



Joseph Anderson
on 020 7614 3629
or via e-mail
j.anderson@kennedys-law.com
or log on to
www.kennedys-law.com



Sean Elson
on 020 7614 3675
or via e-mail
s.elson@kennedys-law.com
or log on to
www.kennedys-law.com

Enforcing safety

The Health and Safety Executive are vigorously enforcing the law against local authorities.

Recent years have seen a clear shift in focus by the Health and Safety Executive (HSE): there is now more enforcement through the criminal courts; and no individual or corporate body – in either the private or public sphere – is immune. Since 2000, the HSE has brought 112 prosecutions against local authorities, and 44 prosecutions against NHS trusts, for breaches of the Health and Safety at Work Act 1974 (HSWA).

There are also more investigations and prosecutions of employees and senior managers. In 2003, HSE published 'Prosecuting Individuals' to assist its inspectors. This important document is the first guidance it has produced on this subject.

The willingness of the police and the HSE to pursue prosecutions is demonstrated by a recent case when an employee of Barrow Borough Council was charged with seven counts of manslaughter caused by gross negligence (see further 'Manslaughter goes corporate' article). It was alleged that she was responsible for ensuring the maintenance of an air-conditioning unit which was the source of an outbreak of legionella and, although the jury was unable to reach a verdict on these charges, she was convicted of a health and safety offence.

The Health and Safety at Work Act

Enacted in 1974, HSWA remains the main source of health and safety regulation. Specific regulations have been implemented under the Act, complementing its broad principles. Breaching an HSWA requirement or regulation is a criminal act.

Employers must ensure that all aspects of their business are safe; this not only includes elements such as plant, systems of working and transport, but also aspects such as training and supervision, and – of course – providing a safe place of work and working environment.

These obligations relate to employees (including casual workers, part-timers, trainees and subcontractors) and to those who use equipment and premises, such as customers. They also apply where people, such as neighbours or users of products, are affected by the work. And employees must ensure their own safety and that of others.

Directors, managers and organisation's secretaries have personal responsibility for health, safety and welfare and for failures due to their 'consent, connivance and neglect'. This means that a manager who is at fault may incur personal liability as well as subjecting the company to action.

Assessing risks

Section 2 of HSWA imposes a non-delegable duty on employers to ensure, so far as is reasonably practicable, the health, safety, and welfare of their employees. A charge under section 2 may be defended by showing that the employer had done all that was reasonably practicable in the circumstances. The burden of proof is on the defendant to prove that it was not reasonably practicable to do more. Middlesbrough Borough Council was prosecuted under section 2 when an employee, who was fixing the roof of an outhouse owned by the authority, fell from a height and died. The council had failed to perform an adequate risk assessment and there was insufficient supervision of the employee. It was fined £17,500.

'Reasonably practicable' is narrower than 'physically possible'; the cost of taking action – the time, money and effort involved – may be balanced against risk.

If a gross disproportion can be shown, with the risk being insignificant in relation to the sacrifice, the person or corporation who has been charged can use this as a defence. Of course, the questions about how much effort and the degree of risk will be argued in court. The balance between the two will be of significance for a local authority with a finite budget.

Caring for the public

Under section 3 of HSWA, employers must, so far as reasonably practicable, ensure the health and safety of people who are not in their employment but who may be affected by their enterprise. This includes members of the public, employees of other businesses, and anyone who may come into contact with the organisations' activities. Because so much of a local authority's activities – operating care homes or sporting facilities, for example – directly affects the public, this is highly significant.

Doncaster Metropolitan Borough Council faced a section 3 prosecution when an electrical contractor was electrocuted and killed while attempting to mend an air-conditioning unit. The council was accused of failing to maintain its unit safely, despite being aware of its condition for some time, and despite another contractor being electrocuted five years earlier. It was fined £400,000 – a sum likely to be devastating to a local authority's budget. Under section 7 of HSWA, an employee at work has a duty to take reasonable care for his or her health and safety and that of others (including the public) who may foreseeably be affected by his or her acts or omissions.

Sentencing

Except for a few specific offences, HSWA prescribes only financial penalties, with fines being limited or unlimited, depending on whether the case comes before the magistrates' court or Crown Court. Significant increases occurred in 1992 so that magistrates could impose fines of up to £20,000 for offences under sections 2-6 of HSWA and up to £5,000 for breaches of regulations, with unlimited fines available in the Crown Court. Fines imposed are increasing every year, particularly where deaths occur.

