

## INSURANCE PRACTICE GROUP LEGAL UPDATE

## News

**Hill Dickinson Expedition and Outdoor Sector Legal Seminar**

On 16 and 17 February 2009 Hill Dickinson's Travel & Leisure Team will be hosting a two day seminar in our Liverpool office for the expedition and adventurous activity sector. Speakers will include partner, Matthew Davies, FRGS, who is described by Chambers & Partners as a leader in this field, and accompanied by other Hill Dickinson experts addressing a diverse range of topics, including company creation, intellectual property, Package Travel Regulations, terms and conditions and coroners inquests. Additional speakers will include insurers, health and safety specialists, specialist Counsel, Trading Standards officers and Child Protection officers. For more information, including costs and an event programme, contact [matthew.davies@hilldickinson.com](mailto:matthew.davies@hilldickinson.com)

Matthew, an intrepid adventurer himself, is at the cutting edge of expedition law and recently provided urgent advice by SMS to a client stuck in a blizzard 4,000 metres up Mount Elbrus!

**Access to justice: at what cost?**

Lord Justice Jackson has been tasked with reviewing the costs of civil litigation to "promote access to justice at proportionate cost".

**Welsh Councils pay over half a million pounds in school accident claims**

It has been reported that more than half a million pounds of compensation has been claimed from Welsh Councils in the last three years. Claims included falls due to potholes, tripping on defective tarmac and slipping on ice.

**Asbestos test litigation**

Mr Justice has now delivered judgment at first instance in the asbestos test litigation a insurers' liabilities (See [Durham -v- Bai](#), et al, opposite).

## Cases

**David Peakman -v- Linbrooke Services Ltd (2008)****Value of an inflated claim is a relevant factor when making a costs order**

When Linbrooke brought a "hopeless" counterclaim and it was clear from the trial documents, and from the trial Judge, that the counterclaim should never have been brought, the Court was obliged to have regard to this when making an order as to costs. The value of the counterclaim had caused the claim to be allocated to the multi-track but, absent the counterclaim, the matter would have been a small claims track case. Linbrooke's conduct, which caused Peakman to incur substantially more costs than should otherwise have been the case, was a relevant factor and Linbrooke was ordered to pay 50% of Peakman's costs from the date of allocation, despite receiving judgment in its favour for £265 plus interest (that being the balance of the successful counterclaim less damages awarded to Peakman).

**Hill Dickinson comment:** The principles enunciated in [Peakman](#) should not be read restrictively. A range of factors, including the value of a claim, influence track allocation, and there are numerous instances in which a point pursued unreasonably may lead to a different track allocation with costs consequences.

**Victor White -v- (1) Fon (2) Omega Red Group Ltd (3) Sentinel Lightning Protection And Earthing (2008)****Determining date of knowledge for the purposes of the Limitation Act 1980**

White appealed against the decision of the trial Judge that his claim for personal injury against Sentinel was statute barred. White issued proceedings in 2006 seeking damages for vibration white finger and carpal tunnel syndrome which he alleged had been caused, in part, by his employment with Sentinel between 1962 and 1996. White claimed that his date of knowledge was 2003 when he saw an advertisement for a claims company. Sentinel contended that White's date of knowledge was much earlier and the Judge found that White had constructive knowledge pursuant to section 14(3) of the Limitation Act 1980 by the time he left his employment with Sentinel because by then it had been reasonable to expect him to have sought medical advice in respect of his symptoms, which would have led to him discovering the link between his condition and vibrating tools. The Court of Appeal was invited to find that the Judge had applied too stringent a test, but concluded that the Judge's finding had been obvious and logical; it was for the Judge to decide what was or was not reasonable for White to have done in the circumstances.

**Hill Dickinson comment:** This decision has potential application to a large number of cases and whilst the application of the Limitation Act 1980 is fact specific, claims handlers should review their files with this decision in mind.

