

theView



CASES REVIEWED IN THIS ISSUE

Psychiatric injury	<i>Hartman v South Essex Mental Health & Community Care NHS Trust</i>
Pre-action protocol	<i>Cunningham and others v Orange Plc</i>
Causation	<i>Gregg v Scott</i>
Vicarious liability	<i>Hawley v Luminar Leisure Plc and others</i>
Limitation	<i>McGhie v British Telecommunications Plc</i>
Expert evidence	<i>Armstrong and another v First York</i>
Asbestos	<i>James Maguire (personal representative of the estate of Theresa Maguire deceased) v Harland & Wolff Plc and another</i>
Occupiers' liability	<i>Searson v Brioland Ltd</i>
Costs	<i>Salmonini v London General Transport Services Ltd</i>
Quantum	<i>Ernest v Gould (fractured right ulna)</i>
	<i>Mitchell v Alasia (severe closed head injury)</i>
	<i>Walker v Midland Electricity (neck and shoulder injury)</i>
	<i>Andrews v Earby (neuropaxia)</i>
	<i>Kennedy v Reading Borough Council (dominant right hand)</i>

News watch

Pleural plaques

A ruling on whether claimants who have pleural plaques but not yet developed any illness can recover damages is awaited. Norwich Union, Zurich Insurance and the Department of Trade & Industry potentially face more than 500,000 claims if the claims are allowed.

Alzheimer's drugs used to treat brain injuries

Recent studies show that drugs used to treat Alzheimer's patients could benefit sufferers of head injuries. The drugs, cholinesterase inhibitors, boost the chemical acetylcholine and help minimise the effects of injury.

Warning signs

APIL has called for high-visibility warnings on 'psychoactive' medicines to warn people that they can dangerously impair judgement and cause serious injury. A Bill dealing with the issue has been introduced in the House of Commons.

Unfair dismissal

A district nurse who injured her neck when the strap on her bag snapped has been awarded £70,000 in an unfair dismissal claim. Diane

Whitten was sacked by Camden & Islington Community Health Care Services because she could not carry out normal duties due to her injuries. The employment tribunal found that the trust had failed in its duties under the Disability Discrimination Act and should have retrained the applicant.

Employers' liability - psychiatric injury; stress at work

Hartman v South Essex Mental Health & Community Care NHS Trust; Best v Staffordshire University; Wheeldon v HSBC Bank Ltd; Green v Grimsby & Scunthorpe Newspapers Ltd; Moore v Welwyn Components Ltd; Melville v The Home Office [2005] EWCA Civ 06
Court of Appeal - Lord Phillips MR, Tuckey and Scott Baker LJJ
19 January 2005

Appeals in these six claims were heard together. The Court of Appeal started from the premise that the practical guidelines given by the Court in *Sutherland v Hatton* [2004] applied but that each case must be deter-

mined on its facts. The overall test remains the conduct of the reasonable employer taking positive action for their worker's safety in the light of what they ought to know. The cases turned on whether foreseeable injury flowing from the employer's breach of duty gave rise to liability.

- (i) In *Hartman*, the judge had found that H was in a high risk occupation (a nursing auxiliary nurse in a centre for children with learning disabilities) and that imposed upon the employer a higher than normal standard of alertness in respect of the risk of psychiatric injury. H's employment was terminated as a result of her ill health from depression and anxiety. The judge found that, but for pressures at work, H would not have become so chronically ill or been off for so long. The employer was found to have failed to protect H from foreseeable harm in that it knew of her pre-existing vulnerability and that there had been complaints of staff shortages. The Court of Appeal disagreed and allowed the employer's appeal. There was no basis for the conclusion that the employer should have a higher state of alert-

ness to risks that its employees would suffer psychiatric injury. H's disclosure to the occupational health department of previous mental health problems was confidential and the employer could not be fixed with such knowledge. There was no evidence that H could not cope with her work despite the general complaints of lack of staff. It was not reasonably foreseeable that H would suffer psychiatric injury and her employer was not in breach of duty.

