PERSONAL INJURY BULLETIN

Welcome to the April edition of our Personal Injury Bulletin.

In this Bulletin we examine recent themes in case law as well as regulatory updates.

The recent strand of cases concerning injuries incurred during activities on employee away-days or outward bound activities is of concern to all employers and organisations, and all defendants will be keen to see what can be done to reduce their exposure to exaggerated or fraudulent claims. We also cover recent developments concerning awards of damages in the light of the Jackson Reforms and the Legal Aid, Sentencing and Punishment of Offenders Act which is now in place. Shipowners will also need to be aware of developments concerning lifeboats and noise regulations on board new build vessels.

Should you require any further information or assistance on any of the issues dealt with here, please do not hesitate to contact any of the contributors to this Bulletin, or your usual contact at HFW.

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Are we taking the fun out of everything?

That old chestnut

The growth of “compensation culture” - that it is acceptable to sue for damages for any injuries and grievances suffered howsoever caused - increasingly affects our daily life in both work and leisure activities. The growing perception that there is such a compensation culture has been, at least in part, attributed to ineffective application and over-interpretation of the health and safety regimes.

Increasingly, questions have been raised about the benefits versus the perceived dangers of activities such as clearing snow or a good old game of conkers. Recent cases concerning seriously debilitating injuries sustained during team-building and/ or leisure activities provided by employers, explored below, stress the importance of conducting appropriate risk assessments. Provided the appropriate planning is in place, there is no need to stop the fun.

Back to basics

It is a fundamental principle that the law should not curb socially desirable activities simply because such activities carry risk[1] and in cases relating to leisure or other beneficial activities, the courts will consider whether a claim may impede or discourage individuals from becoming involved in desirable activities. In order to assess whether the level of risk of an activity is tolerable, the court must look at the individual facts of each case.

This was the approach adopted by the court in *Uren v (1) Corporate Leisure and (2) Ministry of Defence* [2011] EWCA Civ 66. This case concerned an injury sustained by Mr Uren during a ‘Health and Fun Day’, where as part of an event employees were asked to retrieve objects from an inflatable pool of water. On entering the pool head first, Mr Uren struck his head on the base of the pool, breaking his neck, leaving him tetraplegic. Mr Uren brought proceedings against his employer, the Ministry of Defence, and the company that provided the equipment and personnel for the event. The main allegation was that the defendants failed to carry out suitable and adequate risk assessments. At first instance, the judge held that although the risk assessments were insufficient, the activity was fairly safe and there was no breach of duty of care. The High Court ordered a re-trial.

Risk assessment was central to the High Court’s judgment, which stated:

“There will...be some cases in which it can be shown that, on the facts, the failure to carry out a proper risk assessment has been indirectly causative of the injury. Where that is shown liability will follow”.

It was emphasised that risk assessments are an important feature of the health and safety landscape and the duty to perform one cannot be delegated. However, an employer may satisfy himself that a contractor has carried out a thorough risk assessment, which may in turn suffice to show that a suitable and adequate risk assessment has been conducted.

The High Court further stressed that risk assessments provide opportunities for sharp appraisals of the environment, leading to improving safety standards. However, it was made clear that risk assessments are not a solution to all ills and are less helpful where there are many variables to take into account, in which case a dynamic risk assessment would be more appropriate.

An accident waiting to happen?

Another recent case demonstrated that employers cannot afford to disregard the potential safety implications of staff recreational events. In *Reynolds and Strutt & Parker* [2011] EWHC 2263 Ch, Mr Reynolds suffered a serious and permanently disabling brain injury during a cycling event on a staff day off-site. The claimant argued, inter alia, that the employer (a) was negligent in failing to make suitable or sufficient risk assessments and (b) failed to supply relevant information and enforce the wearing of protective equipment, resulting in breaches of health and safety legislation.

One of the key issues explored was the meaning of *‘in the course of employment’*. The judge steered away from the courts’ previously wide interpretation of this concept, despite the activities being more or less compulsory and taking place during (paid) working hours. The judge reasoned that:

“...neither the claimant nor anyone else was in the course of their employment when taking advantage of the defendant’s hospitality. It offends a sense of justness and reasonableness”.