**Durham -v- Bai (Run Off) Ltd (Lead Case 1) : Fleming & Eddleston -v- Independent Insurance Co Ltd (Lead Case 2) : Edwards -v- Excess Insurance Co Ltd (Lead Case 3) : Thomas Bates & Son Ltd -v- Bai (Run Off) Ltd (Lead Case 4) : (1) Akzo Nobel Uk Ltd (2) Amec Plc -v- Excess Insurance Co Ltd (Lead Case 5) : Municipal Mutual Insurance Ltd V Zurich Insurance Co & Ors (Lead Case 6) (2008)****Mesothelioma claims: EL insurer "on cover" at date of inhalation of asbestos should satisfy any judgment**

Traditionally, an insurance company would pay out to a mesothelioma sufferer if it had been the employer's liability insurer at the date of inhalation of asbestos. A series of test cases were brought by insurers who averred that the proper interpretation of the insurance policies resulted in liability only being triggered when a tumour developed as that was when injury was sustained. Accordingly, it was contended that the insurer "on cover" at the time the tumour developed should satisfy any claim. Mesothelioma has a long latency period and in many cases there is no employers' liability insurance in place at the time a tumour develops. Mr Justice Burton held that although there was no injury or disease at the date of inhalation, for the purposes of the policy, injury or disease had been "sustained or contracted" in the sense that it was caused at that time. Further, the proper construction of the insurance policy was that it covered the employer in respect of injury resulting from an exposure during the currency of the policy.

In the premises, the insurer “on cover” at the date of inhalation should satisfy any successful claim by a mesothelioma sufferer.

**Hill Dickinson comment:** Permission to appeal has been granted and the hearing is to be expedited. Hill Dickinson’s comprehensive review of this decision, including its relevance to Public Liability claims and the principle enunciated in [Bolton MBC -v- Municipal Mutual Insurance Ltd](#) can be obtained from Sarah Venn, In-House Counsel.

### [Ian Richard Paterson -v- Surrey Police Authority \(2008\)](#)

#### ***Foreseeability of psychiatric illness as a result of stress at work***

Paterson claimed damages against Surrey Police Authority for a psychiatric condition he developed whilst in their employment. Paterson had worked as an estate manager and was required to be on standby in the event of an emergency. On average Paterson recorded 10 hours overtime each month on emergency call-outs. Paterson was given a booklet which referred to his high levels of stress and many years later Surrey Police had discussions with him about a reduction in his standby duties. Having subsequently suffered a nervous breakdown Paterson retired on the grounds of ill-health and averred that two matters put the police on notice of his stress prior to his breakdown; an alleged self-certification form mentioning stress and a telephone conversation between his wife and Surrey Police in which his wife allegedly discussed the stress.

The Court found that it was not reasonably foreseeable that Paterson would suffer the breakdown as a result of stress at work and that the booklet produced was far too remote in time from the occurrence of the breakdown to be relied on. Further, the hours worked each week by Paterson did not give rise to a reasonably foreseeable risk of developing psychiatric illness as a result of stress. The Court also found that Paterson’s injury was in fact caused by his feelings on how he had been treated when he requested to be accommodated away from the estate, in place of the accommodation he was provided with on the estate to help in the better performance of his duties.

**Hill Dickinson comment:** The Court ruled it could not be accepted that an employer need not foresee the risk of psychiatric injury as a result of stress if an employee worked on average for 48 hours per week in a 17-week period but the employer should have foreseen the risk if the employee worked on average for 48.5 hours per week (referencing the Working Time Regulations 1998). Accordingly, a “black-letter” approach is inappropriate to such claims.

