

INSURANCE PRACTICE GROUP LEGAL UPDATE

News

Resolution takeover on hold

Pearl Assurance's £5 billion takeover of Resolution has been further delayed by the Financial Services Authority, which is questioning whether policyholders will be disadvantaged by the timing of Pearl's plans to free capital from Resolution life funds. Pearl will have to reach agreement with the Financial Services Authority if the takeover is to proceed.

Europe may extend harassment law

In an opinion provided to the European Court of Justice (ECJ) in the case of Coleman -v- Attridge Law, the Advocate General (who acts as a legal adviser to the Court) concluded that it was possible for an individual to be discriminated against "on the grounds of disability"; the Advocate General further stated that "one way of undermining the dignity and autonomy of people who belong to a certain group is to target not them, but third persons who are closely associated with them and do not themselves belong to the group."

Coleman claims she was harassed out of her job after requesting time off to care for her severely disabled son. The ECJ will give its ruling later this year and follows the opinion of the Advocate General in approximately 80% of cases.

The potential implications are manifest: Britain has an estimated six million unpaid carers (expected to reach nine million by 2037), of which three million are workers.

Gambler asserts bookmaker owed him a duty of care

A compulsive gambler is suing William Hill, who he claims negligently allowed him to carry on betting after he asked them to stop taking his money under the company's self-exclusion policy. Other bookmakers excluded the Claimant on his request, but William Hill is alleged to have negligently encouraged him to continue gambling, including by opening a branch for him personally so he could place a £100,000 cash bet. If successful, the claim will be the first of its type. The Claimant is on bail awaiting trial on firearm and drug charges; it is currently unclear if there is a link between these charges and the monies gambled.

Changes to incapacity benefit to tackle "sick note culture"

The Health and Safety Executive reports that 36 million days each year are lost to occupational ill health. A report by Dame Carol Black, National Director for Health and Work, recommends a number of measures to keep employees at work when they become ill; one includes a new version of the sickness certificate which will require GPs to advise employers what tasks a sick employee can perform.

The most significant part of any personal injury claim comprises loss of earnings. If Black's scheme is implemented, injured employees should be back at work and earning sooner, reducing special damages claims.

Cases

Jake Pierce -v- Doncaster Metropolitan Borough Council

(2007) [2007] EWHC 2968 (QB)

Local authorities and social workers to be judged by the standard of a "competent" department

In finding the local authority negligent for failing to carry out a necessary statutory review before returning the Claimant to parental care, in the knowledge of adverse home circumstances, the Court considered the standard of care owed by a local authority to a child at risk. The standard of care to be expected of a local authority's staff was adjudged to be that of a competent department judged according to the prevailing professional climate.

HD comment: As with all other professions, the principles enunciated in Bolitho -v- City and Hackney HA [1998] AC 232 are of application to social workers and their departments and they are expected to meet the standards of a competent department at the material time.

Latona Allinson -v- London Underground Ltd (2008)

Regulation 9 of PUWER 1998 does not impose an absolute duty

The Court of Appeal gave consideration to the construction of Regulation 9 of the Provision and Use of Work Equipment Regulations (PUWER) 1998 which provides: "(1) Every employer shall ensure that all persons who use work equipment have received adequate training for purposes of health and safety, including training in the methods which may be adopted when using the work equipment, any risks which such use may entail and precautions to be taken." The Court concluded that whilst it was mandatory to provide training, the training itself need only be "adequate" in the context of what the employer knew or ought to have known (taking professional advice where necessary) about the risks arising from the activities of his business; the burden is higher than at common law but does not impose "no-fault liability".

HD comment: An interpretation favourable to defendants but only likely to be of practical effect in a limited number of cases where the risk was not foreseen and could not have been foreseen by a diligent employer taking necessary advice.

