

Appendix

Detailed Case Summaries

Abuse and Assault

C v Merthyr Tydfil County Borough Council

The Claimant sought to pursue a claim against the local authority for the injuries she had suffered in connection with the abuse of her children by a neighbour. The Council sought to strike out the claim on the basis of earlier decisions which had precluded a claim in similar circumstances. Here the Court concluded that a separate duty was owed to the Claimant to that which also existed in respect of her children and therefore in principle the claim could proceed.

MAGA v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church

At first instance this was a decision which bucked the trend of a finding of vicarious liability by "employers" for their employees when there had been child abuse. The allegations were against a former Roman Catholic priest. The Court of Appeal overturned the first instance decision and found that the Defendant would be liable for the abuse undertaken by one of its priests even if that was arguably not as a result of him undertaking his priestly duties. The current position with both limitation and vicarious liability in abuse claims makes many of them almost indefensible and a situation akin to strict liability existing.

Raggett v The Society of Jesus Trust

Mr Raggett, who made his case one of high profile and media interest when claiming £5million damages for childhood abuse, saw an appeal proceed challenging the findings on limitation. He himself had for many years been a litigation partner at a City law firm. The outcome of the appeal is awaited.

Webster v Ridgeway Foundation School

The Claimant was the victim of an assault, which it was alleged was racial, with a number of children and adults having been convicted of intent to wound. The claim was for a failure to maintain discipline, negligence in dealing with racial tensions at the school and a claim under the Human Rights Act on the basis the Defendant knew or ought to have known that the Claimant would be exposed to treatment that could be described as inhuman or degrading in that he was at risk of being subjected to a serious assault.

In considering if there was a duty of care the Court accepted that it was reasonably foreseeable that on occasions outsiders might seek to harm pupils in a school. There was a relationship of proximity at least whilst the pupils were on the school's premises.

However Nicol J did not agree that the school's adoption of relevant policies meant that it had assumed responsibility for seeing that these policies were carried out or enforced. There was no claim here for breach of statutory duty. Non implementation of a policy was not sufficient unless the Claimant could also show that this amounted to a breach of the duty of care owed by the Defendant. The Claimant's claim both in negligence and breach of the Human Rights Act failed.

Meanwhile the Local Safeguarding Children Board decided to undertake a Serious Case Review, but limited the investigation to lessons that could be learned pending the outcome of the civil case. The

Claimant challenged this decision in *R v Swindon Local Safeguarding Children Board* and won this case.

ATE Insurance

Kris Motor Spares Ltd v Fox Williams LLP

Following a dispute with its client, the Defendant, which had previously been self-insured, took out After The Event (ATE) insurance shortly before trial which carried an expensive premium of £95,000. Following the Defendant's success at trial, the Claimant was ordered to pay its costs (including the ATE premium). The Claimant appealed on the grounds that the policy had been taken out at too late a stage and the amount was unreasonable.

The judge concluded that there was no principle that a premium on a late incepting policy was irrecoverable as an unreasonable cost and there was no basis to conclude that the Defendant should not have taken it out. The judge held that it would have been imprudent for the Defendant to continue to self insure, especially in light of the fact that the Claimant had instructed Leading Counsel.

As to the question of the reasonableness of the fee, the evidential burden lay on the Claimant to prove that the premium was unreasonable and, in this case, the Claimant failed to discharge it

Michael Phillips Architects Ltd v Riklin and Another

The Court was asked whether the presence of ATE insurance justified a refusal by the Court to order security for costs. Whilst it was possible in principle, the ATE policy was held not to be sufficient security for the Defendants on the facts. The policy was ambiguous as to whether it would cover costs awarded in respect of a successful counterclaim; the sum insured could be eroded by first party costs; the policy only applied where there was a reasonable prospect of success, so insurers could withdraw cover; the policy would not respond if any conditions were broken; there would be no cover for fraud; and there were various rights to cancel.

Persimmon Homes Ltd v Great Lakes Reinsurance (UK) Plc

Persimmon was awarded its costs against another property development company who had taken out ATE insurance with Great Lakes. When that company was wound up, Persimmon sought to recover from Great Lakes under the Third Parties (Rights against Insurers) Act 1930. Great Lakes avoided for non disclosure on the basis that the policyholder had failed to disclose its dishonest conduct and fabrication of evidence when the risk was presented.

Whilst Persimmon argued that the factual account of the underlying events was not material to the risk; the non disclosure had not induced insurers; there had been waiver and negligent underwriting, it was held that on the facts all the aspects of non disclosure could be established and there was no waiver or negligence.

Causation

Harsukhrai Bhatt v Fontain Motors Ltd

In considering liability in negligence for a fall from height by a worker in the workplace (the employee was climbing a ladder which was not footed), the Court of Appeal held that the starting point was whether the accident was as a result of a breach of the Work at Height Regulations 2005 and not the conduct of the worker. The Defendant's breaches of the Regulations were causative of the accident. If an employee fell while working at height when he should not have been required to work at height at all, it was difficult for an employer to maintain that the employee was wholly to blame for the fall on the basis that the fall would not have occurred if he had followed the system prescribed by the employer. Climbing a ladder which was not footed only went to contributory negligence.

Smith v Youth Justice Board for England & Wales & Anor

This is a useful case for Defendants who train employees in restraint procedures. The Claimant was a former custody officer at a secure centre for vulnerable children. The Claimant and two other custody officers (using a procedure known as a seated double embrace) forcibly restrained a 15 year old boy, resulting in the boy's death. The Claimant brought a claim for PTSD. The Court of Appeal reiterated that factual causality is only the first step when considering causation. As a matter of fairness, a Claimant's role in bringing about the harm of which they complain must also be considered. The death was caused by two factors, namely the excessive use of the restraint procedure and the continued use of force despite the boys signs of distress. It would be unjust if the Claimant were to recover damages in these circumstances.

Spencer v Wincanton Holdings Ltd (Wincanton Logistics Ltd)

An employee had previously suffered an injury at work and had his leg amputated as a result. The Defendant appealed against a decision that it was liable for injuries suffered to the same employee for an accident which occurred over 3 years after the initial incident. In the second incident, the Claimant tripped and fell at a petrol station when not using his prosthesis or sticks. As a consequence of this second accident he was permanently confined to a wheelchair. The Defendant sought to argue that the second accident occurred as a result of the employee's unreasonable conduct. The Court of Appeal held that the employee's contributory conduct was not sufficient to break the chain of causation. The appeal was dismissed, but damages for the second accident were reduced by one third to reflect contributory negligence.

Costs

Andrews v Aylott

The issue to be decided by the High Court was whether enhanced interest should be awarded on damages once liability had been settled but prior to agreement for quantum. The Claimant sought enhanced interest for matching an offer of 75/25 contributory negligence. The Judge at trial made a complex order as to the liability for interest which was the subject of a number of different interpretations advanced by the parties. In addition to the just over £2million lump sum agreed between the parties the Claimant sought enhanced interest on index linked payments of £125,000 per

annum. The Judge concluded it would be wrong to make any award of interest under Part 36 for damages for future losses/expenditure. Interest should reflect the Claimant's loss in being kept out of his money and cannot be applied to a future payment. Enhanced interest was awarded only on the lump sum.

Drew v Whitbread

The Court of Appeal had to decide whether to uphold the decision that the costs could be assessed on the basis that the action was a Fast Track matter despite being allocated to the Multi track and whether the Costs Judge on assessment was precluded from taking the point because no reference was made to the issue in the final order.

The Court found that the provisions as set out in *Aaron v Shelton* were too prescriptive and it was not consistent with CPR 44.3 to prevent the Court from exercising its discretion and to preclude a party raising a point highly material to whether the costs were reasonable and proportionate because it had not been raised before the trial judge. However the order was for the costs to be assessed on the standard basis and not on the Fast Track basis and the Costs Judge could not change that order.

The Court went on to say that if the Costs Judge had given reasons why the costs should be assessed on the basis that it was a Fast Track trial, in particular as to why it was necessary for the trial to go in to a second day, this would have been permissible. The costs could have been assessed on the standard basis taking into account the case should have been allocated to the Fast Track.

Higgins v MOD

The High Court had to consider the Cost Master's decision to allow a Kent based Claimant to recover the hourly rates claimed by Central London solicitors. The Court considered the two main authorities of *Wraith* and *Truscott* and found that on the particular facts of this matter it was reasonable not to expect the Claimant to investigate which local solicitors could act on his behalf. The Claimant was 82 years of age diagnosed with incurable cancer with asbestosis being the main cause. The doctor mentioned the name of a central London firm. By this stage the Claimant was able to walk very little and his daughter was caring for him. The next day she contacted the solicitors who attended upon him within the week and were instructed at an hourly rate of £345 as opposed to the expected £200 for Kent solicitors. The Court accepted it was reasonable in these particular circumstances and that the appropriate rates for Central London were recoverable between the parties.

Morris v Southwark Council

This was a High Court decision on an appeal of a Deputy Costs Master's finding that a Conditional Fee Agreement was unenforceable. Although there were only 2 claims before the Court there were a number of other housing disrepair claims brought by the Claimant's solicitor against the Local Authority with the same provisions in the CFA.

The CFA repeatedly stated that if an order for costs was made against the Claimant and there was no insurance policy in place, the solicitor would indemnify the Claimant and pay those costs.

The Defendant claimed the Claimant's solicitors were maintaining the action and had a real financial stake in the matter. Further they were acting as insurers illegally in breach of the Financial Services

and Markets Act which alone would make the CFA unenforceable.

The Court considered the facts of the matter, where only a 10% success fee was being claimed, the indemnity would rarely be used and the CFA came into being upon the solicitor's deciding not to renew their Legal Aid Franchise due to the terms being offered. It was put forward by the Claimant's solicitors that this "new scheme" was to the benefit of the local community in continuing a service and giving access to justice.