- (ii) In *Best*, the claimant was a senior university lecturer. He retired through ill health following a breakdown. The judge concluded that the employer knew of the excessive work burden on B and had sufficient information to realise that B was at real and immediate risk of a breakdown. Again the Court disagreed and allowed the appeal, holding that the finding that B's breakdown was reasonably foreseeable was vitiated by errors of fact on the judge's part and contrary to the weight of evidence. B's failure to use the university's counselling service, although not fatal to his claim, was a factor the judge should have taken into account and given credit for when considering whether the university was in breach of duty. There was no basis for finding that the employer should have foreseen B's breakdown.
- (iii) In *Wheeldon*, the judge held that W had given up her job as a part-time senior customer services representative as a result of a moderate depressive episode with panic attacks. The bank had been aware of impending harm to W, through its occupational health department, but had failed to discuss the issue with her. Whilst noting that it would only be in exceptional circumstances that a part-time employee would be able to successfully claim in a claim for injury caused by stress at work, the Court held that the bank had breached its duty to W by failing to act on its own medical advice and take steps to reduce the stress on her. The judge was entitled to find on the medical evidence that this breach of duty had caused W to suffer an unidentifiable psychiatric injury. Appeal dismissed.
- (iv) Mr Green was a chief sub-editor. He retired through ill health following a breakdown. He had written a memorandum complaining about his workload and the effect it was having on his health. The judge found, and the Court of Appeal held that it was reasonable for him to find, that G's employer had responded reasonably to the memo and could not have foreseen that his inability to cope was more than occupational stress.

- (v) Mr Moore retired through ill health due to sustained bullying by a colleague. The employer appealed a finding of liability on the grounds that the damages for loss of earnings should have been apportioned to take account of factors not related to work. The Court held that, once the work-related stress had been shown to be the cause of M's loss of earnings, it was for the employer to show that there were other potential causes as well in order for damages to be apportioned. The employer had failed to show this and the only non-negligent stressors were related to M's work.
- (vi) Mr Melville was a prison health care worker. He retired with a stress-related illness after dealing with an inmate's suicide, one of eight he had been required to attend to. The foreseeability of M's illness was tried as a preliminary issue and decided in his favour. The employer appealed on the ground that the judge had erred in finding it liable for M's stress-related injury because it had identified a risk of harm to a group of workers rather than considering whether M had shown signs of impending injury. The employer argued that M had given no indication that he was developing mental problems before going off sick. The Court held that the employer had foreseen the risk of injury for the type of work but had failed to implement a system that it had designed to deal with that risk - a 'lamentable' failure. The Court cautioned that the mere fact that an employer offers an occupational health service should not lead to the conclusion that the employer has foreseen risk of psychiatric injury due to stress at work to any individual or class of employees but the availability of such a service makes it less likely that the employer will be in breach of duty if such injury does occur.

Andrew Hogarth QC for the appellant South Essex Mental Health & Community Care NHS Trust

Andrew Glennie for the respondent Hartman David Platt, M Boyle for the appellant Staffordshire University

Kathleen Anderson, S Wright for the respondent Best Robert Stokell for the appellant HSBC Bank Ltd

Richard Seabrook for the respondent Wheeldon

Julian Matthews for the appellant Green Richard Swain for the respondent Grimsby & Scunthorpe Newspapers Ltd

Winston Hunter QC, Simon Burrows for the appellant Welwyn Components Ltd

Simon Dyer for the respondent Moore Wendy Outhwaite for the appellant Home Office

Nigel Cooksley QC for the respondent Melville

Pre-action protocol - failure to comply; costs

Cunningham and others v Orange Plc [2005]
High Court - Master Turner
13 January 2005

Orange Plc has been ordered to pay £15,000 in costs to telephonists who sued the company for damages claiming that their hearing was affected by loud acoustic shocks at work. Orange failed to respond to repeated requests for a decision on liability and to provide disclosure. The defendant was also ordered to give specific disclosure of documents requested by the claimants and to pay £2,500 costs on account of the costs of that application. The case is a warning to any party that fails to comply with the pre-action protocol for PI claims.

Simon Dyer for the claimants

Causation - delayed diagnosis; loss of a chance

Gregg v Scott [2005] UKHL 2
House of Lords - Lords Nicholls, Phillips, Hoffmann and Hope and Baroness Hale
27 January 2005

The House of Lords has again been tested on the issue of loss of a chance in the context of clinical negligence claims. The House was divided (3:2, Lords Nicholls and Hope dissenting), the majority finding in favour of the medical practitioner and dismissing the claimant's appeal. Lord Phillips indicated that perhaps Gregg was not, on its facts, the right case to challenge whether a claimant has a claim for the reduction in his prospects of recovery and the lost chance approach might be appropriate in less complex cases.

