# Hardwicke Building Espresso News

## Hardwicke Building Injury Team

April 2006




# Editorial

**Hardwicke News**

Hardwicke Building is delighted that the Injury Team have been recognised as leading personal injury practitioners in the 2005 edition of the **Legal 500** published last September. This commendation for the whole team demonstrates recognition of our strength and depth in injury related work.

Individuals are also picked out for praise. **George Pulman QC** is listed as a ***leading silk*** and **Charles Bagot, Emily Formby and Steven Weddle** are named ***leading juniors.*** The Legal 500 notes, *"Hardwicke Building's demerger, separating its crime team from its core civil practices in late 2004, allowed the 'fantastically sensible but feisty' set to consolidate its personal injury expertise, currently comprising 18 dedicated specialists. Emily Formby is applauded as 'extremely well balanced, realistic and fantastic with clients.'"* Our clinical negligence experience is also praised, with **Steven Weddle** and **Maggie Bloom** named ***leading juniors***.

The team is further applauded in the 2006 edition of **Chambers UK**, *"'Bright and efficient,' Emily Formby of Hardwicke Building is also extremely diligent and has a caseload rich in employers' liability matters. Joining her in the tables is rising star Charles Bagot whose 'sound advice and thorough approach' has also caught the eye of the market. He is experienced in a range of personal injury matters for both claimants and defendants."*

On a more personal note, as many of you will know, two of our Injury Team, Tianne Goold and Camilla Church have recently been on maternity leave. Both have given birth to boys – Camilla's son Harry arrived in October followed by Tianne's son, William, a month later. Babies have also arrived for Charlie Bagot and Colm Nugent, both girls – Eleanor for Charlie and Tara for Colm so the Injury Team will be busy with more than paperwork this Spring! We wish them all well and are delighted to welcome back Camilla who has recently returned to practice in Chambers.

We are also delighted to welcome Emma Jones who has accepted our invitation of tenancy on completion of her pupillage at Hardwicke Building and becomes the newest Injury Team member. Many of you will have met and worked with Emma over the past 18 months. She is now looking forward to continuing her work as a full member of the team.

**What's happening in the wider world?**

The Court of Appeal heard the pleural plaques case, **Grieves** argued over 4 days, ending on 18 November. At first instance Holland J held that pleural plaques were an actionable injury. However, the Court of Appeal (case reported under the lead name of ***Rothwell v Chemical & Insulating Co Ltd***) reversed that decision holding that the Claimants had failed to establish more than minimal damage. On a majority view (Phillips LCJ and Longmore LJ, Smith LJ dissenting) the Court of Appeal held that pleural plaques, agreed to be markers of asbestos exposure, did not of themselves represent significant injury and so the

Claimants failed on the question of actionability. The Court of Appeal rejected argument that three heads of damage should be added together to form one actionable claim, holding that each head of damage alone was insufficient to mount a cause of action. There was, however, one ray of hope for Claimants, the Court of Appeal rejected Holland J's limits to damages and remitted the claim to the trial judge for reassessment.

From a procedural point of view, one of the most important recent cases is ***Sowerby v Charlton*** *[2005] EWCA Civ 1610*. In this case the Court of Appeal held that CPR 14 does not apply to pre-action admissions although CPR 1 will remain a check on Defendants seeking to resile from admissions. While the Court of Appeal was far from clear as to the principles to be applied to withdrawal of pre-action admission applications, the case appears to open the door for Defendants to withdraw pre-action admissions of liability without censure.

**And finally…**

In September, guest lecturer Dr Michael Gross gave a fascinating seminar entitled "Makers, Fakers and Takers" as part of our continuing in house seminar programme. The lecture considered the subtle effects of some neurological disorders and the difficulties arising when trying to identify and diagnose such complaints particularly when trying to diagnose complaints and thereby decide the extent of a legitimate compensation claim. All who attended were left with food for thought as demonstrated by the lively post seminar debates.

In November, many of you enjoyed a morning of seminars on damages given by members of the Injury Team, with lunch and a chance to chat afterwards.

We look forward to welcoming you to our ongoing seminar programme or seeing you when you are next in Chambers for a conference.

Full details of forthcoming events together with individual CVs of all team members can be viewed on the Injury Team section of the award winning Hardwicke Building website. Check out www.hardwicke.co.uk/pi/team.

If you would like copies of our recently updated Injury Team flier; details of our 2005/6 in-house seminar programme, or would like to add a name to our mailing list please contact Lesley Richardson by email on lesley.richardson@hardwicke.co.uk or by telephone on 020 7691 0012.

# Case Law

**Contributory negligence of 11 year old**

The child claimant suffered a serious brain injury when struck by a car as he crossed the road. The driver was held to have been negligent for failing to see the child on the kerb and as he started to cross the road. The driver would have had a clear and unobstructed view of the child. The driver, who had been travelling at 30 mph, was also negligent in failing to slow down and sound his horn. Those actions would have substantially reduced the prospect of the child being seriously injured. However, the child had been 20% to blame for failing to see the car when standing on the pavement and when he started to cross. A child of 11 years of age should have realised the need to look out carefully for traffic coming from his right on a busy road. Alternatively, given his age, the child would also have been contributorily negligent had he looked and seen the car but misjudged the distance.

*(**Honnor v Lewis** [2005] EWHC 747 QB, Silber J.*

**School not responsible for teacher's depression**

A teacher appealed against the dismissal of her claim for negligence and breach of contract which she said had caused her to suffer stress and the onset of severe depression. The teacher alleged that her condition had been caused by changes in her job without proper support. The Judge found that the condition was caused by her inability to cope with fundamental changes to her teaching methods, despite reasonable support. In the circumstances there was no breach of duty. The Court of Appeal dismissed the appeal finding that it was difficult to see what more the school and other staff could have done without being intrusive and unsupportive.

*(**Vahidi v Fairstead House School Trust Ltd.** [2005] EWCA Civ 765*)

**Circumstances putting an employer on notice required in stress claim**

A former pub manager claimed that stress at work caused him to suffer a heart attack for

which his employer was liable. The claim succeeded at first instance. However, an appeal by the employer was allowed because the Trial Judge had failed to find or name any circumstances which would demonstrate that the employer was put on notice that if it did not take action, it was reasonably foreseeable the employee would suffer either a psychiatric breakdown or a heart attack. On the medical evidence it seemed that the employee's condition was improving and there was nothing that should have notified the employer of a risk to the employee's health. The heart attack was therefore not reasonably foreseeable and no breach of duty was established.

