Personal Injury Team

PUMP COURT CHAMBERS

# Newsletter

February 2010

## JACKSON REPORT: KEY RECOMMENDATIONS

Practitioners will not doubt be aware of the final report and recommendations of Sir Rupert Jackson on his civil litigation costs review produced on 14 January 2010. The report could have far-reaching consequences for Personal Injury work and, if implemented, will amount to a fundamental re-structuring of the market for both Claimants and Defendants and their legal representatives.

Below is a summary of the key recommendations of the report as far as personal injury practice is concerned.

**Success Fees**
The report recommends that both success fees and ATE insurance premiums should cease to be recoverable from defendants. The success fee would be recovered from the Claimant's damages but up to a maximum of 25% of those damages, excepting damages referable to future care or loss.

**General Damages**
Awards of general damages for pain, suffering and loss of amenity to be increased by 10%. Furthermore, a working group may be created to assess and recommend appropriate levels of general damages. Such a group should consist of representatives of claimants, defendants, the judiciary and others.

**Referral Fees**
Lawyers should not be permitted to pay referral fees in respect of personal injury cases

**One Way Costs Shifting**
This is likely in personal injury cases. The claimant would not have the burden of paying the defendants costs if unsuccessful but the defendant would have the burden of paying the successful claimant's costs.

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# JACKSON REPORT: KEY RECOMMENDATIONS CONTINUED

**Fixed Costs**
Fixed costs for fast track personal injury cases – a dual system, whereby costs are fixed for certain types of case, and in other cases there is a financial limit on costs recoverable. The ideal is for costs to be fixed in the fast track for all types of claim.

A costs council would be established to review fast track fixed costs.

**Part 36**
Where a Defendant fails to beat a Claimant's offer, a recovery for the claimant enhanced by 10%.

**Training**
Training for practitioners and Judges alike in the following areas;

E-Disclosure

Costs management and costs budgeting – rules could be drawn up for effective costs management which a judge could choose to implement in a particular case.

**Protocols**
The Pre-action Conduct practice direction, introduced in 2009, to be substantially repealed.

**Case Management**
Case management - a number of measures to enhance the courts' role and approach to case management, including:

- where practicable allocating cases to judges who have relevant expertise;
- ensuring that, so far as possible, a case remains with the same judge;
- standardising case management directions; and
- ensuring that case management conferences and other interim hearings are used as effective occasions for case management, and do not become formulaic hearings that generate unnecessary cost

The full report can be found at - http://www.judiciary.gov.uk/about_judiciary/cost-review/reports.htm

**Adam Gadd**

# SCHOOL DAYS - THE BEST OF YOUR LIFE?

Whether you were the class clown, or, like me, the school swot, the following two cases will remind you of the perils lurking in wait for the unwary, behind every classroom door.

The first was _Palmer v Cornwall CC_ [2009] EWCA Civ 456 and was decided in May 2009, by Lord Justices Waller, Longmore and Richards. The Claimant, Palmer (who we shall christen Bob for ease of reference), was a 14 year old school boy, and in year 9. One day at lunch break, during which one dinner lady was on supervision duty for years 7-10 inclusive, Bob was hit in the eye by a rock thrown by a fellow pupil. The dinner lady accepted that, during the lunch break, her attention was directly mainly towards years 7 and 8, and that she had cast only occasional glances at years 9 and 10. Those of you with teenage sons, or younger brothers, may well think her confidence in their ability to behave themselves without supervision was, at best, a little misplaced.

# SCHOOL DAYS - THE BEST OF YOUR LIFE? CONTINUED

At first instance, Bob lost his claim, with the trial judge finding that allowing one adult to supervise 300 children was an adequate level of supervision. Bob appealed and his appeal was successful. The Court of Appeal found that only allowing one supervisor for four years worth of pupils was negligent, that Bob's witnesses, who gave evidence that they would not have passed their lunch hour throwing rocks had there been a supervisor nearby, were witnesses of truth, and that the purpose of a supervisor was to both deter dangerous activities and stop them if they did occur. In light of this, the Court should be wary of finding the activity would have happened regardless.