Despite this, the judge stressed the importance of the employment relationship and held that there

1. *Barnes v Scout Association* [2010] EWCA Civ 1476 and s.1 of the Compensation Act 2006.

was a duty on the employer to take such reasonable action as any reasonable employer would take in the circumstances. This included ensuring the reasonable safety of employees when making and managing the arrangements on the day. The judge held that this duty was clearly breached - the event was organised by two partners of the firm who did not have the necessary skill and knowledge to make a sufficient and suitable risk assessment of cycle racing and who were unable to spot even the most obvious of risks, i.e. the risk of collision.

However, two-thirds contributory negligence was attributed to the claimant, who was an experienced cyclist, due to the fact that he failed to wear a helmet, which he must have known was available, and the fact that he cycled aggressively. Damages were therefore reduced considerably, demonstrating that employees who are perceived to act recklessly with regard to their own safety at recreational staff events will not usually be able to recover full damages.

Welly wanging - not without danger?

A further recent case emphasised that employers/organisers will be protected from claims where there have been appropriate risk assessments and the accident really could not have been foreseen. In *Blair-Ford v CRS Adventures Ltd* [2012] EWHC 2360, Mr Blair-Ford, a school teacher attending a residential adventure course for pupils and teachers, sustained permanent tetraplegia in a "welly wanging" competition.

Normally, the wellington boot is hurled forwards, with the aim being to "wang" the welly as far as possible. By way of a "handicap" for teachers competing against the pupils, Mr Blair-Ford, following another teacher, was asked to throw the welly between his legs backwards. It appears that he did this with such force that he over-balanced and fell head first and sustained serious injuries as a result.

In bringing an action against the event organisers, Mr Blair-Ford argued that they owed a duty to exercise reasonable skill and care in conducting the activities. The injury was logical and foreseeable, resulting from the unsafe manner of throwing, which could have been avoided if adequate risk assessments were followed. The defendants, on the other hand, argued that the whole event and each of the activities were assessed in a reasonable manner, with the specific activity under deliberation undergoing a dynamic risk assessment on site. It was contended that the unfortunate accident was a tragic but freak event which occurred due to a combination of conditions, and as such could not have been foreseen.

The court agreed with the defendants and dismissed the claim, reiterating the common law principles discussed above. The judgment attached immense importance to the duty to assess risks as explored in *Uren* and explained that the standard of care should be an objective test of reasonableness taking into account the conditions and characteristics of those at risk.
In reaching its judgment, the court took into account the fact that the business had an excellent safety record, was well managed, monitored, licensed and importantly was of social value. Risk assessments were carried out for the whole event and the individual activities, although no advanced plan was made in respect of the method of "handicapping" the teachers. The court commented that this lack of advanced plan should not be criticised, and that this was precisely the type of activity which lent itself to a dynamic risk assessment, as suggested in *Uren*, which was indeed carried out through discussions on the day.

The welly wanging activity was not one of inherent danger, and in line with the reasoning repeated in another recent case[2], a person can only guard against and eliminate risks which they know or ought to know are a *'real risk'*. An employer or leisure company organising a fun day could not be negligent if the risks were just a mere possibility. The risks that needed to be foreseen were risks of serious injury, not just any injury and in the circumstances of throwing a welly, even a minor injury would have been difficult to predict. The key causal factor was the claimant's execution of the throw itself, which the judge concluded could not have been of ordinary nature.

Taking notes

The courts have clearly acknowledged the significant social benefits associated with leisure events in the course of employment. Many employers provide off-site away-days for staff or sporting activities and will want to continue to do so. However, as genuine accidents do happen, recent decisions emphasise the importance of risk assessments, which it may be all too easy to forget in the spirit of the occasion. To reduce the risk of claims,

2. *Berent v Family Mosaic Housing and London Borough of Islington* [2012] EWCA Civ 961.

employers and/or event organisers should:

- Carry out thorough risk assessments for bonding days, staff off-site events, and individual activities undertaken during such days.
- Not delegate risk assessments to contractors, or if such tasks are delegated, employers and event organisers must satisfy themselves that they are happy with the assessments.
- Provide useful and relevant information on health and safety and (where applicable) appropriate protective equipment and enforce the wearing of such equipment.
- Keep records of all health and safety meetings, briefings, accidents, near misses and learn from these.

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"... accidents do happen, recent decisions emphasise the importance of risk assessments..."

More exaggerated claims in personal injury

Following the apparently increasing number of exaggerated claims in personal injury, the UK Supreme Court has recently given its authoritative judgment on the issue in *Summers v Fairclough Homes Ltd* [2012] UKSC 26. Exaggerated or fraudulent claims are always a concern for defendants and their insurers, and this case reviews the options available to the courts and defendants.

