# Hardwicke Building Espresso News

## Hardwicke Civil Injury Team

September 2004




# Editorial

**Hardwicke News**

While the rest of us were looking for bucket and spade, or wondering if we could manage time off at all, Katrina McAteer set off to the Golden Gate City. She has been awarded a prestigious Pegasus Scholarship by the Inns of Court (UK) in conjunction with the American Inns of Court Foundation. Katrina's scholarship has taken her to San Fransisco, where she is sitting with a Judge of the Superior Court and spending time with two very different injury litigation firms. Whether or not she will start to refer to her opponents as "Counsellor" remains to be seen, but her valuable experience of how things are done Stateside will be of interest to us all. Look out for tales of her trip in the next Espresso News.

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

The House of Lords decision in **Gregg v Scott** is awaited with some impatience. Heard earlier this year, the decision will be delayed until the Autumn but will hopefully be available early in Michaelmas term. Many claims are doubtless awaiting their Lordships' views on causation. The constitution of the Court suggests that a change in the law may just be on the cards, certainly a stringent consideration of the issues can be expected.

**And finally ...**

The CVs of all the team members and details of the team in general can be viewed on the Injury Team section of the Hardwicke Civil website. Check out www.hardwickecivil.co.uk/pi/team. Never content to rest on our award winning laurels, our web-site is undergoing an "autumn freshen up".

If you would like copies of our Injury Team flier (which has undergone a re-vamp) or details of our 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

**Failure to install a handrail did not constitute negligence or a breach of statutory duty**

The Claimant sustained injury when he tripped on the third step of a flight of 4 stairs at the Defendant's factory. There was no handrail fitted to the steps. At first instance the Judge found that there was a foreseeable risk that someone might trip on the stairs and that if the Defendant had thought about the situation prior to the Claimant's accident it would have appreciated that risk and installed a handrail. In the circumstances, the failure to install a handrail constituted a negligent omission. There was, however, no breach of

Regulation 12(5) Workplace (Health, Safety and Welfare) Regulations 1992 as the steps did not constitute a staircase for the purposes of that Regulation. Having established that primary liability attached to the Defendant, the Judge made a finding of contributory negligence against the Claimant on the basis that he had failed to look where he was going. Both parties appealed the decision.

The Court of Appeal set aside the finding that failure to provide a handrail constituted a negligent omission. There was no basis for a finding that the steps posed any real risk for users exercising a sufficient degree of care. It was noted that the steps in question were of a common design and the decision of the first instance Judge amounted to a finding that all such steps were unsafe in the absence of a handrail. The Judge had been wrong to find that forseeability of risk was sufficient to found a duty to safeguard against such a risk. An attempt by the Claimant to argue breach of regulation 5 of the Workplace Regulations was also dismissed on the basis that regulation 5 was concerned with the maintenance of equipment that had already been installed. As the Defendant was not under an obligation to install a handrail, regulation 5 had no application to the instant case.

(**Alan Gordon Coates v Jaguar Cars Ltd** - CA – Mummery LJ, Tuckey LJ & Jacob LJ – 4 March 2004 – [2004] EWCA Civ 337)

**No duty owed to policeman who was trespassing on Defendant's property**

The Claimant police officer trespassed on the Defendant's property in the early hours of the morning in order to carry out surveillance of a neighbouring property. The Defendant's property comprised a large yard where coaches were kept, at the back of which there was an inspection pit approximately 40 inches deep. The Claimant conducted a search of the property to make sure that no-one was hiding amongst the coaches. Although he had a torch with him, he did not switch it on. As he searched, the Claimant fell into the pit and sustained injury. Evidence revealed that the normal practice of the Defendant was to park a coach over the pit at night. However, on this particular night there was no coach parked over the pit. At first instance the court dismissed the Claimant's case on the basis that the Defendant did not know or have reasonable grounds for believing that a trespasser would come into the yard and into the vicinity of the inspection pit. The Claimant appealed.

The Court of Appeal upheld the decision of the trial Judge. The Defendant had no reason to believe that a trespasser would find himself in the vicinity of the inspection pit. The pit was not an allurement, nor was it on a natural traffic route from one area to another. Furthermore, there was no evidence that trespassers had strayed into the vicinity of the pit and exposed themselves to a risk of injury from the pit in the past.

(**Higgs v WH Foster t/a Avalon Coaches** – CA – Latham LJ, Maurice Kay LJ – 1 July 2004 – [2004] EWCA Civ 843).

**Scope of an employer's duty to maintain and repair personal protective equipment**

The Claimant was employed as a lorry driver collecting milk from farms. His employer, the Defendant, provided him with steel toe capped safety boots in order to protect his feet against the risk of being crushed by heavy objects, such as a milk churn. The boots were not intended to be weather or water proof as the Claimant would not ordinarily be exposed to extreme weather conditions in the course of his employment. Unbeknown to the Claimant and the Defendant, there was a small hole in one of the boots.

