

State of the Nation – Case Update

Slide 1 – Introduction

Good morning and welcome to the opening address of the Liability Special Interest Group Conference.

I have been allocated 45 minutes to provide you with an overview of some of the important cases that have been through the Courts in the last 12 months which are thought to have special interest to liability case handlers and adjusters.

This Presentation was given last year by Michael Davie, Barrister at Four Pump Court, this year you have me....evidence, if ever it were needed that, as an industry we are truly dumbing down.

The last 12 months have been, as ever, interesting from a legal perspective and I have tried to pick out some of the key cases for us to consider.

At the end of today's programme we have our own version of "Who Wants to be a millionaire" named "Who wants to be a Liability Adjuster". If any of you are concerned about this exercise I will just flag that some of the answers will be covered in the remainder of this presentation.

So what are we hoping to look at this morning?

Cuthbert v Gair

This decision has gained much publicity in recent months and there is further information on it on the CILA website. I do not propose to discuss it at length as there is a session on "Privilege" later in the day where, I have no doubt, it will be discussed more fully.

I will therefore summarise; the case considered when an Insurer could recover the cost of Adjusters Fees when pursuing a recovery.

The Court held that the Insurer could not recover the money they had spent on Adjusters fees; however it is important to understand why.

Cuthbert was injured while at an equestrian event, she sued the Equestrian Centre who instructed Adjusters to investigate, subsequently, when it litigated the Insurers instructed Solicitors to defend the claim.

Cuthbert then discontinued her claim and the Defendants requested a detailed assessment of its Costs and sought to recover the cost of the work undertaken by the Loss Adjusters.

The Court held that a person that acted without a solicitor could not recover any fees and expenses paid to another party for work of a kind which a solicitor could have done.

Here we have clear evidence of the judiciary looking after their own!

The Court also looked at the work undertaken after the defendant had instructed solicitors and stated that if the solicitors had instructed the Adjusters for assistance then they could have recovered those Costs as a profit cost – not as a disbursement. In this case however there was no true agency agreement (no letter of instruction or terms of engagement) and therefore there could be no recovery.

It is a decision that probably confirms what most of us thought was the case that Adjusters fees should not form part of a recovery, the only exception being where they were instructed by solicitors.

As a decision it does not sit easily with other considerations in relation to the work done by loss adjusters. The FSA (in relation to Regulation) and Customs and Excise (in relation to VAT) have recently, and quite separately looked at work done on Insurance claims and both reached the conclusion that it is the nature of the work that is undertaken that governs the rule - not who is working for who. If that logic were applied by the Courts then I suspect a different decision would be reached.

Common Sense Prevails:

Moving on from Cuthbert & Gair I want to look at a group of cases where the decisions reached show the adoption of common sense by the Courts – most of the time. We will look at some helpful decisions and a couple that are not quite so helpful.

State of Knowledge Defence:

There have been some two key decisions in the last few months which suggest that the Courts may be challenging the traditional understanding of the defence of State of knowledge and we will have a look at these cases and also look abroad to see what might we might be facing in the future.

Fraud:

Our colleagues in the Property field have had a key focus on Fraud for the last few years; we will have a look at it from a liability perspective in an attempt to understand the Courts approach in liability cases.

Lord Justice Jackson's review:

Strictly speaking this is not Case Law and possibly therefore outside the remit of this talk. It is however the prelude to what could be some significant developments and we will finish by considering the review in brief.

Slide 2 – Common Sense.

As you will see I have listed a number of cases which have been heard in the past 12 months and which I believe are relevant to what we do on a day to day basis.

You will also see I have included a couple of older cases – these are relevant in that they shape the decisions made in the more recent cases.

Palmer v Cornwall County Council

The first case is one of the latest in a series of cases against local authorities where accidents within school premises have given rise to claims.

