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MAJOR BODILY INJURY GROUP - SPRING SEMINAR

On the cusp of a new era: has the defendant's time come or is it a false dawn?

Date: 15 March 2012

Venue: The Wellcome Collection, Euston, London, starting at 14.30.

To book your place or request further information please contact nicci@greenwoods-solicitors.com

OCCUPIERS' LIABILITY

The case of *Armstrong (a minor) v Keepmoat Homes Ltd (1)*, *Northumberland County Council (2)* and *Blyth Borough Council (3)* [Lawtel 15/02/2012] is another case illustrating that when considering the potential liability of an occupier it is the state of the land which matters, not the claimant's activity.

In 2001 the claimant, who was aged 12, had crossed a dual carriageway and been struck by a motorist causing extensive head injuries. There were two safe routes to cross the carriageway but she had taken neither. She had walked across a grass area, close to an estate constructed by the first defendant, between a nature reserve and an arboretum and walked at right angles to the road. Running along the edge of the road was an area of dense scrub and trees which had a significant gap. The claimant passed through the gap in order to cross the road. It was her case that the first defendant had created a danger by removing a fence and enlarging the gap and that the second and third defendant local authorities had failed to take steps to prevent visitors to the adjoining land from gaining access to the dual carriageway by failing to put up a fence. At trial a witness gave evidence that the first defendant had removed a fence that had been in place by the gap in order to erect an advertising sign and that he had contacted the local authority to inform it the fence was missing.

In dismissing the claim the Deputy High Court Judge found that on the evidence, despite the absence of a right of way, there was a path from the local authority's land to the edge of the road. There had been a fence at some point which had a gap through which any child or adult could pass. As such it was beyond argument that the local authority should have known of the existence of the path and the ready access to it. Accordingly, the local authority had constructive knowledge of the existence of the gap and the path.

There was no evidence that the fence had been removed by the first defendant and it therefore could not be found liable. As the local authority had constructive knowledge of the path and had erected no signs warning against its use, it must have impliedly consented to it being used by lawful visitors for the purposes of the *Occupiers' Liability Act 1957*. However, there was no authority for the proposition that there was any duty either under the Act or at common law on the part of an occupier to prevent a visitor from leaving his land so as to prevent the visitor from coming into contact with a danger on neighbouring land. The danger in the instant case did not arise from the local authority's land. The test of liability was whether what the claimant did had been impliedly assented to.

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Whilst the use of the path was assented to, what she did after she left the local authority's land was neither expressly nor impliedly assented to and there was no

breach of the Act. Neither did any other common law duty arise. The accident had not arisen as a result of any breach of the common duty of care owed under

the Act or a breach of any common law duty.

MENTAL CAPACITY

The assessment of mental capacity is a constant concern in head injury cases and the case of *K v LBX and L (2012) EWCA Civ 79* is therefore of interest on this point. It shows that while a protected parties human rights are to be taken into account it is the provisions of the *Mental Capacity Act 2005* which prevail.

S4 Mental Capacity Act 2005 sets out the checklist to be followed when deciding on what is in a protected party's best interests.

(1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of:

(a) the person's age or appearance, or

(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.

(2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps

(3) He must consider:

(a) whether it is likely that the person will at some time have capacity in relation to the matter in question; and

(b) if it appears likely that he will, when that is likely to be.

(4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.

(5) Where the determination relates to life-sustaining treatment he must not, in considering whether the

treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.

(6) He must consider, so far as is reasonably ascertainable:

(a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),

(b) the beliefs and values that would be likely to influence his decision if he had capacity, and

(c) the other factors that he would be likely to consider if he were able to do so.

(7) He must take into account, if it is practicable and appropriate to consult them, the views of:

(a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,

(b) anyone engaged in caring for the person or interested in his welfare,

(c) any donee of a lasting power of attorney granted by the person, and

(d) any deputy appointed for the person by the court, as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).

(8) The duties imposed by subsections (1) to (7) also apply in relation to the exercise of any powers which:

(a) are exercisable under a lasting power of attorney; or

(b) are exercisable by a person under this Act where he reasonably believes that another person lacks

capacity.

(9) In the case of an act done, or a decision made, by a person other than the court, there is sufficient compliance with this section if (having complied with the requirements of subsections (1) to (7)) he reasonably believes that what he does or decides is in the best interests of the person concerned.

(10) "Life-sustaining treatment" means treatment which in the view of a person providing healthcare for the person concerned is necessary to sustain life.

(11) "Relevant circumstances" are those:

(a) of which the person making the determination is aware; and

(b) which it would be reasonable to regard as relevant.

The appellant father appealed against a decision that his son, the second respondent, should live for a trial period in supported accommodation arranged by the first respondent local authority.

