

MB NEWS

PERSONAL INJURY & CLINICAL NEGLIGENCE NEWSLETTER

Newsletter Introduction

Welcome to the first edition of the Moore Blatch Personal Injury and Clinical Negligence Newsletter. We hope that you find it informative and interesting. Each quarter we aim to include an article on a topic of current interest, a case law round up and a regular feature on costs.

Moore Blatch is one of the largest Personal Injury and Clinical Negligence practices in the South East, with offices in Southampton and Richmond. Our team includes 4 partners, 14 solicitors and 10 other fee earners. We are accredited by the Law Society for our expertise in both Personal Injury and Clinical Negligence and are on the panels for both Headway and the Spinal Injuries Association. We also have links with a number of other charities. We are listed in the Legal 500 and Chambers, the leading Law Firm directories, as being one of the most prominent firms in the south east for personal injury and our team was recognised for "extensive experience in maximum severity cases, including spinal cord and severe head injuries, fatalities and high profile claims relating to infant and patient cases." Head of Personal Injury Damian Horan and our Managing Partner David

Thompson were "Highly Recommended" for their work. We received a similar endorsement for our clinical negligence work with Partner and Head of Department Timothy Spring receiving a warm endorsement.

These are interesting times in the personal injury market. Although the Compensation Act 2006 has yet to make any measurable impact, the handling and regulation of personal injury claims has rarely been out of the legal press this year. There are constantly calls from the insurance market that there should be better control over legal costs, and this is discussed below in our article on small claims. In addition, there remains concern over the continued availability of Legal Services Commission funding for clinical negligence as well as the prospect of the so called "Tesco Law" where outside investors will be able to invest in firms and

perhaps use their brands to increase the market share.

What does remain constant is the fact that clients demand and are entitled to expect a quality service from their legal advisors. We believe that this is the key to success and is at the heart of what we do. We are fortunate to have an experienced, knowledgeable and enthusiastic team who are able to provide a personal and efficient service and will form the core of our business in the future.

Sarah Stanton
Editor & Senior Solicitor

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The **future** By Sarah Stanton of small **claims**

Low value claims and the costs of bringing them have been a topic for discussion in both the legal and insurance press for some years now. The debate goes back as far as Lord Woolf's report "Access to Justice" in the 1990s which led to the Civil Procedure Rules in 1999 and the advent of the Fast and MultiTracks for personal injury claims. However, there is concern amongst commentators that the reforms have not had the impact on reducing legal costs that had been hoped and that now is the time for a review of the current system as far as low value claims are concerned.

The Association of British Insurers: Care and Compensation: paper published in December 2005 reignited the debate regarding small personal injury claims. It identified several flaws in the current system; it is too slow, it is adversarial and undervalues the importance of getting people back to good health and to work as quickly as possible. According to its own figures, for claims under £5000, insurers pay out 93p in legal and other costs for every £1 compensation. It highlighted the success of the small claims track (where legal costs are not payable) and recommended that the track limit be increased to £5000. Not surprisingly, claimant orientated commentators, such as The Association of Personal Injury Lawyers oppose such a proposal, claiming that most people would be put off by having to deal with an insurer directly and would not be able to properly assess any offer made.

In any event the Lord Chancellor has indicated that he will be approaching the matter from the middle ground, with the small claims limit remaining as it is and but the fast track limit increasing from £15,000 to £25,000. There is also a likelihood of an expansion of the predictable costs regime to all types of fast track cases.

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For low value clinical negligence cases, the problem is seen as being even more acute. These claims are perceived as having all of the same costs concerns of low value personal injury claims with the additional prospect of 100% success fees where cases are handled under a conditional fee agreement. The result has been the passing of the NHS Redress Act which sets out a legislative framework whereby claim under a certain value, (expected to be £20000) will be handled outside the adversarial system with only a limited opportunity for legal advice. A statutory body, widely anticipated to be the National Health Service Litigation Authority (NHSLA), will have power to investigate liability, make an offer of compensation and an apology, as well as organising future treatment.