### [Graham Trevor Anderson \(Claimant\) -v- Michel Lyotier & Wendy Lyotier \(T/A Snowbizz\) \(Defendants\) & Jerome Portejoie \(Part 20 Defendant\) \(2008\)](#)

#### ***Ski-instructor’s negligence in taking an individual onto terrain beyond his abilities***

Anderson claimed damages for personal injuries sustained in a skiing accident whilst under the instruction of Portejoie during a holiday booked with Snowbizz. Whilst under tuition Anderson was part of a group skiing off-piste. On the day prior to Anderson’s accident his wife and another member of the group had expressed concerns about the terrain the group was expected to ski on and some members of the group had fallen over, but the next day, the group was asked to ski down a steep off-piste slope and turn around a bush. Anderson collided with a tree and sustained injuries that rendered him tetraplegic. Portejoie stated that he knew the resort very well and had taken all relevant factors into account when deciding what the group should do. He further contended that when assessing the suitability of the slope he could not reasonably have been expected to have in mind the risk of an accident of the sort that occurred or such serious injuries. It was held that factually, there was evidence to show that Anderson had not mastered skiing to a sufficient level to undertake the skiing expected of him safely. Portejoie should have asked if the terrain in the condition was a reasonably safe area for all members of the group. It was reasonably foreseeable that any of three members of the group would have fallen or lost control of their

skis whilst negotiating it and there was a reasonably foreseeable risk of running into a tree. Further, there was a more than minimal risk that an impact would result in serious injury. Accordingly, there had been a breach of duty by Portejoie, but Anderson was one-third responsible for the accident, there being an onus on a skier to speak up if he felt that what was being asked of him was beyond what it was reasonable for him to attempt.

**Hill Dickinson comment:** The trial Judge was careful to emphasise that this decision does not mean that anyone who suffers injury following a skiing accident necessarily wins damages, even if under the supervision of an instructor; skiing is inherently risky and accidents can often occur without negligence on the part of any of the parties. For specialist guidance and a “legal health check” of yours or a client’s existing practice please contact [matthew.davies@hilldickinson.com](mailto:matthew.davies@hilldickinson.com).

### [Heaton -v- Herzog \(As Personal Representative Of Paul Coates Deceased\) \(2008\)](#)

#### ***Contributory negligence: importance of a driver entering a main road from a side road to look left and right***

The estate of Coates appealed a decision that Heaton was entitled to damages without reduction for personal injuries arising out of a road traffic accident where Coates was killed. Heaton had been turning from a side road into a main road when a collision occurred between Heaton’s vehicle and the motorcycle being ridden by Coates. Coates died as a result of the collision and Heaton suffered physical and psychological injuries. Heaton alleged that the accident had been caused by Coates’s negligence and at trial the Judge concluded that the accident had been caused by Coates riding significantly in excess of the speed limit. The Judge also found that Heaton had failed to see Coates until it was too late because Heaton’s line of vision had been obstructed by two parked vehicles. On appeal it was held that a driver turning from a side road into a main road must take extreme care before moving off and during the manoeuvre, especially where the driver’s line of sight was reduced. By Heaton’s own admission she had only looked to her right before moving off and only saw Coates as he hit her car; if she had kept a proper lookout she might have seen Coates’s motorcycle coming towards her and would have had ample opportunity to take action to prevent the accident from occurring. She was therefore 25% at fault.

**Hill Dickinson comment:** Hill Dickinson’s Nerys Parry, Head of Transport, said that “poor observation is a major cause of road traffic accidents and is often a sustainable element of contributory negligence”.

### [Mazhar Hussain -v- Chief Constable Of West Mercia \(2008\)](#)

#### ***Symptoms of anxiety are not enough to amount to material damage; there must be a recognised psychiatric illness, not just distress or any other normal emotion.***

Hussain appealed against a decision to strike out his claim against the police authority for misfeasance in public office. Hussain had adduced psychiatric evidence to the effect that he did not have a psychiatric diagnosis but had experienced significant anxiety symptoms at times of stress. The decision was upheld on appeal. A recognised psychiatric illness was held to be one recognised by the psychiatric profession, which, in general, was an illness within the International Statistical Classification of Diseases and Related Health Problems published by the World Health Organisation.

