYB) V (1) FDZ (2) Motor Insurers' Bureau (3) GHM (4) Uk Insurance Ltd*** **[2018] EWHC 3456 (QB)**

- **Facts:** Following the settlement of a claim for damages for personal injury, the court was required to decide whether it would be in the claimant's best interests not to be told the amount of the settlement.

- When the claimant was 26, he was in a car accident and suffered a brain injury that left him with permanent difficulties in executive functioning and in aspects of his behaviour. He had a case manager, and a support worker who saw him on three days each week to help him plan his routine. The level of damages was agreed, and approved by the court in accordance with CPR r.21.10 because the claimant was a protected person, in a sum designed to compensate him for his future loss of earnings, his support requirements and other heads of loss.

- A deputy for property and affairs was appointed to manage the fund. Because the claimant retained virtually a full life expectancy, the settlement was a significant sum. However, any profligate spending would diminish it rapidly and could lead to it being insufficient to support him. That concern had led his mother and his solicitor to believe that he should not be told the amount.

- The court received evidence from the claimant, his mother, his consultant neuropsychologist, his case manager and his deputy. The professionals shared the view that he should not know the amount. The advocate to the court submitted that the principles in the Mental Capacity Act 2005 s.4 and the United Nations Convention on the Rights of Persons with Disabilities art.3 suggested that ordinarily a person in the claimant's position should be informed of the details of a settlement award so that he was treated in the same way as a person without a disability. The claimant accepted that depriving him of knowledge of the size of his award constituted an interference with those Convention rights, but the issue was whether greater harm would be done by conveying the information to him.

- **Judgment:** Foskett J, sitting as a judge of both the Queen's Bench Division and the Court of Protection, considered the issue:

- If the current position was that the claimant did not have capacity in relation to the issue in question, it was because of the brain damage, which was unlikely to improve; therefore, in terms of s.4(3)(a) of the 2005 Act, he was unlikely to have capacity in the future. When he was capable of calmly weighing up the competing considerations, possibly with help, the claimant himself considered that it would be in his best interests not to know the amount. The evidence that the court had received under s.4(7) was overwhelmingly that it would not be in his best interests to know the amount.

- Concerns over the dissipation of the fund designed to fund his lifetime's needs was one important consideration, as was his inability fully to understand the value of money and the frustrations to which that gave rise. That was likely to remain the position permanently.

- *"33. The primary question, however, is whether I can conclude, on the balance of probabilities, that the Claimant cannot make for himself the decision about whether he should be told the value of the award. As Ms Butler-Cole says, this is difficult in the present case because "by definition, the Claimant cannot be presented with the information relevant to the decision in order to assess his capacity, as that would make the entire exercise redundant." Nonetheless, the Claimant has expressed his views on the*

matter without the exact figure being known to him and there is evidence (particularly in his comment after he left the videoconference room after giving his evidence) that his ability to make this decision is variable and that he could not necessarily sustain over any meaningful period the making of such a decision given his inability to control his impulses and weigh up all the relevant considerations. 34. In those circumstances a declaration as to incapacity in relation to this specific decision is justified."

- Foskett J held that the Order should therefore contain declarations as to: the claimant's incapacity to make the decision, that it was in his best interests that he did not know the size of the award, and that conveying such information to him would be unlawful, and a provision that his Deputy could apply to the Court of Protection on an urgent without notice basis for an order preventing the disclosure of the size of the settlement. However, an injunction preventing any person who knew the size of the award from disclosing that information to the claimant would not be appropriate: it was not clear how it would be policed or how anyone in breach of it could be dealt with.

- **Costs:** The Claimant sought his costs against the Third and Fourth Defendants. This was opposed on the basis that all issues between them and the Claimant had been concluded by the previously approved settlement and that this particular issue was a "solicitor/own client" issue that should not be laid at the door of the tortfeasor. It was also contended that this principle would apply whenever the issue of the Claimant's incapacity to make the relevant decision had arisen. It was further argued that the acceptance or conferment of liability for costs on the Third and Fourth Defendants might lead to an open-ended commitment to pay the costs associated with repeat applications.

- *"50. The more important question is whether, in principle, such a liability should be laid at the door of the tortfeasor. In my judgment, the need to make such an application arises directly out of the injury caused by the tortfeasor and I can see no principled basis for denying liability for the costs of the exercise, whether the claim for costs is sought as a head of damage or by way of an application for costs."*

- Foskett J remarked, *obiter* (paras 52-54), that the instant issue arose quite rarely. However, cases involving head injury with frontal lobe damage, which was frequently associated with the compromise of executive function, were relatively frequent. If it was the case that the issue might arise more frequently in the future, it seemed possible that the interrelation of the normal rules of civil practice and the rules of the Court of Protection should be considered, with a view to trying to streamline a way of dealing with it in a convenient and fair way.

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