

Brain injury claim settles

Instructions were received in May 2008 to resolve a long running claim which stemmed from a road traffic accident on 26 May 1995.

The claim involved a minor, aged ten at the time. It had been handled for insurers by another solicitor without substantial progress despite the issue of proceedings and two subsequent case management conferences. Primary liability was not disputed but contributory negligence remained in issue.

The claimant had suffered a severe diffuse brain injury as well as a right sided lung puncture with possible rib fractures. Neurological evidence had been obtained by both parties, together with evidence from a consultant paediatrician and an orthopaedic surgeon, plus a joint employment report. Despite his injuries, the claimant still possessed legal capacity.

There were difficult issues to be resolved, particularly regarding the claimant's employability and consequent future loss of earnings claim in the context of the claimant's educational background and susceptibility to ongoing seizures.

Following receipt of instructions an immediate ex parte application was made to the court seeking full disclosure of all relevant documentation coupled with strike out provisions for non compliance. A Part 36 offer was made to the claimant at the same time in the net sum of £70,000. The court granted the order as sought and the claimant was consequently persuaded to accept the offer as presented.

The claimant's schedule alone was in excess of £450,000 excluding general damages. The claim was settled promptly and economically only one month after instruction.

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Limitation in industrial deafness claims:

John Field v British Coal Corporation (2008)

In this case the claimant (C) was employed by the defendant (D) at a colliery from 1982 to 1995.

C first consulted his doctor in 1985 complaining of mild hearing loss and a build up of ear wax and infections. No firm diagnosis was made at this time.

In November 2003 following a further consultation he was diagnosed with mild noise induced hearing loss and he claimed damages for negligence and breach of statutory duty against D.

In the trial at first instance, the judge held that, following a consultation in March 1998, C had been in a position to know that he had some hearing impairment not caused by wax or infection and he should have reasonably taken steps to enquire as to the cause of the problem. Consequently the judge concluded that C had constructive knowledge in 1998 that his injury was significant within the meaning of Section 14 (2) of the Limitation Act 1980 and his claim was time barred. Further the judge declined to exercise discretion under Section 33. C appealed against this decision.

The Court of Appeal found it difficult to reconcile the judge's conclusions. On one hand he appeared to be saying that C had

been aware in 1998 that he had a minor problem with his hearing which was not caused by wax or infection and a reasonable person would have taken steps to investigate this. On the other hand it was not until November 2003 that C had knowledge that his reduced hearing was due to anything other than wax and infections.

The Court of Appeal concluded that C had not known that the injury was significant until November 2003, consequently the claim was brought within the time period allowed by Section 11 and the appeal succeeded.

This does give a good indication of the court's attitude when considering the question of constructive knowledge in noise induced deafness claims.

It is our experience that there are frequently entries within the medical records relating to a minor hearing disability, such as build up of wax and ear infection. Often such problems are age related of course. It is our experience (and is supported by this case) that generally it is unreasonable to expect claimants with minor hearing problems to take further action, but clearly each case should be considered on its own individual facts.

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Health & Safety prosecution and related civil claim

We recently handled a health & safety prosecution and civil claim arising from an incident on a reclamation yard. A casual employee, aged eighteen, drove a forklift truck which toppled over on to his left leg resulting in an amputation below the knee. The employee did not have a forklift truck driving licence.

The company was prosecuted under section 2 of the Health & Safety at Work Act (HSWA)1974, Regulation 12 of the Work Place (Health, Safety & Welfare) Regulations 1992, and Section 3 of the Management of Health & Safety at Work Regulations 1999.

Following the case of *R v Chagot* (2007) CA the prosecution can now rely on the accident itself to prove there was a risk to employees and establish its case under section 2 HSWA 1974. The onus is then firmly on the defendant to show that it did everything reasonably practicable to avoid the risk.

In this case the defendant had not completed any written risk assessments. Although the claimant was given an induction session in which he was told not to drive the forklift truck and trained on each task he was given, the training and induction were not documented. Also, there was some evidence to suggest that the claimant and another casual employee had driven the forklift truck in the past unnoticed by the defendant. This raised difficulties in proving that there was adequate supervision. Additionally the road surface where the claimant drove the fork lift truck was potholed and the defendant had been served with an Improvement Notice.

Having considered all the evidence in detail a guilty plea was entered with a view to reducing the amount of the fine as much as possible. This was a serious case in terms of the injury suffered and the nature of the charges against the defendant. There was a real risk that the case could be committed to the Crown Court.

We successfully negotiated with the prosecution and guilty pleas were entered in relation to the first two charges on the condition that the third charge was dropped. A basis of plea was drafted and we ensured the hearing was listed with a time estimate of 1½ hours with a view to the magistrates hearing the facts and sentencing in one hearing. The tactic paid off and the magistrates heard and sentenced the matter without the case being committed.

Mitigation arguments were put forward explaining the undocumented systems the defendant had in place and that the poor surface of the road was not causative of the accident. Out of a potential fine of £25,000 plus costs the defendants were fined only £7,400 inclusive of costs.

Concurrently the claimant's solicitor was threatening to issue

proceedings in the civil claim. Although a guilty plea was entered in the criminal prosecution, liability had not previously been admitted in the civil claim on the grounds that limited evidence had been presented and witnesses for the defendant would confirm that the claimant had acted contrary to specific instructions. However, the evidence in the criminal prosecution revealed some weaknesses in the civil claim and consideration was therefore given to settlement.

The claimant subsequently served a schedule of special damages in the sum of £12,000.00. In the context of the serious injury suffered and the reserve held this was surprisingly low. A global offer was therefore made in sum of £50,000 inclusive of recoverable benefits and the claimant's costs with no admission of liability. Following further discussion the claimant was persuaded to accept £50,000 gross of CRU plus costs of £7,000.

This represented a good commercial settlement in both the criminal and civil claims for insurer and insured alike.

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Carver v BAA (2008) - a significant negotiating tool

We recently settled a claim using the decision of *Carver v BAA* to argue that the defendant should not be liable for any costs after a Part 36 payment into court was made in March 2007.

We made the payment in based on a careful analysis of the claimant's medical evidence and pleaded case, arguing that any losses should be restricted to one year. Eighteen months of litigation ensued with the claimant refusing to accept this. He changed solicitors but essentially his claim did not alter and we obtained an order debaring him from claiming any further special damages.

There was some risk that the claimant would be awarded slightly more at trial depending on the Court's finding on the extent of his psychiatric and orthopaedic injuries but we did not believe he would be awarded much more and certainly not enough to justify eighteen months of litigation.

The claimant's second solicitors were eventually persuaded that the risks were such that the claimant might have to pay all the costs post payment in. Ultimately a commercial settlement was reached with each party agreeing to bear their own costs after March 2007.

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