*(**Harding v The Pub Estate Co. Ltd** [2005] EWCA Civ 533)*

**A mistake by a builder in carrying out a simple task was inexcusable**

J employed his neighbour, a general labourer, and paid him to assist with the erection of a conservatory at the back of J's house. B rested a rafter on the main structure. He thought he had secured the rafter by finger-tightening a screw, which was a temporary measure whilst he went to fetch a screwdriver. As J entered the conservatory, the rafter fell striking J and causing a serious eye injury. The Trial Judge held that the duty of care of a general labourer was satisfied and it was reasonable for B to think it was safe to leave the rafter in place while he went to fetch the screwdriver, even though finger tightening the screw had not been enough to secure it. If B had been liable, J was 50% to blame for failing to ask if it was safe to enter the area. The appeal was allowed as the Court held that the task of inserting a screw and tightening it by hand so that it had clearly connected with the thread was so simple that it fell easily within the capability and duty of a handyman. Nothing more than common sense was required to appreciate the risk of the rafter falling if not properly secured. It was an error to find that B should be excused from liability. There should be no deduction for contributory negligence. It was not reasonable to expect J to stop and seek permission to enter the area as it would have appeared to him that the area was safe.

***(James v Butler** [2005] EWCA Civ 782, Auld LJ, Mummery LJ & Gage LJ, CA.)*

**Late expert evidence on loss of earnings**

Ms Watt suffered injury in a road traffic accident for which the Defendant, Mr Tucker was liable.

She claimed a significant sum for past and future loss of earnings alleging that the accident had caused her to change her work pattern and reduce her hours of work.

The joint orthopaedic expert was not called at trial but the Defendant sought to rely on his response to written questions in order to challenge the claim. An application to adjourn the trial and call the joint expert was successfully resisted by the Defendant.

After reading the expert evidence and hearing the Claimant give evidence, the Judge held that the Claimant's work was affected and awarded her £358,251 in earnings and interest.

On appeal, the Defendant argued that the Judge was wrong to conclude that the Claimant's work reduction was due to the accident given the letters from the joint expert. The Court of Appeal upheld the first instance decision. The manner in which the letters were presented to the Court was unattractive, particularly when coupled with a resistance to calling the Doctor to answer the Claimant's questions.

In the light of his absence, the only oral evidence heard by the Judge was the Claimant's and the Defendant's resistance to an adjournment to have the Doctor present must be taken as acceptance by the Defendant that the Claimant's evidence would be determinative. Therefore, the Defendant could not argue that the Judge had been bound by the expert's reports alone.

*(**Tucker v Watt** [2005] EWCA Civ 1420, CA; Waller LJ, Tuckey LJ, Neuberger LJ)*

**Contributory negligence in RTA**

The Claimant motorcyclist met the Defendant's car at a bend on a narrow road. The Defendant was pulling a horse trailer. The Claimant and Defendant collided. The motorcyclist, rendered paraplegic, did not remember the collision but the driver said that at the point of contact she had stopped or was near to stopping having pulled over on to the nearside verge. The Claimant accepted he was negligent in trying to pass the car at 15mph but argued that the fact the Defendant was moving at all made her negligent too. Expert evidence showed a low speed impact occurred between the two vehicles at a point

 

in the road that was not wide enough for them to pass.
However, the Judge accepted the Defendant's evidence that she was almost stationary at impact. Even if she was moving faster than she contended, this alone did not make her negligent. She was faced with a motorcyclist who appeared to be going too fast and she did the best she could to avoid the accident by trying to pull in to the verge to give him more room, even though this narrowed the distance between the vehicles and meant she was moving at impact. Accordingly, she made one of a number of reasonable choices and was not negligent at all.
*(**Barry v Pugh** QBD [2005] EWHC 2555; Walker J)*

**50% uplift on RTA CFA agreement was reasonable**
Solicitors entered into CFA agreements with 100% uplifts at a time when there was a very significant element of risk in relation to liability for a road accident. The Claimants were passengers in a car driven by D1. D2 was driving another car. It was unclear on the evidence whether D1 and/or D2 were responsible for the accident. Both Defendants denied liability all the way to a trial over 4 years post-accident when the claims were compromised. The Defendants submitted that the most appropriate uplift was 10-20%. The Court held that whilst the passengers' claims were strong there were uncertainties and difficulties which created a very significant element of risk, which was increased by the serious injuries sustained. This case did not fall within the ***Callery v Gray*** category of modest and straightforward RTA claims with a maximum uplift of 20%. The appropriate uplift for this degree of risk was 33-50% and accordingly an uplift of 50% was allowed.
*(**Burton & Haynes v Kingsley & Harper** [2005] EWHC 1034 (QB))*

**Preference of expert evidence**
The Claimant suffered whiplash injury in a road traffic accident for which the Defendant admitted liability. However, there was an argument as to the level of injury sustained. The Defendant argued that the Claimant had significant pre-existing disability and denied the injury sustained in the accident would have prevented the Claimant working as claimed.
The Judge at first instance heard expert evidence for both parties and concluded that the Claimant had suffered a relatively minor injury causing physical and psychological damage from which she should have recovered within 6 months.
On Appeal the Court held there was no error in the Judge's decision. He had given convincing and rational reasons for preferring one expert's evidence over another.
*(**Wilson v Clements** [2005] EWCA Civ 1424; Ward LJ, Arden LJ, Dyson LJ)*

**Children & Occupiers' Liability**
Keown, an 11 year old trespasser, sustained injury when he fell from the underside of a fire escape at the Defendant's hospital premises. The fire escape was used by members of the public as a means of going between the streets at either side. The Judge at first instance held there was a danger due to the state of the premises and, although the Claimant was a trespasser, his case was made out within ***s1(1)(a) Occupiers' Liability Act 1984***. He held the Claimant 2/3 responsible for his injury.
On appeal, the Court of Appeal held there was no danger due to the state of the premises. The risk arose from what the Claimant chose to do. In the circumstances the claim did not pass the threshold requirement in ***s1(1)(a) Occupiers' Liability Act 1984*** and the claim failed.
What was dangerous to a child was a matter of fact and degree, and not necessarily the same as that which was dangerous to an adult. However, if it could be said that the fire escape was dangerous, it was due to the fact it was unguarded and unfenced. While the Claimant could therefore have come within ***s1(3)(a)*** and could have shown that the Defendant knew children played there (***s1(3)(b)***) he would still have failed to establish that the Defendant should have offered protection from this risk (***s1(3)(c)***).
(***Keown v Coventry Healthcare NHS Trust*** *[2006] EWCA Civ 39; CA Mummery LJ, Longmore LJ, Lewison J*)

**Causation of asbestosis**
The Claimant developed malignant mesothelioma due to exposure to asbestos. He brought a claim against the Defendant alleging the negligent exposure occurred when he worked for Transco. The Claimant gave evidence he had worked in a building the floor of which was covered with a thick layer of dust and piping lagged with asbestos.