A decision of great interest to local authorities, head teachers and dinner ladies the country over, this case deals with the concept of reasonable supervision and also foreseeability. Against a history of claims concerning child tort-feasors sustaining injuries in the course of "normal" horse-play, or high jinks, this case was emphatically dealt with on a "fact-sensitive" basis by the learned judges. However, it seems clear that, where it is foreseeable that an activity which is likely to lead injury may well take place (with stone-throwing school-children coming firmly into that category), effective measures must be put in place to prevent, as far as is able, the activity taking place in the first place.

Foreseeability is at the root of the High Court's decision in our second case, that of *Alexis v Newham LBC* [2009] EWHC 1323 (QB) QBD. In this case, the Claimant was a teacher at Brampton Manor School. She was in the habit of drinking from a bottle of mineral water which she kept in the desk drawer in her classroom. On Wednesday 9 February 2005, Miss Alexis was absent from her classroom because of a training commitment and, in her absence, a fellow teacher, Miss Pitt, covered her lesson. However, Miss Pitt elected to teach in her own classroom rather than the Claimant's, and so several pupils were without their work folders. Two of these year 11 pupils, whom we shall call Jacq and Jill, were given permission by Miss Pitt to go to their usual classroom, unlock the same and collect their folders, without being supervised. Clearly this unprecedented level of freedom went to Jill's pigtailed head, because rather than collect her folder, she substituted whiteboard cleaning fluid for the Claimant's water. The two girls were absent from Miss Pitt's class for so long that a third pupil was deputed to go and locate them and bring them back to the classroom. The inevitable consequences ensued upon Miss Alexis's return to the classroom and her first pang of thirst. The Claimant sustained both physical and then psychological consequences, and was extremely fortunate not to have been more seriously injured.

However, the Court held that, whilst injury to a teacher through the mischief or misbehaviour of a pupil was likely enough to impose a duty of care upon the local authority to prevent the same, it would be absurd if teachers were not allowed to exercise their discretion to allow pupils access to an unsupervised classroom, that there was no reason for anyone at the school (bar, potentially, the Claimant) to have suspected that Jill would act the way that she had done, and, further, that Jill had no concept of the severity of the consequences of her actions. Accordingly, the Claimant's claim failed. In comparison to the case of Palmer above, this judgment seems a little harsh – if it is foreseeable that a 14 year old boy might spend his lunch hour baiting seagulls with sandwiches, and then throwing rocks at them, one of which subsequently hit Bob, it seems equally foreseeable that two 16 year old girls given free rein to an empty classroom, staying away for longer than was reasonable, may get up to

# SCHOOL DAYS - THE BEST OF YOUR LIFE? CONTINUED

mischief which could have consequences. Be that as it may, there appears to have been no appeal in the case of Alexis – although one cannot help but have sympathy for the unfortunate Claimant and feel that she has been a little hard done by both in her profession and her litigation.

The moral of the story? Stay away from seagulls, school children and bottled water...

**Helen Trotter**

# A FOOLHARDY ACT OF HORSEPLAY

The law of negligence is peppered with cases involving foolhardy acts of horseplay and tomfoolery. Take the recent case of G v B (2009). The parties had been drinking in a pub and had drunk no more than two pints of beer each before leaving. Whilst outside the pub, the defendant jumped on the claimant's back and they both fell to the ground. The claimant, 41 years of age at the time of the accident, suffered multiple spinal injuries, including several fractures and a disc protrusion, and severe loss of function in his right arm and hand. He experienced spasms, bladder hyperactivity, sexual dysfunction, and restricted mobility. He was not able to live an independent life, nor continue with any form of employment. The claimant's life expectancy was also believed to have been reduced by two and a half years.