You may be aware that a few years ago there was a lot of concern that litigation against schools was going to bring to a halt any after school activity and there was a general feeling that the Courts were going too far in establishing a duty of care on the school. In recent times there have been a number of decisions which made for a more level playing field, we will look at some of these in a minute but we will start with one where the local authority were found liable.

The claim concerned a 14 year old boy who was hit in the eye by a rock thrown by another pupil in the play area. The injured party issued proceedings against the local authority. The claim was brought under the OLA and in negligence and failed on both counts. On appeal only negligence was argued.

Supervision at lunchtimes was provided by 2 dinner ladies, one was outside whilst the other was inside – the play area was therefore supervised by 1 person. There was some difficulty in understanding how many pupils were under her supervision but it was accepted that it could have been in the region of 300. In her evidence the supervisor admitted that she spent more time overseeing the younger pupils and this did not include the claimant.

The CofA reversed the earlier decision stating that the level of supervision was clearly inadequate. In reaching this decision they also considered if the accident would have occurred even if the levels of supervision had been higher – they felt it would not have done, the pupils evidence was that if the supervisor had been nearer then rocks would not have been thrown because they knew it was prohibited.

This case gives some guidelines as to what supervision is not adequate but leaves it uncertain as to at what point supervision becomes adequate. One imagines that the ratio will depend upon the circumstances and the evidence of risk assessments.

Alexis v London Borough of Newham

This case provides a better result for defendants. The claimant was a school teacher who was poisoned by a pupil. Is this not every pupils dream! The pupil concerned had added cleaning fluid to a bottle of water.

The cleaning fluid had been added when the pupil had been allowed unsupervised access to the claimant's locked classroom.

The claimant recovered from the physical damage fairly quickly but strangely seems unable to face teaching again!

The Judge stated that it was not reasonably foreseeable that a pupil, left unsupervised, would attempt to poison a teacher but it was foreseeable that he might indulge in a prank, the Judge thought the case passed the test of foreseeability.

It was also accepted that the defendant owed a duty to teachers to take all precautions as were reasonable to prevent or minimise the risk of injury.

However the Court heard how the school had a sensible policy of locking empty classrooms and not allowing pupils unsupervised access, it was accepted that this practice must allow exceptions (the judge said it would be absurd not to allow a situation where a teacher could not ask a pupil to pop along to an empty classroom to collect something!). The discretion had not been negligently exercised as the teacher had no reason to believe that the pupil would seek to poison another teacher therefore there was no liability.

Samuel David Harris v Perry & Harris.

This is another supervision case; it has been fairly widely reported and has become known as the "Bouncy Castle" case. Mr & Mrs Perry hired a bouncy castle for a party.

A 15 year old climbed on it and started to do somersaults, the claimant was struck on the head by the 15 year olds heel and he sustained a fractured skull.

The lower Court found for the claimant stating there was inadequate supervision by the Perrys.

The CofA however found it was not reasonably foreseeable that boisterous play on a bouncy castle would involve a significant risk of serious harm and, therefore, parents who hired a bouncy castle for a children's party did not have a duty of care to keep the children playing on it under uninterrupted supervision.

The Court also expressed doubt that even if the supervision had been better it would have been difficult to prevent the accident.

The case is important because it does show the Courts will consider if an accident could have been prevented even with close supervision.

Simonds v Isle of Wight Council (2003)

Whilst not a recent case this warrants a mention as it addressed the balance between ordinary play and dangerous play and is therefore relevant to the consideration of much of the current case law.

The claimant broke his arm after jumping from a swing during a school sports day.

The Court did not find the local authority liable as it would not have been reasonable to impose on the school any legal duty to immobilise the swings and that the accident that occurred was one of ordinary play.

Kearn Price v Kent County Council (2002)

This is another older case involving an injury whilst at play. A 14 year old was struck in the face by a leather football. The evidence was that the school had considered the footballs to be dangerous and had banned their use within the school however they had not done enough to implement the ban, the evidence was that the ban was frequently ignored. The Courts found for the defendant.

