

INSURANCE PRACTICE GROUP LEGAL UPDATE

News

Coroners powers extended

From 17 July 2008, a new statutory duty has been placed on organisations to respond within 56 days to Coroners' reports on action that should be taken to prevent future deaths. Reports and responses will be shared with interested persons (like bereaved families) and centrally collated so that trends can be identified, monitored and learnt from.

However, recent figures indicate that only one in three requests for discretionary legal aid funding to provide for representation for bereaved families at inquests is granted.

Secret inquests

The Counter-Terrorism Bill, which will come before the House of Lords this autumn, has proposed powers for inquests considered to be a national security risk by the Government to be held in secret; if enacted, the Home Secretary would be able to stop a jury being summoned, ban the public from inquests and replace a Coroner with a Government appointee.

Car crash fraud targeted

The Insurance Fraud Bureau (an industry funded body) has announced a crackdown on criminals who invent or stage car accidents for insurance scams. The Bureau's first court success came in early August when 13 members of a Hertfordshire gang were convicted over dishonest claims to insurance companies totalling over £250,000. Hill Dickinson provided intelligence data used in the operation. Head of Hill Dickinson's fraud unit, Peter Oakes, said: "regrettably this only scratches the surface of the problem; we are helping to combat similar fraud rings up and down the country."

No win no fee under review

The MOJ has appointed senior academics to review no win no fee arrangements to assess whether they are operating in the interests of access to justice. The review will include no win no fee arrangements in personal injury cases and a report is expected in the autumn of 2008.

Hill Dickinson launches expedition and outdoors team

Hill Dickinson has now launched a bespoke service for the expedition and outdoor sector, building upon the significant expertise the firm has in this sector both of a legal and practical nature. Partner Matthew Davies is a Fellow of the Royal Geographical Society and on the committee writing the new British Standard for safety in overseas expeditions - BS: 8848. He has undertaken expeditions in extreme environments including the arctic circle, desert, jungle and mountainous environments and is qualified to teach expedition safety qualifications, off-site safety management (risk assessment, planning, crisis response etc) and advanced expedition first aid.

The firm acts for high profile clients in this field and has recently provided legal advice on litigation related issues and terms and conditions, property, defamation, injunctions, inquests and contract issues.

If you are an insurer with clients in this field or an expedition company and would like to discuss how the team could assist you, please contact Matthew Davies, matthew.davies@hilldickinson.com, or telephone 0151 600 8000.

Hill Dickinson training

In-house Counsel, Sarah Venn, recently provided training on the legal aspects of manual handling operations to clients in our Liverpool and Manchester offices. All clients of Hill Dickinson are invited to attend future training sessions led by our lawyers and should contact counsel@hilldickinson.com for details on our training packages and forthcoming seminars.

Hill Dickinson lawyers Lachlan Nisbet and Simon Parrington along with Sarah Venn put fire officers through their paces in Chester Magistrates Court during a series of mock trials and PACE interviews in which officers were required to give evidence in a courtroom environment. Presiding over proceedings were three senior fire officers, including a serving magistrate, giving the officers a realistic courtroom experience. Contact lachlan.nisbet@hilldickinson.com for further information.

Solicitor profits from sick miners' compensation scheme

It has been reported that solicitor Jim Beresford, head of law firm Beresfords in Doncaster, has made a personal profit of over £30 million from the government funded scheme that provides compensation for sick coalminers.

Insurance fraudster convicted of perjury

David Cairns, who sued Wigan Council and secured £9,200 compensation after falsely claiming he broke his ankle in a pothole in the road, but had in fact injured himself playing football at Wigan's JJB Soccerdome, was jailed for nine months at Liverpool Crown Court on 14 May 2008 after admitting obtaining property by deception and perjury.

Cases

[Benjamin Collett -v- \(1\) Gary Smith \(2\) Middlesborough Football & Athletics Company \(1986\) LTD \(2008\)](#)

Assessment of damages

Collett was injured by a negligent tackle by Smith, for which Middlesborough Football & Athletics Company was vicariously liable. Collett had been a member of Manchester United's Youth Academy and by 16 years of age had been offered a scholarship with the club and a one-year professional contract thereafter. After the tackle Collett was unable to play to the same standard that he had done before the injury. The Court found that it was overwhelmingly likely that Collett would have been contracted to Manchester United until at least 21 years of age and would have played professional football, in the Championship at least, throughout his career. Future loss of earnings, deducting potential earnings from the career in journalism Collett was pursuing, were assessed at £3,854,328.

