



9 GOUGH SQUARE

Internal Personal Injury Group Legal Update - December 2008

This update was prepared by Jennifer Scott and includes a selection of cases first reported in December 2008 and recent cases involving members of Chambers that may be of particular interest.

Liability

CRANER v DORSET COUNTY COUNCIL

[2008] EWCA Civ 1323

CA (Civ Div) (Sedley LJ, Arden LJ, Longmore LJ)
5 December 2008

Workplace (Health, Safety and Welfare) Regulations 1992, Reg.12; Provision and Use of Work Equipment Regulations 1998 reg.4

Chris Goddard of Chambers represented C, who worked as a handy-man/caretaker at one of D's schools. He was pushing a small-wheeled trolley along a paved when it came to an abrupt halt after coming into contact with a raised paving slab, striking C's right knee and causing injury. The judge at first instance held that the defendants were i) in breach of Regulation 12(3) of the Workplace (Health, Safety and Welfare) Regulations 1992 because the surface of the workplace had not been kept free of obstructions; and ii) in breach of Regulation 4 of the Provision and Use of Work Equipment Regulation 1998 because the trolley was unsuitable work equipment. D appealed

The appeal was dismissed. Although the judge had to do his best in a case in which the evidence was painfully thin, he was not wrong to come to the conclusion he did. This accident was not a freak accident; accidents like it occur frequently. However much the courts may not wish to encourage a compensation culture, the fact remains that the Regulations exist. A case of this kind should be considered under regulations 12(1) and (2) of the Workplace Regulations because the concept of "unevenness" in regulation 12(2)(a) is more apt than the concept of "obstruction" in 12(3) to describe the difference in height between the paving slabs in the present case. Although the trolley was not unsuitable equipment within the Equipment Regulations, the appeal would still be dismissed.

GOODWIN v BENNETTS UK LTD

[2008] EWCA Civ 1374

CA (Civ Div)(Sir Anthony Clarke MR, Dyson LJ, Jackson LJ)
11 December 2008

Health and Safety (Display Screen Equipment) Regulations 1992

C contended that D's breaches of statutory duty and negligence caused her to sustain tenosynovitis as a result of keyboard use whilst working at D's office. The pain had developed around the time that she was involved in a minor car accident in which her hands had struck the dashboard. Her claim was dismissed on the grounds that Reg 4 had not been breached and D had not been negligent. Although Regs 2, 6 and 7 had been breached, those breaches were not causative of injury. The judge also rejected the diagnosis of tenosynovitis. C appealed.

The appeal was allowed in part. The judge was entitled to reject the diagnosis, although it was clear that the symptoms were genuine. It was unknown what the underlying cause of the pain was, but the keyboard work made a material contribution to the pain and D was aware of this after a certain point. D had not complied with Reg 4 (they were unaware of its existence), but the breach had no causative effect. Although the amount of typing C did each day was not such to cause a reasonable employer to foresee any risk of personal injury, after C's return it was or ought to have been apparent to D that C was an employee particularly vulnerable to WRULD from moderate use of the keyboard. In those circumstances D was in breach of its duty of care to the claimant in causing or allowing her to do the work she was undertaking. If D had provided proper training and information after diagnosis, as per Regs 6 and 7, C's keyboard use would have been substantially less than it was, with the consequence that the recurrence in her symptoms would not have occurred. The appeal was allowed in relation to the recurrence of her injuries.

DONNA EGAN v CENTRAL MANCHESTER & MANCHESTER CHILDREN'S UNIVERSITY HOSPITALS NHS TRUST

[2008] EWCA Civ 1424

CA (Civ Div) (Sedley LJ, Keene LJ, Smith LJ)
15 December 2008

Manual Handling Operations Regulations 1992, Reg 4(1)(b)(ii)

C was a nurse. She had taken a patient to a bathroom in a mechanical hoist. She had to manoeuvre the forks of the hoist under the bath. As she pushed the hoist forwards, it suddenly stopped and she suffered a jerking injury to her back. The judge held that although there had been a failure to risk assess the manual handling operation, the breach was not causative of the injury.