Our November 2011 edition of this Bulletin looked at the growing problem through the cases of *Fox v Foundation Piling Ltd* [2011] EWCA Civ 090 and *Nield v Loveday* (unreported - 13 July 2011), in which the courts addressed the issue in two different ways. In *Fox*, although the claimant was held to have exaggerated his claim, he was not guilty of misrepresentation and it was held that the appropriate sanction was through the proper use of Part 36 and the consequent cost protection. In *Nield v Loveday*, however, there was a finding of dishonesty to the criminal standard of proof and the claimant was committed to prison for contempt of court. His wife, who had also verified false statements, was given a suspended sentence, although the court did not find this case to be an example of the most serious contempt.

Since these cases there appears to have been something of an increase in reported cases dealing with fraudulent claims or credibility issues, notably *Summers v Fairclough Homes*, but also, for example, in *Hussain v Hussain* [2012] EWCA Civ 1367 (fraudulent insurance claim through staged road traffic accident); *Charnock v Rowan* [2012] EWCA Civ 2 (inconsistencies in medical records); *Airbus Operations Ltd v Roberts* [2012] EWHC 3631 (exaggeration of claim leading to committal for contempt of court); *Homes for Haringey v Fari* (unreported - 22 January 2013) (strike out and application for committal proceedings).

The most significant of these is *Summers v Fairclough Homes*, which as a Supreme Court judgment has of course been cited in subsequent cases. Mr Summers was injured in an accident at work in 2003, suffering fractures to his hand and heel. Following trial in August 2007, the claimant was successful on liability, with damages to be assessed. The defendant made an interim payment of £10,000 on account of damages.

In October 2007, the claimant signed a witness statement to the effect that he could not stand for more than 10-15 minutes at a time. Around the same time, the defendant obtained images of the claimant through undercover surveillance which demonstrated that the claimant was not so disabled as he claimed and the defendant continued to monitor the claimant until September 2008. The claimant served his first schedule of loss, for £838,616, in December 2008. Shortly thereafter, the defendant disclosed the surveillance evidence and served a re-amended defence alleging that the claim was grossly and dishonestly exaggerated, and applying for the claim to be struck out. Other surveillance evidence was later obtained which showed the claimant apparently working without difficulty.

The claimant then served further schedules of loss valuing the claim at around £250,000. All of the claimant's pleadings and schedules of loss were verified by statements of truth.

At trial in 2010, the judge found that there was no doubt that the claimant had suffered serious fractures which required surgical treatment, but he also found that the evidence established beyond reasonable doubt that the claimant had fraudulently overstated the extend of his injuries and had deliberately lied about them. The judge refused to strike out the claim, and instead awarded damages of £88,716.

Power to strike out

Following an unsuccessful appeal to the Court of Appeal, which held it was bound by earlier cases, the defendant appealed to the Supreme Court. The Supreme Court held that it did have jurisdiction to strike out a statement of case for abuse of process, even after a trial in which the court had made a proper assessment of liability and quantum. They confirmed that fraudulent exaggeration of a claim was an abuse of process, and that they still had jurisdiction to strike out a claim for abuse of process even where such action would defeat a substantive claim. However, such power should only be exercised in limited circumstances and only where it would be in the public interest and a proportionate response. This would require the scrupulous examination of the circumstances of each case.

The Supreme Court confirmed its approval of a wide range of sanctions for deterring dishonest claimants, including ensuring that the award for damage is not increased, making orders for costs, reducing interest and proceedings for contempt or criminal proceedings. The Court also recognised (following *Fox v Foundation Piling*) that there may be value in using Calderbank offers to go beyond the relatively simple sanctions in Part 36 of the CPR. The Court considered that there had been a serious abuse of process in this case, but the injury was genuine and it was not appropriate for the claim to be struck out. The defendant's appeal was therefore dismissed.

The legacy of

Following on from *Fox v Foundation Piling* and *Nield v Loveday*, it is clear that the courts have a range of sanctions available to them, and will apply these sanctions depending on the gravity of the exaggeration and the degree of fraud. While the court can strike out such claims, it seems unlikely, on the basis of *Summers v Fairclough Homes* that it will exercise its discretion to do so in any but the most extreme cases, and it is unlikely to do so where, like in *Summers v Fairclough Homes*, the claimant has suffered a genuine and significant injury. Instead, costs sanctions and the threat of committal for contempt of court are perhaps more effective deterrents. Furthermore, the court may be more sympathetic to an application to strike out a claim (or part of it) if it is made at an earlier stage in proceedings, as long as the grounds for doing so are absolutely clear.

