

Legal Matters

Personal Injury and Insurance

Our quarterly newsletter aims to highlight developments and recent case law in the areas of personal injury and insurance in a concise and readable style. We hope that you find it informative and useful.

Nottinghamshire and Derbyshire Deafness Litigation - heading for the House of Lords?

This landmark litigation could be heading to the House of Lords following the Claimant's success in the Court of Appeal in what is being described as a watershed decision. Should the Judgment stand, it would move us closer to the position in respect of noise exposure where employers will not avoid liability unless they provide a working environment that is risk-free.

The Appeal Judges concluded that, objectively, noise levels above 85dB(A) have always been unsafe and an employer's actual knowledge of this fact or not is irrelevant. In other words the standard for 'safe' in the workplace is to be judged with the benefit of hindsight and without reference to what experts, the HSE and employers generally considered to be acceptable or safe at the relevant time.

Accordingly, once it was established under s 29 of the Factories Act 1961 that a workplace was unsafe then the burden of proof shifts to an employer, whose only defence is to show that it was not 'reasonably practicable' to guard against the risk of harm from noise at 85dB(A) and above.

The Judges went on to find that from early 1977 the average sized employer

in the industry (ie all the Defendants to the litigation and the overwhelming majority of employers) could and should have taken informed/expert advice about the risks of exposure from noise at 85-90dB(A). Once that risk was determined then it was reasonably practicable for them to provide ear protectors within 6-9 months, and therefore those failing to do so were in breach of s 29 from 1 January 1978.



Although Lady Justice Smith refused permission to appeal to the House of Lords, petitions seeking permission have now been filed and we will report on developments.

It should be stressed however that there was no challenge to the finding in the lower Court that no employers were in breach, whether under s 29 or at common law in respect of exposure to noise levels below 85dB (A).

Also that Claimants must establish a diagnosis of NIHL and that 6 out of the 7 cases in the lower Court failed to prove causation.

For further information, please contact Lynn Watts. See page 8 for details.

Court interest rates fall again

From 1 June 2009 the Court Funds Office basic account rate falls to 1% and the special account rate to 1.5%.

This follows the earlier reduction from 1 February 2009 when, to reflect commercial reality, the basic account rate was reduced to 2% and the special account (formerly the short term investment account) rate was reduced to 3%.

Interest calculations will need to reflect the change.

Inside:

Wider version of the maxim ex turpi causa applied by House of Lords	2
Costs capping under the new rules	2
Multi track pilot scheme reviewed	3
RTA drink drive apportionment overturned	3
Night working cancer link	4
School lunchtime supervision inadequate	4
Res ipsa creates aviation history	5
Claimant succeeds despite supporting another's fraudulent claim	5
Recent cases - liability for animals	6
Should precedence always be given to a vehicle on the major road?	7
NHS tariff increased	7
Car hire - failure to mitigate	7
Partner Perspective	8
Contact details	8

Wider version of the maxim ex turpi causa applied by House of Lords

The House of Lords has reversed the decision of the Court of Appeal in this case.

The Claimant had been involved in the Ladbroke Grove rail crash in 1999 and suffered from severe post-traumatic stress disorder as a result. This caused him to undergo a significant personality change and at times suffer uncontrollable anger. In 2001 he stabbed a stranger to death and subsequently pleaded guilty to manslaughter and was detained in hospital under the Mental Health Act 1983.

He claimed damages for lost earnings including the time post detention on the basis that the PTSD meant that he was not able to earn as much as he would have done but for the accident and his prospects after release would be reduced. The Defendants admitted that his injuries were caused by their negligence and that in principle they were liable for loss of earnings up to the date of the manslaughter but they denied liability for losses after the manslaughter on the basis of the principle of ex turpi

causa - no cause of action may be founded upon an illegal act.

At first instance the Judge rejected the claim for loss of earnings after the manslaughter and held that the Claimant fell foul of the principle as his claim was closely connected with or inextricably bound up with his own criminal conduct. However, the Court of Appeal disagreed and distinguished cases where the crime itself was caused by the injury and the symptoms of that injury are reasonably foreseeable. The Court of Appeal held that it was bound by the decision in **Clunis v Camden and Islington** to find that recovery of general damages was



precluded but held that recovery of loss of earnings was not.