Charles Baldacchio v West Wittering Estate (2008)

This is an example of a recent case which confirms the Courts intentions not to create too onerous responsibilities for occupants and to underline that individuals must take some responsibility for their own actions.

This follows a pattern from earlier cases including Tomlinson v Congleton (2003), Keown v Coventry Healthcare Trust (2006) and Evans v Kosmar (2007).

The claimant was a 14 year old who made his way along a wooden breakwater on the defendant's beach. He then climbed up a navigational beacon. He was one of a party of boys who had been spotted going out to the beacon and a local lifeguard was making his way on a jet ski to stopping their activity.

The claimant dived from the beacon and sustained injury to his neck rendering him tetraplegic.

The accident occurred on a hot summers day when it was estimated there were up to 11,000 people on the beach.

The claim was pursued under the OLA 1957, the claimant arguing that the beacon represented an allurement to the children and there should have been a warning sign.

The defence accepted the claimant was a lawful visitor to the beach but was a trespasser so far as the beacon was concerned. They also argued that even if there had been a warning – it would have been ignored by the claimant.

Also argued that they had a reasonable system of supervision and the beach was adequately manned by lifeguards/beach patrol staff.

The Judge found for the defendants stating:

- He accepted he was a trespasser and thus the 1957 Act did not apply
- There was no duty to warn of dangers that are perfectly obvious
- At 14 the claimant was considered to be reasonably aware, he failed to judge the type of dive needed
- A notice would not have stopped him
- There was no undisclosed trap or hazard
- Supervision was adequate

Anderson v Lyotier and Lyotier and Portejoie

Claimant was badly injured whilst on a skiing holiday, his action commenced against the Company with whom he booked the holiday and they brought in the ski instructor as a co defendant.

The accident happened when the claimant a relative beginner, was allowed to ski on the off piste area.

The claimant was part of a group of mixed ability, after two days of tuition they were allowed to ski off piste on day 3. During that session and unseen by the instructor the claimant struggled and at one stage hit a tree

On day 4 they were again off piste and the claimant fell frequently.

On day 6 they skied on a steep off piste slope and the claimant did his normal and hit a tree. Injuries rendered him a tetraplegic.

The ski instructor was found to be negligent, the claimant not having the skills to ski in that terrain with reasonable safety. The Court agreed that it was reasonably foreseeable that on such terrain a fall was likely and the injuries sustained were possible.

The claimant was found 1/3 liable on the basis of contrib.

The Judge did go out of his way to emphasise that this case did not open the door to anyone who sustains an injury under supervision to claim against the instructor.

Jennifer Hunt v Chapter of Ripon Cathedral

This is an important case for the occupiers of historic buildings and their Insurers.

A visitor to Ripon Cathedral sustained an ankle injury after stepping into a depression on a step leading to the crypt.

The Court ruled in favour of the defendant finding that the Occupiers had taken reasonable care to protect visitors – they had undertaken a Risk Assessment, the area was well lit and there was a 1 way system in place with good signage.

It what was described by the Claims Manager as the Court taking a “Common Sense approach” this case appears to set a precedent that uneven surfaces are acceptable in historic buildings so long as the Occupier can show that he has taken sufficient care.

Drake v Harbour

Most of the cases we have looked at are supportive of the Defendant so we had better end this slide, as we started it with a win for the claimant.

This case concerned a fire in a house that was being worked upon by the defendant. The claimant had moved out.

It was found that the Contractor had been negligent but the claimant could not prove this negligence was the cause of the fire.

The Court found that where the loss ensued which was of a kind likely to have resulted from such negligence that would ordinarily be enough to enable a court to infer that it was probably so caused, even if the claimant was unable to prove positively the precise mechanism.

LORD JUSTICE TOULSON said that the extent to which positive or scientific proof of causation was required was a matter of judgment in each case and depended on the evidence as a whole.