Cases continued

[Smith -v- Chief Constable of Sussex](#) (2008) 5/2/2008

Police may owe a duty of care to victims of crime

Smith was left with serious injuries after being attacked by his former partner with a claw hammer. Smith claimed to have repeatedly informed the police that his former partner had threatened to kill him, that the police had ample evidence of this and had no excuse for not making an arrest. The Court of Appeal, reversing a decision to strike-out the claim, concluded that when the life or safety of an individual had been firmly placed in the hands of the police, so as to make it incumbent upon them to take at least elementary steps to protect it, unexcused neglect to do so could sound in damages if harm materialised. A distinction was drawn between the member of the public who fell victim to a criminal whom the police ought to have caught, but had no other nexus with the police (who, as a matter of policy, has no action) and a member of the public who called the police to the scene of a crime of which he was or would be the victim. Depending on the facts found, the latter may have a cause of action and a claim should not be struck out before trial. Lord Justice Pill, in particular, considered that it was now time to absorb the right to life protected by Article 2 of the European Convention on Human Rights (ECHR) into the common law of negligence.

HD comment: The Court of Appeal has made clear that it is time for a review of the extent to which public policy should limit the scope of the duty of care owed by the police to members of the public. In [Osman](#) the schoolboy menaced by his teacher demonstrated sufficient proximity for a duty of care to exist, but it was held contrary to public policy for the police to be liable for the consequent harm. The obligations now imposed on the State by Article 2 of the ECHR may found the basis for an extension to the duty of care owed by the police, in turn generating significant litigation. This case is likely to conclude on appeal after trial.

[Gloucestershire County Council -v- Evans & Ors](#) (2008)

Success fees are enforceable in agreements providing for a contingent rate

The Council entered into an agreement by which it agreed to pay £145 per hour for legal representation, with discounted charges of £95 per hour if it lost. The agreement also provided for a 100% success fee if the Council won. The lawfulness of the agreement was challenged and the Court of Appeal held that the lawfulness of the percentage increase (100% being the maximum permissible) was measured by reference to the fees that would have been payable if the agreement was not a CFA. Accordingly, the agreement provided for a success fee of 100% on the rate of £145 and was enforceable.

HD comment: The Law Society believes that discounted fees CFAs are likely to become increasingly common; they present attractive funding arrangements for high volume litigators and their advisors. It should be noted that the hourly rate and success fee claimed under such an agreement can still be challenged on assessment.

[Shepherd & Neame & Ors -v- EDF Energy Networks \(SPN\) Plc & Ors](#) 2008

Any party can rely on a disclosed expert report

The Court of Appeal confirmed that the withdrawal of a party from proceedings did not affect the operation of CPR 35.11, which allows every other party to rely on a disclosed expert report as evidence at trial.

HD comment: Important confirmation that a party who remains in proceedings may rely on helpful expert evidence disclosed by a withdrawn party, such as a former co-defendant.

[Kylie Palmer -v- \(1\) Estate of Kevin Palmer, Deceased \(2\) Motor Insurers' Bureau \(3\) PZ Products Ltd \(4\) Royal & Sun Alliance Insurance Plc](#) (2008) [2008] EWCA Civ 46 CA (Civ Div)

Insurers can be made personally liable for the costs of actions

An insurance company was ordered to personally pay the costs of a personal injury claim where it had funded, controlled and directed the defence in its own interest and not availed itself of the opportunity to commercially settle the claim.

HD comment: A stern warning to insurers conducting litigation under subrogated rights that they must do so in the interests of their insured; conducting a claim to further the insurer's own interests can be penalised by adverse costs orders.

[B -v- \(1\) Reading Borough Council \(2\) Wokingham District Council \(3\) Chief Constable of Thames Valley](#) (2007) [2007] EWCA Civ 1313

Social workers and/or a local authority do not ordinarily owe a duty of care to a parent suspected of child abuse

B had been granted permission to amend his claim to plead an alleged breach of duty of care by the local authority to him when B's daughter had been interviewed by a social worker and police officer who took the view that B's daughter had been abused by B. B's original claim had asserted that the local authority was vicariously liable for a breach of duty of care owed by the social workers to B; this was struck out. The amended claim alleged a breach by the local authority of a duty owed directly to B to have in place appropriate systems and policies. The Court of Appeal held that however the case was pleaded, the question was whether a social worker had failed to act in the way a reasonably competent social worker would have done (whether because of a personal or system failure) and breached a duty of care. There was a potential for conflict of interest or duty as between B and his daughter; in light of [JD -v- East Berkshire Health NHS Trust](#) (2005) it was held that the social workers owed no duty to B, and as a consequence of this, nor did the local authority. As no breach of duty could be shown, the claim failed.