These were modest claims with damages settling for £10,000 and £1,300 with total costs of £13,000 and £8,000. The Court was at pains to stress that this appeal was to be decided on its own facts and was not intended to create a precedent. It found that the "scheme" was in respect of cases of low risk, low quantum, low volume, low success fee and enhanced access to justice. The Court had to determine a line somewhere and due to the small interest the solicitor had in each individual case this matter fell below that line.

Reference was made to *Dix v Townsend* with the Judge stating he was giving no opinion as to whether that matter had been correctly decided but did venture the opinion "that the strains and stresses in that case were significantly higher". In *Dix* the Deputy Master found that the indemnity provided in similar terms was a broad uncapped liability unsupported by a fund or insurance policy and placed the solicitor in the position of having too much at stake. In *Dix* the Court found the CFA to be unenforceable. In that case the damages were agreed in the sum of £675,000 and the Claimants costs were £146,000.

The Court found that the indemnity did not provide a contract of insurance and was not subject to FSMA as it was subsidiary to a contract for legal services.

The Defendant has obtained permission to appeal to the Court of Appeal.

O'Beirne v Hudson

This case was heard immediately prior to the *Drew* case and raises similar issues. Here there was a consent order for costs to be assessed on the standard basis and although not set out in the same detail in this judgment it was again ruled that the Court on assessment was not precluded from hearing issues as to the conduct of the action.

The case was settled prior to allocation with damages within the small claims limit being agreed despite the Claim Form claiming general damages exceeding £1,000. The Defendant's argument was that only the fixed costs that would have been recoverable on the smalls claim track should be allowed.

The Court found that as the order was for costs to be assessed on the standard basis that the costs judge could not then assess the costs on the small claims track by allowing only fixed costs but the Court was entitled to take into account all of the circumstances including the fact that the case would almost certainly have been allocated to the Small Claims Track including whether it is reasonable for the Defendant to pay the costs of a lawyer instructed by the Claimant.

The Court will not change an order for costs and in this case if the order had been made for the costs to be assessed on the small claims track basis rather than the standard basis then only fixed costs

would have been allowed. However reference to the standard basis does not fetter the Costs Judge's discretion to take into account what costs should be reasonably allowed on the basis the matter would have been allocated to the Small Claims Track.

Pankhurst v White & MIB

The High Court had to decide on appeal the issue of whether enhanced interest could be recovered for beating a Part 36 offer together with an indemnity order for costs under the previous CPR Part 36 rules but also referred to how the matter would be decided under the current rules.

The Claimant had made a Part 36 offer of £3.4 million in May 2006 which was rejected. The Claimant withdrew the offer stating he was no longer intending to rely on the same and subsequently obtained judgment on liability. Shortly before the quantum trial the Defendant made a Part 36 offer of £6.8 million. At trial the Claimant recovered £6.1 million.

It was accepted that the Defendant was entitled to the costs from the date of the expiry of its offer but the Claimant sought to recover his costs on an indemnity basis and enhanced interest from the date of the rejection of his offer to the date of the Defendant's offer pursuant to CPR Part 36.21 (now replaced by 36.14). The matter to be decided was whether the offer had been withdrawn within the meaning of CPR Part 36.5(8) (now replaced and modified by CPR 36.2) where the withdrawal of an offer does not provide any protection under Part 36.

The Claimant's argument was that the offer had not been withdrawn for the purposes of the rule but was extant on the same having been rejected. Under the rules in existence in 2006 the Court decided that if the offer had not been withdrawn and the Defendant had failed to accept the same within the set time limit then an indemnity order could be made with enhanced interest. However the Court went on to consider the current position under the new modified rules. If the offer is withdrawn at any time the Part 36 costs consequences would not follow as would now be the case in this particular set of circumstances. The Court did qualify the point by reference to CPR 44.3 (4) (c), that the Court can, as previously, still consider any offers made in the proceedings when making an order for costs but this puts the duty on the Claimant to persuade the Court that it should not take into account the withdrawal of the offer despite the terms of the current Part 36.

Sousa v Waltham Forest

The matter itself involved subsidence caused by tree roots. The Claimant said his property was damaged by the Defendant's trees, and the claim was settled leaving costs to be assessed. The Claimant's insurers had brought the claim under their rights of subrogation. Insurers had a CFA with a success fee with their instructed firm of solicitors.

In respect of costs, the Defendant said it would not pay the success fee on the grounds that it had not been reasonable for the Claimant to enter into a CFA because he had the benefit of a full indemnity against costs from insurers.

At the costs hearing the Defendant directed the Court to CPR 44.4 which provides that the Court must not allow costs that have been unreasonably incurred, and goes on to say that, should there be any doubt as to whether costs were reasonably incurred the matter should be resolved in favour of the paying party.

The Defendant proposed that the Court should instead look at whether it was reasonable for the paying party to be burdened with a success fee, when in reality the Claimant would not pay the costs because these would be covered by his insurer.

At first instance the District Judge said it was necessary for the court to look at the reality of the situation and held that it was unreasonable to allow the Claimant to rely on a CFA in circumstances where their insurer would pay the costs in any event. The success fee could not therefore be recovered.

On appeal, however, the Judge referred to the basic concept of subrogation and found that an insurer was entitled to benefit from the same rights as the insured. The Judge went on to say that the Defendant could not rely on the fact that the insurer was funding the claim as a defence to the Claimant's claim for a success fee when the claim had succeeded.

This appeal decision affirms the position previously upheld by the Courts that a success fee which has been agreed by an insurer under a collective CFA with their solicitors can be recovered from a losing party.

The Defendant has obtained permission to appeal to the Court of Appeal with a hearing due in the autumn.

Vector Investments v JD Williams

It fell to the High Court to decide liability for costs after all other issues had been agreed between the parties and a consent order made. The Claimant had sought to recover £6 million and had rejected an offer of £400,000 which was not made under the terms of CPR Part 36. The parties eventually agreed damages in the sum of £750,000 plus VAT and the Claimant sought the recovery of costs on the grounds that they had won. The Defendant claimed to be the winner taking into account the amount claimed and averred that they should recover the costs of the action; alternatively neither party was successful and there should be no order for costs. There was also a separate issue as to wasted costs due to the Claimant's conduct in dealing with disclosure.

The parties sought the Court's decision solely as to costs and not the substantive issues. The Court took the settlement sum as the starting point but this was not a determination as to who would have won if the substantive issues had been fought. However in the absence of any other compelling factor the Court considered that the settlement sum was both the starting and finishing point for the consideration of success. The Court found that the Claimant was the successful party as it did not consider that a Defendant who reduces a claim can be regarded as the successful party particularly in a case where the substantive issues were not being determined. Accordingly the starting point was that the usual position is that the successful party should recover the costs of the action.

The Court then considered the conduct of the action in detail and found no relevant issues to make any different order for costs. Any exaggeration of the claim had not been intentional and beating the offer by £350,000 is a substantial amount. However there was a failure by the Claimant to negotiate which was a loss of opportunity for the matter to be compromised before costs of £3.5million were incurred. However the Defendant could have protected their position by making an increased offer.

The Claimant was allowed all of the costs up until 21 days after the offer was made being a reasonable period for negotiations to have taken place and 50% thereafter.

The Court also found that the Claimant had increased the costs of the disclosure process by producing files containing irrelevant material and duplicating information. The Defendants had incurred costs of £137,000 on the Claimant's disclosure but as most of the work would have to be carried out in any event, applications could have been made to the Court during the process and invitations could have been accepted for meetings. The Court awarded the Defendants £20,000 to be set off against the Claimant's costs of the action.

On the basis the Claimant had recovered an order for costs but had lost on the disclosure exercise, had failed to persuade the Court the claim had not been exaggerated and had failed to negotiate, they were awarded 70% of the costs of the application to the Court to determine liability for the costs.

Credit Hire

Accident Exchange v Autofocus

This matter arises from the now concluded case of *Glossop v Christian Salvesen Logistics Ltd* which was heard at Chesterfield County Court on 8 September 2009. Accident Exchange first raised concerns in this case over the accuracy and potential honesty of hire rate evidence submitted by Autofocus on behalf of the Defendant. The case of *Archer v Skanska* first identified their suspicions regarding the evidence. Accident Exchange appealed the decision in *Skanska* and this case is due to be re-heard. The Autofocus evidence used in the first hearing has been ruled as inadmissible and the case is due to be re-heard this year.

Following their suspicions relating to the evidence, Accident Exchange brought an action against Autofocus for unlimited damages on the grounds that evidence had been allegedly fabricated in a number of cases, including the above, which misled both the Court and Accident Exchange and resulted in lower sums being awarded or accepted. Accident Exchange allege that telephone conversations by certain Autofocus employees obtaining spot hire rates from various car rental companies were fabricated and exhibited to witness statements.

Autofocus made an application to the Court of Appeal to strike out the claim or alternatively for summary judgment by reference to witness immunity. Accident Exchange argued that the actions and records produced by Autofocus' employees are not covered by witness immunity.

The application for strike out was dismissed and Autofocus applied for permission to appeal the decision by reference to witness immunity.

The Court of Appeal felt that this was changing the issue from a strike-out appeal into a determination of a preliminary point of law, which they say was not appropriate for them to do as they were not in possession of all of the facts.

The Court dismissed the appeal on 14 July 2010 and declined to make a declaration on the immunity issue. The only comment the judges made was that " if it is established that a particular surveyor dishonestly fabricated evidence..... he would be unlikely to be able to avail himself of the immunity....."

Accident Exchange have indicated that they intend to make an application to the High Court to amend the original proceedings in the case to include all of the Autofocus employees against whom they believe have acted dishonestly.

The case continues.

Beechwood v Hoyer

A motor dealer with a substantial stock of available vehicles for sale and use as courtesy cars was to receive damages for the loss of the use of one of its vehicles due to damage based on the interest and capital employed and any depreciation sustained over the period of repairs in respect of the damaged vehicle, and not on the costs of hiring an alternative vehicle.