Hill Dickinson comment: The decision could impact on football at all levels and a range of other sports. Clubs will need to check their insurance cover and insurers will need to factor in this risk when calculating premiums.

[Stephen John Monk -v- \(1\) PC Harrington Ltd \(2\) HTC Plant Ltd \(3\) Multiplex Constructions Ltd \(2008\)](#)

Nervous shock; secondary victim; foreseeability of psychiatric damage

Monk claimed damages for psychiatric injury suffered as a result of helping victims of a construction accident at Wembley Stadium for which PC Harrington Ltd had admitted liability. Monk had been present when a temporary platform fell 60 feet onto two fellow workers, fatally injuring one of them. Monk tried to help both men at the scene of the accident and later began to suffer from post-traumatic stress disorder and depression. Monk argued that he fell into the category of "rescuer" or "unwilling participant".

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The Court held that whilst Monk could be regarded as a rescuer, the evidence showed that it was improbable that he believed he was putting his own safety at risk (or any belief held was unreasonable) and applying [Alcock](#), [McFarlane](#) and [Dooley](#) the Court found that Monk could not be considered an unwilling participant because there was no reasonable basis for him to believe that his actions had caused another person's injury or death and it was not reasonably foreseeable that Monk would suffer psychiatric injury.

Hill Dickinson comment: The case affirms longstanding principles on the recovery of compensation for psychiatric injury in "nervous shock" cases. A secondary victim (one not exposed to a risk of injury) must show that psychiatric damage caused by shock was a reasonably foreseeable consequence of the defendant's negligence if they are to recover damages.

[\(1\) Wasim Ul-Haq \(2\) Samara Khatoon \(3\) Zahida Parveen -v- Anita Shah \(2008\)](#)

Striking out of the claims of accomplices (but not instigators) to fraud not appropriate where indemnity costs ordered

Shah appealed against a decision refusing to strike out claims made by Ul-Haq and Parveen. Ul-Haq, Parveen and Khatoon issued claims against Shah alleging that they had sustained personal injury in a car accident in a collision with Shah. Shah had admitted liability for the collision but alleged that Khatoon had not been in the car at the time of the accident and that Ul-Haq's and Parveen's claims should be struck out because they had been complicit in the fraudulent assertion that Khatoon had been a passenger in the car. The Court held that participation in a fraudulent attempt to mislead the Court was a serious breach of the overriding objective, but had been a breach in which Ul-Haq and Parveen had participated, not instigated. Weighing all the factors, the lies had no substantial impact on the Court's ability to resolve matters fairly in respect of the minor injuries for which Ul-Haq and Parveen claimed. The award of indemnity costs against Ul-Haq and Parveen had deprived them of any practical benefit of bringing the proceedings and effectively forfeited the genuine claim to damages. Accordingly, there was no additional need to strike out the claims.

Hill Dickinson comment: The Court gave emphasis to the conduct of Ul-Haq and Parveen not being of the worst kind and concluded that outside the special class of insurance claims, it was important that other fraudulent claims were not routinely treated in an exceptional way.

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

Standard of care was too high if it required the uninterrupted supervision of children on a bouncy castle and was breached if children of different sizes were allowed to play together

The Court of Appeal held that the judge at first instance had imposed too high a standard of care when he held a husband and wife liable in negligence for the injury of a child struck on the head by the heel of a taller and older boy performing a somersault on a bouncy castle (see Issue 4 of 2008). It was impossible to preclude all risk that when playing together, children might injure themselves or each other. Keeping children under constant supervision was impractical and it would not be in the public interest for the law to impose such a duty. The standard of care required was that which a reasonably careful parent would have shown for their own children, or to act as would any reasonable provider and supervisor of that kind of inflatable for use by young children.

Hill Dickinson comment: The decision is a practical one and sets an achievable standard of care, alleviating concerns about opening the floodgates of litigation.

[Chief Constable of Hertfordshire -v- Van Colle \(Administrator of the Estate of GC, Deceased\) & Anor: Smith -v- Chief Constable of Sussex \[2008\]](#)

The principle established in Hill -v- Chief Constable of West Yorkshire (1989) AC 53, namely that, in the absence of special circumstances, the police owed no common law duty of care to protect individuals against harm caused by criminals, should be preserved.

