

insurance update

news ...the latest in insurance law



Miner's knee compensation scheme

Miners suffering from osteoarthritis of the knee, 'miner's knee', will be able to claim industrial injuries disablement benefit as osteoarthritis of the knee becomes a 'prescribed disease'.

Pupil sues school over drunken fall from a window

Oundle School is being sued by a former student who was left permanently disabled after falling from a 15ft first floor window after getting drunk at a Valentine's Day ball. She alleges that a drinking culture existed amongst the students and is seeking £300,000 in damages. She claims that the window opened to 12 inches, three times the legal maximum.

False insurance claims rise by nearly a third

The Association of British Insurers (ABI) reports an increase in the number of fraudulent insurance claims over the past year and attributes them to the recession. The number of claims rose by 17% with their value rising by more than 30% compared with 2007. A fifth of people responding to an ABI survey indicated they would consider making a fraudulent claim in the future.

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Welcome

Welcome to the August edition of Hill Dickinson's insurance update. We hope you find our regular features informative, including commentary on key insurance cases and an overview of the hottest topics in insurance law.

You will notice this issue has a different look from past editions. This is an example of Hill Dickinson's new corporate brand identity, which can also be seen on our new website.

Why have we changed our look? The past three years have seen the firm grow 50% by merger and organic growth. A stronger, more distinctive look was needed to reflect the firm's improved status and its prominence in a highly competitive market.

If you have any queries relating to the update, please contact either myself or Cath Wong, catherine.wong@hilldickinson.com.

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Hill Dickinson's head of fraud, Peter Oakes, said the trend was now visible in litigated claims. Hill Dickinson's sophisticated Netfoil software and team of intelligence analysts are helping to combat the threat to the industry. Contact Peter for further details on peter.oakes@hilldickinson.com.

Crash for cash scam

11 people have admitted being involved in a 'crash for cash' insurance fraud, conspiring to defraud Allianz Insurance for non-existent traffic accidents in 2005. 33 people were arrested following a three year investigation by Merseyside police. The trial will commence 5 October 2009 at Liverpool Crown Court and is expected to last up to six weeks.

Plaques may soon be compensatable in England and Wales

Asbestos specialists are preparing for Gordon Brown's anticipated announcement on whether sufferers of pleural plaques can claim compensation. Insurers could face millions of pounds of claims.

First corporate manslaughter charges

Peter Eaton, director of Cotswold Geotechnical Holdings Limited, appeared in court in June to hear the company of which he is the sole director charged with unlawfully killing an employee by gross negligence under the Corporate Manslaughter Act 2007. We will keep you updated of the outcome.

City lawyer permitted to progress abuse claim

Patrick Raggett, a city lawyer who claims that his life was ruined because of years of abuse by Father Michael Spencer, a teacher at the Jesuit-run Preston Catholic College in Lancashire, has been permitted to continue with his claim for damages. The college closed in 1978 and Father Spencer died nine years ago.

Child abuse has cost the Roman Catholic Church in the US more than \$2.6billion, with \$436 million paid out last year alone. Hill Dickinson's Jason Spencer cautions that an influx of new claims could follow if Mr Raggett is successful in his claim.

Radiation claims to proceed to trial

Veterans claiming they were injured due to exposure to ionising radiation as a result of nuclear tests carried out by the British government in the 1950s have been permitted to proceed to trial after the Ministry of Defence asserted that the claims were statute barred pursuant to the Limitation Act 1980.





Cases

Anita Shah -v- (1) Wasim UI-Haq (2) Samara Khatoon (3) Zahida Parveen (2009)

Supporting fraudulent claim will not deny a claimant damages

UI-Haq and Parveen claimed for damages arising out of a road traffic accident in which Khatoon also claimed to have sustained personal injury. Shah had admitted liability of the collision but contended that Khatoon had not been in the car at the time of the accident and that UI-Haq and Parveen's claims should be struck out as an abuse of process due to their part in the attempted fraud.

The trial judge found that Khatoon had not been in the car and that the UI-Haq and Parveen had conspired to support Khatoon's fraudulent claim but declined to strike out their claims, deeming the fraud not to be of the most serious kind.

