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Costs 2015 Emerging Law and Practice

Part 1

Andrew Hogan Barrister at law[1]

Costs and NIHL

1. NIHL claims are perennial. After the cases of the early 1980s and the setting up of schemes by inter alia, the Iron Trades and others to compensate employees of the former heavy industries outside of a litigation process, the 1990s saw NIHL claims come back with a vengeance, in part encouraged by the success of the schemes: with insurers increasingly taking limitation as the ball point defence, reflected in the volume of appellate authority that continues to dog this type of work.

2. The union backed claims of the 1990s have in turn now been overtaken, by the rise of the claims management company, and the adoption of mass advertising techniques by solicitors, which has resulted in a further surge in claims. In turn the implementation of the various Portal schemes, with modest fees for hitherto profitable areas of work, is impelling solicitors into this area. Action will be met with reaction, and the next couple of years are set for substantial arguments to be raised on all aspects of NIHL costs.

Background

3. In September 2014 the Law Society Gazette reported as follows:

Personal injury firms looking for new revenue from industrial deafness claims have been warned the cases come with significantly more risk than routine PI work.

[1] The author's website can be found at www.costsbarrister.co.uk and you are invited to subscribe to it with your email address. I also welcome people linking with me on Linked In.

The Association of British Insurers (ABI) yesterday accused firms of 'cashing in' on claims for industrial deafness to make up for losses suffered through reduced fixed fees in other areas of work.

The ABI said firms are attracted by substantially higher legal fees, stating the average fee for a claimant lawyer settling an industrial deafness claim last year was £10,500 – compared with £500 for whiplash claims going through the fixed-fee portal.

Lesley Graves, managing director for personal injury consulting firm Citadel Law, said any firm seeing industrial deafness claims as easy money was 'sorely mistaken'.

Graves said her firm's industrial disease specialists have seen a tenfold increase in demand to review cases, with a quarter of new enquiries relating to industrial deafness.

'Our review has highlighted serious incidents of poor case preparation and under-settlement or failure, leading to the risk of the firms themselves facing professional negligence claims,' she said. 'You can't pile 'em high and sell 'em cheap in this area of law.'

Graves suggested that the insurance industry should do more to increase its members' skills for dealing with industrial deafness claims, to reduce the time cases take to process.

The ABI has said that the average compensation award for an industrial deafness claim is £3,100, meaning that for every £1 an insurer pays out in compensation to the claimant, they pay out just over £3 in fees to the claimant's lawyer.

Speaking at the European Forum on Claims Management yesterday, ABI head of motor and liability James Dalton said insurers are prepared to pay 'fair compensation' to genuine claimants, but he called for lawyers' fees to be 'more proportionate'.

He added: 'Industrial deafness claims are fast becoming the new cash cow for claimant lawyers, eager to make up for last year's reduction of fixed legal fees in the claims portal.'

4. In October[2] last year the Law Society Gazette ran this further article:

Listed legal business Quindell has revealed it is now handling 44,500 industrial deafness claims – despite rejecting 75% of cases that are reported.

In a trading statement for the third quarter of 2014, the company said it has agreed the 'first few' settlements for noise-induced hearing loss ahead of plan.

The group says it has driven down the cost of the claims, with income 31% less than estimates by the Association of British Insurers.

The ABI has been a critic of the rising number of deafness claims, stating that claimant lawyers settling industrial deafness claims last year earned fees averaging £10,500.

Quindell told the London Stock Exchange that it has a 'two-stage vetting process' for considering the merits of cases: an initial clinic and two separate hearing tests.

Overall, the Quindell board said revenue for this year is expected to be between £750m and £800m, although in August the company had been expecting revenue of £800m to £900m in financial year 2014-15.

The growth of legal services revenue has contributed to pre-tax profit of £83m for the quarter ending 30 September, compared with £34.5m for the same period in 2013.

The statement said legal services brought in £760,000 per business day by the end of September, compared with £500,000 a day at the end of the first quarter.

Profit margin is expected to be between 40% and 45% this year, up from its previous range of 35% to 45%.

The subject of industrial deafness is likely to be a future battleground between claimants and defendants, with some insurers already calling for more stringent rules on assessing the viability of claims.

[2] 13th October 2014 Law Society Gazette

In a guest blog for the Association of Personal Injury Lawyers, executive member Bridget Collier said insurers' misgivings about fraud 'make us wonder if they are simply trying to avoid paying out by shaming people out of claiming'.

Collier said the current test procedure will make it obvious when someone is making a fraudulent claim.

'Insurers say that three years ago the number of fraudulent noise-induced hearing loss investigations was less than half the number it is now,' she added. 'On the back of this, insurance industry representatives claim that the answer lies in culling solicitors by reducing their fees presumably so we won't take the work on.

'The fact is, in the last three years more information about the right to claim for hearing loss has become widely available.'

The pre 1st April 2013 cases

5. In respect of pre 1st April 2013 cases, where a CFA and ATE policy have been incepted and additional liabilities are claimed, the big issue at the moment, is whether NIHL is an injury or a disease, such that the success fee applicable is not 62.5% but is either at large or fixed at 25% by the provisions of the former part 45. Although various cases have been argued before various District Judges, from Mansfield to Burnley, via Sheffield, at the time of writing a decision is awaited on preliminary issues argued in a set of test cases in Cardiff before Mr Justice Phillips.

Is it an injury or is it a disease?

6. Section IV and section V of the relevant rules (the former part 45) must be considered in a little detail:

"Scope and interpretation

45.20

(1) Subject to paragraph (2), this Section applies where –

(a) the dispute is between an employee and his employer arising from a bodily injury sustained by the employee in the course of his employment; and

(b) the claimant has entered into a funding arrangement of a type specified in rule 43.2(1)(k)(i).

(2) This Section does not apply –

(a) where the dispute –

(i) relates to a disease;

(ii) relates to an injury sustained before 1st October 2004; or

(iii) arises from a road traffic accident (as defined in rule 45.7(4)(a)); or

(iv) relates to an injury to which Section V of this Part applies; …"

Section V, headed "Fixed Recoverable Success Fees in Employer's Liability Disease Claims", provides so far as relevant as follows:

"Scope and Interpretation

45.23

(1) Subject to paragraph (2), this Section applies where –

(a) the dispute is between an employee (or, if the employee is deceased, the employee's estate or dependants) and his employer (or a person alleged to be liable for the employer's alleged breach of statutory or common law duties of care); and

(b) the dispute relates to a disease with which the employee is diagnosed that is alleged to have been contracted as a consequence of the employer's alleged breach of statutory or common law duties of care in the course of the employee's employment; and

(c) the claimant has entered into a funding arrangement of a type specified in rule 43.2(1)(k)(i).

(2) This Section does not apply where –

(a) the claimant sent a letter of claim to the defendant containing a summary of the facts on which the claim is based and main allegations of fault before 1st October 2005; or

(b) rule 45.20(2)(b) applies.

(3) For the purposes of this Section –

(a) rule 45.15(6) applies;

(b) 'employee' has the meaning given to it by section 2(1) of the Employers' Liability (Compulsory Insurance) Act 1969;

(c) 'Type A claim' means a claim relating to a disease or physical injury alleged to have been caused by exposure to asbestos;

(d) 'Type B claim' means a claim relating to –

(i) a psychiatric injury alleged to have been caused by work-related psychological stress;

(ii) a work-related upper limb disorder which is alleged to have been caused by physical stress or strain, excluding hand/arm vibration injuries; and

(e) 'Type C claim' means a claim relating to a disease not falling within either type A or type B.

(The Table annexed to the Costs Practice Direction contains a non-exclusive list of diseases within Type A and Type B)."

7. Section IV of CPR 45 was introduced by the Civil Procedure (Amendment No 2) Rules 2004 (SI 2004/2072), which came into force on 1 October 2004. Section V was introduced by the Civil Procedure (Amendment No 3) Rules (SI 2005/2292), which came into force a year later, on 1 October 2005.

8. The background to these provisions was explained by Dyson LJ in *Lamont v. Burton* [2007] EWCA Civ 429, [2007] 1 WLR 2814, at [6]:

"Although Sections II to V of CPR Pt 45 were recommended by the Civil Procedure Rule Committee and they subsequently received parliamentary approval, their genesis lies in a series of negotiations which were conducted under the auspices of the Civil Justice Council. The parties to the negotiations were some liability insurers who promoted the interests of defendants, and a combination of claimants' solicitors (represented by Association of Personal Injury Lawyers and the Motor Accident Solicitors Society) and legal expenses insurers who promoted the interests of claimants. The figures in Sections II to V were the product of those negotiations."

9. There is no definition of what constitutes a disease in section V. There have been three attempts to formulate a definition, in the case-law to date. There is a definition of what constitutes a disease in the relevant Protocol at paragraph 2.2. This says:

This protocol covers disease claims which are likely to be complex and frequently not suitable for fast-track procedures even though they may fall within fast track limits. Disease for the purpose of this protocol primarily covers any illness physical or psychological, any disorder, ailment, affliction, complaint, malady, or derangement other than a physical or psychological injury solely caused by an accident or other similar single event.

10. However this is not a definition which has been adopted in the more recent case-law. The reasons are largely twofold. The first is that the definition is expressly limited to the "the purpose of this protocol". It is directed at pre-litigation conduct, and shoe horning a class of case, into a particular mode of pre-litigation behaviour, rather than acting as a comprehensive definition for the discrete purposes of the rules relating to costs.

11. Secondly there is a respectable line of authority pointing out that Practice Directions (and the Protocol is not even a Practice Direction) cannot be used to interpret Rules. They are at best a weak aid to interpretation: to use a Practice Direction for such a purpose is really to put the cart before the horse.

12. The case of Patterson.v.Ministry of Defence [2012[EWHC 2767, in essence, involved consideration as to whether trench foot could be regarded as a disease or an injury. It is useful to consider this case in some detail, as it represents the only decision of a High Court judge to date on this topic.

13. Against that background one considers the following points made by the Learned Judge at paragraph 14 of his judgment:

I draw attention at this stage to a number of points:

(1) Section IV applies where the dispute arises "from a bodily injury". It constitutes the basic or default rule applicable to success fees in employers' liability claims.