The appeal was allowed. It was clear that the judge had not given separate consideration to Reg 4(1)(b)(ii) when he should have done. It was not sufficient to examine whether a risk assessment would have made any difference. The burden was on D to prove all appropriate steps had been taken to reduce the risk to the lowest level reasonably practicable, and the judge may have placed that burden on C. There may in practice be an evidential burden on C

but the legal burden remains on the employer. The suggestions made by C would have involved modest cost, would have been reasonably practicable and would have reduced the risk of injury to a significant degree. In the circumstances, the NHS were in breach of its duty and liable for the injury. However, as C had been careless to some degree, contributory negligence of 50% was appropriate.

HALL v HOLKER ESTATE CO LTD

[2008] EWCA Civ 1422

CA (Civ Div) (Sir Mark Potter (President Fam), Arden LJ, Hughes LJ)
17 December 2008

Occupier's Liability and Inspection Systems

C was playing football at a caravan park owned and operated by D. C was retrieving a ball from the net of a portable tubular goal frame (provided by D) when his foot got caught and he fell to the ground. The goal tilted and fell forwards and he was stuck in the face by the crossbar. The judge found that the goal should have been pegged to the ground and was not. D asserted that it had a 'continual operation' to check the pegs, but there was little detail of that regime. The judge found that the incident was isolated and drew the inference that the situation at the time of the accident had not existed for very long. There had been provision of appropriate equipment and stabilising items and at least some effort to deal with the question of interference. Therefore it had not been proved by C that D's system (whatever it was) was inadequate. C appealed.

The appeal was allowed. The judge had erred. It had been established that the accident was caused by a want of safety, there was a known risk that called for counter measures by way of regular inspections, and that D accepted such a duty but failed to prove that the system was in operation at the time. The judge should have gone on to find that there was no basis for holding that the accident would likely have happened irrespective of a proper and adequate system: *Ward v Tesco Stores Lts (1976) 1 WLR 810 CA* applied.

BEVERLEY ANNE BARCLAY v BRITISH AIRWAYS PLC

[2008] EWCA Civ 1419

CA (Civ Div) (Laws LJ, Thomas LJ, Wilson LJ)
18 December 2008

Montreal Convention on International carriage by Air 1999, Art. 17.

C sustained an injury to her right knee after she slipped on a strip embedded in the floor of an aircraft while travelling from the USA to London. At first instance, the judge held that the injury had not been caused by an accident within the meaning of the *Montreal Convention on International Carriage by Air 1999, Art. 17*. C appealed.

The appeal was dismissed. If C's case was good, then Art.17 would appear to impose liability for a very wide range of injuries suffered on board aircraft. Art 17 contemplated, by the term "accident", a distinct event, not being any part of the usual, normal and expected operation of

the aircraft, which happened independently of anything done or omitted by the passenger. When the injury indisputably resulted from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it had not been caused by an accident. There was no accident here that was external to C, no event which happened independently of anything done or omitted by her. All that happened was that C's foot came into contact with the inert strip and she fell.

Quantum

LEE CARL THOMPSTONE (A MINOR BY HIS MOTHER & LITIGATION FRIEND HEATHER BRINDLEY) v TAMESIDE HOSPITAL NHS FOUNDATION TRUST, AND OTHER CASES

[2008] EWHC 2948

QBD (Sir Christopher Holland)
2 December 2008

Precedent for Periodical Payment Orders

The Court of Appeal had previously considered periodical payment orders in these cases and orders relating to the judgment had been drafted and approved. However, they were later redrafted and this court was required to consider the model schedules to be incorporated. The 'Model Schedules' were approved with minor amendments. Although no more than a precedent to be used for adaptation for periodical payment orders for use in personal injury cases where a Claimant was to receive payments during his or her lifetime, any future draft order departing from the best current expertise represented in the order would have to be justified to secure court approval.

The final draft of the 'Model Schedules' was appended to the judgment. The Schedules are in three parts: Part 1 establishes the life time obligation and the mechanics of payment; Part 2 makes provision for such periodical payments as may in the circumstances of the case be indexed by reference to the RPI; and Part 3 focuses upon those that are to be indexed by reference to ASHE 6115.

MARTINE WIDLAKÉ v BAA PLC

[2008] EWHC 2825 (QB)

QBD (Judge Richard Seymour QC)
28 November 2008

Assessment of Damages & Exaggeration of Symptoms

Liability was admitted in C's claim for damages for personal injuries sustained in an accident at work. The hearing was to assess damages. C's second witness statement (written three years post-accident) described significantly more serious pain and interference with her daily life from her back than her first statement (written three months post-accident). She had said that she had no previous history of lower back pain, but it emerged later she had a significant history. A covert film of C showed no evidence of overt disability.