Even so, it is unlikely that a court would strike out a claim where other sanctions are available. In *Airbus Operations v Roberts*, the claimant gave evidence that he was virtually incapacitated due to a back injury, requiring help to dress himself and reliant on crutches. He was later filmed moving heavy rubble and other debris into a skip. In that case, contempt of court was an appropriate way of punishing the claimant and deterring others.

However, in *Homes for Haringey v Fari*, the claimant claimed £750,000 following a tripping accident, but the case was later struck out following *Summers v Fairclough Homes* and its value assessed at £1,500. The application for committal proceedings was also granted, as surveillance evidence showed a vast disparity between the amount claimed and the true value of the injury. Although the claimant had already lost her claim, and suffered embarrassment due to the attendant publicity, there was strong public interest in pursuing false claims and for them to be investigated by the court. This can be distinguished from *Summers v Fairclough Homes,* as the injury was minor and the fraudulent overstatement of the case extreme, and in this case, applying the reasoning in Summers, strike out of the claim was appropriate.

Following *Summers v Fairclough Homes*, the Court has had its power to take action against fraudulent claims confirmed, and defendants should remember that there are a wide range of options to reduce or strike out such claims, including the criminal charge of contempt of court (which may be punished by a fine or imprisonment). The courts' decisions in these cases send a strong message that claimants should not be tempted to intentionally (and fraudulently) exaggerate their genuine claims. This would, of course, not apply to misguided but honest

exaggerations, and defendants should therefore be cautious about alleging fraud where there is no evidence of dishonesty. It should also be noted that an allegation of fraud or dishonesty must be backed up with material evidence, and the use of surveillance should be considered if fraud is suspected.

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Jackson revisited: the trouble with double-bubble

(No.2) [2012] EWCA Civ 1288

On 26 July 2012, the Court of Appeal handed down its judgment in the case of *Simmons v Castle* [2012] EWCA Civ 1039. In that case, the Court decided to increase general damages by 10% with effect from 1 April 2013 and, in so doing, brought to life the proposals of Sir Rupert Jackson in his 2009 Final Report on Civil Litigation Costs. This increase was intended to correspond with the coming into effect of the changes to the CFA (Conditional Fee Agreements) costs regime, namely that from 1 April 2013, under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), premiums for After the Event insurance and success fees will no longer be recoverable from defendants.

However, on 25 September 2012, following protests by a number of interested parties, including the Association of British Insurers (ABI) and the Personal Injury Bar Association (PIBA), the Court of Appeal took the unusual step of reopening and clarifying its earlier decision.

ABI made two applications in which it invited the Court to reconsider:

1. Whether the 10% uplift should apply in those cases where a claimant has entered into a CFA prior to 1 April 2013 and is therefore still able to recover the success fee from the defendant.

2. Whether the 10% uplift should apply to non-CFA or 'conventional claimants' who would effectively receive a windfall as a result of the increase in general damages awarded.

PIBA raised an additional point, namely whether the 10% increase should apply only to tort claims or whether it should also apply to contract claims and other claims for general damages.

The Court accepted ABI's first point that the 10% increase in general damages should not apply to those claimants who entered into a CFA prior to 1 April 2013 and are therefore entitled to recover a success fee. The Court achieved this result by excluding from the ambit of its earlier decision those claimants who fall within s.44(6) of LASPO.

However, the Court rejected ABI's second point and refused to deprive non-CFA claimants of the 10% uplift. Whilst the Court accepted that 'conventional claimants' and litigants in person would be in a better position post-1 April 2013, it considered that a consistent approach is required. Furthermore, the Court emphasised that the proposed regime is only intended to be an intermediate measure.

The Court also accepted PIBA's point that the 10% uplift should apply not only to tort claims but also to contract claims and other heads of general damages, namely the following categories of claim: (i) pain and suffering, (ii) loss of amenity, (iii) physical inconvenience and discomfort, (iv) social discredit, and (v) mental distress. The Court acknowledged that there may be some further categories of general damage in relation to which it is unclear whether the uplift should apply and that such cases would need to be resolved on their own merits.