 

Initially the Claimant said he had suffered exposure for an extended period of time and had witnessed asbestos removal. This evidence later changed to the effect that his exposure time was reduced and he could not remember direct examples of exposure, simply removal of waste material.

The Judge found the change of evidence was unprompted, that the Claimant was an honest witness who had been exposed to asbestos fibres due to the Defendant's actions. He therefore found in favour of the Claimant.

On appeal the Defendant contended the Judge had erred in his findings and the inferences to be drawn from the facts he found. In particular, given the Claimant's change of evidence, the Judge should not have found him to be a reliable witness.

The Court of Appeal did not interfere with the Judge's initial findings of fact, since he had made out his rulings clearly and they were not such that the Court should interfere with them.

The Judge had clearly had regard to the inconsistencies of the Claimant's evidence when reaching his conclusions and was entitled to reach his findings on that basis.

(***Cox v Transco Plc*** *[2006] EWCA Civ 127; CA; Buxton LJ, Gage LJ, Lloyd LJ*)

**No distinction between contractual and non-contractual visitors under the Occupiers' Liability Act 1957**

The Defendant was found liable for injuries sustained by the Claimant in an accident at a leisure centre it operated. The Claimant was using a climbing machine when the resistance of the machine gave out, causing the Claimant to fall backwards and injure herself.

The Judge found both the Council who ran the leisure centre and the manufacturer of the machine (a company in America) liable.

The Council was found to be in breach both of its duty as occupier and by breach of an implied term of the contract between it and the Claimant – due to the Claimant's ticket of entry to the centre.

On appeal, the Defendant alleged there should be no difference in the duty owed pursuant to contract and as occupier, so the Judge had erred. Further, since the Defendant had a maintenance agreement with the American manufacturer, it was not in breach of its duty as occupier.

The Court of Appeal agreed that *s5 Occupiers' Liability Act 1957* was intended to do away with the common law distinction between the occupier's liability to a visitor entering under contract or not. Therefore, the Judge was wrong.

Further, in relation to the maintenance contract, the Defendant was entitled to rely on it. Despite the fact that at the time of the Claimant's accident, the maintenance agreement between the American company and the Council had yet to begin, it was clearly contemplated and so the Council should not have been found liable under the Act. Appeal allowed.

(***Maguire v Sefton Metropolitan Council & Precor Products Limited*** *[2006] EWCA Civ 316; CA, Rix LJ, Carnwath LJ, Jacob LJ*)

**Material risk of damage and material contribution to damage no place in single accidents**

The Claimant, while inebriated, fell off a wall dividing two swimming pools and broke his neck.

The Judge held that the wall had not been painted with non-slip paint, and should have been, but this negligence and breach of duty of care did not cause the accident.

On appeal, the Claimant submitted the Judge had erred on the issue of causation, and had misapplied the "but for" test. If non-slip paint was likely to have made a difference, failure to use it should have been treated as making a material contribution to the accident, which was sufficient to establish liability. Two distinct concepts existed: material contribution to damage and material contribution to risk of damage. If the negligence made a contribution that was more than minimal the Claimant should succeed.

The Court of Appeal held that the Defendant did owe the Clamant a duty of care even though he was inebriated.

It was trite law that the Claimant was entitled to recover damages for personal injury caused by the Defendant's negligence (***Chester v Afshar*** considered). However, the broad principle identified by Mustill LJ in the Court of Appeal on ***Wilsher v Essex*** that liability could be established even though the existence and extent of the contribution made by the breach of duty could not be established had twice been rejected by the House of Lords (***Fair child v Glenhaven Funeral Home*** and ***Wilsher v Essex***).

Fairchild was a development of the law but did not undermine the trite law of personal injury involving an individual and specific occasion of negligence. The "but for" test was not a

 

single, invariable test for causation issues (***Bonnington Castings v Lardlaw*** and ***McGhee v National Coal Board*** applied). The principles in ***Fairchild*** did not apply to this case. The accident the Claimant suffered was not exceptional. Any distinction between material contribution to damage and material contribution to risk of damage had no application where there was a single instance of negligence. To prove liability the Claimant had to show that a breach of duty caused or materially contributed to his injury. The Judge correctly identified and applied the principles and held that the application of non-slip paint would not have prevented the accident from happening. Increased risk by failure to use non slip paint had not caused or materially contributed to the Claimant's accident, so the claim failed.

(***Clough v First Choice Holidays & Flights Limited*** *[2006] EWCA Civ 15; CA Sir Igor Judge (President QB), Richards LJ, Hallett LJ*)

**Nightclub vicariously liable for action of doorman**

A doorman employed by Ase Security assaulted a member of the public and caused grievous bodily harm.

The nightclub (Luminar) contracted with Ase for the supply of security, including doormen.

The Judge held that the doorman was deemed to be a temporary employee of the nightclub who exercised detailed control over what the doormen did and how they were to do it. Therefore, Luminar were vicariously liable for the actions of the doorman. Ase, having relinquished such control, were not vicariously liable. Default judgment was entered, Ase's contribution assessed at nothing, although they were entitled to claim on their insurance since, when assessed from the perspective of the policy the assault was "accidental" even if the action of the doorman was intentional.

All points were appealed. The Court of Appeal upheld the finding of the Judge, following ***Mersey Docks v Coggins*** on vicarious liability.

