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Editorial

by **Jonathon Rushton**,

head of the Commercial, Property and Personal Injury Team

Happy New Year and welcome to the first newsletter from the Commercial, Property and Personal Injury Group at 36 Bedford Row.

For the first time in its hundred-plus year history, Chambers has appointed joint head of Chambers in the form of William Harbage QC and Richard Wilson QC. Both William (Crime) and Richard (Civil) have been valued members of Chambers for almost 30 years, and it is with some excitement that we now see them take up their positions as joint Heads of Chambers.

We also say "welcome" to our latest members of Chambers, Grainne Mellon, Saoirse Townshend and Martha Spurrier all of whom successfully completed their pupillage in September 2011.



Expert reports – the devil is in the detail

by **Christopher Carr**

Occasionally cases become topics of discussion amongst the Civil team not because of the novelty of the arguments that arise or the complexity of the issues but the subject matter. One such case, on which I recently advised, involved work carried out to a pre-World War II grand prix racing car built in the early twentieth century. The car in question was a prized asset that formed part of a collection similar period racing cars held by a foreign businessman.

The issue in the case was the quality of restoration work which had come at a cost of over £100,000 to the car's owner. The particular difficulty in this case was proving to the Court that the restoration work did not result in the cars being in full working and running order.

Cases concerning the standard of a specialists' work will often turn on the opinion of experts brought into the case by the parties but where do you begin when dealing with a racing car that is over eighty years old? The idea that a European car company of the 1920's would provide a standard specification soon disappears when you realise that each car was handmade, often built to the customers own specification and many of the original factories are now gone.

Experts who work in this niche area, I have now discovered, are few and far between and many know each other personally. So, where do you begin when focusing on securing the best expert evidence possible in somewhat limiting circumstances? Turning to the client, an avid collector of rare and exotic motor cars, he lends you his books on early twentieth century racing cars and between you, you begin to identify the pool of potential experts.

So begins the essential groundwork as experts in niche areas of work may be required to give expert evidence to a Court on only a handful of occasions in their career and it is the first contact and instruction from the solicitor that makes certain that report starts off on the right foot with the aim of producing a report whose impact will aid a successful outcome.

When looking for an expert in the niche area of classic car restoration it was quite easy to find any number of garages and engineering firms all holding themselves out as 'experts' in this chosen field. However, it was apparent that many did not possess the formal qualifications and experience that would prove crucial if the report was to stand up to scrutiny.

A suitable classic and vintage car restoration specialist was found who

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» Competency and vulnerable complainants continued

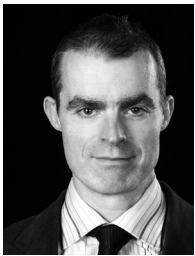
not only possessed the necessary formal qualifications but also boasted years of experience in classic and vintage car restoration. He was instructed inspect the car and provide a comprehensive report with a strong, detailed methodology supported by detailed record keeping of his chosen method of examination. The report's tight structure followed that of the particulars of claim and the opinions and conclusions expressed in the report were both clear and stood up well to a high level of scrutiny but only because of the time taken by the legal team in preserving the evidence, getting the right expert and providing detailed instructions to the expert.

The High Court Judge Anthony Thornton QC was asked to decide a very similar dispute in **Brewer v Mann & Others [2010] EWHC 2444 (QB)**. A "1930 Speed Six Bentley" was the focus of the dispute and two experts had reported on its disputed provenance. One of the experts was an automotive engineer specialising in Bentleys and the other an historic and classic car engineering expert with considerable expertise but no real professional qualification or active involvement in the maintenance, repairing, rebuilding or reconstruction of Bentleys. The battle of the experts was won by the Claimant's expert

on account of his ability to demonstrate the better methodology by which to support his conclusions that the Bentley in question could not safely be described as a "Speed Six".

The challenge of ensuring the Court has before it the best expert evidence in fields where there are few specialists and even fewer impressive experts may steadily become harder following **Jones v Kaney [2011] UKSC 13**. Here, the Supreme Court stripped away the long-standing immunity from suit of experts in relation to evidence given both in court and in anticipation of court proceedings. The majority view of the Supreme Court judges' was that there was no evidence that experts will be reluctant to provide their services as a result of this change. It is the writer's opinion that a question mark must now hang over the use and availability of expert evidence in cases where there are so few specialists that it is already difficult to obtain an expert report.

