

Personal Injury Bulletin

Issue 1 - Summer 2007

It gives me great pleasure to introduce the first edition of the Tanfield Chambers Personal Injury Bulletin, produced by barristers in the Personal Injury Group. The aim of this quarterly Bulletin is to provide solicitors practising in personal injury law with a succinct update of recent developments or cases of interest. In this issue, Michelle Marnham considers a recent case relating to an employer's liability for work related stress, Tim Hammond examines the amended CPR 36, and Amanda Gourlay reports on some recent cases. Details of the forthcoming Tanfield Chambers Personal Injury Group Seminar Programme can be found on the back page.

Geraint Jones QC

WORK PLACE STRESS - HAS THE TIDE TURNED?

Following the recent decision of the Court of Appeal in *Intel Incorporation [UK] Ltd v. Tracy Ann Daw, [2007] EWCA Civ 70, [Lawtel 07/02/2007]*, it is likely that the number of claims by employees involving stress will increase.

In *Daw* the Court of Appeal upheld the trial judge's finding that Mrs Daw's stress and ill health had been caused by her employers' negligence.

The appellant employers appealed against judgment for Mrs Daw on her claim for personal injury caused by stress at work. Mrs Daw had worked for her employer since 1988 as a Finance Assistant and by May 2000 had become a Mergers and Acquisitions Payroll Integration Analyst. During her employment as finance assistance Mrs Daw had had two periods off work with post natal depression. The first occasion caused Mrs Daw to be absent from work for four months and the second for a longer period, though less than a year. Following her first occasion Mrs Daw had eight sessions of counselling with her employer's counselling service and on the second occasion she was under community psychiatric care. Only one of her managers, Mr Howell, was aware of the episodes of post-natal depression. In late 2000 and early 2001 Mrs Daw's workload was heavy and following a major re-organisation

Mrs Daw's reporting lines were blurred. Between September 2000 and March 2001 Mrs Daw had "protested" on at least 14 occasions to her managers complaining about her excessive workload, organisational problems, unclear management direction, perceived bureaucracy and concerns at promotion prospects. In March 2001 Mrs Daw was found by her manager in tears at her desk. She was asked to write down her problems which she subsequently did in a long email addressed to her manager. The email concluded "*I can not sustain doing the level of work that I am currently doing. No-one is getting a particularly good service, I am not enjoying what I am doing, bureaucracy is stressing me out [evidenced by my violent mood swings] - bad sign..been there before - twice, HR/PX are demoralising me and I want out*". Mrs Daw's evidence was that the reference to "*been there before*" was a reference to her previous episodes of post natal depression. Whilst this email was read by her manager, he did not focus on the last paragraph and did not appreciate the significance. Following the email Mrs Daw was informed that provision was to be made for a permanent post for M&A, and she was persuaded to stay in her role. The expected additional employee did not materialise and Ms Daw's health deteriorated leading to an attempted

suicide.

Golding J, at first instance, found that there were two connected elements which led to Mrs Daw's stress and breakdown. The first was that the reporting lines in her job were confused and there was a problem of prioritising between the demands made upon her by her different managers. The second was that she was provided with insufficient assistance and had to work excessive hours to get the job done. The judge found that in early March 2001 the appellants ought to have known that the demands made upon Mrs Daw were in the circumstances totally unreasonable and that the risk of her harm to health was clear. He held that had appropriate action been taken the significant breakdown would probably have been prevented. Any action after March 2001 would not have affected the outcome. Of note is that the judge at first instance found that:

- despite Mrs Daw's previous post natal depression, her employer did not have knowledge suggesting that Mrs Daw was "*susceptible to work related depression*". She was considered by everyone to be a "*capable resilient employee*";
- a reasonable employer would not consider Mrs Daw to be at a greater risk of stress related depression than the normal employee;
- the events prior to the beginning

of March 2001 would not have led the reasonable employer to foresee a real risk of injury to health. They were increasing complaints by an employee who appeared to be able to do her job.

- The manager should have read Mrs Daw's email with care and if he had not understood what the last paragraph meant he should have asked Mrs Daw. The Defendant's submission that the employer was not required to make searching enquires of the employee and is generally entitled to take what he is told at face value [a reference to one of HHJ Hail's propositions in Hatton - see paragraph 29 of Hatton] was rejected.

The Appellant's appeal was based upon two grounds. They submitted that given that pre-March 2001 complaints would not have led the reasonable employer to foresee a real risk of injury and that any action after March 2001 would not have prevented the breakdown, the window of opportunity in preventing a serious breakdown opened in March

2001 and closed in April 2001. This, they submitted, imposed a too high burden on the employer. Secondly they submitted that the employer had discharged their duty of care by providing a counselling service and medical assistance. It was argued that had Mrs Daw used the service, the seriousness and the urgency of the situation would have become clear. The Appellant's argued that there should be close adherence to the principles laid down in Hatton and that given that one of the practical propositions stated in Hatton was that that "*an employer who offers a confidential advice service, with referral to appropriate counselling or treatment services, is unlikely to be found in breach of duty*", the appellants should not be found to be in breach of duty.