(***Hawley v (1) Luminar & (2) Ase Security & (3) Mann*** *[2006] EWCA Civ 18; CA Latham LJ, Neuberger LJ, Hallett LJ*)

**Warning of impending stress at work**

The Claimant was a house manager working in excess of 90 hours per week. He complained to his employer that the hours were excessive and he was tired. His employer agreed and accepted there was a need for an assistant manager. However, before an assistant was appointed, the Claimant collapsed complaining of chest pains. He subsequently sued for psychiatric illness caused by stress at work.

The Judge held that in the circumstances the employer was on notice and the injury to the Claimant was attributable to stress at work was reasonably foreseeable. Further, under the ***Working Time Regulations 1998*** the employer was under a duty to take all reasonable steps to ensure, without written agreement, the Claimant did not work more than 48 hours per week.

On appeal the Court of Appeal highlighted that the correct test to determine whether there was a duty on the employer to take steps was whether the indications of impending harm to health arising from stress at work were plain enough for any reasonable employer to realise he should do something about it (***Barber v Somerset CC***). In this case the signs were sufficiently plain and so the appeal was upheld.

(***Six Continents Retail Limited v Mark Hone*** *[2005] EWCA Civ 922; Lord Phillips of Worth Maltravers MR, Dyson LJ, Wall LJ*)

**Measure of damages in Fatal Accident claims**

The deceased died from mesothelioma resulting from exposure to asbestos. He was the beneficiary of a scheme run by his employers which provided a payment on retirement and payment on termination of service. The employers made a payment on termination of service, which accrued before death and was paid to the estate. His widow argued dependency on the payment to be made on retirement, stating the termination payment received should be ignored pursuant to s4 of the Fatal Accidents Act 1974. The employer argued that benefit under the scheme had been exhausted by the payments made.

The Court of Appeal held that the termination payment had to be ignored because this only arose as a result of mesothelioma arising from the Defendant's tort. Therefore, he would, but for the tort, have been entitled to retirement benefit, on which his widow retained a claim as dependant. ***Auty v National Coal Board*** *[1985] 1 WLR 784* distinguished.

 

(***(1) Harland & Wolff Plc (2) Husbands Ltd v Patricia Lillian McIntyre*** *[2006] EWCA Civ 287; CA Buxton LJ, Lloyd LJ, Richards LJ*)

**Judge entitled to reach conclusion on extent of injury based on all the evidence**

The appellant challenged a Judge's determination that her personal injuries suffered in an RTA were soft tissue injuries that resolved within 15 months. The Claimant relied upon the report of an orthopaedic expert prepared two years post accident in which he noted that the Claimant continued to suffer from cervical whiplash and a troublesome lower back. The report was made without full access to the Claimant's medical records.

At trial, under cross examination, the expert conceded that the Claimant's injuries should have resolved within a relatively short period; the examination of the Claimant was consistent with ordinary recovery and the Claimant's subsequent physical deterioration could not be explained orthopaedically. The Claimant appealed on the basis that the Judge had failed to pay sufficient attention to the expert's initial report, the Defendant submitted that the expert's view had changed in the witness box – and that material change was reflected in the trial judge's finding.

The Court of Appeal agreed that on all the evidence the Judge had been entitled to find that the Claimant's injuries had resolved within 15 months this finding was based both on the expert's evidence at trial and consideration of the accident itself.

(***Jolghazi & Anor v Ali & Anor*** *(unreported Lawtel 20/3/2006; Law LJ, Rix LJ, Hooper LJ*)

**Assessment of future loss of earnings**

The Claimant was injured at the age of 18 and developed a chronic pain condition. He had returned to work for a little under 2 years post accident but thereafter had been forced to give up his job and had not worked since. The claim for future loss of earnings was difficult to assess – the Claimant was not capable at the time of trial but the prognosis was unclear.

The Judge took the view that the Claimant would return to work eventually. He therefore adopted the Claimant's net annual salary at the time he left work as the multiplier, with the usual age-related multiplier and allowed 15% of that figure.

The Court of Appeal held these figures were too low in the light of the finding that the Claimant was not malingering and his prognosis was poor. The multiplicand should have been based on the net annual earnings that the Claimant would have been earning at the date of trial. While this required a finding of fact by the judge, itself difficult, this was the correct approach. Further, reducing the multiplier to 15% was too great a reduction.

(***Davies v Molyneaux*** *CA, Waller LJ, Sedley LJ, Gage LJ; 7/4/2006 unreported Lawtel*)

**Use of medical evidence at trial**

At first instance the Claimant's claim that he had hand arm vibration syndrome as a result of use of vibrating tools at work was dismissed by the Judge on hearing the Claimant's evidence only. Medical evidence was not called. The Claimant had been examined with a view to diagnosing HAVS and vascular symptoms rather than sensori-neural symptoms. No suggestion was made by either party's expert at report or in the joint discussion that the symptoms may be sensori-neural.

After the trial, the Claimant was examined again by his expert who, having considered the evidence given by the Claimant at trial, suggested the symptoms may be sensori-neural.

Appeal was based on the submission that the Claimant's expert should have been called at trial and could have dealt with the evidence given by the Claimant in Court. The appeal was resisted by the Defendant alleging this was an attempt to put a new cause of action, using evidence that could have been called at first instance.

The Court of Appeal dismissed the appeal for the following reasons: (1) the judge had considerable expertise in HAVS and was aware of the importance of assessing the Claimant's own description of those symptoms. He had made clear to Counsel at trial the parts of the Claimant's evidence that contra-indicated his having HAVS; (2) at trial the Claimant's counsel had taken the decision, based on evidence heard, that there was no point in calling his medical expert at trial. If he had sought permission to call expert evidence it would have been granted; (3) reliance on sensori-neural symptoms was a new case that if advanced at trial the Judge would have been bound to reject in any event; (4) while it was wrong for a Court to take the view that it could decide medical matters without expert evidence if one party or other wished to call that evidence this was not the case here; (5) the appeal was really an attempt to put in fresh evidence. Even if this was put in, the

 

case for sensori-neural symptoms was extremely weak and the likely damages very low therefore there could be no justification in referring the claim for a re-trial.

(***Hague v Rexam Glass (Barnsley) Ltd*** *[2006] EWCA Civ 377, CA, Waller LJ, Longmore LJ, Lloyd LJ*)

**Negligence leading to suicide no bar to Fatal Accident claim**

Thomas Corr was badly injured in a factory accident that the Defendant for which liability was admitted. He suffered PTSD and was treated in hospital for depression. Some 6 years post accident he committed suicide. His wife brought a claim against the former employers for dependency under the Fatal Accident Acts. At first instance the claim was dismissed as not reasonably foreseeable.

