Hardwicke Building

Espresso News

Hardwicke Building Injury Team
August 2000

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Seminars

Between Easter and the start of the Long Vacation, members of the Injury Team delivered a full programme of seminars on personal injury and clinical negligence issues relevant to the practitioner. Seminars took place both in Hardwicke Building's library/lecture theatre and at the offices of our professional clients. Subjects covered included introductory seminars on common heads of damages such as loss of earnings, care and pension claims, in depth consideration of the probable implications of the soon-to-be-law Human Rights Act 1998 on surveillance evidence, and the new MIB Agreement. All seminars are accredited for CPD and ILEX points.

Watch out for the next issue of the Injury Team Newsletter for details of our autumn seminar programme.

If you would like to attend any of the events shown, or have suggestions for other seminars, please contact Lesley Richardson on 020 7691 0012 or via e-mail to lesley.richardson@hardwicke.co.uk.

Case Law

General Damages: increased by up to one third

Law Commission Report No 257 recommending increases in awards of general damages was implemented in part by the Court of Appeal. Awards exceeding £10,000 should be increased on a sliding scale up to a maximum of one third (*Heil v Rankin* - CA – 23.03.00). A useful online calculator can be found at www.newbailey.co.uk/psla.htm

Interest on generals now 2%

Interest on general damages for pain, suffering and loss of amenity runs at 2% from service of the claim form. If, relying upon inferences drawn from the judgment in *Wells v Wells,* you have settled at or been awarded 3%, your client has been over-compensated. If you have paid out at 3%, you have been too generous. In all but near catastrophic injury claims, the difference will have been minimal, however (*Lawrence v Chief Constable of Staffordshire* - CA - 29.06.00)

3% multipliers appropriate

Although ILGS rates of return may have dropped below 3%, it is not open to the courts to change the discount rate. The CA held that as a result of the views expressed on this issue by the HL in *Wells v Wells*, the courts must regard their hands as tied until the Lord Chancellor sets a new discount rate under s1(1) of the Damages Act 1996 (*Warren v Northern General Hospital Trust*- CA – 04.04.00).

Sexual abuse: parents' psychiatric claim can go to trial

Foster parents who suffered psychiatric injury on learning that a foster child in their care had sexually abused one of their natural children had an arguable claim for damages against the local authority

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notwithstanding the restrictions imposed on recovery by secondary victims by cases such *as Alcock v Chief Constable of South Yorkshire Police (W & ors v Essex County Council & anr* - HL - 16.03.00)

Main site contractor owed no duty to sub-contractor's employee

A claimant could not recover from a main contractor for injuries sustained when using his equipment (tower scaffold). The CA endorsed an old injunction of Lord Diplock that the courts should not extend the "nursemaids school of negligence" to impose a duty to advise someone who was the employee of an independent contractor (*Makepeace v Evans Brothers (Reading) (a firm) and Another* – CA – 23.05.00)

Psychiatric claim against negligent son fails

A fire officer who suffered psychiatric injury after attending the scene of an accident in which his son had negligently injured himself was barred for policy reasons from recovering damages against his son. Cazalet J so held in dismissing the claimant's claim in the trial of a preliminary issue, holding that as a matter of principle the victim of self-inflicted harm owed no duty to a secondary party who suffered only psychiatric injury as a result of witnessing the event causing the injury or its immediate aftermath (*Greatorex v Greatorex* The Times 06.06.00).

Highway authority: no duty to salt or grit

The duty to maintain under s41 of the Highways Act 1980 does not extend to the removal of snow and ice likely to make a road dangerous. In approving a 22-year-old dissenting judgment of Lord Denning, the CA held that the claimant in this case could not recover against a highway authority (*Goodes v East Sussex County Council* – CA – 15.06.00)

Animals Act: officer bitten by police dog has no claim

An officer bitten by a police dog when attempting to detain a suspect failed to establish that the behaviour the German Shepherd had come within s2 (2) of the Animals Act 1971 (*Gloster v Chief Constable of Greater Manchester* – CA – 24.03.00)

Ambulance service liable for delayed response

An ambulance service is liable to a member of the public who sustains further foreseeable injury by inexcusable delay following a 999 call (*Kent v Griffiths and Others* – CA - 03.02.00)

Limitation: sins of solicitor not to be visited upon claimant

The discretion under s33 of the Limitation Act 1980 to allow a claim issued out of time to proceed should be exercised where the claimant's solicitor allowed the primary limitation to expire whilst instructed. In March 1993 the claimant had learned that his chest condition was attributable to his metal spraying work. In September 1993 he instructed solicitors, but they failed to issue proceedings until August 1996. There was no evidence that the delay between March and September 1996 prejudiced the defendants (*Corbin v Penfold Metallising Co Ltd* – CA - The Times 06.04.00).