Nobody goes into the law for fame, fortune, fast cars and the high life but on occasion you may get lucky. My only regret in the case is that there was no call for the lawyers' to test drive the cars in question just to double check the lawyers' opinions!



The liability of one competitor to another

by Nick Blake

This is the first in a series of articles on Sports related Personal Injury matters prepared by the CPPI Group. Other topics for later issues of this newsletter will include: Liability of Officials; Spectator Claims; Liability of Regulatory Bodies and; Liability of Occupiers of Venues. This article examines the existence of the duty of care between competitors and the appropriate standard of care.

Duty of care

Condon v Basi [1985] 1 W.L.R. 866 was the first English case to consider whether one participant in sporting activity may owe a duty of care to another. Mr Condon's leg was broken in a tackle by Mr Basi during a football match. The referee in his match report described the tackle as "reckless". The Court of Appeal held that in a contact sport such as football, each participant owes the others a duty to take reasonable care in all the circumstances in the process approving the High Court of Australia in the case of **Rootes v Shelton (1968) ALR 33** in which it was stated that:

"By engaging in a sport... the participants may be held to have accepted risks which are inherent in that sport... : but this does not eliminate all duty of care of the one participant to the other."

Standard of care

What then is the appropriate standard of care in the sporting context where the action is often fast moving and physical contact is often part and parcel of play? The courts have held that the threshold for liability will be high.

In the Irish case of **McComiskie v McDermott [1974] I.R. 75** it was held that the duty owed by a rally driver to his navigator was to exercise such care as was reasonably to be expected of a driver "going all out to win the rally."

In **Pitcher v Huddersfield Town Football Club Ltd.**

the claimant, a professional footballer, claimed more than £1 million following a tackle by an opponent which he alleged to be negligent. Hallett J. held that the tackle was mistimed and an error of judgment but found that the Defendant was not, vicariously in breach of its duty of care. Expert evidence on behalf of the Defendant and accepted by the Court was that this type of tackle was seen many times every Saturday afternoon. Hallett J concluded that the claimant had not shown that the challenge crossed "the high threshold to take this case from a simple late tackle, albeit one with tragic consequences, to one of negligence".

In **Caldwell v Maguire and others [2001] EWCA, Civ 1054**, a professional jockey was seriously injured in a fall during a race. He brought a claim against two other jockeys. The Court of Appeal in upholding the lower Court's decision that there was no negligence on the part of the Defendants, as their momentary carelessness should be regarded as nothing more than an error of judgement, approved the following principles:

"...the threshold for liability is in practice inevitably high; the proof of a breach of duty will not flow from proof of no more than an error of judgment or from mere proof of a momentary lapse of skill (and thus care) respectively when subject to the stresses of a race. Such are no more than incidents inherent in the nature of the sport..."

"...In practice it may therefore be difficult to prove any

such breach of duty absent proof of conduct that in point of fact amounts to reckless disregard for the fellow contestant's safety. I emphasise the distinction between the expression of legal principle and the practicalities of the evidential burden."

In the referee case of **Smoldon v Whitworth [1996] EWCA Civ 1225** it was held that reckless disregard is not required for liability to attach, though the threshold is undoubtedly high:

"The level of care required is that which is appropriate in all the circumstances, and the circumstances are of crucial importance. Full account must be taken of the factual context in which a referee exercises his functions, and he could not be properly held liable for errors of judgment, oversights or lapses of which any referee might be guilty in the context of a fast-moving and vigorous contest. The threshold of liability is a high one. It will not easily be crossed."

One case where a breach of duty did arise was where a rugby player was been injured by an illegal "spear" tackle (**Jarrod McCracken v Melbourne Storm Rugby League Club [2005] N.S.W.S.C. 107**).

The author has been involved in several football injury cases when good evidence of a "reckless" leg braking challenge often results in prompt settlement. A red card helps.

A relative standard of care?

Is an experienced professional player owed a higher standard of care than a less experienced amateur? In **Condon v Basi** Sir John Donaldson M.R. said that:

"there will of course be a higher degree of care

required of a player in a First Division football match than of a player in a local league football match."

