

Injury Team Newsletter

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November 2010

ISSUE

#2

VOLUME

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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.

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Welcome to the November Edition of the Hardwicke Injury Team's Newsletter. In this edition members of the Injury team share details of some of their recent cases which have led to useful decisions on spinal acceleration, defences to Highway claims, disclosure of medical records and loss of enjoyment.

If you have any suggestions or ideas for our coming editions please contact Louise Poppelwell, Marketing Manager by email on louise.poppelwell@hardwicke.co.uk or telephone Louise on 020 7242 2523.

What have we been up to?

- **The Legal 500 2010** edition ranks Hardwicke as a **Leading Set** within the field of Personal Injury. The 'very analytical' **Charles Bagot's** 'attention to detail is exceptional' while **John Gallagher** is 'highly experienced in difficult personal injury cases'. **Romilly Cummerson** stands out as 'an excellent advocate with exceptional cross-examination skills'. The 'formidable opponent' **Colm Nugent** debuts in the table as does **Henry Slack**, recommended for his expertise in defeating exaggerated claims, and **Jasmine Murphy**, described as an 'up and coming performer'. **Dr Maggie Bloom** and **Steven Weddle** continue to be ranked as Leading Juniors in the field of Clinical Negligence.
- Hardwicke continued to shine in the **Chambers UK 2011** directory. **Dr Maggie Bloom** featured in the Clinical Negligence tables and was praised for working 'effectively and with great sensitivity.' **Charles Bagot** also featured in the Personal Injury tables due to his 'legendary courtesy' and 'tireless commitment.'
- In June **Helena White** was welcomed as a new member of the Insurance Division. Helena completed her pupillage at 3 Serjeants' Inn and after a very busy 3rd six with Hardwicke, has been taken on as a tenant. Called in 2007, Helena is building a personal injury practice with a particular interest in clinical negligence.
- In October **Gemma Witherington** joined the Insurance Division of Hardwicke following a successful pupillage.

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Before joining Hardwicke, Gemma worked in the litigation department of a large international bank. Gemma specialises in injury work for both claimants and defendants and is already delivering lectures as part of our seminar programme.

- **Jamie Clarke** has been busy on the seminar circuit again. In October 2010 he gave a well-received seminar for Central Law Training on the impact of the availability of state provision on awards for care and services. Looking ahead to 2011 Jamie has been invited back by CPD Webinars to present a new paper on Occupational Disease litigation.
- **Colm Nugent** featured in The Lawyer's Work-Life Quiz. You can read about his favourite bed time story here: <http://www.thelawyer.com/colm-nugent/1004599.article>
- In May 2010 Hardwicke's Equine Group was launched. **Jasmine Murphy** wrote an article about the Animals Act 1971 and injuries caused by horses for its inaugural Newsletter, which you can read here: <http://www.hardwicke.co.uk/media/35/235-hardwicke-equine-newsletter.pdf>. The second edition of the Newsletter will be available on the website shortly....
- On 26 May 2010 **Charles Bagot** and **Jef Thompson** presented a seminar at Hardwicke entitled "Lies, damned lies and avoidance" to a packed audience of both claimant and defendant solicitors as well as insurers. This evening seminar dealt with fraudulent and exaggerated claims on insurance policies as well as by third party Claimants. It touched on strategies to adopt (by both sides) where fraud or exaggeration is suspected as well as recent decisions affecting such claims.
- Some members of the team have also been exercising more than just their minds this summer. As well as being part of the team that won the Legal Cup in the London Triathlon, **Charles Bagot** came 66th out of the 1,100 swimmers swimming 2.25 miles of the Thames in the Nokia Thames Swim on 1 August 2010. On 5 September 2010 **Steve Weddle**, **Simon Hale** and **Jasmine Murphy** completed the 37 mile London to Windsor bike ride in 3 hours raising money for the British Heart Foundation.

Spinal Acceleration

I represented the Claimant in the case of **Watson v MoD, 28 January 2010, HHJ Jenkins, Lincoln County Court** (reported on Lawtel) the court had to decide between the Claimant's case of complete causation of back injury and the Defendant's case of acceleration of pre existing asymptomatic degenerative changes visible on scanning. When questioned and presented with published material the Defendant's expert replied:

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“I confirm, I have read this article. I do not think it adds anything to the case. The contents are not controversial. The basic difference between myself and *[the Claimant's expert]* is that he does not believe a disc prolapse is inevitable and furthermore I got the impression that he did not believe in the Medico-Legal concept of acceleration. *[His]* position on this matter is perfectly reasonable because there is no scientific evidence one way or the other.”

This adds fuel to the continuing arguments as to whether there is any force in the medico legal presumption that signs of degenerative changes suggest chronic problems in any event. The evidence is moving to suggest that the proposition cannot be correct.

