Hardwicke Building Espresso News

Hardwicke Building Injury Team

December 2007

Editorial

Hardwicke News

The Hardwicke Building Injury Team is thrilled that Hardwicke Building is recommended as a ***Leading Set*** within the field of Personal Injury in the latest edition of **The Legal 500**. **Dr Margaret Bloom, Emily Formby** and **Steven Weddle** continue to be recognised as ***"Leading Juniors"***.

Hardwicke Building is pleased to welcome **Mary Speculand** to the marketing team as marketing manager. Mary comes to us from Burges Salmon and, amongst other things, is responsible for ensuring that our seminars run smoothly.

Mary assisted with the team's **Damages Seminar** on 19 July 2007 which was a very pleasant way to obtain 4 CPD points. **Steven Weddle, Katrina McAteer, Emily Formby, Romilly Cummerson and Jamie Clarke** took the attendees at a brisk trot through recent developments and hot topics. Of particular interest was the practical guide to calculations involving the 8th Edition of the Ogden Tables.

The Injury Team would like to take this opportunity to congratulate **Paul Martenstyn** who recently completed the Chartered Institute of Marketing Certificate. Paul has been honing his skills with Hardwicke for the past four years and we are very proud to work with the first barrister's clerk to have achieved this success.

Useful Tip

As of 1 October 2007 fast track trial fees increased to:

- **£485** for claims under £3,000
- **£690** for claims between £3,000 - £10,000
- **£1,035** for claims more than £10,000.

The necessary amendments have been made to CPR 44.2 and CPR 44.3. It is worth remembering that the "value of the claim" determining the level of fast track trial costs differs depending on whether the party claiming the costs is the claimant or the defendant.

If the claimant is awarded fast track trial costs, the relevant value is the total amount of the judgment excluding interest and costs and any reduction made for contributory negligence.

However, if a defendant is awarded its trial costs, the value is based on the information contained in the statement of value on the claim form. If a fixed amount is being claimed then the value is that fixed amount. If a range is given such as "more than £5,000 but less than £15,000" then the value of the claim is the maximum amount which the claimant reasonably expected to recover according to the statement of value included in the claim form. If the claim form states that

the claimant cannot say how much he expects to recover, then the value is considered to be more than £10,000 and the defendant is entitled to the highest bracket of fees.

So, in a case where a fast track claim is worth £7,500 but was pleaded on the claim form as being worth "more than £5,000 but less than £15,000" the trial fee shown on the claimant's cost schedule should be £690 and on the defendant's cost schedule £1,035.

Full details of forthcoming events together with individual CVs of all team members can be viewed on the Injury Team section of our Hardwicke Building website.

In the meantime, if you would like copies of our Injury Team flier, details of our 2008 in-house seminar programme, or would like to add a name to our mailing list please contact Mary Speculand by email to mary.speculand@hardwicke.co.uk or by telephone on 020 7691 1844.

Case Law

Horse rider injured by rearing horse succeeds under the Animals Act 1971

W was riding the defendants' horse, along a road when it reared up and fell backwards on top of her, causing her to suffer a head injury. She brought her claim in negligence (which failed) and under s.2 of the Animals Act 1971 (which succeeded). The defendants appealed. The Court of Appeal upheld the judgment and dismissed the appeal. Although the judge found that damage was not likely to be caused by the horse, who was docile, he found that if damage was caused it was likely to be severe. This was due to the horse's characteristics, in particular a tendency to rear up in the circumstances when he did not want to go forward and did not have a confident rider on board. The first instance judge said that the defendants, who were experienced horse owners, would have known that their horse would act unpredictably or rear in certain circumstances. On appeal the Court of Appeal considered s.2(2)(b) and (c) in detail. It considered what could constitute normal/abnormal behaviour and reaffirmed that the relevant question was not whether that particular animal had acted like this before, but whether the behaviour was abnormal or normal in certain circumstances. There was expert evidence that it was normal for horses to rear in certain circumstances. Subsection (c) did not require specific knowledge by the owner that the animal had behaved in that way before. It was sufficient for the keeper to have knowledge that it was normal for animals of that species to behave in a certain way in certain circumstances. However contrast this decision with ***Clark v Bowlt*** [2006] where a differently constituted bench of the Court of Appeal took a different approach to interpreting the Animals Act.
Welsh v Stokes & Stokes [2007] EWCA Civ 796 reported at www.bailli.org and on Lawtel