The Chief Constable of Hertfordshire appealed a decision that the police had been under a duty of care (pursuant to Article 2 of the ECHR) to take preventive measures to protect a witness who was being

threatened and was subsequently murdered. The Chief Constable of Sussex appealed against a decision that a claim in negligence against the police should not be struck out where the police were aware of death threats made against an individual who was subsequently attacked and seriously injured (Issue 2 of 2008). The House of Lords held that the relevant test was set out in [Osman](#) and that the Court had to be satisfied that the authorities knew or ought to have known "at the time" of the existence of "a real and immediate risk to the life" of the individual from the criminal acts of a third party. If they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk, the positive obligation was violated. In [Van Colle](#) the action had been by a seriously disturbed and unpredictable individual and it could not have been reasonably anticipated from the information available at the time that there was a real and imminent risk to life. In Smith's case the House was concerned to preserve the principle set out in [Hill -v- Chief Constable of West Yorkshire](#), whereby in the absence of special circumstances, the police owed no common law duty of care to protect individuals against harm caused by criminals. On the facts the Court of Appeal had been wrong not to strike out the claim. However, if a member of the public furnished a police officer with apparently credible evidence that a third party, whose identity and whereabouts were known, presented a specific and imminent threat to life or physical safety, the police would owe a duty to take reasonable steps to assess the threat and, if appropriate, take reasonable steps to prevent it being executed.

Hill Dickinson comment: An important decision on the scope of the duties owed by the police which rejects a duty that would cause "defensive policing" and divert police resources from combating crime to responding to litigation.

[John Field -v- British Coal Corporation \(2008\)](#)

A claim for damages for noise-induced deafness was brought within the period of three years after the date of knowledge that the injury was significant, and therefore the claim was not statute-barred

Field appealed against an order dismissing his claim for damages for personal injury in the form of noise-induced hearing loss. Field was not diagnosed with noise-induced hearing loss until 2003 but the Judge held that in March 1998, following an examination that detected no abnormality with Field's ears, Field had been in a position to know that he had some hearing impairment not explicable by wax or infection and should have taken steps to enquire into the matter, even though Field himself had not been aware that he had a hearing problem not attributable to wax or infection. The Judge held that Field ought to have known in 1998 that his injury was significant within the meaning of section 14(2) of the Limitation Act 1980. On appeal it was held that the Judge had wrongly thought that he was required to attribute to Field the knowledge that a reasonable man possessed of the knowledge that Field had would have discovered. If Field had been aware of the fact that the medical examiner had detected no abnormality with his ears, he could reasonably have been expected to have taken some steps to obtain further medical advice, but he could not reasonably have been expected to seek further medical advice while he had reason to ascribe his symptoms to recurrent problems with wax and infections, especially when those who had carried out the tests had caused him to believe that there was nothing wrong with his hearing and he was fit to continue work.

Hill Dickinson comment: The Judge's findings were inconsistent, but the crucial finding was that Field had not known that his reduced sense of hearing was due to anything other than wax and infections until November 2003; in the premises he could not be fixed with knowledge for the purposes of section 14(2) prior to this.

[Grannia Geraldine Bailey \(by her father & litigation friend Maurice Bailey\) -v- Ministry of Defence & Anor \(2008\)](#)

A patient claiming damages for injury following a lack of post-operative care needed to show on the balance of probabilities it made a material contribution, namely something greater than negligible

Bailey underwent an unsuccessful operation to remove a gallstone and suffered brain damage attributable to negligent (lack of post-operative care) and non-negligent causes. On appeal it was held that if the evidence demonstrated on a balance of probabilities that an injury would have occurred as a result of a non-tortious cause in any event, a claimant would have failed to establish that the tortious cause

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contributed. However, if the evidence demonstrated that “but for” the contribution of the tortious cause the injury would probably not have occurred, the claimant would have discharged the burden. In a case where medical science could not establish the probability that “but for” an act of negligence the injury would not have happened but could establish that the contribution of the negligent cause was more than negligible, the “but for” test was modified, and the claimant would succeed.

Hill Dickinson comment: Where cumulative causes create a weakness it is correct to ask if the negligence made a material contribution to the injury suffered.

