TANFIELD CHAMBERS

PERSONAL INJURY GROUP *BULLETIN*

In this edition, Michelle Marnham looks at the Court's response to fraudulent claims and Michael Bailey examines claims against Occupiers and the voluntary assumption of risk. I hope you enjoy the read. Sadly we have to say goodbye to Matthew Wildish, who has been the principal clerk for the PI team for a number of years. He is leaving for pastures new and takes up an appointment as Senior Clerk on the 1st October 2011. We will miss him and wish him well. However we welcome David Wright who will be taking over the reins of the PI clerking team.

Kerstin Boyd, Head of the Personal Injury Team

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FRAUDSTERS BE WARNED!

At a time when the Insurance Fraud Bureau continues to release statistics pinpointing the top 20 areas of the UK affected by 'Crash for cash' activity and interest in fraudulent claims appears to have gained momentum, it seems that the Courts may finally be getting tough. Whether this is due to the difficult economic climate, potential political and/or press criticism, such an approach must be welcome to all who practice within the field of personal injury.

Previously in dealing with fraudulent cases the Courts seemed reluctant to find Claimants in contempt of court, especially when the Claimant had "merely" exaggerated an otherwise legitimate claim. Moreover when courts were prepared to find a Claimant in contempt of court the sentences were not sufficient to act as a deterrent.

The change in stance started in July 2010 when the Divisional Court, in **Barnes v Seabrook and others** [2010] EWCH 1849, in a ground breaking ruling, opened the way for insurers to bring contempt proceedings. The Divisional Court held that notwithstanding the language of CPR r.32.14 and r31.23, and the words *"must refer that allegation to the court dealing with the claim"* in PD 32 para.28, a party in county court proceedings was entitled to go to the Divisional Court under RSC Ord.52 for a committal order.

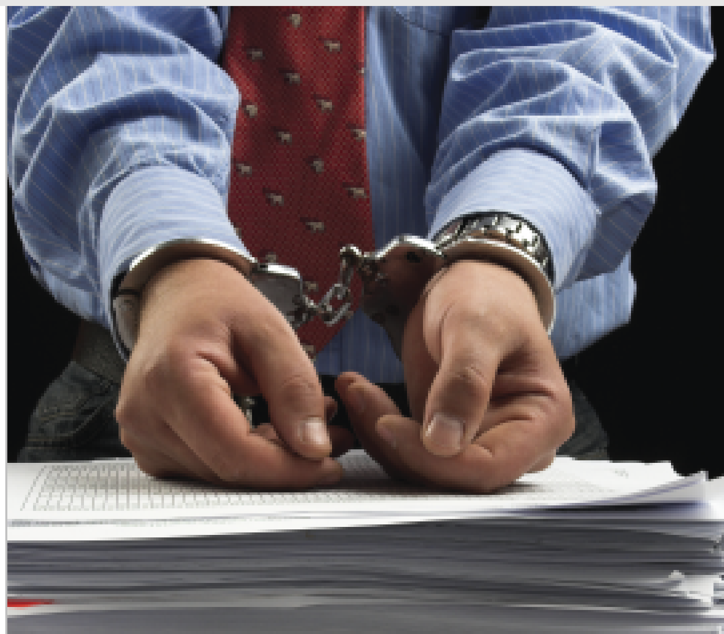
Following this case two recent decisions demonstrate that the courts are beginning to get tougher.

In March 2011, in **MIB v. James Shikell and others**, James Shikell, who sustained orthopaedic injuries and a possible head injury, submitted a £1.35 million claim against the MIB on the basis he suffered from extreme fatigue, physical restrictions and reduced levels of concentration which prevented him from playing football. James Shikell was subsequently sentenced to 12 months' imprisonment for contempt of court. The decision came after footage of him revealed him taking part in a football game.

FRAUDULENT CLAIMS

CLAIMS AGAINST OCCUPIERS

CONTINUED OVERLEAF



Honour Judge Blecher said that she was satisfied beyond all reasonable doubt that the only reason for him telling the lie was to increase the likely award of damages in the personal injury claim. The Counts against James Shikell were based on the witness statements he made to the effect that he was unable to play football and on his general level of incapacity. His father also received a 12 month sentence as he assisted his son. The case against the father was based on statements he provided and the fact that he was present during certain examinations with medical and legal professionals and heard the false reports made by his son.

In the second case of **Nield v Loveday** [2010] EWCH 3399, Acromas were granted permission to take legal action over claims the Lovedays exaggerated a back injury that kept Mr Loveday off work. In the original action, Mr Loveday claimed damages amounting to a six figure sum said to arise out of a road traffic accident. Mr Loveday brought proceedings in which he claimed that the accident had caused him a painful soft tissue injury that as a result he could not work or drive, was often reliant on a wheelchair, had to be cared for by his wife all the time, feared going out and could no longer go caravanning. His wife verified a statement supporting the claim. Surveillance footage appeared to show that Mr Loveday was far more active and able than he claimed. When this was disclosed, the claim was settled for a mere £1,850, plus predictive costs of £1,570. Subsequently, further evidence of his dishonesty emerged – on a trip to Lake Garda he stated he had to be taken through airport security in a wheelchair when in fact he had driven a Landrover towing a twin axle caravan. SAGA brought contempt proceedings. ***On 14th July 2011, in the first contested committal action, the trial judge commented that the Mr Loveday's deceitful claim was a "public wrong, not just a private matter between you and an insurance company," adding that "telling deliberate lies in court proceedings undermines the fabric of justice which itself is part of the fabric of society."*** Mr Loveday was sentenced to 9 months imprisonment and Mrs Loveday a suspended sentence.