The detail of the scheme is still vague and will be captured in the regulation which will shortly follow. These regulations are currently subject to consultation. Concerns amongst claimant lawyers are likely to focus on the impartiality of the NHSLA in administering the scheme and crucially, the extent and nature of the legal advice that the scheme will allow.

Clearly, in the light of the proposed changes, over the next year or two firms will have to consider how best to accommodate the new limits and will need to pay particular attention to ensuring that cases are dealt with as efficiently as possible in order to continue to be profitable.

Case Law, Quantum & Practice update

The following is a round up of recent important decided cases.

By **Rebecca Waller**
Solicitor

Gray v Thames Trains and Network Rail Infrastructure Ltd (2007) EWCH 1558 (QB) Flaux J

The Claimant was a survivor of the 1999 Paddington train crash and brought a claim for personal injury against the Defendant train operators. He suffered only minor lacerations in the crash, but he claimed that he had suffered PTSD which had turned him into a killer. Following the crash he had become anxious, socially withdrawn, was drinking heavily and suffered from angry outbursts. In 2001 he killed a stranger who walked in front of his car and banged on his windscreen.

In 2003, he pleaded guilty to manslaughter on the grounds of diminished responsibility. It was submitted on behalf of the Claimant that prior to the rail crash, he had been a law abiding man who avoided any confrontation. It was alleged that he had been turned into a criminal by his post accident psychological disorder. The Defendant admitted that it was liable in negligence, but sought to rely upon a well established principle of law that, if one is engaged in illegal activity, and suffers some injury, then one cannot sue another for damages that arose out of that illegal activity. On this basis, the defendant submitted that they

should not be liable for any damages after the date of the killing.

HELD: Damages were limited to losses incurred prior to the killing in 2001. The test applied was whether the claimant's claim was so closely connected to his criminal conduct that if the Court permitted him to recover damages, they would appear to condone his conduct. Since his claim for losses after the killing included lost earnings, invariably the Court could not allow his claim without appearing to lend aid to the Claimant based on his criminal conduct.

Piccolo v Larstock Ltd (t/a Chiltern Flowers) and Chiltern Railway Company Ltd

The Claimant suffered injury having slipped and fallen on a petal and water outside the First Defendant's flower shop at Marylebone Station; the concourse itself being owned and operated by the Second Defendant. The Claimant contended that the First Defendant had been in breach of its duty of care to take reasonable and effective steps to avoid the risk to pedestrians of accidents. In particular it was submitted that

the First Defendant had failed to operate a safe cleaning system and that the Second Defendant ought to have taken such steps as were necessary to ensure that the First defendant kept the shop and concourse in a clean and safe manner:

The First Defendant contended that it had operated a reasonable system of "clean as you go" and that, as a small florist, it was not possible or reasonable for it to have kept the floor dry and petal-free at all times. The First Defendant further submitted that the Second Defendant owed a greater duty as it was a large organisation with primary responsibility to station users. The first defendant also argued that, were negligence to be found, the Claimant had been negligent in failing to have reasonable regard for his own safety in avoiding the petal.

HELD: Judgment for the Claimant. (1) The presence of petals on the concourse in the area in front of the First Defendant's flower display had created a foreseeable risk of slipping. There was evidence that the second defendant had highlighted concerns regarding safety risks posed by petals/water to the First Defendant on several occasions before this accident.

The First Defendant's duty of care was measured in the context of large numbers of people passing all day across the front of the shop, engaged with other pre-occupations. To that extent the First Defendant's duty in respect of the concourse was unlike in an ordinary florist's shop. In the circumstances, the First Defendant's "clean as you go" system had not been a reasonably effective and safe system for dealing with the danger of fallen petals. On the balance of probabilities, the accident had been caused by the First Defendants failure to implement a safe and proper system of work. (2) The Second Defendant had not been in any breach of duty and had discharged its common duty of care as occupier of the area where the accident had occurred by the imposition of contractual obligations upon the First Defendant the previous warnings. (3) The claimant had been walking with reasonable care at the time of his accident and had not been negligent in failing to notice the petal.