The judge did not find C to be an impressive witness and found that she had deliberately concealed her previous history in the hope of increasing her compensation. Although it might be necessary for her to take pain killers at times, she was then able to operate substantially normally. The film demonstrated this. The suggestion of any significant pain in the back for more than a few weeks after the accident is not well founded. If anything, D's stated position that C should be compensated for 12 months worth of aggravated back pain was over-generous. Damages for pain, suffering and loss of amenity were assessed at £3,500.

BEVERLEY KIRK (EXECUTRIX OF THE ESTATE OF KENNETH ARTHUR KIRK, DECEASED) v VIC HALLAM HOLDINGS LTD

[2008] EWHC 2969 (QB)

QBD (S Phillips QC)
3 December 2008

Mesothelioma/ General Damages/ Care, Dependency and Future Loss Claim

C's father contracted mesothelioma as a result of his exposure to asbestos during his employment with D. He became aware of his condition approximately 10 months before his death. He underwent decortication surgery and a complete visceral pleurectomy in an attempt to prolong the reasonable quality of his life, but his condition deteriorated and he died two weeks later. D contended damages for pain and suffering should be awarded on the basis that he had had an unusually short period of pain and suffering. C argued his pain was exacerbated by serious and invasive surgery which had caused him considerable additional pain and trauma in his final days.

The judge considered that the period of suffering was 10 months, well in excess of the three months regarded as 'short' in the JSB Guidelines. Neither the guidelines nor authorities supported the contention that only periods of serious breathlessness were relevant to the calculations. Although C's father had been spared the worst symptoms in the final months of typical mesothelioma, he instead suffered considerable trauma and very painful and distressing after-effects of unsuccessful invasive surgery. There was no justification for treating Mr Kirk's case as one of exceptionally short or limited pain and suffering and the pain and suffering caused by the unsuccessful surgery exacerbated the level of damages. Damages were assessed at £62,500. Consideration was also given to C's care claim, the dependency claim and a claim for loss of C's father's services.

JANE BEESLEY (WIDOW & EXECUTRIX OF THE ESTATE OF JOHN LAMBIE, DECEASED) v NEW CENTURY GROUP LTD

[2008] EWHC 3033

QBD (Hamblen J)
16 December 2008

Measure of Damages/ Mesothelioma/ Law Reform (Miscellaneous Provisions) Act 1934/ Fatal Accidents act 1976

C's husband contracted mesothelioma as a result of being exposed to asbestos during the course of his employment for D. Liability was admitted. He underwent three cycles of chemotherapy and was in pain and suffering for a period of 17 months. He was completely incapacitated before his death, and in need of continual care and diamorphine infusions. C contended that the suffering was extreme so that the case fell at the higher end of the JSB Guidelines (9th ed.) range of £52,500 to £81,500 and that it was appropriate to make an award of damages for loss of intangible benefits in respect of the extra value derived from such help provided by a husband and friend. D submitted that the top of the JSB bracket was too high and that a midpoint figure was appropriate. D also said that it was inappropriate to make an award of damages for loss of intangible benefits.

The judge considered it appropriate to follow the JSB Guidelines, as they represent the current best practice. The appropriate award for general damages was £72,000, an uplift being justified by the extreme pain, suffering and loss of amenity in the last few months. The principle of making awards for loss of intangible benefits is well established. It reflected the fact that there are considerable advantages in having jobs around the house and garden done by a husband at his own time and convenience rather than having to go out to find and choose commercial providers. Such an award can be made and was in this instance (the so called *Regan v Williamson* award).

Procedure

JAKE PIERCE v DONCASTER METROPOLITAN BOROUGH COUNCIL

[2008] EWCA Civ 1416

CA (Civ Div) (Sedley LJ, Hughes LJ, Hedley J)
12 December 2008

Limitation Act 1980, S. 14(3)/ Constructive Knowledge

When he was in his late twenties, C sued D upon the allegation that it had failed to take him into care as an infant and in consequence exposed him to abuse and grave neglect by his parents. He had been taken into voluntary care for the second time at six months old. At 14 months, he was returned to his family, whom he lived with until he left to fend for himself at 14. It was clear when he was returned at 14 months that although circumstances in the parents' home fluctuated, they were a long way short of satisfactory. When he left home, he showed signs of personality disorder, his behaviour was sexualised and there were episodes of theft and arson. The judge concluded D had been negligent in returning C to his family. D appealed.

