

MB NEWS

PERSONAL INJURY & CLINICAL NEGLIGENCE NEWSLETTER

Welcome to the Summer Edition of our Newsletter. This quarter we have articles on Stress in the Workplace, Minor Head Injuries and Special Needs Trusts, as well as some examples of our recent work.

Here at Moore Blatch, there has been a recent change to our business structure in that we have now converted from a traditional Legal Partnership to a Limited Liability Partnership (or "LLP") status. This is the business structure of choice

now for forward thinking firms. In addition, our personal injury and clinical negligence department have now become a totally separate legal entity from the rest of the firm, known as "Moore Blatch Resolve LLP". This will enable us to streamline

and improve our existing systems for the benefit of our clients.

There is still no word on the detail of the personal injury reforms first suggested almost a year ago now, but we hope to give you further news about that in future editions.

As always, please let us know if there is anything that you would like us to consider for future newsletters or if you require any further information about any aspect of our work.

Sarah Stanton
Editor & Senior Solicitor

Six of the best join the team



We are firmly on the expansion trail having recently appointed six new personal injury and clinical negligence specialists.

Anne Carvalho, Denise Stephens, Rebecca Waller, Lee Harris, Fadwa Errhioui and Carla Mandis have joined the insurance division

to meet the growing demand from our diverse and expanding range of clients for quality advice in this field.

This latest recruitment drive brings the total number of staff to more than two hundred and twenty at five offices based in Southampton, Lymington, Milford-on-Sea and Richmond.

Anne Carvalho joins the firm's Southampton office from Chichester-based George Ide Phillips. Prior to specialising in clinical negligence claims, Anne pursued a career in midwifery at a senior level, providing maternity units with risk management advice.

In her new role, Anne will assist with the firm's obstetric claims and its longstanding pro-bono commitment to educating health care providers in the areas of clinical risk management.

Damian Horan, partner and head of the Moore Blatch insurance division, said: "We are renowned for our specialism in personal injury and medico-legal issues and have extensive expertise in managing both high value personal injury and clinical negligence claims".

Also joining the firm's Southampton team from Hart Brown is senior solicitor Denise Stephens. She has 15 years' experience

specialising in multi-million-pound medical negligence cases and high value personal injury claims.

Solicitors Rebecca Waller, Fadwa Errhioui and Carla Mandis, along with legal assistant, Lee Harris, have also joined the team and between them will be dealing with road traffic accident claims, employer's liability and stress at work claims.

Moore Blatch has been recognised by Legal 500 and Chambers as one of the top leading full-service law firms in the south east.

Minor head injuries

– Cyrus Katrak, 3 Paper Buildings

Major head injuries are relatively easy to spot. Minor head injuries can be much more difficult to spot, sometimes even for professionals such as solicitors and neurologists.

Matters are complicated given that the symptoms of such an injury can manifest themselves weeks or even months after the initial trauma.

The facts and myths of head injuries need to be appreciated:

1. The Claimant's head need not be physically struck in order for there to be a head injury. A baby may suffer a brain injury by being shaken. A seat-belted motorist may suffer a "contra-coup" injury (where the head moves violently backwards and forwards) in a rear end shunt as may a motorcyclist especially if wearing a heavy helmet.
2. The Claimant need not lose consciousness in order to suffer a minor traumatic brain injury.
3. The absence of retrograde amnesia does not exclude a minor head injury.
4. A normal Glasgow Coma Scale (GCS) does not exclude a minor head injury (This scale is somewhat crude and is often administered by junior, overworked staff).

5. The consequences of a minor traumatic brain injury may be masked by depression and/or post-traumatic stress disorder.
6. The consequences of minor traumatic brain injury are almost always permanent – brain cells cannot recover. The brain, may however "re-wire" allowing the Claimant to cope better.
7. A "mild" or "minor" head injury does not mean "insignificant". This is especially so when dealing with people who rely on a high level of mental functioning for their job or those who are creative in their employment.
8. A younger brain is more vulnerable to injury.
9. Negative MRIs and CT scans do not rule out minor traumatic brain injuries.