The Court of Appeal allowed the widow's appeal (with Ward LJ dissenting on reasonable foresight) on the grounds that the suicide did not break the chain of causation between the employer's negligence and the consequences of the negligence – the suicide was a consequence. It did not need to be established that suicide was reasonably foreseeable at the time of the accident as a kind of damage separate from physical or psychiatric personal injury. The case was brought on the basis of depression caused by the accident which was admitted to be a foreseeable consequence of the employer's negligence. The uncontroverted evidence was that suicide was a not uncommon consequence of severe depression. Therefore the suicide flowed from a condition for which the Defendant was responsible by reference to appropriate foreseeability criteria.

(***Corr v IBC Vehicles Ltd*** *[2006] EWCA Civ 331; CA Ward LJ, Sedley LJ, Wilson LJ*)

**Risk assessment at work and foreseeability of risk**

The Claimant was employed to clear empty properties on housing estates. At one property there was a small fire in the garden. The Claimant kicked it to put it out. He did not know or see there was an aerosol can in the fire. It exploded causing injury to his face and eye.

The Claimant sued his employer alleging failure to carry out any risk assessment or provide training in relation to fires. The Judge held that the fire and explosion were not something the employer could have predicted or guarded against. Even if a risk assessment had been carried out, it would not have foreseen the type of injury the Claimant suffered.

The Claimant appealed submitting that the employer had a duty to keep the place of work safe within the limits of what was reasonably practicable.

The Court of Appeal dismissed the appeal. The question to be decided was whether there was an appreciable risk of harm. It was a well established principle that when considering the question of reasonable practicability the gravity of the risk had to be assessed and balanced against the cost of offsetting the risk. The judge's decision was open to him on the evidence

(***Brown v Grosvenor Building Contractors Ltd****; unreported 10/2/06; CA Waller LJ, Smith LJ*)

**Limitation**

The Claimant was injured in an RTA for which liability was not in dispute. Her solicitors issued the claim form a week after expiry of primary limitation and then failed to serve particulars of claim within 4 months or at all. The Court struck out the claim on its own motion. The Defendant indicated that if pleadings had been served within 4 months it would not have pursued its limitation defence.

The Claimant issued a new claim. The judge held as a preliminary issue that he had no discretion to disapply s11 pursuant to s33 of the ***Limitation Act 1980*** and would not have done so as a matter of discretion. The Claimant submitted that the Court was not bound by ***Walkley v Precision Forging Ltd*** *[1979] 1 WLR 606* to hold that it could not disapply the limitation period since in that case the first claim was issued before primary limitation expired.

On appeal, the Court of Appeal held it was equitable to allow the Claimant's action to proceed. The anomalies of ***Walkley*** needed to be carefully considered. The ambit of that case was not determined by the fact that the first action collapsed through discontinuance, strike out or failure to serve or renew the writ. Rather, the salient feature was that the first action between the same parties was begun within the primary limitation period of three years. The point in ***Walkley*** was that the Claimant could not be prejudiced by s11 if the first action was brought within time and so the Court had no discretion under s33. In this case both proceedings were brought out of time so ***Walkley*** was distinguished. Further,

 

the Judge had erred in his consideration of the s33 discretion. It was unfettered and the essential question was whether it would be equitable to allow the action to proceed balancing the prejudice to the Claimant if the action was time-barred against that of the Defendant if it was allowed to continue.
(***Jacqueline Adam v Rasal Ali*** *[2006] EWCA Civ 91*; *CA, Ward LJ, Arden LJ, Dyson LJ*)

**CFAs and recoverable costs**
The claimant suffered injury in an RTA and entered a CFA in relation to the claims. The claim was settled. The Claimant's solicitors sought fixed recoverable costs, disbursements and a success fee pursuant to CPR 45.9 and CPR 45.11. Costs could not be agreed. Costs only proceedings were commenced. The Defendant challenged payment on the grounds that it was not satisfied there was compliance with the ***Conditional Fee Agreements Regulations 2000*** so as to render the CFA enforceable.
The Judge held that although the disbursements were subject to assessment, the indemnity principle did not apply to the entitlement to fixed recoverable costs under CPR 45.9 and CPR 45.11 so it did not matter whether the CFA was valid and enforceable. The Defendant submitted that not only was the indemnity principle fundamental to the costs regime, the CFA had to be lawful to be enforceable.
The Court of Appeal held that the intention underlying CPR 45(II) was to provide an agreed scheme of costs recovery which was certain and easily calculated by providing fixed levels of remuneration. In some cases it may over compensate, in others under but in general payment overall would be fair. It was clear that the indemnity principle did not apply to the figures that were recoverable and so there was little reason why the indemnity principle should have any application to CPR 45.9 or CPR 45.11 and good reason why it should not. The whole idea underlying CPR Part 45 (II) was that it should be possible to ascertain appropriate costs without having to have further recourse to the Courts.
Further, there was no overriding need for the paying party to satisfy itself that the CFA was compliant with the regulations. All the receiving party had to show was that the conditions laid down under the Rules had been complied with.
(***Butt v Nizami: Butt v Kamuluden***; *16/2/06 unreported, QBD Simon J, Master Hurst, Jason Rowley*)

**No deduction from future care for local authority payments**
The Claimant suffered upper body paralysis in an RTA. The Defendant admitted liability but the Court was required to assess damages. The Claimant was wheelchair dependent but cognitively intact. She required long term future care. The Defendant argued that the future care claim should be adjusted to reflect the fact that she was currently receiving local authority care and this may continue. There was a suggestion that the local authority may seek reimbursement of care provided before trial, but this decision was reversed before trial.
The Court held that the local authority could not give any guarantee of future care funding policy. It was impossible for the Court to estimate what the Claimant may receive from her local authority in the future and no assistance was provided to the Court as to how it may make this assessment – ***Sowden v Lodge*** *[2004] EWCA Civ 1370* distinguished. No deduction from her award for future care would therefore be made. Although this could lead to possible double recovery it was unlikely. The Defendant had failed to prove that the local authority would continue to provide care or at what rate, so there was no injustice to them. No indemnity was provided by the insurer should the local authority care be reduced in the future – the Defendant sought to push all the risk to the Claimant. The application was dismissed.
(***Freeman v Lockett*** *[2006] EWHC 102 (QB), Tomlinson J*)

**Deduction from future care for local authority payments**
The Claimant suffered injury at birth and was 26 at the time of the award. The Claimant had suffered irreversible neurological damage shortly after birth due to delayed treatment required as a consequence of a severe congenital heart defect.
In direct contrast with the case above, HHJ Reid QC did deduct from agreed future annual care costs the assumed costs that he believed would continue to be paid by the local authority. He held that the local authority direct payments would probably continue irrespective of the Claimant's place of residence.