The appeal was allowed in part. The judge properly applied the Bolam test, and his conclusions on the facts would not be overturned. Although the case was one of neglect rather than of violence or abuse, the foreseeable loss had been injury through bad parenting, and it was impossible to say that the judge's award lay outside the bracket properly available to him. However, C's claim had been out of time. He had requested D's files several years earlier and D had offered to pay for his train fare for him to go and view them, but he failed to do so. It was clear that C had had constructive knowledge under s.14(3) Limitation Act 1980. The matter was remitted to consider the issue of discretionary extension of time under s.33 of the 1980 Act.

**TCD v (1) HARROW LONDON BC (2) WORCESTERSHIRE CC
(3) BIRMINGHAM CC**

[2008] EWHC 3048

QBD (Eady J)
10 December 2008

S. 14 and S.33 Limitation Act 1980

C had been adopted when she was six by a man who sexually abused her during her childhood. There was evidence that each D had permitted her adopted father to have contact with C or to live in his care despite knowing of one or more of his convictions for assault. In particular, the second and third defendants allowed it in the knowledge that he had pleaded guilty to indecently assaulting her. The question for the court was whether the claim was statute barred: C was 42 years old at the date of the instant proceedings.

The judge concluded that C was fixed with knowledge of the relevant facts for the purposes of s.14 from attaining majority, consideration given to observations in *Broadly v Guy Clapham & Co [1994] 4 All ER 439 CA (Civ Div)*. Not everyone bringing a late claim for damages, however genuine their complaint might be, could reasonably expect the court to exercise the s.33 discretion in their favour, *A v Hoare (2008) UKHL 6, (2008) 1 AC 844* applied. Although the discretion was unfettered and had to be addressed in the light of all the circumstances, there was a public interest in legal certainty and finality that should not lightly be discounted, especially not out of sympathy for an individual litigant. Both D1 and D3 would suffer prejudice due to gaps in documentation and lack of relevant witnesses: a fair trial would not be possible. Fairness required a balance of interests, and it would not be in the overall interests of justice to allow the matter to proceed. Regarding D2, there was no sufficient evidence of a breach of duty such that justice required disapplication of the limitation period.

STEPHEN CAIN v BERNICE FRANCIS : SHONA MCKAY v (1) STEPHEN HAMLANI (2) DIRECT LINE INSURANCE PLC

[2008] EWCA Civ 1451

CA (Civ Div) (Sir Robert Andrew Morritt, Smith LJ, Maurice Kay LJ)
18 December 2008

S.33 Limitation Act 1980

In two separate RTA cases, liability was admitted. In both, proceedings were issued outside limitation due to the fault of solicitors. The issue for the courts at first instance had been whether the court should exercise its discretion under s.33 to disapply the relevant time limits. C1's case had been issued one day late: the judge concluded D1 would be prejudiced and refused to disapply the limitation period. C2's had been issued one year late: the judge in that case held that he should ignore any prejudice to D2 from the loss of the "windfall" of the limitation defence, and he disapplied the time limits. The cases were joined on appeal.

C1's appeal was allowed. D2's appeal was dismissed. Although a judge's discretion is unfettered, there should be consistency of approach between judges on this issue. In a case

where D has had early notice of the claim, the accrual of a limitation defence should be regarded as a windfall and the prospect of its loss, by the exercise of the s.33 discretion, should be regarded as either no prejudice at all or only a slight degree of prejudice. The length of the delay cannot be the deciding factor (although reasons for the delay should be considered); rather, it should be considered whether D has suffered any evidential or other forensic prejudice as a result of the delay. Parliament cannot have intended that the financial prejudice to D of having to pay damages should be taken into account in the exercise of the discretion. The fact that C has a possible claim against his solicitor would not necessarily mean that the time limit should not be disapplied. The basic question to be asked is whether it was fair and just in all the circumstances to expect D to meet the claim on the merits, notwithstanding the delay in commencement.

Costs

C (A PATIENT ACTING BY HER LITIGATION FRIEND J FOX) v W

[2008] EWCA Civ 1459

CA (Civ Div) (Arden LJ, Thomas LJ, Moore-Bick LJ, Master Hurst)
19 December 2008

Conditional Fee Agreements/ Success Fees

Liability was admitted at the time that a CFA was entered into in this case. The claim subsequently settled. The success fee had been calculated by C at 98%. A DJ allowed a success fee of 70% on assessing costs. On appeal to a Judge, that was reduced to 50%. D contended the success fee was still too high.

