Cobden House CHAMBERS

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"Unknown" Lord's decision creates loophole in children cases

Many practitioners might have thought that an offer to settle a claim brought by a child, which had been accepted, would constitute a binding agreement between the parties, subject to the Court's approval.

However in Drinkall (a minor) v Whitwood (6th November 2003) the Court of Appeal found it "regrettable", but they were bound by a 1969 House of Lords case (Dietz v Lennig Chemicals Limited (1969) 1 AC 170), and that the Defendants were entitled to renege on such an agreement.

"regrettable though it might seem, the Defendants here were entitled to renege on their agreement as they did, for good reason or none, and must therefore succeed upon this appeal."

In Drinkall the Claimant made a Part 36 offer to settle the issue of liability on an 80/20 basis in her favour. This offer was accepted by the Defendant who later sought to withdraw from that agreement.

Proceedings were issued relying on the agreement on the issue of liability. However the Defendants claimed that the parties were unable to enter a binding agreement whether as alleged or at all without the approval of the Court. This argument was rejected by the Trial Judge.

However, the Court of Appeal held that they were bound by the decision in Dietz. In that case Lord Pearson stated "the settlement .... in which the infant was interested, was only a proposed settlement until the Court approved it. Either party could lawfully have repudiated it at any time before the Court approved it."

Simon Brown LJ concluded, "regrettable though it might seem, the Defendants here were entitled to renege on their agreement as they did, for good reason or none, and must therefore succeed upon this appeal."

He did go on to add a number of footnotes which suggested concerns in relation to the law as it stands, and noted that once a child claimant reached adulthood, a settlement agreement which until then, on the authority of Dietz, had been invalid, could, unless and until repudiated, be treated as an offer and accepted by either side.

The Court of Appeal stated that it was desirable that Dietz and indeed Drinkall be brought more clearly to the profession's attention. It found it most surprising that Dietz had not been referred to either the White Book or the Green Book.
Richard Goddard

Richard Goddard

Specialises in Personal Injury Law.

2004 SEMINAR PROGRAMME

Stress Claims
7th September

Seminar Workshop (Blackpool)
14th September

Criminal Injuries Compensation
17th September

Spinal/Brain Injuries
1st October

Boundary Disputes/ Adverse Possession (part 1)
15th October

There is no charge for attending our seminars in Chambers which are CPD accredited.

There will be a small charge for attending the seminar workshop

If you would like register your interest in attending one of our seminars please contact *Jackie Morton on 0161-833 6000*

A full information programme including the names of the speakers will be sent out to those registering their interest, five weeks prior to the seminar.

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Stress & the primary victim

Donachie v The Police 2004 and the correct application of Page v Smith.

The Claimant suffered a stroke as a result of the Defendant's breach of duty. The Claimant was subject to the risk of physical violence by criminals which caused an aggravation of his previously undisclosed hypertension which lead to him suffering extreme stress culminating in a stroke. The Defendants argued that as the Claimant had not suffered the foreseeable physical injury and because the Defendant had been unaware of the Claimant's pre-existing hypertension, the psychiatric injury and stroke were not reasonably foreseeable. The Claimant appealed on the grounds that the Judge had wrongly failed to consider whether he was a primary or secondary victim.

Pursuant to Page v Smith the Claimant was a primary victim in respect of whom there was a reasonably foreseeable risk of a physical injury and therefore it was unnecessary to prove involvement in an 'event' in the form of an assault or otherwise. It was immaterial if an injury caused is in fact psychiatric when the only reasonably foreseeable injury was of a physical nature and, likewise, it was immaterial that the particular form of physical injury was itself not reasonably foreseeable. Since the Claimant was a primary victim any pre-existing vulnerability

"for Primary Victims the test is whether there was a reasonable foreseeability of physical injury arising out of the Defendant's breach of duty".

to stress causative of psychiatric injury was irrelevant and the Chief Constable had to take his victim as he found him.

The Defendant's argument that an accident as in Page v Smith was a prerequisite to a Claimant becoming a primary victim was rejected. The Court of Appeal accepted that for Primary Victims the test is whether there was a reasonable foreseeability of physical injury arising out of the Defendant's breach of duty. The House of Lords rejected the Defendant's petition to appeal. **Marc Willems**

Marc Willems

Was Junior Counsel for the Claimant/Appellant.