Steven Weddle

Highway Defences

I acted on behalf of Aviva Insurance, the Defendant's insurer, in ***Denise Thring v Owen Mullen Ltd*, 9 February 2010, HHJ Hammerton, Medway County Court** (reported on Lawtel). This case clarifies the duty of those carrying out roadworks to road users for (i) the state of the road surface; and (ii) the operation of temporary traffic lights. It extends the principle in ***James v Preseli District Council*[1992] PIQR P114**, which dealt with trips on the pavement, by deciding that the Claimant moped rider had to prove that the state of the road caused her accident. The Claimant sought damages of up to £250,000 but her claim was dismissed at trial. The Judge also stated that had the claim not failed entirely, the Claimant's contributory negligence would have been assessed at 60%. This is a useful example of the likely finding in such a case.

Charles Bagot

Can I force a Claimant to disclose medical records?

In ***OCS Group Ltd v. Wells* [2008] PIQR P18** the Court decided that, despite a Claimant's medical records possibly qualifying for disclosure under a pre action disclosure application made by a Defendant, it may not be desirable to order disclosure for a number of reasons including the Claimant's right to decide how to formulate the claim and the issue of privacy.

In order to try and circumvent the privacy element, the Defendant recently applied in ***Clark v Monteith*, 16 June 2010, Clerkenwell & Shoreditch County Court**, for disclosure of the Claimant's medical records, not to the Defendant's solicitors, but to a third party business to advise the Defendant as to what rehabilitation was required. I represented the Claimant. The application failed for want of power.

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S.52(2) of the County Court's Act 1984 only permits production (i) to the applicant's legal advisers; or (ii) to the applicant's legal advisers and any medical or other professional adviser of the applicant; or (iii) if the applicant has no legal adviser, to any medical or other professional adviser of the applicant.

Steven Weddle

Lost Enjoyment of Holiday

"How Queen Victoria's Bottom Flexed on our Nightmare £60,000 Cruise!" so ran the Yorkshire Post's headline reporting the case of **Milner v Carnival PLC [2010] EWCA 389**. A familiar feature of injury claims is lost enjoyment of a holiday as a consequence of the injury. However the argument ran conversely in **Milner** where it was argued that the lost enjoyment of a holiday allegedly caused injury and distress.

This claim was based on breach of contract and brought under the Package Travel Regulations. Mr and Mrs Milner sued Carnival for their ruined £60,000 cruise on the Queen Victoria. In the Court of Appeal's judgment Ward LJ carried out a helpful review of awards for inconvenience and distress for ruined holidays at paragraph 37 of the judgment:

One place to look is to trace the awards given in holiday cases. As I have already pointed out at [] above, this is not a particularly fruitful exercise because the facts of one case will be infinitely different from the facts of the next. For what it is worth, counsels' diligent analyses tend on the whole to show rather low awards. One of the highest for a ruined honeymoon was only £4,406, adjusted for inflation. The award in Jarvis is worth £1,885 today and in Jackson £4,101 for the family of five and in Keppel-Palmer £3,499 for the party of six adults. Factors which will have a bearing on the amount of damages awarded in individual cases include the type of holiday so that a special occasion, such as a honeymoon, is likely to attract more damages than for an ordinary annual package holiday. Mr Christopher Lundie, for the appellant, gathered the known holiday cases in categories which show that the highest awards (£4,406 to £4,360) were to couples whose plans to marry abroad were wrecked; the disappointed honeymooners received from £321 to £1,890; for other special holidays the range was £264 to £1,161 and the run of the mill ruined holiday attracted between £83 and £1,876.

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The nature of the breach will matter: the sports fanatic denied his sporting facilities will suffer more disappointment than his wife who is perfectly happy on a sun bed by the side of a pool. Thus the features of the holiday which were regarded as the primary features will make a difference.

Milner and the holiday cases referred to by Ward LJ above provide useful guidance when assessing general damages for lost enjoyment of a holiday caused by injury. There are many cases reported in Kemp & Kemp, Current Law or on Lawtel where awards have been made for disappointment and distress when the injured claimant has still gone on a pre-planned holiday but the enjoyment of that occasion has been reduced. However there are less reported cases where the claimant has had to cancel or miss a holiday as a result of injury.

In the recent case of **Warren v NIG Insurance, 5 July 2010, HHJ Birtles, Mayors and City of London County Court**, the sum of £250 was awarded to compensate the Claimant for holidays that she missed out on as a result of injury. I represented the Claimant. On the day of the accident the Claimant was travelling to the airport to fly to Ireland to spend Christmas with her family. As a result of the accident the Claimant could not take that holiday, she missed another family celebration in Ireland and a planned skiing holiday. The Defendant agreed to pay the Claimant's expenses in relation to the cancelled holidays in full but refused to make any offer in respect of the Claimant's lost enjoyment of the holiday. Having been referred to Kemp & Kemp Volume I at paragraph 20-008 and **Haw v Hampshire County Council [1987]**, HHJ Birtles said that it was clear that he could and should make an award for the Claimant's loss of enjoyment of these events because she would have been able to go and enjoy them but for the accident.

Jasmine Murphy

Upcoming Events

We are continuing our seminar program at Hardwicke throughout the year. We also offer tailor-made and in-house CPD accredited seminars on particular injury topics important to you and your colleagues. Please contact **Louise Poppelwell** on **020 7242 2523** or email louise.poppelwell@hardwicke.co.uk for further information.

This newsletter was edited by Jasmine Murphy

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