Whilst the test to prove contempt is not an easy one and exaggeration of a claim alone is not proof of contempt, these two decisions are likely to act as a deterrent to "would be" fraudsters. One can readily see more cases being brought especially since the insurance industry has recently funded a multi-million pound City of London Police unit aimed at tackling the significant insurance fraud.

MICHELLE MARNHAM

TC

OCCUPIERS' LIABILITY ASSUMPTION OF RESP

Section 2(5) of the Occupiers Liability Act 1957 provides: "The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another)." Section 1(6) of the 1984 Act, re the duties owed to trespassers, stipulates that "no duty is owed by virtue of this section to any person in respect of risks willingly accepted as his by that person". The occupier prima facie has no liability for risks willingly accepted by the visitor or trespasser, exactly mirroring the position at common law and summed up in the maxim volenti non fit injuria. Liability may bite, however, where a visitor or trespasser has willingly accepted a risk but the occupier has also assumed responsibility for the organisation or supervision of the risk full activity itself.

By **Caparo Industries plc v Dickman** [1990] 1 All ER 568 a duty of care at common law may be imposed if three requirements are satisfied:

(i) a foreseeable Claimant (referable to the kind of harm involved);
(ii) a relationship of proximity between the Claimant and the Defendant;
(iii) if fair just and reasonable in the circumstances for such to be imposed on the Defendant.

Having established an applicable duty of care, the Claimant must show firstly that a negligent act/omission was committed within the scope of that duty; secondly that the damage claimed is of a nature that is recoverable; thirdly that the damage that flowed from that act/omission complained of.

VOLUNTARY ASSUMPTION OF RISK BY THE CLAIMANT:

In **Tomlinson v Congleton Borough Council** [2004] 1 AC 46, the claimant broke his neck when diving into a lake in a country park owned and managed by the defendant Council who had posted signs prohibiting swimming. The House of Lords held that any risk of the claimant suffering injury had arisen, not from any danger due to the state of the defendants' premises, or to things done or omitted to be done on those premises, but from the claimant's own misjudgement in attempting to dive in water that was too shallow. Lord Hoffmann referred to there being a duty to protect against obvious risks or self inflicted harm only in the absence of genuine and informed choice or

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Michelle has extensive experience in all areas of Personal Injury work both procedural and substantive. She acts for both Claimants and Defendants in a wide variety of employers' liability, Highways Act Claims (appearing extensively for highway authorities in relation to section 58 defences but also for Claimants), building and construction sites and school cases. She has experience in catastrophic injury, occupational disease and psychological injury

Michael Bailey

Michael Bailey is a member of the Tanfield PI team. His practice includes public body liability, professional negligence, actions against police and clinical negligence. He acts for both claimants and defendants. He is a keen yachtsman, fanatical supporter of the Wales rugby team and a lover of fine wine and classical music (the latter two preferably in conjunction).

AND VOLUNTARY ONSIBILITY

some lack of capacity, such as the inability of children to recognise danger or the despair of prisoners which may lead them to inflict injury on themselves (para 46).

In **Evans v Kosmar Villa Holidays PLC** [2007] EWCA Civ 1003 a young man just under the age of 18 dived into the shallow end of a swimming pool and suffered catastrophic injury. The claim was allowed at first instance, albeit with a finding of 50% contributory negligence. The defendant's appeal was allowed on the basis that he was of full capacity and able to make a genuine and informed choice. Richards LJ affirmed that Lord Hoffman's reasoning in **Tomlinson** applied not only to trespassers but also to lawful visitors to whom there is owed the common duty of care under section 2(2) of the Occupiers Liability Act 1957.

The occupier prima facie has no liability for risks willingly accepted by the visitor or trespasser, exactly mirroring the position at common law and summed up in the maxim *volenti non fit injuria*

In **Trustees of the Portsmouth Youth Activities Committee (a Charity) v Poppleton** [2008] EWCA Civ 646, the claimant suffered extensive tetraplegic injuries at an indoor climbing centre when he had attempted to emulate a fellow climber's dangerous manoeuvre. The claimant had succeeded at first instance, albeit with a reduction of 75% for contributory negligence. The defendant's appeal was allowed. May LJ reiterated that a duty to protect against obvious risk or self inflicted harm exists only in cases in which there is no genuine or informed choice or where a defendant has in some relevant way assumed responsibility for the claimant's safety, as with for example regulatory control.