Provisional damages award not appropriate where it was the prognosis, not the condition, which may deteriorate

The claimant applied for a provisional award of damages. She had been severely injured and needed a hip replacement operation. There was a 20% chance that after the operation she would be in the same or worse position due to developing an infection or palsy. The court found that if the operation did not improve her condition, this would not amount to a deterioration but rather a failure to make her condition better. Further, if she suffered a palsy or infection this would not amount to a serious deterioration in her *condition*, but rather deterioration in her *prognosis*. A final award of damages was made instead.
Garth v Grant & MIB [2007] QBD 25 May 2007 Lawtel

The presence of a gap at the end of a pontoon did not give rise to a reasonably foreseeable risk of injury that required a Defendant to take precautions

The claimant (C) was injured while she and her husband were attempting to moor their boat "Bully Boy" at the Defendant's (D) pontoon. C was standing on the pontoon while her husband was attempting to manoeuvre the boat. She put her foot through a gap at the end of the pontoon, fell, broke her leg and was left upside down with her head under water. C claimed that a surge had destabilised the pontoon and thrown her off balance. D, however, argued that C had been standing very close to the gap and had been dragged forward whilst attempting to pull in the boat using a rope. C's case was that her presence on the pontoon was reasonably foreseeable, that the gap should never have been there and that had it not been, the accident would not have occurred. She argued that had D carried out a risk assessment, the gap would have been deemed a risk and attended to. The court held that the initiating cause of the accident was C being pulled by the rope. The gap posed no increased risk of injury requiring steps to be taken to avoid such risk. It was small, easily visible and known by C to be there. Furthermore, it was structurally important as it served as a fender. D hadn't conducted a risk assessment but even if he had done he would have correctly decided not to fill in the gap. It had been foolish for C to go so close to the gap that, if thrown off balance, she was liable to step into it.

Parker v Levy [2007] QBD 20 July 2007 Lawtel

A railway station flower shop should have operated a proactive cleaning system in order to prevent passers by slipping on petals and water

The first defendant (L) ran a flower shop on a station concourse owned and operated by the second defendant railway company (C). The claimant (P) was injured when he slipped on flower petals and water on the concourse. P sued L arguing breach of a duty to stop petals and water accumulating and failure to operate a safe system of cleaning. L argued that it had operated a "clean as you go" system which involved cleaning up hazards if and when they came to his attention, and that it was unreasonable to expect more from a small florist. He also argued that, if there was a serious problem, C, as a large company with primary responsibility to station users, had responsibility for dealing with it. The court held that the nature of L's duty differed from that of an ordinary flower shop due to the large number of people that passed by the shop. There had to be some reasonably effective system for dealing with a slip hazard. (***Ward v Tesco Stores Ltd*** [1976] 1 WLR 810). A pro-active system was required and a reactive "clean as you go" system was inadequate, though on the facts it seemed that there had not even been a reactive system in place. C had placed contractual obligations on L and had previously warned L of the risk of injury through its staff. Therefore C was not in breach of duty. There was no contributory negligence.

