

Autumn 2008

MB NEWS

PERSONAL INJURY & CLINICAL NEGLIGENCE NEWSLETTER

Welcome to the Autumn Edition of the Personal Injury and Clinical Negligence Newsletter. This edition includes a contribution from John Davies, our Chief Executive, on the non-legal aspects of running a law firm. This is particularly topical as we are currently preparing for the post Legal Services Act world with all of the advantages and opportunities that it will bring.

We also have a contribution from Damian Horan on the impact of EU Law on road traffic accidents and one of our personal injury solicitors, Fadwa Errhioui, details a round-up of some important cases of interest that we have recently been

working on. At last, the personal injury reforms have been announced over the summer; although not to universal praise. We have a summary of the important changes.

This quarter sees the launch of our Serious Injuries Team which

reflects the increasing amount of high value cases that we do. The team consists of Timothy Blackwell, Victoria Hydon, John Hedley, Rebecca Waller and myself, as well as our latest recruit Ciaran McCabe. In total, we have over 50 years of experience in cases of the utmost severity as

well as expertise in both industrial disease and clinical negligence cases.

Sarah Stanton
Editor & Senior Solicitor



Serious Injuries Team [L - R: Rebecca Waller, John Hedley, Tim Blackwell, Ciaran McCabe, Vicky Hydon and Sarah Stanton]

Road Traffic Accidents in Europe

Damian Horan, Head of Legal Practice, Moore Blatch Resolve

It is a fact of life that every year millions of UK nationals go abroad on holiday. Most are in pursuit of sunshine and will understandably have given little or no thought to what their position is should they have the misfortune of being involved in a road traffic accident through no fault of their own. With their holiday ruined and having suffered injury and other losses it is not surprising that when they return they might need to seek advice from a specialist personal injury solicitor as to whether they can claim damages.

It is of course not only UK citizens being injured in road accidents travelling abroad. With the ever expanding European Union and the accession of 12 new countries since 2004, the number of claims involving accidents suffered by UK citizens caused by drivers in foreign vehicles in the UK has also

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rised significantly. Since 2001 it has been reported that there has been a 50% increase in claims from motor accidents involving foreign vehicles in the UK, and vehicles from eight of the ten new accession countries made up 95% of this increase. Accidents involving a foreign vehicle in the UK are not so problematic because the UK courts will assume jurisdiction without any difficulty. Fortunately the position

now in relation to individuals who have been injured in motor accidents abroad has improved significantly as a result of the introduction of the EU fourth and fifth directives on motor insurance.

In the past you had the option of pursuing a claim against the driver at fault in his home country or the place where the accident happened. Often this left injured Claimants in an extremely difficult position in having to deal with a foreign legal system and in some cases non-English speaking lawyers. In addition, the claim was subject to the laws of the country concerned and injured persons were compensated according to the levels awarded in that country. By and large the awards given by the UK courts tend to be more generous than most other jurisdictions in the EU. In addition in jurisdictions outside the UK it is generally rare to recover legal costs. Injured personal injury victims therefore find themselves in a position where they would have to spend more on legal costs than sometimes they could hope to recover in damages.

The fourth and fifth EU directives now mean that claims can be pursued in the injured persons

home courts directly against the third party insurers provided that the insurer is based in the EU. So for example if you travel to France on holiday or on business and a French national causes an accident and you are injured, you would now have the option to pursue a claim either in France or; provided you are a resident in the UK, through the UK courts.

The benefits are obvious. You can instruct a specialist UK based personal injury solicitor. The levels of damages will be in line with those awarded by the courts and of equal importance is the fact

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that your legal costs should be recoverable.

These changes mean that UK citizens, who now go abroad on holiday with their car, can have some peace of mind when it comes to pursuing a claim following a road accident. Undoubtedly there are complexities and these cases are not straightforward. It is vital that a specialist is instructed.

The Moore Blatch Resolve personal injury team has many years experience of dealing with accidents abroad and is recognised as one of the leading personal injury practices in the UK.