In **Vowles v Evans [2003] 1 W.L.R. 1607** (a referees case), Lord Phillips M.R. regarded the point as one where there was "scope for argument". Where the teams are of a similar standard this issue may not make much practical difference, but a claim arising out of injuries suffered in an early round of the FA Cup between a Premiership side and perhaps lower league or non-league opposition may require this issue to be fully argued.

In **Elliot v Saunders & Liverpool FC**, Drake J disagreed with the obiter comments by Lord Donaldson in **Condon** that there might be a higher standard of care required of a player in a higher standard of competition. He stated that the standard of care is always the same but that the standards of skill to be expected from the players would form part of the factual context within which such standard fell to be applied. Most commentators prefer the Drake J approach.

Summary

From the decided cases, some principles can be stated about the standard of care in competitor cases:

- i) There is a general standard of care. The standard is objective;
- ii) The factual circumstances including the level of competition and expected skill level of the participants are all important;
- iii) Liability will not attach for errors of judgement, oversight or lapses of which any player may be guilty in the context of a fast moving and vigorous game;
- iv) The threshold for liability is a high one but "recklessness" is not required.



Social housing: Article 8 and possession proceedings

following **Manchester City Council v Pinnock [2010] UKSC 45**

by **Jonathon Rushton**

On 3 November 2010 the Supreme Court handed down judgment in the case of **Pinnock** that will bring wide ranging changes to residential possession proceedings brought by local housing authorities and other registered social landlords.

Cleveland Pinnock (the Defendant) occupied residential premises under a secure tenancy along with his partner and five adult children. Allegations were made against the Defendant's partner and their children that concerned serious anti-social behaviour. Subsequently, the claimant issued proceedings seeking an order for possession of the property, or alternatively a demotion order in respect of the secure tenancy.

At Manchester County Court evidence was given over six days of serious anti-social behaviour at the hands of the Defendant's partner and children.

At the conclusion of the trial Recorder ordered that the Defendant's tenancy be demoted as of 8 June 2007.

On 6 June 2008 (the day before the demotion order was to lapse) the Claimant landlord served notice under section 143E of the Housing Act 1996 informing the Defendant that possession was sought on account of continued anti-social behaviour in the vicinity of the premises carried out by two of the Defendant's sons, in breach of the demoted tenancy.

The Defendant exercised his right to request a review of the Defendant's decision to serve notice on the basis that he had not committed the behaviour complained of

and that the two children responsible for the anti-social behaviour did not live at the property.

The local authority panel met on 3 July 2008 and upheld the decision to serve notice on the Defendant given the presence of continued anti-social behaviour.

The Local Authority issued possession proceedings and on 22 December 2008 Judge Holman in his judgment correctly described his role as "limited to conducting a conventional judicial review" of the Council's decision to bring the possession proceedings, and that his remit did not extend to "resolving factual disputes". In particular, he could not entertain any argument based on article 8. The Judge concluded that the Council's decision to prosecute the claim was rational. Accordingly an outright order for possession was made.

The Defendant's appeal to the Court of Appeal was dismissed: **[2009] EWCA Civ 852**. Argument before Stanley Burnton LJ raised by the Local Authority submitted, in part, that the Defendant was not able to raise the issue of the proportionality of his eviction (see: **Kay v Lambeth LBC (2006) UKHL 10**).

The Court of Appeal, when asked to construe s.143E

of the Housing Act 1996, viewed the role played by the county court as limited to scrutinising whether the procedure under ss.143E and 143F of the 1996 Act has been followed. If the court concludes the procedure has not been followed, it will not make an order for possession. If it has been followed, it must make the order. Importantly, the Court of Appeal went on to say that the county court cannot review the substance or rationality of the landlord's decision, or whether or not it is consistent with the tenant's or other occupiers' Convention rights.

