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Clinical & Personal Injury newsletter

This newsletter is one in a series of publications produced by the Clinical Negligence and Personal Injury Group within the Private Individuals Division of Penningtons Solicitors LLP. If you would like further details on any of the subjects covered, please contact us at the addresses at the end of the newsletter.

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Accidents can happen

The recent case of *Cole v Davies Gilbert and the Royal British Legion* has been hailed as a victory for common sense in the field of personal injury claims.

Mrs Cole was a visitor to East Dean, in Sussex, which had the tradition of an annual village summer fete with maypole dancing, run by the local branch of the Royal British Legion. A special hole had initially been dug in 1977 to house the maypole. Each year it was dug out again in order to erect the maypole and then filled in following the fete.

In April 2001 Mrs Cole was walking on the village green when she tripped on the hole, which had become exposed, and fell, sustaining an injury. She brought a claim primarily against the Legion for leaving the hole exposed. In fact, the maypole had not been used since 1999. She also brought a claim against the local estate which formally owned the green – on the basis of occupier's liability.

Initially Mrs Cole succeeded in her claim and it was held that The Royal British Legion had failed in its duty of care by not ensuring that the hole was properly filled in after the 1999 fete. The claim against the estate failed as the court considered that it was entitled to rely upon the Legion repairing the hole.

The Legion appealed on the grounds that the finding that Mrs Cole sustained injury by stepping into the hole was inconsistent with the evidence and that there was no indication that it had failed to take adequate steps to make the hole safe in 1999.

The Court of Appeal accepted the previous court's finding that Mrs Cole had sustained injury from tripping on the hole and agreed that the Royal British Legion was responsible for filling in the hole safely after using the maypole.

However, it held that there was no evidence that this had not been done or done properly after the summer fete in 1999 and was satisfied that the process had been carried out adequately. Evidence was given that the hole had been filled in properly and there was no evidence that the hole had become exposed at any time from that point until the accident.

Mrs Cole's fall occurred nearly two years later and the Court of Appeal found that it was unreasonable to hold the Royal British Legion permanently responsible for the filling of the hole. The infill was likely to have worn away with frequent use of the green but the actual reason for exposure of the hole was not known. The Court of Appeal held therefore that there was no evidence of any breach of duty on the part of the Legion.

Given the regular usage of the green, it was likely that the hole had only become exposed shortly before the accident. Otherwise this would have been identified by residents. The hole was probably exposed by children playing on the village green after the grass had been cut - just before Mrs Cole's fall.

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There is a need to consider reasonableness when assessing any potential liability.

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Timing was a significant issue in establishing causation of injury in this case – the fact that the obligation on the Legion was to take action in 1999 and that the hole was held likely to have only been exposed shortly before the accident were major features in the decision.

The Court of Appeal agreed that liability did not rest with the estate.

The Court of Appeal concluded by reminding the parties that accidents do happen. Lord Justice Scott Baker stressed the need to consider reasonableness when assessing any potential liability for injury. Otherwise, if a higher standard were to be applied, 'there would be no fetes, no maypole dancing and none of the activities.. associated with the English village green for fear of what might conceivably go wrong'. Sir Igor Judge stressed the contribution of the fete and maypole dancing to bringing together the village community and felt that ordinary sensible precautions had been taken.

This case does not state any new principles or change the law but it does remind potential claimants that where defendants can show that sensible and reasonable action was taken to prevent risk of injury, they should not be held liable.

Litigation friends

The way in which decisions are reached on behalf of those who are unable to make them personally has taken a bold step forward as a result of the changes introduced by the Mental Capacity Act 2005.

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The Act has a large number of provisions. Most relate to the new Court of Protection and how the assets of an incapacitated person are to be managed.

In personal injury claims, there is an important change concerning court proceedings on behalf of an incapacitated person. The courts have long required that those who lack capacity should act through another person – who is called a litigation friend after the changes in court procedure in 1998. For some, the ability to manage their own litigation was uncertain. That uncertainty could be resolved by the court, which will have relied unsatisfactorily on a doctor's necessarily uncertain assessment.

The new Act provides a more complex but more reliable arrangement for assessing capacity. It follows the thinking of the courts in medical consent cases that capacity has many degrees. It accepts that capacity will vary for different decisions and at different times.

A particular example is the capacity to conduct court proceedings and the capacity to manage and control money recovered in those proceedings. These are reflected in the new terms replacing the old *patient* with *protected party* and *protected beneficiary* respectively. They are but two practical categories in a system which allows for a multitude of possibilities.