One of the perceived limitations of HSWA is that, save for a few exceptions, a fine is also the only penalty for individuals. Custodial offences may be imposed for offences involving explosives and for breaches of licensing conditions, of improvement or prohibition notices, and of court orders.

Public profile

Health and safety law is gaining public prominence, as evidenced by the new corporate manslaughter bill. The HSE has a clear policy of prosecuting both private and public bodies, as well as individuals, whenever a breach of the law can be established and prosecution is warranted. Local authorities should be aware that there is a determination to create a level playing field between the private and public sectors and that prosecutions will be vigorous where there have been failures to manage risk.

Supporting risk managers

Kennedys

Local Authority advice in black and white

Local Authority Briefing

July 2005

Updated September 2005



Richard West
on 01227 698736
or via e-mail
r.west@kennedys-law.com
or log on to
www.kennedys-law.com

Welcome to the 2005 edition of **Kennedys' Local Authority briefing**. The local authority team at Kennedys have had an exciting year. We have continued to win plaudits from our clients for the service that we provide and for our approachability. In the autumn of 2004 the team was awarded the contract to undertake Transport for London's and London Underground's liability work. In the last year we have also been placed on the panel of 3 more local authorities. We have also launched our extranet which enables our clients to have full electronic access to their cases in real time.

I hope that you will find this bulletin useful. We have included articles covering many areas relevant to local authorities in 2005. Topics covered include; The Freedom of Information Act, corporate manslaughter and psychiatric injury.

If we can provide any assistance or advice on any of the issues mentioned in this update, please do not hesitate to contact either Andrew Caplan or myself.



Andrew Caplan
on 01227 698755
or via e-mail
a.caplan@kennedys-law.com
or log on to
www.kennedys-law.com

The road to freedom

An insurance perspective on the Freedom of Information Act 2000

The Freedom of Information Act (FOIA) was passed in November 2000 and was finally implemented in January 2005. It was felt that this gap in time was needed to allow the public sector to push through the political and cultural reforms necessary to ensure that the new rules would function.

The Act's intention is to place duties of openness and transparency on public bodies, from government departments to parish councils; this is clear because, since 1 January, individuals have had the legal right to access a huge array of information, about material ranging from how much a local authority spends on tea-bags to its grounds for appointing a particular contractor.

If the law works, it should lead to greater accountability for public spending and more transparency about value for money in contracts for public services. Ultimately, this should cast more light on the facts and analysis behind major policy decisions.

The Act

An individual will be able to make a request for information; but, if any person is the subject of that information, it may possibly be protected by the Data Protection Act (DPA). The FOIA sets out two rights for the individual:

- 1) the right to be told whether the information is held by the public body; and
- 2) the right to receive the information.
Public authorities are obliged to supply the information within 20 working days.

The FOIA creates 23 exemptions – some absolute, some qualified – to the right to disclosure. Where the authority decides that an exemption applies, it must give its reasons and explain the right of appeal, which is to the Information Commissioner.

Highways cases

Requests for information about highways cases can be expected – about highways records, contractors, and material on road safety. How far does the Act go beyond the authorities' usual disclosure obligation? Should an authority try to implement any exemption? What scope is there for abuse by potential claimants?

Unless expressly stated, the FOIA will not be subordinate to legislation with overlapping provisions. For example, where PAP1 provides for disclosure for limited categories of documents within a three-month period, there will be nothing to prevent an individual requesting more far-reaching documents under FOIA and the local authority will be obliged to deal with such a request within 20 days.

It is feared that unscrupulous claimants could turn the Act into a fraudster's charter by using it to acquire a global view – not previously available – of various aspects of public authority activity. In the worst case, the fraudster might obtain highway records showing which streets had not been inspected as frequently as they should have been or where repairs had not been completed within the stipulated timescale. Claims could then be based around these particular flaws.

Numerous authorities' policies may now be compared, giving an insight into potential soft targets by discovering which authorities appear not to have implemented their policies. Soft targets might also be identified more subtly, by requesting insurance data such as information showing how many claims are settled and how many are repudiated, or legal advice on claim valuation; this would show how robustly various authorities defend claims.