Care provided by Family members

The recoverability of damages for the value of care provided gratuitously by family members is an unpredictable area for both Claimants and Defendants. Damages are usually awarded on the basis of the impression formed by the judge. The Court of Appeal has recently provided guidance in this area in Giambrone and others v Sunworld [2004] EWCA Civ 158.

The Appeal involved a number of test cases in which children had developed gastro-enteritis whilst on holiday and claimed damages for care provided gratuitously by their parents.

The Defendant relied upon Mills v BREL [1992] 1 PIQR Q130, and particularly the words of Dillon LJ that awards should be restricted to 'care by the relative well beyond the ordinary call of duty for the special needs of the sufferer…it must only be in a very serious case that an award is justified'.

"The Court of Appeal were keen to encourage standardised awards in this type of care claim, which could be extended to other areas".

The Court rejected the argument that Mills was authority for the proposition that awards should only be made in very serious cases. It was said that caring for a child with gastro-enteritis 'went distinctly beyond that which is part of the ordinary regime of family life'.

Although higher awards had been made by the trial judge, the Court of Appeal said that awards for the level of care received in the test cases should be restricted to £50 a week.

"The Court rejected the argument that Mills was authority for the proposition that awards should only be made in very serious cases."

The Court of Appeal were keen to encourage standardised awards in this type of care claim, which could be extended to other areas.

In concluding his Judgment, Brooke LJ said: 'this may well be a situation in which appropriate representatives of claimants and defendants …might usefully try to agree a guideline tariff for gastro-enteritis cases generally, depending on the severity of the illness…so that the disproportionate cost of proving these smalls heads of damage may be avoided'. **Michael Jones**

Michael Jones

Specialises in Personal Injury Law.

The diminishing effect of Article 8 ECHR

One joint tenant can terminate the tenancy by serving notice to quit. If a tenant remains in occupation he is an unlawful occupier but the premises are still his "home" for the purposes of Article 8 of the ECHR.

This will not, however, prevent his landlord from obtaining possession. In Qazi v. Harrow LBC [2003], the House of Lords held that contractual and proprietary rights cannot be defeated by Article 8 ECHR. Art. 8(2) (derogation) is satisfied wherever the law affords an unqualified right to possession on proof of termination of the tenancy.

Lord Millett considered that, save in exceptional circumstances, there was no lack of respect for the home or any infringement of Art. 8 where an order is made in favour of a person entitled to it by national law.

In Bradney v. Birmingham CC; Birmingham CC v. McCann [2003] the Court of Appeal followed Qazi and upheld orders for possession made against former joint tenants.

The fact that the tenant giving notice is unaware that it will terminate the rights of his other joint tenant(s) is not an exceptional circumstance.

This will apply in all cases where there is an automatic right to possession, e.g. squatters. Furthermore, in Notting Hill Housing Trust v. Blackley [2001] it held that s. 11 of the Trusts of Land and Appointment of Trustees Act 1996 did not apply as the tenant serving notice was not exercising a function in relation to a trust of land, therefore no prior consultation was required. **Alyson Kilpatrick**

"Lord Millett considered that, save in exceptional circumstances, there was no lack of respect for the home or any infringement of Art. 8 where an order is made in favour of a person entitled to it by national law".

Alyson Kilpatrick

Specialises in Housing Law.

No Injury to Feelings in Unfair Dismissal: Dunnachie v Kingston Upon Hull City Council

It will come as little surprise to many practitioners but with disappointment to many an Applicant that on 15th July the House of Lords called time on awards for injury to feelings in unfair dismissal claims.

The House of Lords held that the plain meaning of the word 'loss' in section 123(1) of the Employment Rights Act 1996 excludes non-economic loss.

Lord Steyn agreed with Brooke LJ (who gave a dissenting judgment in the Court of Appeal) that it is inconceivable that in this particular context Parliament intended the word to mean anything other than financial loss.

The final word is that Lord Hoffman's comments in Johnson v Unisys were obiter and that Norton Tool Co Ltd v Tewson remains good law. **Joanne Woodward**

Joanne Woodward

Specialises in Employment and Personal Injury Law.

The Civil Team welcomes...

...Mohammed Asif comes to chambers from specialist private client law firm Wrigleys. Prior to that he completed pupillage in London before joining the tax teams at Coutts & Co. and Deloitte & Touche respectively.

Mohammed was called to the Bar in 1998 (Inner Temple) and is a former solicitor. He is also a Chartered Tax Advisor, a member of the Chartered Institute of Taxation and a member of the Charity Law Association.

His practice will focus mainly on tax, private client and chancery matters.