Piccolo v Larkstock Limited & Others [2007] QBD 17 July 2007 Lawtel

The failure of an activity centre to comply with the Management of Health and Safety at Work Regulations 1999 provided evidence of a breach of a common law duty of care

The claimant (P) suffered spinal injuries while using a climbing wall at an activity centre run by the defendant trustees (T). The accident happened when P attempted a dangerous manoeuvre and fell onto a crash mat and suffered spinal injury. P argued that he would not have attempted such a manoeuvre outside in the natural world because he would not have had the security of a crash mat. In other words, the presence of the mat gave him a false sense of security that it would be safe to fall from the wall. He brought his claim in negligence and Occupiers' Liability. The court considered that it would not be fair, just and reasonable to impose a duty on T to assess P's abilities and then provide him with any necessary supervision and training. However, there was a duty to inform P that the mere presence of matting did not make it safe to fall from the wall. T admitted a failure to carry out an adequate risk assessment under the Management of Health and Safety at Work Regulations 1999. If a risk assessment had been carried out under the

Management Regulations, then the deficiency regarding warnings would have been revealed. Therefore, breach of the Regulations provided evidence for the knowledge that T should have had at the material time and of the breach of the common law duty of care. P was held 75% to blame for the accident as he had carried out a dangerous manoeuvre which he knew was well beyond his capabilities. His decision to do this was the immediate cause of his injury.
Poppleton v Portsmouth [2007] EWHC 1567 (QB)

A puddle of urine which made a workplace floor temporarily slippery was covered by the Workplace (Health, Safety and Welfare) Regulations 1992 reg.12(1) and reg.12(2)
The claimant (E) worked as a care assistant in a home for the elderly run by the respondent local authority (B). E was injured when she slipped in a pool of urine that had been left in the corridor by a resident. The majority of the residents were incontinent and there was urine on the floor at least several times a week. Furthermore, the surface of the floor was smooth, making it slippery when wet. E lost at first instance. She pleaded her case under the Workplace (Health, Safety and Welfare) Regulations 1992 reg.12, alleging that the floor was not suitable for its purpose. The judge dismissed the claim on the basis that the strict liability in reg.12 (1) and reg.12(2) related to the construction of the floor surface and not to a transient hazard. On appeal it was held that the trial judge had erred in failing to consider the circumstances of the floor's use, including circumstances that were temporary in nature providing they arose with a sufficient degree of frequency and regularity. The Regulations did not just cover permanent sates of slipperiness but could also include transient slipperiness in the circumstances. The floor was dangerous when wet and the presence of urine was a frequent and regular occurrence, making injury foreseeable. The urine was not easy to see, and employees would not always be able to concentrate on its possible presence. Taking all those factors into account, the floor was not suitable for the purpose for which it was used. Nevertheless, E's failure to heed warning signs that had been erected meant contributory negligence of one-third.
Ellis v Bristol City Council [2007] EWCA Civ 685

The Manual Handling Operations Regulations 1992 could not be construed so widely as to cover any manual moving of an object
In this Scottish case, H developed carpal tunnel syndrome. She claimed this was aggravated by her work as a chicken processor and sued her employer. Her case under the Manual Handling Operations Regulations 1992 was rejected at first instance. On viewing video evidence, the court concluded that the trussing of wings and legs of chicken carcasses did not constitute a manual handling operation. H appealed arguing that the expression in the Regulations "any transporting or supporting of a load" should be construed widely so that the moving of any object manually involved a manual handling operation. It was held that the meaning of manual handling proposed by H meant that every activity that was anything more than purely cerebral would be covered by the Regulations. This would be an absurd result. On appeal it was held that the lower court, applying common sense to the facts of the case, had been entitled to conclude that the operation in question did not constitute a manual handling operation.
Hughes v Grampian Country Food Group Ltd [2007] CSIH 32