Exemptions

A few of these are worth considering in more detail:

Section 21 This provides an absolute exemption if the information is accessible by other means. Where an inquirer has already instigated a claim, could the authority argue that the information was available under the Civil Procedure Rules' disclosure provisions and therefore that it need only be made available within three months? This would give more time to collate it. Although this would not assist as to the more far-reaching requests set out above, it would prevent a claimant imposing an onerous timescale.

Section 32 This provides an absolute exemption if the information is a court record. This would stop attempts to build up a picture of an authority's defence record by seeking court documents relating to a class of action. DPA might also apply here.

Section 36 There is an exemption where the information would inhibit the free and frank provision of advice or views within public



authorities. While this exemption is qualified (the authority would have to demonstrate that disclosure was against the public interest), it could be used to prevent disclosure of information about joint local authority or insurer initiatives targeting fraudulent claims, or co-ordinating defence strategies generally.

Section 41 There is an absolute exemption where the information would constitute a breach of confidence actionable by the information's owner. Because of this, authorities should be advised that,

where they agree a settlement or are involved in sensitive information-gathering, confidentiality clauses should be included in any settlement or other agreement.

Section 42 There is an exemption where the information is legally privileged. Perhaps surprisingly, this is only a qualified exemption, so unless the authority can prove that the public interest is best served by secrecy, details would have to be provided. Timing could be relevant; for example, if a tenant claimed damages for disrepair,

it would be against the public interest to disclose the advice on damages during or before proceedings but this would not apply a year after the case had finished.

Coping with abuse

Authorities have an arsenal of weapons with which to meet potential abuse. In addition to the Act's exemptions, the narrowing of the disclosure rules means that claimants should be aware that, even if they apply for vast tranches of records, the authority will refuse disclosure in subsequent litigation and

oppose any claim for costs arising from reviewing records that go beyond the scope of the CPR.

FOIA undoubtedly places an additional burden on local authorities. There will need to be systems in place to process requests and, in highways cases, authorities' inspection regimes will be open to scrutiny. But the exemptions should afford sufficient protection so that, for the claims farmers who target local authorities, the Act will prove to be a white elephant, rather than a fraudster's charter.



Richard West
on 01227 698736
or via e-mail
r.west@kennedys-law.com
or log on to
www.kennedys-law.com

A new mental age

The courts seem to be taking a more generous approach towards psychiatric claims.

The general rule is that only a claimant who has innocently suffered a genuine and recognised psychiatric illness as a result of an accident caused by another is entitled to recover compensation. For example, a claimant who suffers from post-traumatic stress disorder or depression after being innocently involved in an accident caused by someone else will be entitled to receive compensation, whereas someone who is "shaken or shocked" as a result of an accident will not be.

Background

However, the legal position on psychiatric harm has never been straightforward. Historically, most psychiatric injury cases failed unless the psychiatric element was accompanied with actual physical injury. The law began to change gradually in the 1980s. But it was the terrible Hillsborough disaster of 1989 that generated the groundbreaking cases regarding the recovery of damages for psychiatric injury.

In *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, the House of Lords established the criteria by a person (who in subsequent cases became known as a 'secondary' victim) might recover damages for a 'purely psychiatric injury':

- (1) The claimant must have a sufficiently close relationship – that is, a relationship based on ties of love and affection – with whoever has been physically involved in the accident.
- (2) There has to be a proximity of location and time – that is to say, the claimant must have been at the location of the accident at the time it happened, or in its immediate aftermath.
- (3) A recognised psychiatric injury must have resulted.

Page v Smith [1995] 2 WLR 644 took this one step further. There, the House of Lords said that a distinction must be made between a 'primary' and a 'secondary' victim. A primary victim was one who was in the zone of foreseeable injury. Here, proximity was already established and there was no need to apply the *Alcock* guidelines. Where the claimant is a primary victim and the defendant has a duty of care to avoid causing personal injury to him or her, it is enough to ask whether the defendant should have reasonably foreseen that the claimant might suffer some kind of personal injury as a result of the defendant's negligence.

Again these principles were reconsidered and expanded in *White v Chief Constable of South*

Yorkshire Police [1999] 2 AC 455 (House of Lords). A primary victim was held to be someone:

- within the range of foreseeable personal injury; or
- who had reasonable fear of personal injury.