When seeing a Claimant the following evidence should be considered:

- (a) Any blow/bruise/haematoma to head.
- (b) Damage to a crash helmet.
- (c) Ambulance records.
- (d) Police records.
- (e) GP records.
- (f) Hospital records.

A problem often faced by lawyers is that medical experts

may attribute symptoms of minor traumatic brain injury to short term psychological injury. It is crucial, therefore, that any recommended treatment has been concluded before making a final determination on whether there exists a minor head injury.

Some of the common consequences of a head injury are listed below:

- a) Constant mental fatigue – the clients attention may wander after 15 mins.
- b) His/her temper is much worse post-accident.
- c) The Claimant may require significantly more sleep.
- d) Headaches.
- e) Impaired short term memory.
- f) Difficulty in multi-tasking. This can be very marked in "high achievers".
- g) Word retrieval difficulty.
- h) Slurring of words.
- i) Disinhibition of speech.
- j) Difficulty in dealing with money – liable to spend impulsively.
- k) Obsessive compulsional disorder (OCD).
- l) Problems with taste/smell/balance.
- m) Alcohol intolerance.

When dealing with minor head injuries it may be best to first obtain evidence from a Neuropsychologist (to determine the existence/extent of any minor head injury) and then neurologist

(to deal with prognosis/any treatment options).

A crucial question for any medical expert is when is a clear conscious memory restored. This highlights the importance not only of an early witness statement, but also the extreme care that must be taken by the lawyer in compiling that statement. It is extremely easy to "lead" a person who has suffered a head injury, and they will often adopt "facts" they have heard from other people.

Finally, if a head injury is suspected, the possibility of epilepsy must also be considered, if necessary by way of a provisional damages claim.

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Stressed at Work?

Carla Mandis, Solicitor

The Health and Safety Executive (HSE) has estimated that stress-related work accidents and ill health costs the UK a staggering £7 billion a year.

The HSE defines stress at work arising “when the demands of the job and the working environment on a person exceeds their capacity to meet them”.

Common law duty and statutory obligations

Employers have a general duty to provide a safe place of work, prevent risks to health and safety, ensure that safe working practices are set up and followed and that they provide safe and competent employees.

Employers must also carry out risk assessments, which should include a review of the activities that could cause unreasonable stress levels. There is also a specific duty to take reasonably practicable steps to shield employees from exposure to stress and from the consequences of having to work in unreasonably stressful working conditions. If an employer becomes aware that an employee is suffering from stress, then they are under a duty to take steps to remedy those symptoms. Note the judgements in *Barber v Somerset County Council* [2004] UKHL 13 that greater emphasis should be placed on the duty of employers to be on the look out for stress in their employees and take protective measures to alleviate stress (and note *Daw v Intel Corporation (UK) Ltd* 2007 EWCA Civ 70).

A broader duty has also developed, which is expressed as an implied contractual term (implied into every contract of employment) that the employer should take care of the health as well as the safety of its workforce. Liability was first established in the case of *Johnstone v Bloomsbury Health Authority* [1991] ICR 269 CA. This case concerned a junior doctor who claimed to suffer a stress related illness as a result of working intolerably long hours (although his contract actually allowed such hours).

Employees have obligations too

Employees are under a duty to inform their employers or the employee responsible for health and safety, of any work situations which represent a serious and imminent danger to health and safety, or any shortcomings in his/her training (*The Management of Health and Safety at Work Regulations* 1992).

Employees are also under a general duty to take reasonable care for the health and safety of themselves and other persons in the workplace.

What claims may an employee bring?

Claims are divided into two areas: (a) stress as a personal injury/negligence claim; and (b) stress as an employment claim which arises out of a constructive dismissal and/or discrimination.

There is a significant overlap between the two disciplines and therefore an employee needs to be advised on both areas of law.

