



Bond Pearce

Insurance briefing - Catastrophic Injury and Casualty Risks

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Introduction

In this edition we look at a series of road traffic cases involving motorcyclists and some welcome decisions for insurers on countering fraudulent claims, interim payments and costs.

Welcome to our regular review of significant liability cases and other legal developments.

Road traffic accidents

Motorcyclist takes the blame for injuries sustained by horse-rider

Devereux v Hayward and another [2011] EWHC 2780 (QB)

The issues: Was a motorcyclist to blame when a horse bolted as it approached? Should the horse-rider have dismounted or moved her horse onto the verge?

The facts: C was badly injured when her horse bolted after a motorcyclist (D) approached at speed. The facts were disputed, with C claiming that the excessive noise and speed of D's motorbike had caused her horse to bolt and D claiming that he had reduced his speed down from 45mph after spotting the horse but that it had suddenly reared and turned to flee.

The decision: The judge found that D was at fault in coasting past the horse, rather than braking to reduce his speed and noise. If he had slowed to 20-25mph and steered to the left to pass, it was unlikely C's horse would have reacted as it did. The accident was therefore caused by D's failure to control his motorbike due to his excessive speed.

C was not negligent in failing to dismount or move her horse onto the verge. She was riding a horse she knew to be stable and not easily spooked in traffic and was entitled to assume that she could safely proceed along the carriageway as the motorbike approached. There was no discount for contributory negligence.

Comment: This decision demonstrates the caution which all motorists, but particularly drivers of noisy vehicles such as motorbikes, must exercise when approaching horses and their riders.

Motorcyclist found 80% liable after jumping the queue

Burton v Evitt, Court of Appeal, 18 October 2011

The issue: Who was to blame when a car driver turned right, knocking down a motorcyclist who was overtaking the queue of traffic?

The facts: The defendant car driver (D) was at the front of a queue of traffic waiting to turn right. His vision behind was obstructed by a larger vehicle. D turned right and collided with a motorcyclist (C) who was overtaking the queue of traffic. At first instance D was found to be one third liable.

The decision: On appeal, D argued that he had slowed down and checked before turning, and to require more was a counsel of perfection. The Court of Appeal disagreed, holding that since

D could not see clearly behind him, he should have inched out. However the motorcyclist was more to blame, with the result that the judge's apportionment was set aside and replaced with an 80/20 apportionment in D's favour.

Comment: D was cautious in this case, but not cautious enough. Where visibility is restricted, drivers must inch out. However as overtaking is a hazardous manoeuvre, generally overtaking vehicles or motorcyclists will take the greater share of liability in this type of collision.

Motorist held liable, even though the judge did not identify the precise negligent act or omission

Smith v Kempson [2011] EWHC 2680 (QB)

The issue: Could a judge hold a defendant motorist liable for an accident, without making specific findings about what actions were negligent?

The facts: The defendant motorist (D) was attempting to pull out of a minor road onto a major road. Her vision was obstructed by parked cars. She pulled out and collided with a motorcyclist (C) who was overtaking the parked cars on the major road. At trial, the judge found that on the balance of probabilities, the accident was caused by D's negligent driving in pulling out from a minor road onto a major road when it was not safe to do so. C appealed, submitting that the judge had failed to make findings about what she had done or failed to do which constituted a breach of the duty of care.

The decision: Although the trial judge did not make a specific finding of what it was that D did or did not do that was negligent, that did not preclude her from reaching the conclusion that D failed to reach the high standard of care required. It is open to a judge to conclude that a person is in breach of a standard of care, even if the judge has not or cannot say precisely what action or omission constituted the fault.

Comment: A significant factor in this case was that the trial judge had made a finding that the motorcyclist was not speeding, so there was a clear finding that he was not at fault. This sets it apart from the "nose-poking" case of *Farley v Buckley [2007]*, where a motorist who pulled out onto a main road was held not to have been negligent after colliding with a reckless motorcyclist.

Employers' liability

Manner of injury does not need to be foreseen

Hadlow v Peterborough City Council, Court of Appeal, 20 October 2011

The issue: Was an accident reasonably foreseeable, when it did not happen in the likely manner?

The facts: The claimant (C) worked in a secure school for teenage girls with behavioural issues. The local authority (D) had a policy that no staff member should be left alone with more than two pupils because of the danger of assault. On the day of the accident, two escorts left C alone in a locked classroom with three pupils. C hurried to the door to call the escorts back and tripped over a chair as she did so. D argued that the accident was not reasonably foreseeable and that C had broken the chain of causation when she fell over the chair.

The decision: The accident had not arisen in the most likely manner, by an attack from the pupils. However it had arisen as a result of C taking action to remove the risk and to remedy D's breach of its own policy. A risk of injury was foreseeable and was caused by D's breach of duty.

Comment: As long as an injury is a foreseeable result of breach of duty, the fact that it was not caused in the expected manner will not provide a defence.

Contempt of court

Suspended sentence for dishonest defendants

Brighton & Hove Bus & Coach Company Ltd v Books and another [2011] EWHC 2819 (Admin)

The decision: The High Court has imposed suspended jail sentences and ordered indemnity costs to be paid by two defendants, previously found guilty of contempt of court. During a

road traffic accident claim, they had made false and dishonest statements and representations concerning the mobility of one defendant.