On appeal, the Court of Appeal held that the invariable rule was that where a claim had been dishonestly exaggerated, the judge should award the limited damages which were appropriate to his findings; a claimant would not be deprived of damage to which he was entitled because he had fraudulently attempted to obtain more than his entitlement and there was no logical justification for suggesting that a claimant who lied about another person's claim should be treated more severely than a claimant who lied about his own claim.

Hill Dickinson comment:

The Court of Appeal took the view that the court could mark its disapproval in an order for costs and that only dishonesty which made a fair trial impossible might merit striking out. Insurance companies will be concerned that the message from the Court of Appeal does not dissuade potentially fraudulent claimants and weakens the fight against insurance fraud.

Gray (original respondent and cross-appellant) -v- Thames Trains Ltd and ORS (Original appellant and cross-respondents) (2009)

Ex turpi causa precludes claim for loss of earnings and general damages flowing directly from criminal act

Gray had been a passenger on a train involved in the Ladbrooke Grove rail crash, which was operated by Thames Trains Limited. The accident had been caused by Thames Trains Limited's negligence. Gray sustained only minor injuries but the experience caused him to suffer post traumatic stress disorder. Whilst he was receiving treatment and taking medication for that condition he stabbed to death a pedestrian who had stepped into the path of his car. He pleaded guilty to manslaughter on the grounds of diminished responsibility and was sentenced to be detained in hospital.

In an action against Thames Trains Limited, Gray claimed general damages for his conviction, detention and feelings of guilt and remorse, and for damage to his reputation. He also claimed special damages in respect of his loss of earnings and sought an indemnity against any claims which might be brought by dependents of his victim.

The trial judge decided he was precluded from recovering general and special damages arising as a consequence of his own criminal act. The Court of Appeal held that it was bound by the decision in Clunis -v- Camden and Islington HA (1998) to find that recovery of general damages was precluded, while recovery of loss of earnings was not. The House of Lords confirmed that a person could not recover for damage that was a consequence of a sentence imposed on him for a criminal act but held that Gray was not entitled to compensation for loss of earnings after his arrest; Gray had been unable to earn because he was detained. Gray's claims for guilt and remorse and indemnity claims were consequent to him having deliberately killed the pedestrian and were also not recoverable.

Hill Dickinson comment:

Many sufferers of childhood abuse go on to perpetrate crimes. The principles enunciated in Gray will help legal advisors to determine the extent of losses claimed which are recoverable.

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Cases continued

Julie Copley -v- Kenneth Lawn: Iain Maden -v- D Haller (2009)

Credit hire: failure to mitigate does not extinguish a claim entirely

The Court of Appeal held that where a claimant's car was damaged in a road traffic accident and the claimant wished to hire a replacement, it was not unreasonable to reject an offer of a replacement car from the defendant's insurer if that offer did not indicate the cost of hire to the insurer.

Further, a claimant who unreasonably rejected or ignored a defendant's offer of a replacement car did not forfeit his damages claim altogether but was entitled to recover at least the cost which the defendant would reasonably have incurred.

The court held that a claimant who had been deprived of the use of his car by the negligence of a tortfeasor only had to take reasonable steps to mitigate his claim and could not be said to act unreasonably if he made or continued his own car hire arrangements, unless he was made aware that it could be done more cheaply by the defendant.

Hill Dickinson comment:

Bump cards are a first step to curtailing hire charges claims, but insurers will now need to provide claimants with information of the cost of hiring a vehicle to them if they are to successfully argue that a claimant should have mitigated their losses by accepting a replacement vehicle from them. Insurers will also need to revisit reserving methods to ensure that they reserve for no less than the cost of hire to them.

Smith -v- Northamptonshire County Council

Equipment for the purposes of PUWER 1998 is only 'work equipment' if it has been incorporated into and adopted as part of the employer's business or other undertaking and was provided to the employee by the employer or by someone else with the employer's consent

Smith appealed against a decision of the Court of Appeal that Northampton County Council was not liable under the Provision and Use of Work Equipment Regulations 1998 for the maintenance of an access ramp at the home of one of its service users.