Solicitor's failure to serve Claim Form in time fatal to action

Where a solicitor negligently fails to serve a Claim Form within the 4 months allowed from issue, the Court has no power to grant a retrospective extension unless one of the conditions of CPR 7.6(3) can be satisfied, even though liability is not in issue, an interim payment has been made and the defendant is not prejudiced (*Vinos v Marks & Spencer plc* newlawonline 200059002).

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Dissatisfied party can instruct own expert

In claims involving substantial damages, a party should be allowed to instruct his own expert carer where he is unhappy with the report of a jointly instructed expert (*Daniels v Walker* – CA - The Times 02.05.00)

Appeals: new procedure

From 02.05.00 all civil appeals must now be considered in the light of the new rules. In general, appeals now lie to the next level of judge in the court hierarchy (*Tanfern Ltd v Cameron-Macdonald* – CA – The Times 17.05.00)

Closer Look

Multiple Sclerosis and trauma

In 1996 a Scottish High Court judge accepted evidence called by an MS sufferer that his condition had been triggered by whiplash injuries sustained in a road traffic accident (*Nicholas Mark Dingley v The Chief Constable of Strathclyde).* As a result, Mr Dingley, a former police officer aged 31 at trial, was awarded £547,250.00 compensation. The award was made up of £75,000.00 for general damages and the balance for loss of earnings and care.

Sadly for Mr Dingley, the judgment was successfully appealed to the Scottish Court of Session. Mr Dingley appealed further, and on 9th March 2000 the House of Lords upheld the appeal court's decision. In the speech of Lord Hope of Craighead, approved by the four Law Lords sitting with him, the House of Lords rejected arguments that the appeal court was not entitled to interfere with the trial judge's findings that (a) as a matter of principle symptomatic MS can be triggered by an injury to the central nervous system; and (b) that in Mr Dingley's case it was.

The House of Lords decision has profound implications for what is believed to be a large number of claimants and potential claimants in England and Wales. The first instance decision in *Dingley* gave hope to many who developed symptomatic MS for the first time after sustaining (usually) hyperextension-flexion injury to the neck. But the decision, being a Scottish decision, was not binding on courts in England and Wales - it was merely of persuasive authority. However, in June 1997 the High Court in England held that a causal link was established between a claimant's whiplash injury and the subsequent onset of his MS (*Kennedy v LFCDA*). After hearing expert evidence, and having *Dingley* cited to him, His Honour Judge Kenny (sitting as a Deputy High Court Judge) awarded Mr Kennedy, a chauffeur injured in a crossroads accident, £450,156.00 (gross). *Kennedy* was not appealed and, being an English authority, gave further hope to dozens claiming damages in England and Wales, many of whose treating neurologists believed in a causal link between the onset of their patients' symptoms and their accidents. The actions of many of these claimants were stayed or adjourned pending the outcome of the House of Lords appeal in *Dingley.*

MS is a disease affecting the central nervous system (CNS). It operates by depleting the myelin sheath surrounding nerve fibres that carry electric current from the brain and spinal cord to various parts of the body. This demyelination process impairs the ability of the nerve fibres to carry electric signals and results in the formation of plaques within the CNS. In time the plaques become scarred (or "sclerotic"). As more plaques and scarring develop, the sufferer experiences distortion or loss of sensation and/or function in those parts of the body served by the damaged nerve fibres. The disease is of a relapsing/remitting nature, but is nevertheless progressive.

No one knows what causes it. The received wisdom is that a genetic factor is involved. It is common ground that trauma to the CNS cannot <u>cause</u> it. The controversy is whether those genetically at risk (potential demyelinators) can be rendered symptomatic by trauma to the CNS. i.e. whether trauma can <u>trigger</u> MS. Many potential demyelinators have MS but are

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unaware of it because it remains completely or largely asymptomatic.

In *Dingley* and *Kennedy* the claimants relied principally upon the evidence of two senior neurologists: Dr Charles Poser (Harvard Medical School) and Professor Peter Behan (University of Glasgow). They stated that an injury such as a whiplash injury to the neck can produce a temporary alteration or breakdown in the blood brain barrier (BBB), the organic mechanism separating the CNS from the blood stream whose function is to allow essential nutrients to pass from the blood to the brain. The hypothesis is that when the BBB is opened by such an injury, deranged cells known as T-lymphocytes are permitted free passage from the blood stream into the CNS where they contribute to the development of MS plaques. Hence, a whiplash injury triggers MS in an asymptomatic potential demyelinator.