(2) Claims falling within Section V which would otherwise fall within Section IV are expressly excluded from Section V. The exclusion applies not only to cases where the dispute "relates to a disease", but also where the dispute "relates to an injury to which Section V of this Part applies". (These latter words were not in the original version of Section IV which came into force at a time when Section V did not yet exist, but were added later). The provisions contemplate, therefore, that as a matter of language the terms "disease" and "injury" are not mutually exclusive. At least some injuries can also be regarded as diseases, and therefore fall within Section V. However, because of the express exclusion of disputes relating to diseases and to injuries to which Section V applies, Sections IV and V are mutually exclusive.

(3) Certain injuries which would not be regarded as constituting a disease as a matter of ordinary language expressly fall to be treated as within Section V. For example, CPR 45.23(3) refers to "a disease or physical injury alleged to have been caused by exposure to asbestos", from which it is apparent that a physical injury caused by such exposure need not amount to a disease (at least as that term is ordinarily used) in order to fall within Section V. Similarly, some (but not all) psychiatric injuries and upper limb disorders expressly fall within Type B, even though they would not be regarded as diseases as a matter of ordinary language.

(4) However, as appears from CPR 45.23(1)(b), in order to fall within Section V the dispute in question must still relate to a disease. It follows that, at least to some extent, the term "disease" appears to have a more extensive meaning in

Section V than its meaning in every day language. In particular, it must include those injuries not ordinarily regarded as constituting diseases which are expressly referred to in the definitions of Type A and Type B claims.

(5) When there is a dispute whether Section IV or V applies, the question is whether the condition in question qualifies as a disease (including one of the specific categories of injury expressly included in Section V). If it does, Section V applies and it does not matter whether the disease also constitutes or results from a "bodily injury".

(6) However, although some terms used in the Rule are defined, and some specific examples are given of claims falling within Section V, there is no definition of "disease".

14. The Learned Judge then considered at paragraph 18 how, he could approach the issue of defining what a disease was:

The following principles of interpretation are clear:

(1)The task of the court is to ascertain the intention of the legislator expressed in the language under consideration. This is an objective exercise.

(2)The relevant provisions must be read as a whole, and in context.

(3)Words should be given their ordinary meaning unless a contrary intention appears.

(4)It is legitimate, where practicable, to assess the likely practical consequences of adopting each of the opposing constructions, not only for the parties in the individual case but for the law generally. If one construction is likely to produce absurdity or inconvenience, that may be a factor telling against that construction

(5)The same word, or phrase, in the same enactment, should be given the same meaning unless the contrary intention appears.

15. He also directed himself that the following points could be said to constitute the statutory purpose for a purposive interpretation:

What then are the "basic objectives" of CPR 45, Sections IV and V? It was not in dispute that they are essentially as follows:

(1) to promote certainty and, in particular, to avoid arguments about the level of the success fee (see the citations from Lamont v. Burton [2007] 1 WLR 2814 set out at [11] and [12] above);

(2)to recognise that, in general, certain types of employers' liability cases carry a greater risk of failing on liability and should therefore be rewarded with a higher success fee on settlement than would be awarded under the Section IV regime

(3) to recognise that, in general, certain types of employers' liability cases involve more investigation (and thus carry a greater financial risk) than others, and to reward solicitors and counsel for undertaking that greater financial risk, albeit that no distinction is drawn between Sections IV and V when it comes to cases that conclude at trial (where a success fee of 100% is payable); and

(4)to recognise that even within Section V, certain types of "disease" claim are more difficult than others, and should therefore attract a higher reward for those who undertake them.

16. He went onto deprecate dictionary definitions in this way:

I am reinforced in this view of the essential irrelevance of these dictionary definitions by Lord Clyde's comments in Chief Adjudication Officer v. Faulds [2000] 1 WLR 1035 at 1051H, where the issue was the meaning of the word "accident" in social security legislation:

"The word 'accident' is not defined in the statute. It has no special or technical meaning but is to be understood in its ordinary sense. In such circumstances there seems to me to be nothing gained by resorting to dictionary definitions. Where a word is to be understood in its ordinary meaning it is preferable to confine one's attention to the application of the statutory expression and avoid the temptation to elaborate upon it by introducing other words which may seem to be synonymous but which may simply lead in other cases to analysis not of the statutory words but of the gloss which has been added to them."

17. Later in the judgment there are some very interesting paragraphs at 38 to 41. They deal with the notion of an extended definition of disease. Or a definition set by the expectations of the personal injury "industry". He then went onto question, (albeit obiter dicta) whether noise induced hearing loss was a disease, without resolving the point:

The status of injuries of the nature described in CPR 45.23(3)(d) but which do not fall within the Type B definition because they do not satisfy the causation requirements of the definition was in dispute between the parties. Mr Williams for the claimant contends that such injuries, even though not falling within Type B, nevertheless fall and are generally understood to fall within Type C. He relies on this to support his submission that the term "disease" in CPR 45 is used to include conditions which would not normally be regarded as diseases even if such conditions are not within the specific definition of Type B claims. He refers also to other injuries not normally regarded as diseases and plainly not Type B claims (e.g. noise induced hearing loss) which, he says, have attracted success fees calculated in accordance with Section V, not Section IV, thus demonstrating that the term "disease" has been generally understood as having an expanded meaning. Mr James for the defendant, in contrast, contends that such injuries do not fall within Section V at all, and must be dealt with under Section IV.

I do not find it necessary to determine this issue, although there does appear to be some force in Mr Williams' submission as to the way in which in practice some claims not falling within Type B (for example, vibration white finger claims) are generally regarded as Type C Section V claims and not Section IV claims. Even if psychiatric injuries and upper limb disorders which do not satisfy the causation requirements of the Type B definition nevertheless constitute "diseases" within the meaning of CPR 45, these represent specific extensions of the ordinary meaning of the term "disease" and in my judgment do not demonstrate with sufficient clarity that the intention of the legislator was to apply an extended meaning of "disease" more generally. Similarly, even if such claims as claims for noise induced hearing loss have in practice generally attracted the higher success fees applicable under Section V, I cannot regard that as a sure foundation on which to conclude that an extended meaning of the term "disease" was intended.

If that had been intended, it is surprising that there is no definition of "disease" in CPR 45. Nor is there any indication of the factors which would need to exist in order to qualify a condition not normally regarded as a disease in ordinary

language for inclusion under Section V. However, these omissions are not surprising in view of the circumstances in which Sections IV and V came into being as a result of the negotiations described at [11] and [12] above. I do not know whether there was any attempt to produce an agreed definition of the term "disease", but it is not in the least surprising that no such definition was in fact agreed by the competing interests involved. In my judgment, therefore, psychiatric injuries and upper limb disorders constitute specific exceptions and do not justify any more general wider meaning being given to the term "disease".

There is in my judgment a further compelling reason why detailed consideration of the Type B definitions in CPR 45.23(3)(c) cannot determine the meaning of the term "disease" in CPR 45. This is that the term "disease" was included as an exclusion from Section IV when Section IV was first introduced in October 2004. At that time Section V did not yet exist, but the term "disease" in Section IV must nevertheless have had a meaning. It is not suggested that the coming into force of Section V one year later had the effect of changing the existing meaning of "disease" in Section IV and it is obvious that the term was intended to be used consistently in both Sections. Since the meaning of "disease" in Section IV cannot have been determined by the provisions of a Section V which did not yet exist, any justification for an extended meaning of "disease" in Section IV, and therefore in Section V, must be found elsewhere than in the detailed definitions of Type A and Type B claims in Section V. In the end Mr Williams accepted this, submitting that although the extended meaning of "disease" in Section IV for which he contends cannot come from the language of Section V, it is to be derived from the concepts contained in the Pre-Action Protocol.

18. Ultimately, after numerous paragraphs of extremely careful consideration and weighting of factors, he concludes that when construing disease, one must use the "natural and ordinary" meaning of the word.

Accordingly the claimant has not demonstrated that the term "disease" in CPR 45 is used in other than its natural and ordinary meaning, save to the extent that the specific injuries included in the definitions of Type A and Type B claims must be regarded as constituting diseases for the purpose of the award of success fees. (As indicated at [39] above, I do not decide whether those injuries constitute diseases within Type C when not caused in the manner required by the Type A and Type B definitions; even if they do, that only means that the specific extension of the meaning of "disease" for the purpose of CPR 45

extends somewhat further than if they do not). Nor in my respectful view has the claimant succeeded in identifying with sufficient clarity and certainty the extended meaning of "disease" for which Mr Williams contends.

19. For the future he sets out this approach at paragraph 50:

Notwithstanding the objective of CPR 45 to provide a clear and certain test for the award of success fees, inevitably questions may arise as to whether particular conditions are to be characterised as "diseases". When that occurs, and when the answer is not obvious, there is in my judgment no single test or definition which can be applied. In circumstances where the Rule itself provides no definition of "disease", and where the dictionaries do not assist, it would not be practicable or sensible for the court to attempt to supply its own definition. Instead it will be necessary to apply the natural and ordinary meaning of the word, and in cases which are near the borderline to form a judgment by taking account of the various factors which point in one direction or the other. In the present case the relevant factors are those identified above and, taking them into account, I have no doubt that NFCI is not a disease.

20. The actual decision that trench foot is not a disease was made in these terms. It might be thought significant, that trauma was thought to weigh in favour of an injury, and weight was given to the medical evidence:

In view of Mr Williams' realistic acknowledgment that as a matter of ordinary language NFCI would not be regarded as a disease, the conclusions reached so far are sufficient to dismiss this appeal. Even without that acknowledgment, however, I regard the defendant's submissions set out at [17(6)] above as compelling.

Thus NFCI is not caused or contributed to by any virus, bacteria, noxious agent or parasite. It is simply a case where blood fails to reach the cells in the nerves, skin and muscle of the claimant's feet as result of exposure to weather or environmental conditions. Although it involves no trauma in the sense of the direct application of force to the body, the mechanism is essentially the same as occurs in a case of trauma such as when a tourniquet is applied to a limb or a victim is stabbed. The result is damage or injury to the body parts affected, but this cannot be regarded as a "disease". I accept the defendant's submission that if NCFI is a "disease", so too are such conditions as chilblains, hypothermia, frostbite, sunstroke, sunburn and heat blisters which are no more than the result of exposure to weather conditions, and that this would be stretching the

meaning of "disease" to surprising lengths which cannot have been intended. I accept also that it is significant that nowhere in Dr Roberts' detailed report on NFCI is there any suggestion that it constitutes a disease. While none of these factors is determinative by itself, together they amount to a compelling and in my judgment correct case that NFCI is not a "disease".

