

INSURANCE PRACTICE GROUP LEGAL UPDATE

News

Hill Dickinson joined by Health and Safety Consultant Paul Robinson

Hill Dickinson's regulatory capability has been strengthened by the appointment of health and safety consultant Paul Robinson to the team. Paul has over 13 years experience advising on health and safety law in a number of sectors. In particular, he was senior advisor for the project management team Infrasppeed on the largest rail and construction project to be undertaken in Europe. Paul has a NEBOSH Certificate in Occupational Safety and Health and a Diploma in Safety, Health and Environmental Management. He is also a professional member of the International Institute of Risk and Safety Management.

Paul's arrival enhances the regulatory team who provide a multi-disciplinary approach to health and safety management and is able to offer clients expertise in all aspects of their health and safety systems including drafting policies, carrying out risk assessments, training and accident investigation.

Asbestos - New claims threat for UK

The Health and Safety Executive has launched a new campaign, "Asbestos: the hidden killer", aiming to inform tradesmen of the "real and relevant" threat that asbestos poses to them. Fresh claims have recently been instigated by asbestos removal specialists, who claim culpable exposure to fibres during the removal process.

"Adventure can't be sanitised"

A couple claiming that their P&O Amazon adventure cruise was ruined when one fell from a plastic chair and was left with concussion were told that "if you have an adventure it can't be sanitised" and their £3,000 claim for compensation was met with an award of just £150. The Judge stated that "Part of the adventure is that you are in another environment. If you don't like it, you don't go anywhere like that at all or you don't eat the food. We tend to blame someone but we must not do that, it's the adventure." Leisure operators facing similar claims should contact [Matt Davies](#), Partner and Head of Hill Dickinson's Expedition Team, for support.

Mesothelioma compensation scheme begins operation

The Mesothelioma Scheme 2008, which will provide up-front financial support within six weeks to a range of people not previously eligible for financial assistance, has started to accept claims. Those exposed to asbestos from a relative (e.g. from their overalls), environmentally, and the self-employed will benefit from the new scheme.

Ninth edition of JSB Guidelines Released

The ninth edition of the JSB Guidelines for the Assessment of General Damages in Personal Injury Cases has recently been published. The new guidelines promote increased compensation awards for many conditions. For example, the recommended bracket for minor neck and whiplash injuries rises from £750 - £2,550 to £850 - £2,750.

Pothole claims cost councils £53m a year and playground claims increase

The Local Government Association has reported that local government is paying up to £53m a year in compensation to motorists for damage to their cars caused by potholes and that "no-win, no-fee" claims are "clogging up the system". A survey of 150 local education authorities in the UK also revealed that almost £2m were paid out for slipping and tripping claims in schools, with claims reported to be increasing on a daily basis. Hill Dickinson has a dedicated local authority law team and [Katherine Harrison](#) should be contacted for further information.

Cases

[Janis Williams -v- Calvin Jervis \(Aka Lex Komatsu\) \(2008\)](#)

Low-velocity impacts; extensive harm can follow

Williams was injured in what appeared to be a minor impact in a road traffic accident (estimated speed change at impact of 9 - 10mph), but this had been sufficient to cause the claimant subtle brain injuries resulting in impaired cognitive function. The Defendant had contended that it was a nonsense that the Claimant could have been injured to such a level, but the Claimant recovered over £500,000 in damages.

Hill Dickinson comment: The decision of the Court sends a clear message to insurers; the Courts accept that in some cases significant harm can arise from a LVI; reserving and assessment of claims should be done on a case by case basis.

[Environment Agency -v- Christopher Ivan Ellis \(2008\)](#)

Appropriate test for causation: successive causes

Ellis injured his back in an accident in the course of his employment for the Environment Agency. Almost two years later Ellis fell on his staircase at home, injury his right knee. Ellis contended that the injury to his right knee was a direct consequence of the accident at work. Medical opinion was that if Ellis had not been injured in the accident at work the knee injury would not have followed. There had been a second accident at work in the period before the knee injury for which the trial Judge had made a reduction to the award of damages. On appeal it was found that the second accident was a "single indivisible event" and not a full-blown intervening event. Accordingly, the Judge had been wrong to make a deduction and there should have been no departure from the but-for test; satisfaction of the but-for test did not require a Claimant to establish that the Defendant's negligence was the only, single, or chronologically last causative event.