For employment claims, the most likely claim an employee will bring will be constructive dismissal. This arises when an employer has committed a “fundamental” breach of the employee’s contract of employment which justifies the employee’s resignation and his/her claim to have been constructively dismissed.

This type of claim will arise where the nature of the employee’s work is such that he or she cannot cope and the employer, although aware of this does nothing to alleviate the problem, or the employee may be subjected to bullying in the workplace and nothing is done to prevent this.

The employee may also have a right to bring a discrimination claim.

Limitation

Limitation is three years for a personal injury claim however it can be very difficult for a practitioner to pinpoint the exact “date of knowledge”. If the employee wants to recover compensation for any earlier incidents he/she must seek advice as soon as possible otherwise they may find themselves statute barred from doing so.

The time limit for issuing proceedings in employment claims is usually three months from the date of dismissal (actual or perceived) or from the date of discrimination. Problems for the practitioner can arise where the employee has experienced a series of discriminatory acts which have occurred over a period time. Time will usually run from the date of the last act or event but the practitioner will need to be sure that there is a connected series of events and there is no break in the chain.

The burden of proof

In personal injury, an employee must also prove, on a balance of probabilities that there has either been negligence on the part of an employer (i.e. a breach of the employer's common law duty) or a breach of the statutory duty.

For discrimination claims, if an employee has established facts that there is a potential case of discrimination, the burden shifts to the employer to prove and produce evidence that there has been no discrimination as a result of the employee's sex, race, disability, age, sexual orientation or religion or belief in order to defeat their claim.

Foreseeability

The Courts have always found it difficult to make a ruling on whether it is foreseeable that an employer's conduct will give rise to an injury. The difficulty arises because an employer is entitled to assume that an employee can withstand the normal pressures of the job unless he or she shows some particular vulnerability or problem.

At common law, if the injury is not foreseeable than an employer is not liable for the losses arising. For example, in *Barlow v Broxbourne Borough Council* [2003] EWHC 50 QB, Mr Barlow claimed to have been bullied and victimised by his employer. His claim failed because he had not complained directly to his employer, his medical notes did not refer to any episodes of stress or problems at work and therefore in the absence of such signs, the injury was not foreseeable.

For discrimination claims, once the discrimination has been established, the injury caused by the discrimination can be compensated. There are no requirements that the damage is foreseeable unlike PI claims.

Causation

The breach of duty must cause the damage and therefore for PI claims the employee must prove that he or she has suffered a recognised psychiatric injury as a result of workplace stress.

In *Hatton v Sunderland* [2002] EWCA Civ 76 the Court of Appeal considered the issue of causation in some detail and concluded that if it can be established that the harm suffered to the employee has a number of causes, the employer should be liable for the proportion of the harm he or she has caused the employee to suffer, unless the harm is truly indivisible.

The Tribunals are expected to approach the issue of causation in the same way as the Courts however; note the case of *HM Prison Service v Salmon* EAT [2001] IRLR 425 where the Tribunal awarded a 25% discount to an injury to feelings award because the claimant was vulnerable to psychiatric injury due to childhood sexual abuse and pre-existing mild depression which was unrelated to the sex discrimination she had suffered.

Damages

In the landmark case of *Walker v Northumberland County Council* [1995] ICR 702, QBD, the High Court recognised that there was no reason why the general duty of care owed by an employer to an employee should not extend to the risk of psychiatric damage caused by the nature of the work that an employee might be required to perform.

Mr Walker, a social services officer with Northumberland County Council, suffered a nervous breakdown as a result of excessive workload. He had repeatedly expressed concern but his employer did little to assist him. He was able to succeed in his claim for damages for breach of that duty as a consequence of suffering two nervous breakdowns caused by his working conditions. Damages were agreed at £175,000.

There is no cap on the damages that can be awarded by the Court.

In constructive dismissal claims, there is no need to prove a recognised psychiatric injury – just injury to feelings and therefore if there is any doubt that the employee has suffered a psychiatric injury; it may be preferable to bring an employment tribunal claim, however, damages are currently capped at £72,900.