One icy morning the Claimant's lorry got stuck in the snow and he spent three hours digging it out. During that period, water leaked through the hole in the boot and the Claimant developed frost bite in his little toe. The Claimant's allegation of negligence was abandoned because he conceded the Defendant's argument that the boots were adequate for the ordinary conditions of his work. The Claimant therefore put forward an alternative allegation that the Defendant's failure to keep the boots in good repair constituted a breach of Regulation 7 ***Personal Protective Equipment at Work***

 

***Regulations 1992***. The Court of Appeal dismissed the claim.

On appeal, the House of Lords upheld the decision of the Court of Appeal by a majority of 3:2. The duty to keep the boots in "*an efficient state, efficient working order and in good repair*" was not an absolute concept. It related only to the risks against which the equipment was intended to protect the Claimant. In this case, the boots were designed to protect the Claimant from a risk of his employment, namely the risk of his feet being crushed by heavy milk churns. In spite of the hole, they remained efficient for that purpose.

Injury caused by extreme weather conditions was not a risk of the Claimant's employment and the boots were not provided to him in order to protect him against such a risk. Thus, the Defendant's obligation under regulation 7 did not extend to carrying out maintenance and repairs that would render the boots weather and/or water proof.

(**Fytche v Wincanton Logistics PLC** - HL – Lord Nicholls of Birkenhead, Lord Hoffmann, Lord Hope of Craighead, Lord Walker of Gestingthorpe, Baroness Hale of Richmond – 1 July 2004 - [2004] UKHL 34).

**Highway Authority successfully establishes s.58 Highways Act defence**

The Claimant sustained injury when she tripped on a loose paving stone outside Selfridges on Oxford Street, London. The cement around the paving stone had worked loose, which caused the stone to rock when stepped on. The Judge found that as the stone rocked, it created a trip of approximately 15mm. A stone adjacent to the stone in question was also loose and the Judge accepted that if the two stones were caused to rock at the same time a more significant trip, of approximately 20mm would be created.

At trial, the Judge found that the paving stone in question was dangerous for the purposes of the Highways Act 1980. However, the Defendant succeeded on its s58 defence. Routine inspections were carried out on a monthly basis and any complaint from a member of the public resulted in a reactive inspection. The last inspection of the relevant stretch of pavement had taken place just 3 weeks before the accident.

The Judge rejected the allegation that this inspection must have been inadequate. The inspection system was adequate. The Defendant was not aware of the rocking stone at the time of the accident and had acted reasonably in relying upon the systems it had in place for reporting defects.

(**Owen v City of Westminster** – QBD – Judge Altman – 9 June 2004 – [2004] EWHC 1557 (QB).

**Scope of farmer's duty to prevent cattle straying on to the highway**

The Defendant farmer kept cattle in a field that was separated from the highway by land belonging to another farmer ("Farmer B"). The cattle were prevented from straying onto Farmer B's land by a 5 bar gate ("the gate") which the Defendant kept in good order and secured with a hook and chain. Farmer B's farm was in a dilapidated state. Consequently, if the Defendant's cattle got out of their field and onto Farmer B's land, there was, in effect, nothing to prevent them from straying onto the highway.

A popular public right of way ran across the Defendant's field and it was not at all unusual for ramblers to pass through the field and through the Defendant's gate. On one occasion some ramblers left the gate open and the cattle escaped from and strayed across farmer B's land and out onto the highway, where they came into collision with the Claimant's motorbike.

At first instance the Defendant was found liable for the accident.

The Court of Appeal upheld that decision. The Defendant should have addressed his mind to the risk that walkers might leave the gate open and to the consequences that would follow from such an event. Given that the right of way was heavily used by ramblers and that the gate was effectively the final barrier between the cattle and the highway, the Defendant was under an obligation to take extra precautions to ensure that the gate was kept locked and secure. There were a variety of other provisions such as stiles or kissing gates that could have been used without difficulty or great financial hardship to enable the

gate to be kept locked whilst still allowing ramblers to exercise the right of way.
*(***Donaldson v Wilson** – CA – Potter LJ, Rix LJ, Munby LJ – 9 July 2004 – [2004] EWCA Civ 972).

**Part 36 Payments**
The Claimant brought proceedings against the Defendant following a road traffic accident. The Defendant admitted liability and instructed a medical expert to examine the Claimant on her behalf. However, prior to receiving the expert's report, the Defendant made a Part 36 payment into Court of £24,500. One week later the expert provided the Defendant with a favourable report. The Defendant therefore issued an application for permission to reduce the Part 36 payment to £10,000 and faxed the Claimant's solicitors, informing them of the application and purporting to withdraw the Part 36 payment. Five days later, prior to the hearing of the Defendant's application, the Claimant gave notice of acceptance of the original payment in. This was within 21 days of the payment being made.
At the subsequent hearing, a Deputy District Judge allowed the Defendant's application. The Claimant appealed to a District Judge who set aside the Deputy's Order. The Defendant in turn appealed to a Circuit Judge who set aside the District Judge's decision on the basis that the Defendant had good reason to reduce the amount in court and that it would be unfair to allow a claimant to accept money in court when it knew there was an application outstanding to reduce the payment in. The outstanding application operated to suspend the time allowed for acceptance of the payment until after the hearing of the application.
The Claimant appealed once again and the Court of Appeal allowed that appeal. It was noted that a Part 36 Payment can be distinguished from a Part 36 offer in that it is an entirely procedural construct that is not subject to the general law of contract (**Chanirai v Boston** *11th July 2002 QBD* disapproved). Consequently, although it may be possible, under the general laws of contract, to withdraw an offer less than 21 days after it has been made but before it has been accepted, a Part 36 payment could only be withdrawn in those circumstances with the permission of the Court (*CPR 36.6(5)*). The rules made no provision for such an application to operate as a stay on the Claimant's unfettered right under *CPR 36.11* to accept a payment within 21 days of it being made, without the permission of the Court.
When deciding whether or not to allow an application to reduce or withdraw a Part 36 payment, the Court must give appropriate weight to the effect on the Claimant of being deprived of that unfettered right.
Finally, it was noted that, in making the Part 36 payment before she received her medical report, the Defendant had taken a risk. The fact that the risk had materialised was insufficient to justify the Court in granting her permission to reduce the Part 36 payment.
*(***Flynn v Scougall** – CA – Brooke V-P LJ,Potter LJ, May LJ – 13 July 2004 – [2004] EWCA civ 873).