The court had to consider any alternative theories of causation advanced by the defendant before reaching its conclusion about where the probability lay.

If it concluded that the only alternative suggestions put forward by the defendant were on balance improbable, which was likely to fortify its conclusion that it was legitimate to infer that the loss was caused by the proven negligence.

This is not good news for those of us who act for defendants in relation to subrogated actions for fire. It appears our standard response of “prove it” may not be quite so valid in future.

So what do these cases tell us as Adjusters?

Well I think there are some key messages:

- The Courts have moved a little from the approach that Insurers have deep pockets and should be accountable for anyone's failings – including the claimants
- The Courts recognise the difficult position many bodies find themselves in when dealing with a significant number of visitors
- The claimant cannot get away with blatantly ignoring his own safety
- Critically, the Courts are looking at the case and seeking to establish what the Insured have done to reduce or manage the risk. Risk Assessments and the adoption of good procedures and practices are essential.
- Common sense does appear to feature and play a part
- It will probably all revert back next year!

Slide 3 – State of Knowledge defence.

I want to have a look at the very recent decisions in the Corby group litigation and the Nottinghamshire and Derbyshire Deafness litigation to see if we can see a common thread and to take a view of whether this challenges our current understanding of the use of the State of Knowledge defence.

Firstly let us look at Corby.

Corby was a new town created in the 1950s and was dominated by a steel plant. Most of the working population were employed at the steel works.

In the 1970s the town declined dramatically, imported steel was far cheaper than Corby produced steel and the plant closed in 1980. Out of a working population of 16,000 there were 11,500 out of work.

The Council decided a programme of regeneration was essential and after successful applications for Enterprise Zone status and derelict land grants it started to buy the derelict land off British Steel. It purchased the land in parcels carrying out reclamation as it went.

This programme was considered a success and the area began to redevelop. However between 1985 and 1999 a group of children were born with limb reduction defects (mainly missing fingers and clubbed feet).

The child claimants were represented in a Group Action where it was argued that small particles of waste material had become airborne during the reclamation and were inhaled by the mothers early in their pregnancies.

It was claimed that during the waste removal the transportation of the waste was undertaken in un sheeted lorries on public roads (It only became legally necessary to sheet all lorries in 1992).

It was also argued that dust from the reclamation sites could travel for up to 4kms.

A number of unhealthy substances were shown to be found within the waste. It was accepted that these substances were hazardous.

However; in the 80s and 90s none of the substances listed were known to be hazardous to pregnant women.

The work was undertaken in liaison with all the relevant authorities and done in accordance with their instruction and guidance. However it was found that over a number of years the management of the process was at times very poor and the whole project appeared to be too big for those handling it. The Judgement refers to years of neglect in the way the project was managed.

A number of experts and consultants had been appointed prior to the commencement of the reclamation and none of these had warned of the potential dangers to pregnant women.

The Judge found for the Group claimant subject to causation on individual cases.

In a damning conclusion to the judgement The Honourable Mr Justice Arkenhead stated he found CBC liable in public nuisance, negligence and in respect to their actions post 1992 they were also in breach of Statutory Duty (Environmental Protection Act 1990).

One is left asking the question, could these injuries be foreseen?

The Judgement runs to 288 pages, it is a thrilling read and is available on the Internet. The Judgement deals with the question of foreseeability. It sets out:

Q: Whether any alleged loss arising out of such breach was foreseeable

A: Yes

That's it!

In the Notts and Derby deafness litigation the Court of Appeal has just announced its decision. The Judges concluded that noise levels above 85 decibels have **always** been unsafe and that an Employers actual knowledge of this fact or not is irrelevant.

Effectively this is saying that the standard for “safe” in the workplace is to be judged with the benefit of hindsight and appears to ignore what the HSE and other experts considered to be safe at the relevant time.

This decision identifies those workplaces that have noise levels of 85 Db + as being unsafe and therefore in breach of S29 of the Factories Act 1961.