The House of Lords found that

the Court of Appeal had been correct to hold that it was bound by *Clunis* (to reject the Claimant's claim for general damage) however it had not been right to go on to hold, despite its finding that the rule applied, that the Claimant was entitled to compensation for loss of earnings after his arrest.

The criminal act of manslaughter led to the imposition of the hospital order, thus preventing the Claimant from working. For public policy reasons the Claimant should not recover either general damages or special damage arising from this criminal act. Unlike the Court of Appeal, the House of Lords did not treat the case solely in relation to issues of causation but also considered public policy issues relating to the inconsistency of compensating a claimant in the civil courts for the consequences of the operation of the criminal law.

Gray (original respondent & cross-appellant) v Thames Trains Ltd & Ors (original appellants & cross-respondents) [2009] HL

Costs capping under the new rules

This High Court defamation case appears to be the first decision on the application of the new rules on costs capping which came into effect on 6 April 2009.

The Claimant was funded by a CFA with ATE insurance. The Defendant applied for a costs capping order on the basis that its total costs liability could be over £1 million, taking into account the CFA uplift, ATE premiums, VAT and its own

costs. The Court applied the new rules on costs capping, introduced into the CPR on 6 April 2009 (CPR 44.18-20) and refused the cost capping order. Although there was a risk of a disproportionate escalation of costs because of the hourly rates sought by the Claimant's solicitors and their proposal to instruct Leading Counsel, given the "exceptionality principle" and that the issue of the reasonableness of the hourly

rates and the involvement of Leading Counsel could be adequately addressed on detailed assessment, it was not appropriate to order a costs cap under the new rules.

The Judge noted that were it not for the new rules he would have been "strongly inclined" to order a costs cap.

Matthew Peacock v MGN [2009] QBD

Multi track pilot scheme reviewed

The multi track pilot scheme commenced in July 2008 and had an overriding objective to resolve liability as quickly as possible, help claimants to access rehabilitation when appropriate and resolve their claims in a cost effective manner and within an appropriate time frame, with all sides working together in an environment of mutual trust and collaboration.

The 6 month review report concluded that the number of cases entered into the online monitoring system had been low, the predominant reason being that many participating claimant firms have not

received instructions in any cases that satisfy the criteria. This could be, for example, because the claim is in clinical negligence or disease (such claims being excluded) or because the identified insurers are not participants within the scheme. For those cases already identified as falling within the pilot scheme and entered into the monitoring system feedback has been excellent and there has been a high level of cooperation between the parties.

The current volume of cases was considered insufficient to establish any firm conclusions and more cases are needed

for monitoring. The 12 month pilot is therefore to be extended to 18 months.

The pilot scheme applies to personal injury cases, excluding clinical negligence and disease cases, with an estimated value of £250,000 or more where instructions were received after 1 July 2008 which fall within the multi track and are road traffic accidents, Employers Liability or Public Liability claims for spinal, brain, multiple; amputee, orthopaedic, psychiatric or other non disease or clinical negligence injuries.

RTA drink drive apportionment overturned

In a recent case it was held by the Court of Appeal that a Judge had erred in his apportionment of liability between a motorcyclist and a car driver.

The Appellant motorcyclist was travelling with a pillion passenger on a major road. The Respondent emerged from a minor road and collided with the motorcycle causing injury to the pillion passenger. Proceedings were issued against both the Appellant and the Respondent by the seriously injured passenger. The car driver was alleged to have emerged from the side road without stopping whilst the motorcyclist was also alleged to be at fault for riding in the middle of the road. An independent witness confirmed in evidence that the motorcyclist swerved into the middle of the road to avoid a parked vehicle

and this caused the collision.

The Judge at first instance held that the motorcyclist was travelling at the incorrect speed given the obstruction caused by the parked vehicles. He also found that the motorcyclist was not permitted to travel in the middle of the road and should not have been riding at all because he was over the drink drive limit. The car driver was also found to be at fault for failing to look before emerging from a minor road. Liability was apportioned 80% against the motorcyclist and 20% against the car driver.