Smith was employed by the local authority as a minibus driver and carer and would collect people from their homes and take them to day centres. One of the service users was a wheelchair user who had a wooden ramp outside her home which had been installed some years earlier by the NHS. Smith had used the ramp many times but on the material day it crumbled beneath her foot, causing her to sustain injury. She sought damages from Northampton County Council claiming breach of the regulations.

The House of Lords held that whilst abstractly the ramp was work equipment, because it would from time to time be used by persons at work, that was insufficient to satisfy the definition contained with the regulations, which had to be construed to give effect to the source EU directive. The House explained that a nexus was required between the undertaking and

the equipment, beyond the mere fact of use. It could not properly be said that the ramp had either been incorporated into and adopted as part of the local authority's undertaking or was under its control. The local authority had not provided the ramp and neither owned nor possessed it, nor did it have any responsibility or right to repair it. The fact that the local authority had inspected the ramp showed merely that it was careful, not that it controlled the ramp or had incorporated it into its undertaking. Further, the defect was latent and not observable on inspection. Accordingly, the regulations did not apply.

Hill Dickinson comment:

The court adopted a purposive and practical approach to interpretation of the regulation. Employees invariably manufacture their own work equipment or use equipment without the knowledge of their employer and this case will be useful for an employer seeking to refute liability when an accident ensues as a consequence.

Shaaira Alexis -v- Newham London Borough Council (2009)
Duty of care owed to poisoned teacher not breached where school took reasonable care

Alexis claimed for damages for personal injuries sustained in the course of her employment at a school for which Newham London Borough Council was responsible.

Whilst Alexis had been away from school for a day, three pupils had been granted access to her classroom (which would otherwise have been locked) for the purpose of obtaining their study materials. One pupil added whiteboard cleaning fluid to Alexis's bottled water and when, on her return, she drank the liquid in the bottle, she suffered immediate physical injuries and consequential psychological injuries.

Alexis alleged that the local authority had negligently allowed the pupils unsupervised access to her classroom.

The Court of Appeal found that the pupil had not set out to injure Alexis, but indulge in a prank, the serious consequences of which she did not anticipate. The duty of care owed was that of a reasonable employer. It was absurd to suggest that teachers could not exercise their discretion to allow pupils access to an unoccupied classroom for the purpose of retrieving something. None of the teachers, with the possible exception of Alexis, had previously had any reasons to suspect the pupil was likely to do what she did and the teacher who gave the pupil the keys to the classroom was not negligent in doing so.

Hill Dickinson comment:

Children can be unpredictable and pranks of the nature performed in Alexis cannot be eliminated. The court's view that reasonable care is required rightly ensures that an absolute duty to prevent harm is not owed.

Edward Guy Tibbatts -v- British Airways Plc (2009)

Tibbatts claimed damages for personal injury from British Airways Plc after an accident in 2003 when he sustained injury to his shoulder whilst unloading baggage from a flight. British Airways admitted that the injury was a consequence of negligence of breach of the Manual Handling Operations Regulations 1992 but contended that Tibbatts had been contributory negligent in lifting the heavy bag.

The court held that Tibbatts bore a substantial responsibility for the injury sustained as he knew that the bag was one which should have been handled by two people and his damages were reduced by one third for contributory negligence.

Hill Dickinson comment:

This particular bag had a heavy label, but it was not adequately labelled, weighing 43 kg and not the stated 32kg. The claimant had failed to read the label and knew that two people were required to lift any luggage weighing 32kg and above. In the event, the error on the label was of no consequence and a degree of contributory negligence applied. The case is of direct relevance to a number of Hill Dickinson clients and may be applied in future claims.

Palmer -v- Cornwall County Council (2009)
Lack of adequate supervision of pupils is negligent

Palmer appealed against a decision that Cornwall County Council was not liable in negligence for personal injuries sustained by him when he was hit in the eye whilst a pupil at a local authority school. Palmer had been hit by a rock thrown by a peer at a time when only one dinner lady had been on duty to supervise the children. There had been approximately 300 children on the field that day and the local authority was negligent in not ensuring there was adequate supervision.

