

Injury Team Newsletter

DATE

January 2010

ISSUE

#1

VOLUME

#1

The members of Hardwicke's Insurance Division have specialised skills and experience in all aspects of injury law including matters such as employer's liability, public liability, clinical negligence and road traffic accidents. We represent both claimants and defendants via conventional means in addition to direct access.

Telephone

020 7242 2523

Email

enquiries@hardwicke.co.uk

Web

www.hardwicke.co.uk

Practice Director

Amanda Illing

Senior Practice Manager

Vivian Frew

Practice Manager

Oliver Edwards

Welcome to a special edition of the Injury Team Newsletter. As part of the Insurance Division, the Injury Team continues to grow with the recent addition of Simon Hale who joined chambers in October 2009 from 1 Essex Court. Other new joiners in 2009 were Sarah Venn and Kevin Haven. Sarah came to Hardwicke from Hill Dickinson LLP where she was the Head of the In-House Counsel and Advocacy Team. Kevin previously headed up the Personal Injury and Clinical Negligence team at Pallant Chambers. If you have any suggestions or ideas for our coming editions please contact Louise Poppelwell, Marketing Manager at Hardwicke at louise.poppelwell@hardwicke.co.uk or phone Louise on 020 7242 2523.

What have we been up to?

- We were ranked as a leading Personal Injury Set in the most recent edition of the Legal 500 with John Gallagher, Romilly Cummerson, Emily Formby and Charles Bagot being singled out for special mention as excellent juniors. Maggie Bloom, Steven Weddle and Emily Formby were ranked as leading juniors in the field of Clinical Negligence
- Jasmine Murphy advised various panel solicitors in the "Son of TAG" professional negligence ATE insurance litigation
- By invitation Steven Weddle, Jamie Clarke, John Gallagher and Jasmine Murphy presented papers at Conferences organised by Central Law Training in September and October 2009. Topics covered included accidents involving children, difficult road

Hardwicke

traffic accidents, occupiers' liability, life expectancy and multipliers and care claims.

Costs on Account

We are now all used to summary assessment of costs in smaller cases and on hearings of applications and also reasonably familiar with a sum on account of costs at the end of a trial or disposal hearing where the full bill is going for detailed assessment.

What seems as yet not to be common is an order for a sum to be paid on account of costs when judgment is entered on liability by consent but there is still a long way to go in assessing quantum.

In most litigation that has got as far as proceedings being issued it is likely that the Claimant, or his solicitor or insurer in many instances, has been forced to incur substantial costs. For example, in a PI case there will be the cost of the liability investigation, the medical report fee, the cost of any advice or pleadings and the issue fee, in itself pretty substantial these days. In many instances the very fact that it has been necessary to issue proceedings even though liability is agreed suggests that the case has been going some time and perhaps limitation is looming.

It seems that there is no real reason why these costs, or at least a reasonable proportion of them, should not be recovered along the way rather than waiting to the end.

CPR43.8 says "*Where the court has ordered a party to pay costs, it may order an amount to be paid on account before the costs are assessed.*"

The case of ***Mars v Tecknowledge Ltd (Costs)*** [1999] 2 Costs LR 44 is good authority for the proposition that in general an interim order for payment of costs should be made prior to the detailed assessment but such decision should be subject to proper consideration. The principle is that the Claimant should be entitled to something on account and therefore should be paid it. In ***Allason v Random House UK Ltd*** [2002] EWHC 1030 the court decided that the Defendant should have a payment of a sum regarded as the absolute bare minimum it would recover on detailed assessment.

Steven Weddle

Hardwicke

Important recent decisions

Spencer v Wincanton Holdings Ltd [2009] EWCA Civ 1404

The claimant suffered injuries which led to amputation of his right leg in an accident at work. Subsequently he injured his left leg when he fell over and this was serious enough to put him in a wheelchair. The claimant claimed for the effects of both accidents. The defendant admitted liability for the first accident and the amputation, however alleged that the chain of causation had been broken in respect of the second accident. At first instance the court found that the chain of causation had not been broken and found the defendant liable for the second accident subject to a reduction of 25% for contributory negligence. The facts were that the claimant had gone to a petrol station to fill his car with petrol. Instead of using either his prosthesis or crutches or asking for any help, he got out of his car and hopped to the petrol pump. On hopping back the claimant tripped over a manhole cover and fell. The defendant relied on the well known case of ***McKew v Holland and Hannen and Cubitts (Scotland) Limited [1969] 3All ER 1621***. In that case a man with a knee that was prone to giving way was found to have broken the chain of causation by his own unreasonable actions of descending a steep staircase without holding onto the hand rail. The Court of Appeal upheld the decision of the lower court. It stated that the test of unreasonableness in ***McKew*** was a high test. In this case the claimant had not acted unreasonably, although he was partially to blame and this was reflected in the reduction for contributory negligence. It was relevant that this was an everyday task which the claimant had done several times this way as he was determined to act without reliance on others.