The Court of Appeal held that there was no evidence that the speed of the motorcyclist contributed to the incident and therefore the speed was not deemed important. There was no evidence of alcohol impairment and the swerve was

found to be due to an error in judgement as opposed to the ill effects of alcohol. Some fault had to be apportioned to the motorcyclist as the accident would not have happened had he stayed on the correct side of the road.

The Judge had been correct to find both parties at fault but had erred in his approach to apportioning liability. The original hearing did find that the car driver had emerged from a minor road without looking but this had not been given the due weighting. The Court of Appeal held both the motorcyclist and car driver to be at fault and in the circumstances liability was apportioned equally.

Hamilton v O’Kane [2009] CA

For further information contact Tanveer Rakhim - details on page 8.

Night working cancer link

The Danish Government has recently agreed to provide compensation to a number of workers who had contracted breast cancer on the basis that there was some evidence to show a causal link between shift working and this form of cancer. Whilst Denmark operates a no fault compensation policy, provided there is some causal link, concern is increasing in this country over the future potential liability of employers and their insurers with regard to this type of claim.

The question that is quite rightly being raised is whether companies who employ females working night shifts should now consider their position and the measures they should take.

A significant body of scientific evidence now suggests there to be a causal link between working night shifts and an increase in the chance of contracting breast cancer. The theory is that nocturnal exposure to light reduces the production of melatonin and in experiments with animals melatonin has been noted to suppress tumour growth.

However, the literature does confirm that the current evidence is far from conclusive and is compounded by other features. As an example, it

has been found that there is a greater preponderance of alcohol use and abuse amongst those who work night shifts, and that this, in itself, is likely to increase the risk of cancer.

In terms of an employer's duty the courts have historically required a certain level or state of knowledge to be imputed on an employer before a duty will be imposed. In other words it is necessary to consider what employers knew or ought to have known at various times and what they should have done with their actual or imputed knowledge when deciding whether an employer is under a duty to take steps to protect their workers. In turn they will not impute that state of knowledge until there is a sufficient body of evidence showing an obvious causal link between a substance or method of work and an illness/condition.

We are at a very early stage in relation to the potential link between shift working and breast cancer although employers and insurers will wish to keep themselves aware of developments in this field.

School lunchtime supervision inadequate

The Claimant was a 14 year old boy who was hit in the eye by a rock thrown by another pupil in an outside play area.

Proceedings were issued against the Local Authority and the pupil who threw the rock, but were subsequently withdrawn against the pupil.

At first instance the claim, brought under the Occupiers' Liability Act and in negligence, failed on both counts. On appeal only negligence was pursued.

The established facts were that lunchtime supervision consisted of 2 dinner ladies, one of whom supervised outside and the other supervised indoors moving outside as the building emptied of pupils after lunch.

At the time of the accident there was only one supervisor outside. Whilst the exact numbers of pupils to be supervised could not be accurately gauged it was clear that it could have easily been in the region of 300. The Claimant was a year 9 pupil. Years 9 & 10 were separated from years 7 & 8 and the supervisor gave evidence that she paid greater attention to the younger age group. The Court of Appeal held that having not even one supervisor with 100% concentration on the 150 or so children in years 9 & 10 was inadequate and stated that the Recorder's decision that this was adequate was perverse.

The Court of Appeal then considered whether the

accident would have occurred whatever level of supervision had been in place and decided that it would not have done. Evidence from pupils was to the effect that if a supervisor had been near they would not have thrown stones because they knew it was prohibited. The Court of Appeal found no reason not to accept this evidence. The appeal was allowed.

This decision provides a good opportunity for local authorities to review their position in relation to school lunchtime supervision.

Palmer v Cornwall County Council [2009] CA



Res ipsa creates aviation history

Historically, the doctrine *res ipsa loquitur* has not applied to aviation cases. However, the recent Privy Council decision of **Williams (deceased) v Eagle Air Services Ltd** has held that the doctrine can apply in certain circumstances.

In this case the deceased was employed by the Respondent as a mechanic to maintain and service their aircraft. He was killed when the Respondent's aircraft on which he was travelling as a passenger crashed. His wife brought a dependency claim under the Fatal Accidents Act 1976.