A secondary victim was the same as established in *Alcock*.

Perhaps even more importantly, however, it was held in *White* that rescuers who suffer no physical injury – but who go on to develop a recognised psychiatric condition – can only recover damages if they come within the meaning of a primary victim.

Recent developments

Recent cases have tried to extend these boundaries. *Farrell v Avon Health Authority* [2001] Lloyd's Rep Med 458, for example, has arguably extended the meaning of a primary victim. In this case it was held that the appropriate test is one of foreseeability of some risk of physical or psychiatric harm by the defendant.

Interestingly, in *Christopher Simmons v British Steel* [2004] UKHL 20, the House of Lords held that where a claimant was a primary victim, the aggravation of a skin condition and the anger



reactions could lead to other conditions, both physical and psychiatric, for which damages could be awarded.

Other significant developments have occurred in relation to what constitutes the 'immediate aftermath' of an accident. In *Galli-Atkinson v Seghal* [2003] EWCA Civ 697 (Court of Appeal), for instance, a claimant was allowed to recover damages for a psychiatric injury that arose when she saw her daughter's body in a mortuary immediately following a road accident.

In recent years there has been significant case law regarding workplace stress. In *Hatton v Sutherland* [2002] EWCA Civ 76, the Court of Appeal laid down some guidelines for such cases. Firstly, the court confirmed that a duty of care could be assumed and went on to say that such cases were "contractual claims by primary victims". It was then held that:

- (1) The ordinary principles of liability applied.
- (2) An employer was normally entitled to assume that an employee could withstand the ordinary pressures of the job, unless made aware of the existence of a particular problem.
- (3) No jobs were intrinsically dangerous to mental health.
- (4) An employer was unlikely to be thought negligent if a confidential advice service with referral to appropriate counselling services was made available.

Very recently, the Court of Appeal has decided six cases of workplace stress in *Hartman v South Essex Mental Health & Community Care NHS Trust* [2005] EWCA Civ 06. Most of these cases turned on the question of whether the psychiatric injury

was reasonably foreseeable; and the Court of Appeal reinforced the usefulness of the principles laid down in *Hatton v Sutherland*.

Conclusions

The courts are slowly applying normal tortious principles of foreseeability in psychiatric injury claims in order to bring claimants within the category of primary victims. Where this is not possible, the courts have been prepared to interpret generously the control mechanisms, again in a claimant's favour.

This is, of course, a developing area of law. However, local authorities should be alive to the difficulties that psychiatric claims can pose. It may be sensible in appropriate cases to apply a reserve to a psychiatric claim even if, strictly speaking, a claimant's claim does not fall within the current tests for primary or secondary victims.

resulting from the accident that led to the claimant's depressive illness could both be assumed to fall within the scope of its liability, so long as there was a causal link between the symptoms and the accident. As a result, although a claimant cannot recover damages for normal emotional reactions such as anger and fear, these emotional



Andrew Caplan
on 01227 698755
or via e-mail
a.caplan@kennedys-law.com
or log on to
www.kennedys-law.com

The road to recovery

Local authorities can now take a more bullish attitude over street accidents involving statutory utilities.

Historically, *Esther Nolan v Merseyside County Council and North West Water Authority* (1982) has been the test used to determine liability between statutory undertakers and local councils where accidents have resulted from defective apparatus or street works. However, the days of the Nolan test could be numbered in the light of recent decisions and the New Roads and Street Works Act 1991.

The Nolan case

On 30 May 1979, the claimant was walking along a pavement, which was part of the highway for which the highway authority was responsible. Fitted into the pavement was a water hydrant, which was the property of the water authority. Due to vandalism, the cover of the hydrant was missing and there was a hole in the pavement. The claimant tripped in the hole, causing her to fall to the ground and sustain injury.

She sued both the county council and the water authority. The trial judge gave judgment solely against the water authority for damages and costs. The water authority appealed, saying that the judge had been wrong to hold it solely responsible for the claimant's injuries. On appeal, the court looked at the question of apportionment, as governed by sections 1 and 2 of The Civil Liability (Contribution) Act 1978. Taking into account the responsibilities of two or more defendants for the damage in question, the water authority's appeal was allowed.