I accept that there are factors pointing in the opposite direction, in particular that NFCI develops typically over a period of time as distinct from exposure on a single occasion, that it involves no trauma and that it is a condition to which individuals of Black African or Black Caribbean origin are particularly susceptible. Moreover, it has some features in common, so far as the conduct of litigation is concerned, with claims which do relate to diseases, although I regard that as a less significant matter and certainly not sufficient on its own to characterise NFCI as a disease.

21. Hunter's Diseases of Occupations states at page 467:

It is becoming increasingly apparent that the damage to the cochlea caused by excessive noise is the result of cellular injury from reactive oxygen species (ROS). ROS are ions or small molecules that include oxygen ions, free radicals…and peroxides…and are produced in the mitochondria. They are a natural product of oxygen metabolism and have an important role in cell signalling. They may, however, be produced in excess in response to stress and are then capable of causing serious damage to cell structures…

22. At page 471 the authors note:

Ageing is associated with a progressive loss of auditory function, a condition which has been described in the past as "presbyacusis". It is recognized that most of the impairment arises as a result of progressive cochlear dysfunction with loss of hair cells from the organ or Cortis, affecting the higher frequencies first, but advancing through the cochlea to affect eventually the whole frequency range to some extent….Age related hearing loss takes a progressively accelerating course with time. Thus, the contribution of occupational noise-induced hearing loss to the total sensori-neural hearing loss decreases with age, and by the age of 80 it would make virtually no difference what the noise had been.

23. Is noise induced hearing loss a disease, or an injury inflicted by invasive sound energy? There is a respectable argument that it is an injury and not a disease, based on the matters discussed above. Historically, deafness has always been treated as a disease, and it remains the norm today, that it is regarded as a disease by personal injury lawyers. The Civil Justice Council in 2005 plainly thought deafness was included as a disease (see their Press Release).

24. The position might be thought to be even stronger, in relation to hand arm vibration syndrome, given that type B claims, in the rules expressly exclude what are termed hand-arm vibration injuries and this is again, an example of a condition caused by the traumatic application of external vibration.

The post 2013 cases

25. In terms of the post April 2013 cases, a number of issues spring to mind that may well become of more significance over the coming year. The first is to consider the impact of QUOCs: consider the position where a NIHL claim is valued at a few thousand pounds, and there is or may be a viable limitation defence.

26. At the moment, an insurer can run that case on the basis that the trial may well be held at the ATE insurers expense. But if every single trial, is being held at the insurers expense, win or lose, will the impetus to settlement in all but the grossest of cases become irresistible, and will QUOCs function, in that finely pejorative phrase of Judge Cook as a "blackmailers charter?" So the effect of QUOCs in terms of the dynamics of litigation in this area will prove very interesting indeed.

The scope of the Portal

27. Notionally at least NIHL claims fall to start within the Portal, under the . But the exclusion of claims where there is more than one Defendant employer,

from the Portal means that practically a majority of NIHL claims don't go anywhere near it. Even those which do, if they fall out of the scheme, are not caught by the part 45 fixed recoverable costs regime.

28. Of course, after the election this may change. The natural tendency, will be for the Portal schemes to be extended, with their consequential fixed costs regimes. When they do so, this will no doubt have a dampening effect on the NIHL market.

Proportionality

29. It is perhaps surprising that no decisions have reached the appellate courts (yet) on the test of proportionality. As the second anniversary since the implementation of LASPO and the introduction of the reformulated test of proportionality arrives, this is a point which should surely be considered in the Court of Appeal.

30. It is a central point and theme, which will surely arise in the context of NIHL costs, if nowhere else. This is because such claims represent the paradigm example of a claim, worth a few thousand pounds which have the potential to generate disproportionate costs. If an NIHL claim is worth in total, say £3000, should the courts under the new principle, take the view that costs of say, £3000 be the proportionate amount to allow, or indeed to budget for? If not, how is the proportionality principle to be applied?

31. Master Gordon-Saker has recently observed in his lecture to the Commercial Litigation Association on 1st October 2014:

We have a new test of proportionality and proportionality now trumps reasonableness. Even if the costs are reasonable, they will not be recoverable on the standard basis if they are disproportionate. Costs incurred are proportionate if they bear a reasonable relationship to – the sums in issue in the proceedings; the value of any non-monetary relief; the complexity of the litigation; any additional work generated by the conduct of the paying party; and any wider factors involved in the proceedings, such as reputation or public importance.

It is said that we will need guidance on how to apply the new test. I disagree. The guidance is already there. It is likely that somebody will in some case or another seek to appeal the approach that has been taken. But I would suggest that there is no reason to suppose that the court hearing the appeal will do other than restate the guidance that has already been given by Jackson LJ in his final report: … I propose that in an assessment of costs on the standard basis, proportionality should prevail over reasonableness and the proportionality test should be applied on a global basis. The court should first make an assessment of reasonable costs, having regard to the individual items in the bill, the time reasonably spent on those items and the other factors listed in CPR rule 44.5(3). The court should then stand back and consider whether the total figure is proportionate. If the total figure is not proportionate, the court should make an appropriate reduction. There is already a precedent for this approach in relation to the assessment of legal aid costs in criminal proceedings: see R v Supreme Court Taxing Office ex p John Singh and Co [1997] 1 Costs LR 49.

In the 15th implementation lecture on 29th May 2012 – the lecture entitled "Proportionate Costs" – Lord Neuberger, then MR, quoted that passage and said that it seems likely that the courts will develop the approach to proportionality "as Sir Rupert described it" in that paragraph.

Singh, a decision of the Civil Division of the Court of Appeal concerned the costs of criminal proceedings but the same process can easily be applied to a civil bill.

So applying the Singh principle to an inter partes civil bill in a case commenced after 1st April 2013 in respect of work done after that date, the court would assess it in the usual way, but then stand back and look at the total which has been allowed. If that total is disproportionate the court would then reduce it to a proportionate amount.

This approach has been criticised as arbitrary, but it is no more arbitrary than the Lownds approach. After all, to decide, at the outset of an assessment, whether a bill has the appearance of being disproportionate, one must have an idea of what would be proportionate – that is, one must have a figure for proportionate costs in mind.

Whether the Court of Appeal will agree with the Senior Costs Judge's views the point will surely be argued.

Part 36

Background

32. Part 36 has generated a large volume of litigation over the years, and has been amended on multiple occasions. Indeed, a causal link can be made between the amendments, and the litigation. Many of the cases have been generated by solicitors failing to realise that the rules have changed, using outdated precedent letters, and then finding that what they fondly imagined was a part 36 offer, was no such thing, or arguably so, leaving the appellate courts to agonise how to characterise such offers and what consequences flow from them.

33. In a sense all of the former case law can be consigned to the dustbin, after April 2015, when a wholly new Part 36 is brought into force. I say wholly new, in reality it codifies many of the principles, or points established by the case law over the years. In short, it is a new code and must be studied closely by everyone who makes or receives settlement offers, which in fact, is everyone.

The new Part 36

34. I include within this paper, the full text of the new part 36, and offer some thoughts about how it will work, and the consequences of the provisions.

Starting with the index, there are some 30 particular rules, meant to cover the common applications of part 36. The index reads as follows:

"PART 36OFFERS TO SETTLE

Contents of this Part

Title	Rule number

Title	Rule number
Deduction of benefits and lump sum payments	**Rule 36.22**
MISCELLANEOUS	
Cases in which the offeror's costs have been limited to court fees	**Rule 36.23**
Section II – RTA Protocol and EL/PL Protocol Offers to Settle	
Scope of this Section	**Rule 36.24**
Form and content of a Protocol offer	**Rule 36.25**
Time when a Protocol offer is made	**Rule 36.26**
General provisions	**Rule 36.27**
Restrictions on disclosure of a Protocol offer	**Rule 36.28**
Costs consequences following judgment	**Rule 36.29**
Deduction of benefits	**Rule 36.30**

35. Turning to consider the particular provisions, rule 36.1 is keen to emphasise that because this is a set of statutory provisions, the rules are self contained and there is no scope for eg, importing principles of the common

law, such as contractual rules for offers and acceptance. This reflects the statement first made in the case of **Gibbon.v.Manchester City Council**[3]

Scope of this Part

36.1.—(1) This Part contains a self-contained procedural code about offers to settle made pursuant to the procedure set out in this Part ("Part 36 offers").

(2) Section I of this Part contains general rules about Part 36 offers.

(3) Section II of this Part contains rules about offers to settle where the parties have followed the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ("the RTA Protocol") or the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims ("the EL/PL Protocol") and have started proceedings under Part 8 in accordance with Practice Direction 8B.

36. The new part 36 also codifies and brings together the application of the principles, dealing first of all with general principles and then moving on to consider specifically the Protocols.

SECTION I Part 36 Offers to Settle

GENERAL

Scope of this Section

36.2—(1) This Section does not apply to an offer to settle to which Section II of this Part applies.

(2) Nothing in this Section prevents a party making an offer to settle in whatever way that party chooses, but if the offer is not made in accordance with rule 36.5, it will not have the consequences specified in this Section.

(Rule 44.2 requires the court to consider an offer to settle that does not have the costs consequences set out in this Section in deciding what order to make about costs.)

[3] [2010] EWCA Civ 726. See also the later case of **Shovelar.v.Lane** [2011] EWCA Civ 726

(3) A Part 36 offer may be made in respect of the whole, or part of, or any issue that arises in—

(a)a claim, counterclaim or other additional claim; or

(b)an appeal or cross-appeal from a decision made at a trial.

(Rules 20.2 and 20.3 provide that counterclaims and other additional claims are treated as claims and that references to a claimant or a defendant include a party bringing or defending an additional claim.)

37. It should be noted that part 36 does not preclude a party making a Calderbank offer, or an offer "without prejudice save as to costs" or any other conceivable offer, which will have the effect of being a material factor when the court comes to address issues of costs. The rule also reflects the Court of Appeal decision in **AF.v.BG**[4] an interesting decision dealing with counterclaims which exceed claims, and to what extent a net benefit to a defendant invokes part 36 consequences.