**Hill Dickinson comment:** This decision affirms principles enunciated in cases such as [Alcock](#) and is of particular relevance to those conducting personal injury litigation. Many claimants’ solicitors will seek to adduce psychological evidence to support a claim for psychiatric injury. In light of this decision it must be seen as inappropriate and any claim for psychiatric harm relying on the evidence of a psychologist only must be seen as vulnerable.

[Grace Sanderson \(Administratrix Of The Of Estate Of Mr Sanderson, Deceased\) -v- Donna Marie Hull \(2008\)](#)

*Departing from the “but-for” test should be exceptional and is inappropriate where the trial Judge has failed to make the findings of fact which are required for its application.*

Sanderson appealed an order that the estate was liable for an infection Hull had contracted whilst working for it. Hull had been a turkey plucker and was provided with gloves and aprons but a few days later started to work without gloves and subsequently suffered campylobacter enteritis, which she alleged had been caused by her infection from bacterium she was exposed to during the course of her employment and was an inherent risk in handling dead poultry. The Recorder held that several statutory duties had been breached and there was clear evidence of negligence in the failure to warn Hull of the risks of exposure to the bacterium and advise her as to the precautions she should take to minimise the risk of infection. On causation the Recorder concluded that the exception to the “but for” test applied and that Hull had established a causal link by showing that the breaches had materially increased the risk of infection. Sanderson argued that the case was not one of the exceptions to the “but for” test. On appeal it was held that great caution was required before any development of the exception to the “but for” test of causation should be allowed. An essential element for the extension of the exception was the impossibility for the claimant to prove enough to satisfy the “but for” test; mere difficulty of proof would not be enough. In the instant case, there was not an impossibility of proof but a failing by the Recorder to make necessary findings of fact.

**Hill Dickinson comment:** It was found that the Recorder was wrong to hold that the case was exceptional. Anyone preparing a case in which these arguments are likely to be raised should have in mind the findings the trial Judge will need to make to apply the “but for” test and consider what evidence should be adduced to present the best position for their party.

[Iris Joan Harrington \(Widow & Personal Representative Of The Estate Of James Harrington, Deceased\) -v- Department For Business, Enterprise & Regulatory Reform \(2008\)](#)

*Low level of exposure to asbestos prior to 1960 does not give rise to a foreseeable risk of pulmonary injury*

Harrington brought a claim for damages following the death of her husband from malignant mesothelioma. In the period 1956 – 1958 the deceased had been employed as a bricklayer by the National Coal Board (the Department for Business, Enterprise and Regulatory Reform was the statutory successor to the Coal Board). Harrington averred that the deceased had been exposed to significant quantities of asbestos during the course of his employment with the Coal Board but the deceased’s evidence was inconsistent with contemporaneous records. Evidence showed that the Coal Board had no reason to suppose that a bricklayer working on the surface would ever, during the course of his employment, be exposed to significant or substantial amounts of asbestos. The Court had to ask whether the Coal Board ought reasonably to have foreseen a risk of pulmonary injury and, in the case of mesothelioma, the exercise was artificial. Prior to 1960 the risk of contracting mesothelioma (which can be caused by inhalation of a single fibre) as a result of asbestos exposure was unknown; all other pulmonary conditions required significant asbestos exposure, so, in order to succeed and show that a risk of pulmonary injury was foreseeable, Harrington needed to demonstrate significant asbestos exposure. The Court found that the deceased was exposed to asbestos on infrequent and isolated occasions during his employment. The claim therefore failed.

**Hill Dickinson comment:** Hill Dickinson’s specialist asbestos team, led by David Dunne, has significant experience of handling claims of this nature. The date of knowledge of foreseeable injury is fact and industry specific advice and guidance should always be sought if this is likely to be a live issue.