The claim alleged that the deceased was onboard the flight in the course of his employment and that, in the absence of any evidence that the aircraft was defective, the crash was caused by the pilot's mishandling and that the Respondent should be vicariously liable for the actions of the pilot, their employee. The Respondent denied all allegations of negligence and alleged that the deceased had not been authorised to fly and therefore was acting outside the course of his employment. The Respondent also alleged that if the pilot had mishandled the aircraft then he was acting outside the course of his employment. The Respondent did not put forward a

positive explanation for the accident.

At first instance the Appellant sought to rely on the Air Accident Report as evidence of the pilot's negligent mishandling of the aircraft. However, the Appellant's legal representatives failed to disclose the report in time. By the time it was disclosed the Court found that to allow it to be entered as evidence would unfairly prejudice the Respondent. Without the Air Accident Report the Appellant was unable to prove negligence and her claim was dismissed.

The case was appealed to the Privy Council where the Appellant raised *res ipsa loquitur*. The Judges referred to the US Federal Appeal Court's Judgment in **Higginbotham v Mobil Oil Corpn** where it was held that the doctrine could apply to aviation cases. In that case it was reasoned that because of developments in aviation technology, the high standards of safety and its excellent accident record, it could be shown that crashes did not ordinarily occur due to a fault with an aircraft itself, but through human error connected with the maintenance or operation of the aircraft.

In the Appellant's case the Privy

Council held that *res ipsa loquitur* should apply to reverse the burden of proof. The Court found that in the event of a crash it was not unreasonable for the owner to investigate its occurrence so as to satisfy themselves of an absence of fault on their part. The Respondent had failed to discharge the burden of proof by failing to put forward any positive explanation for the crash.

The Judges rejected the Respondent's argument that the deceased and pilot were acting outside the course of their employment. It was accepted that the deceased did not enjoy flying and would not have flown without some invitation from the pilot, presumably in connection with the mechanical operation of the aircraft.

The appeal was allowed and the Judgment entered against the Respondent, potentially extending this area of the law.

Williams (deceased) v Eagle Air Services Ltd [2009] PC

Williams (deceased) v Eagle Air Services Ltd [2009]

Higginbotham v Mobil Oil Corpn [1977]

For further information contact Jarrod Parker - details on page 8.

Claimant succeeds despite supporting another's fraudulent claim

This Court of Appeal decision will be of interest to those dealing with RTA fraud claims. This was a second appeal for which permission was granted because it raises a point of general importance, namely whether it is possible to strike out a genuine claim on the grounds that the claimant has been involved in a fraud upon the Court in respect of an associated claim.

In this case the Appellant appealed against a decision that it was not appropriate to strike out claims made against her by 2 Claimants injured in a road traffic accident as an abuse of process because they had fraudulently

supported a claim by a third person who it was established was not actually in the car with them at the time. The Judge had dismissed the claim by the Claimant who was not actually present in the vehicle and awarded damages to the other 2 Claimants but held that they should pay two thirds of the Defendant's costs of defending their claims.

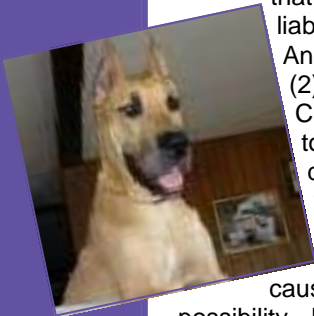
The Court of Appeal dismissed the appeal. It said that it was unaware of any reported case in which a judge had dismissed the whole of a claim because he had found that it had been dishonestly exaggerated. The invariable rule was that where a claim had been

dishonestly exaggerated the judge awarded the limited damages which were appropriate to his findings. It was well established that a claimant would not be deprived of damages to which he was entitled because he had fraudulently attempted to obtain more than his entitlement. 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.