38. Rule 36.3 is the definitional section:

Definitions

36.3. In this Section—

(a)the party who makes an offer is the "offeror";

(b)the party to whom an offer is made is the "offeree";

(c)a "trial" means any trial in a case whether it is a trial of all issues or a trial of liability, quantum or some other issue in the case;

(d)a trial is "in progress" from the time when it starts until the time when judgment is given or handed down;

(e)a case is "decided" when all issues in the case have been determined, whether at one or more trials;

[4] [2009] EWCA Civ 757

(f)“trial judge” includes the judge (if any) allocated in advance to conduct a trial; and

(g)“the relevant period” means—

(i)in the case of an offer made not less than 21 days before a trial, the period specified under rule 36.5(1)(c) or such longer period as the parties agree;

(ii)otherwise, the period up to the end of such trial.

39. An old problem, arising from a case I dealt with more than a decade ago, was the question as to whether part 36 offers made in advance of trial, needed to be renewed to be effective on an appeal. Rule 36.4 effectively confirms the earlier case law:

Application of Part 36 to appeals

36.4.—(1) Except where a Part 36 offer is made in appeal proceedings, it shall have the consequences set out in this Section only in relation to the costs of the proceedings in respect of which it is made, and not in relation to the costs of any appeal from a decision in those proceedings.

(2) Where a Part 36 offer is made in appeal proceedings, references in this Section to a term in the first column below shall be treated, unless the context requires otherwise, as references to the corresponding term in the second column—

Term	Corresponding term
Claim	Appeal
Counterclaim	Cross-appeal
Case	Appeal proceedings
Claimant	Appellant

Term	Corresponding term
Defendant	Respondent
Trial	Appeal hearing
Trial judge	Appeal judge

40. A key rule is going to be 36.5, which in effect dictates the requirements for making an effective part 36 offer. The requirements are mandatory. It is worth reading. Then reading again. Even as recently as in the case of **Shaw.v.Merthyr Tydfil County Borough Council**[5] solicitors were failing to draft effective part 36 offers: see the caustic comments of the Court of Appeal on the solicitor who had used an old and out of date precedent, without realising the rules had changed in the interim.

MAKING OFFERS

Form and content of a Part 36 offer

36.5.—(1) A Part 36 offer must—

(a)be in writing;

(b)make clear that it is made pursuant to Part 36;

(c)specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs in accordance with rule 36.13 or 36.20 if the offer is accepted;

(d)state whether it relates to the whole of the claim or to part of it or to an issue that arises in it and if so to which part or issue; and

[5] [2014] EWCA Ci 1678

(e)state whether it takes into account any counterclaim.

(Rule 36.7 makes provision for when a Part 36 offer is made.)

(2) Paragraph (1)(c) does not apply if the offer is made less than 21 days before the start of a trial.

(3) In appropriate cases, a Part 36 offer must contain such further information as is required by rule 36.18 (personal injury claims for future pecuniary loss), rule 36.19 (offer to settle a claim for provisional damages), and rule 36.22 (deduction of benefits).

(4) A Part 36 offer which offers to pay or offers to accept a sum of money will be treated as inclusive of all interest until—

(a)the date on which the period specified under rule 36.5(1)(c) expires; or

(b)if rule 36.5(2) applies, a date 21 days after the date the offer was made.

41. Note also the provisions in relation to defendant's offers:

Part 36 offers – defendant's offer

36.6.—(1) Subject to rules 36.18(3) and 36.19(1), a Part 36 offer by a defendant to pay a sum of money in settlement of a claim must be an offer to pay a single sum of money.

(2) A defendant's offer that includes an offer to pay all or part of the sum at a date later than 14 days following the date of acceptance will not be treated as a Part 36 offer unless the offeree accepts the offer.

42. Rule 36.7 clarifies some points about timing and expressly makes it clear that a part 36 offer is subject to the normal rules of service: this can be quite important. I can recall cases where sudden changes of mind or instructions can necessitate the sudden withdrawal of an offer, which are eased where, it has not in fact been "made".

Time when a Part 36 offer is made

36.7.—(1) A Part 36 offer may be made at any time, including before the commencement of proceedings.

(2) A Part 36 offer is made when it is served on the offeree.

(Part 6 provides detailed rules about service of documents.)

43. Clarification means precisely what it says: there is no more scope under the new rules, than there was under the old rules, for eliciting how an offer is broken down, or on what assumptions it has been calculated.

CLARIFYING, WITHDRAWING AND CHANGING THE TERMS OF OFFERS

Clarification of a Part 36 offer

36.8.—(1) The offeree may, within 7 days of a Part 36 offer being made, request the offeror to clarify the offer.

(2) If the offeror does not give the clarification requested under paragraph (1) within 7 days of receiving the request, the offeree may, unless the trial has started, apply for an order that the offeror do so.

(Part 23 contains provisions about making an application to the court.)

(3) If the court makes an order under paragraph (2), it must specify the date when the Part 36 offer is to be treated as having been made.

44. Returning to the question of time, again note that withdrawal must be in writing and again, is subject to the rules of service. The classic mistake is not to recognise that many firms, still, do not accept service by email. This can and has led, to ineffective withdrawals, which are superseded by acceptances properly served.

45. Rule 36.9 is horribly convoluted, but quite important dealing as it does with further considerations on changing offers. It reflects a change from the position in **C.v.D**[6] where it was established that purported part 36 offers which provided for their withdrawal or non acceptance, were not in fact part 36 offers. It also clarifies that making an improved new offer does not also withdraw the earlier offer, which of course might be of significance if that earlier offer is operative at trial:

Withdrawing or changing the terms of a Part 36 offer generally

36.9.—(1) A Part 36 offer can only be withdrawn, or its terms changed, if the offeree has not previously served notice of acceptance.

(2) The offeror withdraws the offer or changes its terms by serving written notice of the withdrawal or change of terms on the offeree.

(Rule 36.17(7) deals with the costs consequences following judgment of an offer which is withdrawn.)

(3) Subject to rule 36.10, such notice of withdrawal or change of terms takes effect when it is served on the offeree.

(Rule 36.10 makes provision about when permission is required to withdraw or change the terms of an offer before the expiry of the relevant period.)

(4) Subject to paragraph (1), after expiry of the relevant period—

(a)the offeror may withdraw the offer or change its terms without the permission of the court; or

(b)the offer may be automatically withdrawn in accordance with its terms.

(5) Where the offeror changes the terms of a Part 36 offer to make it more advantageous to the offeree—

(a)such improved offer shall be treated, not as the withdrawal of the original offer; but as the making of a new Part 36 offer on the improved terms; and

[6] [2011] EWCA Civ 846

(b)subject to rule 36.5(2), the period specified under rule 36.5(1)(c) shall be 21 days or such longer period (if any) identified in the written notice referred to in paragraph (2).

46. The new rule 36.10 is a recipe for litigation:

Withdrawing or changing the terms of a Part 36 offer before the expiry of the relevant period

36.10.—(1) Subject to rule 36.9(1), this rule applies where the offeror serves notice before expiry of the relevant period of withdrawal of the offer or change of its terms to be less advantageous to the offeree.

(2) Where this rule applies—

(a)if the offeree has not served notice of acceptance of the original offer by the expiry of the relevant period, the offeror's notice has effect on the expiry of that period; and

(b)if the offeree serves notice of acceptance of the original offer before the expiry of the relevant period, that acceptance has effect unless the offeror applies to the court for permission to withdraw the offer or to change its terms—

(i)within 7 days of the offeree's notice of acceptance; or

(ii)if earlier, before the first day of trial.

(3) On an application under paragraph (2)(b), the court may give permission for the original offer to be withdrawn or its terms changed if satisfied that there has been a change of circumstances since the making of the original offer and that it is in the interests of justice to give permission.

47. Again note the emphasis on written notice, and the rules of service in the rule on acceptance:

ACCEPTING OFFERS

Acceptance of a Part 36 offer

36.11.—(1) A Part 36 offer is accepted by serving written notice of acceptance on the offeror.

(2) Subject to paragraphs (3) and (4) and to rule 36.12, a Part 36 offer may be accepted at any time (whether or not the offeree has subsequently made a different offer), unless it has already been withdrawn.

(Rule 21.10 deals with compromise, etc. by or on behalf of a child or protected party.)

(Rules 36.9 and 36.10 deal with withdrawal of Part 36 offers.)

(3) The court's permission is required to accept a Part 36 offer where—

(a)rule 36.15(4) applies;

(b)rule 36.22(3)(b) applies, the relevant period has expired and further deductible amounts have been paid to the claimant since the date of the offer;

(c)an apportionment is required under rule 41.3A; or

(d)a trial is in progress.

(Rule 36.15 deals with offers by some but not all of multiple defendants.)

(Rule 36.22 defines "deductible amounts".)

(Rule 41.3A requires an apportionment in proceedings under the Fatal Accidents Act 1976(1) and Law Reform (Miscellaneous Provisions) Act 1934(2).)

(4) Where the court gives permission under paragraph (3), unless all the parties have agreed costs, the court must make an order dealing with costs, and may order that the costs consequences set out in rule 36.13 apply.

48. Clarity is provided in relation to split trials: this is important, when, for example limitation is being fought and embodies a doctrine of implied withdrawal:

Acceptance of a Part 36 offer in a split-trial case

36.12.—(1) This rule applies in any case where there has been a trial but the case has not been decided within the meaning of rule 36.3.

(2) Any Part 36 offer which relates only to parts of the claim or issues that have already been decided can no longer be accepted.

(3) Subject to paragraph (2) and unless the parties agree, any other Part 36 offer cannot be accepted earlier than 7 clear days after judgment is given or handed down in such trial.

49. Rule 36.13 creates a deemed costs Order: what is interesting is to note that it expressly cross refers to part 45 and the fixed costs regime there: in effecting following the case law on how part 45 will trump the notion of a standard basis costs order following on acceptance, in certain categories of case.

Costs consequences of acceptance of a Part 36 offer

36.13.—(1) Subject to paragraphs (2) and (4) and to rule 36.20, where a Part 36 offer is accepted within the relevant period the claimant will be entitled to the costs of the proceedings (including their recoverable pre-action costs) up to the date on which notice of acceptance was served on the offeror.

(Rule 36.20 makes provision for the costs consequences of accepting a Part 36 offer in certain personal injury claims where the claim no longer proceeds under the RTA or EL/PL Protocol.)

(2) Where—

(a)a defendant's Part 36 offer relates to part only of the claim; and

(b)at the time of serving notice of acceptance within the relevant period the claimant abandons the balance of the claim,

the claimant will only be entitled to the costs of such part of the claim unless the court orders otherwise.