In **Keown v Coventry Healthcare NHS Trust** [2006] EWCA Civ 19, the Court of Appeal held that a boy playing on the fire escape chose to run a risk through a dangerous activity that was nothing to do with the state of the premises within the Occupiers' Liability Act 1984 s1(1)(a). Even though the claimant was a child, the Court of Appeal found that it could not be said that he did not recognise the danger. The risk arose out of what he chose to do and there was no relevant duty. This case was distinguished from **Young v Kent County Council** [2005] EWHC 1342(QB) where the state of the premises had been inherently dangerous to a child (brittle nature of a skylight known to the defendant: had he been an adult the claimant would not have recovered).

VOLUNTARY ASSUMPTION OF RESPONSIBILITY BY DEFENDANT

Where the Claimant has engaged in a risk filled activity of his/her own volition and has capacity to understand those risks, liability can only be placed upon a defendant where the latter has assumed a particular responsibility to the claimant and/or where it can be shown that the claimant had relied on the defendant so as to found a "Caparo" common law duty of care.

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In **Fowles v Bedfordshire County Council** [1995] PIQR P380 the claimant succeeded at first instance and in the Court of Appeal in his claim for personal injuries against the owners and organisers of gym facilities. The claimant had received some instruction as to the use of gymnastic mats, but the instruction from the defendants was inadequate and had not made him aware of the dangers. Subsequently, when the claimant used the mats with a friend on a subsequent occasion, without supervision, he suffered a serious injury. Millett LJ stated that liability was founded on the defendant's assumption of responsibility in respect of the inadequate teaching and advice given to the claimant.

In **Barrett v Ministry of Defence** [1995] 1 WLR 1217, the claimant's widow succeeded both at first instance and in the Court of Appeal, albeit with an increase in contributory negligence. A drunk serviceman was inadequately looked after by a senior naval officer but died, having asphyxiated on his own vomit. The Court of Appeal

CONTINUED OVERLEAF

held that it was fair, just and reasonable to leave a responsible adult to assume responsibility for his own actions in consuming alcoholic drink and until he collapsed, he alone was responsible for his condition. The defendant was vicarious liable because of the assumption of responsibility through the intervention of its officer who took measures that had fallen short of the standard reasonably to be expected.

In **Mitchell v Glasgow City Council** [2009] UKHL 11, the deceased was attacked by his neighbour, and subsequently died of his injuries. They were both tenants of the defendant Council. The deceased family brought a claim in negligence, alleging that the defenders had failed to act on the repeated complaints against the neighbour and failed to warn the deceased that, shortly before the attack, the neighbour had been threatened with possession proceedings and was likely to be angry and violent. Lord Hope stated that foreseeability of injury was not sufficient to establish a duty of care (para 15) and that as to the scope of any claim against the defendants as landlords:

"...the situation would have been different if there had been a basis for saying that the defenders had assumed a responsibility to advise the deceased of the steps that they were taking, or in some other way had induced the deceased to rely on them to do so. It would then have been possible to say not only that there was a relationship of proximity but that a duty to warn was within the scope of that relationship...."

DISCHARGING THE DUTY OF CARE: RISK ASSESSMENT

In the recently decided case of **Maddison Hufton v Somerset County Council** [EWCA] Civ 789, the Court of Appeal (Sir Andrew Morritt (Chancellor), Jackson LJ, Elias LJ) 7/7/2011 upheld a finding that a school was not liable to a pupil who had slipped and fell on pooled water deposited in a school hall by children who had not been physically prevented from entering the school when it had rained during a break. The school's defence per its risk assessment was that pupils were not permitted to enter the school on wet days and a sign placed on fire doors operated as an instruction to prefects to prevent pupils from entering the school. Inevitably there might be a delay between it starting to rain and putting up the sign: it was during this period that the pupil had slipped. The law did not require an occupier of premises to take measures which would absolutely prevent an accident from never occurring; all that was required was a reasonable exercise of care. The school had assumed responsibility for pupils who entered the school on wet days but had discharged its duty of care through its risk assessment that was both reasonable and appropriate.

MICHAEL BAILEY

DAVID WRIGHT

David joined Tanfield Chambers in 2007 as principal Commercial/Employment Clerk following 9 years at a leading Commercial /Employment and PI set. He is a qualified Barrister's Clerk and a Member of the Institute of Barristers' Clerks. He is very familiar with personal injury work and has a wealth of experience in clerking PI specialists. In his spare time David plays squash and badminton and has been a Scout leader at his local Troop for 14 years.

WHAT'S NEW

An amendment to Part 36 which comes into force on the 1st October 2011 to clarify the meaning of "more advantageous" and "at least as advantageous" [see rule 36.14(1A)].

For further information or to instruct a barrister, please contact **David Wright**, Principle Clerk or **Kevin Moore,** Senior Clerk on +44 (0) 20 7421 5300 or clerks@tanfieldchambers.co.uk

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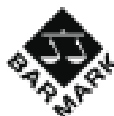

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