Hill Dickinson comment:

This decision falls in line with Alexis and, had the pupils been adequately supervised, the claim would have failed.



Success stories

Weeks -v- Hill Dickinson client

The claimant was employed by Hill Dickinson's client as a promotions manager. She contended that during the course of her employment she caught the heel of her shoe in a faulty piece of flooring, thereby causing trauma to her back which eventually necessitated significant surgery.



The claimant contended that even though she had a vulnerable back already, following a diving accident at the age of 15, the index incident had effectively ruined her career. Her total special damage claim was pleaded at just under £600,000.

Investigations confirmed that the flooring was faulty, and liability was properly and promptly admitted. However, causation remained very much in dispute. Careful and detailed gathering and analysis of documentation and witness evidence established that:

- Although the incident was pleaded as having occurred on 13 July, the claimant attended upon her GP that very evening and did not mention the incident.
- The claimant admitted delayed onset of the most significant symptoms, but said this had been only 24 hours. We were able to piece together documents and records that effectively doubled this period of delay, which had a considerable effect upon the claimant's credibility.
- Witness evidence suggested that the claimant had been more concerned about the condition of her shoe in the immediate aftermath, and the accident report form was only completed three weeks later.
- Surveillance evidence taken of the

claimant at the bungalow (adaptation costs of which formed part of her claim) showed her moving smoothly up and down steps at the rear of the property rather than the level entrance at the front.

- Scrutiny of the claimant's work emails showed that she had been researching properties that had the potential for development in the days leading up to the incident. We also established that her husband had previously worked as a builder.
- The claimant argued that she had been made redundant as a result of long-term illness absence which was directly related to the incident. We obtained witness evidence from the manager who conducted the redundancy exercise which confirmed that the claimant had indeed been made redundant in March 2006, but that according to the disclosed scoring sheets relating to the claimant and a competing employee, no account whatsoever was taken of illness/absence when calculating which employee should be retained.
- The claimant admitted, in the face of internet enquiries and requests for relevant information, that she had started working as a pilates instructor.

Quantum

The claimant contended that she was incapable of working again and/or at a significantly reduced level. Her schedule of special damage was initially supported by orthopaedic and nursing care evidence. However, when faced with robust orthopaedic evidence on behalf of the defendant, backed up by the causation evidence referred to above, the claimant's orthopaedic expert was forced to make very significant concessions. Even then, the claim still justified, on the claimant's analysis, a gross award of £ 50,000+. The initial offer from the claimant had been nearly £250,000.

Following a conference, our carefully selected orthopaedic expert then made further inroads within the joint statement, with the result that we reduced the claim to a case of acceleration of symptoms by a period of 1-2 years.

Whilst negotiations continued, we secured a review of the DWP certificate. Taking the

orthopaedic joint statement into account, we reduced the DWP liability from over £35,000 to just over £5,000.

With the DWP position clarified, we then settled the claim at £10,000 net of DWP, a far cry from the claimant's original expectations and only 2% of the original schedule of loss.

In settling the claim on a commercial basis, however, we argued that many aspects of the claim had been so devoid of merit that this should be reflected in costs. We had offered £5,000 in March 2007, and argued that in essence all of the costs incurred since that offer had been rejected. The claimant accepted the force of our submissions to the extent that she agreed there should be no order as to costs from March 2007. Based on the claimant's costs schedules, this equated to a further saving in the region of £25,000.

Summary and financial implications

Robust and careful handling of procedural matters, allied to intensive and detailed investigation, both by solicitors and witnesses, has succeeded in reducing a claim which was pleaded at almost £600,000 and reserved at £206,000 at its highest point to a claim spend of comfortably less than £50,000 inclusive of damages and costs of all parties.

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Luke Tunstall -v- Hill Dickinson client

In September 2006 an employee at our client's manufacturing site in Prescot sustained a laceration injury to his finger and brought a personal injury claim against the company alleging, amongst other breaches, failure to provide adequate PPE. Whilst quantum was modest, the company was determined to defend the case. This required a wide ranging investigation and collation of detailed witness evidence to demonstrate that the generic PPE systems

met all safety requirements. The evidence involved significant disclosure of documents to establish that all proper considerations had been given to the need to balance the safety features of the PPE whilst retaining full dexterity of use. In light of the potential ramifications of the case, the court was persuaded to allow engineering evidence by both parties and a joint site inspection took place in December 2008 after which each expert produced their own report and later a joint statement of issues. On the basis of the joint report the claimant discontinued his claim in May 2009.