The Claimant, a motor dealer with a large stock of vehicles, made a claim for credit hire following an accident with the Defendant. At the hearing, the judge stated that the Claimant had failed to mitigate its loss, as it should have used a replacement vehicle from its available stock. However, he held that in reliance on *Lagden v O'Connor* the correct approach was to award general damages based upon the spot hire rate for the comparable vehicle and awarded the Claimant £12,000. The Defendant appealed the decision on the basis that if the Claimant was entitled to an award of general damages, it was not to be based on the costs of hiring an alternative vehicle but on the cost of maintenance and operation of the alternative vehicle.

The appeal was successful and the Court held that where a Claimant had been deprived of its vehicle and needed to hire a replacement, it had to take reasonable steps to mitigate its loss. The judge had erred in adopting the spot hire rate as the fair approach to the measure of damage as identified in *Lagden*. The case concerned a corporate claim for loss of use of a vehicle employed in the course of a business that could absorb the loss by supplying a substitute from stock without any loss of profit and cost of hire of a replacement was not a proper basis for the assessment of damages as there was no need for a replacement vehicle. The correct measure of damages should be calculated on the corporate cost of maintaining and operating the substitute vehicle and an award should be given on the interest and capital employed and any depreciation sustained over the period of repairs of the damaged vehicle. The relevant figures were not before the Court, and the parties were to agree a suitable figure for loss which could be awarded in place of the original award.

Bent v Allianz

This case establishes that there is no need to provide an exact spot rate for an almost exactly comparable car.

The Claimant, a well known footballer, had an accident in his Mercedes V12 6.3 - a £72,000 sports car. The first Defendant's driver was at fault. Both Defendants (the second Defendants were the first Defendant's insurers) accepted liability for the accident.

The Defendants accepted that Mr Bent was in need of a replacement car whilst his car was being mended. They also accepted that he was entitled to hire a broadly equivalent car to his own, damaged, Mercedes and that they would have to pay appropriate hire charges.

The issue surrounding the case was that the Defendant did not accept that they would have to pay the

full hire charges of £63,406.90. The Defendants said this was too much because the hire car was more expensive than the Claimant's own vehicle and the Claimant should have hired from the spot market in order to mitigate his losses.

The Judge in the first instance allowed the claim in full as the spot rates provided by the Defendant were for 2009, not 2007 when the hire occurred and he did not want to speculate what the rate would have been at the time for a young man hiring a specialised car for a lengthy period.

The Defendant's insurers appealed the decision and the Court of Appeal considered that the judge had got it wrong. The Court of Appeal held that the spot rate evidence did not have to be for the exact time of hire - clearly evidence of the spot rate a year or so later than the relevant date was likely to throw considerable light on what the spot rate would have been at the time.

Lord Justice Jacob also commented that "one must not be hypnotised by any supposed need to find an exact spot rate for an almost exactly comparable car." Normally, the replacement car need be no more than in the same broad range of quality and nature as the damaged car.

The matter was remitted for a retrial.

Copley v Lawn

The Claimant appealed against a decision that they had failed to take reasonable steps to mitigate their loss by refusing the Defendant's insurers' offer to provide them with replacement cars while their cars were being repaired following road accidents.

The Claimant could reasonably reject or ignore the offer if it did not make clear the cost of hire to the Defendant for the purpose of enabling the Claimant to make a realistic comparison with the cost to him of making his own hire car arrangements. If a Claimant did unreasonably reject or ignore the offer, he did not forfeit his damages claim altogether but was entitled to recover at least the cost which the Defendant could show he would reasonably have incurred. The general rule that the Claimant could recover the market rate of hire for his loss of use prevailed, unless, and to the extent that, the Defendant could show that, on the facts of a particular case, a car could have been provided more cheaply than at the market rate.

Deafness

Baker v Quantum

The Court of Appeal decision in *Baker v Quantum* sent shudders of concern amongst those who have employed or insured noisy work environments as it applied a wider interpretation of s. 29 Factories Act 1961. The Defendants in Baker applied to the Supreme Court for permission to appeal, which was granted subject to the Claimant being represented and being protected as to costs. The hearing is listed for 23 November 2010.

Disclosure

Arroyo & Others v BP Exploration Co (Colombia) Ltd

Master Whitaker concluded that a Court has no power to order a party to disclose an ATE policy, contrary to earlier decisions including last year's *Barr v Biffa Waste*. Whilst Costs PD 19.4(1) requires information about an ATE policy to be given "unless the Court otherwise orders", that enabled a Court to relieve a party of the obligation - it did not provide a power to require greater disclosure.

The Senior Master went on to decide that the policy was covered by litigation privilege, having come into existence for the purpose of the proceedings.

Disease

The Corby Group Litigation

This landmark decision saw the Court conclude that a duty of care was owed by a local authority to mothers and their unborn children not to expose them to injury when preventing the dispersal of dust carrying toxic chemicals. The council requested permission to appeal but the group action was subsequently settled.

Double Insurance

National Farmers Union Mutual Insurance Society Ltd v HSBC Insurance (UK) Ltd

A fire occurred between exchange and completion of a contract for the sale of building. The contract specified that the risk of a loss at this time was to be borne by the buyers. The buyers held buildings cover on the property with NFU, the policy stating that "If when you claim there is other insurance covering the same ...damage..., we will only pay our share" (a rateable proportion clause). The buyers paid the purchase price and recovered under their policy.

The sellers had retained their policy with HSBC up to completion, due to their ongoing insurable interest and the buyers' insurers claimed contribution. That policy covered both sellers and buyers but included an "escape" provision which stated that "we will not pay....if the buildings are insured under any other insurance". Cover was also subject to a claims condition that "we will not pay any claim if any loss, damage or liability covered under this insurance is also covered wholly or in part under any other insurance except in respect of any excess beyond the amount which would have been covered under such other insurance had this insurance not been effected" (an excess clause).

It was held that this was not a case of double insurance. The existence of the NFU policy triggered the HSBC escape provision and there was therefore no "other insurance" under the NFU policy. The purpose of the HSBC policy was to provide cover to purchasers, and therefore protect the seller, where they may otherwise be uninsured. It was the construction of the specific policies, therefore, that was the key to the decision.

The decision considered the well known authorities of *Weddell*, *Gale* and *Austin* and cast doubt on the correctness of the construction of the policies in *Austin*.

Exclusion Clauses

Axa Corporate Solutions SA v National Westminster Bank Plc & Marsh Ltd

On renewal of their policy by fax, the Claimant proposed terms including a renewal of the primary liability cover at the same limits as the expiring policy but with the additions of a terrorism exclusion excess of £10m for EL and in relation to the £5m cover for public and products liability, a "Terrorism exclusion (wording to be agreed)". The Defendant and their broker denied that the exclusion applied, it not being insisted upon by the Claimant or agreed to by the Defendant or their broker, and therefore it did not form part of the agreement.

It was held that the renewal terms were as set out in the fax. Except to the extent that they may have been amended by agreement, they formed the basis on which the Claimant was offering to renew and they were accepted by the order given to place the cover. The fact that the Defendant did not know about them was irrelevant. The broker was their agent and was under a duty to communicate the terms to its client. There was no evidence that there had been any agreement that the renewal terms should be amended and the overwhelming probability was that the terrorism exclusion was not even discussed, still less negotiated out. The terrorism exclusion therefore applied. As to the meaning, the words "terrorism exclusion" were words of substance and content on their own; they did not require the inclusion of some clause which had not been identified. The fact that a fuller expression of the terms had been contemplated did not affect the position.

Markerstudy v Endsleigh

The Claimant alleged breaches of a number of claims handling agreements and claimed losses. The Court was asked to rule on the construction of two clauses. They excluded liability for:

"indirect or consequential loss (including but not limited to loss of goodwill, loss of business, loss of anticipated profits or savings and all other pure economic loss) arising out of or in connection with the business"

It was held that the exclusion clause only excluded liability for indirect or consequential loss, the introductory words of "indirect or consequential loss" defining the scope of the specified forms of loss that follow. Use of the phrase "including but not limited to" was a strong indicator that the specified heads of loss were only examples of the excluded indirect loss.

Similarly, whilst it was held that a cap clause covering its total liability in contract covered any contractual claim for interest, statutory interest was not a liability in contract and was therefore excluded from the cap.

Ex Turpi Causa

Safeway Stores & Ors v Twigger & Ors

At the beginning of this year (January 2010) the High Court dismissed an application to strike out a claim for damages brought by three companies in the Safeway group against some of its former directors and executives who were involved in a dairy cartel. The claim is being brought for breach of their employment contract, fiduciary duties and also for negligence.

The Defendants applied to have Safeway's claim struck out on the basis that it infringes the principle of *ex turpi causa* (the legal doctrine that a Claimant cannot pursue a cause of action if it arises in connection with its own illegal act) as well as arguing the claim was fundamentally inconsistent with the UK competition regime. The High Court found that Safeway had a real prospect of successfully defeating an *ex turpi causa* defence and arguments that the claim goes against the UK competition regime.

The judge found that a breach of Chapter I of the Competition Act 1998 is sufficiently serious to engage the principle of *ex turpi causa* but went on to say that, as the unlawful acts were not approved by the board of directors or shareholders, Safeway did not have the required level of primary or direct liability for the defence to apply.

In relation to the Defendant's argument that the claim is contrary to UK competition law, the Defendants argued that, if successful, the claim would impose an indirect civil liability that had not been intended by Parliament. The Court dismissed this argument and stated that the causes of action were based on established principles of employment, contract and company law as well as tort, and that this claim, whilst engaging new facts, would involve the application of well established law. Furthermore, the Judges said that it would be wrong if Defendants could not owe their employers a duty not to put them in breach of competition law.