The damages were paid by way of lump sum and the main argument between the parties was whether the Claimant was entitled to funds to enable him to live in his own specially adapted accommodation with a tailored care regime or whether he would have to continue to live in local authority accommodation.
(***Andre Crofton (by his Father and Litigation Friend, John Crofton v National Health Service Litigation Authority***; *(2006) Lawtel 19 January 2006; QBD; HHJ Reid QC*)

# Helpful website

If you have to assess life expectancy in a claim, particularly in cases involving cerebral palsy, persons in a vegetative state, spinal cord injuries or traumatic brain injuries have a look at www.lifeexpectancy.com. A useful first port of call providing articles and medical research literature with a wealth of information including a discussion on multipliers for discounting the cost of future care.

# Closer Look

# Warsaw all about?

Jasmine Murphy gives 10 tips to prepare you for take off in Warsaw Convention claims

The Warsaw Convention in its various forms is the international liability regime governing claims arising out of injuries during international carriage by air. This article gives a synopsis of the main issues that could arise out of a claim under the Warsaw Convention system.

**(1) Warsaw, Hague, Montreal – which Convention?**
Since the original 1929 Warsaw Convention, there have been a number of amendments and treaties:

- The Warsaw Convention as amended by Additional Protocol No 1 of Montreal, 1975
- The Warsaw Convention as amended at The Hague 1955
- The Warsaw Convention as amended at The Hague 1955 and by Additional Protocol No.2 of Montreal 1975
- The Warsaw Convention as amended at the Hague 1955 and by Protocol No.4 of Montreal 1975
- The Montreal Convention 1999.

There is no easy answer as to which Convention will apply to each individual case. It will depend on many different factors such as: when the accident happened, where the carriers are based, whether the destination is to a country that is a party to the Treaty, and whether the carriage falls within international carriage as defined in each treaty. It is essential to identify the places of departure and destination to begin to determine which, if any, international treaty applies. The most recent Convention, the Montreal Convention 1999, came into force in Britain on 28 June 2004.

**(2) Special Drawing Rights – a new form of traveller's cheque?**
Because the Warsaw Convention system is international, all financial limits and values are valued in Special Drawing Rights ("SDRs"). SDRs are then converted into the relevant currency for the country where the claim is being brought. The current value of a SDR is shown on the International Monetary Fund's website www.imf.org. At the time of writing one SDR is worth approximately 81 pence.

**(3) Article 17 Liability**
Article 17 of the Convention provides that a carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. The word *accident* within the Convention means the cause of the injury and not the injury itself. It is not necessary to prove that the accident was as a result of the carrier's negligence. The Convention's description of an accident includes non-fault events. Most disputes centre on whether the injury arose out of an accident within this definition.

**(4) Someone's duty-free fell out of the overhead locker and hit me on the head – is that an accident?**
The accident was defined in *Air France v Saks* [1985] 470 US 399 that an accident is an unexpected or unusual event or happening that is external to the passenger. It does not include the passenger's own internal reaction

 

to the usual, normal and expected operation of the aircraft. Thus in the *Deep Vein Thrombosis and Air Travel Group Litigation* cases in 2003 the Court of Appeal found that DVT or the failure to warn of a risk of DVT was not an accident. Lord Phillips of Maltravers MR re-affirmed the *Air France* case and said that an accident can be broken down into two elements (1) there must be an event and (2) the event must be unusual, unexpected or untoward.

Obvious examples of accidents include plane crashes and terrorist attacks. Turbulence can even be viewed as an accident if it is serious enough to cause injury. Being poisoned by the in-flight catering, or suffering burns as a result of cabin staff spilling hot coffee in your lap could constitute an accident. The conduct of other passengers, such as drunken rock stars falling on you, can also be an accident.

Being hit by an object from an overhead locker will be an accident. However in the American case, *Gotz v Delta Airlines Inc* 12 F supp 2d 1999 DC Mass 1998 26 Avi 1, 796, it was held not to be an accident when a passenger interrupted his efforts to load his own carry-on bag into an overhead locker to avoid hitting another passenger and damaged his shoulder muscles in the process. The activity was in no way unusual or unexpected and did not arise out of the operation of the aircraft.

**(5) I was scalped when I caught my hair in the moving walkway in the airport. Can I claim under the Warsaw Convention?**

The Conventions specify that the accident must happen either on board the aircraft or in the course of any of the operations of embarking or disembarking. The first part of this is easy enough and the second part clearly includes ascending or descending the aircraft's steps. In certain cases accidents on a shuttle bus moving passengers across the airport apron from the plane to the terminal have also be found to fall within this definition. However if the accident occurs inside the airport terminal it will be more difficult to bring it within the ambit of the convention. It is unlikely that the general procedures which apply to all passengers such as check-in or passport control will be viewed as operations relating to embarking or disembarking a particular flight or aircraft. In one case where someone fell off a travelator at Heathrow it was found that it was not an accident within the operations of disembarking the aircraft as she was no longer under the control of the carrier but instead was free to choose her route inside the airport.

**(6) I suffered shock, fear and depression as a result of opening up my in-flight meal - was that bodily harm?**

There must be physical injury to the passenger's body, caused either directly by the accident or flowing from the psychological trauma the accident produced. This is different to our normal interpretation of injury which includes mental injury if it can be shown by expert evidence to amount to a recognisable psychiatric illness or injury. The House of Lords heard conjoined appeals on this issue in *King v Bristow Helicopters* and *Morris v KLM* in 2002. Their Lordships held that King, who suffered PTSD resulting from a forced landing leading to a peptic ulcer disease could recover for the peptic ulcer disease only, but Morris, indecently assaulted by another passenger, could not recover for the clinical depression she suffered as a result.