HD comment: This case resolves ambiguity surrounding the decision in [JD](#) and holds that ordinarily, a parent suspected of child abuse is not owed a direct duty of care by social workers or the local authority employing them.

[Eileen Corr \(Administratrix of the Estate of Thomas Corr, Deceased\) -v- IBC Vehicles Ltd](#) (2008) [2008] UKHL 13

Losses from suicide recoverable under the Fatal Accidents Act 1976

Corr's husband was involved in an accident at work when he was struck on the head by a machine. After the accident he suffered post traumatic stress disorder and required reconstructive surgery. He became increasingly depressed and committed suicide nearly six years after the accident. The deceased had begun proceedings against his employer and after his death his wife was substituted as Claimant. The House of Lords held that an employer owed a duty to avoid causing psychological as well as physical harm and that the deceased would not have acted as he did but for his employer's breach of duty. Depression was a foreseeable consequence of the employer's breach of duty of care and it was not incumbent on Corr to show that suicide was foreseeable (although it was in the instant case); the precise form of damage need not be foreseen. Losses attributable to the deceased's death could be recovered under the Fatal Accidents Act 1976 and the claim was not barred by principles of causation, remoteness or foreseeability.

HD comment: In the circumstances the act of suicide was not an intervening act or too remote. Future cases will have to be considered carefully on their facts, conscious of the developing jurisprudence on employers' liability for such losses.

Cases continued

[Graham Morris Leesmith -v- Gordon Evans](#) (2008)

Calculating future of loss of earnings where career progression is not clearly structured

A Claimant injured in a road traffic accident had a number of different career prospects. It was not possible to make exact assessments as to the rates which would be earned at specific periods of time and the Court held that rather than apportion the multiplier, a broad view should be taken and the multiplicand should be adjusted to allow for variations over the period of loss.

HD comment: A principle to be born in mind when calculating reserves and making offers of settlement. In such cases it is still appropriate to adjust the multiplier in accordance with the introduction to the Ogden Tables to take account of factors such as education and disability.

[Lisa Jeynes -v- \(1\) News Magazines Ltd \(2\) News Group Newspapers Ltd](#) (2008)

In a defamation action an article should be read as a whole to determine if they are capable of bearing a defamatory meaning

The Claimant brought a libel action against a magazine which published a photograph of her on its cover with the headline "BB's Lisa "The Geezer" – My false boobs fell out on date with James Hewitt." The Claimant contended that the words meant that she was either a man posing as a woman or a transgender person. The Court of Appeal found that the meaning of the words contended for was irrational, fanciful and absurd and not capable of bearing a defamatory meaning. The reasonable reader is neither naïve or unduly suspicious, nor avid for scandal and would not select one bad meaning where other non-defamatory meanings were available; an article is to be read as a whole, excluding any strained, forced or utterly unreasonably interpretations. Claim stood struck out.

HD comment: In principle, it is for the Judge to determine whether words are capable of bearing a defamatory meaning, and the meaning of the words is a matter for the jury. [Jeynes](#) illustrates that it can be appropriate for a Judge to determine whether the words are capable of bearing the meaning alleged at an interim application and dispose of a claim if they are not.

[Evans -v- Cig Mon Cymru Ltd](#) (2008)

Amending a claim form to correct an obvious error does not raise a new claim

The Court of Appeal held that on an application to amend a claim form it was appropriate to look at the pleadings as a whole to determine if the claimant sought to raise a new claim or correct an obvious error.

The Claimant had consulted solicitors with regard to an accident at work and alleged workplace bullying. The bullying claim was not pursued, but a claim form in respect of the accident was erroneously issued for "loss and damage arising out of abuse at work". When the claim form, particulars of claim and medical report were served, the Defendant took issue with the inconsistencies within the documents. It was appropriate to allow "an accident" to be substituted for "abuse"; the proposed amendment would simply clarify an inconsistency.

HD comment: It appears that the particulars of claim and medical report were served with the claim form, so it could not be said that the Defendant was misled; there may still be scope for argument where the particulars of claim and supporting documents are served some time after the claim form, but Defendants should hesitate before taking overly "technical points".