(3) Except where the recoverable costs are fixed by these Rules, costs under paragraphs (1) and (2) are to be assessed on the standard basis if the amount of costs is not agreed.

(Rule 44.3(2) explains the standard basis for the assessment of costs.)

(Rule 44.9 contains provisions about when a costs order is deemed to have been made and applying for an order under section 194(3) of the Legal Services Act 2007(3).)

(Part 45 provides for fixed costs in certain classes of case.)

(4) Where—

(a)a Part 36 offer which was made less than 21 days before the start of a trial is accepted; or

(b)a Part 36 offer which relates to the whole of the claim is accepted after expiry of the relevant period; or

(c)subject to paragraph (2), a Part 36 offer which does not relate to the whole of the claim is accepted at any time,

the liability for costs must be determined by the court unless the parties have agreed the costs.

(5) Where paragraph (4)(b) applies but the parties cannot agree the liability for costs, the court must, unless it considers it unjust to do so, order that—

(a)the claimant be awarded costs up to the date on which the relevant period expired; and

(b)the offeree do pay the offeror's costs for the period from the date of expiry of the relevant period to the date of acceptance.

(6) In considering whether it would be unjust to make the orders specified in paragraph (5), the court must take into account all the circumstances of the case including the matters listed in rule 36.17(5).

(7) The claimant's costs include any costs incurred in dealing with the defendant's counterclaim if the Part 36 offer states that it takes it into account.

50. Rule 36.14 deals with some procedural consequences:

Other effects of acceptance of a Part 36 offer

36.14.—(1) If a Part 36 offer is accepted, the claim will be stayed.

(2) In the case of acceptance of a Part 36 offer which relates to the whole claim, the stay will be upon the terms of the offer.

(3) If a Part 36 offer which relates to part only of the claim is accepted, the claim will be stayed as to that part upon the terms of the offer.

(4) If the approval of the court is required before a settlement can be binding, any stay which would otherwise arise on the acceptance of a Part 36 offer will take effect only when that approval has been given.

(5) Any stay arising under this rule will not affect the power of the court—

(a)to enforce the terms of a Part 36 offer; or

(b)to deal with any question of costs (including interest on costs) relating to the proceedings.

(6) Unless the parties agree otherwise in writing, where a Part 36 offer that is or includes an offer to pay or accept a single sum of money is accepted, that sum must be paid to the claimant within 14 days of the date of—

(a)acceptance; or

(b)the order when the court makes an order under rule 41.2 (order for an award of provisional damages) or rule 41.8 (order for an award of periodical payments), unless the court orders otherwise.

(7) If such sum is not paid within 14 days of acceptance of the offer, or such other period as has been agreed, the claimant may enter judgment for the unpaid sum.

(8) Where—

(a)a Part 36 offer (or part of a Part 36 offer) which is not an offer to which paragraph (6) applies is accepted; and

(b)a party alleges that the other party has not honoured the terms of the offer,

that party may apply to enforce the terms of the offer without the need for a new claim.

51. One of the problems of part 36 is the fact that there can be quite a division between the way damages are calculated and the way that costs are recoverable: in particular in multiple defendant cases, a defendant who makes an offer needs to be clear that if accepted, it is likely to trigger a liability to pay common costs, as well as the costs of individually pursing that defendant. Of course, the starting point is to be clear, whether the claim that is being pursued is against joint or several tortfeasors:

Acceptance of a Part 36 offer made by one or more, but not all, defendants

36.15.—(1) This rule applies where the claimant wishes to accept a Part 36 offer made by one or more, but not all, of a number of defendants.

(2) If the defendants are sued jointly or in the alternative, the claimant may accept the offer if—

(a)the claimant discontinues the claim against those defendants who have not made the offer; and

(b)those defendants give written consent to the acceptance of the offer.

(3) If the claimant alleges that the defendants have a several liability(GL) to the claimant, the claimant may—

(a)accept the offer; and

(b)continue with the claims against the other defendants if entitled to do so.

(4) In all other cases the claimant must apply to the court for permission to accept the Part 36 offer.

52. Rule 36.16 has potential application in any split trial situation: liability/quantum or limitation.

UNACCEPTED OFFERS

Restriction on disclosure of a Part 36 offer

36.16.—(1) A Part 36 offer will be treated as "without prejudice except as to costs".

(2) The fact that a Part 36 offer has been made and the terms of such offer must not be communicated to the trial judge until the case has been decided.

(3) Paragraph (2) does not apply—

(a)where the defence of tender before claim has been raised;

(b)where the proceedings have been stayed under rule 36.14 following acceptance of a Part 36 offer;

(c)where the offeror and the offeree agree in writing that it should not apply; or

(d)where, although the case has not been decided—

(i)any part of, or issue in, the case has been decided; and

(ii)the Part 36 offer relates only to parts or issues that have been decided.

(4) In a case to which paragraph (3)(d)(i) applies, the trial judge—

(a)may be told whether or not there are Part 36 offers other than those referred to in paragraph (3)(d)(ii); but

(b)must not be told the terms of any such other offers unless any of paragraphs (3)(a) to (c) applies.

53. The consequences of a part 36 offer being beaten, have been tidied up. It should be noted, that defendants have improved their position, by being entitled to interest on their costs, the claimants position has worsened, through the capping of all interest at 10% above base rate, and there is scope on a split liability trial, to get an additional amount in respect of costs, by an appropriately worded offer. There is of course scope within the rules for a

conflict of interest, as the additional amount can only be awarded once: what would you rather have: more damages or more costs?

Costs consequences following judgment

36.17.—(1) Subject to rule 36.21, this rule applies where upon judgment being entered—

(a)a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer; or

(b)judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer.

(Rule 36.21 makes provision for the costs consequences following judgment in certain personal injury claims where the claim no longer proceeds under the RTA or EL/PL Protocol.)

(2) For the purposes of paragraph (1), in relation to any money claim or money element of a claim, "more advantageous" means better in money terms by any amount, however small, and "at least as advantageous" shall be construed accordingly.

(3) Subject to paragraphs (7) and (8), where paragraph (1)(a) applies, the court must, unless it considers it unjust to do so, order that the defendant is entitled to—

(a)costs (including any recoverable pre-action costs) from the date on which the relevant period expired; and

(b)interest on those costs.

(4) Subject to paragraph (7), where paragraph (1)(b) applies, the court must, unless it considers it unjust to do so, order that the claimant is entitled to—

(a)interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;

(b)costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;

(c)interest on those costs at a rate not exceeding 10% above base rate; and

(d)provided that the case has been decided and there has not been a previous order under this sub-paragraph, an additional amount, which shall not exceed £75,000, calculated by applying the prescribed percentage set out below to an amount which is—

(i)the sum awarded to the claimant by the court; or

(ii)where there is no monetary award, the sum awarded to the claimant by the court in respect of costs—

Amount awarded by the court	Prescribed percentage
Up to £500,000	10% of the amount awarded
Above £500,000	10% of the first £500,000 and (subject to the limit of £75,000) 5% of any amount above that figure.

(5) In considering whether it would be unjust to make the orders referred to in paragraphs (3) and (4), the court must take into account all the circumstances of the case including—

(a)the terms of any Part 36 offer;

(b)the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;

(c)the information available to the parties at the time when the Part 36 offer was made;

(d)the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and

(e)whether the offer was a genuine attempt to settle the proceedings.

(6) Where the court awards interest under this rule and also awards interest on the same sum and for the same period under any other power, the total rate of interest must not exceed 10% above base rate.

(7) Paragraphs (3) and (4) do not apply to a Part 36 offer—

(a)which has been withdrawn;

(b)which has been changed so that its terms are less advantageous to the offeree where the offeree has beaten the less advantageous offer;

(c)made less than 21 days before trial, unless the court has abridged the relevant period.

(8) Paragraph (3) does not apply to a soft tissue injury claim to which rule 36.21 applies.

(Rule 44.2 requires the court to consider an offer to settle that does not have the costs consequences set out in this Section in deciding what order to make about costs.)

54. Perhaps unsurprisingly, rules for personal injury claims have continued to have their own niche, starting with periodical payments:

PERSONAL INJURY CLAIMS

Personal injury claims for future pecuniary loss

36.18.—(1) This rule applies to a claim for damages for personal injury which is or includes a claim for future pecuniary loss.

(2) An offer to settle such a claim will not have the consequences set out in this Section unless it is made by way of a Part 36 offer under this rule.

(3) A Part 36 offer to which this rule applies may contain an offer to pay, or an offer to accept—

(a)the whole or part of the damages for future pecuniary loss in the form of—

(i)a lump sum;

(ii)periodical payments; or

(iii)both a lump sum and periodical payments;

(b)the whole or part of any other damages in the form of a lump sum.

(4) A Part 36 offer to which this rule applies—

(a)must state the amount of any offer to pay or to accept the whole or part of any damages in the form of a lump sum;

(b)may state—

(i)what part of the lump sum, if any, relates to damages for future pecuniary loss; and

(ii)what part relates to other damages to be paid or accepted in the form of a lump sum;

(c)must state what part of the offer relates to damages for future pecuniary loss to be paid or accepted in the form of periodical payments and must specify—

(i)the amount and duration of the periodical payments;

(ii)the amount of any payments for substantial capital purchases and when they are to be made; and

(iii)that each amount is to vary by reference to the retail prices index (or to some other named index, or that it is not to vary by reference to any index); and

(d)must state either that any damages which take the form of periodical payments will be funded in a way which ensures that the continuity of payments is reasonably secure in accordance with section 2(4) of the Damages Act 1996(4) or how such damages are to be paid and how the continuity of their payment is to be secured.

(5) Rule 36.6 applies to the extent that a Part 36 offer by a defendant under this rule includes an offer to pay all or part of any damages in the form of a lump sum.

(6) Where the offeror makes a Part 36 offer to which this rule applies and which offers to pay or to accept damages in the form of both a lump sum and periodical payments, the offeree may only give notice of acceptance of the offer as a whole.

(7) If the offeree accepts a Part 36 offer which includes payment of any part of the damages in the form of periodical payments, the claimant must, within 7 days of the date of acceptance, apply to the court for an order for an award of damages in the form of periodical payments under rule 41.8.

(Practice Direction 41B contains information about periodical payments under the Damages Act 1996.)