The judgment only relates an application to strike out the claim but it indicates that the *ex turpi causa* defence is likely only to be available where the employees at fault are the directing minds of the company. If Safeways' claim is successful it will mean we are likely to see many more damages actions against directors by companies, after a private damages action or fine against the company themselves.

Fraud

Barnes v Seabrook & Others

A party in County Court proceedings was entitled to ask the Divisional Court under RSC Ord.52 for a committal order against another party for alleged false statements that were verified by a statement of truth, and was not obliged to follow the procedure in PD 32 para.28 and request that the County Court judge dealing with the proceedings refer the matter to the Attorney General. The Court summarised the principles relevant to granting permission to apply for committal and the contents of the application. This case provides useful guidance from the Divisional Court on the procedural steps and evidential thresholds required to be satisfied by insurers in bringing committal proceedings against dishonest litigants who verify documents with statements of truth knowing that their content is untrue in a material way.

Clarke v Colin Maltby

A Defendant was to pay the Claimant's costs of a quantum hearing for personal injuries sustained in a road traffic accident on an indemnity basis where the Defendant's conduct at trial included the fact that, in the face of medical evidence to the contrary, he had accused the Claimant of deliberately exaggerating her symptoms.

Dawson v Hargreaves & Zurich Personal Lines

In this recent case Zurich successfully convinced the Court that the method by which a road traffic accident was alleged to have occurred was in fact false and the result of the two parties colluding to defraud the insurers.

The Claimant, an elected official with Burnley County Council representing the BNP party, alleged that on 18 March 2003 he was injured when the first Defendant (H) collided with a ladder whilst driving his motor vehicle. Mr Dawson, who was walking close to the ladder, alleged that it had first struck his shoulder knocking him to the floor and then rebounded from the ground striking his foot and causing a pilon fracture. H, Zurich's policyholder, initially supported Mr Dawson's claim, although he later amended his case during cross examination to say that he did not know how Mr Dawson was injured or how the ladder fell. Zurich did not accept the explanation of the accident given by H, and successfully applied to the Court to be joined in the action as second Defendants.

Liability was denied by Zurich and the Claimant was put to strict proof as to all aspects of the claim. After the Claimant had given evidence the pleadings were amended to plead fraud. Indemnity was reserved in respect of H.

A pilon fracture, of the type sustained by the Claimant, is a high energy fracture more usually seen in high speed motorbike accident or falls from height. Medical experts for both sides agreed that the injury was more likely to have been caused by some other means than the pleaded accident but could not state that the accident was impossible. Engineering evidence differed significantly on this issue with Zurich's expert engineer, Mr Botham, giving evidence that the incident required a significant sequence of highly improbable events so as to make the accident as pleaded impossible. The Claimant's engineer gave evidence that the incident was no more than 'possible'.

In finding against the Claimant, His Honour Judge Morgan accepted Mr Botham's evidence that the ladder could not have fallen with sufficient energy to have rebounded to the height necessary to cause the pilon fracture as alleged. He concluded that the Claimant was, on the balance of probabilities, standing up the ladder and fell from it. On the basis of this finding of fact, the Court concluded that there must have been an agreement between the Claimant and H to mislead both the Court and Zurich, with the specific intention of recovering damages.

The first Defendant's application for leave to appeal was refused. Zurich were given permission to refer the matter to the Attorney General for consideration of criminal and contempt of court charges.

Morton v Portal Ltd

The Claimant claimed damages for personal injury from the Defendant following an accident at work. The Claimant's company had been engaged by the Defendant as a subcontractor on a building project. Whilst carrying out some roofing work, the Claimant had fallen through a missing pane of glass and was paralysed for life.

The Claimant admitted that he had misled his accountant and HM Revenue and Customs in respect of his earnings. He also admitted routinely overstating the cost of materials and understating the cost of labour in order to reduce the tax liability. Those deceptions had the effect of understating the profits of his company. The Claimant also accepted that the past and future loss of earnings claim was worth

very much less than had originally been contended. However, that fact did not itself show that there had been exaggeration within CPR 44.3(5)(d). That paragraph could not have been intended to be satisfied merely because a genuine claim was overestimated. Exaggeration for the purposes of that rule must indicate conduct meriting criticism, not the mere overestimation of a genuine claim. While the Court did not underestimate the seriousness of the Claimant's illegitimate fiscal adjustments in his company accounts, they were deceptions made with a view to minimising the company's tax liabilities. It could not be assumed that a person who was willing to deceive the Inland Revenue should be regarded as someone who was equally willing to deceive a Court, or had done anything else in his dealings with the Court such as would merit criticism.

Whether the case was taken as a whole, or whether one considered the lost earnings claim alone, overall the Claimant was the winner. His case did not involve a failure to negotiate or put forward a counter-proposal. For all of those reasons his conduct was not such as would warrant a departure from the default costs position.

Owens v Noble

The Claimant sustained personal injury in a road traffic accident and contended that he would need a wheelchair for the rest of his life. The Claimant was awarded over £3 million. However, subsequent surveillance produced evidence of the Claimant chopping down trees and driving a dumper truck. The Defendant obtained a freezing injunction over a significant part of the award.

This fresh evidence was adduced in the Court of Appeal and tended to show that the judge at first instance had been deliberately misled as to the extent of the Claimant's personal injuries. The Court would only allow the appeal and order a retrial where either the fraud was admitted or the evidence of it was incontrovertible. Where the issue of fraud had to be tried, it was not necessary to commence a fresh action and the issue could be referred to a judge under CPR r.52.10(2)(b). It was therefore appropriate to remit that matter to the original trial judge for determination.

Sulaman v Axa Insurance PLC

The appellant appealed against a decision to reduce her entitlement to costs by two thirds following her successful defence of a claim brought by the respondent insurer. The appellant and five others had been suspected of perpetrating a fraud against the insurer. Following discovery of the fraud, the insurer refused to pay certain insurance claims, and actions were brought against it to recover the sums supposedly due under the claims. The insurer joined the appellant and the others suspected of involvement as Pt 20 Defendants. The insurer succeeded in its claims against the other Pt 20 Defendants but failed to prove the appellant's involvement.

The judge found that Miss Sulaman gave knowing assistance to her fraudster brother but he could not conclude that she was part of the common fraudulent design. She applied for her costs, assessed on the standard basis up to the expiry of a Part 36 offer she had made and which the respondent insurer had failed to beat, and on the indemnity basis thereafter. The trial judge awarded her costs assessed on that basis, but reduced her entitlement by two thirds because he found that she had lied to him in two respects in her evidence at trial.

In dismissing the appeal, Longmore LJ stated that lies maintained and repeated in a complex case are insidious. The appellant's lies had made the litigation more difficult and the judge's task more

intractable. The judge was undoubtedly entitled to express his disapproval of the appellant's lies. Longmore LJ also reminded us that elaborate judgments on costs are to be discouraged, as is excessive reliance on authorities. He criticised the trial judge's reference to *Grupo Torras SA v Al-Sabah* and the notes of that case cited in the *White Book* at 44.3.2 and said it was not usually helpful to compare factual details in one case with factual details in another. It had been within a judge's discretion, on the facts of the case, to reduce a successful Defendant's entitlement to costs by two thirds because she had lied while giving evidence.

Widlake v BAA

The Claimant suffered injuries in an accident at work and was found to have exaggerated the extent of those injuries in order to increase her claim for compensation. Her pre-existing back condition was found to have been aggravated for no more than 12 months and damages for pain, suffering and loss of amenity were assessed accordingly. The Claimant had beaten a CPR Pt 36 payment into court, but had attempted to manipulate the civil justice system on a grand scale by misleading her medical experts as to her medical history in an attempt to exaggerate her claim. At first instance it was held that it was appropriate for her to pay the Defendant's costs.

On appeal, the Court of Appeal held that where a personal injury Claimant had exaggerated her claim but had still beaten the Defendant's payment in, the right order in all the circumstances was to make no order for costs.

Yeganeh v Zurich plc and Zurich Insurance Co

The Claimant held a buildings and contents policy with the Defendants which included both an express fraud provision and a requirement to do all he could "to prevent and reduce any costs, damage, injury or loss". He made a claim following a fire at his home including in relation to a quantity of expensive clothing and some pine furniture. The forensic evidence of the Claimant did not support the level of the clothing claim and pine furniture was later found undamaged in a shed. The Defendants refused payment and the policy was brought to an end, on the basis that the Claimant had deliberately started the fire and exaggerated the contents claim.

It was held that, in the absence of any motive, the Defendants had not proven arson, although it could not be discounted. However, the Claimant had been untruthful on a number of occasions, including in relation to his council tax (stating that the property was uninhabitable, empty and due to have building works) and highlighting bar bills on his bank statements as evidence of home contents purchases in addition to the clothing and furniture claims. It would appear that this persuaded the Judge that the discrepancies could not be attributed to gross carelessness. The fraud allegation therefore succeeded and the claim failed in its entirety.

Beachcroft LLP successfully acted on behalf of the Defendants.

Health & Safety

R v EGS

The HSWA and associated health and safety regulations require an undertaking to take steps to guard against risks to ensure the safety of employees and non employees. In order however to ascertain

what risks require assessment in the first place, previous guidance (*R v. Porter*) was that undertakings should be considering "material risks" which takes into account the issue of foreseeability.

The case of *R v. EGS* (an appeal of a terminating ruling that could not be challenged to the Supreme Court) has unfortunately muddied the water in this area. The case related to an accident whereby a 9 year old boy put his head through some electric gates and then pressed a button to open them. His head became stuck and he was crushed to death. The Court of Appeal revisited the issue of what constituted a "risk" under HSWA and determined that any risk which was "more than trivial" required consideration and assessment. As a result, this case opens up the potential for prosecution following the exposure of individuals to a risk which an undertaking may not have considered as foreseeable or requiring assessment.