The appeal was allowed. A success fee should reflect a reasonable and rational assessment of the risks facing the solicitors at the time when the agreement was entered into. In this case, it was difficult to see how C would have failed to recover substantial damages given the serious nature of her injuries. However, it was more difficult to assess the risk that the solicitors might lose the right to recover part of their fees as a result of C's failure to beat a CPR Pt 36 offer which she rejected on the advice of the solicitors (a clause relating to which was incorporated in the CFA, as per the Law Society's then standard form of agreement). It was unlikely that highly experienced solicitors practising in the field would differ widely in their assessment. A number of percentage increases to the CFA in the current case were not justified, including 20% to reflect the size of the claim and 10% for 'unidentified defendants and insurance issues'. The CA considered the risk assessment and all the circumstances of the case before concluding that the appropriate success fee was 20%.

J MURPHY & SONS LTD v JOHNSTON PRECAST LTD (FORMERLY JOHNSTON PIPES LTD)

[2008] EWHC 3104 (TCC)

QBD (TCC) (Coulson J)
16 December 2008

Issue Based Cost Orders

This was a case where although the judge found (in accordance with submissions from C) that there was a concluded contract, he found against C on the issues of contract terms, breach and causation, and concluded that D was not liable to pay any damages. During the later costs arguments, C submitted that as a matter of principle, in every case in which an issue based costs order was sought, the court should ask itself the question posed in *Fleming v Chief Constable of Sussex (2004) EWCA Civ 643, (2005) 1 Costs LR 1*, namely whether there was any discrete issue or matter pleaded which added significantly to the length of the trial to necessitate displacing the prima facie rule that costs should follow the event.

The judge found that D was clearly the successful party in this case, having won the underlying dispute and being required to pay no damages to C. As such, the question posed in *Fleming* did not arise. An issue based costs order was not justified simply because the successful party had not been successful on every last issue. It was also relevant that C had rejected two offers to settle (the latter in accordance with Part 36). The appropriate rate of interest on costs from the commencement of proceedings was base rate plus one per cent, but D was not entitled to interest at an enhanced or higher rate.

PERSONAL INJURY GROUP



GRAHAME ALDOUS QC
1979



CHRISTOPHER
GODDARD 1973



DUNCAN MACLEOD
1980



ROGER HIORNS
1983



GAURANG NAIK
1985



JONATHAN LOADES
1986



STEPHEN GLYNN
1990



CLARE PADLEY
1991



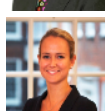
CHRISTOPHER
STEPHENSON
1994



LAURA ELFIELD
1996



TOM LITTLE
1997



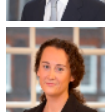
PERRIN GIBBONS
1998



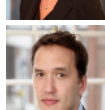
LINDA NELSON
2000



OLIVER MILLINGTON
2003



ESTHER MACLACHLAN
2005



ED LAMB
2006



ANDREW ROBERTSON
QC 1975



GILES EYRE
1974



CHRISTOPHER WILSON
1980



SIMON CARR
1984



VINCENT WILLIAMS
1985



EDWIN BUCKETT
1988



PHILIP JONES
1990



AILEEN DOWNEY
1991



DANIEL LAWSON
1994



JEREMY FORD
1996



STUART McKECHNIE
1997



GILES MOONEY
1998



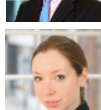
ADAM DAWSON
2000



ESTHER POUNDER
2003



ALASTAIR HOGARTH
2005



CATHERINE ATKINSON
2006



JOHN FOY QC
1969



TREVOR DAVIES
1978



NICOLAS HILLIER
1982



ANDREW RITCHIE
1985



JACOB LEVY
1986



MARK WHALAN
1988



JEREMY CROWTHER
1991



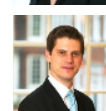
LAURA BEGLEY
1993



RAJEEV SHETTY
1996



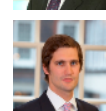
TARA VINDIS
1996



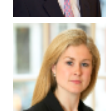
SIMON BRINDLE
1998



SHAHRAM SHARGHY
2000



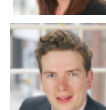
ROBERT McALLISTER
2002



EMILY VERITY
2003



JENNIFER SCOTT
2006



BEN RODGERS
2007