Hill Dickinson comment: The Court held that whilst the "fringes of delineation" may be debatable, a departure from the but-for test should be limited to industrial disease or injury cases where there has been successive exposure to harm by a number of agencies, where the effect of the harm is divisible and it would be unjust for an individual Defendant to bear the whole of a loss. This decision is of application to what are principally "single-accident cases" and does not preclude acceleration arguments from being advanced in personal injury cases. In [Ellis](#) a reduction was made to reflect that the Claimant's pre-existing back injury would have presented at some point in the future in any event.

[Ryan St George \(A Patient Suing By His Father And Litigation Friend David St George\) -v- Home Office](#)

Drug and alcohol addiction not contributory

On admission to prison St George informed prison staff that he was a drug user and alcoholic and had previously suffered withdrawal seizures. Despite this he was allocated a top bunk bed and a few days later suffered a withdrawal seizure, falling from the bed and suffering a head wound. The seizure developed into "status epilepticus" and St George suffered severe brain damage.

The trial Judge reduced St George's damages by 15% for contributory negligence because his injuries were partly caused by his condition; the fault appeared to be attributed to St George's decision to become involved with drugs and alcohol as a teenager. The Court of Appeal found St George's actions as a teenager to have been too remote in time, place and circumstance to amount to contributory negligence.

Hill Dickinson comment: The position of St George was found to be analogous to that of a patient admitted to a rehabilitation clinic for the express purpose of being weaned off an addiction to drugs. Whilst a person is not admitted to prison for treatment purposes, there is a common purpose between a prison and rehabilitation clinic, and that is to wean off those in their care from drug and alcohol dependency. It was foreseeable that a person in the prison's care may suffer a withdrawal seizure in the process. The Court gave the example of the smoker treated for lung cancer who suffered injury from medical negligence, noting that no deduction would be made in these circumstances and that the situation was analogous.

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[Janet Birch -v- University College London Hospital NHS Foundation Trust \(2008\)](#)

Extension of doctor's duty of care to explain comparative risks in treatment

Birch underwent invasive surgery and claimed against the NHS trust for injuries (a stroke) sustained as a result of alleged clinical negligence. One of the trust's neurosurgeons had decided to perform a catheter angiography on the Claimant, rather than an MRI scan. Birch averred that the trust had been negligent in failing to disclose the comparative risks of MRI scanning to her and that no reasonable body of doctors would have proceeded to perform a catheter angiography rather than an MRI scan. The decision to perform a catheter angiography withstood "logical scrutiny" as acceptable practice by reasonable medical professionals. However, a doctor had a responsibility to inform a patient of significant risks that would affect the judgement of a reasonable patient and the logical extension of that principle was that the duty would not be discharged unless a patient was made aware that fewer or no risks were associated with another available and alternative treatment. Birch said that if the comparative risks had been explained she would have chosen an MRI scan. The trust was liable to Birch.

Hill Dickinson comment: Properly informed, the Claimant would have declined the procedure which led to her stroke. The "logical extension" to the doctor's duty of care meant that negligence lay in failing to discuss the imaging methods and their comparative risks.

[Dickins -v- O2 Plc \(2008\)](#)

Liability for psychiatric injury where employer had notice of excessive stress

Dickins had been employed by O2 for several years and had been promoted to a position for which she did not have the necessary qualifications, although training and support had been promised. The help promised did not transpire and Dickins asked to move to a less stressful job. She was told that there were no vacancies and requested six months off as she did not know how much longer she could carry on before taking sick leave and "cracking up". Her manager failed to refer her to the occupational health department of O2, as he had agreed to, and Dickins was later signed off as unfit for work on account of anxiety and depression. The Court held that Dickins's condition should have been clear to her employers and that it was a clear indication of her impending illness. O2 should have taken the whole background into account when considering Dickins's request for time off and Dickins should have been referred to occupational health. O2's suggestion that Dickins use its in-house counselling service was not adequate and the presence of this unit did not automatically discharge O2's duty of care.

Hill Dickinson comment: Whilst the dicta in [Hatton](#) were extensively relied upon, the Court of Appeal raised the question whether apportionment was appropriate in a case of this kind, where there was essentially indivisible injury. In addition to stress at work, Dickins had IBS, relationship difficulties and a vulnerable personality. However, the stress at work had made a material contribution to her injuries and the Court of Appeal expressed "grave doubts" about the apportionment exercise agreed to by both parties. The Court stated that first instance decision makers should take their cue from [Bailey -v- MOD](#) (see issue 6 of 2008). The decision in [Environment Agency -v- Ellis](#) (see above) gives powerful support to no apportionment being in cases of this type where a material contribution to an indivisible injury is shown.