Interim Payments

Brown v Emery

The Claimant, a protected party, applied for an interim payment of £800,000 where liability had been admitted. The Claimant had suffered a serious head injury as a rear seat passenger and was only capable of very basic interaction. She sought an interim payment in order to fund the purchase of suitable accommodation where she could live with her family once discharged, an appropriate vehicle to transport her to and from hospital and certain case management costs. She submitted that the capital sum likely to be awarded at trial was £1.04m less interim payments of £76,000 already received. She argued that a reasonable proportion of that sum to be ordered as an interim payment was £800,000. The Defendant argued the application was premature since no real need had yet been demonstrated for the purchase of the accommodation in question and that any interim award should be assessed without reference to such costs.

The Judge held that an application for an interim payment was not dependent upon a particular need being established for the payment. It was only necessary to establish a "need" where the Court was invited to take into account additional factors to those of general damages, past losses and accommodation - *Eeles v Cobham Hire Services Ltd (2009)*. However, there was to be a dispute at trial as to whether it would be in the Defendant's best interests for her to remain in publicly funded accommodation or for her to be cared for at a home with her parents. It followed that if the application was granted there was the possibility that there would be an "unlevel playing field", a factor that was taken into account in determining the application. However, there was no dispute that the likely capital sum to be awarded in respect of PSLA would be in the order of £220,000 and loss of future earnings in the region of £175,000. Although it would usually be appropriate to include accommodation costs in the capital sum, it was not possible to proceed on that basis in light of the real dispute as to whether such costs would be awarded by the trial judge. Accordingly, the Defendant was entitled to an interim payment of £250,000, which was about 75-80 per cent of the sum likely to be awarded at trial.

Jurisdiction and Applicable Law developments in cross-border RTA claims

Homawoo v GMF Assurance SA and Others

The Court was required to determine, as a preliminary issue, whether Rome II applied to a claim brought by H for personal injury against the foreign insurance company (G). The claim arose out of an injury sustained in an RTA in France on 29 August 2007. H argued that Rome II did not apply to

events before 11 January 2009 or, in the alternative, that Rome II only applied to proceedings commenced on or after that date. G argued that since Rome II was published in the Official Journal of the European Union on 31 July 2007, in the absence of a specified date for entry into force, Rome II entered into force on 20 August 2007.

The Court held that as there was no judicial decision on the temporal scope of Rome II it was necessary to refer the question to the European Court of Justice for interpretation before the preliminary issue could be determined. The Judge stated that there was no reason why Rome II should only apply where legal proceedings had been commenced or were determined by the Court – it would often be the case that parties would seek to reach an agreement before the commencement of proceedings and its objectives (legal certainty and that uniform rules should enhance the foreseeability of Courts' decisions) would not be achieved if the application of Rome II was dependent on the date of issue of proceedings.

(The High Court decision in *Robert Bacon v Nacional Suiza Cia Seguros Y Reseguros SA*, was handed down only a few days after that in *Homawoo*. The Court indicated that, if it had been necessary to decide the issue, it would have held that Rome II only applied to cases where the event in question i.e. the accident occurred after 20 August 2007 and where legal proceedings were issued on or after 11 January 2009.)

Jacobs v Motor Insurers Bureau

An English Claimant sued the MIB following an accident in Spain in December 2007, caused by a German driver resident in Spain. The Defendant was driving an uninsured vehicle bearing a UK registration plate. Under the application of Rome II, Spanish law would apply to the claim as the damage was caused in Spain. The Claimant argued that English law should apply as the 2003 Regulations implementing the 4th Directive provide that the injured party should be compensated "as if the accident had happened in Great Britain". The Court held that Rome II applied to all situations involving a conflict of laws in cases of non-contractual obligations in civil and commercial matters. The contractual obligation to compensate arose only because of the initial tort, so it was a tortious and not contractual claim. Rome II took precedence over the English legislation. Alternatively the Claimant argued that as the Claimant and the MIB were resident in England, the common habitual resident rule applied to impose English law. The Judge held that the MIB was a technical Defendant, but the actual Defendant was the uninsured driver. The Judge applied the general rule that applicable law is that of the place where the damage occurred, in this case Spain. The Judge rejected the argument that the 'damage' occurred in England because that was where the judgment against the uninsured driver could not be enforced, holding that 'damage' clearly occurred where the accident occurred. Whether Rome II applied in view of the accident date was not argued. The matter went to appeal in July 2010 and judgment is awaited.

Voralberger Gebietskrankenkasse v WGV-Schwabische Allgemeine Versicherungs

This claim arose out of an RTA in Germany and focused on issues around the application of the Fourth Motor Directive and whether it applied to a commercial institution as opposed to a perceived weaker party, the latter being who the Directive set out to protect. The Court concluded that VGKK could not rely on the provisions of Regulation 44/2001 to bring a direct action in its home Court against the insurer of a person allegedly responsible for the accident. Case law held that no special protection was justified where the parties concerned were professionals in the insurance sector with none in a

weaker position than the others. However, the Court considered that where the statutory assignee of the rights of a directly injured party was a dependant (i.e. an individual) then they could bring a direct action against the foreign insurer because they would be a "weaker party".

Limitation

Axa Insurance Ltd (Formerly Winterthur Swiss Insurance Co) v Akther & Darby Solicitors

The Appellant inherited an after the event insurance scheme for which the Respondent firm of solicitors had carried out a vetting procedure. The Appellant claimed that the Respondent had been negligent in accepting claims with a lower than 51% chance of success, in handling the litigation or in failing to notify the insurer when the chance of success fell below 51%. The Judge at first instance held that claims were statute barred where the policy had been issued (in the case of negligent vetting)/ the chance of success fell below 51% (in the case of conduct) more than 6 years ago. The Appellant claimed that the relevant date for time to run was when there was a valid claim under the policy, as until then there was only a contingent liability.

The Court of Appeal dismissed the appeal. It held that the insurers had acquired policies which would in due course generate claims exceeding the premium. The cause of action against the Respondent accrued when the policies incepted (where they were inadequately vetted) or when the chance of success fell below 51%. The risk of claims exceeding the premiums was too high to be considered merely a contingent liability.

Dixie v British Polythene Ltd

The Claimant brought a claim for an accident at work. Pre-issue, the Defendant's insurers admitted liability but the claim was issued only days before limitation expired and, due to an "oversight" by the Claimant's solicitors, proceedings were not served within 4 months of issue. The Defendant applied to strike out the claim and was successful. The Claimant then brought a second claim (identical to the first), asking the Court to exercise its discretion under s.33 Limitation Act 1980 to extend the limitation period. The Defendant applied to strike out this second case on the basis that it was an abuse of process.

The Judge held that he could not consider discretion under s.33 of the Limitation Act 1980 until he had considered whether or not the second claim was an abuse of process. Despite *Horton v Sadler* (in which the House of Lords held that s.33 was available in a second set of proceedings) the Judge concluded that the second claim was an abuse of process and should therefore be struck out. He also commented that even if he had considered s.33, he was unlikely to have exercised discretion in the Claimant's favour given that the delays were due to his solicitor's failings.

Finally, he granted permission for appeal on the grounds that "...this is a point of some importance and will inevitably crop up again and again." The Court of Appeal judgment (which was reserved) is still awaited.

Harley & Others v Smith & Another

The Claimants sustained injuries from exposure to toxic fumes whilst working as professional divers for the Defendants in Saudi Arabian waters. The Claimants returned to the UK (although continued to be paid by the Defendants) and commenced proceedings just less than three years after the date of the accident. The judge at first instance held that the claims were not statute barred by the expiry of the relevant limitation period under Saudi Labour Law (article 222, which specifies that work related claims must be brought within 12 months of either the accident or termination of the work relationship) on the basis that the Claimants' continuing pay from the Defendants delayed the termination of the work relationship to less than a year before the commencement of proceedings. Even if the judge was wrong on that, he would have extended the limitation period on the grounds that "undue hardship" would be caused (as per the Foreign Limitation Periods Act 1984).

Ultimately, the Defendants' appeal against these findings was dismissed, since the Court of Appeal accepted the Claimants' arguments that in fact, Saudi Labour Law did not apply but rather, Shari'ah law applied, with no limitation periods, and the claims were not statute-barred. However, the Court of Appeal did criticise the judge at first instance for a) purporting to construe foreign legislation (the definition of "work relationship") by applying principles of interpretation which had not been established by evidence; and b) incorrectly establishing "undue hardship" on the basis of the difficulties faced by the Claimants' lawyers' lack of knowledge of the foreign law and limitation periods, as opposed to considering only whether hardship would be caused by the application of the foreign limitation period itself.

Whiston v London SHA

The Claimant was born in 1974 with cerebral palsy, allegedly caused by the negligence of a junior doctor during the delivery. Proceedings were issued in October 2006 but the Defendant denied liability and alleged that the claim was statute barred. At first instance, it was held that the Claimant did not have actual or constructive knowledge until November 2005 (which the Defendant appealed) but that if the claim had been statute barred, discretion would not have been exercised in favour of the Claimant to extend limitation under s.33 Limitation Act 1980 (which the Claimant cross-appealed). The Court of Appeal held that:

- 1) the Claimant's actual knowledge of the "essence of the acts and omissions" of his case was not until November 2005;
- 2) the judge at first instance had incorrectly applied a subjective test in relation to the Claimant's constructive knowledge. He should have considered objectively, and bearing in mind the House of Lords' "tightened up" approach, the degree of curiosity expected of a reasonable Claimant in all the circumstances of the case. Applying this test, the Court of Appeal found that the Claimant was fixed with constructive knowledge in 1998 and the claim was statute barred; but
- 3) the judge at first instance had also failed to consider all the factors of s.33 for applying discretion. Here, a fair trial was still possible and the prejudice to the Claimant in being unable to proceed with a claim of substantial value was an important factor. Discretion was therefore applied and the claim was allowed to proceed.