Comment: This case follows on from *Nield and another v Loveday and another [2011]*, in which a defendant was given an immediate sentence of nine months' imprisonment for contempt of court, by signing statements of truth on documents that he knew to contain untruths. In another case, *Lane v Shah (2011)*, three members of the same family were all jailed for contempt of court after signing statements of truth on documents they knew to be false. The courts are now showing that they are prepared to impose heavy penalties on claimants who bring fraudulent claims.

Damages

Interim payment application to fund the purchase of a property refused

Crispin v Webster, 4 November 2011

The issue: Should the court order an interim payment of £750,000 to fund the purchase of a particular property?

The facts: C was rendered tetraplegic in a road traffic accident. Following her discharge from hospital she could not return to her house near the centre of Winchester and instead rented a property further away. She applied for an interim payment of £750,000 to purchase a two-storey house with character near the city centre. D submitted that there were other houses on the market which also suited C's needs and were cheaper.

The decision: The application was rejected. Following the *Eeles* decision, the crucial issue was whether the judge was satisfied at the interim stage that the trial judge would award a lump sum to purchase that particular house. In this case, the court was not satisfied that the trial judge would consider the proposed property reasonably necessary to meet C's needs. It was up to the trial judge – after hearing evidence – to reconcile

the kind of property C wanted and needed with what was objectively reasonable. The trial judge's discretion in carrying out this exercise should not be fettered by the decision made on an interim application.

Comment: This case demonstrates that courts hearing applications for interim payments must be careful not to fetter the trial judge's discretion when it comes to awarding capital sums and periodical payments. There is still potential for an interim award for accommodation costs, but only where the judge hearing the interim application is satisfied - with a high degree of confidence - that there is a real immediate need for accommodation and that the amount of money requested is reasonable.

Assessing general damages for multiple injuries

Sadler v Filipiak and another, Court of Appeal, 10 October 2011

The facts: The claimant (C) appealed after being awarded £32,000 for general damages for multiple injuries, including a fractured femur, PTSD, scarring, an eye injury and whiplash. She appealed on the grounds that the award was too low and the judge's approach to valuation was wrong.

The decision: The judge should have had separate figures in mind for the claimant's various injuries and then stood back to see if it was appropriate for the totality of injuries suffered, instead of first forming an overall impression, awarding a figure and then breaking the award down. The Court of Appeal substituted an award of £40,000.

Quantum reports

RE X (2011)

A young woman received £2,644,853 for brain damage received from a criminal injury when she was a child. Her life expectancy was reduced to age 70, and she suffered motor difficulties, scoliosis, impaired intellect and poor memory and concentration. Significant elements of the award were £175,000 for general damages, £380,000 for future loss of earnings, £130,000 for past care costs, £2,240,000 for future care costs and £225,000 for future accommodation costs.

Steven Kilmartin v Margaret Richards (2011)

A 45 year old man received £623,977 for the brachial plexus injury he suffered to his arm and shoulder in a road traffic accident in 2009. His injuries left him unfit for work as a railway engineer. Significant elements of the award were £50,000 for general damages, £290,000 for future loss of earnings and £90,000 for future care requirements.

R v Weston Area Health NHS Trust (2011)

A 79 year old man received £155,000 after suffering a permanent cognitive deficit which he alleged was due to poor management of his medical treatment. He underwent further surgery and suffered loss of mobility, hypertension and a reduced life expectancy. Liability was not admitted and the figure received reflected litigation risk. On a full liability basis, the estimated award would have included £60,000 for general damages, £67,472 for past care costs and £130,271 for future care costs.

Costs

Solicitors cannot claim costs associated with setting up an ATE package

Yao Essaie Motto & ors v (1) Trafigura Ltd (2) Trafigura Beheer BV [2011] EWCA Civ 1150

The issue: Could a party recover the costs associated with its ATE package from its opponents?

The decision: The Court of Appeal held that claimants cannot recover costs incurred by their solicitors in setting up an ATE package or liaising with ATE insurers during the course of the litigation. Delivering the substantive judgment Neuberger MR stated: "*The time, expertise and effort devoted by solicitors to identifying a potential claimant, and negotiating the terms on which they are to be engaged by the claimant, in connection with litigation, cannot, in my view, be properly described as an item incurred by the client for the purposes of the litigation.*"

Comment: This case involved an ATE premium of £9.7m, where the costs of negotiating a premium must have been significant, but the ruling will also apply to lower value claims.

News

Ban on referral fees

The Government's announcement on 9 September 2011 that it will ban referral fees in personal injury cases has been widely welcomed by the insurance industry and the ABI. The plan is that it will be a regulatory offence for firms to pay and receive referral fees. However with no universal definition of what constitutes a referral fee, we can expect lengthy debate and legal challenges on this point.

Implementation of Jackson LJ's costs reforms

A Civil Justice Council working party has been formed to consider technical aspects of implementing Jackson LJ's proposals for reform of civil litigation focusing on the introduction of qualified one-way costs shifting (QOCS), reform of Part 36 and a reform of the proportionality test. The current intention is that the full package of civil litigation costs reform will be implemented in October 2012.

Seventh edition of the Ogden Tables published

The seventh edition of the Ogden Tables was published on 10 October 2011. If you missed our bulletin on this topic and would like more information, [please click here](#).

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