There is no statutory limit on the amount of award a Tribunal can make for discrimination claims (although consider the guidance given in *Chief Constable of West Yorkshire v Vento (No.2)* [2003] IRLR 102 which the Tribunal will take into account when making its award).

In *Eastwood and anor v Magnox Electric Plc* HL [2004 UKHL 35] it was held by the House of Lords that in exceptional cases, a dismissed employee may also be entitled to bring a claim for damages in the Courts as well as an unfair dismissal claim in the Employment Tribunal, however; the claim for damages in the Courts must arise out of facts which are independent of the dismissal.

Conclusion: PI v employment claims

Any employee who is stressed as a result of workplace issues must talk to their line manager or some other member of the management team about their difficulties. Once an employer is aware of the situation, they should take appropriate steps i.e. retraining, to minimise the risk to that employee.

It is also evident that those advising on stress at work claims need to have knowledge of both areas of law and should not advise unless they have the experience to do so. If the PI practitioner is not competent to deal with both aspects of the claim, he or she should liaise very closely with the employment lawyer in the firm.

Moore Blatch Cases

Simon Pimlott, Solicitor

We have recently settled a case for £850,000 which involved a 26 year old housewife who suffered severe life threatening injuries following a road traffic accident in November 2003. The Claimant suffered an open fracture to the right femur and tibia, which was treated initially by external fixators, but despite various operations the Claimant underwent an above knee amputation 2 years post-accident. She also suffered a depressed fracture to the skull, fracture to the left femur and left tibia, injuries to the left humerus, radius and ulna bones, with plating to the left wrist resulting in a permanently restricted range of movement. In addition to significant compensation for the injuries, the claim for financial losses and expenses included the cost of lifelong care and assistance, housing and adaptations, prosthetic limbs, additional household expenses and mobility and transport needs.

The Judge found on a 100% basis in favour of our client and awarded her full damages to reflect the considerable pain, restriction and financial loss that she had incurred

We recently secured damages of £50,000 for a client following a 2 day trial to determine both liability and quantum. Our client had sustained a compression fracture of the lateral tibial plateau of the right knee, requiring surgery and plating, following a slipping accident in a public house. Our client was leaving a public house when she slipped and fell as a result of excessive spillage on the bar floor. The Defendant disputed liability on various alternative grounds, including alleging that the incident happened outside the bar; that there was no spillage present and that the Claimant lost balance due to her knee giving way. At trial, the Judge found on a 100% basis in favour of our client and awarded her full damages to reflect the considerable pain, restriction and financial loss that she had incurred.

We act for a young lady who was involved in a serious horse riding incident in February 2001. She was 14 at the time when she fell from her horse after it was startled by a passing dog. In falling from the horse she fell into a wooden post positioned in the bridleway, which had previously formed part of a fence. The local Council, who were responsible for the bridleway, initially accepted that the presence of the post in the bridleway was dangerous and accepted this was a breach of their statutory duty to our client. However, after Court proceedings were commenced, the Council sought to withdraw this admission in relation to the post and in addition claimed that our client had not struck the post at all and that she was partially responsible for failing to control the horse. They also brought proceedings against our client's

parents (as the legal owners of the horse) alleging that they were strictly liable under the Animals Act 1971. At a preliminary hearing to determine whether the Council would be entitled to retract their admission in relation to the post, the Court refused permission and ordered that the matter should now proceed to a full liability trial in July 2008. We subsequently agreed a liability settlement on a 90/10 basis in favour of our client, with the proceedings brought against her parents withdrawn. Our client has suffered a serious injury to her right arm, which has caused permanent weakness and restriction of movement. This impacted significantly on her schooling and exam results, resulting in her being unable to complete a college course. The claim for damages is continuing but our client should now receive a significant award to reflect the seriousness of the injuries and the financial losses she will continue to suffer as a consequence.