Although it is generally accepted that an injury to the CNS does produce an alteration in the BBB, it is hotly disputed that this is associated with the development of MS symptoms. In *Dingley* the defence relied upon an equally distinguished team of neurologists to dispute the Poser-Behan hypothesis, in particular Professor D A S Compston (University of Cambridge) and Professor William Sibley (University of Arizona). They maintained that epidemiological MS studies failed to demonstrate a relationship between onset of symptoms of the disease and trauma. In both *Dingley* and *Kennedy* (in which Professors Compston and Sibley did not give evidence), both sides relied upon vast quantities of medical research material. The defendants' contention in both cases was that this material did not establish that onset of symptomatic MS following trauma was anything other than coincidental.

For the time being at least, those who develop MS following injury are unlikely to be able to establish on the balance of probabilities that the onset of their disease was related to their accident. Research into the origins of MS and what causes a potential sufferer to become symptomatic continues here and abroad. What was lacking in *Dingley* was hard evidence that onset of the disease following an insult to the CNS was more than merely coincidental. The House of Lords ruling will not stop those who develop symptoms for the first time after injury believing in a causal relationship, particularly where symptoms develop shortly afterwards. However, if a scientific link is ever established, it may well come too late for them to obtain compensation.

Alan Smith

Heil v Rankin

The judicial basis for this decision is both interesting and novel. The Law Commission reported after detailed consultation with first instance judges (additionally at a JSB conference), 'the people' (an opinion poll survey was carried out) and with others. Various people had responded. There were two conflicting legal views as to how general damages could in law be increased: (1) only Parliament could do it (2) it could be done by the CA who would refer to the cases in the 1940's and 1950's to show that the awards (made by juries in those years) were well above current awards when inflation and other heads of damage are taken into account.

The CA declared that they (in addition to Parliament) had the power to increase awards of general damages. The basis of the argument is not clear, because it is not recorded in the judgments.

There were three courses open to the CA on the evidence and arguments put to them: (1) no change; because the CA does not have power to change 50 years legal authority overnight: that is Parliament's function; (2) double all the awards: because the opinion poll and the consensus view of the judges at first instance thought this correct; and (3) add 100% to the top end and scale up the other awards accordingly (i.e. £75,000 general damages would be increased by 50%, etc).

Nobody argued for the result which the CA gave. What was its basis? Firstly, they dismissed the opinion poll because, they thought, it was based on the people's misconception of total awards of damages

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and awards of general damages alone. That is not a view that the pollsters would accept. Secondly, they agreed that the awards should go up. But, I hear you ask, don't they need some evidence for this? The historical analysis proposed to the Law Commission was not adopted. They relied on the evidence that an increase was *seen to be* appropriate. But they decided the rate and the amount. On what basis is not apparent.
One factor seems to have substantially influenced the CA, namely, some figures from the NHS on the effect on the increase of awards. That evidence was put in at the CA and could not be challenged. I make one point about it. As a former member of the Legal Aid Board I compared two figures for damages: (i) the total recovered by legally aided claimants in medical negligence cases (likely to be near the total because very few privately paying clients can afford to bring a claim for medical negligence; and (ii) what the NHS said that they paid out in negligence cases. There was no comparison. The figure recovered by legally aided claimants was a small fraction of what the NHS said that they were paying. Why is there this difference? It may well be because the NHS included all their Employers Liability claims (injured nurses and other employees) and all their RTA claims (NHS vehicles causing collisions resulting in injuries).

It is unfortunate - as the lawyers say - that the information on which the CA decision was based could not be subjected to cross examination or any other analysis. That is compounded by the fact that there was clear information - the judges' view and the opinion poll view - on which their decision could have been based.

Large awards are made in clinical negligence cases because doctors, nurses and others are guilty of negligence leading to catastrophic injuries. Those large awards consist of general damages together with other heads of damage. It is the other heads of damage - loss of earnings, care, housing, etc - which make up about 80% of the award, if not more. Increasing general damages from £150,000 to £300,000 in a £2m case adds 7.5% to the award.

Claimants deserve just awards of damages. If the law is to be perceived to be just, those awards should accord with a general view of fairness. The CA, doing the Treasury's bidding, does not sit easily with fairness nor with the independence of the judiciary.

George Pulman QC

Team

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George Pulman QC	1971 (1989)
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Michael Hopmeier	1974
Steven Weddle	1977
Alan Smith	1981
Karl King	1985
Caroline Hallisey	1990
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