The driver of a car who collided with a motor scooter after failing to "nose-poke" whilst turning right onto a main road, was not negligent in respect of personal injuries sustained by the rider of the scooter
The appellant (F) was driving his motor scooter on a main road with the intention of overtaking a refuse wagon travelling in the same direction. The wagon indicated that it intended to turn into a side road on its left and slowed down leaving a gap in the traffic. The respondent (B) exploited this gap by emerging from the same side road and turning right into the main road. He collided with the scooter as it overtook

the wagon. The judge dismissed F's claim holding that F's speed of 30mph had been reckless in the circumstances that he was overtaking a line of slow moving traffic. He held that B had been travelling continuously at a speed of 5 to 8mph. F appealed arguing that B should have "nose-poked" i.e. edged forward bit by bit, and that a 50:50 apportionment was appropriate. The Court of Appeal held that given the short distance between the offside of the wagon and the centre of the road it had not been unreasonable for B to move continuously and that nose-poking might even have created other problems, such as encouraging an oncoming motorcyclist into a hazardous swerve. F had driven recklessly and the judge had been entitled to find as he had. The court stressed that its decision was not authority for a general proposition that failure to nose-poke would not constitute negligence or that emerging from a minor road at 5 to 8mph was an acceptable manoeuvre.
Farley v Buckley [2007] EWCA Civ 403

An employee who suffered injuries after crashing his employer's van when he fell asleep at the wheel was found to be one third responsible for the accident
The appellant (C) suffered serious injuries when he lost control of the van that he was driving in the course of his employment. He was accompanied at the time by his manager. C had been awake for nineteen hours prior to the accident and had complained of feeling tired. He argued that his employer (D) was at fault in permitting him to drive. The judge rejected C's assertion that he couldn't remember the final part of the journey and used this as the basis for finding that the real cause of the accident was C sending text messages on his phone. D was found not liable. The Court of Appeal held that the judge had been wrong to reason that because C had not been entirely truthful it must have been C's use of his mobile phone that caused the accident. The judge should have weighed up all the relevant factors and various possibilities whilst treating C's evidence with caution. Such a process would have led to the finding that the accident had been caused by C falling asleep. There must have been some time, albeit a short time before the accident, when C realised that he was at risk of falling asleep. This, together with the fact that C had not been wearing a seat belt, led to a finding of 33 per cent contributory negligence.
Eyres v Atkinsons Kitchens & Bedrooms Ltd [2007] EWCA Civ 365

Court of Appeal warns about setting standards of care higher than what is reasonable: woman injured as a result of falling into maypole hole
The organisers of a village fete dug a hole in a village green in order to erect a maypole. The hole was later filled in with soil, stones and a bung by others. However, two years later it had become exposed and C, whilst crossing the green, put her foot into it and broke her leg. The Court of Appeal held that the trial judge had been wrong to find that C had a case against the organizers of the fete at all. The hole had only become exposed shortly before the accident, possibly by children, and it was this exposure of the hole rather than a failure to fill it in at all that was the cause of the accident. Too high a standard of care could jeopardise the future of traditional activities on village greens. Accidents still happened and to impose a standard of care higher than what was reasonable would unreasonably inhibit such activities.
Cole v Davis-Gilbert & Others [2007] EWCA Civ 396

Court entitled to make inferences that Council's system of highway inspection was inadequate
The Court of Appeal dismissed the Council's appeal that it was not liable for damages sustained by D when he drove into a pothole in the road. The pothole was big and deep enough to deploy one of the airbags in D's car and damage two wheels as well as causing D injury. D did not report the pothole for nearly two years and did not have any direct evidence of the pothole. Instead D relied on statements from family and friends that the highway had generally been in a poor state of repair for a long time. The Council said it had a 6 monthly driven inspection regime for that road and the last inspection was 2 months

before the accident. Its records did not show that any potholes were identified for repair. The Court of Appeal upheld the judge's findings that there was a pothole, that for it to have caused so much damage it must have been dangerous, and that for the pothole to form it must have been present at the date of the last inspection and should have been noted by the Council. Therefore, the Council's s.58 Defence failed. However D was found to be 40% contributorily negligent. The Court of Appeal said that judges in such cases had to draw inferences from limited evidence.
Day v Suffolk County Council & Another [2007] EWCA Civ