The trial judge had been wrong, the court said, to find the water authority solely to blame. Liability was apportioned on a 50/50 basis.

However, Nolan predated the New Roads and Street Works Act 1991 and – for reasons that are unclear – the local authority in the case did not attempt to rely on the statutory defence of reasonable care under section 58 of the Highways Act 1980.

The New Roads and Street Works Act 1991

The works of statutory undertakers in streets in England are governed by the 1991 Act. A 'street' is the whole or part of any of the following:

- a highway, road, lane, footway, alleyway or passage;
- a square or court; or
- land laid out as a way, whether or not it is, for the time being, being formed as a way.



Wendy Mayes
on 01227 698730
or via e-mail
w.mayes@kennedys-law.com
or log on to
www.kennedys-law.com

'Street works' are defined as (1) works carried out in a street which involve the placement, inspection, maintenance, adjustment, repair, removal, renewal or change of position of apparatus or (2) works required for or incidental to any such works.

How does the Act affect liability as between a highway authority and a utility in a case where a third party has suffered personal injury? This was the question the court had to consider in *Hilma McKinley v City of Westminster and Level 3 Communications Ltd* (2004).

The claimant tripped over a pothole on 24 June 2000, injuring her right knee. She sued the City of Westminster (whom we represented) alleging breach of statutory duty, negligence and nuisance. Westminster issued Part 20 proceedings for a contribution/indemnity against Level 3 Communications, whose contractors – TE Beach – had undertaken roadworks in the area. The contractors said that the roadworks had been completed satisfactorily by 15 May 2000. Westminster relied upon the guarantee period of two years in the codes of practice accompanying the 1991 Act. Level 3 Communications were adamant that the site of the accident remained in a satisfactory condition, without any pothole or defect creating a hazard.

Relying on the section 58 defence, Westminster maintained that the area had been subjected to regular inspections and that its highway inspector, who had carried out a routine inspection the day before the incident, had not recorded a defect at the site of the accident.

District Judge Gilchrist held that Westminster had complied with its duty to maintain the highway under section 58 of the 1980 Act. He was satisfied with the system of three-monthly inspections and the quality of inspection carried out by the contractors employed by Westminster. He found as a fact that, in addition to defects being recorded by the highways inspector, any defects below the intervention level were also noted.

The judge then considered Level 3 Communications's duties, and in particular their obligation under section 70 of the 1991 Act to reinstate the street. On the balance of probabilities, he ruled that it was unlikely that the road patches carried out at the accident site had subsided spontaneously and for no reason. It was more likely that the defect and the patch related to TE Beach's roadworks. Having regard to the photographs of the accident site, the judge commented on the similarity between the material used in the trench and the patch effected by TE Beach. Accordingly, Level 3 Communications were responsible for creating a pothole. Consequently, the claimant succeeded completely against Level 3

Communications, who were also ordered to pay the claimant's and Westminster's costs.

Practical advice

What practical steps can local authorities take? The New Road and Street Works Act 1991 was enacted to govern the relationship between utilities and local authorities. In cases where the accident has been caused by defective apparatus or poorly reinstated works, local authorities should keep opening and closing notices issued in respect of the works. If appropriate, they should also serve a notice requiring reinstatement: if the notice is not complied with, then the local authority has the power to carry out the repair work and recover the cost from the relevant statutory undertaker. Where responsibility is unclear, the authority might consider excavating the accident site and inviting the utility to attend.

The case of McKinley should encourage local authorities to plead the 1991 Act's powers and guarantee periods in their defence. They should also not be afraid to issue Part 20 proceedings in cases where statutory undertakers still try to hide behind the decision in Nolan.



Kieron West
on 01227 698721
or via e-mail
k.west@kennedys-law.com
or log on to
www.kennedys-law.com

Asbestos: anxiety pays

A recent court ruling confirms that anxiety may be compensatable.

The High Court has recently considered whether there should be compensation for negligent exposure to asbestos when this has caused no physical or recognised psychological condition but where the claimants say they have experienced anxiety about the risk of further injury.

In *Grieves v FT Everard & Sons* (LTL 16/02/05), Mr Justice Holland was looking at the cases of 10 claimants, each of whom displayed radiological evidence of asbestos pleural plaques. These plaques were caused by their occupational exposure to asbestos fibres due to the defendants' negligence. Although the claimants were free from any respiratory or other physical symptoms, the judge decided that they were still entitled to be compensated for their injuries.

