

INSURANCE PRACTICE GROUP LEGAL UPDATE

News

Medical negligence compensation triples in Scotland

Data released by the Scottish Executive shows that compensation payments for clinical negligence claims have almost trebled in the last year to £21.4 million from £7.7 million. A spokesman for the Executive stated that "We believe the large increase in 2006-07 is exceptional and caused by a larger than normal number of high-value settlements - mostly birth related cases which often take several years to settle." It remains to be seen if this is an anomalous year or in fact indicative of likely future expenditure on clinical negligence claims.

Compensation culture flourishing

Recent research has found that 81% of respondents believe that the UK is heading into the grip of a US-style claim culture, with 53% of respondents believing that claimants are more often financially motivated than the unfortunate victims of wrongdoing. 86% of respondents indicated that they would sue their employer if their health was seriously damaged or affected long term and 90% would sue the NHS or their local council. 86% would also sue a school, college or university if their child's health was seriously affected.

Hill Dickinson has been predicting an increase in claims to fill the gap left by the credit crunch and these statistics illustrate an increasingly litigious society, mindful of the potential financial gain to be derived from employers' liability and public liability litigation.

Potential liability of employers of nightclub workers

Hill Dickinson's Jason Bleasdale warns that as the application of the Control of Noise at Work Regulations 2005 was extended to the music and entertainment sectors on 6 April 2008, and with a reported estimated noise level of 95-105dB in a nightclub, employers may be obliged to provide personal hearing protectors to staff.

New guidance on the level of risk from exposure to asbestos

The Health and Safety Executive has revised its guidance on the level of risk from occupational exposure to asbestos. A new section of the revised document includes advice designed specifically for employers. The guide can be accessed here:

<http://www.hse.gov.uk/foi/internalops/fod/oc/200-299/265-48.htm>

Cases

Slava Josefine Davies -v- (1) Craig Bradshaw (2) Michael Bradshaw (T/A Hanson's Franchisee) (2008) [2008] EWHC 740 (QB)

Limited scope for provisional damages awards

The Claimant was injured in a road traffic accident and suffered incomplete tetraplegia. The parties were in agreement on all heads of damage save for future care. The Claimant claimed provisional damages in relation to her increased risk of developing syringomyelia (a condition by which cysts form on the spinal cord). Mr Justice Wilkie, applying the case of Willson -v- MOD, stated that the courts should be "slow to invoke the concept of provisional damages where it is in a position to make a judgment on future developments of the injury for which damages are being assessed."

HD comment: Wherever possible a final award should be made in respect of the injury for which damages are being assessed and parties should be mindful that the courts are hesitant to make provisional damages awards.

Arriva Trains Northern Ltd -v- David Eaglen (2008) [2008] EWCA Civ 352

Appeal Court can re-interpret medical evidence

Arriva appealed the decision of the trial judge to prefer the evidence of one medical expert over another when concluding that Arriva's breach of duty to the Claimant had caused him additional pain, suffering and loss of amenity to that already caused by a pre-existing degenerative condition. Arriva's appeal was allowed, the Court of Appeal concluding that the trial judge had misinterpreted the evidence of one of the medical experts, and judgment was entered for Arriva.

HD comment: The Court of Appeal has again emphasised that a defendant's breach of a duty of care to a claimant does not of itself give rise to an entitlement to compensation: damage above the claimant's pre-existing suffering, which is recognised by the law, must be shown to have been caused by the breach of duty.

Lisa Carver -v- BAA Plc (2008)

"More advantageous" for the purposes of Part 36 is not simply a financial measure

The Defendant made a payment into court of £4,520.00 in accordance with the provisions of CPR Part 36. The Claimant did not accept the payment and at trial was awarded £4,686.26 inclusive of interest. The judge found that the Claimant had not succeeded in obtaining a judgment more advantageous than the Defendant's Part 36 offer. Both parties agreed that the Civil Procedure (Amendment No 3) Rules 2006 applied. The Court of Appeal held that the change effected by the amendment to the rules, by which money and non-money claims were to be treated in the same way, meant that "more advantageous" was an "open-textured phrase" such that a wider review of all the circumstances of a case was appropriate in determining whether the fruit of the litigation was "worth the fight". The Claimant had exaggerated her claim (claiming in excess of £19,000) and had contested the case for an unnecessary amount of time; accordingly, the judgment stood.