[Smyly Agheampong -v- Allied Manufacturing \(London\) Ltd \(2008\)](#)

Driving without insurance tainted a claim with illegality

Smyly claimed damaged from Allied when Smyly's car was hit whilst parked and unoccupied by a lorry driven by one of Allied's employees. At the time of the accident the car had no compulsory third party motor insurance. In addition to the pre-accident value of the vehicle, Smyly claimed the cost of hiring a substitute vehicle for 341 days. The Court was satisfied that Smyly had set out to mislead the Court about his lack of insurance and that the evidence supported the inference that Smyly intended to drive without compulsory third party insurance unless prevented from doing so by an event for which he was not responsible. Smyly had demonstrated a willingness to commit the offence of driving whilst uninsured and an intention to defraud the road tax fund by driving whilst uninsured. His case therefore fell within the ambit of the *ex turpi causa* principle and his claim for loss of use of the vehicle was dismissed.

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Hill Dickinson comment: Claims handlers will regularly encounter claims for losses of this kind and should add this case to their armoury. Hill Dickinson's dedicated [fraud unit](#) has experience of refuting claims of this kind and should be contacted for further guidance.

[Susan Elizabeth Cuthbert -v- Stephen Ronald Gair & Wendy Isabell Gair \(T/A Bowes Manor Equestrian Centre\) \(2008\)](#)

Recoverability of pre-action work undertaken by loss adjusters

Cuthbert appealed a costs order made in favour of the Equestrian Centre following her discontinuation of a personal injury claim against them. Cuthbert discontinued her claim after it was allocated to the Fast Track and the Equestrian Centre sought to recover costs in relation to work undertaken by loss adjusters appointed before a firm of solicitors was instructed to defend the claim. It was held that a person who acted without a solicitor was not entitled to recover, as a disbursement, any fees and expenses paid to a third party for work of a kind which a solicitor would have done.

Hill Dickinson comment: Recoverability of expenses incurred in the run-up to and during litigation is a complex field. [Paul Edwards](#), Hill Dickinson's Head of Costs, offers expert advice on this topic.

Hill Dickinson Successes

[Gibbons -v- Hill Dickinson client](#)

The Claimant brought a claim for damages for increased symptoms of constitutional arthritis due to dampness and anxiety and depression arising from "harassment" and dampness. The claim was pleaded under the Landlord and Tenant Act 1985, the Defective Premises Act 1972 and the Protection from Harassment Act 1997.

The Claimant discontinued following a robust Defence and application presented by Hill Dickinson's Head of In-House Counsel, Sarah Venn, and Partner Lisa Grey to strike out the entirety of the claim or for Summary Judgment to be entered in favour of the Defendant.

Hill Dickinson contacts: [Lisa Grey](#) and [Sarah Venn](#)

[Yarwood -v- Hill Dickinson client](#)

The Claimant sought pre-action disclosure of documents and issued an application before the expiry of the investigation period provided for by the personal injury pre-action protocol because the Defendant had not acknowledged her claim. The Claimant relied upon the Defendant's failure to respond as the substantive ground for her application. Hill Dickinson's Head of In-House Counsel, Sarah Venn, successfully defeated the application on the basis that: the grounds for making the application did not satisfy the test in CPR 31.16; the Claimant's remedy, if her letter of claim was not acknowledged, was to issue substantive proceedings. The Claimant was ordered to pay the Defendant's costs.

Hill Dickinson contacts: [Lauren Ireland](#) and [Sarah Venn](#)

[Durgan -v- Hill Dickinson client](#)

The Claimant alleged that on arrival at the Defendant's hotel, he was tripped over by a Yucca plant which "grabbed his leg". The claim was robustly defended by Hill Dickinson and the Claimant discontinued one week before trial, abandoning a claim pleaded at over £50,000.

Hill Dickinson contact: [Ian Evans](#)

[Anten -v- Hill Dickinson client](#)

The Claimant sought compensation for a flight cancelled by Hill Dickinson's client. The Claimant has been reimbursed in accordance with European Union regulations, but sought the difference between the price paid for alternative tickets and the cost of her original flights. The Claim was successfully defeated at an economic saving to Hill Dickinson's client and other claims of this nature continue to be robustly defended.