Loss of Profit

Aldgate Construction Co Ltd v Unibar Plumbing & Heating Ltd

The Defendant admitted responsibility for a fire that destroyed one of two houses that the Claimant was building on a plot of land. Whilst insurers paid for the cost of repairing the property, the Claimant brought proceedings for loss of profits from the Defendant. The Claimant had an established practice of acquiring and developing dual property sites due to the economies of scale. As a family business, it also did not rely on bank funding. The issue was what would have happened to the Claimant's property development portfolio if the fire had not occurred. The Claimant stated that it had lost the opportunity to develop four properties. The Defendant argued that these projections were improbably optimistic and that the chain of causation had been broken by the Claimant's decision not to take a bank loan to enable it to proceed with its development plans.

It was held that the first question was whether the loss fell within either limb of *Hadley v Baxendale* and, if so, whether as a matter of fact, on the balance of probabilities, the loss had actually been caused by the relevant incident. It was necessary to eliminate those losses caused by another event and unrelated to the breach of duty. Evidentially, it was necessary to consider how long planning permissions, design work and the actual developments would take. On the evidence, the Claimant had lost the opportunity to effect three developments, calculated on the basis of loss of profit per house, with an additional profit if it had been able to work on two properties on one site at a time. On the facts, it would not have been reasonable for the Claimant to have taken out a bank loan or for the directors to have given personal guarantees, especially as unacceptable terms had been proposed by the bank. The chain of causation could not be broken simply by the Claimant acting sensibly. The Court also made the point that the losses had been exacerbated by the fact that the Defendant had denied liability and refused to compensate the Claimant for any of the losses it had claimed.

Non-Disclosure

Jones v Environcom and Another

Environcom, who recycled waste electrical goods, failed to disclose various fires and use of plasma guns, on which insurers relied to assert material non-disclosure and avoid the policy following a further serious fire. The policyholder argued that the brokers had a duty to ask about hazardous processes and that, if they had, they had a realistic and substantial prospect of obtaining cover.

It was held that a broker had to satisfy itself that the insured understood the obligation of disclosure. That would usually require a specific oral or written exchange on the topic both at placement and renewal. Where this was not done, the broker was under a higher standard of care in eliciting material from the client.

Here, the broker was in breach of its duty as it should have asked about outbreaks of fire. However, it was not causative of the loss as insurers had already been unwilling to offer terms before the full facts were disclosed and the policyholder had also been conducting its operations in breach of its waste management licence. The prospects of obtaining cover were therefore purely speculative and the claim in negligence against the broker failed.

R&R Developments Ltd v Axa Insurance Plc

The Court held in this case that questions to the insured in a proposal form should be construed contra proferentem. On that basis the Court only needed to determine whether the answer was correct on the reasonable meaning of the question, not interpret each question.

The claim related to a combined contract works (CAR) policy to protect against theft and damage. The policy provided that it would be voidable in the event of misrepresentation, misdescription or non-disclosure in any material particular. In the proposal form R&R had answered 'no' to the question of whether *"any directors either personally or in connection with any business in which they have been involved have ever been declared bankrupt or are the subject of any bankruptcy proceedings or any voluntary or mandatory insolvency"*. AXA contended that a director of R&R had been a director of a company in administrative receivership and of a number of liquidated and dissolved companies and that this should have been disclosed. The failure to do this amounted to a misrepresentation. R&R argued that the questions were ambiguous and, in any event, administrative receivership was outside the scope of *"voluntary or mandatory insolvency"*

The Court held, following *Doheny v New India Assurance*, that there was genuine ambiguity and that, on the plain reading of the words, the question related to the insured and its directors in respect of their personal affairs. The question did not therefore extend to companies in which the directors had been involved. R&R's interpretation of the question was reasonable and its answer was accurate. Accordingly, it was not necessary for the Court to decide whether administrative receivership was *"voluntary or mandatory insolvency"*. It did, however, indicate that it was neither.

This decision demonstrates that questions in a proposal form need to be clear and unambiguous to avoid the contra proferentem principle being applied to both the representation and, where it became a term, to the term of the contract.

Notification

Loyaltrend Ltd v Brit

The Claimant, operating a chain of high end clothing stores including one in Notting Hill, sought an indemnity from insurers for material damage to tenants improvements following subsidence. The policy required, as a condition precedent, immediate notification of "the happening of any injury or damage in consequence of which a claim is or may be made". The Claimant stated that brokers were notified of the subsidence in August 2004. Insurers stated that it was August 2005.

It was held that the Claimant had not complied with the notification requirement, the Court finding that the claim had not been notified until August 2005. It had to be asked when a reasonable person would have considered a claim likely to arise given the known circumstances. On the facts, the Claimant appointed a buildings surveyor in 2003, notified their landlord's agents of cracks to the front of the building in August 2003 and there were records confirming the existence of severe cracking in 2003 including to the pavement in front, around the front door and water leaking through the ceiling. It was therefore found that notification should have been given by December 2003. In comparison, the Landlord's property insurers were notified in November 2003.

A further point rose as to when the material damage occurred as there were different insurers on risk

throughout the period. Whilst damage had occurred in the period covered by Brit, the Court's view was that the damage had for the most part occurred subsequently. The Court stated that "it would be surprising if Brit, who insured only the middle of three years over which the relevant events occurred, was liable for the entirety of the loss sustained." However, the trigger of liability for BI losses was the first occurrence of material damage, as opposed to the subsidence, so that if there had been some damage in Brit's year then they would have been liable for subsequent business interruption during the succeeding 18 month indemnity period.

Nuisance & Negligence

J A Robinson v P E Jones (Contractors) Ltd

This case confirmed that, in principle, a builder could owe a duty of care in tort to its client, concurrent with its duty in contract, in respect of economic loss. The builder built and sold a house to the Claimant. Over twelve years later, problems were discovered with the flues to the gas fires in the property which had not been constructed by the builder in accordance with good building practice or the Building Regulations in force at the time. As any claim in contract would be statute barred, the Claimant brought a claim in tort against the builder.

The builder argued that the House of Lords decision in *Murphy v Brentwood* was binding authority for the proposition that a builder does not owe a duty of care to owners or occupiers of property constructed by the builder, save in relation to defects which cause either personal injury or physical damage to real property other than the property itself, and that this applied as much where the owner occupier is the party contracting with the builder as where the owner occupier has no contractual relationship with the builder.

Judge Davies did not agree. He took the view that the judges in *Murphy v Brentwood* were looking at the position where the builder had no direct contractual relationship with the owner or occupier. The general rule that a builder does not owe a duty of care to an owner or occupier of the building where there was economic loss did not apply where the owner was the client who had entered a contract with the builder and who therefore had a special relationship of proximity.

Unfortunately for the home owner, the builder had in this case excluded that tortious duty in its contract and therefore the home owner's claim was statute barred and failed.

A contractor may therefore still face a claim in tort many years after the contractual limitation period has expired. However, contractors can take advantage of the fact, as illustrated in this case, that the any liability in tort for economic loss can be limited by the contractual terms.

Lambert v Barratt Homes Ltd

The local authority sold part of its land to Barratt Homes, which the latter developed and in doing so blocked a drainage ditch and culvert. As a result surface water from the local authority's land accumulated within that land and flooded into the Lamberts' property and caused damage. To prevent flooding, a catch pit needed to be constructed on the local authority's land and drainage laid. The Lamberts commenced proceedings against Barratt Homes and the local authority. At first instance, Barratt Homes were found to be primarily responsible but the local authority were also found to have breached their measured duty of care in failing both to abate the nuisance and to co-operate in solving

the problem, including by failing to construct the necessary relief scheme.

On appeal, it was held that there was a measured duty of care in nuisance or negligence owed by one occupier of land to another and it was necessary to consider what steps it was reasonable for them to take. Whilst one factor was that the hazard was created by Barratt Homes, it could not be taken into account unless it was clear that there was a good cause of action against them. By the time of the hearing, the judge was able to determine that Barratt Homes were liable to the Lamberts in respect of the nuisance, which could then be taken into account in determining the current scope of the local authority's duty of care. It was therefore held on appeal that it was not just to impose on the local authority a duty to carry out and pay for any part of the relief works. It was simply under a duty to co-operate in the relief scheme.

Linklaters Business Services v Sir Robert McAlpine Ltd and Others

The recoverability of economic loss in tort may be about to change significantly. The issue arose in the context of a strike out application. The Court had to decide whether the sub-sub-contractor owed Linklaters a duty of care in respect of damage to pipework which cost £3.5 million to replace. The 1991 House of Lords decision in *Murphy v Brentwood* established that where the damage is to the building itself, that damage is to be treated as economic loss and irrecoverable in the absence of a contractual or other special relationship.

Mr Justice Akenhead had to decide whether an insulation sub-sub contractor owed a duty to the eventual lessee of the premises in relation to careless workmanship in insulating the chilled water pipework to the air-conditioning system resulting in rust and corrosion to the pipework which had to be replaced. The sub-sub-contractor argued that as the loss suffered by the lessee was purely economic loss, no duty of care existed to cover this loss. The Claimants argued that a duty of care could exist where there was damage and it was not to work or materials or elements of the building actually provided by the sub-sub-contractor.

Having reviewed the relevant authorities, the judge noted that the main authorities were concerned with whether the overall builder of the whole building owes a duty of care to owners or occupiers of the building with whom it has not been in contract. He decided that the case was not suitable for judgment as there were factual uncertainties and because this was "*an area of developing jurisprudence*". Upon granting permission to appeal he commented that the case raised "interesting and important issues of law upon which the Court of Appeal might well wish to rule." Further clarification is awaited.

R v Winter and Winter

In July 2010, the Court of Appeal heard the appeal against conviction in this matter. A father (the director of Festival Fireworks Ltd) and son (an employee) had kept dangerous fireworks at premises when they did not have an appropriate storage licence. Following a fire at the premises there was an explosion that killed a fireman and another individual who was a civilian media awareness officer filming a documentary to be used in training of fire officers. At the time of explosion the officer filming had been told several times to leave the scene. The fire officer who was killed was in the same area as the officer filming, under instructions from senior officers to enable the fire to be fought from a distance.