**(7) What defences do carriers have?**

Article 20 of the Warsaw-Hague Conventions provides a defence that the carrier had taken all necessary measures to avoid the damage or that it was impossible for it to take such measures. However if the carrier is a Community carrier (granted a valid operating licence by a Member State) reliance on this defence is precluded for cases worth less than 100,000 SDRs by Council Regulation 2027/97.

For cases coming under the Montreal Convention 1999 this defence is only available in cases of delay, not injury. However in that Convention where damages exceed 100,000 SDRs, the carrier is not liable if it can prove that (a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or (b) such damages were solely due to the negligence or wrongful act or omission of a third party. It is essential to check the carrier's terms and conditions of carriage as sometimes it waives its right to rely on this defence.

The defence of contributory negligence is available under Article 21 of the Warsaw Conventions and is preserved in the Montreal

 

Convention. The applicable law will be that of the country where the action is brought.

**(8) Can I start my claim in English courts?**
The claim lies against the relevant carrier. In all versions of the Warsaw Convention and the Montreal Convention an action for damages must be brought in either:

- The court having jurisdiction where the carrier is ordinarily resident; or
- The court having jurisdiction where the carrier has its principal place of business; or
- The court having jurisdiction where the carrier has an establishment by which the contract has been made;
- The court having jurisdiction at the place of destination.

There is a fifth option added by the Montreal Convention for cases arising out of claims under the Montreal Convention. The case can be brought in the court of the country where the passenger had his or her principal and permanent residence at the time of the accident, and to or from which the carrier operates services and conducts business.

**(9) How long have I got to bring a claim?**
All versions of the Warsaw & Montreal Conventions restrict the time period within which an action for damages can be brought to **two years** from the latest of the following three dates

- The date of arrival at the destination; or
- The date on which the aircraft should have arrived; or
- The date on which the international carriage stopped.

If a claim is not brought within the two year period, the right of action under the Convention is extinguished completely and there is no discretion to disapply or extend the limitation period.

**(10) My accident was more than two years ago. Can I bring a claim in tort instead?**
The Convention is an exclusive uniform international code for the liability of international carriers by air. Although in theory other causes of action in contract or tort would normally exist, it is established in the international body of case law that the only circumstances in which a carrier would be liable in damages to a passenger for injury claims arising out of his international carriage by air would be under the Convention. Therefore, if the carrier would normally be liable under the Convention but the passenger fails to bring his claim within the two year limitation rules, he cannot then bring his claim under another cause of action which has a longer limitation period. Additionally if a passenger engaged in international travel fails to prove that the cause of his injury falls within the bounds of the Convention's definition of an accident, he has no other remedy.

For further reading – *Shawcross & Beaumont Air Law* – published by Butterworths.

Jasmine Murphy

# How strict is strict?

Emily Formby looks at recent cases on an employer's strict liability

One may be forgiven for thinking that the higher Courts have adopted an Alice in Wonderland quadrille approach to strict liability in the last few months – not strict, strict then not strict again is the message on first read. However, a closer look at the trio of cases, ***Fytche v Wincanton Logistics*** *[2004] UKHL 31*; ***Ball v Street*** *[2005] EWCA Civ 76*; and ***Lewis v Avidan Limited*** *[2005] EWCA Civ 670* shows a consistency of approach and depth of analysis that may surprise.

The Court of Appeal has twice considered strict liability in employers' regulations since the House of Lords majority decision of ***Fytche v Wincanton Logistics*** *[2004] UKHL 31* last year. In that case an employee developed frost bite in his toe while digging his way through snow. The steel capped boots he had been given by his employer, as part of his personal protective equipment, had a hole in them. The snow and cold therefore got in, and his toe got frostbite.

The House of Lords considered Regulation 7(1) of the *Personal Protective Equipment at Work Regulations 1992*. This regulation states that, *"Every employer shall ensure that any personal protective equipment provided to his employees is maintained (including replaced or cleaned as appropriate) in an efficient state, in efficient working order and in good repair."*

One may think the use of "shall" would be sufficient to impose a strict liability upon the employer. Certainly it seems to follow the wording of regulation 6(1) of the *Provision and Use of Work Equipment Regulations 1992*[1] which states that, *"Every employer shall ensure that work equipment is maintained in an efficient state, in efficient working order and in good repair"*. That wording was sufficient for the Court of Appeal in ***Stark v Post Office*** *[2000] ICR 1013* to hold that the PUWER wording imposed a strict liability on the Post Office when their employee suffered injury when he had an accident caused by a defect in his bike. This liability was imposed even though a rigorous examination of the bike would not have revealed the defect.

But the House of Lords did not find for Mr Fytche. The majority decided that the strict liability had to be construed with regard to the specific risks against which the protective equipment was intended to guard in the first place. So, in Mr Fytche's case, the boots provided were steel toed. The risk they were to guard against was that of dropping something heavy on the foot. Not the risk of getting wet and cold in the snow.
According to the House of Lords, stage one in the process was assessing the risk. Stage two was ensuring the protective equipment was suitable to guard against that risk (Regulation 4(1)). Consideration must be had to Regulation 4(3) – pre-requisites for any assessment of suitability.

Therefore, the House of Lords looked at the strict liability of Regulation 7(1) in the context of the risk against which the equipment was provided to guard. The strict liability was accordingly qualified by purpose.

It should be noted, and this may make the decision of the Court of Appeal less surprising, that the House of Lords decision was a 3:2 majority. Even within that majority Lord Walker dismissed the Claimant's appeal with "rather more hesitation" that the other two Lords.

The dissenting Lords (Lord Hope and Baroness Hale) placed emphasis on the need, at Regulation 4(3)(a) to consider, *"… the conditions at the place where exposure to the risk may occur"* and the slightly wider analysis of whether protective equipment is suitable set out in Regulation 6(2), *"The assessment required by paragraph (1) shall include – (a) an assessment of any risk or risks to health or safety which have not been avoided by other means…"* It is arguable that the place of exposure could include a wet or snowy location and the risk one of frostbite not avoided by other means. However, their Lordships stood by a connection between strict liability for provision of equipment being related to the risk the employer assessed it necessary for an employee to be protected from.