The Court of Appeal rejected both arguments. Lord Justice Pill giving the Judgment of the court found that the Judge was fully entitled to hold that by early March, injury to Mrs Daw's health was reasonable foreseeable and that immediate action, in the reduction of

workload, was required. Lord Justice Pill recognised that there will be cases in which an employee may be expected to take refuge in the counselling services offered by its employer and that failure to do so would absolve the employer. The relevant fact in the instance case is that Mrs Daw had pointed out the serious management failings which were causing her stress and the failure to take action was that of management. Such failings by the management would not have been avoided by the provision of counsellors. At best the counsellors may have informed the management that action was required but Mrs Daw's managers knew that action was required. As Lord Justice Pill stated "*Reference to counselling services in Sutherland did not make such services a panacea by which employers could discharge their duty in all cases*".

MICHELLE MARNHAM

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CPR PART 36 – NEW RULES

Amendment

On 6 April 2007 CPR Part 36 was amended pursuant to the Civil Procedure Rules (Amendment No.3) Order 2006. This synopsis seeks to highlight the most significant changes.

Offer

Under the previous rules, whereas a claimant could simply make a written offer of settlement, any offer by a defendant would not have the consequences set out in CPR Part 36 unless a payment for the full sum offered was paid into court. Under the new rules a defendant can make a written offer and no longer has to make a payment into court.

For a defendant to make a valid Part 36 offer, however, the offer must include a term that payment will be made within 14 days (unless the claimant accepts a later date). If payment is not made within 14 days of acceptance, the claimant can enter judgment for the unpaid sum. Therefore before making a Part 36 offer a defendant needs to

be aware of the risk of judgment being entered against him if he does not pay as agreed.

Under the previous rules neither a claimant nor a defendant could make a Part 36 offer or Part 36 payment until after proceedings had started. CPR r. 36.3(2) sets out that a Part 36 offer may now be made at any time, including before the commencement of proceedings.

Withdrawal

Under the previous rules a Part 36 offer could be withdrawn at any time before acceptance whereas a Part 36 payment could be withdrawn or reduced only with the permission of the court.

Under the new rules both a claimant and a defendant require the court's permission to withdraw or amend a Part 36 offer during "the relevant period" (a period defined in CPR r. 36.2(2)(c) as being a period not less than 21 days). Neither claimant nor defendant now requires the permission of the court to

withdraw or amend a Part 36 offer after the expiry of "the relevant period".

Acceptance

Under the previous rules a Part 36 offer or Part 36 payment was open for only 21 days, during which period it could be accepted without the permission of the court. After the period of acceptance had lapsed, it was necessary for the party seeking to accept the offer out of time to obtain the permission of the court if the parties could not agree the liability for costs. Under the new rules if an offer has not been withdrawn it can be accepted after "the relevant period" has expired without the permission of the court.

The offeror must therefore constantly keep the offer that he has made under review. He will need to consider how developments in the case affect his position and withdraw or amend his offer accordingly.

Costs and other consequences

A judgment obtained by a claimant need

now only be “at least as advantageous” (rather than “more advantageous” in the previous rules) as that claimant’s Part 36 offer for the claimant to benefit from the Part 36 enhanced costs and interest entitlements. A claimant must fail to obtain a judgment more advantageous than a defendant’s Part 36 offer for that defendant to be entitled to his costs from the date upon which “the relevant period” expired.

Under CPR r. 36.14(2)(b) a defendant is now entitled to interest upon any costs that he is awarded. There is however within CPR r.36.14 neither a reference to the rate at which interest should be calculated upon a defendant’s costs nor an indication as to whether a defendant’s costs should be on the indemnity basis.

Transitional provisions

Any Part 36 offer or Part 36 payment made before 6 April 2007 that would

have had the consequences set out in CPR Part 36 as it was in force immediately prior to the amendment will have the consequences set out in the amended rules. If, however, the permission of the court would have been required in order to accept the Part 36 offer or Part 36 payment under the previous rules, permission will still be required.

TIM HAMMOND

CASE REPORTER

Cole v (1), (2) Davies-Gilbert, (3) The Gilbert Estate, (4) East Dean and Friston Parish Council, (5) The Royal British Legion [2007] EWCA Civ 396

CA (Civ Div) (Sir Igor Judge (President), Laws LJ, Scott Baker LJ) 1/3/2007

A hole for a maypole was dug in the East Dean village green in 1977 and used annually by the Brownies for dancing at the village fête organised by the Royal British Legion.

After the fête in 1999, the hole was filled in by an elderly war veteran who inserted a wooden bung and dressed the gravel around the top.

There was no maypole dancing in 2000 owing to a shortage of Brownies.

The Claimant suffered injury when she caught her leg in the hole in April 2001.

At first instance the judge accepted that “*following the fête in 1999 the hole had been properly sealed up [by the RBL] and was therefore safe*”. He nonetheless held the RBL liable for the Claimant’s injury. The RBL appealed.