The Defendant appealed to the Supreme Court and in so doing asked for the following issues to be decided:

1. Whether the jurisprudence of the European Court of Human Rights requires that, before making an order for possession of property which consists of a person's home pursuant to a claim made by a local authority (or other public authority), a domestic court should be able to consider the proportionality of evicting that person from his home under article 8, and, in the process of doing so, to resolve any relevant factual disputes between the parties;
2. What does this conclusion mean in practice in relation to claims for possession, and related claims, in relation to residential property;
3. Whether the demoted tenancy regime in the 1985, 1996 and 2003 Acts can properly be interpreted so as to comply with the requirements of article 8; and
4. How this appeal should be disposed of in the light of the answers on the first three issues.

The Supreme Court dismissed the appeal but, taking into account the earlier judgments of the House of Lords in *Harrow London Borough Council v Qazi* [2003] UKHL 43; [2004] 1 AC 983, *Kay v Lambeth London Borough Council* [2006] UKHL 10; [2006] 2 AC 465, and *Doherty v Birmingham City Council* [2008] UKHL 57; [2009] 1 AC 367 the Supreme Court held that:

- Where courts are asked by a local authority to make an order for possession of a person's home, they must have the power to assess the proportionality of making the order in so doing resolve any factual disputes between the parties;
- Generally, article 8 and the issue of proportionality of possession will only need to be considered if it is raised by an occupier as, in what is seen as exceptional cases only, such a defence may result in an extended period of possession, suspending the order for possession, or a refusal of the order.

Proportionality may prove itself relevant when dealing with occupants who are vulnerable through mental illness, physical or learning disability, poor health or frailty, where the issue may require the local authority to explain why they are not securing alternative accommodation;

- Section 143D(2) of the 1996 Act is to be interpreted in a way that permits the court to review the proportionality of a landlord's decision to seek possession and, if necessary, to make its own assessment of facts in dispute; and
- The events which had led to the demotion order were many and serious, there were differences between the allegations relied under s.143E, those relied on by the Panel, those relied on by the county court and those relied on by the Court of Appeal: the latter's analysis was correct.

In practice

The Supreme Court's decision in *Pinnock* lifts to prominence the issue of proportionality throughout the possession process. Both local authorities and registered social landlords (not private landlords) will have to give proper due consideration to the question of proportionality both before and during claims for possession.

Where the issue of proportionality is raised by a defendant, the courts can assess the proportionality of making a possession order and in the process make its own assessment of the facts in dispute. Thereby, the courts will be able to consider and assess not only if the landlord followed the necessary legal process when instigating possession proceedings but also if that action was proportionate.

In circumstances where there is no automatic right to remain in possession, proportionality will justify the making of an order for possession where it would enable the authority to comply with their duties in relation to the distribution and management of their housing stock (consider allocation of housing, refurbishment of housing, under occupancy, the transfer of the vulnerable into supported housing schemes).

In virtually every case where a residential occupier has no contractual or statutory protection, and the local authority are entitled to possession as a matter of domestic law, there will be a very strong case for saying that making an order for possession would be proportionate, although in some cases there may be factors which would tell the other way.

In *Pinnock* the Local Authority's application for a possession order is to be seen as a proportionate response to the need to remove a source of nuisance. Throughout the entire process of recovering possession the grounds upon seeking possession should be writ clear, leaving it to the Court to be concerned with the occupier's personal circumstances. Where the local housing authority seek possession for reasons considered 'out of the norm' they will clearly have to plead formally to that ground of possession and adduce evidence in support.

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Equal Opportunities

36 Bedford Row operates an Equal Opportunities policy. Equal opportunities officers: **Christopher Donnellan QC**, **Stuart Alford** and **Emilie Pottle**.



Disclosure of unfavourable expert reports – damned if you do, damned if you don't

by Peter Dean

Suppose your solicitors have obtained an expert report in a personal injury case for a claimant ("C") and not only are you unimpressed with it – e.g. it is superficial and lacking in detailed analysis, but worse still its conclusions are unfavourable – can you simply "kick it into the long grass", never to be seen again? Or might you have to disclose it to the defendant ("D"), so letting the cat out of the bag, with all the reasons why your expert thinks the case will not succeed clearly set out for D to lap up?

This issue was considered by the Court of Appeal in *Edwards-Tubbs v JD Wetherspoon PLC* [2011] EWCA Civ 136. Could C, who had obtained a medical report from expert A, but chose not to rely on it and now wanted to rely on a report from expert B, be put on terms that he could not rely on B without disclosing A's report? The lead judgment is by Lord Justice Hughes, which I attempt to summarise below.