In Gregg, the defendant GP negligently misdiagnosed a lump under the claimant's arm and failed to refer the claimant to a specialist consultant, resulting in a nine-month period of delay before the claimant was diagnosed as suffering from non-Hodgkin's lymphoma. By then the cancer had spread. Expert evidence was that, as a result of the delay, the chance of a 'cure' for the claimant, defined as 10-years survival, was reduced from 42% to 25%. Treatment was aggressive and painful. At first instance the judge held, following *Hotson v East Berkshire Health Authority* [1987], that the claimant could not show on the balance of probabilities that, even if diagnosis and treatment had been prompt, he would have a greater than 50% chance of surviving for 10 years and dismissed the claim. The claimant appealed but the majority of the Court of Appeal upheld the decision. Damages for loss of a chance could not be awarded in a clinical negligence claim such as this. The claimant had to show he had a greater than 50%

chance of surviving or he would recover nothing at all. The claimant had failed to prove that the delay had caused a diminution in life expectancy and therefore no question of quantification arose.

On appeal the claimant argued a 'quantification approach': the reduction in the chance of a cure should be treated as a matter of quantification rather than a causation issue. He argued that claimants who had suffered a reduction in their prospects of survival due to the defendant's negligence should be able to recover damages. The majority dismissed this approach. A reduction in the chance of survival was not a recoverable head of damage. The claimant's argument that as a matter of policy the law should recognise loss of chance in clinical negligence claims found favour with Lord Nicholls (who criticised the established approach and held that the law should recognise the existence and loss of poor and indifferent prospects, the difference being reflected in the amount of compensation payable rather than there being no liability at all), but not with the majority who noted the potential complication and increase of personal injury claims by the adoption of 'possible rather than probable causation as the criterion of liability'.

Simeon Maskrey QC and Julian Matthews for the claimant

Philip Havers QC, William Edis and David Manknell for the defendant

Vicarious liability - temporary employment

Howley v Luminar Leisure Plc and others [2005]

High Court - Mr Justice Wilkie
10 January 2005

In August 2000, the claimant was assaulted by a doorman after leaving the first defendant's club. The doorman, a Mr Warren, was an employee of the second defendant, ASE Security Services Ltd, which provided security services to the club. The claimant was punched so hard on the jaw that he fell backwards and struck his head on the pavement causing severe brain injury. Warren was successfully prosecuted and convicted of inflicting grievous bodily harm. The claimant brought an action against both the club and the security firm alleging that they were both responsible for Warren's actions, the first defendant being the temporary deemed employer for the purpose of vicarious liability.

The second defendant was put into voluntary winding up in May 2002. Faraday Underwriting Ltd, the nominated underwriter of ASE, was joined as third defendant. The claimant sought leave to amend its claim to plead s1(1) of the Third Parties (Rights Against Insurers) Act 1930 and take advantage of the insurance policy between ASE and Faraday. Luminar denied that Warren was an employee or tem-

porary employee at the material time and denied vicarious liability. Faraday argued that it was liable to indemnify ASE for damages arising from 'accidental bodily injury' and not from an intentional assault.

The matter came before the judge on the following issues:

- (i) was Warren a temporary employee of Luminar such as to fix them with vicarious liability; and
- (ii) was the liability attaching to ASE to be regarded as a liability for accidental bodily injury within the meaning of the policy.

The manner and extent of the control that Luminar had over ASE's employees was such as to make Warren a temporary deemed employee for the limited purpose of establishing vicarious liability on that night. A contract signed by ASE to maintain employer and public liability insurance and giving an indemnity to Luminar against all liabilities arising from the provision of its services or any acts, omissions or defaults of its door stewards did not operate to override Luminar's liability.

On the indemnity issue, it was a question of from whose perspective the bodily injury had to be seen as accidental. The insurance was for public liability and the focus of the policy was the assured and not that of the victim. ASE's liability did fall within the policy.

Brain Langstaff QC for the claimant

Limitation - proportionality; balance of prejudice test

McGhie v British Telecommunications Plc [2005] EWCA Civ 48

Court of Appeal - Buxton and May LJJ
18 January 2005

The judge was held to be wrong to have exercised his discretion under s33 of the Limitation Act 1980 in the claimant's favour without evaluating the issue of proportionality. The claimant had injured his back whilst working for the defendant in 1988. He issued proceedings five years later after being advised that he should have been sent on a training course and provided with special equipment. He had a pre-existing history of back problems. Limitation was pleaded and the matter heard as a preliminary issue. The judge based his decision on the claimant's devotion to his job and that he had acted reasonably, which was not the statutory test. The judge made no reference to the balance of prejudice. There was no evidence as to what a prudent employer would have done in 1988 and the case was based on hearsay. The claim was modest and, applying the balance of prejudice test, it was wrong to exercise discretion in the claimant's favour and allow the claim to proceed out of time.