**Disapplying Section 33 Limitation Act 1980**
The Claimant was employed by the Defendant in the 1970s. In 1991 he was advised by his doctor that he had pleural thickening to the left lung, described as 'slight scarring' and that he could sue regarding his condition. The Claimant believed that his condition was mild and therefore decided not to bring a claim. During further screenings in the 1990s, his condition was again referred to as 'slight scarring' until 1999 when it was referred to as 'pleural plaques'. As a result of the change in phraseology the Claimant believed, mistakenly, that his condition had worsened and in April 2003 he issued proceedings.
On a preliminary issue regarding limitation, the Judge held that the Claimant had actual and constructive knowledge for the purposes of ss 14(2) and (3) of the Limitation Act 1980 but exercised her discretion under s33 to disapply the primary limitation period on the basis that the Claimant had real and substantial reasons for not acting between 1991 and 1999. It was not until the phrase 'pleural plaques' was used that the Claimant believed his condition had worsened and took action.

 

The Defendant appealed arguing (1) that the Judge had been wrong to focus on the reasons why the Claimant had started proceedings in 2003 as opposed to the reasons why he had *not* started proceedings in 1991; (2) that the Judge had incorrectly placed the burden on the Defendant to show why the limitation period should not be disapplied; and (3) that the Judge had given no weight to the fact that the Claimant's condition had not in fact changed since the original diagnosis in 1991.

The Court of Appeal allowed the appeal, holding that (1) the discretion under s33 is unfettered and requires an overall consideration of the circumstances of the case in order to determine whether or not it is equitable to disapply the limitation period; (2) the burden of proof is on the Claimant to persuade the Court to exercise its discretion; (3) the relevant considerations for the Court are the length of delay in commencing proceedings and the reasons for that delay. Having identified the reasons, the Court should consider whether or not they had 'real or decisive' weight; (4) that in this particular case the Claimant had the requisite knowledge but had taken a clear and conscious decision not to commence proceedings. This fact was not altered by his later, mistaken, belief that his condition had worsened. The Claimant had, therefore, failed to show a reason for his long delay in commencing proceedings; (5) the Judge had misapplied s33(3)(a) and had failed adequately to address the delay in terms of s 33(3)(e); (6) there was no equitable reason to justify the disapplication of the limitation period.

(**Buckler v Sheffield City Counci & Anor** – CA – Brooke LJ, Potter LJ, May LJ – 21 June 2004 – [2004] EWCA Civ 920.

**Duty of care owed by youths engaged in informal games and horseplay**

The Claimant and Defendant were teenage friends who, together with 3 friends, engaged in horseplay which involved throwing pieces of bark chipping at one another.

The Claimant threw a piece of bark at the Defendant who threw it back, hitting the Claimant in the eye and causing serious injury. The Claimant sued the Defendant in negligence and battery.

At first instance, the Judge rejected the defence of *volenti non fit injuria* but reduced damages by 50% for contributory negligence.

On appeal by the Defendant, the Court of Appeal held that the horseplay was in the nature of informal play and had been conducted in accordance with certain tacitly agreed understandings or conventions which were objectively ascertainable by the Claimant. There was a sufficiently close analogy between organised or regulated sport/games and the teenagers' activities for the guidance given by Diplock LJ in **Woolridge v Sumner** *[1963] 2 QB 43* to apply in a slightly expanded form.

In the circumstances, a breach of duty would be established where one participant's conduct amounted to recklessness or a very high degree of carelessness. In this particular case the Defendant's conduct did not fall within that category. At most it was "an error of judgement or lapse of skill". It was simply an unfortunate accident and there was no breach of duty.

Furthermore, by participating in the game, the Claimant had to be taken to have impliedly consented to the risk of a blow to any part of the body, including his eye, provided that the bark was thrown more or less within the tacit understandings or conventions of the game.

(**Blake v Galloway** – CA – Sir Andrew Morritt VC, Clarke LJ, Dyson LJ – 24 June 2004 – [2004] EWCA Civ 814).

**Two inch step constituted an obstruction despite warning sign**

The Home Office appealed a finding that it was liable in negligence for personal injuries sustained by the respondent (L) in a workplace accident. L cross-appealed a finding of 50% contributory negligence.

L was employed as an instructional officer in a prison. On the day of the accident she entered the prison via a side entrance, which involved walking up a covered ramp to the entrance of a portacabin. The portacabin had an outer door and an inner door with an unmarked two-inch step-up to the level of the portacabin between the two

 

doors. The inner door was kept closed. There was a window in the inner door and a sign warning of the step was placed above the window.