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Hickford -v- Lowery Ltd Claimant's case

The claimant alleged that from October 1978 to December 2002 he was employed by the defendant as a skilled mechanic to repair and test a variety of machinery, some of which were vibratory tools. He alleged that on average he would test vibratory tools for 2 - 3 hours per day and as a result of this testing he was exposed to vibration which caused Hand/Arm Vibration Syndrome.

He also claimed (although not in his Particulars of Claim, but included in his witness statement) that he was exposed to vibration when using needle guns and CP9 chipping tools to knock away solidified concrete in a cement mixer.

The medical evidence on behalf of the claimant indicated that he had bilateral Hand/Arm Vibration Syndrome graded at 3SN and 2V in each hand.

Defendant's case

The defendant alleged that the claimant would only test the tools for a few seconds after repairing them. The defendant's witness estimated that at most the claimant would be exposed to vibratory tools for approximately 10 minutes each day. The defendant conceded that no training or warnings were given to the claimant about the issue of Hand/Arm Vibration Syndrome because it was felt that, given the claimant's job, he was not at risk of contracting this condition.

With regard to chipping out the solidified concrete in a cement mixer the defendant argued that this would be a job for an unskilled labourer rather than a skilled mechanic like the claimant, as it would cost more money for the claimant to knock out the concrete.

Case management conference

At an early case management conference, Hill Dickinson argued that the matter should be allocated to the multi-track and that the defendant should be given permission to rely on their own medical evidence. However given the value of the claim, which was less than £15,000, the district judge allocated the matter to the fast-track and ordered that there should be no second medical expert.

We were therefore limited to putting questions to the claimant's medical expert, who conceded that if the exposure periods stated by the defendant's witness were correct, then the claimant's exposure to the defendant's vibratory equipment could not have caused his condition. However the medical expert gave no other reason such as exposure to vibratory equipment at other employers or a constitutional reason as to why the claimant had the condition.

Trial

The matter proceeded to trial at Uxbridge County Court before District Judge Banks on 26 March 2009.

Both parties maintained their position regarding the amount of exposure the claimant was subjected to whilst testing the vibratory tools in question. In submissions the defendant's counsel referred to the case of Billington -v- British Rail Engineering Limited (2002) where it was held that even if exposure exceeded 1 m/s^2 the defendant would only be in breach of their duty to the claimant where there is "regular prolonged use of tools likely to be hazardous". The judge in this case found that as the course of testing the equipment was a very small proportion of the claimant's working day and the fact that the claimant would often be travelling to various sites to repair the tools, then it was not likely on the balance of probabilities that there was "regular prolonged use of tools likely to be hazardous".

The judge made no finding regarding the amount of exposure but advised that it was certainly less than 2.8 m/s^2 and even if it was above 1 m/s^2 , given that there was no prolonged use of the tools, then the defendants were not in breach of their duty in line with the case of Billington -v- British Rail Engineering.

Judgment

The claimant's claim was dismissed with costs.

Comment

The case of Billington -v- British Rail Engineering can be used more often where exposure to daily levels of vibration is in the 'grey area' of 1 m/s^2 to 2.8 m/s^2 where there is intermittent use of tools and the defendant has not warned the claimant or given training regarding the condition of Hand/Arm Vibration Syndrome. It would be more difficult though to defend a case using Billington where there was more regular use of tools but the exposure level would still be within this grey area.

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Razzaque -v- Siemens Plc

The claimant sought damages for an accident at work in which he slipped on ice, fell and allegedly injured his back. Liability and causation were robustly denied.