HD comment: Defendants can obtain good protection by the judicious use of Part 36 offers. The use of realistic offers at an early stage of litigation should be encouraged in reasonably low value claims where there is little scope for significant divergence on quantum.

James Ashley & Anor -v- Chief Constable of Sussex (2008) [2008] UKHL 25

Assault and battery: self defence

The father and son of a male fatally shot by the police during an armed raid on his home brought proceedings against the Chief Constable alleging negligence and assault and battery. Part of the dispute centred on whether self-defence to a civil claim for tortious assault and battery, in a case where the assailant acted in the mistaken belief he was in imminent danger of being attacked, required such mistaken belief to have been both honestly and reasonably held. The House of Lords held that both criteria had to be satisfied.

HD comment: A decision of relevance to a range of professions, including professional carers, which re-states the current law and incorporates a test of "reasonableness".

A Train & Sons Ltd -v- Maxine Emma Fletcher (Executrix of the Estate of Carl Fletcher, Deceased) (2008)

Appropriate interest on special damages in fatal accident claims

The Claimant's husband had died of malignant mesothelioma. The trial judge ordered that the Defendant pay interest on the whole of the damages, including future losses, from the date of death until trial. The Defendant argued that this decision was wrong in light of the decision in Cookson -v- Knowles (1979) AC 556, following which an award of interest on damages for financial dependency should be at half the short-term interest rate and limited to losses arising between the date of death and date of trial. The Court of Appeal accepted the Defendant's contentions and allowed the appeal.

HD comment: A widely accepted principle which is often overlooked; anyone with conduct of claims which include future losses should ensure they are familiar with this decision.

Contd...

Cases continued

[Anthony Peter Supperstone -v- \(1\) Robert Alfred Hurst \(2\) Ann Stephanie Hurst \(2008\)](#)

Failure to comply with notice requirements in respect of funding is not fatal

The judge granted relief from sanctions to legal representatives who had failed to properly serve a notice of funding, by emailing it the day before a hearing unsigned and without identification of an insurer or policy number. The paying party argued that the success fee provided for in the policy should not apply but the costs judge granted relief from the sanctions of the CPR which would disallow the uplift sought. The legal representatives had wrongly assumed that the date for notice was when the insurance policy came into effect, rather than the date it was issued, and had made it clear that they would apply for relief from sanctions if the court found that the notice of funding was inadequate. The decision of the costs judge stood; no evidence was adduced to defeat the application and the power to grant relief had been exercised in accordance with the CPR.

HD comment: A party seeking to challenge defective notice of funding should prepare evidence in response which addresses the criteria set out in CPR 3.9 (relief from sanctions).

[Samuel David Harris \(A Minor & A patient suing by his mother & litigation friend Janet Harris\) -v- \(1\) Timothy Perry \(2\) Catherine Perry \(3\) David Harris \(2008\)](#)

Parents liable for accident at children's party

The Defendants had hired a bouncy castle for use at their child's birthday party and erected it on a public playing field. The Claimant asked if he could join in and was injured when an older boy somersaulted and struck the Claimant on the forehead with his heel, causing serious injury. The Claimant alleged that the Defendants had failed to maintain adequate supervision of the castle. The Claimant succeeded when it was found that a shortfall in supervision was causative of the accident and the risk of a damaging collision was manifestly enhanced by allowing children of different sizes onto the bouncy castle together.

HD comment: Because of the potential significance of this decision, permission to appeal has been granted. A government survey estimated that 2,500 – 3,000 injuries are caused by bouncy castles each year; the potential consequences are manifest.

[Adam Mason -v- Satelcom Ltd \(2008\)](#)

PUWER – liability is determined by nature of control over equipment

A worker had fallen in the course of his employment from a ladder too short for its purpose whilst on the property of a third party. The third party appealed the decision that it was 25% liable for the Claimant's injuries. The Court of Appeal found that the third party had only limited control over the ladder, which did not extend to ensuring that it was suitable for its use and accordingly, the third party was not liable under the Provision and Use of Work Equipment Regulations 1998.