55. Rule 36.19 deals with provisional damages:

Offer to settle a claim for provisional damages

36.19.—(1) An offeror may make a Part 36 offer in respect of a claim which includes a claim for provisional damages.

(2) Where the offeror does so, the Part 36 offer must specify whether or not the offeror is proposing that the settlement shall include an award of provisional damages.

(3) Where the offeror is offering to agree to the making of an award of provisional damages, the Part 36 offer must also state—

(a)that the sum offered is in satisfaction of the claim for damages on the assumption that the injured person will not develop the disease or suffer the type of deterioration specified in the offer;

(b)that the offer is subject to the condition that the claimant must make any claim for further damages within a limited period; and

(c)what that period is.

(4) Rule 36.6 applies to the extent that a Part 36 offer by a defendant includes an offer to agree to the making of an award of provisional damages.

(5) If the offeree accepts the Part 36 offer, the claimant must, within 7 days of the date of acceptance, apply to the court for an award of provisional damages under rule 41.2.

56. The rules then move on to consider the various Portal schemes and those cases which drop out:

Costs consequences of acceptance of a Part 36 offer where Section IIIA of Part 45 applies

36.20.—(1) This rule applies where a claim no longer continues under the RTA or EL/PL Protocol pursuant to rule 45.29A(1).

(2) Where a Part 36 offer is accepted within the relevant period, the claimant is entitled to the fixed costs in Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 for the stage applicable at the date on which notice of acceptance was served on the offeror.

(3) Where—

(a)a defendant's Part 36 offer relates to part only of the claim; and

(b)at the time of serving notice of acceptance within the relevant period the claimant abandons the balance of the claim,

the claimant will be entitled to the fixed costs in paragraph (2).

(4) Subject to paragraphs (5), (6) and (7), where a defendant's Part 36 offer is accepted after the relevant period—

(a)the claimant will be entitled to the fixed costs in Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 for the stage applicable at the date on which the relevant period expired; and

(b)the claimant will be liable for the defendant's costs for the period from the date of expiry of the relevant period to the date of acceptance.

(5) Subject to paragraphs (6) and (7), where the claimant accepts the defendant's Protocol offer after the date on which the claim leaves the Protocol—

(a)the claimant will be entitled to the applicable Stage 1 and Stage 2 fixed costs in Table 6 or Table 6A in Section III of Part 45; and

(b)the claimant will be liable for the defendant's costs from the date on which the Protocol offer is deemed to have been made to the date of acceptance.

(6) In a soft tissue injury claim, if the defendant makes a Part 36 offer before the defendant receives a fixed cost medical report, paragraphs (4) and (5) will only have effect if the claimant accepts the offer more than 21 days after the defendant received the report.

(7) In this rule, "fixed cost medical report" and "soft tissue injury claim" have the same meaning as in paragraph 1.1(10A) and (16A) respectively of the RTA Protocol.

(8) For the purposes of this rule a defendant's Protocol offer is either—

(a)defined in accordance with rules 36.25 and 36.26; or

(b)if the claim leaves the Protocol before the Court Proceedings Pack Form is sent to the defendant—

(i)the last offer made by the defendant before the claim leaves the Protocol; and

(ii)deemed to be made on the first business day after the claim leaves the Protocol.

(9) A reference to—

(a)the "Court Proceedings Pack Form" is a reference to the form used in the Protocol; and

(b)"business day" is a reference to a business day as defined in rule 6.2.

(10) Fixed costs shall be calculated by reference to the amount of the offer which is accepted.

(11) Where the parties do not agree the liability for costs, the court must make an order as to costs.

(12) Where the court makes an order for costs in favour of the defendant—

(a)the court must have regard to; and

(b)the amount of costs ordered must not exceed,

the fixed costs in Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 applicable at the date of acceptance, less the fixed costs to which the claimant is entitled under paragraph (4) or (5).

(13) The parties are entitled to disbursements allowed in accordance with rule 45.29I incurred in any period for which costs are payable to them.

57. Rule 36.21 deals with the drop out cases which proceed to judgment:

Costs consequences following judgment where section IIIA of Part 45 applies

36.21.—(1) Where a claim no longer continues under the RTA or EL/PL Protocol pursuant to rule 45.29A(1), rule 36.17 applies with the following modifications.

(2) Subject to paragraphs (3), (4) and (5), where an order for costs is made pursuant to rule 36.17(3)—

(a)the claimant will be entitled to the fixed costs in Table 6B, 6C or 6D in Section IIIA of Part 45 for the stage applicable at the date on which the relevant period expired; and

(b)the claimant will be liable for the defendant's costs from the date on which the relevant period expired to the date of judgment.

(3) Subject to paragraphs (4) and (5), where the claimant fails to obtain a judgment more advantageous than the defendant's Protocol offer—

(a)the claimant will be entitled to the applicable Stage 1 and Stage 2 fixed costs in Table 6 or 6A in Section III of Part 45; and

(b)the claimant will be liable for the defendant's costs from the date on which the Protocol offer is deemed to be made to the date of judgment; and

(c)in this rule, the amount of the judgment is less than the Protocol offer where the judgment is less than the offer once deductible amounts identified in the judgment are deducted.

("Deductible amount" is defined in rule 36.22(1)(d).)

(4) In a soft tissue injury claim, if the defendant makes a Part 36 offer or Protocol offer before the defendant receives a fixed cost medical report, paragraphs (2) and (3) will only have effect in respect of costs incurred by either party more than 21 days after the defendant received the report.

(5) In this rule "fixed cost medical report" and "soft tissue injury claim" have the same meaning as in paragraph 1.1(10A) and (16A) respectively of the RTA Protocol.

(6) For the purposes of this rule a defendant's Protocol offer is either—

(a)defined in accordance with rules 36.25 and 36.26; or

(b)if the claim leaves the Protocol before the Court Proceedings Pack Form is sent to the defendant—

(i)the last offer made by the defendant before the claim leaves the Protocol; and

(ii)deemed to be made on the first business day after the claim leaves the Protocol.

(7) A reference to—

(a)the "Court Proceedings Pack Form" is a reference to the form used in the Protocol; and

(b)"business day" is a reference to a business day as defined in rule 6.2.

(8) Fixed costs must be calculated by reference to the amount which is awarded.

(9) Where the court makes an order for costs in favour of the defendant—

(a)the court must have regard to; and

(b)the amount of costs ordered shall not exceed,

the fixed costs in Table 6B, 6C or 6D in Section IIIA of Part 45 applicable at the date of judgment, less the fixed costs to which the claimant is entitled under paragraph (2) or (3).

(10) The parties are entitled to disbursements allowed in accordance with rule 45.29I incurred in any period for which costs are payable to them.

58. CRU provisions are found in rule 36.22

Deduction of benefits and lump sum payments

36.22.—(1) In this rule and rule 36.11—

(a)"the 1997 Act" means the Social Security (Recovery of Benefits) Act 1997(5);

(b)"the 2008 Regulations" means the Social Security (Recovery of Benefits)(Lump Sum Payments) Regulations 2008(6);

(c)"recoverable amount" means—

(i)"recoverable benefits" as defined in section 1(4)(c) of the 1997 Act; and

(ii)"recoverable lump sum payments" as defined in regulation 1 of the 2008 Regulations;

(d)"deductible amount" means—

(i)any benefits by the amount of which damages are to be reduced in accordance with section 8 of, and Schedule 2 to the 1997 Act(7) ("deductible benefits"); and

(ii)any lump sum payment by the amount of which damages are to be reduced in accordance with regulation 12 of the 2008 Regulations ("deductible lump sum payments"); and

(e)"certificate"—

(i)in relation to recoverable benefits, is construed in accordance with the provisions of the 1997 Act; and

(ii)in relation to recoverable lump sum payments, has the meaning given in section 29 of the 1997 Act, as applied by regulation 2 of, and modified by Schedule 1 to, the 2008 Regulations.

(2) This rule applies where a payment to a claimant following acceptance of a Part 36 offer would be a compensation payment as defined in section 1(4)(b) or 1A(5)(b)(8) of the 1997 Act.

(3) A defendant who makes a Part 36 offer must, where relevant, state either—

(a)that the offer is made without regard to any liability for recoverable amounts; or

(b)that it is intended to include any deductible amounts.

(4) Where paragraph (3)(b) applies, paragraphs (5) to (9) will apply to the Part 36 offer.

(5) Before making the Part 36 offer, the offeror must apply for a certificate.

(6) Subject to paragraph (7), the Part 36 offer must state—

(a)the gross amount of compensation;

(b)the name and amount of any deductible amounts by which the gross amount is reduced; and

(c)the net amount of compensation.

(7) If at the time the offeror makes the Part 36 offer, the offeror has applied for, but has not received, a certificate, the offeror must clarify the offer by stating the matters referred to in paragraph (6)(b) and (c) not more than 7 days after receipt of the certificate.

(8) For the purposes of rule 36.17(1)(a), a claimant fails to recover more than any sum offered (including a lump sum offered under rule 36.6) if the claimant fails upon judgment being entered to recover a sum, once deductible amounts identified in the judgment have been deducted, greater than the net amount stated under paragraph (6)(c).

(Section 15(2) of the 1997 Act provides that the court must specify the compensation payment attributable to each head of damage. Schedule 1 to the 2008 Regulations modifies section 15 of the 1997 Act in relation to lump sum payments and provides that the court must specify the compensation

payment attributable to each or any dependant who has received a lump sum payment.)

(9) Where—

(a)further deductible amounts have accrued since the Part 36 offer was made; and

(b)the court gives permission to accept the Part 36 offer,

the court may direct that the amount of the offer payable to the offeree shall be reduced by a sum equivalent to the deductible amounts paid to the claimant since the date of the offer.

(Rule 36.11(3)(b) states that permission is required to accept an offer where the relevant period has expired and further deductible amounts have been paid to the claimant.)

59. Some new provisions are tucked away under the heading of miscellaneous, dealing for example with the "Mitchell" problem.

MISCELLANEOUS

Cases in which the offeror's costs have been limited to court fees

36.23.—(1) This rule applies in any case where the offeror is treated as having filed a costs budget limited to applicable court fees, or is otherwise limited in their recovery of costs to such fees.

(Rule 3.14 provides that a litigant may be treated as having filed a budget limited to court fees for failure to file a budget.)

(2) "Costs" in rules 36.13(5)(b), 36.17(3)(a) and 36.17(4)(b) shall mean—

(a)in respect of those costs subject to any such limitation, 50% of the costs assessed without reference to the limitation; together with

(b)any other recoverable costs.