No duty to protect people against obvious risks
K, a tour operator, provided the claimant (E) with a holiday in Greece. The hotel had a swimming pool which was not safe for diving and had "no diving" notices. Early one morning E decided to dive in at the shallow end, hit his head of the bottom and was rendered tetraplegic. The Court of Appeal overturned the finding that K was 50% liable for E's injuries for being in breach of its contractual duty of care and the Package Travel Regulations 1992. People had to accept responsibility for the risks they chose to run and there was no duty to protect them against obvious risks. E's thoughtlessness was not a good reason for holding K to have been under a duty that it would not otherwise have owed him.
Evans v Kosmar Villa Holidays PLC [2007] EWCA Civ 1003

Contributory negligence assessed at 30% for claimant who travelled in the boot of a car being driven by a drunk driver
The court considered that, as the claimant (G) knew that the defendant driver (C) had drunk too much to be driving, there was no reason why contributory negligence should not be 20% following ***Owens v Brimmells*** [1977] QB 859. ***Froome v Butcher*** [1976] QB286 suggested a reduction of 25% where wearing a seatbelt would have prevented injury. Travelling in the boot was more foolhardy than not wearing a seatbelt. However you could not just add those two percentages together as both elements flowed from G's impaired decision making and there was an element of double counting. Further, a 45% reduction would make little distinction between the parties relative blameworthiness. C was more to blame for the accident than G because he drove when he had been drinking, drove too fast, crashed and allowed G to ride in the boot. Therefore the appropriate reduction was 30%.
Gleeson v Court [2007] EWHC 2397 (QB)

Pleural plaques do not amount to actionable damage
The House of Lords has finally put an end to the pleural plaques litigation. Their Lordships found that pleural plaques were symptomless and would never cause symptoms, increase susceptibility to other diseases or shorten life. There was no effect on health and therefore no damage for the purpose of creating a cause of action. Further, as there was no compensable injury, risk of future disease and consequent anxiety could not be taken into account.
Johnston v NEI International Combustion Ltd [2007] UKHL 39

Helpful Website

The University of California has posted on its website a very helpful guide to clinical medicine for its students:

http://medicine.ucsd.edu/clinicalmed/

The Guide contains step by step descriptions of physical examinations of various parts of the body, complete with eye-watering anatomical photographs.

It also includes video clips of certain physical tests being carried out such as McMurray's test, Lachman's test or an Appley Scratch Test. Check out the website to help understand the tests carried out by medical experts or if you just always wanted to know what a ganglion looked like or how gamekeeper's thumb can be caused.

Smith v Manchester Claims – a re-birth?

Emily Formby examines the impact of the latest edition of the Ogden Tables on an old favourite.

Smith v Manchester claims have long been with us, and perhaps over the years have become a little misunderstood. While the original basis of the judgment in ***Smith v Manchester*** [1974] 17 KIR 1 was not new (see Lawton LJ in ***Herod v Bird's Eye Food Ltd*** [1975] 25th November, CA (unreported): '*... this case raises no new principle of law at all. Ever since I have been in the law judges have awarded damages for loss of earning capacity.*') it is the case of ***Smith v Manchester*** which has become the leading case for the assessment of a lump sum for loss of earning capacity.

While the basic principles of the ***Smith v Manchester*** claim have remained unchanged - a claim for future loss of earnings expressed as a lump sum for loss of earning capacity – in recent years it is my experience that very often a ***Smith v Manchester*** claim is pleaded by the Claimant without any real expectation of proving the claim, but the threat of a further lump sum is accepted by both parties as being one of the grey areas for negotiation; part of the wriggle room of the case.

This is inevitably an oversimplification. Many claims are properly and fully articulated with damages sought for a clear and articulated loss, but it is not these claims that I consider in this article. Rather I am concerned with those cases where there "may be something in it", where there is a future risk of loss of earning capacity/ diminution in earning power/ general disadvantage in the workplace as a result of accident. Not a clear and obvious risk or loss. Not a danger that can be expressed in terms but a sense of "something there" recognised by both Claimant and Defendant. It is these cases where a little something by way of lump sum is often added to the claim to try to recognise and articulate this sense of something more.