We were recently successful at trial to assess the quantum of damages in a personal injury claim, our client having sustained injury in an accident at work in April 2002. At the time of the accident he was working as an

HGV driver and delivering pallets to the Defendant's premises. Whilst he was kneeling on the ground with his left foot behind him, toes to ground and heel in the air, a fork lift truck driven by the Defendant's employee struck his left foot squashing it and pushing it over. Liability was admitted in July 2003. Our client suffered an injury to the left ankle, causing pain and feelings of instability ever since. He also experienced swelling, restriction of movement and altered sensation in the big toe and second to fourth toes. He has undergone a number of surgical procedures and investigations, and received a very large amount of physiotherapy. Our client's case was that his continuing symptoms in his ankle restrict everyday activity and also his ability to travel overseas in connection with his current work. In addition to the claim for personal injury, our client sought compensation for his loss of earnings following the incident, disadvantage on the open labour market, medication, treatment and the gratuitous care received from family and friends necessitated by the injuries. A number of offers were rejected prior to the trial but at Court, our client was awarded £78,000, which was significantly more than the previous proposals.

For further information please contact the following:-

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What should I do with my **Personal Injury (PI)** lump sum award?

Here at Moore Blatch not only do we have a specialist PI department but we also have our Wealth Management department who work closely with the PI team to ensure that that you not only receive the best award possible but also receive continued service to ensure that any financial award which is received will work best for you. By providing this bespoke service you not only get the best PI advice but also benefit from the wealth management services Moore Blatch offers.

Once you have received a financial award this can be held in a trust. A trust is an arrangement whereby the award is held by the people whom you have chosen to hold the money on your behalf and for your benefit. There are a number of possible trusts which our team can advise you on and tailor according to your individual wishes.

Why should I put my PI award into trust?

If you are in receipt of means-tested benefits and you receive a compensation payment, that amount will have an impact on your benefits and may result in a reduction in the benefits you receive. A means-tested benefit is a benefit which is awarded to you if the capital assets that you own are below a certain level.

For income support purposes, if you have capital above £16,000 you may not be entitled to receive the benefit. If the capital you own is above £6,000 but below £16,000 you may lose benefits on a sliding scale and if the capital you own is below £6,000 then you are likely to be entitled to receive the full entitlement to the benefit. These rules are also reflected in other means-tested benefits such as housing benefits and council tax benefits.

By providing this bespoke service you not only get the best PI advice but also benefit from the wealth management services Moore Blatch offers.

However, by seeking advice it is possible to effectively ring fence the lump sum you have received so that this amount is disregarded for the purposes of assessment for means tested benefits. This will then ensure that you are not penalised financially because you have received a PI award.

In addition to the financial benefits it may also be that you would prefer

someone else to control your finances on your behalf, in which case a trust can be set up appointing people to act on your behalf. This may be simply due to the fact that you may not want to deal with the financial side of things.

Alternatively, if you or the person receiving the award is a minor i.e. under the age of 18, then it would be necessary for the money to be held by someone else in order to safeguard those funds. If the person

receiving the PI award has suffered such an injury that they do not have mental capacity and are therefore no longer able to understand what is going on then obviously someone should be dealing with their finances on their behalf. It may not even be that they have lost mental capacity but simply if that person feels vulnerable then a trust can assist in offering protection.

A common concern with those considering setting up a trust is that they will not be able to access the money held in the trust. However, due to the variety of trust structures available we can ensure that the trust provides you with the flexibility that you require.

Advice on a PI trust not only needs to be considered if you are currently in receipt of means-tested benefits, but in addition, if you are likely to become entitled to such benefits in the future. It should also be remembered that long-term care provision is a means-tested benefit.

In some cases it may be that a PI trust is not necessary because of the size of the award and also because of the recently introduced rules which mean that the capital received from a PI award can be disregarded for a short period of time after the date of the first award. However, despite the rules appearing fairly simple, they are in fact rather complicated and advice should be sought on the application of these rules.

If you would like to discuss PI trusts please contact Naomi Gagg on 01590 625821 who is a solicitor in the Wealth Management department at Moore Blatch.