L had approached the portacabin in conversation with a colleague. As they approached the inner door, one of the Defendant's employees opened the inner door and L tripped over the threshold.

The first instance Judge held that the threshold exposed L to a risk to her health and safety of such a degree that the floor was not suitable for the purpose for which it was used, contrary to regulation 12 *Workplace (Health, Safety and Welfare) Regulations 1992*. He further found that the presence of a warning sign was insufficient to discharge the burden imposed by the *Regulations*. The Home Office had failed to satisfy him that it was not reasonable practicable to avoid or remove the threshold.

On appeal, the Home Office contended that the judge had erred in principle or taken into account irrelevant matters in regarding the step as a "substantial risk". In particular, the Home Office argued that the following factors were wrongly considered relevant: (i) that one would not necessarily expect to find a step at the top of a ramp; (ii) that a pedestrian's attention would be drawn to the window; and (iii) that the step would not be as prominent to a pedestrian as it appeared to be on the photographs included in the trial bundle. Further, it was argued that the risks were negated by the presence of the warning sign or alternatively that the Judge was plainly wrong in his assessment of suitability.

The Court of Appeal declined to interfere with the Judge's findings. The assessment was one that it was open to him to make and that he was well placed to reach on the evidence. He had correctly carried out the assessment of relevant factors identified in **Palmer v Marks and Spencer plc** *(2001) EWCA Civ 1528*.

Internal risk assessments, which accepted the step as suitable and safe subject to the presence of the notice, were relevant but not determinative. On the facts, the judge could not be criticised for concluding that there was an obstruction for the purposes of reg. 12 (3) as he had considered all the relevant factors when making his assessment under reg. 12(1).

As far as common law negligence was concerned, the Judge was entitled to conclude that, in all the circumstances, there was a foreseeable risk of injury and a duty of care, that was not discharged by the simple presence of a warning sign. It was open to the Judge to make the finding that L should have seen the warning sign and would have appreciated the risk to which it referred, had she not been deep in conversation at the relevant time. However, the Judge had noted that it was not too surprising to find people arriving at work deep in conversation and, therefore, not paying full attention to the most prominent of notices. In the circumstances, the court would not interfere with the Judge's assessment of contributory negligence. The appeal and the cross-appeal were both dismissed.

(**Home Office v Lowles** – CA – Mance LJ, Wall LJ, Buckley LJ- 29 July 2004 – [2004] EWCA Civ 985)

**No duty on highway authority to warn drivers of the need to proceed slowly**

The Claimant was involved in an accident on the crest of a road for which the Defendant had responsibility under the Highways Act 1980. At the time of the accident, there were no markings or signs warning of the dangers of the road. In the past, the word "SLOW" had been painted onto the surface of the road but it was no longer visible at the time of the accident. The Claimant brought proceedings against the Defendant for failing to warn her of the dangers of the road.

At first instance, the Judge held that the failure to provide a warning constituted a breach of s41 of the 1980 Act and that the accident was, therefore, the fault of the Defendant authority. The Defendant appealed, and the Court of Appeal found that sole responsibility for the accident lay with the Claimant. The Claimant appealed on the basis that the absence of any warning signs constituted a breach of s41 of the 1980 Act and, further, that the failure to erect a sign represented a breach of the Defendant's duty under s39 Road Traffic Act 1988.

The House of Lords rejected the Claimant's appeal. Their Lordships found that the section 41 duty to maintain the highway has a narrow scope that does not extend to the provision of warning signs and/or road markings.

Section 41 is concerned solely with the condition of the surface of the highway. There was no common law duty to erect warning signs on the road. It was acknowledged that if a Highway Authority created a reasonable expectation about the state of the highway it would be under a duty to ensure that it did not thereby create a trap for motorists driving in reliance on such an expectation. However, in the instant case there was no suggestion that the Defendant had done anything to give rise to such a duty.

S39 Road Traffic Act 1988 did not give rise to a private right to sue for breach. In the circumstances, it could not give rise to a common law duty of care that would not have existed in the absence of the statute. The fact that the Defendant had, in the past, painted a warning sign on the road, was insufficient to found a common law duty to repaint the sign when it faded or was obliterated (**Larner v Solihull Metropolitan Council** (2001) PIQR P248 disapproved). Furthermore, drivers were under a duty to drive at appropriate speeds and to take reasonable care for their own safety regardless of whether or not there were warning signs on the road.

*(***Denise Gorringe (Acting by her litigation friend June Elizabeth Todd) v Calderdale Metropolitan Borough Council** – HL – Lord Steyn, Lord Hoffmann, Lord Scott, Lord Rodger, Lord Brown of Eaton-under Heywood – 1 April 2004 – [2004 UKHL 15).

**Highway Authority not responsible for the layout of the highway**

The appellant had been walking along a narrow beaten earth path on the verge of a highway when she strayed from the path and fell into a ditch beside the track just where it emerged from a culvert and sustained injury. The path had been in use for a number of years and had been made by visitors to the campsite to which the path led.

At first instance, the Judge found that the path was safe for those who used it and kept to it and s.41 was not directed to avoiding the risk of harm that could be created where pedestrians walked to the side of the path.