[A -v- Iorworth Hoare \(2008\)](#)

Exercise of discretion to disapply primary limitation period

The Claimant had been the victim of a serious sexual assault by Hoare, who was convicted of rape and sentenced to life imprisonment. 16 years after his conviction Hoare won £7 million on a lottery whilst on day release from prison. The Claimant suffered a recurrence of her post-traumatic stress disorder and brought civil proceedings against Hoare for damages for assault and battery resulting in psychiatric injury. The Court held that Hoare’s conviction meant he had no grounds for disputing the factual basis of the tort alleged against him and the detrimental effect of the delay on the expert evidence could be addressed at trial. The delay in issuing the claim was attributable to Hoare’s impecuniosity prior to the win, which meant that he would not have been able to satisfy any judgment made against him. The Court allowed the claim to continue.

Hill Dickinson comment: The Court was motivated by the exceptional circumstances of this case, which created no danger of a floodgate of civil litigants and reflects a claimant-sympathetic approach to the disapplication of the primary limitation period in abuse claims.

[Byrne -v- Motor Insurers’ Bureau and Another \(2008\)](#)

Limitation period applicable to MIB claims should be no less favourable than that in tort against a traced driver

The Court of Appeal held that the three year time limit for bringing a claim under the Untraced Drivers Agreement 1972 was not compliant with Community law in circumstances in which a claim brought by a minor outside the three year time limit was rejected. Lord Justice Carnwath said that the time limit should be no less favourable than that which applied to the commencement of Court proceedings by a minor under section 28 of the Limitation Act 1980 (which provides for a suspended limitation period during a claimant’s minority).

Hill Dickinson comment: The UK was found to have failed to comply with Directive 84/5 (which the MIB agreement was intended to implement) and this failure was sufficiently serious to expose the UK to a claim for damages. It is anticipated that the agreement will be reviewed to reflect the provisions of section 29 of the Limitation Act 1980.

[Oriakhel -v- \(1\) Dominic Vickers \(2\) Groupama Insurance Co Ltd \(3\) Mohammed Munaver Khan \(4\) Graham Coffey & Co \(A Firm\) \(2008\)](#)

Witness will only be subject to a non-party costs order in exceptional circumstances

Groupama Insurance Co Limited appealed against a decision not to make a costs order against a witness alleged to be a party to a conspiracy to bring a dishonest insurance claim. Groupama succeeded in showing that the claim was a dishonest fabrication and it was dismissed as fraudulent. Groupama then sought to join the witness to obtain a costs order against him. The Court of Appeal upheld the Judge’s decision not to make a costs order against the witness; it was held that it would be exceptional for an order to be made against a non-party where the applicant had a cause of action against the non-party and could have joined him as a party to the original proceedings.

Hill Dickinson comment: The application failed for a number of reasons, including that the insurer had not made the witness a defendant to the counterclaim (when he could have taken full legal advice and adduced a defence) and Groupama remained free to sue the witness for his part in the dishonest conspiracy. The witness did not have such a close connection to the primary claim to be bound by its result and the ambit of the alleged conspiracy had not been pleaded. If costs are to be sought from a witness in this type of case, the witness should be joined

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to the proceedings or the subject of further litigation.

[John Lough \(Claimant\) -v- Intruder Detection & Surveillance Fire & Security Ltd \(Defendant\) & Robert Fulton \(Third Party\) \(2008\)](#)

Fulton had been refurbishing his family home and had engaged Intruder to provide an integrated security system. In the course of refurbishment a staircase had been replaced and neither balustrade nor banisters were present. Lough, an employee of Intruder, fell from the landing to the hall floor below, sustaining serious injury. Intruder sought a contribution from Fulton on the basis that he owed a duty under the Occupiers’ Liability Act 1957. The Court of Appeal held that Fulton was not absolved of his duties simply because Intruder was also liable for Lough’s injuries and held that liability should be apportioned.

Hill Dickinson comment: Confirmation that a duty of care is not extinguished simply because it can be demonstrated that another party also owes a duty of care.