60. Section II is devoted to the cases dealt with under the Protocols and in the Portals:

SECTION II RTA Protocol and EL/PL Protocol Offers to Settle

Scope of this Section

36.24.—(1) Where this Section applies, Section I does not apply.

(2) This Section applies to an offer to settle where the parties have followed the RTA Protocol or the EL/PL Protocol and started proceedings under Part 8 in accordance with Practice Direction 8B ("the Stage 3 Procedure").

(3) A reference to the Court Proceedings Pack Form is a reference to the form used in the relevant Protocol.

(4) Nothing in this Section prevents a party making an offer to settle in whatever way that party chooses, but if the offer is not made in accordance with this Section, it will not have any costs consequences.

Form and content of a Protocol offer

36.25.—(1) An offer to settle which is made in accordance with this rule is called a Protocol offer.

(2) A Protocol offer must—

(a)be set out in the Court Proceedings Pack (Part B) Form; and

(b)contain the final total amount of the offers from both parties.

Time when a Protocol offer is made

36.26.—(1) The Protocol offer is deemed to be made on the first business day after the Court Proceedings Pack (Part A and Part B) Form is sent to the defendant.

(2) In this Section "business day" has the same meaning as in rule 6.2.

General provisions

36.27. A Protocol offer—

(a)is treated as exclusive of all interest; and

(b)has the consequences set out in this Section only in relation to the fixed costs of the Stage 3 Procedure as provided for in rule 45.18, and not in relation to the costs of any appeal from the final decision of those proceedings.

Restrictions on the disclosure of a Protocol offer

36.28.—(1) The amount of the Protocol offer must not be communicated to the court until the claim is determined.

(2) Any other offer to settle must not be communicated to the court at all.

Costs consequences following judgment

36.29.—(1) This rule applies where, on any determination by the court, the claimant obtains judgment against the defendant for an amount of damages that is—

(a)less than or equal to the amount of the defendant's Protocol offer;

(b)more than the defendant's Protocol offer but less than the claimant's Protocol offer; or

(c)equal to or more than the claimant's Protocol offer.

(2) Where paragraph (1)(a) applies, the court must order the claimant to pay—

(a)the fixed costs in rule 45.26; and

(b)interest on those fixed costs from the first business day after the deemed date of the Protocol offer under rule 36.26.

(3) Where paragraph (1)(b) applies, the court must order the defendant to pay the fixed costs in rule 45.20.

(4) Where paragraph (1)(c) applies, the court must order the defendant to pay—

(a)interest on the whole of the damages awarded at a rate not exceeding 10% above base rate for some or all of the period starting with the date specified in rule 36.26;

(b)the fixed costs in rule 45.20;

(c)interest on those fixed costs at a rate not exceeding 10% above base rate; and

(d)an additional amount calculated in accordance with rule 36.17(4)(d).

Deduction of benefits

36.30. For the purposes of rule 36.29(1)(a) the amount of the judgment is less than the Protocol offer where the judgment is less than that offer once deductible amounts identified in the judgment are deducted.

("Deductible amount" is defined in rule 36.22(1)(d).)"

Portal problems

61. I now turn to consider some particular issues which have arisen in relation to the RTA Portal scheme and which might yet generate some appellate case law over the next year or two.

Exiting the Portal

62. Sometimes cases "fall out" of the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents, as they are withdrawn by claimants solicitors who contend that the insurers are raising complex issues of law and fact.

63. From what I have seen, these issues typically arise in the context of a claim for credit hire, where there is a substantial claim for "vehicle related" damages. This raises in turn interesting questions as to whether credit hire claims should be pursued within the Portal or whether insurers can effectively ask for them to be excluded, and then litigated on the Small Claims track. To what extent can a claim be divided in this way to facilitate costs saving on the part of the insurers?

64. When a claim is taken out of the Protocol, the insurers will usually contend that the claimant has acted unreasonably and that the costs of any part 7 proceedings should be irrecoverable and the claimant limited to those elements of costs prescribed by the Protocol. How does the court adjudicate on these competing arguments and with what criteria?

65. The relevant rule is 45.24. In essence the Appellant must be judged to have acted unreasonably in withdrawing the claim from the MOJ Portal. Reasonableness connotes a spectrum of conduct/available decisions open to a party. Provided the decision to withdraw the claim was within that spectrum, the decision will be reasonable.

66. The key to resolving this issue is to consider the scope of the Protocol and the sort of dispute that it envisages can be properly conducted within its constraints, both procedurally and in terms of costs.

67. As a general proposition a dispute which requires disclosure, cross examination, a forensic enquiry into the issues, and the expenditure of costs to properly investigate and litigate the case is a case which is suited for the part 7 procedure, rather than the part 8 procedure leading to a stage 3 hearing as contemplated by the Protocol.

68. Similarly a dispute which requires substantial work by solicitors to gather evidence or deal with disputes of fact or legal argument, and the expenditure

of legal costs, in sums which exceed by some margin the limited costs contemplated by the Protocol would fall outside its scope.

69. Looking at the "old" Protocol, for simplicity's sake, per paragraph 1.1(6) of the Protocol, vehicle related damages includes damages for PAV and hire. Per paragraph 4.3 of the Protocol:

A claim may include vehicle related damages but these are excluded for the purposes of valuing the claim under paragraph 4.1

70. See also paragraph 6.4: the claim for vehicle related damages may be dealt with by a third party, or it may be dealt with by the legal representative named in the CNF. It is important to note what are vehicle related damages: they include elements of credit hire damages. The reference within the Protocol to industry agreements, is a reference to the ABI GTA initiative, where subscribing insurers and claims handling organisations (credit hire companies) have agreed a tariff for the settlement of claims: see more generally the ABI GENERAL TERMS OF AGREEMENT (GTA) BETWEEN SUBSCRIBING INSURERS (Insurers) AND CREDIT HIRE ORGANISATIONS (CHOs).

71. However, if the insurer in a case, or the credit hire company is not a party to this agreement, then the Agreement has no application. It is not the case that claims involving elements of credit hire are otherwise to be "hived off" from a claim on a general basis. The claimant is entitled to include such a head of loss within the CNF.

72. Paragraph 7.26 provides that a stage 2 settlement pack must be sent to the defendant's insurer which includes evidence of pecuniary losses. There then follows scope for a series of offers/counter offers. It is important to note that in context, this will include such things as receipts, invoices and similar

"proof". This is material that simply provides confirmation of loss and a basis for valuation of the claim. The newer version of the Protocol (see paragraph 7.11) which contemplates service of witness statements, to value the claim.

73. It is not meant to encompass relevant material which might fall within the scope of standard disclosure, eg bank statements, or contentious witness statements which would form the basis for evidence in chief and cross examination at a contested trial. Had it been so contemplated then no doubt, that could have been included in this version of the Protocol. Detailed issues of mitigation, and arguments on evidence for example are not contemplated in this procedure.

74. There is no scope for the insurer to serve evidence contra the claimant's evidence. There is no provision for a forensic trial of strength at stage 3. As contemplated by the Protocol, stage 3 disputes can be "paper" exercises, where parties who disagree on a valuation, can seek the court's judgment.

75. However the claim may leave the Portal, if the requirements of paragraph 7.67 (latterly 7.76) are met:

Where the claimant gives notice to the defendant that the claim is unsuitable for this Protocol (for example, because there are complex issues of fact or law in relation to the vehicle related damages) then the claim will no longer continue under this Protocol. However, where the court considers that the claimant acted unreasonably in giving such notice it will award no more than the fixed costs in rule 45.29.

76. Complex is not an absolute term, but a relative concept. Some cases are more complex than others. The word "complex" must be read in context: complex must mean of sufficient complexity to make it unsuitable for

resolution with the Protocol, if necessary by a stage 3 hearing. It does not require that a case break new ground or establish some new legal principle or require a 3 day time estimate, for it to fall without the quick and cheap Protocol process.

77. It is also noteworthy that the example given as to why a claim may exit the Protocol, is because of issues of fact or law making it more complex. Credit hire claims often require disclosure of a claimant's financial circumstances, bank statements and the like, rates evidence and cross examination.

78. A severely restrictive approach is taken to evidence in Practice Direction 8B. See in particular 6.4, 7.1 and 8.2 and 11.3. In brief, an insurer cannot file evidence. If the claimant wishes to put in additional evidence per paragraph 7.2, the case will continue as a part 7 claim.

79. So the key in any case is whether the insurer has raised issues of fact or law of sufficient complexity to justify the case being taken out of the Protocol procedure. In this context complexity of law and fact means a degree of complexity greater than that suitable for resolution within a stage 3 hearing. It is necessary to consider which issues are properly capable of resolution within stage 3 and which consequently are not.

80. Insurers benefit from the Protocol, as if they promptly admit liability and make sensible offers, even if the case goes to a stage 3 hearing, their liability for costs is capped at the fixed costs prescribed by part 45. Equally, however, insurers are sometimes keen to investigate and defend claims, to challenge causation and quantum or to put forward alternative evidence: but in so doing they are taking the case beyond the very limited scope of the Protocol, and the scope of a stage 3 hearing.

81. There is a plain tension between settling claims cheaply and speedily and embarking on a forensic investigation, at greater length and greater cost. Accordingly, it is not possible for an insurer to have his cake and eat it: they can accept the evidence put forward in the Portal and then argue for a different valuation to that contended for by the claimant at a stage 3 hearing.

82. If however they dispute the evidential foundation, raise issues of credibility or wish to rely on their own evidence, then the matter goes beyond the scope of stage 3. It should be noted that a claimant (or any potential witness) does not need to attend a stage 3 hearing.

83. What is not permissible, is to seek to enlarge the scope of the Protocol, so that disputes which are properly disputes apt to fall within part 7 are shoehorned into stage 3, so that the insurer can mount a forensic challenge risk free as to costs. In such a scenario, the exception of the Portal scheme subsumes the norm of county court proceedings and the insurer through its conduct will be able to practically mount the sort of defence best dealt with, in a part 7 claim at the claimant's cost.

84. So insurers who serve part 18 requests, or ask for disclosure of bank statements or put forward alternative rates evidence within the Protocol, are raising matters which cannot be dealt within the Protocol and which would justify a case being removed from it.

