

INSURANCE PRACTICE GROUP LEGAL UPDATE

News

School headteacher awarded over £400,000 for stress claim

Erica Connor, former head of New Monument primary school, Surrey, was awarded over £400,000 damages after suffering a nervous breakdown which forced her to give up her job. Her employer, Surrey County Council, was found to have given her insufficient support after it became clear that she was suffering with mental health problems after school governors accused her of racism and Islamophobia.

Insurer asbestos liability remains unclear

In recent test litigation driven by Hill Dickinson's David Dunne it was rejected that diagnosis of asbestosis is a material injury in its own right worthy of compensation; each case must be treated on its own merits. Two cases succeeded, where both Claimants were found to suffer breathlessness amounting to a 5% disability, with asbestosis making a small contribution, whereas one Claimant, who suffered a 3% respiratory deficit, was judged not to have any material injury.

Raleys lawyers guilty of misconduct

Three solicitors at Raleys, which earned £92 million of public funds for its work on coal health claims, have been suspended for professional misconduct.

Cases

[LISA MARIA ANGELA FERGUSON -v- BRITISH GAS TRADING LTD \(2009\)](#)

Protection from Harassment Act 1997

Ferguson, a former customer of British Gas, switched to another energy supplier but received several bills from British Gas which she claimed were unjustified. She also received letters threatening to cut off her gas supply, start legal proceedings against her and report her to credit rating agencies. Ferguson contacted British Gas several times but the bills and threats continued. Ferguson claimed that British Gas's conduct amounted to an unlawful harassment contrary to the Protection from Harassment Act 1997. The Court held that a course of conduct must be grave before the tort of harassment was proved and that the conduct complained of could constitute harassment. It further held that it was difficult to think of a policy reason why large corporations should be exonerated for conduct which, if carried out by an individual, would amount to harassment (having heard argument from British Gas that it was only liable for acts of the directing-minds of the company or employees for whom it was vicariously liable and not its automated systems). The Court refused British Gas's application to strike out Ferguson's claim.

HD Comment: British Gas applied for Ferguson's claim to be struck out before trial. The Court refused to do this and took the preliminary view that Ferguson had an arguable case. The claim will receive detailed consideration if it reaches trial but the early views expressed by the Court of Appeal are strong and persuasive.

[CHRISTOPHER WHIPPEY -v- ANDREW MICHAEL JONES \(2009\)](#)

Standard of care of a dog owner

Jones had been running along a footpath in a park when Whippey's dog, a Great Dane, knocked his shoulder, causing him to lose balance and fall down a slope, breaking his ankle. Whippey's evidence was that he would only unleash the dog when he was satisfied that nobody was in the vicinity and that on the date in question he had checked to see if anybody was around him before unleashing the animal. The dog was large and had a tendency to approach strangers but not jump up at

them. The Court held that the question whether Whippey had acted negligently was not answered simply by analysing what he did or did not do in the circumstances that prevailed at the time and testing it against an objective standard; the court had to be satisfied that a reasonable person would contemplate that injury was likely to follow from his acts or omissions and the remote possibility of injury was not enough.

HD Comment: An individual need only contemplate that injury was likely to follow and does not need to foresee the precise manner of injury sustained.

[CHANTELLE PETERS \(BY HER LITIGATION FRIEND SUSAN MARY MILES\) \(Claimant\) -v- \(1\) EAST MIDLANDS STRATEGIC HEALTH AUTHORITY \(2\) P HALSTEAD \(Defendants\) \(3\) NOTTINGHAM CITY COUNCIL \(Part 20 Defendant\) \(2009\)](#)

Costs of future care recoverable on a self-funding basis in preference to reliance on the statutory obligations of a public authority to provide care and accommodation

The Health Authority (found to be liable to Peters for its tortious actions) contended that there should be a reduction in the accommodation and care element of damages awarded to Peters to reflect the local authority's statutory duty to provide accommodation and care for her. The Court held that there was no reason in policy or principle why a claimant who wished to opt for self-funding and damages in preference to reliance on the statutory obligations of a public authority should not be entitled to do so as a matter of right, provided there was no double recovery.

HD Comment: In the instant case the risk of double recovery was dealt with as a consequence of the Claimant's affairs being managed by the Court of Protection and the restrictions imposed upon those with control of the Claimant's affairs by the Court. The scope of the risk is likely to be tested in future cases but in the majority of cases faced by HD clients, claims are advanced for past care and the risk is unlikely to arise.

[GRANT COUZENS -v- T MCGEE & CO LTD \(NOW T/A MCGEE GROUP LTD\) \(2009\)](#)

Work equipment for the purposes of PWER 1998

Couzens transported waste in a tipper lorry and suffered injuries when his lorry overturned because he was travelling too fast. He claimed that he had been unable to move his right foot from the accelerator to the brake as a piece of scrap metal that he kept in the side pocket of the driver's door had caught in his trouser leg. Couzens used the metal as a makeshift tool for a variety of tasks, such as scraping mud from the lorry's tyres. Couzens claimed that his employer should have provided a suitable place for him to keep his makeshift tool. The judge found that the employer knew that several drivers provided their own small scraping tools to use where necessary but it was not aware of the tool used by Couzens. On appeal it was held that if equipment had not been supplied by an employer it would not be "work equipment" for the purposes of the Regulations unless the employer expressly or impliedly permitted its use or must be deemed to have permitted its use (which could be inferred where the employer ought to have realised that an item was being used but had not). Couzens's claim was dismissed.