The grounds for appeal were that it was not foreseeable that someone in the role of the officer filming would be injured by their negligence and that the duty of care ended when the officer disobeyed instructions to retreat. The Court of Appeal rejected the appeal stating that a duty of care was owed to all persons in the surrounding area who could be injured by an explosion which was something about which both the father and son were aware.

This case predated the new Corporate Manslaughter Act and although the size of the company is such that they are perhaps not the type of company which the Act was primarily aimed at, the issues involved (i.e. a corporate culture of poor health and safety – fireworks being stored in insecure locations on the farm with the knowledge of key managers) are exactly the type that would likely put a company now at risk of a Corporate Manslaughter charge.

Uren v Corporate Leisure (UK) Ltd & Ors

The Claimant was injured when participating in a relay race (involving a shallow inflatable pool) during a family fun day. The Defendants' case was that the activity was reasonably safe and that all sporting activities involved an element of risk. The Judge found that despite the Defendants' risk assessment being 'fatally flawed', the risk of serious injury posed by the relay race was very small, and the existence of that risk did not mean the Defendants were in breach of their duty of care to the Claimant. This case demonstrates the Court's approach of striking a careful balance between the level of risk involved in an activity and the benefits that the activity confers on the participants and society as a whole.

Policy Coverage

A C Ward & Sons Ltd v Catlin (Five) Ltd (Court of Appeal)

Following a warehouse theft, Catlin refused to pay a claim for stock by Ward under a commercial insurance policy. The policy contained warranties for both an approved burglar alarm to be in full and effective operation at all times when the warehouse was closed and that defects occurring in any protections would be promptly remedied.

Over a weekend in March 2007 burglars entered the warehouse and stole about £450,000 worth of cigarettes and alcohol. In the process they disturbed a vibration sensor but the burglar alarm was not triggered. The warehouse had remotely monitored CCTV that was fitted with motion detectors but the cameras failed to transmit during the burglary and, in any event, no alarm was raised by the monitoring agency, UK Business Watch. Following Catlin's refusal, Ward brought proceedings against Catlin, who in turn applied for reverse summary judgment. Catlin argued that the warranties in the policy were more properly construed as suspensive conditions (limiting the risk) as highlighted in the cases of *Kler Knitwear v Lombard General Insurance* and *CTN v General Accident*. Catlin argued the effect was that Ward was, in essence, "off cover" whilst it failed to comply with the warranties. Due to Ward's non-compliance, Catlin was entitled to summary judgment.

Mackie J held that the terms, so described in the policy as warranties, should not be construed as suspensive conditions but as warranties. Summary judgment was refused as it was held that Ward had an arguable case and was therefore entitled to a final determination based on a review of the full material. Catlin appealed on the grounds that the judge had erred in not finding on the facts that Ward was in breach of the warranties and therefore had no prospect of succeeding in its claim.

The Court of Appeal held, dismissing the appeal, that: (1) Mackie J had been correct to find that it was not the case that Ward had no prospect of success; (2) the more unreasonable the effect of the terms of a policy the more clear and explicit such terms should be (Catlin's draconian interpretation of the warranties meant that unless the approved burglar alarm was in full and effective operation when the warehouse was closed, then the entire policy was automatically discharged); and (3) the warranties contained standard terms and therefore the Court's decision in this case could affect insureds other than Ward and, therefore, the construction of the warranties and their effect should be determined at a trial on their own facts.

Dunlop Haywards and Others v Barbon Insurance Group Ltd and Others

The Claimant group of companies carried out, inter alia, commercial property valuation work. In 2006 the group of companies received various claims regarding allegedly negligent valuations and duly notified their professional indemnity insurers. The primary layer insurer accepted the claims and paid the full primary layer indemnity. However the excess layer policy contained a condition that the cover was for the property management business of one part of the Claimant group of companies only. Consequently the claims were declined and the Claimants brought this action against the broker, the placing broker and the excess insurers.

The Court held that the broker was negligent in failing to check the conditions of the excess layer insurance and highlight them to their client. The placing broker was also negligent in failing to check the conditions of the excess layer insurance, but the broker's claim against the placing broker was reduced to 20% of the claim due to their own negligence.

Global Process Systems Inc v Syarikat Takaful Malaysia Bhd (The Cendor Mopu)

The Claimants' oil rig lost three legs off the coast of South Africa whilst being towed on a barge from the USA to Malaysia. The Defendant insured the Claimant under an all risks policy, excluding in particular inherent vice. A policy coverage dispute ensued in relation to the incident and at first instance the Commercial Court held that the Claimant was not covered under its insurance policy as the proximate cause of the loss of the legs was inherent vice.

On appeal, the Court ruled in favour of the Claimant. Waller LJ held that "a leg breaking wave, not bound to occur in the way it did on any normal voyage round the Cape of Good Hope, caused the starboard leg to break off. That led to the others being at greater risk and then breaking off". The appeal judges found that inherent vice was not the sole proximate cause of loss in this case as it was not certain the rig's legs would have broken off on the voyage undertaken and, furthermore, there was a concurrent cause: perils of the sea. The Court went on to say that even if the loss was probable, the Claimant did not know about this risk. It now seems that, in order to operate as an exclusion, inherent vice must be the only proximate cause of the loss.

Horwood & Others v Land of Leather (In Administration) & Ors

The Commercial Court was required to determine a preliminary issue regarding coverage for certain personal injury claims brought in relation to alleged skin allergies suffered from the use of sofas purchased from Land of Leather. The Court held that where a product liability insurance policy expressly allowed an insurer to control all proceedings in respect of any claims for which it may be

liable, a prohibition upon the insured party settling those claims had to extend to claims against third parties made by the insured as well as those made against it. It would be absurd if the insurer had control of proceedings commenced in the name of Land of Leather against others but the insured was under no prohibition to settle them. The Court observed that the prohibition enabled the control of claims enjoyed by the insurer to be effective.

Orient Express v Assicurazioni General SpA (UK)

A hotel owned by the Claimant suffered significant damage from Hurricane Katrina. At the same time, the local authority in New Orleans imposed a mandatory evacuation of the city. The Claimant suffered business interruption losses as a result of the two concurrent, independent causes. The Claimant sought to recover under the BI section of their policy which contained a typical insuring clause requiring loss to have been caused by physical damage to property. Insurers rejected the claim on the basis that the Claimant could only recover losses which would not have arisen had the damage to the hotel not occurred. The Claimant also had prevention of access and loss of attraction cover but the limits of indemnity were far lower than for the BI cover.

Arbitrators found in favour of insurers and there was an appeal to the High Court. It was held that the policy did not provide cover in respect of loss that was caused concurrently by physical damage to the property and damage to/consequent loss of attraction of the surrounding area. The application of the "but for" test of causation used in tort claims was a reasonable approach and was supported by the language of the policy. Here, had the hotel suffered no damage, the same BI losses would still have been incurred.

Insurers should review their policy wording to see whether it lends itself to a "but for" test interpretation, linking losses to damage to the insured risk. Where there is a risk of this type of catastrophe, a policyholder would be well advised to negotiate an amendment to the cover.

Supershield Ltd v Siemens Building Technologies FE Ltd

The failure of a nut and bolt connection in a float valve caused flooding in the new offices occupied by solicitors, Slaughter & May, resulting in significant financial losses. A number of parties were involved in the consequent litigation, with liability being passed down the contractual chain.

Siemens had sub-contracted the installation of the sprinkler system to Supershield. Following a mediation attended by all parties, Siemens reached a settlement with the parties up the contractual chain at just under 50% of the claims. Siemens then sought to recover the settlement figure of over £2.8 million from Supershield.

Supershield argued that the settlement was not reasonable as it did not reflect the strength of the defences of causation and remoteness that Siemens had. Supershield argued that the effective cause of the flood was the blockage of the drains in the room in which the water storage tank was situated. Alternatively, if the overflow of the tank was a partial cause, the escape was too remote a consequence for Siemens to be liable as in the usual course of things the water would have flowed down the drains.

The Court of Appeal rejected these arguments. The overflowing of water from the tank was the effective cause of the flood. The blockage of the drains did not take away the potency of the overflow

to cause damage, but rather failed to reduce it. Siemens had assumed a contractual responsibility to prevent the escape of water from the tank. The float valve was the first line of protection and it had failed. It was always possible that the second means of protection, the drains, might also fail. The flood which resulted from the escape of water, even if it was unlikely, was within the scope of Siemens contractual duty to prevent and therefore not too remote. Accordingly, the settlement was reasonable.

Widefree Ltd v Brit Insurance

The Claimant jeweller was the victim of a "distraction" theft by two women who stole a £120,400 diamond from its Hatton Garden premises and for which it accordingly claimed on its insurance policy. The Defendant insurer declined to provide an indemnity on the basis that (i) as the Claimant had failed to notice the ring had been stolen on the day of the theft, and it was only discovered at stocktaking, it was unable to prove the date and circumstances of the loss and it therefore fell within the "unexplained loss" exclusion; and (ii) the Claimant failed to comply with the claims co-operation condition precedent, which obliged the Claimant to provide evidence which the Defendant may "*reasonably require*". The Claimant, which had 5 CCTV cameras on its premises, provided the Defendant with details of 1 camera which had been reviewed by a policeman and was deemed to have been the only relevant piece of footage and wiped the details from the other 4 cameras. The Defendant argued that the insured should have asked it if it wanted to see all 5 CCTV cameras.

The judge rejected the insurer's "unexplained loss" argument and was convinced that on the balance of probabilities, the fact that the Claimant kept accurate records, the women were seen to behave strangely and the identification of one of the women as a renowned jewel thief, the two women committed the theft.