The new test is in two parts - firstly to show that there is an impairment, and secondly that the impairment is sufficient to render the person unable to make a particular decision. Where such an impairment exists, the litigation will be conducted by the litigation friend who may be what the new Act calls a *deputy* – appointed by the Court of Protection to make decisions on behalf of the protected party.

The litigation friend is now obliged to act in the protected person's best interests and in a way that is least restrictive of his or her rights and freedom of action but to continue to involve the protected person so far as possible in any decisions, and to monitor changes in incapacity.

This change provides a fairer, more understanding and accountable, but more expensive, procedure for protecting the interests of those lacking capacity.

This provides a fairer, more understanding and more accountable procedure.

Records and confidentiality

The Freedom of Information Act 2000 gives non-personal rights to information held by public authorities. Do these provisions introduce a new way to obtain access to medical records?

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Access to medical records is usually under rights given by the Data Protection Act 1998. An exception is where the patient has died because the Data Protection Act is only concerned with data of the living. Following a death, the old law applies under the Access to Health Records Act 1990. This Act reflects more a way to circumvent reliance on a right of ownership of records (in the case of the NHS by the Secretary of State for Health). A person who is making a claim arising out of a death or a personal representative can use this process. The meaning of 'the person making a claim' is still ill-defined and ill-understood.

In a recent case decided by the Information Commissioner, a mother tried to obtain a medical history of the events leading up to her adult daughter's death. Her daughter's husband was also her personal representative and made it clear that the daughter had indicated that she did not want any clinical information to be given to her mother.

The public authority concerned (County Durham NHS PCT) declined disclosure under a much used provision (Section 41) of the Freedom of Information Act 2000, stating that the information requested was obtained from another person (the daughter), but that disclosure to the public would constitute a breach of confidence, *actionable* by that person. In this case, that person would probably have no claim in damages but the widower may have been able to obtain a court order restraining disclosure.

Interestingly, the Information Commissioner considered whether a duty of confidence exists after death. He split this into consideration of matters of principle and legal authority. Where disclosure of such information is unconscionable, it may be restrained by the Court even if no loss occurs. Thus as a matter of principle, there was a duty of confidence after death. Legal arguments are less clear, but the Information Commissioner decided, in default, that there was no legal argument *against* his finding of principle.

Disclosure to the public would constitute a breach of confidence.

He therefore found a duty of confidence to which there might be exceptions – where the patient has consented, where disclosure is required by law and where the greater public interest overrides the duty of confidence.

It would seem that while this case was clear, the door might be open to argue a wider public interest in, say, a case where the circumstances of death were suspicious. Subject to that, the Freedom of Information Act is unlikely to become the weapon of choice to obtain access to personal clinical records.

Casewatch

Examples of the work undertaken by our team:

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£230,000 settlement following inadequate treatment

We acted for a young man who was concerned about treatment he had received to correct a rotation of his femur. Our client was a promising prison officer and a new father. He was keen to establish himself in a career that would allow him to provide for himself and his new family in the long term. He had left the Marines as he could no longer participate in active duties, despite recovering from the injuries he sustained in the accident.

We investigated the claim by obtaining medical evidence which was critical of the way in which the operation to correct the rotation, and a number of subsequent procedures, had been carried out.

As we progressed to trial, the defendant continued to deny liability and causation of the injuries, together with the value of the claim. However, a round table settlement negotiation resulted in a settlement of £230,000.

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Casewatch

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Poor medical care leads to premature death

A woman in her sixties with diabetes was admitted to hospital on suspicion of a gastro intestinal bleed and subsequently received treatment for multiple liver abscesses. She went on to develop pressure sores on her feet and in her sacral area.

Despite concerns raised by the patient and her family, little nursing attention was given to the sores and she was discharged from hospital without her GP being advised of her condition. The sores became worse and she was readmitted to hospital to receive specialist vascular care. There was little improvement and she had to undergo a below knee amputation to her right leg. Sadly, her condition deteriorated further and she died.

Her husband brought an action relating to the poor standard of nursing care that his wife received and failure to undertake regular assessments of her pressure sores. He alleged that if she had received appropriate care, she would not on the balance of probability have suffered from such severe pressure ulcers, required a below knee amputation and died prematurely.

Liability was initially denied but subsequently admitted. Following settlement negotiations, damages of £30,000 were agreed in autumn 2007.

The sum could be broken down to allow £10,000 for bereavement damages, approximately £10,000 for pain, suffering and loss of amenity and £10,000 for dependency.

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