Ben Leech for the defendant
Roger Eastman for the claimant

Expert evidence - flawed evidence; honest claimants

Armstrong and another v First York [2005] Court of Appeal - Brooke, Arden and Longmore LJJ

17 January 2005

The claimants alleged that, although there had been little damage to the car in which they were travelling when hit by a bus owned by the defendant, they sustained neck and spinal injuries. The effect of the defendant's expert's opinion was that there had been insufficient movement to the car to have caused 'occupancy displacement' sufficient to have caused the injuries claimed and basically the claimants were making a false claim. The judge found that the claimants were honest and reliable witnesses, not making up their claim and also that the expert's opinion was logical and, on its face, flawless. The judge concluded that as he refused to find that the claimants were fraudulent, it must follow that the expert's evidence was somehow flawed, although he could not identify any flaw. He found the defendant liable. The defendant appealed, arguing that where the judge was faced with uncontroversial expert evidence which he found reasoned and logical he had to apply a credible, reasoned rebuttal in order to make a finding against it.

The Court held, dismissing the appeal, that the judge did give clear reasons for his decision - his finding that the claimants were honest witnesses and that their evidence was supported by the medical evidence. There was no principle that an expert witness must be preferred, compelling the judge to find the witnesses fraudulent. Particularly in a developing field such as accident reconstruction, there was a possibility that the expert could be wrong, even if the judge could not identify a flaw.

Timothy King QC and Michael Jones for the claimants

Marcus Grant for the defendant

Asbestos - foreseeability; familial exposure

James Maguire (personal representative of the estate of Theresa Maguire deceased) v Harland & Wolff Plc and another [2005]

EWCA Civ 01

Court of Appeal - Judge, Mance and Longmore LJJ

26 January 2005

Mrs Maguire (M) contracted mesothelioma as a result of exposure to asbestos dust carried home on her husband's work clothes. Her

husband had been negligently exposed to asbestos dust between 1961 and 1965 and breach of duty for that exposure was admitted by his employers, the defendants. The defendants appealed against the judge's finding that they ought reasonably to have foreseen at that time that M was at risk of contracting pulmonary injury from her secondary exposure.

The Court held that before 1965 there was no suggestion from industry, those responsible for health and safety or the medical profession that it was necessary or prudent for risks arising from familial exposure to be addressed. It was not foreseeable at that time that a wife who washed the clothes of her husband who had been exposed to asbestos would be subject to the risk of personal injury. The defendants' failure to appreciate the risk and take precautions before 1965 was not negligent.

Mance LJ dissented, holding that the defendants had negligently exposed the husband to such a degree and shown such disregard for their employees' safety that injury to others like M was sufficiently foreseeable for there to be liability. Arguably, claims based on secondary exposure prior to 1965 therefore remain possible.

An appeal to the House of Lords is likely.

David Allen QC for the claimant
Charles Feeny for the defendants

Occupiers' liability - raised doorway; egg shell skull rule

Searson v Brioland Ltd [2005]
Court of Appeal - Buxton, May and Sedley
LJJ
24 January 2005

The claimant was seriously injured when she tripped over a threshold raised by approximately 3cm when leaving the defendant's hotel. There was no warning or notice to advise of the step. The Court held that the judge could not be shown to be in error in finding that it was reasonable to expect a raised threshold in a doorway when entering premises but not when leaving. The claimant acted reasonably despite the fact that no one else had tripped over in the same doorway. The defendant's argument that in excess of one million people had passed through the same doorway without incident did not establish that the doorway was not a hazard. The defendant had to take the claimant as it found her.

James Counsell for the claimant
William Norris QC and Lee Evans for the defendant

Costs - CFAs; enquiries as to alternative funding

Salmonini v London General Transport Services Ltd [2005]
Chief Master Hurst
28 January 2005

The claimant's costs were disallowed in total on detailed assessment on the basis that there was insufficient evidence to show that the claimant's legal representatives had made proper enquiries as to the existence of alternative legal expenses insurance. The Costs Judge upheld the decision of the Principle Costs Officer and dismissed the claimant's appeal. The court was entitled to look behind the solicitor's signature on the bill because as the claimant was a taxi driver it was unusual that he did not have BTE insurance and this required investigation. There had been a breach of the Conditional Fee Agreement Regulation 4(2)(c) as the enquiries made by the solicitor and/or AAH were inadequate and insufficient to comply with the Regulations. The breach had a materially adverse effect upon the protection afforded to the client as the client had entered into a CFA, a loan agreement and an ATE insurance policy. The CFA was unenforceable and no costs could be recovered under it.