The clause required the Claimant to provide such information as was requested by the Defendant insurer and no such request had been made. The insurers should have known that CCTV footage would not be kept indefinitely and, if it wanted it, should have asked. Therefore, if insurers wish to rely on such a clause, they will have to be more specific in their requests and not expect an insured to second guess what they want.

Product Liability

O'Byrne v Aventis Pasteur

The Claimant alleged that a vaccine was defective and had caused him brain damage, claiming damages under s2 Consumer Protection Act 1987. The claim was made in time against the distributor but the Defendant retorted that it was not the correct Defendant and that the parent company should be sued as manufacturer. By this time however, the claim was time barred under the strict ten year time limit but the Claimant sought to rely on s35(5)(b) of the Limitation Act 1980. Reference was made to the ECJ.

The ECJ held that a national rule allowing substitution could not be applied to permit a producer to be sued after expiry of the relevant period.

It did however leave open the possibility of substituting the parent company for a wholly owned subsidiary which had been sued within the prescribed period where the parent company which manufactured the product determined when it was put into circulation. This was a matter of fact for

the national Court.

Following reference to the ECJ, the Supreme Court has now ruled that the substitution of the British subsidiary distributor with the French parent company manufacturer outside the strict ten year timeframe was not allowed as a matter of fact. The parent subsidiary relationship was only one factor to consider when identifying the entity controlling the putting into circulation of the product.

Road Traffic

Churchill Insurance Company Ltd v Wilkinson and Evans v Equity Claims Ltd

In these conjoined appeals the Court of Appeal considered the statutory liability of an insurer to meet a judgment against a driver not insured under the policy. In both cases the insured was injured whilst a passenger in a vehicle driven, with the insured's permission, by someone whom he (she in the case of *Evans*) knew to be uninsured. In both cases the insurers accepted that by virtue of s.151(5) of the Road Traffic Act 1988 (RTA) they were liable to compensate the Claimant but argued that they could reclaim that compensation from their insured by virtue of s.151(8). This section allows an insurer to recover any compensation it is bound to pay as a result of s.151(5) from the insured provided they '*caused or permitted*' the use of the vehicle involved. The question is whether this right of recovery can be exercised when it is the insured who is the Claimant. In *Wilkinson* the judge held there was no right of recovery, whilst in *Evans* the Court found that there was.

Unfortunately, the Court of Appeal judgment leaves matters unresolved. The appeal judges considered that the effect of s.151(8), as a matter of English law, must be to exclude from the benefit of insurance a passenger who is the insured but has given permission to an uninsured driver to drive. However the Court went on to consider whether, if interpreted in this way, European Law would hold the effective exclusion of liability to the insured to be void and unenforceable. The judgment determined that:

- 1) the issue of whether s.151(8) in its present form complies with Community Law should be referred to the European Court of Justice,
- 2) no consideration could be given as to whether s.151(8) can be interpreted as compliant until a decision has been reached on (1).

There is as yet no indication as to the likely timing for the referral hearing.

An additional point arose in *Evans* where the insurers sought to rely on a contractual right of recovery within the insurance policy. This was given short shrift, the Court finding that the clause reserves a right and unless that right exists, nothing has been reserved. Since that right is under s.151(8) it follows that any right is dependant upon the interpretation of s.151(8): the section does not purport to give an independent right to recover.

Manuel Helmot v Dylan Simon, Royal Court of Guernsey

This is an important decision for insurers who underwrite business in Guernsey. The Claimant was a cyclist who suffered catastrophic injuries. In adopting the Lord Chancellor's 2.5% discount rate and adjusting it for specific Guernsey factors and for changes in the net return on ILGS since 2001, the

Royal Court adopted a rate of 1% for future losses. The decision is not of course binding on English Courts.

Smith & Co-operative Group Ltd v Hammond

The Court of Appeal has confirmed once again that the standard of care expected from drivers is that of a 'reasonably prudent motorist'. This decision is consistent with and follows the approach taken by the Court of Appeal in the earlier cases of *Ahanonu v South London and Kent Buses* and *Lambert v Clayton*).

The Claimant was a thirteen year old boy and was employed by the Co-op as a newspaper boy. During the course of his employment the Claimant, without looking, cycled out of a driveway across a pavement into the road. The Defendant lorry driver who was approaching the locus at the material time braked and swerved but could not avoid hitting the Claimant. The Defendant accepted that he did not sound his horn. The Claimant subsequently brought proceedings against the Defendant and his employer for injuries he sustained. The Defendant counterclaimed for subsequent post-traumatic stress disorder, relying on expert evidence which concluded that even if he had sounded his horn, reaction times meant that the accident still would not have been prevented. The judge chose not to accept this expert evidence, instead relying on his own experience to find that if the Defendant had sounded his horn the accident could have been avoided, as most people react instantaneously to the sound of a horn. The Defendant was therefore found primarily liable at first instance. The counterclaim was dismissed on the basis that a thirteen year old child could not foresee that cycling into the path of a lorry could cause physical injury to the lorry driver. On appeal, the Court of Appeal overturned the decision at first instance, finding that the Defendant had taken reasonable steps to avoid the collision and had not been travelling at an excessive speed. The standard to be applied was that of a reasonably prudent motorist and the Court was not entitled to impose a counsel of perfection on road users. The Defendant had not been negligent in failing to sound his horn at the same time as being involved in emergency braking and swerving to avoid a collision. The Court also found that the judge had erred in rejecting the expert evidence relating to the sounding of the horn. Whilst the judge was not bound to accept such evidence, if it was to be rejected there should be good grounds for doing so and reasons should be given. A judge's personal perceptions and opinions are not to be taken as more reliable as they amount to a layman's view of the issues and must therefore carry less weight than evidence presented in scientific terms. Since there was no negligence on the part of the Defendant, the counterclaim succeeded in full.

This decision therefore confirms the Court of Appeal's unwillingness to impose a standard of driving on motorists which amounts to a counsel of perfection. Whilst road users are expected to exercise a degree of care proportionate to the dangers encountered, it could not be a higher standard than that of a reasonably prudent driver.

Stanton v Collinson

In this case the Court of Appeal confirmed that the approach taken in *Froom v Butcher* nearly 30 years ago remains the standard today in terms of determining contributory negligence for failure to wear a seatbelt. The Claimant was a front seat passenger who suffered severe head injuries. Not only had he failed to wear a seatbelt, he had exposed himself to a greater risk of injury by having another passenger sitting on his knee and had actively encouraged the driver to drive too fast. The judgment has not completely ruled out a departure from *Froom*, but litigators will have to consider carefully what

expert evidence, whether engineering or medical, is required to deal with the issue of causation.

Yetkin v Newham London Borough Council

This Court of Appeal decision clarifies the scope of the duty of care owed by a local authority to road users, including reckless pedestrians. The Defendant (local authority) was found negligent in failing to maintain a hedge it had planted on a central reservation which dissected a traffic light controlled pedestrian crossing. It was accepted that whilst the Claimant had attempted to cross when the light was red for pedestrians, her view of oncoming traffic was seriously interfered with by the overgrown bushes, and this contributed significantly to the sequence of events. At first instance, the Court applied the House of Lords decision in *Gorringe v Calderdale MBC* which held that the statutory duty imposed by s39 Road Traffic Act 1988 did not go so far as to require a local authority to paint a marking on the surface of the road where the Claimant's accident occurred. The Court of Appeal distinguished this case on the grounds that the decision in *Gorringe* was only concerned with the narrow issue of an authority's duty to road users in respect of a decision not to exercise a statutory power, and that the case does not apply to situations where a council has done something positive that may give rise to a common law duty of care. In this case, the local authority actually created the danger, in the form of high bushes, and should therefore have maintained them to ensure that they did not make the crossing unsafe. Likewise, if in *Gorringe* the local authority had painted a 'Slow' sign on the road but let it fade so as to be unnoticeable, the local authority would no doubt have been found liable. The case is a lesson for highways inspectors on the need to check for encroaching trees and foliage that may hinder the field of vision for motorists or other road users, especially when the council has been responsible for the planting.

Stress and Harassment

Connor v Surrey County Council

The Court of Appeal upheld the Claimant's entitlement to damages where allegations were made of stress caused by the relationship between a head teacher and the school governors. Much of the judgment considers the relationship and overlap between common law and statutory duties of public bodies. Leave to appeal has been sought.

Rayment v MOD

This case involving myriad allegations about colleagues' inappropriate behaviour serves as an example of how the costs of claims of this nature can significantly outweigh the damages awarded.

Veakins v Kier Islington

Whenever possible Claimants include allegations of harassment and seek to prove a breach of the Protection from Harassment Act 1997. This was the case with Ms Veakins. The Court reconsidered and applied the test of whether the behaviour complained of had moved from being unattractive and unreasonable to oppressive and unacceptable. The behaviour was found to have crossed the threshold and damages were awarded to Ms Veakins.

Vibration White Finger

Vance-Daniels v Corus

Causation and limitation remain important issues in these claims. How regular exposure to vibration must be to give rise to a foreseeable risk of injury was at issue. The Court of Appeal agreed with the trial judge's conclusion that a reasonable employer would not deduce that exposure above the action level once per week gave rise to a foreseeable risk of injury. There is a potential defence in a case where exposure is intermittent and exceeds the action level on a very infrequent basis, provided there is no history of problems from comparable levels of exposure within the workforce. However, care should be taken with this decision. It is understood that there was no deterioration in the Claimant's condition between the onset of his symptoms and his eventual removal from the tasks which had caused the problems.

Witnesses

Jones v Kaney

The issue of witness immunity has been referred to the Supreme Court and the hearing is listed for 11 January 2011. The current thinking underlying the present policy position (that witnesses cannot be sued in connection with discussions with the expert on the other side of a case) is that the expert owes a duty to the Court that overrides any duty that might otherwise be owed to their clients. Otherwise, experts would refuse to shift their opinions.