The Claimant argued that the fault of the Highway lay in the unsafe juxtaposition of the path and the ditch. However, the Court of Appeal dismissed the Claimant's appeal.

The section 41 duty was not a general duty to ensure, subject to the defence in s.58 of the Act, that the highway was not dangerous to traffic; it was no more than a duty to repair the structure of the highway if it was out of repair. **Gorringe v Calderdale MBC** (2004) UKHL 15**,** (2004) 2 All ER 326 and **Goodes v East Sussex County Council** (2000) 1 WLR 1356 applied.

Neither ditch, culvert nor pathway were out of repair or in disrepair. A highway user had to be prepared to overcome natural dangers by taking precautions as drivers would with the hazards of road layouts. The juxtaposition of path and ditch related to layout and had nothing to do with a lack of repair. Further, the growth of vegetation which could have obscured the open ditch or tended to push pedestrians over towards the ditch, was a mere obstruction and did not constitute lack of repair to the surface of the path, **Hereford & Worcester CC v Newman** (1975) 1 WLR 901 distinguished.

(**Fiona Thompson v Hampshire County Council** – CA - Potter LJ, Rix LJ, Carnwarth LJ – 27 July 2004 [2004] EWCA Civ 1016).

**Recoverability of damages for primary victim**

DD was a police officer who was required, in the course of employment, to attach a tagging device to the underside of a suspect's car. The batteries in the device were faulty and DD had to return to the car a total of 9 times in order to remedy the problem. Unfortunately, it was not the first time that DD had experienced this problem. He found the experience extremely stressful as he feared that the suspect might return to the vehicle, catch him fitting the device, and cause him physical injury. DD had a history of hypertension that was exacerbated by this stress.

 

The trial Judge accepted medical evidence that, as a result of this experience, DD had developed a psychiatric condition, leading to an acute rise in blood pressure which in turn resulted in a stroke. He also found that the Defendant was in breach of a statutory duty to provide DD with equipment that was in an efficient state and had negligently failed to provide DD with a safe system of work. However, he dismissed DD's claims on the basis that DD had not suffered the physical injury he had feared and that psychiatric injury was not reasonably foreseeable as the Defendant was unaware of DD's history of hypertension.

DD's appeal was allowed. DD was a primary victim and it was reasonably foreseeable that he would suffer physical injury as a result of the Defendant's negligence/breach of duty. In the circumstances, it was immaterial whether or not any psychiatric injury or the particular form of physical injury actually sustained, was foreseeable. A primary victim need only establish that some form of injury was foreseeable. **Page v Smith (1995) P & CR 329** applied.

*(***David Donachie v The Chief Constable of the Greater Manchester Police** – CA – Auld LJ, Latham LJ, Arden LJ – 7 April 2004 – [2004] EWCA Civ 405).

**Success Fee of 87% reasonable. Callery v Gray distinguished**

The deceased contracted mesothelioma as a result of exposure to asbestos during the course of his employment with the Appellant (S). S instructed solicitors to pursue a claim against S but died prior to the issue of proceedings. His widow, the First Respondent (JE) commenced proceedings in August 2000. In order to do this JE entered into a CFA with her solicitors, which provided for a success fee of 87%.

Liability was admitted shortly before trial and at the trial on quantum, JE and the other Respondents were awarded £180,000 plus costs to be assessed. At a detailed costs hearing the costs Judge held that the 87% success fee was reasonable and should be recovered. That finding was upheld on appeal. The appeal Judge found that advising on quantum was not a straightforward matter, particularly in a case such as this where there were several factors affecting the final award. Although it was possible to consider liability and quantum separately, it was ultimately necessary to arrive at a single success fee on the basis of an assessment of the prospects of success. **Callery v Gray (2001)** EWCA Civ 1246 and **Russell v Pal Pak Corrugated Ltd** (2001) 1 WLR 2112 were distinguished on the basis that they had involved the calculation of success fees in "simple" claims.

(**Smiths Dock Ltd v (1) Jill Mary Edwards (Widow and Executrix of the Estate of Peter Guy Edwards, deceased) & Others** – QBD – Crane J – 13 May 2004- [2004] EWHC 1116 (QB)).

**Extension of time for service of a claim form not permitted.**

The Claimant was involved in a road traffic accident as a result of which he was rendered tetraplegic. Proceedings were issued, but not served, 8 days before expiry of the limitation period. One working day before expiry of the validity of the claim form, the Claimant issued a without notice application for an extension of time for service of the claim form. The Master allowed the application and granted a 3 week extension.

The Claimant then purported to serve the claim form but the claim form was lost. In the meantime, the Defendant issued an application to set aside the Master's Order on the basis that the Claimant had failed to establish good grounds for failing to serve the claim form within time. The Defendant also applied to strike out the claim on the basis that the claim form had not been served within the period of the 3 week extension. The deputy Master dismissed both applications and the Defendant appealed. The Court of Appeal ordered a complete rehearing, at which it held that the incompetence of the Claimant's solicitors was the sole reason for the failure to serve the claim form within the period of its validity. In the circumstances, the time for serving the claim form should not have been extended. To allow an extension in such circumstances would be to negate the rule in CPR 7.5 that a claim form must be served within 4 months of the date of issue.

In addition, it was noted that any other outcome would give rise to a real risk that guidance given by the Court of Appeal regarding the importance of observing time limits would not be taken seriously in the future.