In the first of the two Court of Appeal cases, ***Ball v Street*** *[2005] EWCA Civ 76*, Mr Ball lost the sight in his left eye when he was struck in the eye by a spring which fractured during the use of a haybob. Mr Ball was using the machine quite correctly. The part fractured during use. While there was evidence that the shaft coil springs quite commonly fractured, it was confirmed this fracture could occur during perfectly normal working operation. The Judge at first instance held that the fractured spring had shot towards the ground, ricocheted upwards from a tyre and entered the Claimant's eye. It was, he said, an unforeseeable freak accident.

Not so, said the Court of Appeal. In the leading judgment Lord Justice Potter said, *"in this context, namely the known likelihood of fracture of a powerful spring from time to time in course of operation, I would hold that the risk of injury to someone in close proximity at the time of such fracture, in relation to which there would be no warning or prior indication of wear, and in respect of which no protective safety casing was present on the machine, was reasonably foreseeable …"*

Of greater significance, the Court of Appeal rejected the first instance judge's adoption of the ***Fytche*** type reasoning that the assessment of breach of the duty to maintain in efficient working order relied on an assessment of suitability as work equipment. The spring that broke on the haybob did not disable the machine, it simply prevented one pair out of eight pairs of tines working. The machine could still be used. The machine was capable of working, in the Recorder's view, in *"… an overall effective and efficient manner"*. Therefore, liability was not established.

[1] Now regulation 5(1) of the 1998 Regulations

 

Lord Justice Potter, however, distinguished the purposive assessment in ***Fytche***. The duty on employers when providing machinery was somewhat differently defined. Long before the European Regulations, the ***Factories Act 1937*** at ***s152(1)*** was held by the House of Lords in ***Galashiels Gas Co Ltd v Millar*** *[1949] AC 275* to impose an absolute obligation to maintain work equipment in an efficient state or in efficient working order.

Regulation 6(1) of the ***Provision and Use of Work Equipment Regulation 1992*** imposed a strict duty on the Post Office in the case of ***Stark*** (see above). While both cases were referred to in argument before the House of Lords in ***Fytche*** their Lordships did not overrule them. Therefore, Mr Ball's case followed the previous line of authority, not the ***Fytche*** decision, insofar as the two were not inconsistent in reasoning.

The wording of Regulation 5(1) of the ***Provision and Use of Work Equipment Regulations 1998*** – the relevant regulation for Mr Ball, states that, *"Every employer shall ensure that work equipment is maintained in an efficient state, in efficient working order and in good repair."* That the haybob may continue to work with one of its eight pairs of tines broken did not mean that it remained in an efficient state. Efficiency was not defined by purpose, by economic activity and productivity. There is no provision for defining the employer's duty in terms of overall suitability of equipment to perform a task. Rather it is an absolute obligation on an employer providing any employee with machinery to ensure that all of the mechanical parts are in good repair and efficient state and working order so as to prevent injury to the person using the equipment.

A spring shooting out of a machine without warning carries a foreseeable risk of injury. As soon as that spring has broken, whether it could have been discovered or known about in advance or not, the machine is not longer in good repair and efficient state, and the obligation of the Regulation bites.

The distinction between the provision of protective equipment and work equipment is that the former is provided to protect against a particular risk or hazard which has been specifically identified and which cannot be controlled by other means. The PUWER regulations deal with general considerations of health and safety in the broad sense – the risk of accidental injury inherent in the use of machinery not in good repair.

While perhaps a fine distinction, this reasoning is at least clear and the Court of Appeal has maintained the strict liability for employer provision of machinery which has been in place since at least 1937.

The second Court of Appeal decision, that of ***Lewis v Avidan Ltd*** *[2005] EWCA Civ 670* concerned the ***Workplace (Health, Safety and Welfare) Regulations 1992***. Mrs Lewis worked as a care assistant in High Meadow Nursing Home. As she neared the end of a night shift she slipped on water which had flooded a linoleum floor. The water came from a pipe which had unexpectedly burst shortly before the accident. Nobody knew of the burst until it was found by the claimant. The claim could not succeed on Regulation 12(3) of the ***Workplace (Health, Safety and Welfare) Regulations 1992*** since it was accepted that the Defendant had discharged that duty defined as, *"so far as is reasonably practicable, every floor in a workplace and the surface of every traffic route in a workplace shall be kept free from …. Substance which may cause a person to slip…"*

However, argument centred around the strict liability of Regulation 5, *"(1) The workplace and the equipment, devices and system to which this regulation applies shall be maintained (including cleaned as appropriate) in an efficient state, in efficient working order and in good repair"*.

Surely, argued the Claimant, this wording follows the wording in regulation 5 of PUWER and Mrs Lewis' claim should succeed following the line of ***Galashiels, Stark*** and ***Ball***?

Not so said the Court of Appeal. The pipe was not within the workplace, as defined by the regulation 2. Therefore, since the enclosed pipe was not part of the premises there could be no breach of regulation 5(1) due to a failure to maintain the workplace.

Could the pipe, however, be defined as equipment, a device or system? Pursuant to regulation 5(3), *"The equipment, devices and systems to which the regulation applies are – (a) equipment and devices a fault in which is*

 

*liable to result in a failure to comply with any of these regulations"* While the fault in the pipe would render the floor wet, this alone is not sufficient to lead to breach of regulation 12(3). The regulation is breached by a failure to take reasonably practicable steps to stop the substance being or remaining on the floor. It is concerned with cleaning practice, inspection and general maintenance. Therefore, while the burst pipe would make the floor wet, this is not the cause of the breach of regulation 12(3). For the strict liability in regulation 5 to trigger, the failure has to lead to breach of another of the WHSW regulations. In this case it did not so Mrs Lewis's employers were not in breach of their duty toward her.

While these decisions at first blush seem contradictory (now the liability is strict, now it is not) in fact they follow a logical progression. ***Ball v Street*** is not an anomalous decision, it follows a long line of cases in which strict liability has been imposed on employers providing machinery for use by their employees.

In other cases the regulations bear careful scrutiny. The purpose for which the protective equipment is provided is a crucial element in establishing the ambit of strict liability under PPE. So too, defining the workplace or establishing the effect of equipment and devices on the general safety of the workplace are important considerations when looking at strict liability under WHSWR.

It is unusual for broadly similar statutory wording to be examined by the higher courts on three different occasions in quick succession. The importance of the purposive assessment is confirmed by the ***Fytche*** decision being in the House of Lords. Careful consideration of the whole of the relevant regulations must remain imperative for those bringing or defending employer's liability claims.

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