On behalf of the claimants, it was argued that symptom-free pleural plaques constituted a 'disease'; it was said that the formation of the plaques should be considered alongside concomitant factors, including the risk of further and more significant disease or injury and the anxiety engendered by that risk.

Earlier cases

Three similar asbestosis cases came before the High Court in the 1980s and have remained unchallenged

since. Two of the three predated the introduction of provisional damages. In each case, the defendant argued that a claimant who is free from symptoms should not, as a matter of principle, be awarded damages. All three trial judges overcame this argument by relying on the perceived anxiety of the claimant about the risk of further injury.

None of these cases went to the Court of Appeal – doubtless, the defendants wanted to avoid the expense of appealing because of the modest sums awarded – and so, although persuasive, they were not binding on Mr Justice Holland. In the 1980s, it could not be anticipated that there would be the number of pleural plaque cases that are seen today nor could it be foreseen that the average size of current awards would be so high.

What is ‘injury’?

The defendants’ principal argument in *Grieves* was

that pleural plaques cannot be regarded as a ‘disease’ and that, in any event, they give rise to no physical impairment. Although pleural plaques amount to scarring of the lungs, they have no impact upon bodily function. The defendants also argued that anxiety engendered by the risk of further injury



is not, as a matter of law, compensatable; it cannot contribute to ‘damage’ so as to found a claim.

Mr Justice Holland said that “damage” or “injury” in these cases was “the permanent physical penetration of the chest by asbestos fibres to such an extent as to give rise to:

- the actual development of pleural plaques;
- the possible future onset of symptoms, even of a terminal condition; and
- consequent, potentially continuing anxiety”.

He agreed that pleural plaques could not, in themselves, be categorised as a ‘disease’ or ‘impairment of physical condition’ but, relying on *Cartledge v Jopling* (1963) AC 758, he took the view that “anxiety engendered by tortiously inflicted physiological damage can properly contribute to damage or injury so as to complete

the foundation of a cause of action”. On this basis, he decided in favour of the claimants.

Low awards

The insurance industry can take little comfort from Mr Justice Holland’s findings on liability; but there is some consolation in his findings on quantum. For those claimants claiming provisional damages, the judge considered general damages for pain and suffering to be worth between £3,500 and £4,000.

For those claiming damages on a full and final basis, where the anticipated risk of further injury was low, he refused to follow the approach to assessment taken by county courts, which have commonly been making awards starting at around £12,500; he considered a bracket of £6,000 to £7,000 to be more realistic.

The *Grieves* case is now being appealed.



Richard West
on 01227 698736
or via e-mail
r.west@kennedys-law.com
or log on to
www.kennedys-law.com

Paying in: still the way

Should local authorities follow the example of the NHS trust in *Crouch* and make a written offer instead of paying into court?

The Court of Appeal’s judgment in *Peter Crouch v King’s Healthcare NHS Trust* is a major triumph for NHS trusts and the NHS Litigation Authority. The Court of Appeal accepted that, when the court exercises its discretion on costs, it should treat an offer by an NHS trust in the same way as a part 36 payment, unless there is some special factor about the circumstances of the case.

Background

In *Crouch*, the NHS trust admitted liability and the claim proceeded to trial, where the claimant was awarded damages of £30,208. Before trial, the trust had made a written offer to settle the claim for £35,000. This had been rejected.

An assessment-of-damages hearing took place on 2 and 3 September 2003 before His Honour Judge Latham. Because the judgment sum had not beaten the trust’s offer, the trust applied for an order that the claimant should pay its costs from the date when the offer to settle expired.

The judge held that the trust had not successfully protected its position on costs because it had not paid money into court and expressed concern that defendants making written offers might not remain solvent until they had met their obligations. He ordered the trust to pay all the claimant’s costs, ignoring the written offer.

The appeal

The NHS trust appealed, saying that the judge should have made an order for costs in its favour, as if there had been a payment into court. The trust relied on part 36.1(2) of the Civil Procedure Rules (CPR), which gives the court the discretion to order that an offer to settle should lead to the same consequences as those in CPR part 36.20; it argued that the judge could and should have exercised this discretion.