Hill Dickinson was able to show that the company had an appropriate system in place for de-icing walkways and, as shift supervisor on the day of his accident, the claimant was solely responsible for ensuring the system was put into place. Further, on close review of the medical records, we were able to question the claimant's medical expert regarding the facts that not only did the claimant have a long history of back problems but that he did not complain of suffering symptoms in his back until some nine months post-accident after he had been positioned working underneath a vehicle for some time.

As a result of early investigations, a Calderbank -v- Calderbank offer for the claimant to discontinue his claim with no order as to costs was presented shortly after proceedings were issued. Some three months following expiry of this offer, the claimant attempted to negotiate terms of discontinuance. At a tactical advantage, we were able to secure costs of the action, on an indemnity basis from the date of expiry of the offer. In addition, during the course of this action we successfully challenged a CRU certificate showing a net liability of nearly £18,000, which was reduced to nil. Damages, claimant's costs and 90% of defence costs were saved.

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Jarrett -v- Hill Dickinson client

Mrs Jarrett issued a claim in the High Court claiming £1,000,000 in damages for losses she alleged arose from the unlawful enforcement of a magistrate's warrant against her. She alleged that Hill Dickinson's client had trespassed onto her property, caused significant damage to it and unlawfully removed and kept items from within her home. In-house counsel Sarah Venn and partner Lisa Grey successfully applied for early judgment in Hill Dickinson's client's favour and obtained an order that Mrs Jarrett pay the costs of the action. This early intervention saved Hill Dickinson's client the costs of going to trial and ensured that the matter was disposed of quickly and efficiently.

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Rose -v- Hill Dickinson client

This case was one of two lead cases pursued by separate solicitors relating to a novel type of claim.

The allegations centred on use of an item of equipment known as a barhole tool or searcher bar which is used to break the road or ground surface when searching for gas escape. The item of equipment is both heavy and slightly unwieldy and specific technique is therefore tutored to the workforce. The equipment is provided to most members of the company's industrial workforce and hence is used on a daily basis by thousands of operatives.

There was therefore significant potential if a claimant could succeed on liability particularly given that certain of the allegations touched on additional use of the common spade and also use of oil dispensers. There were live issues relating not only to breach of duty and quantum but also discrete and multilayered/complex medical causation issues.

Early investigation and use of generic evidence and documentation enabled a tactical advantage to be obtained. Whilst the claimant held favourable lay witness evidence and medical reports which established medical causation, it was argued that the defendant could counter that evidence to establish that the claimant's carpal tunnel syndrome and associated problems were not work related.

Prior to formal presentation and/or exchange of engineering/ergonomic evidence, the

claimant confirmed the discontinuance of the claim. This was a potentially precedent setting claim and the discontinuance will help the company to deny future claims. The outcome of this proves the benefits to be obtained when Hill Dickinson is requested to coordinate lead action and potentially precedent setting issues with a view to ensuring a consistent and successful approach.

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Bourne Leisure Ltd (T/A British Holidays) -v- Marsden (On behalf of the estate of M Marsden, deceased) (2009)

Duty of care owed by caravan site owners to parents not breached where owners took necessary steps to keep children safe on its premises.

Caravan site owners Bourne Leisure appealed against a decision that it was liable for an accident causing the death of Marsden's two-year old son. The Marsden family had been staying in a caravan in Bourne Leisure's holiday site when the accident occurred. The two-year old boy wandered off and climbed over the rails surrounding a small lake where he drowned. Marsden had alleged that more effective measures should have been taken, such as placing a barrier around this site and providing more notice to warn them of the lake nearby.

The Court of Appeal held that Bourne Leisure did not owe a duty of care to warn the parents of the existence of the pathway or the location of the lake, as this presented an obvious danger to unaccompanied children. The park owners could not be held liable as they had exercised reasonable care in providing the family with map on their arrival, which identified dangerous areas for young unaccompanied children.

Comment

Insurers could take some solace in this decision because the facts can be applied to a number of different parks that may contain water. As long as the company takes reasonable steps and does not disregard personal safety the courts may deem that sufficient.

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About Hill Dickinson

The Hill Dickinson Group offers a comprehensive range of legal services from offices in Liverpool, Manchester, London, Chester, Piraeus and Singapore. Collectively the firms have over 150 partners and a complement of more than 1,100 staff.

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