(**Mahmood Hashtroudi v Terence Hancock** – CA – Thorpe LJ, Dyson LJ, Bennett LJ – 25 May 2004 – [2002] EWCA Civ 652).

**Costs of investment advice not recoverable**

The Claimant sustained a significant injury at birth that led to his suffering predominantly dyskinetic quadriplegic cerebral palsy. Liability was admitted but quantum remained in issue and was expected to be at least £2m.

The claim included the projected cost of management of his award, estimated at between £530,000 and £930,000. The Defendant argued that the Claimant was not entitled to this. At a hearing on this preliminary issue, the Claimant argued that, realistically, he would incur costs in managing such a substantial award and that such costs should, therefore, be viewed as a separate head of damages to be calculated on the usual multiplier/multiplicand basis. It was further argued that the Lord Chancellor had clearly envisaged when he exercised his power under the Damages Act 1996 s 1(1) to issue the Damages (Personal Injury) Order (2001) that a Claimant would incur costs in relation to investment advice, and that such costs would be recoverable.

The Court adopted the Defendant's argument that the 2.5% discount rate set by the Lord Chancellor took into account the potential cost of investment advice. Consequently, the Defendant argued that a separate claim for investment costs constituted an illegitimate attack on that discount rate. It was inherent in the Lord Chancellor's reasons for making the Damages (Personal Injury) Order 2001 that he had taken investment costs into account when setting the discount rate at 2.5%. Any attempt to claim investment costs as a separate head of loss therefore constituted an indirect attack on that Order. The Claimant was, therefore, precluded from claiming the cost of investment advice.

It was noted that this outcome would have the benefit of creating the sort of certainty and consistency that the Lord Chancellor had expressly intended to achieve by making the 2001 Order.

(**Page v Plymouth Hospitals NHS Trust** – QBD – Davis J – 20 May 2004 – [2004] EWHC 1154 (QB)).

**No recovery of brokers' fees charged by Court of Protection**

The Claimant, a patient, was awarded damages of £1.5m. Various elements of that award were appealed, but three of the Court of Appeal's findings are of particular interest.

(1) The Court of Appeal allowed the full cost of a rehabilitation programme undertaken by the Claimant despite the fact that the Defendant was not aware until the date of trial that the Claimant had undergone rehabilitation and the Defendant had not been given the opportunity to be involved in the selection of a suitable programme;

(2) The trial Judge's finding that the Claimant was obliged to use her Mobility Allowance to participate in the Mobility Scheme and thereby provide herself with a system of transport less costly than that proposed in her own Schedule of Losses, constituted an infringement of s17 Social Security (Recovery of Benefits) Act 1997;

(3) (Buxton LJ dissenting) The trial Judge had correctly dismissed the claim for the cost of panel brokers' fees for investment advice as charged by the Court of Protection. Any Claimant could spend his/her damages as he/she wished. If a Claimant wished to maximise his/her return by utilising a broker he/she must set off the broker's fees against the gains made and not seek to recover those costs from the Defendant (**Page v Plymouth Hospitals NHS Trust** [2004] EWHC 1154 (QB); **Page v Sheerness Steel Co Ltd** (HL); **Thomas v Brighton Health Authority** (HL); **Wells v Wells** (HL) considered.

The Court of Appeal was not persuaded by the Claimant's argument that patients should be treated differently for these purposes as they were obliged to incur investment fees by virtue of the involvement of the Court of Protection. The principle was unaffected by this lack of choice. It was also noted that, as a matter of principle, application of the law should not differ depending upon whether or not the Claimant was a patient.
(**Eagle v Chambers** - CA – Waller LJ, Buxton LJ, Scott Baker LJ – 29 July 2004 – [2004] EWCA Civ 1033

**Occupiers' Liability Act 1984 claim failed**
The Defendants were the occupiers of a disused gravel pit which was used for recreational purposes such as fishing and sailing. Signs placed around the pit stated that the pit was private property and that swimming was not allowed. It was accepted that the Claimant was aware of those signs. On the day of the accident, the Claimant and his friends met to play football on land adjacent to the water. During the course of their game the football fell into the water and the Claimant went to retrieve it. He did a running dive into the water and hit his head on a fibreglass container lying on the bottom of the pit in shallow water.
At first instance the Judge rejected the claim on the basis that the accident had been caused by the Claimant's own actions in diving into the water and not by the activities of the Defendant. The Claimant accepted that he became a trespasser when he entered the water. However, he appealed the decision on the basis that the concealed container constituted a danger for the purposes of section 1(3) of the 1984 Act and the Defendant had failed to protect him against that danger.
The Court of Appeal held that on the basis of the Judge's findings section 1(1)(a) of the 1984 Act was satisfied and the injury was caused by the state of the Defendant's premises. **Tomlinson v Congleton Borough Council & Anr** [2003] UKHL 47 was therefore distinguished.
However, the Claimant had, nevertheless, failed to establish liability under section 1(3) of the Act. Although the container would have been identifiable on an underwater inspection, the Defendant was under no obligation to carry out such an inspection and there was no evidence that the container was visible from the shore or from the surface of the water. The Claimant had therefore failed to meet the threshold requirement for a duty of care set out in section 1(3)(a) of the Occupiers' Liability Act 1984.
(**Jamie Rhind v (1) Astbury Water Park Limited (2) Maxout Ltd** – CA – Judge LJ, Latham LJ, Thomas LJ – 16 June 2004 – [2004] EWCA Civ 756.