If you would like free initial advice on accidents abroad or any other accident claim then please get in contact with us by contacting **Damian Horan** on **023 8071 8054** or **damian.horan@mooreblatch.com**

The non-legal aspects of managing a law firm in a post-Clementi world

John Davies, Chief Executive, Moore Blatch Resolve

Since the Legal Services Act (LSA) received Royal Assent on 30 October 2007, legal firms across the UK have had to accept that the UK legal profession, and consequently how legal firms are managed, is about to change significantly. With a few years until the full impact of the LSA is felt, we are already considering its effects and how we can bring ourselves up to speed to ensure our success in a post-Clementi world.

The LSA aims to place the interests of the consumer first, with a separate, independent body to handle consumer complaints. However, one of the most significant changes the Act will bring will be the development of alternative business structures that will potentially see solicitors, barristers and importantly, non-lawyers, become involved in the management and ownership of firms.

The potential to capitalise on the opportunities the Legal Services Act will provide are great. By bringing all different types of people and experiences together into ownership, whether qualified lawyers or non-qualified business professionals, firms will be able to increase the value and knowledge delivered to clients. The challenge for traditional solicitor firms, who in the past have been constrained in their thinking, regulation and capital, is to take advantage of the opportunity to manage a law firm from a non-legal perspective.

The LSA will additionally bring the opportunity for firms to raise finance and generate external investment in new ways, including stock market flotation. Firms that are not averse to change and who, under the leadership of a strong and skilled management

team, constantly seek new ways to reach clients and potential investors, will benefit from the opportunities the LSA will present. More competition will lead to an increase in better levels of customer care, services provided and standards of professionalism. With a well thought out business strategy and pre-existing relationships that have been developed and maintained over the years, firms will be in a position to compete. And, once the effects of the LSA come into full force, these relationships mean there will be the opportunity to acquire outside investment.

To embrace this opportunity of diversification, we have transferred Moore Blatch's personal injury and clinical negligence business to a separate Limited Liability Partnership (LLP), Moore Blatch Resolve. Under the leadership of myself as chief executive, and Damian Horan as head of legal practice, we have a combination of non-lawyers and lawyers who will take responsibility for the delivery of a coherent business model which will ensure the delivery of our ultimate objective - to provide exceptional client service and build the business of Moore Blatch Resolve to a substantive and sustainable level within the next five year period. With the creation of a separate

LLP we are transforming our existing model into an alternative business structure which will be able to compete in an increasingly specialised legal market.

Although we are not yet feeling the full effects of the LSA at present, many firms are formulating their own marketing strategies to compete in the evolving legal market. Both Damian and I see a convergence of similar client facing organisations - insurers, brokers and other intermediaries - emerging to build and manage sales and distribution channels linked to the processing of personal injury claims in a manner that does not compromise on the quality of services they provide to their clients.

By specialising and defining the market a firm is in, they will be able to distinguish themselves as being different and unique to any of their competitors. We specialise in the personal injury and clinical negligence market and have an excellent reputation supported by a team of highly experienced and knowledgeable staff. We have developed a culture that reflects this experience and reliability, further strengthening our credibility in our chosen market sector. By utilising the additional skills of business and marketing

professionals we aim to stand out and be the firm of choice.

The LSA will inevitably bring about a significant change in the relationship between non-lawyers and fee earners, however we understand that this change will happen and appreciate the importance of the key supportive roles both parties will play in the success of a law firm. By implementing and managing a totally new business model and separate LLP which integrates the skills and experience of qualified lawyers with those of business professionals, we hope that despite the major changes in the legal services industry, and significant increase in competition we are set to face, we will have the creativity, imagination and entrepreneurial approach to management to be in a position to compete and capitalise on the opportunities ahead.

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Summary of the Ministry of Justice's reforms to the claims process

At last, the Ministry of Justice has announced its proposed reforms to the personal injury process. Readers will recall that there was an initial announcement in 2007 following expressed concerns that the litigation process had become too lengthy and that solicitors' costs were too high and disproportionate to the amount of damages awarded.

In particular, the insurance industry felt that these costs were becoming an increasing burden and one which they had to pay for. In the end, the reforms announced during the summer are considerably more limited in scope than those initially envisaged. In particular, there will be no fixed fees in employers' liability or occupiers' liability cases and no changes to the After the Event (ATE) insurance market. It had been thought that ATE insurance was going to be scrapped for cases where liability was admitted in its early stages.