Appeals on both cases are considered likely.

However there is a clear message here, the Courts don't like the State of Knowledge defence and will seek ways around it – particularly when there are potentially a large number of effected people.

On the back of these 2 decisions we should be alive to a recent decision of the Danish Government who have agreed to give compensation to a number of workers who have contracted Breast cancer on the basis that there is some evidence to show a casual link between shift working and this form of cancer.

It is important to note that Denmark operates a no fault compensation policy – but given the Courts views in Corby and in the deafness litigation there must be some concern about the potential for this type of claim in the future .

Should Companies who employ women night shift workers consider their position.

For those who are interested the theory goes that nocturnal exposure to light reduces the production of melatonin. On experiments on animals melatonin is noted to suppress tumour growth.

It is not cut and dry, there is also evidence that nightworkers are more susceptible to alcohol abuse and this in itself is likely to increase the risk of cancer.

Insurers will wish to keep abreast of developments in this area. Maybe an Endorsement of the Policy requiring women to stay at home in the kitchen where they will be safe!

Slide 4: Fraud

Fraud has long been at the top of the agenda for Property Adjusters but has not featured so highly in the thoughts of Liability Adjusters.

According to the ABI there are 2,000 fraudulent claims submitted every week!

The value of those claims is estimated at £14m per week, which is £728m per annum.

How will the current recession affect these numbers?

Will there be any impact in respect to submitted EL and PL claims?

Given these numbers and the potential for growth how robust will our beloved Courts be when faced with Fraud in liability claims?

Two recent cases provide us with a clue.

Carol Walton v Joanne Kirk

In this case the Claimant made false statements during the proceedings for injury following an RTA.

Her claim was for £750,000.

The Defendant Insurer believed the claim to be exaggerated and commissioned surveillance. The surveillance demonstrated a significant disparity between her claimed condition and the actual condition.

The Claim was settled for £25,000 with the Claimant paying the Insurer's costs of £21,000.

It gets better!

The Insurers then sought to commit the claimant for contempt of court and the claimant was found guilty. It is hoped that this sends a strong message to future potential fraudsters.

Shah v UI-Haq

Before we celebrate too much we need to consider the case of Shah v UI-Haq.

Mr UL-Haq was injured in an RTA, he and his wife suffered whiplash injuries and it was claimed his mother also had a whiplash injury.

Both Mr UI-Haq and his wife gave evidence in Court in support of his mother's injury.

The Defence successfully argued that the mother had not even been in the car and that Mr UI-Haq and his wife had conspired to support her fraudulent claim.

The question for the Courts was whether they had the power to strike out the claims for Mr UI-Haq and his wife as the perpetrators of a fraud as they were seeking to benefit from an illegal activity.

The Insurers representatives laboured the point that the Courts had a duty to stamp out this sort of behaviour and demonstrated that they alone had challenged 157 "phantom passenger" claims in the last 12 months.

The Court however saw it differently, whilst it did award Costs against the Claimant it would not allow the claims to be struck out.

The Courts said it was clear that there is established case law which shows a claimant will not be deprived of damages because they have fraudulently attempted to gain more than their entitlement.

They suggest that if this is change is needed it must come via an Act of Parliament.

Slide 5 – Lord Justice Jacksons Review of Civil Litigation Costs

This is not Case law and thus outside my brief, time (along with lack of knowledge) prevents me from discussing this in detail.

However you should be aware that this is going on.

It follows a disappointing conclusion to the MOJ Reforms.

LJJ has been asked to look at the Cost of Civil Litigation and his initial findings were reported in May this year.

His Report deals with 3 contentious areas:

1. Contingency Agreements
2. Level of ATE Premiums
3. Proportionality

His report is generally encouraging from a defence perspective....but I think we have been there before.

Your homework for the next couple of weeks is to read the review and develop your understanding...or for those that like choice you can read the 288 page judgement from the Corby litigation!

Thank you.