HD comment: The application of PUWER turned on whether the third party had control for the purposes of ensuring that the equipment was "constructed or adapted" so as to be suitable for the purpose for which it was used (Regulation 4(1)). The factual matrix of any case should always be considered carefully to determine the nature and extent of control exercised by a party when liability is considered.

[Melanie Jane Arnup -v- M W White Ltd \(2008\)](#)

Fatal Accidents Act 1976 – deductible payments

The Claimant's husband had been killed whilst in the employment of the Defendant; the Claimant had received payment from a death-in-service benefit scheme and payment from an employee benefit trust. The Court of Appeal held that these payments were to be disregarded in the assessment of damages by reason of section 4 of the Fatal Accidents Act 1976 as they were a result of the deceased's death.

HD comment: A person seeking to make an ex gratia payment who may, in the future, be sued and held liable for a death, and wishes to have that payment taken into account when damages are assessed should make the payment subject to the stipulation that it is not a benefit caught by section 4 but a conditional payment on account.

[Tedstone -v- Bourne Leisure Ltd T/A Thoresby Hall Hotel & Spa \(2008\)](#)

Negligence – Occupiers Liability Act 1957 – slipping

The Claimant was injured when she slipped on a pool of water near a Jacuzzi at the end of a swimming pool. Evidence showed that the area was clear of water five minutes before the accident and that some areas held water and required repairs. The Court of Appeal dismissed the Claim, finding that the accident did not arise from want of care on the part of the Defendant. The water came from an unusual spillage from the Jacuzzi which happened a minute or two before the accident and no reasonable system would have dealt with the unusual occurrence in the time available.

HD comment: The Defendant's contention that the duty of care argued for by the Claimant was too high, in circumstances in which the water had been there for no longer than five minutes, was accepted. The Defence was conducted by Hill Dickinson (contact David Scott) and the decision of the Court of Appeal is of application across a range of fields, including retail.

[OCS Group Ltd -v- Davinia Wells \(2008\)](#)

Pre-action disclosure of medical records

An employer sought pre-action disclosure of its employee's medical records where there were potential personal injury proceedings. It was held that the judge had jurisdiction to make an order for pre-action disclosure of medical records, but on the facts, disclosure before proceedings had started was not desirable to dispose fairly of the anticipated proceedings or to assist the dispute to be resolved without proceedings. The judge emphasised that a claimant bringing a personal injury claim should be prepared to reveal their medical records to the opposition at the appropriate time and to the appropriate people.

HD comment: Disclosure of medical records is often contentious and this decision is of some use as it makes clear that they are a "relevant document". It is difficult to think of when, in the pre-action regime, such disclosure will be appropriate, but it is evident from this decision that the claim must be clearly delineated if an application is to succeed.

Hill Dickinson successes

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

The Claimant asserted that he had developed Hand-Arm-Vibration-Syndrome ("HAVS") as a consequence of his employment with the Defendant. Whilst ongoing exposure was alleged, many aspects of the claim were historical and the Claimant applied to the court for an order that his claim be allowed to proceed on the grounds that it was not statute barred by the provisions of section 11 and section 14 of the Limitation Act 1980, or, in the alternative, if it was, the court should exercise its discretion under section 33 of the Limitation Act 1980 to allow the Claimant to proceed. Hill Dickinson successfully argued at trial that the Claimant's 'date of knowledge' was over five years before that which he claimed and that the claim was brought outside the primary limitation period. The court declined to exercise its discretion under section 33 of the Limitation Act 1980 to disapply the primary limitation period, accepting the Defendant's argument that to do so would prejudice the Defendant's ability to defend the claim. On appeal, the court held that all causes of action alleged to have arisen more than three years before the issue of proceedings were statute barred; the Claimant could only pursue a claim for damages for injury and losses shown to have been caused by alleged ongoing breaches of duty occurring after issue of the Claim Form, reducing the Defendant's potential liability to a period of just three years.

HD contact: Jason Bleasdale

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

The Claimant alleged noise induced hearing loss arising from his employment in the Defendant's factory between 1990 and 2001. Hill Dickinson discovered that the Claimant had been employed in two other factories not connected to the Defendant in 1978-1980 and 1983-1990. The Claimant discontinued and agreed to pay the Defendant's costs when Hill Dickinson obtained expert evidence showing that the majority of excessive noise exposure occurred in the employment preceding that with the Defendant and that the Claimant's audiograms were inconsistent with noise induced hearing, but suggested age-related hearing loss.