The claimant brought an action for negligence against the defendant, alleging that the latter's actions were unnecessary and undertaken in a foolhardy act of horseplay which created a foreseeable risk of injury. Liability was admitted and the claimant received an out of court settlement of **£1.8 million.**

What about the standard of care to be expected of children who engage in pranks and horseplay? The matter has been considered in a number of cases, most notably above and in *Mullin v Richards and Birmingham City Council* [1999] 1 WLR 1304, *Blake v Galloway* [2004] EWCA Civ 814, and in *Orchard v Lee* [2009] WLR (D) 130. In *Mullin v Richards,* two schoolgirls were engaged in a mock sword fight with their plastic rulers when one of the rulers snapped and a fragment of plastic hit one of them in the eye, causing loss of sight. Lord Justice Hutchison, who gave the lead judgment, approached the issue by addressing, primarily, the question of foreseeability of injury. In that regard, the fact that the first defendant was, at the date of the accident, a fifteen year old schoolgirl was not irrelevant. The question for the court was not whether the actions of the defendant were such as an ordinarily prudent and reasonable adult in the defendant's situation would have realised gave rise to a risk of injury, it was whether an ordinarily prudent and reasonable 15 year old schoolgirl in the defendant's situation would have so realised.

# A FOOLHARDY ACT OF HORSEPLAY CONTINUED

In *Blake v Galloway*, the claimant and his friends, all about 15 years of age, were randomly throwing twigs and pieces of bark in the direction of each other. In the course of this high-spirited horseplay, the claimant was struck in the eye by a piece of bark thrown by the defendant. Since neither *Mullin v Richards*, nor any other authorities which dealt with negligence in the context of horseplay, were cited before the court, guidance was derived from personal injury cases involving sports and regulated games instead, such as football (*Condon v Basi* [1985] 2 All ER 453) and horseracing (*Wooldridge v Sumner* [1963] 2 QB 43). According to Lord Justice Dyson:

> "…the horseplay in which the five youths were engaged was not a regulated sport or game played according to explicit rules, nor was it organised in a formal sense. Rather, it was in the nature of informal play, which was being conducted in accordance with certain tacitly agreed understandings or conventions…there is a sufficiently close analogy between organised and regulated sport or games and the horseplay in which these youths were engaged for the guidance given by the authorities to which I have referred to be of value in the resolution of this case. The only real difference is that there were no formal rules for the horseplay."

Having cited the common features between horseplay and formal sport involving vigorous physical activity, the Court of Appeal held that for a defendant to be in breach of his duty of care to a claimant in horseplay, the conduct complained of must amount to "recklessness or a very high degree of carelessness". An error of judgment or lapse of skill will not do.

By setting the threshold for negligence in cases involving horseplay at that level, the court has come down in favour of giving greater recognition to the risks associated with any form of play involving physical contact. Although *Mullin v Richards* was not referred to in *Blake v Galloway*, both cases were later cited in the judgment of Lord Justice Waller in *Orchard v Lee*, which involved two boys playing tag and the duty of care owed to persons supervising them. Having reviewed a number of authorities in this area, his Lordship was of the view that both cases consistently demonstrate that for a child to be held culpable in negligence for acts of horseplay, the conduct must be careless to a "very high degree". His Lordship further stated that, "where a child is partaking in a game within a play area, not breaking any rules, and is not acting to any significant degree beyond the norms of that game, he or she will not be held culpable."

**Jennifer Lee**

# PERSONAL INJURY TEAM

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|---|---|
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| Geoffrey Kelly | 1992 |
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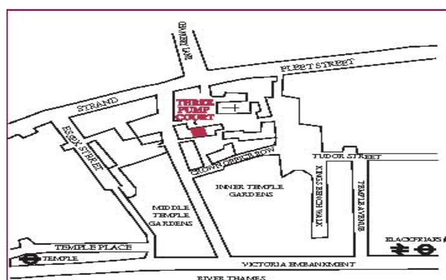


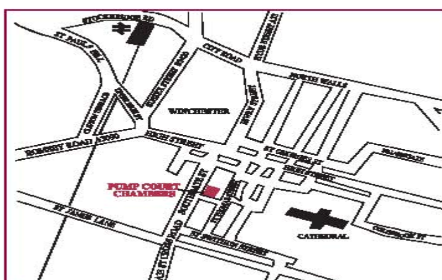


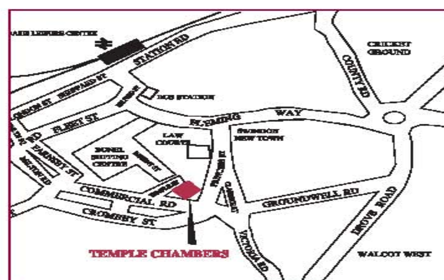


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