Perhaps these types of claim should never have been called ***Smith v Manchester*** claims – an easy use of nomenclature in a claim that does not fit the evidential tests and clear the medical evidence hurdles required for a true loss of earning capacity claim.

How have these claims been changed by the Ogden Tables, 6th edition? Quite a lot in my view. Some months have passed since Ogden 6th was published. Time has been spent digesting the new tables (not much change), the contingencies (lots of change) and the basis of the analysis (education is in effect the only factor that significantly influences the tables other than mortality).

Time now needs to be spent absorbing the changes and considering the tactical effect they will have on injury claims. In my view the significant effect will be the rise in the use of the ***Smith v Manchester*** claim – quite contrary to the intention of those drafting the tables.

It was the real difference between the likelihood of remaining in work, or indeed finding work in the first place, for those with a disability and those who were able bodied that led the drafters of the Tables to address the residual earning capacity element of the claim, bringing in new contingencies for adjusting a raw multiplier depending on both the Claimant's educational achievements and also reflecting whether the Claimant is disabled or able bodied.

The impact of the changes can be stark. Where a previously able bodied Claimant is left post accident with a disability the change to the multiplier can result in claims some 200% – 300% higher than if calculated using the 5th edition of the tables. Sudden increases of this level, legitimately made, can cause havoc with negotiations, Part 36 Offers and insurer reserves.

A Claimant should, of course, make the increased claim, but how will it be responded to by the Defendant? In my view it will be tackled by a resurgence of reliance on the lump sum assessment – the ***Smith v Manchester*** claim.

It is only by emphasising the inevitable educated guesswork behind the factual basis of the claim that a Defendant can challenge its efficacy – the maths will be accepted as part of the Ogden Tables. Therefore, the multiplicand and the assumptions upon which the basis of the loss of earnings claim are made, will form the focus of attention.

I therefore predict that more time will be spent looking into the facts of a claim:–

- how much will be earned/was being earned?
- what other factors may intrude?
- to what extent might the Claimant's condition improve?
- what would the prospects have been before the accident?

Particular consideration will be given to the meaning of disability – is the Claimant in fact disabled as a result of the accident/ is it a disability that affects his work?

Armed with such arguments, or at least the ability to sow doubt about the Claimant's claim, the Defendant is then likely to make a generous ***Smith v Manchester*** claim as a negotiating tool to challenge the Ogden residual earning claim.

I predict a rise in the number of ***Smith v Manchester*** awards, and an increase in their value. It will be a bold Claimant who resists a large lump sum against the uncertainty of a trial leading to the valuation of the claim on the facts of the case as determined by the Court. It is too soon for cases to have been reported in any large number or for a ground swell of anecdote to tell if I am right, but in a year's time in my view the ***Smith v Manchester*** will be alive and kicking, stronger than ever as a vital tool in the armoury of litigants, both Claimant and Defendant.

Emily Formby

Team

Walter Aylen QC	1962 (1983)
George Pulman QC	1971 (1989)
Michael Powers QC	1979 (1995)
Michael Hopmeier	1974
John Gallagher	1974
Robert Leonard	1976
Steven Weddle	1977
Karl King	1985
Colm Nugent	1992
Emily Formby	1993
Maggie Bloom	1994
Jamie Clarke	1995
Charles Bagot	1997
David Lewis	1997
Romilly Cummerson	1998
Henry Slack	1999
Jasmine Murphy	2002
Emma Jones	2003

Clerks

- Kevin Mitchell
- Paul Martenstyn
- Oliver Edwards
- Richard Evans
- Annabelle Lock

Comments, queries and contributions to the editor: editor@hardwicke.co.uk
Hardwicke Building, New Square, Lincoln's Inn, London WC2A 3SB
Telephone: 020 7242 2523
Facsimile: 020 7691 1234
www.hardwicke.co.uk