Instead the reforms are limited to the following:

- 1.** The small claims track limit remains at £1,000 for personal injury cases
- 2.** The fast track limit will increase from £15,000 to £25,000
- 3.** There will be a special procedure for road traffic accident claims worth up to £10,000. Essentially, a Claimant will have to initiate a claim within 5 days, although quite from when that 5 day period runs from remains an issue
- 4.** The Defendant then has to give a view on liability within a further 15 days and if liability is admitted there will be a very simplified procedure with a fixed fee regime. Should there be any issues over

contributory negligence or causation, then this new streamlined procedure will not apply

The insurance industry in particular has been quite critical at the lack of any radical new proposals - regarding this as a wasted opportunity. One of the problems that has been envisaged is that the Claimants will not have time to fully investigate claims so the insurers will either have to make a quick decision on liability or risk an as yet unclear penalty for not doing so. It is likely that in the short term there will be an increased amount of claims made.

It is also feared that the proposals will do nothing to address frontloading of costs in some cases. Moreover, as none of these reforms will apply to anything other than road traffic claims there is the possibility of a "two tier system" whereby some people could have the same type of injury with different circumstances (one a road traffic accident and one an employer's liability claim) but their cases are dealt with in very different ways.

Moreover, it does not look as if the reforms will come into effect particularly quickly as the new fixed fee regime will have to be included in the amended Court Rules. This is not likely to happen until next year:

The feeling is that the insurance industry will look to its own solutions to speed up the process by piloting their own schemes. Certainly here at Moore Blatch Resolve LLP, we are giving a great deal of thought as to how we structure ourselves in order to reposition ourselves in the new regime.

Moore Blatch Cases

Fadwa Errhioui, Solicitor

Harris v Perry (2008) EWCA Civ 907

The Perrys organised a party for their triplets' 10th birthday. They hired a bouncy castle and a bungee run which were pitched on a school playing field outside their back garden. The Perrys signed an agreement requiring them to ensure that the equipment would be supervised at all times by a responsible person and any boisterous behaviour stopped.

While playing on the castle the Claimant aged 11 was struck on the head by the heel of a much taller and older boy performing somersaults. The Claimant suffered a depressed skull fracture and subdural haematoma. When the accident occurred the mother's attention was turned towards the bungee run where she was assisting a child. The Claimant won his case at first instance.

On Appeal:

It is impossible to preclude all risks when children play together. Minor injuries are common place however it is impractical for parents to keep children under constant surveillance and supervision. It is not in the public interest to impose a duty on them to do so.

Some activities might involve unacceptable risks to children unless subject to constant surveillance and supervision but somersaulting on a bouncy castle was not such.

In this instance a serious injury was not foreseeable. The standard

“Uninterrupted supervision was too high a standard of care. The mother could not have been held to have been at fault for the way she acted.”

of care was that appropriate to protect children against injury falling short of serious. Uninterrupted supervision was too high a standard of care. The mother could not have been held to have been at fault for the way she acted. It was held that this was sadly a “*freak and tragic accident [which] occurred without fault.*”

2 Smith v Northamptonshire County Council (2008) EWCA Civ 181

The Claimant (S) was employed by the Defendant as carer/driver. As part of her duty she was required to collect (C) from her home and take her by minibus to a day centre. On the day of the accident S collected C and proceeded to push her in a wheelchair to the minibus. As S pushed the wheelchair down a ramp and stepped onto the edge of the ramp, it gave way causing her to stumble and sustain an injury. The ramp, which had been installed by the National Health Service several years before,

was made of wood and was left outside on a permanent basis. The ramp had however been inspected by the Defendant and was not found to be in a state of disrepair such as to put anybody on notice. The Claimant argued that the Defendant had breached the Provision and Use of Work Equipment Regulations 1998.

At First Instance:

The Judge concluded that the Defendant was strictly liable under the Regulations in particular reg. 5(1) in that it failed to maintain the access ramp. The Defendant Appealed.

On Appeal:

The Defendant was not strictly liable under the Regulations. The duty to maintain could not normally apply to something which was part of someone else's property. Furthermore, it could not normally apply to something in relation to which access was

“The Defendant was not strictly liable under the Regulations. The duty to maintain could not normally apply to something which was part of someone else's property.”

limited, and in relation to which, if some maintenance was necessary, consent to carry out the work was necessary. Both reg. 4 and 5 contemplated some underlying relationship from which it would be natural to contemplate some responsibility for the construction of maintenance or at the least a right to construct or maintain, before the obligation to ensure suitability for performance or maintenance would apply. The absence of any control by the Appellant over the ramp was a factor militating strongly against it being strictly liable under the Regulations for the construction and maintenance of the ramp.