HD contact: David Joyce

Hill Dickinson successes continued

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

The Claimant sought damages for Hand Arm Vibration Syndrome, allegedly caused by exposure to excessive vibration arising from the use of pneumatic tools during the course of employment as a fitter. At an early stage Hill Dickinson disclosed the Defendant's risk assessments and surveys which indicated that vibration levels from the tools used fell below 1m/s². Hill Dickinson contended that the Claimant's work did not give rise to a foreseeable risk of injury and the Claimant discontinued.

HD contact: Luty Choudhury

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

The Claimant worked from 1991 to date as a manufacturing assistant. He alleged noise induced hearing loss from exposure to excessive levels during the course of his employment with the Defendant. The Claimant's audiograms were not symmetrical and after detailed questioning by Hill Dickinson, the medical expert conceded that the hearing loss in one ear could not be attributable to the Claimant's employment with the Defendant. The medical expert further said that whilst there was probably some noise induced hearing loss in the other ear, this diagnosis could only be confirmed if an acoustic engineer concluded that the Claimant was regularly exposed to levels of excessive noise during the course of his employment with the Defendant. Engineering evidence was obtained which did not support exposure to noise above the first action level (85dB). The Claimant discontinued.

HD contact: David Joyce

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

The Claimant asserted that he had developed Hand Arm Vibration Syndrome as a consequence of his employment with the Defendant. Hill Dickinson obtained expert medical evidence which did not support the Claimant's injuries having been caused by his employment with the Defendant; the Claimant's condition was constitutional in origin and there was no more than a theoretical risk that it would have been made worse by vibration exposure. The Claimant discontinued his claim.

HD contact: Rachel LeBreuilly

[Joseph Rogers -v- Metropolitan Borough of Wirral](#)

The Claimant brought a claim in the High Court for property damage allegedly caused by the Council's alterations to the pavement outside his property. The claim was a re-issue of the Claimant's previous claim and appeal based upon the same facts, successfully defended by Hill Dickinson. The Claimant also brought separate proceedings against the surveyor who had given joint evidence to the Court in the previous claim. Hill Dickinson robustly defended the claim as a breach of process, requested the Court to hear both actions simultaneously and made application for the Claimant's claim against the Council to be struck out and for an extended Civil Restraint Order preventing the Claimant from bringing any further proceedings relating to his claims against the Council, in any court. On 17 March 2008 the matter of liability was heard as a preliminary issue and despite the Claimant's attempts to adduce fresh evidence, Akenhead J had no hesitation in striking out the Claimant's claim as being totally devoid of merit and making the Civil Restraint Order, as asked. In addition, the court awarded the Council their costs which will be set as a charge against the Claimant's property.

HD contact: Mary Lutton

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

The Claimant alleged that he suffered noise induced hearing loss as a consequence of his employment with the Defendant between 1970 and 1986. Hill Dickinson defended the claim on the basis that it was unlikely, on the balance of probabilities, that the Claimant was exposed to excessive or unsafe levels of noise, relying on expert engineering evidence that it was unlikely that the Claimant was exposed to noise above 90dB on a consistent basis, as was alleged. The claim was brought before the Noise at Work Regulations 1989 (now superseded by 2005 Regulations), under which the first action level was 85dB, and the Claimant discontinued.

HD contact: David Joyce

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

The Claimant sought £105,804.40 in respect of credit hire charges accrued between 23 September 2005 and 8 March 2006. Hill Dickinson's investigations revealed that in November 2005 the Claimant had been involved in another accident whilst under the influence of drugs and alcohol, resulting in him being sentenced to six and a half years in prison and disqualified for driving from eight years. The claim was quickly withdrawn.

HD contact: Andrew London

This bulletin is intended as a general overview and discussion of the subjects dealt with. It is not intended, and should not be used, as a substitute for taking legal advice in any specific situation. Hill Dickinson LLP will accept no responsibility for any actions taken or not taken on the basis of this publication. If you have a particular query or issue, we would strongly advise you to contact a member of the insurance practice group, who will be happy to provide specific advice, rather than relying on the information or comments in this newsletter.

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