Hill Dickinson cases of note

[Leech -v- D D Heating Limited](#)

The Claimant had been involved in a collision which the Defendant driver described as "very slight", leaving only scratches to both vehicles. The Claimant asserted damage to the exhaust, rear bumper, number plate, tailgate, boot floor and rear panels; he also claimed loss of use and whiplash injury. Primary liability was admitted and the claim was defended on quantum and causation.

Hill Dickinson's investigations revealed that two engineer's reports and two repair invoices had been produced (one dated the day of the accident). Further, closer examination revealed that the vehicle had travelled 6,000 miles between each engineer's inspection. Evidence suggested that the claim had been grossly over-inflated and damage to the vehicle was pre-existing. At trial, the Claimant's claim was dismissed and costs were awarded against the Claimant and paid by his solicitors.

HD contact: Andrew London.

[Juniper -v- Hill Dickinson Client](#).

Hill Dickinson successfully opposed at a hearing another pre-action disclosure application issued by a Claimant's solicitor seeking a signed list of documents. Whilst wholly misconceived, such applications are becoming increasingly commonplace and inflate costs. Hill Dickinson maintains a rigorous approach and our numerous recent successes should help to deter claimants' solicitors from making further unnecessary applications.

HD contact: Hayley Riach.

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

Hill Dickinson's client conceded primary liability subject to contributory negligence and made an offer to settle close to trial. The Claimant accepted the settlement offer on the day of trial. The Claimant was funded by a CCFA; Hill Dickinson successfully argued for a reduction in the success fee from 100% to 27.5%.

HD contact: Anthony Curley.

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

The Claimant brought an action for damages exceeding £1 million when he sustained injury at the Defendant's go-karting track. He had completed forty-five laps when, for no apparent reason, he lost control of the vehicle and was involved in an accident causing serious brain injury. Hill Dickinson was able to show that there had been no defect with the go-kart and the Motorsport Association had performed regular inspections of the kart. The Claimant discontinued.

HD contacts: David Scott and Ian Evans.

[Dudek -v- Globespan](#)

The Claimant issued proceedings in England and Wales for expenses incurred after a flight was delayed. Hill Dickinson successfully argued that the claim should be struck out because a term of the conditions of travel provided that any dispute would be governed by Scottish Law and should be pursued in Scotland.

HD contacts: David Scott and Ian Evans.

Hill Dickinson cases of note continued

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

The Claimant pursued a straightforward claim for damages for personal injury arising from a road traffic accident. The parties were only £500 apart on damages when the Claimant issued proceedings in order to avoid the predictable costs regime, which significantly curtails claimant costs in cases of this type. Following settlement the Claimant presented a bill for £9,000. Hill Dickinson's costs department argued in points of dispute that the Claimant had failed to comply with the personal injury pre action protocol and had failed to take into account the overriding objective of the CPR by issuing prematurely. The Claimant accepted Hill Dickinson's offer of £3,500 (the total the Claimant was entitled to under the predictable costs regime), saving the client £5,500.

HD contact: Paul Edwards.

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

The Claimant issued proceedings following two accidents on board our Clients Ro-Ro vessel. It transpired that the Claimant had been economical with the truth both in relation to liability in the first accident and quantum in the second. The pleaded claim was for estimated general damages of £5,000.00 and special damages of £16,500.00. The Claimant's cost schedule was circa £35,000.00. On the morning of the trial the Claimant accepted the Defendant's offer to 'drop hands', saving our Client approximately £56,500.00.

HD contacts: Phil James and Andrew Glynn-Williams.

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

The Claimant brought a claim for psychiatric damage, alleged to have been caused by bullying and verbal harassment from one of his line managers, contrary to the Protection from Harassment Act 1997.

Hill Dickinson sent a robust letter of response to the Claimant's solicitor indicating that any alleged conduct of the Claimant's manager (which was not accepted) did not reach the threshold standard of criminal conduct set out in the recent case of [Conn -v- Sunderland County Council](#). Furthermore the Claimant complained of one incident only, which Hill Dickinson argued was insufficient to amount to a 'course' of harassment under s7 (3) of the Protection from Harassment Act 1997. Upon receipt of this letter the Claimant decided not to pursue his claim.

The case demonstrates that it is possible to defend claims under the Protection from Harassment Act 1997 and that they can be defeated at an early stage with a robust denial.

HD contacts: Lisa Grey and Hayley Quirk.

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