# Top Tip

The Court of Appeal has given general guidance on the use of ADR and mediation in personal injury litigation, in particular guidance on the times when it is right to penalise a party who has refused mediation. See the judgment of **Halsey v Milton Keynes** [2004] EWCA Civ *576* and the Court's conclusions, reached having heard representations from ADR providers:

- The Court does not have power to order parties to mediate: the court can only encourage
- The Court can, if the party refusing mediation has acted unreasonably, penalise that party in costs
- It is for the unsuccessful party at trial, seeking to avoid costs, to show that the successful party was unreasonable to refuse mediation and seek trial
- If mediation is undertaken, the Court cannot examine why the case did not settle – parties can adopt whatever stance they choose at mediation
- Parties and the Court should not presume in favour of mediation – not all cases are suitable.

Perhaps these guidelines will provide a ballast to the standard direction now issued by many Courts that parties should engage

in ADR or explain to the Court why they have refused to do so.

# Closer Look

# Acceleration in Orthopaedic cases

**Steven Weddle considers the validity of expert opinion on the acceleration of previously asymptomatic degenerative conditions.**

The concept of injury making a pre-existing symptomatic condition worse is easy for all to understand but not so when the pre-existing condition was asymptomatic. As injury law practitioners we are often faced with orthopaedic opinion that a minor injury has accelerated an asymptomatic condition and brought forward a condition by a number of years.

The argument tends to be that the expert can look at an x-ray or scan and say that the symptoms suffered now would have been suffered in N years time even if the injury had not happened.

It is suggested by many orthopaedic sources that almost 100% of men and 85% of women show spondylitic change on plain x-ray and if they are all going to become symptomatic within, say, 10 years, then most of the male population and a large proportion of the female population would be queuing up at our orthopaedic departments waiting for their backs to be examined. That is plainly not the case. Even if we put it as low as 'probable' that pain will be suffered then we would still be looking at the best part of half the population experiencing symptoms by the age of 70. It does not happen.

The question we face is 'Must we accept the opinion?' to which I answer 'Not necessarily.'

It goes without saying that every case will stand on its own facts but there are ways of getting round it. Part 35 questions to an expert can work.

I am not aware of any publications by medical practitioners that support the theorem of inevitable pain, or even probable pain, from natural spinal degeneration. It must be right that the older someone is or the longer they have the degeneration the more prospect there is that it will become symptomatic but, taking the generally agreed premise that changes seen on an x-ray bear no correlation to pain suffered as a result, it must be impossible to say which person is likely to suffer pain, or when, with any degree of certainty.

Orthopaedic surgeons will very rarely see an asymptomatic spine and it would probably be unethical to x-ray a large group of asymptomatic people at, say, 55, in order to see how their spines fare 5, 10 or 15 years later. It is therefore highly unlikely that any expert is giving this opinion on the basis of research or experience.

The Part 35 questions must therefore drive at 2 fundamental points:

(1) What publication, research or actual experience does the expert rely upon to support the conclusion, and

(2) Bearing in mind the prevalence of degenerative changes in the spine in the older population, generally without pain, why is it probable, as opposed to possible, that this person should fall into the group that would have pain?

The phrasing of the questions is a matter for the practitioner but the answer is quite likely to be that the expert has difficulty supporting the opinion other than on the broad basis that 'It is generally accepted that …' pain will be suffered.

That answer is, strictly speaking, accurate because you will find that most orthopaedic practitioners in the medico-legal world appear to agree, but why?

I think the answer lies in constant repetition reinforcing the opinion which is founded on

some kind of medical 'logic' but which has no real foundation. It's rather like saying a man who loses all his hair due to illness or treatment would have lost it all eventually anyway because men do. We only need to look around to see that is false. A large proportion of men lose some hair as they age, some lose very little, but very few lose it all.

Because we are now expected to ask questions and deal with these matters long before we get to court, it is rare that one will get the opportunity to cross-examine an expert on this issue. If the opportunity does arise and Part 35 questions have not been asked then the prospects of 'turning' the expert in the witness box are greater than on paper as they have less time to prepare the answers. There is a risk that the court will stop the ambush but it could be worth a try!

Steven Weddle

# The MIB – still causing problems?

Emily Formby focuses on **Pickett v Motor Insurers' Bureau** [2004] EWCA Civ 06 and looks at the Court of Appeal's consideration of the MIB's obligations

*Why you should read this case*
Ms Pickett's failure to recover damages under the Compensation of Uninsured Drivers Agreement (the 1988 agreement) despite the circumstances of the accident and the severity of her damages serves as a stark reminder of the additional hurdles placed in the way of a claimant seeking payment of damages for personal injury by the Motor Insurers' Bureau (MIB).

*What were the circumstances of the accident?*
On 12 July 1999 Ms Pickett was a passenger in a car. It was being driven by her partner, Nathan Roberts. On any view, he drove very badly indeed. He lost control of the car he was driving while doing handbrake turns on a mountainside near Merthyr Tydfil. The road was an old track – a gravel path. Mr Roberts accelerated up the hill, then pulled the handbrake and spun the car. He had to fight to keep control. He did this several times. Ms Pickett described her dog being "flung about" in the back of the car. Ms Pickett had no control over the car. She was an innocent victim of Mr Roberts' negligent driving.