Quantum

Fractured right ulna
Ernest v Gould [2004]
Cardiff County Court - HHJ Jones
22 November 2004

The claimant was hit by the defendant's vehicle whilst using a pelican crossing. He was thrown into the air, landing heavily on his head and neck. Liability was admitted. Claimant aged 37 at the date of the accident and 42 at award. He suffered a fracture to the mid-shaft of his right ulna, a temporary dislocation of his elbow, soft tissue injuries to his neck and to the medial/cruciate ligaments of his right knee plus generalised bruising. An operation was required to immobilise the arm with a plate and bone graft and a further operation to remove the plate. He required a knee brace for six months. There was some restriction of the arm with pain at extreme movement. A pre-existing back condition was aggravated. He suffered anxiety and flashbacks. All symptoms resolved within a year of the accident. Award: £54,358.33 including £13,000 for PSLA and £3,000 future loss of earnings/handicap in the labour market

Severe closed head injury
Mitchell v Alasia [2005]
High Court - Mrs Justice Cox
11 January 2005

The claimant was hit by a car in May 2001 and suffered a head injury which resulted in

an inability to control his temper, impaired concentration and an altered personality. The defendant made no admission of liability and settlement was agreed on a 60% liability basis. The claimant made a good physical recovery but was noted to have 'tremendous difficulties' with his short term memory. He had had a difficult childhood, getting into trouble in his early teens and leaving school with no qualifications, but was described as 'easily led' rather than 'delinquent'. The judge found that the claimant, aged 22 at trial, was unlikely to ever work again.

Award: £511,000

Nicholas Hillier for the claimant
Edward Faulks QC for the defendant

Neck and shoulder injury
Walker v Midland Electricity [2004]
Mayor's & City of London County Court - HHJ Cox QC
8 November 2004

The claimant was working 40 feet up an electricity pole when it broke, colliding with his face and leaving him suspended by his harness. Liability was admitted. The claimant sustained a whiplash-style injury to his neck, a lesion to the nerve root in his neck and two fractured front teeth. The neck injury caused permanent pain and restriction of movement in the left shoulder. He suffered from depression and an adjustment disorder following the accident. He did not work for 14 months and then returned to lighter duties.

Out of court settlement: £325,000 including £17,500 for PSLA and £246,000 for future loss of earnings.

Andrew Ritchie for the claimant
Neil Thompson for the defendant

Neuropraxia
Andrews v Earby [2004]
Liverpool County Court - District Judge Humphreys-Roberts
18 February 2004

The claimant sustained an injury whilst carrying a gas turbine blade during the course of his employment as a machine operator for the defendant. He alleged breach of the Manual Handling Regulations 1992. Liability was admitted. The 45-year-old claimant sustained a soft tissue injury and a traction-type injury to the left side of his neck. This caused neuropraxia of the seventh cervical root, causing paraesthesia and weakness of the left hand. He was still in constant pain three years after the accident. The claimant was placed at a disadvantage on the open labour market. The claimant was offered work with the defendant as a manager but the court found that this was not a realistic prospect.

Award: £14,000 including £7,500 for PSLA and £5,000 Smith v Manchester award

Jeremy Greenfield for the claimant

Dominant right hand
Kennedy v Reading Borough Council
[2004]
Oxford County Court - District Judge
Matthews
28 November 2004

The 11-year-old claimant was playing on his school's playing field when he put his hand down on a broken bottle and sustained serious lacerations to his right hand and forearm. Liability was denied, the defendant stating that it operated a reasonable standard of inspection and relied on outside contractors to keep the fields tidy. The claimant was unable to bend his fingers fully and had no feeling in the fingers. His ability to write and type was impaired. He had problems gripping properly and in particular could not grip tools which hampered his desired career as a car mechanic. The scarring on his forearm was permanent.

Award: £15,450 including £10,000 for PSLA, £3,500 for handicap on the labour market and £1,500 for loss of congenial employment

James Aldridge for the claimant
Daniel Shapiro for the defendant

Please contact Jason Rowley at the address below if you wish to discuss these or any other legal matters.

Jason Rowley
Managing Partner
Vizards Wyeth
Riverbridge House
Anchor Boulevard
Crossways
Dartford
Kent DA2 6SL

City office
Asia House
31-33 Lime Street
London EC3M 7HT

Tel: 020 7400 9999
Fax: 020 7400 9990
email: jr@vizardswyeth.com