HD Comment: This case emphasises the importance of an employer not turning a 'blind eye' to practices within the workplace and the risk of liability ensuing where an employee formulates their own systems of work which are not reasonably monitored or are implicitly endorsed.

[MITCHELL & ANOR v GLASGOW CITY COUNCIL \(2009\)](#)

Foreseeability alone is not enough to impose a duty to safeguard a person from the criminal acts of third parties

The widow and daughter of a man killed by his next-door neighbour in 2001 sued Glasgow City Council for failing to warn the deceased of the risk he faced to his livelihood. In 1994 the deceased's attacker had used an iron bar to batter down the deceased's door and smash his windows after the deceased had tried to get him to turn his music down. The attacker made repeated threats to kill the deceased thereafter and he was invited by the local authority to a meeting to discuss his behaviour where he was told that the local authority would be seeking to recover possession of his home from him. He lost his temper at the meeting but then apologised. After leaving the meeting he returned home and fatally assaulted the deceased. The House of Lords held that the crucial question was whether it was fair, just and reasonable for the local authority to be held liable in damages for the omission to warn the deceased about the meeting. It was held that as a general rule, a duty to warn another person that he was at risk of loss, injury or damage as a result of the criminal act of a third party would only arise where the person who was said to be under the duty had by their words or conduct assumed responsibility for the safety of the person at risk. No case under Article 2 of the ECHR arose where there was nothing to suggest that the deceased's life was really at risk; although the deceased's attacker lost his temper at the meeting and was abusive, he did not utter any threats against the deceased and was not armed; he did nothing to alert the local authority to the risk that he would attack the deceased when he got home, let alone inflict injuries from which the deceased might die.

HD Comment: The House of Lords felt that if the Scottish Court had had the advantage of reading the decision in *Smith v Chief Constable of Sussex Police* [2008] (see Issue 6 of 2008) the impossibility of the claim succeeding would have been recognised. Circumstances in which one party will owe another party a duty to warn them of the impending violence by a third party will be very rare.

[ORCHARD -v- LEE \(2009\)](#)

Duty of care owed by playing 13-year-old schoolboy

Orchard appealed against the decision that her claim for personal injury against Lee should be dismissed. Lee had been playing tag in the courtyard and part of a walkway that was a designated social area at his school. While he was running backwards he collided with Orchard, a lunchtime supervisor, causing her serious injuries. There was no rule against running in the area where the incident occurred and the accident was said to have been caused by horseplay. The Court held that no ordinarily prudent and reasonable 13-year-old boy would reasonably have foreseen the risk of injury by virtue of the game of tag in question. The appeal Court affirmed that Lee's conduct was to be expected of a 13-year-old boy playing tag; it was not outside the norm and it did not break any rules; it could not, therefore, be described as being careless to a very high degree and it was clear that he was not culpable. A reasonable 13-year-old boy would not have anticipated that there was sufficient probability that the harm actually caused would have resulted.

HD Comment: The standard of care contended for exceeded that recognised by law and was measured by the standards to be expected of a child of that age. The principles overlap with those expressed in *Whippey* (above) which emphasised the need for a probability of resultant harm to be recognised before a claim can succeed.

Hill Dickinson success stories

[Woodhouse -v- Meteor Parking Limited and BAA Plc](#)

Mr Woodhouse brought a claim against Meteor Parking Limited (referred to as Meter) and BAA Plc with respect to an accident which occurred on 27 March 2005. Mr Woodhouse was disabled. He alleged that he had contracted with Meteor to park at the Pink Elephant long stay car park at Stansted Airport, the car park being managed by Meteor but owned by BAA Plc. He alleged that when he and his personal assistant drove into the car park, there were no directions stating where he should park and therefore, following directions given to him by a "male attendant" he parked in Zone D within a parking bay designated for disabled customers. When he returned to collect his car and manoeuvred his wheelchair across the car park, the front wheel struck a gully and he was thrown from his wheelchair and injured. The Claimant raised various allegations of negligence and breach of the Occupiers Liability Act 1957 against Meteors and BAA Plc. He alleged that the area around the gully was not adequately lit, that there were no signs, bollards or notices warning the Claimant of the gully, that Meteor allowed the Claimant to traverse the gully when it wasn't safe to do so, and failed to direct him to alternative routes, and that Meteor also failed to mark the gully with reflective paint or at all and failed to take care for their customer's safety.

Following detailed investigations carried out pre-action with Meteor, One Liability Services issued a robust denial of liability. Liability was denied on the basis that the Claimant was not a lawful visitor to the car park as he had parked in Zone D against the presence of three no entry signs and Zone D was reserved for staff car parking/awkward vehicle parking only, that the car park was sufficiently inspected and maintained and the lighting was adequate.