The son, who was 28 years old, was mildly retarded and lived with his brother and the appellant. The father acknowledged the need for a long-term plan to move his son into local authority arranged care so that he could gain greater independence, but he disagreed with the local authority about when that should happen. A judge held that a trial period in supported accommodation was in the son's best interests.

The judge rejected the father's submission that the starting point of her consideration should be the family life that the son had with him and the brother. The issue was whether the right to family life under *Article 8 European Convention on Human Rights 1950* required the court in determining issues under the inherent jurisdiction or the *Mental Capacity Act 2005* to afford priority to placement of an incapacitated adult

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in their family, or whether family life was simply one of "all the relevant circumstances" that the court had to consider under *S4* of the 2005 Act when determining a person's best interests.

In rejecting the appeal the Court of Appeal held that in cases under the 2005 Act, the safe approach for the judge was to ascertain the best interests of the incapacitated adult by applying the checklist in *S4*, then ask whether the resulting conclusion amounted to a

violation of their rights under *Article 8* and whether that violation was nonetheless necessary and proportionate. The judge's approach could not be faulted.

MESOTHELIOMA

Those readers dealing with mesothelioma claims will wish to be aware of the judgment of Swift J in *Ball v Secretary of State for Energy and Climate Change (2012) EWHC 145 (QB)*.

Between about 1967 and 1985 the ninety-two year old, living claimant was exposed to asbestos dust during the course of his employment with the defendant's predecessors, the National Coal Board and British Coal. The only issue to be determined was the appropriate level of damages for PSLA.

The chest symptoms were first noted on 26 January 2011 and as at the date of trial the claimant was predicted to die within one to five months. But for the illness the claimant's life expectancy was put at 2.9

years.

The principal issue before the court was the extent to which the *JSB Guidelines* should be used to assess the appropriate award. The judge noted that the tenth edition of the guidelines was published in September 2010 and provided a bracket for awards ranging from £35,000 (about which the judge expressed concern) to £83,750. It was the defendant's case that they must be the starting point for quantifying the claim as representing a "fair spread" of the kinds of awards made by the courts.

Swift J expressed concern "*at the emphasis which successive editions of the JSB Guidelines have placed on the primacy of duration of symptoms..*". In the light

of many hundreds of mesothelioma claims it was evident that there are a large number of other factors, including the level of symptoms; the extent and effect of invasive investigations; radical surgery; and other forms of treatment. Age would be a relevant factor but "*a person of any age who is informed that his or her life will be cut short... is likely to suffer a good deal of distress*".

Accordingly, in the present case, having taken all of the relevant factors into account the judge awarded £50,000. The claimant had argued for £60,000-65,000 and the defendant for a figure at the bottom end of the *JSB* bracket: £35,000-40,000.

FURTHER NEWS ON THE EXPANSION OF THE MOJ PORTAL

On 13 February the MOJ published further details of its proposals to extend and develop the existing Protocol for handling low value claims to cover RTA cases with a value of up to £25,000 and also to a range of EL and PL claims. The impression given is that the process will be a lengthy one to ensure that all

aspects of the changes are properly thought through; supported by the necessary rule changes (including fee structures); and can be operated using software systems that function correctly.

To allow for all necessary discussions/negotiations;

drafting protocol and rule changes; and thorough testing it seems likely that we are looking a year or more ahead before anything concrete is in place.

DATE FOR YOUR DIARY

15 March 2012

Major Bodily Injury Group Spring Seminar - The Wellcome Collection, Euston, London, commencing at 14.30.

11 July 2012

An audience with Mr John Nixon (Orthopaedic Consultant).

Further information

For further information on any of the issues dealt with in this Alert, other than where a contact has been provided, please contact Geoff Owen on T. 01908 298216 or E. gro@greenwoods-solicitors.com

To subscribe or unsubscribe from this Alert, please email crm@greenwoods-solicitors.com

Seminars

Greenwoods holds a series of training events for both our lawyers and interested clients. Below are those events being held in the next few months.

If you would like to attend any of the following seminars please email crm@greenwoods-solicitors.com, indicating which you are interested in attending.

E-DISCLOSURE

Date	Time	Location	Speaker(s)
21 February 2012	16.00-17.00	3600 Parkway Fareham PO15 7AN	Simon Thomas Greenwoods

FATAL ACCIDENT CLAIMS

Date	Time	Location	Speaker(s)
22 February 2012	16.00-17.00	18 Bedford Square London WC1B 3JA	Geoff Owen Greenwoods

PI UPDATE FOR Q1: THE KEY CASES AND PROCEDURAL DEVELOPMENTS

Date	Time	Location	Speaker(s)
14 March 2012	16.00-17.00	18 Bedford Square London WC1B 3JA	Geoff Owen Greenwoods

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