*The claim against Mr Roberts*
Judgment was entered against Mr Roberts on an 85/15 split. The reduction was due to Ms Pickett's failure to wear a seatbelt. She was severely injured in the accident – she was rendered paraplegic as a consequence of the car plunging into a ditch and overturning.

However, the claim against Mr Roberts could not be enforced. He had no money. Of greater significance, he had no insurance. Accordingly, on 18 January 2002, MIB was added as a defendant to the proceedings. MIB's obligation to meet the judgment arose pursuant to Clause 2.1 of the 1988 Agreement.

*Meeting the claim*
The MIB, despite accepting its obligations, declined to meet the unsatisfied judgment. Ms Pickett appealed the decision. She lost at first instance. She appealed again. By a majority (Pill LJ dissenting) the Court of Appeal confirmed the first instance decision that the claim need not be met by the MIB.

*Ms Pickett knew the driver had no insurance*
Ms Pickett's first problem was that she owned the car. There was no question that she knew the car was not insured. The tortuous argument articulated in **Cooper v Motor Insurers' Bureau** [1985] QB 575 was not employed on this occasion. The MIB had firmer grounds of dispute. It relied upon Clause 6.1 that sets out the circumstances in which MIB is exempt from meeting an unsatisfied judgment it would otherwise be obliged to meet pursuant to Clause 2. In particular, Clause 6.1(e) which states *"at the time of use… the person suffering… bodily injury… was allowing himself to be carried in … the vehicle … if either before the commencement of his*

*journey in the vehicle or after such commencement if he could reasonably be expected to have alighted from the vehicle he* (or Ms Pickett) … *(ii) knew …* the vehicle was uninsured.

*Could Ms Pickett have got out of the car?*
The broad facts are that following a day out and a drink in the pub, Mr Roberts drove Ms Pickett and her dog up the mountain. There he started to do hand brake turns. Ms Pickett had been in a car while he did this on a previous occasion. That time he had stopped and let her out. On this occasion, despite the dog being flung about in the rear of the car and despite Ms Pickett's protests and requests that he stop, Nathan carried on performing stunts until the car went into a ditch. You may have thought that, once in a car performing stunts, it would be hard to get out of the car unless the driver stopped and let you.

*What is "consent to be carried"?*
Nonetheless, while being in the car and unable to get out, the crucial question is whether Ms Pickett had consented to be carried in a car, despite knowing it had no insurance.

Consent to be carried can, it was agreed, be withdrawn during the course of a journey. Consent to be carried must be in force at the time of use giving rise to liability - that is at the time of the accident. Knowledge of lack of insurance tends not to change during a journey. Generally a passenger will know if there is insurance in place before a journey starts. Therefore, they will generally have given consent before the journey begins. It is likely therefore, that if a passenger knows there is no insurance in place at the time of the accident, they will have known this at the start of the journey and therefore, by getting in to the car they will have consented.

*Can consent be withdrawn?*
Sometimes, however, a passenger may only find out during the course of a journey that the driver has no insurance. Once in such a position of knowledge, they will tend not to forget. Consent to be carried may be withdrawn upon finding out that insurance is not in place, but once consent is given or allowed to continue, withdrawal of consent will have to be very clear indeed. Moreover, withdrawal of consent will have to be more than an unwillingness to be carried in a car when the driving is bad; it must be unwillingness to be carried in a car being driven without insurance.

*How does this apply to Ms Pickett's case?*
In this case, Ms Pickett certainly knew there was no insurance in place. Therefore, at the start of the drive she must have consented to being carried without insurance. However, before the accident happened, she gave evidence that she had asked Mr Roberts to stop and let her out.

This request that the car stop was not enough. In the opinion of Lord Justice Chadwick supported by Lord Justice May, the request had to be sufficiently clear to be an unequivocal request to stop so she could get out and so end the joint endeavour: she had to want to get out of the car because there was no insurance. Ms Pickett's noted request for the car to stop and clear indication that she was fed-up and frightened and concerned for the dog was not enough. She needed clearly to repudiate the common venture - she had not done so and therefore had not withdrawn consent within the meaning of Clause 6.1(e).

*What will happen next?*
One may wonder what further indication of a desire to repudiate is required, since Ms Pickett's statement clearly showed she wanted to get out of the car. Unequivocal words seem also to be necessary: "I want to get out of the car because you are driving without insurance".

In his dissenting judgment Lord Justice Pill urged a more common sense approach. In his view, not only had Ms Pickett made an unequivocal request, he felt that her circumstances were analogous to finding oneself consenting to a drive only to end up on a race track - consent to a different order of driving altogether. He criticised the inferences drawn by his brother judges as to Ms Pickett's intention and belief.

 

*How does this affect dealing with claims?*
It is always difficult to bring a claim against MIB. However, make sure:

(i) you have as clear a description as possible about the circumstances of the accident;
(ii) if there may be repudiation issues, take an early statement trying to record the exact words used by the Claimant;
(iii) if there are other passengers in the car, try to obtain their corroboration of words used;
(iv) consider not just the fact of consent or withdrawal of consent but the specific way in which it is done;
(v) don't despair!

Emily Formby

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