[Craner -v- Dorset County Council \(2008\)](#)

*Protruding paving slab breached Workplace Regulations 1992*

Craner suffered personal injury when a wheeled trolley he was pushing along a paved area between classrooms came to an abrupt halt when it came into contact with the raised edge of a slab, causing his knee to hit the trolley. Dorset appealed the decision at first instance that the raised paving slab constituted an obstruction for the purposes of regulation 12(3) of the Workplace (Health, Safety and Welfare) Regulations 1992. There was a paucity of evidence before the Judge on the distance of the slab’s protrusion and no experiments had been performed with the trolley. A paving slab was distinguished from a weather strip (a regular fitting which may reasonably be expected to stand proud) and Dorset lost the appeal.

**Hill Dickinson comment:** The decision affirms the onerous responsibilities on employers, but the Court noted that in future cases regulations 12(1) and 12(2) were more appropriate. The complaint was in fact about the unevenness of the floor.

## Hill Dickinson Successes

[Chappel -v- Hill Dickinson Client](#)

The Claimant alleged that she was injured when an unattended cage of beer and spirits rolled down the tail lift from a delivery vehicle and knocked her over. Hill Dickinson file handler Hayley Riach made extensive enquiries which revealed that the delivery driver was employed by a third party and had failed to ensure that the tail lift was properly positioned before placing the cage on to it. Hill Dickinson put pressure on the third party to take over responsibility for the claim and following service of a strong defence and Part 18 Request drafted by Head of In-House Counsel, Sarah Venn, the third party agreed to take over the claim and pay all associated costs, presenting significant savings.

**Hill Dickinson contacts: Hayley Riach and Sarah Venn**

[Evans -v- Hill Dickinson Client](#)

Several passengers on a bus and the bus driver brought claims for personal injury following an incident in which a lorry’s wing mirror scraped along the side of a bus. Hill Dickinson obtained a statement from a passenger who stated that she had not noticed any contact with the lorry and did not experience any movement that would have caused her injury. Engineering evidence also confirmed that the contact between the vehicles would not have caused movement any greater than that which one would usually experience whilst travelling on a bus. All four claims were discontinued and the Defendant’s costs (which exceeded £10,000) were paid.

**Hill Dickinson contact: Peter Oakes**

[Claimant -v- Hill Dickinson Client](#)

A Claimant who asserted that he had been injured when another vehicle struck his parked car had his claim dismissed when the evidence he adduced in support of his claim failed to satisfy the Court. The Claimant produced no evidence to show that he was in his vehicle at the time of the collision and the driver of the Defendant’s vehicle was adamant that the Claimant was not. The Claimant’s medical evidence was founded upon what the Claimant told the medical expert almost three years after the collision and after tenacious questioning by Hill Dickinson, the Claimant conceded that the mode of injury he described was impossible. The claim was dismissed and a costs order was made in favour of the Defendant, saving the Defendant over £15,000.

**Hill Dickinson contact: Pam Graham**

Soan -v- Hill Dickinson Client

Soan sought in excess of £100,000 compensation for damage and loss he averred he sustained after falling over in the Defendant's store. Hill Dickinson's Jason Spencer defended the claim robustly and at a hearing attended by Sarah Venn, Head of In-House Counsel, Hill Dickinson was able to ensure that several "unless" orders were imposed on Soan, which failure to comply with would lead to his claim being struck out. Soan failed to comply with the relevant orders and his claim was struck out, presenting significant savings to the client.

Hill Dickinson contact: Jason Spencer

Gallagher -v- Hill Dickinson Client

The Claimant was a lawful visitor to premises owned by the Defendant. The Claimant slipped on water in the entrance hall to the premises and sued for damages. Hill Dickinson made a thorough investigation which revealed that maintenance work had been subcontracted to another firm just one week prior to the accident. Hill Dickinson obtained a full indemnity from the subcontractor saving the Defendant the costs of litigation and compensation by the Claimant.

Hill Dickinson contact: Emma Ireland

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