Although the decision in *Simmons v Castle* (No.2) has provided welcome clarity to the Court's earlier ruling, and relief for defendant lawyers and insurers who can now be certain that the 10% uplift does not apply to claimants who have entered into a CFA prior to 1 April 2013, some important questions remain. Crucially, we do not yet know how a court will determine the costs consequences of a Part 36 offer that is beaten by the claimant only as a result of the 10% increase in general damages. For now, at least, it is simply a case of watching this space.

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Lifeboats under scrutiny

Lifeboat accidents resulting in fatalities have been occurring for a number of years despite efforts to reduce them. Due to the most recent incident involving the *Thompson Majesty*, a cruise ship operated by Thomson Cruises, lifeboat safety will without doubt come under further scrutiny.

Eight seafarers were inside the lifeboat at the time of the drill. The lifeboat had been lowered into the water and was being hauled back up into position when the incident occurred. The drop cable snapped resulting in the lifeboat plummeting more than 50ft into the sea. Five out of the eight crew members inside the lifeboat were killed as a consequence of the cable failure. The incident highlights crucial weaknesses in how lifeboats can be lowered and raised swiftly and safely. According to BIMCO lifeboat expert and Marine and Risk Consulting partner, Dennis Barber, lifeboat cables are put under unending stress when lifeboats are stored on their wires rather than on davit blocks.

The *Thompson Majesty* was one of the worst casualties involving lifeboats of recent years, however preceding incidents have also provoked concern and raised separate issues. The *Costa Concordia* disaster also drew attention to the weaknesses in launching lifeboats on either side of the vessel when the vessel is listing/ capsized.

The International Maritime Organization's Maritime Safety Committee amended regulations to the International Convention for the Safety of Life at Sea (SOLAS) regarding lifeboat release hook mechanisms, which is aimed at preventing accidents during lifeboat launching. The amendments were adopted in May 2011 and entered into force on 1 January 2013. Pursuant to the amendments, it is now a requirement that lifeboat on-load release mechanisms are to replace existing release hooks that do not comply with the new Life Saving Appliances (LSA) Code. The replacements should take place no later than the first scheduled dry-docking of the ship after 1 July 2014 but, in any case, not later than 1 July 2019.

The SOLAS amendment is intended to establish new, stricter, safety standards for lifeboat release and retrieval systems, and will require assessment and possible replacement of a large number of lifeboat release hooks. Meanwhile, extreme care should be taken when launching, retrieving and storing the lifeboats back into their davits.

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Sounding off? New noise protection for crew

The 91st IMO Maritime Safety Committee (MSC) adopted certain mandatory instruments which will enter into force on 1 July 2014, amongst these is the new SOLAS regulation for the protection against noise. The new SOLAS regulation II-1/3-12 will have a significant impact on newbuildings, as it requires new ships to be constructed to reduce onboard noise and to protect personnel on board from noise.

The Code includes requirements for measuring equipment specifications and use, information about how measurements are to be taken, limits on the exposure to noise, measures to be taken in high noise areas, information about acoustic insulation in accommodation areas of the ship and hearing protection options.

The majority of the Code is mandatory, and certain aspects of the Code are recommendatory only. The regulation is applicable to ships of 1600GT or above, and will be applied where:

- The building contract is placed on or after 1 July 2014.
- In the absence of a building contract, the keel is laid (or for vessels at a similar stage of construction on) or after 1 July 2015.
- Delivery is on or after 1 July 2018.

The new regulation is applicable to most commercial vessels including bulk carriers, tankers and container ships; specialist vessels and pleasure crafts are excluded. Ships delivered before 1 July 2018 and contracted for construction before 1 July 2014 should comply with the existing regulation II-1/36. The new regulation will replace the current regime from 1 July 2014.

There are no specific measures/ sanctions provided within the mainframe of the IMO instrument. However, the right to bring sanctions

against owners rests with the State Parties to the Convention and it is therefore dependant on the State Parties to implement, interpret and enforce the new requirements. Port State Control will be responsible for ensuring compliance, and vessels may be subject to detention and ultimately banned if they do not comply with the requirements. The noise requirements may also give crew members grounds for bringing personal injury claims where vessels are non-compliant.

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Conferences & Events

2nd Annual Conference on Marine Salvage and Wreck Removal
India, Mumbai
(7 May 2013)
Presenting: Hugh Brown, Dominic Johnson
Attending: Paul Dean

Unsafe Ports
HFW, London
(6 June 2013)
Presenting: Martin Dalby and Jean Koh

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