C had suffered a fall at work. Liability for the fall was accepted, but not that it had led to chronic whole body pain. The claim was governed by the pre-action protocol for personal injuries, compliance with which was important for case management. Parties should notify opponents of the names of experts they might instruct. C's solicitors had given such notice. D's insurers did not object to the experts put forward but had written saying they anticipated the report would be disclosed, failing which they reserved the right to obtain their own one.

C obtained a report from an expert, but then did not rely upon it or disclose it. Proceedings were issued. The Particulars of Claim were supported by a report from a different expert which alluded to the fact of the earlier report. D applied for its disclosure, conceding there was no absolute right to this but saying it should be a condition of the permission C needed under CPR35.4 in order to rely on it.

The court's power to grant relief by way of case management directions which were subject to conditions was not in doubt, yet it was also clear that the report was a privileged document, nor could any adverse inference be drawn against a party relying on privilege. Could C be required to waive privilege as the price of relying on expert B, the justification being the need to prevent expert-shopping and to put the whole of the available evidence before the court on the question in issue and not only part?

C argued this was only permissible where a change of expert was sought after the issue of proceedings. The Circuit Judge had agreed.

In *Carlson v Townsend* [2001] EWCA Civ 511 the concept of privilege was supported and upheld, but no-one had sought to argue for a conditional order. The case could thus be distinguished.

In *Beck v MOD* [2003] EWCA Civ 1043 D had C examined by a psychiatrist in whom it then lost faith, but prior to a direction permitting the parties to call one unnamed psychiatrist each. C objected when D sought to have him examined by a second psychiatrist. The Court of Appeal said D did not need permission to call him as it already had a direction for this but D did need permission to have C examined a second time, and it attached a condition requiring disclosure of the earlier report.

What was important was the reasons given for this: submission to examination was intrusive and should be justified as necessary, and in an earlier case (*Lane v Willis* [1972] 1WLR 326) it was suggested that disclosure of the earlier report would normally be required.

Beck also included observations that it would

be difficult to imagine any circumstances where it would be appropriate to allow D to instruct a fresh expert without being required at any stage to disclose the earlier expert's report; and that expert shopping should be discouraged; such that the answer in that case, and in any case where a similar situation arose, was that permission to instruct a new expert should be on terms that the report of the previous expert be disclosed. There had been no discussion of privilege in *Beck*, but it was impossible that this had been overlooked, while it made no difference in substance that the accommodation sought was the enforcement of a second medical examination rather than the substitution in an order for expert evidence of one named expert for another.

Hajigeorgiou v Vasilou [2005] EWCA Civ 236 concerned the valuation of a restaurant business. D had a valuation done out by A. The subsequent court order permitted one unnamed expert valuer each. D wished to switch experts and C said it could not unless it disclosed the earlier report. The Court of Appeal held as the court order simply allowed each party one valuer, and did not name valuer A, D did not need permission to change to B, but Dyson LJ, giving the court's reserved judgment, added that **expert shopping is undesirable, and that wherever possible the court will use its powers to prevent it: so that if a party needed permission to rely on one expert in place of another such a condition would usually be imposed.**

Moving to the "discussion" section of his judgment (Paras 25ff), Hughes LJ noted that CPR35 is concerned with experts who are instructed to report "for the purpose of proceedings" (which not all experts might be). He said he could see no difference of principle between a change of expert instructed for the purposes of proceedings pre-issue and a change of expert only instructed, for the same purpose, post-issue: in which case the remaining question was whether the imposition of a condition of disclosure should be seen as exceptional or the norm. The argument against the imposition was that it was a disproportionate interference with the established right of privilege. However, the answer had been given as a matter of authority in *Vasilou* albeit obiter. Nor was there any reason to confine that statement of principle to post-issue cases.