Parker v TUI UK Limited [2009] EWCA Civ 1261

A tour operator organised a toboggan run as part of a package skiing holiday. The claimant was injured when she used a toboggan on an icy steep lower road after she had completed the defined course. She lost at first instance. In dismissing the claimant's appeal Lord Justice Longmore said *I cannot bring myself to hold that it is the duty of a tour operator dealing with rational adults on a winter holiday to repeat simple warnings already given with clarity or to point out obvious dangers of ice on the road and the relative safety of snow at its side. So to hold would only encourage potential claimants to believe that whenever an injury occurs someone must be to blame. That is not what the law of negligence is about.*

Hardwicke

Insurers use illegality defence as latest weapon in credit hire claims

The defence of *ex turpi causa* is not regularly used but has recently been successfully deployed to defeat a claim for credit hire within a road traffic case. The defence of *ex turpi causa* acts to bar a claim founded on illegality. **Clerk & Lindsell on Torts** concludes that *the true function of the ex turpi causa defence in tort ... is to protect the integrity of the legal process by not being seen to assist, through the law, those who sustain damage through flagrant breaches of the law*. In the scope of road traffic cases, the doctrine has been successfully used to defeat claims where the claimant has been involved in an illegal act when injury was caused. In **Pitts v Hunt** [1991] 1 QB 24 the claimant was denied compensation when he was riding pillion on a motorbike driven by his friend who the claimant knew was drunk, uninsured and without a licence yet the claimant egged his friend on.

How far can this doctrine be stretched to cover incidental illegal acts, such as breaking the speed limit, driving a car with bald tyres or driving a car with an expired tax disc? For a claim to be struck out entirely on the basis of *ex turpi causa* the claimant's claim has to be founded upon his own criminal or immoral act. The facts which give rise to the claim must be inextricably linked with the criminal activity. It is not sufficient if the criminal activity merely gives occasion for tortious conduct of the defendant – **Vellino v Chief Constable of Greater Manchester Police** [2002] 1WLR218.

Therefore the claimant in **Churchill Car Insurance v Kelly** [2007] EWHC 18(QB) who was displaying a stolen tax disc on his car when he was involved in a collision caused by the defendant was not barred from bringing a claim. Likewise the drunk driver claimant in **Edwards v Jerman** [2003] CLY 04/2703 recovered damages against the defendant driver, although there was a reduction for contributory negligence.

However, in June 2008 HHJ Dean heard **Acheampong v Allied Manufacturing (London) Limited** at Central London County Court (reported on Lawtel). In this case the claimant claimed credit hire in the sum of £35,000 when his parked car was hit by the defendant in March 2006. The claimant's car was taxed and MOTed but not covered by any insurance as the claimant was not insured. The claimant had been convicted of using a vehicle on the day

Hardwicke

of the accident without insurance and his licence endorsed with 6 points. The court found that the claimant had been without insurance since December 2004 and in his evidence had set out to mislead the court. The defendant initially appeared to argue that the claimant's whole claim was barred by the doctrine of *ex turpi causa* but this *extreme position* was abandoned in final submissions (*in my view wisely* commented the judge). However, the court did not make any award in respect of the credit hire claim, which arose out of the loss of use of the claimant's car. This is because the court found that, having intentionally driven without insurance for the past 16 months it was likely that he would drive without insurance for the period of credit hire. Therefore he sought compensation for projected unlawful use and as such his claim failed.

Principles to be drawn from this decision in credit hire claims:

- Claimants and defendants should be careful to check that at the time of the accident the claimant's car was covered by insurance, a valid MOT and tax disc;
- If the claimant's car was being used illegally at the time of the accident, the whole claim may not be dismissed;
- However if the defendant can establish likely ongoing future illegal use, any loss of use/credit hire/hire claim may be defeated;
- Establishing future illegal use may be difficult to prove at trial, but could be a useful negotiating tool by defendant insurers.

Jasmine Murphy

Upcoming Events

Look out for more newsletters throughout the year from the Insurance Division. Following on from our sold out morning seminar about psychiatric issues on 20 January 2010, we are continuing our 2010 seminar program at Hardwicke to include a one day workshop and evening lectures. We also offer tailor-made, in-house CPD accredited seminars on particular injury topics important to you and your colleagues.

For further information please contact **Louise Poppelwell** by email: louise.poppelwell@hardwicke.co.uk

George Pulman QC	1971 (1989)
William Lowe QC	1972 (1997)
John Gallagher	1974
Robert Leonard	1976
Steven Weddle	1977
Kevin Haven	1982
Karl King	1985
Colm Nugent	1992
Emily Formby	1993
Dr Maggie Bloom	1994
Jamie Clarke	1995
Charles Bagot	1997
Romilly Cummerson	1998
Henry Slack	1999
Jasmine Murphy	2002
Sarah Venn	2002
Rebecca Richardson	2003
Simon Hale	2006

Hardwicke

Hardwicke Building, New Square,
Lincoln's Inn, London WC2A 3SB
Telephone 020 7242 2523
Facsimile 020 7691 1234
DX LDE 393
Email enquires@hardwicke.co.uk
www.hardwicke.co.uk