Despite this denial of liability, Mr Woodhouse issued proceedings against both Meteor and BAA Plc. We pleaded a robust Defence raising denials of liability issued by One Liability Services, and in addition alleging that Mr Woodhouse was an unlawful visitor, we confirmed that the car park had sufficient pedestrian routes for the Claimant to have accessed his car which would have avoided him traversing over the gully. In addition, we pleaded that if the design of the car park was defective for having a rainwater gully, then the obligation to make safe a dangerous defect or hazard rested upon BAA who owned/designed the car park rather than Meteor. Our Defence was bolstered by witness evidence obtained and served by Trefor Jones of Meteor who assisted us throughout.

The matter proceeded to Trial on 15 January 2009.

The Claimant was funded by a no win/no fee CFA agreement.

Before the Trial commenced, the Judge indicated to all parties' Counsel that she would find the Claimant was a lawful visitor to Zone D and therefore the Occupier's Liability Act would apply. However, having heard evidence from both the Claimant, Trefor Jones, and witnesses on behalf of BAA Plc, the Judge found that the lighting to the car park was adequate, and that the gully was not inherently dangerous such as to require it either to be filled in with gravel or marked with reflective paint or warning notices. The Claimant therefore lost his action against both Defendants and was ordered to make a contribution towards Go Ahead's costs in the sum of £7,500.00 exclusive of VAT.

This case demonstrates that with team work, we can defeat spurious claims by Claimants, and we look forward to winning more cases with you in the future!

HD Contact: Paula Garvey

[Strefford & Philpot -v- Metcalfe 8RC00265](#)

Leech & Co for the Claimants, Andrew London of HD for the Defendant via Tradex.

HD received instructions to defend the issued claim in relation to quantum, liability was admitted.

The Claimants were a driver and passenger in a road traffic accident; liability was not disputed.

Early Part 36 offers were made on a global basis for each of the Claimant's damages excluding the hire claim. Both claimed similar losses and medical reports carried identical prognosis.

The offer of £1765.00 in accordance with CPR 36 to each Claimant prior to the litigation commencing. The offers were rejected and proceedings issued by Leech & Co.

The proceedings included the hire claim of £4090.65. HD advised the client to pay this in full as the matter would have greater grounds for the court to order for costs against the Claimants if the only matters before the court were those heads of claim protected by the pre-litigation Part 36 offers. The hire claim was paid in full with the defence thus restricted to the personal injury claim and accompanying special damages.

The Claimant's made their own Part 36 offers in the sum of £2,400.00.

At the disposal hearing the judge awarded each Claimant the sum of £1774.10 and summarily assessed costs in the sum of £7158.37.

The judge split the award for each claimant as follows: £1750.00 for general damages plus interest of £14.10, plus special damages of £10 for miscellaneous expenses.

Counsel for the Defendant challenged the judgment in relation to costs but the judge refused to entertain any argument stating that the Part 36 offer was said to be inclusive of interest and therefore, as the judgment had similarly included interest, the Claimant had obtained a settlement more favourable than the offer. Permission to appeal was refused.

Hill Dickinson sought permission to appeal.

Hill Dickinson argued that the judge had misdirected herself because the decision was 'wrong' as per CPR 52.11(3)(a) as the settlement was not more advantageous than the Part 36 offer, as set out in CPR 36.14(1)(a).

Although the offer was deemed to include interest calculated until the expiry of the 21 day period for which the offer was open for acceptance, as the offer had been made before the litigation had commenced no interest would have been due as interest on General Damages only accrues after the proceedings had been commenced.

The judge had erred in including the £14.10 in the calculation for the purposes of CPR 36.14(1)(a).

The Claim had ultimately been assessed at £1760.00 which was lower than the Defendant's offer of £1765.00.

In addition it was arguable that in any event the award was not more advantageous; the proceedings only resulted in the Claimant receiving an additional £9.10 on the original offer and in line with the decisions in *Morgan v UPS* and *Lisa Carver v BAA plc* it was not 'more advantageous' to issue proceedings and incur the costs of the litigation for a mere £9.10.

The appeal sought that the costs order be set aside and the Claimants pay the Defendants costs from the 21 days after the Part 36 offer had been made.

Permission to appeal was granted and a hearing date set.

The Claimant solicitors consented to the appeal on all grounds in order to reduce the costs that they would have been liable to pay.

The Claimants also agreed to pay the costs of the appeal.

HD Contact: Andrew London

For further details please contact:

Jason Spencer

Head of Insurance Practice Group
0151 600 8940
jason.spencer@hilldickinson.com

Sarah Venn

In-house Counsel
07515 328 174
sarah.venn@hilldickinson.com

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.

www.hilldickinson.com

Hill Dickinson LLP:

**Liverpool
Manchester
London**

**Chester
Singapore**

Hill Dickinson International:

**Greece
London**

Hill Dickinson LLP is a limited liability partnership