85. Accordingly, any case must be carefully evaluated to determine whether it should be quickly settled, or the risk taken that a forensic investigation will cause a case to exit the Portal with any potential savings on damages dwarfed by a bill for part 7 costs.

Admissions on the Portal

86. One of the other issues that remains up in the air, is the nature of an admission made under the Protocol, through the MOJ Portal. Many road traffic accident claims will involve both parties suffering both insured and uninsured losses: commonly negotiations between the parties, their respective solicitors and insurers will run in parallel, dealing with the various claims and counterclaims.

87. If proceedings are necessary, claim and counterclaim can be made, either settled in isolation in whole or in part and those elements which are left outstanding go to trial. Such a case is daily bread for the junior barrister in the first years of practice. However what happens when an insurer and insured fall out?

88. Or simply do not communicate with each other, so that an insurer wishing to make an economic settlement of a claim intimated through the MOJ Portal admits liability. Is such an admission binding on the insurer's policy holder who may otherwise wish to pursue a claim for uninsured losses, eg personal injuries but who would be precluded from doing so by the admission?

89. Although this scenario concerns the consideration of the status of an admission made within the context of the RTA Protocol rather than a settlement, the issues raised are not new and have arisen in the past where either an insured or insurer has acted to prejudice the interests of the other through an ill-informed settlement. For a general survey see **Foskett on The Law and Practice of Compromise 7th edition** per chapter 22.

90. The scenario of an admission requires consideration of similar issues: namely what has actually been admitted/settled and did the maker of the

admission, the insurance company, have actual/ostensible authority to make the admission in question?

91. The starting point is to note that a motorist is required by law to have third party liability insurance when using a motor vehicle on the road. The Road Traffic Act 1988 establishes the scheme of compulsory insurance. The motorist accordingly by law has to effect a contract of insurance with an insurance company.

92. Whatever the scope of the indemnity of such insurance as the motorist may carry, which might be third party, third party fire and theft, or comprehensive insurance such insurance will not provide an indemnity for all the losses the motorist might potentially suffer. A motorist might incur uninsured losses most obviously personal injury, special damages consequent on the personal injury, general damages for loss of use of his motor vehicle and if he mitigates his loss by hiring a replacement vehicle, damages for hire.

93. The insurance company is thus concerned to have rights of control of the proceedings under the contract of insurance in respect of it's own liability it indemnify a third party. It has no interest in the uninsured losses, being neither required to pay for them, nor to pay for legal costs in pursing recovery of them.

94. The insurance company is also concerned, as is the insurance industry generally, to deal with those claims it is concerned with as cheaply and as efficiently as possible. It is also well known that insurance companies may settle cases for all sorts of reasons: on the merits, and for economic reasons.

95. The scheme set up under the MOJ Portal and encapsulated in the **Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents**, is thus primarily for Claimants to pursue their uninsured losses through a cheap and quick procedure, and for insurance companies to be able to settle their liabilities accordingly. The scheme is wholly different to an action in the civil courts, which might involve claim and counterclaim, issues of causation and quantum, evidence and fact finding.

96. Accordingly, it might be thought to be a surprising result if as a by blow of the Pre-Action Protocol an admission by an insurer concerned to agree and settle its liability could bind it's insured in respect of his own personal injury claim, which is not insured by the insurer, not indemnified by the insurer, not of interest to the insurer, and which cannot be raised within the Portal by the insurer. Equally it would be surprising if, an insurer wanting to make an economic settlement of a low value claim, to preserve its' insured position must deny liability and lose the benefits of a resolution within the Portal.

97. In fact some might argue that consideration of the Protocol indicates that this is not the case. Construction of the provisions of the Protocol, indicate that an admission made within the Portal is intended to bind the insurer's interest, not the insured's personal claim and any admission made must be construed to relate to only to the claim made against the insured and indemnified by his insurance company (a narrow construction) and not in respect of the insured's own personal claim (a wide construction).

98. It is noted that insurance companies often rely on the case of **Ullah.v.Jon** decided by a District Judge in the Croydon County Court to argue that an admission of liability made by a Claimant's insurer binds the Claimant personally: but that decision is not binding and could be argued to be wrong in any event.

99. The Protocol is made under a Practice Direction. Practice Directions are made under the Civil Procedure Act 1997 and the Constitutional Reform Act 2005. Although not delegated legislation made by statutory instrument, it is likely that the general canons of statutory construction will apply to construction of the Protocol: namely that it must be construed in a purposive way and that the purpose is to be given effect by a literal construction.

100. The aims and thus the purpose of the Protocol are expressly set out in paragraph 3.1:

3.1 *The aim of this Protocol is to ensure that—*

(1) the defendant pays damages and costs using the process set out in the Protocol without the need for the claimant to start proceedings;

(2) damages are paid within a reasonable time; and

(3) the claimant's legal representative receives the fixed costs at each appropriate stage.

101. Looking at the Protocol's definitions:

1.1 *In this Protocol—*

(1) 'admission of liability' means the defendant admits that—

(a) the accident occurred;

(b) the accident was caused by the defendant's breach of duty;

(c) the defendant caused some loss to the claimant, the nature and extent of which is not admitted; and

(d) the defendant has no accrued defence to the claim under the Limitation Act 1980;

102. However this has to be read with:

(10) 'defendant' means the insurer of the person who is subject to the claim under this Protocol, unless the context indicates that it means—

(a) the person who is subject to the claim;

(b) the defendant's legal representative;

(c) the Motor Insurers' Bureau ('MIB'); or

(d) a person falling within the exceptions in section 144 of the Road Traffic Act 1988 (a "self-insurer");

103. Thus according to the definition, the Protocol seems directed not at the insured personally, but at the insurance company standing behind him. The admission made by the defendant, is made by the insurance company which has to settle the claim accepted. It could be said that it has nothing to do with uninsured losses or the defendant's personal claim (if any).

104. Secondly, this consideration is re-inforced by the forms used. Per paragraph 6.1

6.1 *The claimant must complete and send—*

(1) the CNF to the defendant's insurer; and

(2) the 'Defendant Only CNF' to the defendant by first class post, except where the defendant is a self-insurer in which case the CNF must be sent to the defendant as insurer and no 'Defendant Only CNF' is required.

6.2 *The 'Defendant Only CNF' must be sent at the same time or as soon as practicable after the CNF is sent.*

105. Perusal of the forms reveal that the Defendant Only CNF has no box for a response. It is provided for information only. There is no scope for the Defendant to engage personally in the process, which might be thought to be a pointer to the Protocol having nothing to do with the Defendant's personal claim, and any admission made within it, being limited to the Defendant's insurer's liability.

106. Thirdly, the response made is expressly enjoined to be by the insurer. The insurer has no facility to include within the response any intimation of a claim for its own insured's personal claim, though for the reasons above it would have no interest in doing so:

6.10 *The defendant must send to the claimant an electronic acknowledgment the next day after receipt of the CNF.*

6.11 *The defendant must complete the 'Insurer Response' section of the CNF ("the CNF response") and send it to the claimant within 15 days.*

107. Accordingly it is arguable that on a proper construction the admission made, is for the purposes of the Protocol only and limited to an admission in respect of the subject matter of the Protocol: the potential liability of the insurance company, which alone is bound by it.

108. Insurance companies stand behind the veil. They rely on the doctrine of subrogation, an ancient doctrine, being a fusion of legal and equitable concepts to preserve their interests when an insured event happens.

109. Subrogation is the right of an insurer to sue in an insured's name when it has provided an indemnity under a policy of insurance, to recover the loss under the policy from a wrongdoer. Subrogation can also encompass the right to claim from an insured, the fruits of any litigation the insured has undertaken to repay to the insurer sums it may have paid out under the policy.

110. The law of agency, deals with the insurer's rights to deal with third parties when negotiating settlements, and in particular the scope of their actual or ostensible authority to effect a settlement. Dealing with actual authority first, this has to be considered in a number of respects. First the contract of insurance in this scenario, will have given the insurance company authority to settle. But settle what? On general principles of contractual interpretation, the authority to deal with the subject matter of the contract (the right to an indemnity) must be dependent on what the insurer's obligations are under the terms of the contract.

111. If the indemnity had a limit of say, £1 million, an insurer purportedly making a settlement of £2 million, would be acting without actual authority in so doing. Whether the settlement was binding vis a vis a third party would hinge on issues of ostensible authority.

112. Accordingly, in this scenario, where the claim is for uninsured losses, the insurance company can have full authority to dispose of its interest under the indemnity, but by definition it cannot have any actual authority, grounded in the contract of insurance, to deal with claims or losses it is not indemnifying and which fall outside the scope of the contract.

113. Secondly, implied within the contract of insurance, will be a contractual term that the insurer will not exercise rights of subrogation to his prejudice: see **MacGillivray on Insurance Law 12th edition** at paragraph 23-059: in circumstances where the insurers by admitting liability and precluding the insured from bringing a claim for his own losses, are in breach of implied term,

they would plainly be acting without actual authority given to them by the contract.

114. In terms of ostensible authority, the general position is summarised in **Chitty on Contracts 31st edition at 31-057**. The court must consider all the circumstances to conclude whether ostensible authority can be found or not. This is inevitably a case specific, fact sensitive exercise.

115. All the above analysis, however, if rejected by a court, does not detract from a very simple point, that it is hard to see why in this scenario,the court should refuse permission to the Claimant to withdraw his admission. See generally the helpful checklist in the Practice Direction to part 14 set out below:

7.1 *An admission made under Part 14 may be withdrawn with the court's permission.*

7.2 *In deciding whether to give permission for an admission to be withdrawn, the court will have regard to all the circumstances of the case, including –*

(a) the grounds upon which the applicant seeks to withdraw the admission including whether or not new evidence has come to light which was not available at the time the admission was made;

(b) the conduct of the parties, including any conduct which led the party making the admission to do so;

(c) the prejudice that may be caused to any person if the admission is withdrawn;

(d) the prejudice that may be caused to any person if the application is refused;

(e) the stage in the proceedings at which the application to withdraw is made, in particular in relation to the date or period fixed for trial;

(f) the prospects of success (if the admission is withdrawn) of the claim or part of the claim in relation to which the offer was made; and

(g) the interests of the administration of justice

116. In a case where an admission is sought to be withdrawn at an early stage, and where there is no evidential prejudice, the case for withdrawal of an admission made by an insurer without express assent from a client and in breach of an implied term might be more straightforward to argue than other cases.