Anita Shah v Washim Ul-Haq (1) Samara Khatoun (2) Zahida Parveen (3) [2009]

Recent cases - liability for animals

Dogs



In this case a Great Dane knocked over a jogger. At first instance the Judge decided that the owner was not liable under the Animals Act 1971 s 2 (2) because the Claimant had failed to prove that the damage suffered was of a type which the dog was likely to cause. It was only a possibility. However, he found

the owner liable in negligence for failing to *'take reasonable care to ensure that a dog does not put people in a position where they might reasonably foreseeably suffer some sort of injury'*.

The Court of Appeal disagreed. If the dog did not have a tendency to jump up at other people there was no reason why a reasonable person would have anticipated that the dog would have

jumped at the jogger and no reason why the dog's owner should have anticipated the dog's actions.

The remote possibility of injury was not enough. There had to be sufficient probability of injury to lead a reasonable person to anticipate it.

Whippet v Jones [2009] EWCA

Cows



Shirley McKaskie, 49, a company director, sustained serious personal injury when she was walking from her home in Greystoke Gill, Cumbria to a pub in the Greystoke Village.

The Claimant decided to use a footpath across farmland in order to reach the pub. She was walking with her Jack Russell terrier. In the field were cows, some with calves. Unfortunately the cows attacked the Claimant who sustained serious head injuries. It is believed that the cows reacted to the dog being in the field and acted to protect their young.

The Defendant was found liable under the Animals Act 1971 based on expert evidence, which confirmed that it was characteristic of cows with calves to act aggressively especially towards dogs and people accompanied by dogs.

The Claimant has been awarded an interim payment of £250,000 on account of a claim submitted in excess of £1 million pounds. The Defendant is seeking leave to appeal to the Court of Appeal.

This is a County Court decision, therefore not binding precedent. However, it is one of a number of similar incidents which have caught the media's attention.

Veterinary surgeon, Liz Crowsley, died in similar circumstances and police Inspector Chris Poole reached an out of court settlement for injuries that he sustained after being attacked by a herd of cows. David Blunkett was also the victim of a similar attack.

Landowners and particularly farmers have a responsibility to members of the public to ensure that they are safe when using bridleways and public rights of way.

Unless there is no alternative, cows should not be kept in

fields where there is a public right of way. If there is no alternative, the risk to the public should be assessed given the make up of the herd, prominent signs clearly displayed warning the public of the presence of cattle and access denied or an alternative route provided.

Equally, the public has a responsibility for their own safety when walking in the countryside and should stick to the designated rights of way.

The Health and Safety Executive has published a number of free guidance leaflets on its web site, which will provide valuable, sensible advice.

Shirley McKaskie v John Cameron [2009]

For further information contact Sally Adams, contact details on page 8.



Should precedence always be given to a vehicle on the major road?

This case looks at the emergence of a vehicle from a minor road onto a major road and who must give precedence.

Mr Lambert appealed against a decision in a claim arising out of a fatal road traffic accident in which he was held liable to compensate the Claimant subject to a deduction of 75% for contributory negligence for travelling at excessive speed.

Mr Lambert was driving a pickup and towing a cattle trailer. As he turned into a lane a motor cycle ridden by the Deceased collided with the rear near side of the pickup and the front near side corner of the trailer. The case on behalf of the deceased was, inter alia, that Mr Lambert had turned across the path of the motorcycle when it was clearly in view. Mr Lambert alleged he had no option to proceed with the turning in an attempt to clear the carriageway but was unable to do so before the

collision occurred. There were no independent witnesses.

On appeal it was argued that as Mr Lambert had already begun his turn when the motorcycle came into view he faced a split second decision, because of the speed at which the motorcycle was travelling, whether to stop, swerve back or go on. None of those options was the perfect solution; each had its potential disadvantages. On appeal the Court noted that HHJ Behrens did not criticise Mr Lambert's driving in anyway other than that he made the wrong decision when faced with a split second decision.

The Court of Appeal in allowing the appeal stated: "*It may well be that, had he taken a different decision, the accident might have been avoided. But that is not the test and judges must take care not to hold a motorist liable in negligence just because the accident might have been avoided if*

a different decision had been taken."