[BRB \(residuary\) Ltd -v- Connex South Eastern Ltd \(formerly South Eastern Train Co Ltd\) \(2008\)](#)

Payment under misapprehension did not prevent a party from recovering a contribution under the Civil Liability (Contribution) Act 1978

BRB brought proceedings against Connex under the Civil Liability (Contribution) Act 1978 to recover damages it had paid out to the estate of a railway worker. The worker had died from mesothelioma caused by exposure to asbestos during the course of his work and BRB admitted liability (following which judgment was entered against BRB) and settled the claim. BRB subsequently discovered that Connex was in fact the body liable; Connex argued that BRB could not bring a claim against it as BRB had been under no liability to the worker and had in effect made a voluntary payment. BRB was allowed to claim a contribution; it had made a payment under compulsion of judgment.

Hill Dickinson comment: An important point of interpretation. The histories of corporate bodies and their liabilities are often complex and, as a consequence of the expedited procedure utilised in living mesothelioma and asbestosis claims, it is often only after judgment has been entered against a body that the identity of the correct compensator is identified.

[Fraser Wood -v- Director of Public Prosecutions \(2008\)](#)

Police officers commit assault if they restrain a person but do not, at the time of restraint, have any intent or purport to arrest them

Wood appealed against a conviction for two offences of assaulting police officers and one of threatening behaviour. Three police officers had attended a wine bar where it was reported that a customer had smashed an ashtray. When asked if it was him, Wood denied it and tried to struggle away from the police officers who had taken him by the arms (and in the course of so doing committed assault). The police officers gave evidence that when Wood came out of the wine bar they could not arrest him as they were not sure who he was and therefore Wood was taken by the arms to detain him to confirm who he was. The Court held that where a police officer restrained a person but did not intend or purport to arrest him, he was committing an assault, even if the arrest would have been justified. The officers did not intend to arrest Wood when they took hold of him and the convictions were quashed.

Hill Dickinson comment: Another recent case emphasising the importance of ensuring that police officers are aware of the precise remit of their powers and exercise them diligently.

[Harvey Jennings -v- Forestry Commission \(2008\)](#)

PURWER not of application where the injured party is an independent contractor and there is no assumption of responsibility

The Forestry Commission appealed against a finding of liability in relation to an injury suffered by Jennings. Jennings had entered into a service contract with the Forestry Commission to build a fence and the contract provided that Jennings would ensure that all vehicles operated by him would be roadworthy and that he would ensure full compliance with all health and safety obligations, maintaining third party liability insurance.

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Jennings drove up a steep slope to the fence line in his Land Rover, when he lost control and it rolled over, causing him serious injuries.

The Land Rover was agreed to be unsuitable for the task and at first instance the Forestry Commission was found liable under the Provision and Use of Work Regulations 1998 (PUWER) as the trial Judge found that it had control over the Land Rover and the factual relationship was that of employer and employee. On appeal the decision was reversed: Jennings was plainly acting as an independent contractor and not an employee. Of importance was who had control and Jennings had been in charge of the work and was not subject to supervision. Accordingly, the Regulations did not apply.

Hill Dickinson comment: It is important to carefully analyse the relationship between parties in any case and those negotiating contracts should have particular regard to the implications of the agreements they conclude.

Hill Dickinson successes

Jennings -v- Hill Dickinson Client

The Claimant requested documentation and “any other relevant documents” in a pre-action disclosure application. Hill Dickinson argued that “any other relevant documents” was too wide and the District Judge agreed, holding that it was not for the Defendant to decide which documents were material to the issues. The Defendant was awarded full costs.

Hill Dickinson contact: Jennifer Lees

Connor -v- Hill Dickinson Client

Prior to the issue of proceedings an offer was made to settle the Claimant’s claim in the sum of £2,000. On the day of the hearing the Claimant asked if it was too late to accept the offer. Hill Dickinson negotiated settlement on the basis that the offer could be accepted but only if the Claimant’s costs were limited to predictable costs, saving the client over £6,000.

Hill Dickinson contact: Graham Lynch

Chambers -v- Hill Dickinson Client

The Claimant issued an application for pre-action disclosure in a tripping case where she sought accident report forms for similar incidents at the store and all of the Defendant’s other stores. Hill Dickinson argued that the request was onerous and disproportionate. The Claimant’s solicitors argued that this information should be kept on one database at Head Office and be readily accessible. The Judge held that it was unreasonable to expect the Defendant to go to such lengths and that accident report forms from other stores were not relevant to the Claim. The Defendant was awarded its costs of responding to the application.

Hill Dickinson contact: Hayley Riach

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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