Authority apart, it might often, perhaps normally, be appropriate to permit a party to rely on a second report, but that was a different question from whether the first expert's opinion should be denied to the other side by the fact of who instructed him. An expert who

had prepared a report for court is different to another witness. His primary duty is unequivocally to it, and he should say the same whoever instructed him: so once the pre-action protocol had been embarked upon there was no justification for not disclosing a report obtained from an expert who had been put forward by a party as suitable for the claim, has been accepted by the other party as suitable, and has reported. Disclosure should be the norm once the parties had embarked upon the protocol. Where a party had taken advice pre-protocol the same justification did not exist for hedging his privilege, in the absence of some unusual factor.

Although by CPR35.11 "where a party has disclosed an expert's report, any party may use that expert's report as evidence at the trial." the court could if necessary require the party seeking to rely on it to call the author (so that the party who had originally obtained it could test its contents).

The significance of this judgment is clear:

1. Whereas previously there had been no uniformity of practice on this topic, the rule is that once you have got to the protocol stage and want to rely on

- another expert your opponent will be able to insist on disclosure of the first report, and this is a price you will have to pay.
2. The rule is different if the report was obtained before embarking on the protocol.
3. The rule after the protocol stage means that the selection from the start of the best possible expert must be a priority. Be careful if possible not to instruct an expert with whom you are unfamiliar or whose experience or credentials may be in doubt.
4. Consider in an appropriate case obtaining an initial view from your expert by telephone. If you are unsatisfied with what the expert says, for example you feel the expert has not done justice to the strength of your case, you will not be stuck with their written report.
5. In clinical negligence case where the issue of breach of duty will often be subject to the **Bolam** test, i.e. D will avoid liability if a reasonable body of professional opinion would support his actions even if there is expert evidence to the contrary, plainly by the time expert A has reported in writing there may be little point in instructing expert B.



Property news – vacant possession

by Jonathon Rushton

In the summer the Court of Appeal handed down the much anticipated decision in **NYK Logistics (UK) Ltd v Ibrend Estates BV** [2011] EWCA Civ 683 and in handing down their decision the Court of Appeal have debunked the mvth surrounding the definition of vacant possession.

The Court of Appeal were tasked to decide whether:

1. a break clause in a commercial lease requiring vacant possession of premises at the purported termination date had been correctly exercised where the tenant's contractors had remained on the premises carrying out dilapidation repairs after the specified date; and
2. if not, the landlord by offering to send someone to collect the keys had waived the need for compliance with the requirement for vacant possession.

Dismissing the appeal, Lord Justice Rimmer made it abundantly clear that if a tenant is to satisfy the vacant possession condition in the break option, it had to give such possession to the landlord by midnight on the designated date and not a minute later.

The concept of "vacant possession" was not complicated: it meant that at the moment that "vacant possession" was required to be given, the property was empty of people and that the purchaser was able to assume and enjoy immediate and exclusive possession, occupation and control of it.

The tenant argued before the Court of Appeal that provided that they downed tools and left the warehouse the moment that the landlord asked them to, after the designated date, was not inconsistent with the landlord's right to vacant possession and therefore it had given such possession. The Court of Appeal rejected such an argument out of hand as not a correct statement of principle.

The landlord's mere oral uttering of words in relation to collecting keys after the relevant date, could not extinguish a legal estate in a term of years vested in his tenant:

- there was an absence of any writing satisfying the Law of Property Act 1925 s.53(1)(a);
- no consideration moving between the parties;
- no acts performed by tenant in reliance on the landlord's statement as to the keys that might have enabled it to assert that it would have been inequitable for the landlord to go back on his word, and nothing else that might have entitled the tenant to hold the landlord to them.
- In those circumstances, the landlord's words had no effect on the parties' respective rights and legal positions and there was no substance in the waiver argument.

Finally, Lord Justice Rimmer put the icing on the cake by making clear to all exactly what the Court of Appeal looks for when dealing with the question of vacant possession.

^[44] "...The concept of 'vacant possession' in the present context is not, I consider, complicated. It means what it does in every domestic and commercial sale in which there is an obligation to give 'vacant possession' on completion. It means that at the moment that 'vacant possession' is required to be given, the property is empty of people and that the purchaser is able to assume and enjoy immediate and exclusive possession, occupation and control of it. It must also be empty of chattels, although the obligation in this respect is likely only to be breached if any chattels left in the property substantially prevent or interfere with the enjoyment of the right of possession of a substantial part of the property."