The Court of Appeal stated that giving precedence to vehicles on the main road "*does not necessarily entail allowing an oncoming vehicle to proceed unimpeded at a very fast speed. It is not necessarily negligent, particularly on a country road where large slow vehicles have to use the highway, for one driver to cause another driver the inconvenience of having to slow down.*"

In allowing the appeal Smith LJ found in respect of the motorcyclist that "*the severity of this accident was due to his speed at the moment of impact and that speed was due not only to his initial manner of riding but also his failure to apply his brakes.*"

Richard Lambert v Jenny Natasha Clayton (Administratrix of the Estate of PM Clayton, Deceased) [2009] CA

NHS tariff increased

The recovery of NHS Charges tariff was increased in England & Wales effective 1 April 2009. Full details can be found at the following link:

<http://dwp.gov.uk/docs/tariff-increase-20-05-09.pdf>

In Scotland the government has increased the tariff and ceiling on charges in line with England and Wales but with effect from **12 June 2009**.

Car hire - failure to mitigate

The Court of Appeal has overturned a decision on hire rates and failure to mitigate.

The appeals in this instance were against a decision in the lower courts that the Claimants had failed to take reasonable steps to mitigate their loss by refusing the insurers offer to provide replacement vehicles whilst their own were being repaired. The vehicles had been involved in separate unrelated accidents and for different reasons the insurers offer of a replacement vehicle was not taken up.

The Defendant's argument was that it was unreasonable to fail to respond to the offer

of a replacement car and as their loss could have been wholly or mainly avoided no claim for loss of use was sustainable.

The Court of Appeal held that it is not unreasonable for a claimant to reject or ignore an offer from a defendant (or his insurers) which does not make clear the cost of hire to the defendant for the purpose of enabling the claimant to make a realistic comparison with the cost which he is incurring or about to incur. If a claimant does unreasonably reject or ignore a defendant's offer the claimant is still entitled to recover at least the cost which the defendant can show he would reasonably

have incurred. The claimant does not forfeit his claim for damages altogether.

The general rule that the claimant can recover the "spot" or market rate of hire for his loss of use claim is upheld unless and to the extent that a defendant can show that a car could have been provided even more cheaply than that spot or market rate. In these cases there was no such evidence and the appeals were allowed. Judgment was entered for the sums claimed.

Julie Copley v Kenneth Lawn and Iain Maden v D Haller [2009] CA



Partner Perspective

Tim Roberts Partner in the Parabis Group considers the implications of Lord Justice Jackson's review of civil litigation costs.



It is now 10 years since the Civil Procedure Rules, the Woolf Reforms, were introduced in England and Wales and a decade later Lord Justice Jackson has been tasked with looking at the costs of civil litigation and asked to carry out a review. His preliminary report produced in May highlights a number of areas that he would like to address. He has specifically looked at contingency agreements, the level of ATE insurance premiums which he has argued may be too high, Conditional Fee Agreements and proportionality.

Whether there is a compensation culture which has been promoted by the present system is a moot point but claimants are encouraged to bring an action, which may have little merit, because they are at no risk in relation to costs. We feel that a proposal to give claimants some financial involvement in their claim is likely to receive much support.

ATE insurers are extremely concerned about the issues raised by Lord Justice Jackson. He has suggested that limiting the application and scope of ATE insurance may be the way forward and given that in personal injury matters around 98% of cases settle, this proposal has considerable merit. In this

context, we support the suggestion that the provision of universal BTE insurance should be explored further. In our view there are significant opportunities to be obtained from contingent BTE policies where the liability insurer will offer legal expenses cover to third parties bringing claims against their policyholders.

Proportionality has become a major concern to the industry over recent years with costs disproportionate to the damages awarded and it will be important that this becomes central to Lord Justice Jackson's recommendations. To this end we strongly favour an increase in the small claims level to £5000. We think this will also ensure that the new MOJ process will work much more efficiently since it will filter out a substantial volume of very straight forward claims.

The extent to which the final recommendations will lead to reform after all interested parties have had their say is difficult to predict but Lord Justice Jackson's report could lead to a far more cost effective legal system and remove some of the current inefficiencies.

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We hope you have enjoyed this issue of Legal Matters. However, if you do not wish to continue receiving the publication, please email : anna.pickles@parabis.co.uk, providing your name, company name and address.