Nunns v RJ Cannon (Crane and Plant Hire) Ltd (2007)

The Claimant, a 59-year-old man, received total damages of £6,000,000 for the injuries sustained in a road traffic accident

in September 2002. He suffered paraplegia with no voluntary movement below his abdomen and hypoxic brain damage following surgery that he had to have following his injuries. His speech and ability to swallow were also severely impaired and he relied on a computer for speech. He was dependent on a power chair for mobility and required a 24-hour care package

Lomas v Braxby (2006) September

The Claimant, a 35-year-old man, received £12,206 for the eye injuries sustained in a road traffic accident in March 2006. He suffered epithelial erosion of his right cornea. His vision was affected and he was required to wear spectacles. He was unable to work for seven weeks but was expected to make a full recovery after 40 months. Liability admitted, but with an agreed 70/30 apportionment to account for his 30 per cent contributory negligence.

Mansfield v Trent Motor Traction Co Ltd and others (February 2007)

The Claimant, a 67-year-old man, received £156,662 for

retroperitoneal fibrosis sustained following exposure to asbestos at work between 1955 and 1977. He suffered injuries to his abdomen, right kidney and right lung. He also suffered a reduced life expectancy and there was a chance that he would require dialysis. He brought an action against the Defendant alleging that they were negligent in their health and safety duties towards their employees contrary to the Factories Acts 1937 and 1961 and the Asbestos Regulations 1969. The Claimant alleged that the absence of respiratory and other protective equipment and clothing was a failure to provide a safe place and system of work and there was a failure to provide warnings and instruction about the dangers of exposure to asbestos.

Moore Blatch Cases

By Simon Pimlott - Solicitor

We have dealt with and are currently dealing with the following cases of interest which give a flavour of the diverse nature of our work.

We acted for a child who, at 5 days old, was paralysed from the waist down in a car accident. Liability was disputed for some time. We were successful in negotiating a settlement before trial in the region of £1.8m. We continue to work with the family to ensure that the child receives the best possible rehabilitation, care and treatment. We have provided the family with full support from a number of different areas of the practice including our property and private client teams.

We recovered £211,000 for the wife of a man who died from Mesothelioma caused by exposure to asbestos during his employment with a number of ship builders/repairers. This was a particularly complex case involving several defendants one of which was in liquidation.

We acted for a young lady who suffered severe orthopaedic injuries, a closed head injury and facial scarring in a head-on car accident. A few weeks after the accident she suffered a stroke. This was caused by cerebral artery thrombosis resulting from internal carotid dissection. It was initially disputed that the stroke was accident related but medical evidence established a causal link.

The claim was settled before trial for £215,000.

We are acting for a five year-old girl whose brain was injured by low blood sugar levels as a newborn. The parents' account of what happened was entirely different to that of the hospital staff. It needed evidence from a team of highly-specialist medical experts to build the case. We have secured an admission of liability and are now dealing with the proper level of compensation.

We are acting for a man who sustained a significant brain injury as a result of a compound skull fracture requiring excision of significant component of the left frontal lobe. Since then he has also suffered from epileptic fits. He has significant learning and behavioural problems as a result of the injuries sustained. A full admission of liability has been secured from the third party insurers on his behalf. Quantum of damages remains in issue

We acted for a thirty six year-old man who suffered a nerve injury during a simple knee operation. As a result of the nerve injury he developed a "drop foot" and was unable to return to his much-loved work as a gardener. Solicitors acting for the hospital argued that the injury was an example of bad luck rather than negligent surgery but we were able to negotiate a settlement which gave our client sufficient funds to start up a business based on his talent for making exceptionally good bread. The business is going well.

We acted for a 19 month old boy through his litigation friend for a claim arising from food poisoning whilst holidaying in the Dominican Republic. The boy was diagnosed with salmonella poisoning and suffered severe gastric symptoms for 5 weeks. Liability admitted by the Holiday Company and compensation of £3,000 was agreed.