Lord Justice Waller directed that, when a court exercises its discretion under part 36, it should have regard to all the circumstances of the case and ask whether it was right to apply the presumption in CPR 36.20. He thought that an NHS trust was bound to be ‘good for the money’ and that the offer was as good as a payment into court.

Implications of *Crouch*

Should a defendant local authority now choose to make a written offer rather than the usual



Joanne Kelly
on 01227 698728
or via e-mail
j.kelly@kennedys-law.com
or log on to
www.kennedys-law.com

payment in? This is an attractive idea for any public body; by making offers instead of paying money into court, a local authority can use the freed-up money to pay for services that may otherwise remain underfunded.

But our advice is that local authorities should avoid this approach. The NHS argued that the money paid into court could be tied up for many years; but it is rare for even complex personal injury cases to take more than three years from the issue of proceedings to a final trial – most of the work tends to be carried out under the personal injury pre-action protocol – and there is even less delay in non-clinical injury cases, meaning that money is released more quickly.

NHS trusts and local authorities

The courts are also likely to view an NHS trust in a more sympathetic light than a local authority. An NHS trust needs money to save lives and cure the sick. Of course, local authorities provide public services but these may not be seen to be of the same type. The decision to run the argument in *Crouch* was driven genuinely by the NHS and therefore carried considerable conviction – something which an insurer or claims handler, with many fewer witness statements in support, would find it difficult to match.

Whereas the NHS is self-funding, for major cases, local authorities tend to be insured. In those cases when a local authority is self-funding, the sums will generally be smaller. The smaller the sum, the harder it will be to win a *Crouch* argument.

Some local authorities surcharge the ‘offending’ department so that, where a highways inspector is found to have been in breach of duty, a highways department may have to meet part or all of the uninsured judgment sum. If the money in question is seen to come from a particular department, this may or may not help. Most claims against local authorities relate to highways incidents and an argument that the authority should not have to pay money into court because of the impact on street maintenance will not carry the same weight as the one deployed by the NHS. This type of argument might be more attractive if a local authority care team was involved.

Finally, what pressure will a claimant be under? The effect of a well-assessed sum of money being paid into court should not be underestimated. A recent Law Commission consultation exercise found that a majority of lawyers and judges felt that payments in should be retained. Part 36 payments into court are a very persuasive device in the defendant’s toolbox. Will a simple offer to pay carry the same weight?

Advice to local authorities

It is unlikely that a local authority would be able to win a *Crouch* argument and there is the risk that additional costs would be generated in trying to justify the decision not to pay in. If a court found that the money should have been paid in, then a local authority would be faced with a substantial liability for costs that could have been avoided.

In local authority liability cases, the potential risks of adopting a *Crouch* argument more than outweigh the benefits of doing so. A decision against a local authority would have costs consequences and a potential effect on claims experience which would be less than beneficial.

Update

In a Judgment published on 8 July, but handed down on 11 July, the Court of Appeal in *Stokes* held that in certain circumstances post litigation Part 36 offers should be considered to carry the same weight and therefore give the same costs protection as a Part 36 payment into court.

The circumstances in which a Part 36 offer will give such protection are:-

1. The offer must be expressed in clear terms stating the parts or issues in the claim to which it applies, whether it takes into account any Part 20 claim, and whether the offer includes interest. In addition the CRU position will need to be spelt out clearly when any offer is made. I would suggest that a copy of the CRU certificate accompanies any such offer.
2. The offer must be open for at least 21 days and otherwise accord with the terms of a Calderbank offer (The offer should be made “Without Prejudice save as to the issue of Costs”).
3. The offer must be genuine and not sham or non-serious.
4. The Defendant must clearly be good for the money when the offer is made.

Implications for public bodies

It appears that local authorities and public bodies will now be able to make such offers after litigation has commenced and still protect themselves as to costs.

If the above conditions are satisfied, the court should give as much weight to such an offer as would be given to a Part 36 payment into court. Local authorities and public bodies should satisfy the 4th condition.

The corollary of the above will be that public bodies are now in a position to rely on such offers rather than using their funds to lodge moneys in court which they may feel can be better used elsewhere. Of course, ultimately any offers that are accepted will have to be paid promptly and therefore appropriate accounting steps will need to be taken to reserve for moneys that will need to be paid.