Hill Dickinson contact: [Ian Evans](#)

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Waller -v- Hill Dickinson client

The Claimant asserted occupational deafness arising out of employment with the Defendant between 1980 and 2002. Hill Dickinson maintained that there was in fact no exposure to noise working as a weighbridge attendant until April 1984, and that there were noise surveys for the Claimant's working environment in the factory from 1984 onwards indicating that the Claimant did not work in a particularly noisy area. A joint acoustic engineering report concluded that, on the balance of probabilities, the Claimant's overall daily exposure would not have exceeded 85db(A) on the evidence available. The Claimant's own medical expert also revealed past ear problems. The claim was subsequently discontinued on the eve of the trial.

Hill Dickinson contact: Jason Bleasdale

Frodsham -v- Hill Dickinson client

The Claimant was involved in an accident on 21 July 2004 whilst working for the Defendant. It was alleged that the Defendant's negligence had caused the accident, from which the Claimant suffered pain in his lower back and buttocks. Hill Dickinson denied liability. Following agreement between the parties a joint engineer's report was prepared. The report highlighted the Claimant's long history of back problems and stated that the Defendants had acted in a responsible manner with regard to risk assessment. Having received the engineer's findings, and rejected a subsequent Part 36 offer, Hill Dickinson invited the Claimant to discontinue proceedings. The Claimant filed a Notice of Discontinuance just four days before trial.

Hill Dickinson contact: Jason Bleasdale

Butcher -v- Hill Dickinson client

The Claimant alleged that he was exposed to excessive noise for up to eight hours a day during his employment with the Defendant between 1963 and 1966, causing hearing loss and tinnitus. Investigations showed that it was likely that the Claimant would have been exposed to excessive noise during periods of work with other employers. The claim was defended on the basis that the Claimant's noise exposure with the Defendant did not cause his conditions. Further enquiries were made of the Claimant's medical expert but he subsequently failed to contact the Defendant's medical expert in accordance with a Court Order. Hill Dickinson contacted the Court requesting that the claim be struck out for failure to comply with this Order. The claim was subsequently struck out with an Order that the Claimant pay the Defendant's costs.

Hill Dickinson contact: Jason Bleasdale

Reddington -v- Hill Dickinson client

The Claimant alleged Noise Induced Hearing Loss ("NIHL") as a result of being exposed to excessive noise during the course of his employment with the Defendant (1987-1996). Hill Dickinson contended that the Defendant had not exposed the Claimant to noise that was excessive or unsafe. The Claimant's personnel records revealed that he had a poor attendance record and received several warnings for absence and other disciplinary reasons, whilst the Occupational Health records contained audiometry that was not typical of NIHL. Hill Dickinson disclosed these documents to the Claimant's solicitors and a Notice of Discontinuance was subsequently received.

Hill Dickinson contact: Jason Bleasdale

Mirfin -v- Hill Dickinson client

The Claimant, a Police Sergeant, alleged that he was exposed to noise from his radio, his motorbike, the road and the wind during the periods 1983-1993 and 2000-2002 when he was engaged as a Motorcycle Officer. From 1998/1989 the Claimant was supplied with foam earplugs, but these inhibited the use of radios and communications with the public so he only wore them intermittently. Hill Dickinson undertook detailed investigations given the potential for a "floodgates" situation in the event of any payment. Despite the Claimant's solicitor's contention that he had had success with similar cases in the past (which he accepted were ancient cases and that things had improved dramatically over the last 20 years), Hill Dickinson pressed for discontinuation of the claim given the weak supporting evidence and the Claimant's failure to adhere to any of the Court's directions. A Notice of Discontinuance was eventually filed by the Claimant.

Hill Dickinson contact: Jason Bleasdale

Hill Dickinson Costs Team Successes

At a recent hearing in Sheffield, Hill Dickinson's costs team saved £85,000.00 on a costs assessment in a mesothelioma claim and obtained a £2,000.00 contribution towards costs of attendance at the hearing.

Hill Dickinson contact: Richard Foy

On average the costs team makes a 35% saving on files and in its last 489 negotiations saved approximately £2,960,000, an average of over £6,000 per file.

Hill Dickinson contact: Paul Edwards

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