3 OCS Group Limited v Davinia Wells (2008) EWHC 919 (2B)

The Appellant employer (O) appealed against the decision to reject its application for pre-action disclosure of the medical records of the Respondent worker (W) in potential personal injury proceedings.

W injured her back whilst lifting a sack of confidential waste during the course of her employment as a security guard with O. W indicated that she would follow the pre-action protocol for a personal injury claim. She sent a letter of claim to O, including a claim for reduced earning capacity. O admitted primary liability. It was agreed that W could obtain a report from the orthopaedic surgeon but there was a delay of over a year before any examination took place.

O faced a potential claim for continuing loss of earnings but had received no medical report or schedule of damages. O therefore applied for pre-action disclosure of W's medical records under CPR r.31.16 and r.31.6.

At first instance:

It had not been established that the records were relevant at that stage as it was too early to say whether the records would adversely affect O or W. However the medical records should not be disclosed because they were private records covered by the European Convention on Human Rights 1950 article 8 and 8(2) and the judge did not have jurisdiction under r31.16 to order disclosure.

“...there was no jurisdiction and in finding that it was too early to say whether the medical records would be relied upon or be adverse to either party's case.”

O appealed and submitted that the Judge had erred in saying that there was no jurisdiction and in finding that it was too early to say whether the medical records would be relied upon or be adverse to either party's case.

On Appeal:

The Judge did have jurisdiction to make an order for pre-action disclosure of the medical records under r.31.16(3) (a), r.31.16(3) (b) and r.31.16(3) (c). O and W were both likely to be parties to subsequent proceedings if bought. It was incorrect to say that the medical records were not relevant at that stage as it was necessary to look ahead and see what would happen if proceedings had started and any claim for reduced earning capacity inevitably meant that the medical records would be disclosable.

However disclosure of the medical records before proceedings had started was not desirable either to dispose fairly of the anticipated proceedings or to assist the dispute to be resolved without proceedings, pursuant to r.31.16(3) (d). W would not know the full details contained within her medical records, which might contain either embarrassing or disturbing information that could cause her to limit or even withdraw her claim.

A claimant therefore should be prepared to reveal their medical records to the opposition, but only at the appropriate time and to the appropriate people.

the back wall to a buttress on the opposite wall. He landed on his head on the matting below and was rendered tetraplegic. He brought a claim for damages for failing to provide sufficient supervision and breach of Section 2 of the Occupiers Liability Act 1957. Rules forbidding jumping were displayed outside the climbing room but the Claimant was not referred to them.

At first instance:

The Judge concluded there was nothing wrong with the state of the premises and that the club was under no duty to assess the climber's competence or ensure that he had the necessary training before allowing him on the wall. However the Judge did find that the Defendant had breached this duty of care to the Claimant by not warning him that the safety matting did not make the climbing wall safe. The Judge therefore found the Claimant 75% contributory negligent for the accident.

“It was extremely rare for an occupier of land to be under a duty to prevent people from taking risks which were inherent in activity that they freely chose to undertake.”

The Defendant appealed and the Claimant cross appealed.

On Appeal:

It was extremely rare for an occupier of land to be under a duty to prevent people from taking risks which were inherent in activity that they freely chose to undertake. Adults who chose to engage in physical activities which obviously give rise to a degree of unavoidable risk may find that they have no means of recompense if the risks materialise so that they are injured.

No amount of matting will avoid absolutely the risk of severe injury from an awkward fall and the possibility of an awkward fall is an obvious risk of climbing.

The law therefore did not require the Appellant to prevent him from undertaking the climb nor to train or supervise him while he did it, or to see that others did so. Therefore, the appeal was allowed and the cross appeal dismissed.

4 Trustees of the Portsmouth Youth Activities Committee (a charity) v Poppleton (2008) EWCA Civ 646

The Claimant fell from a height whilst climbing an indoor rock wall and after attempting to leap from