We are acting for a 77 year old lady who is heavily disabled and has been wheelchair bound for more than 20 years. She was injured last whilst in her electric wheelchair. She was thrown from her chair as a result of a plank on a wooden pathway rearing up and stopping the wheelchair dead. Our client has sustained multiple leg fractures. She is now in a care home. The responsible Developer has admitted liability and an interim payment for care home fees has been paid. Damages are likely to be substantial.

We are acting for a lady who was injured whilst operating a rollercoaster on Brighton Pier. The rollercoaster stopped on the ascent as one of the safety barriers was not properly secured. Our client climbed up the ascent to manually lock the barrier on the car when another member of staff unwittingly restarted the rollercoaster. It ran over our client's leg causing serious injuries including a fractured ankle. The owners of Brighton Pier have agreed to deal with the claim on a 75/25 basis – a good liability settlement!

We have successfully defended a prosecution of our client for driving without due care and attention on a defence of "automatism". Our client's vehicle suddenly changed lanes at a roundabout and collided with a motorcyclist causing significant injuries. However our client has no recollection of the accident and with the benefit of medical evidence we have shown that he was suffering from a condition that caused acute vertigo resulting in a complete loss of control and recollection. We are now defending the civil claim on the same basis.

We recently settled a claim for an ex-professional footballer who retired prematurely due to a back condition and was re-training as a brick-layer. Whilst at work a wooden walkway on site collapsed as he walked across it causing him to fall and injure himself. He exacerbated his pre-existing back condition and medical opinion stated that he would be unable to perform heavy manual labour in the future. A sum of just over £77,000 was agreed.

**Nigel Ferriman -
TMS Legal Costs Consultants**

Costs update: Hollins v Russell - friend or foe

We are dealing with a case at the moment where the paying party is disputing the validity of the Conditional Fee Agreement (CFA) on the grounds that the risk assessment was not carried out in accordance with the solicitors risk assessment procedure.

The receiving party disclosed the CFA and, because they were asked to, they also disclosed the risk assessment. Schedule 1 of the CFA refers to the fact that the percentage Success Fee reflects the risks in the case and refers to "the attached risk assessment form". The risk assessment form incorporates the procedure to be adopted by the firm of solicitors in assessing the Success Fee. It is alleged that the procedure was not correctly followed.

In essence the paying party is saying is that as the CFA referred to the risk assessment which incorporates details of the solicitors' internal risk assessment procedure, the risk assessment procedure forms part of the CFA and therefore by not following it, there has been a breach of the CFA regulations and the CFA is unenforceable.

This is one of a number of examples where the problem for receiving parties is that paying parties will continue to find new arguments, spurious or otherwise, which only serve to postpone settlement of costs and generate more satellite litigation.

Paying parties are keen on quoting Hollins v Russell as authority for the fact that "So far as matters of procedure are concerned, we consider that it should become normal practice for the CFA to be disclosed for the purpose of costs proceedings in which a success fee is claimed".

Paying parties do not quote those sections of the Hollins judgment that are less helpful to them.

Procedurally, Hollins clarified that apart from the CFA no other documents should be disclosed "but the judge conducting the assessment

may require the disclosure of material if a genuine issue is raised". Practice Direction 40.14 deals with this procedure at assessment.

The judgment in Hollins then turned to matters of law, stating that costs judges should ask themselves the following question: "Has the particular departure from a regulation or requirement in S58, either on its own or in conjunction with any other such departure in the case, had a materially adverse effect either upon the protection afforded to the client or upon the proper administration of justice".

While paying parties continue to go on fishing exercises in the hope of evading a costs liability on the grounds of a technicality, it will remain fair game for receiving parties to rely on technicalities in response. There is no reason why a receiving party should not insist on the paying party defining their "genuine issue" and disclosing any documents required to establish that genuine issue before being dragged into disclosure beyond that defined by Hollins.

To achieve this, a paying party must not only demonstrate a procedural irregularity but that it "had a materially adverse effect upon the protection afforded to the client or upon the proper administration of justice".

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