Scott Baker LJ, giving the leading judgment, could find no evidential basis for the RBL having breached their duty of care. More particularly, he found that there was no causative link between Mrs Cole’s injury and the exposure of the hole. 21 months had passed between the filling in 1999 and the accident. He concluded that the hole was likely to have become exposed

relatively shortly before the accident, the most probable cause being children playing. Implicitly, he refused to accept the Claimant’s case that the RBL had an ongoing duty to ensure that the hole remained adequately filled.

In judgments strongly redolent of Denning LJ’s observations in *Miller v Jackson* [1977] QB 966, their Lordships expressed anxiety about the inhibitory effect of setting too high a standard of care: “*there would be no fêtes, no maypole dancing and none of the activities that have come to be associated with the English village green for fear of what might conceivably go wrong*”.

Laws LJ found that “*the law imposes no absolute duty in circumstances like this to keep the area of land in question safe*”.

The Court of Appeal judgment highlights two points:

- 1) whilst it is arguable that this decision was motivated for policy reasons, liability is not strict in common law negligence;
- 2) causation is live issue in actions where considerable time passes between alleged negligence and injury.

The limitations of limitation

McCoubrey v Ministry of Defence [2007] EWCA Civ 17

CA (Civ Div) (Ward LJ, Neuberger LJ, Tugendhat J) 24/1/2007

A thunderflash exploded near the Claimant in 1993 when he was on army exercises. A day or so later the hearing in his left ear deteriorated. In early 1994 his hearing was markedly reduced.

In 2001, his army status was temporarily downgraded. He was formally downgraded in 2003 and told by his colonel that he was likely to be permanently excluded from active service.

In 2004, nine years after the thunderflash explosion, he issued a claim, relying on s.11(4)(b) of the Limitation Act 1980 (special time limit for actions in respect of personal injuries).

The judge looked at both the severity of the injury itself and the effect of the injury on the Claimant’s quality of life and ability to follow his chosen career and permitted him to rely on s.11(4)(b) LA 1980. The MoD appealed on the meaning and application of s.14(2) of the 1980 Act (definition of date of knowledge for the purposes of s.11), which dealt with whether an injury was “significant”.

The Court of Appeal held that the test under s.14(2) was substantially objective. The question of whether an injury was “significant” within s.14(1)(a) should be based on the seriousness of the injury, and not on its effect on the claimant’s private life or career.

S.11(4)(b) and s.14 should be relatively narrowly construed, bearing in mind that s.33 LA 1980 (discretionary exclusion of time limit for actions in respect of personal injuries and death) was available as a fall back position.

Ultimately the fact that the injury did not lead to any setback in M's career until 2001 was not an appropriate reason for holding that time did not start running under s.11(1)(b) until 2001. M had all the information he needed about the injury by early 1994. The requirements of s.14(2) had not been satisfied.

Establishing breach of the Highway Code does not raise a presumption of negligence: burden of proof for contributory negligence

Wakeling v McDonagh, MIB [2007] EWHC 1201 (QB)

Judge Mackie QC 25/5/2007

The Claimant suffered catastrophic injuries when he was knocked off his bicycle by the First Defendant, who was driving at over 50mph under the influence of crack cocaine in a 30mph zone.

Liability was conceded by the MIB, subject to argument on contributory negligence.

The case for contributory negligence was based on the Claimant's riding out from behind the parked van into

the path of the First Defendant, failing to wait for him to pass, and failing to ensure that it was safe to cross before attempting to do so.

The judge found that

a) breach of the Highway Code does not create a presumption of negligence, but was a factor for the court to take into account in reaching its decision *Powell v Phillips* [1972] 3 All ER 864, b) in any event, the Claimant had in all likelihood checked the road before moving out: to do otherwise would be "contrary to the simple and deep instinct for self-preservation ... quickly acquired by anyone of any age ... when cycling on London's roads", and c) the Claimant was deceived by the speed of the First Defendant's car.

Mindful that the burden of proof for contributory negligence rested with the Defendants, the judge concluded that on the evidence available – of which there was little, the Claimant being too seriously injured to give evidence, and the First Defendant not appearing – the Defendant had not discharged the burden of proof for contributory negligence. S.1(1) Law Reform (Contributory Negligence) Act 1945 required that the Defendants establish on the balance of probabilities that the Claimant was at fault, that the fault had caused the injury suffered and that it was just and equitable to reduce the Claimant's damages.

AMANDA GOURLAY

DIARY DATES

Thursday 8th November 2007 6pm Tanfield Chambers
"Accidents Abroad" – Kerstin Boyd,
"Work Related Stress" – Peter Linstead,
The New Ogden Tables [6th Edition] – Michelle Marnham

The Lecture carries CPD points and is followed by refreshments. To book a place please contact Susan Yacoub on 020 7421 5300. The seminars will be credited for 1 ½ hour CPD. Registration will start at 5.45 and the seminar will start promptly at 6.00 pm.



For enquiries about Personal Injury advice and representation, please contact Matthew Wildish, Principle Clerk by email at mwildish@tanfieldchambers.co.uk or on 020 7421 5300. Please see our website for more details and individual profiles at www.tanfieldchambers.co.uk.

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