APIL Joint Product Liability SIG/Child Injury SIG

21st February 2002 - Birmingham

Chaired by: Cathy Leech (Pannone & Partners) and Amanda Stevens (Charles Russell)

Secretary: Andrea Johnson (Stewarts)

Speakers: Dr Michael Hayes of CAPT

Mr Rob Wheway of Wheway Consultancy

Mr Richard Holt of Evans Derry Binnion & Co (APIL EC)

Ms Cathy Leech

Michael Hayes – Child Accident Prevention Trust

Dr Hayes outlined the history of the Trust which was established in 1979, and historically has focused on pre-school age children. Now the Trust's work has been extended to those aged 10 to young teenage years, which seem to be the most neglected in the area of child accident prevention. There are now 2 CAPT offices, one in Omagh and the other in London. 16 people currently work for the Trust. They have a budget of £650,000 a year. The Trust is in receipt of a small grant from the Department of Health but a significant chunk of money comes from commercial concerns. The aim of the Trust is to reduce the number of deaths and serious injuries in young people. The Trust works with Government Departments, such as The Department of Health and Department of Trade and Industry, local authorities, the voluntary sector and professional groups. The Trust recognises there is a conflict between providing children with a healthy lifestyle and opportunities for creativity and freedom of movement, and protecting safety issues.

Dr Hayes reported that The Department of Health are increasingly taking a lead on child safety issues and are a driving force with the accidental injury task force. Dr Hayes said that the UK along with most other countries, does not know enough about what is happening to cause children's accidents, or how to

prevent them. Work has been done on children's cycle helmets, child car restraints, swimming pool fencing, area wide traffic engineering schemes, child resistant chemical containers, smoke alarms and reduction in temperature of bath water. Nobody has yet looked closely enough to determine scientifically whether safeguards work. There is a lack of political will to get things done, in the area of child safety and a lack of funding. This is despite 1.2 million accident and emergency attendances of children every year in the UK. It is estimated that one child in every 4 or 5 seeks professional medical attention as a result of an accident every year.

Dr Hayes noted that there is a huge social class gradient, such that more accidents tend to happen to children in the lower socio-economic groups when compared to the higher groups (although accidents resulting from horse-riding and similar activities tend to occur more often in the higher socio-economic groups). The bias was such that children from socio-economic group 5 were 5 times more likely to die as a result of an accident (16 times more likely to be involved in house fires). Dr Hayes noted that this gradient was getting steeper.

It was also noted that the number of deaths from accidents was reducing, although there was no change in the number of accidents. Dr Hayes suggested that this may be due to product safety, for example air bags/seat belts had improved, changes had been made in playground safety. Also, improvements in medical treatment were probably responsible in part.

Dr Hayes noted that the types of accidents were linked by level of development of the child rather than his/her biological age:

Newborn baby - wriggling and rolling around

- Dropping baby
- Hot water bath
- Unsupervised feeding
- Car crashes
- Bath drowning (only takes a few centimetres to drown)

Baby - sitting and reaching

- Falling off raised surfaces
- Sharp objects on the floor

- Reaching for cups of hot drinks
- Swallowing tablets and household cleaners
- Swallowing small objects

Baby - crawling and walking

- Fall on stairs or out of buggies
- Cuts from glass doors/windows
- Falls into fires
- Reaching and pulling kettle flexes
- Opening cupboard doors
- Car crashes (all ages)

Toddler - walking and climbing

- Climbing out of windows
- Playing with matches and lighters
- Swallowing pills
- Playing with plastic bags
- Drowning in garden ponds

Child - school age

- Pedestrian injuries
- Falling from heights - trees, garages, walls, etc
- Copying adult tasks, eg knives/tools
- Cycle crashes
- Drowning in open water

CAPT works towards prevention of accidents is done by 3 routes:

1 Education - raising awareness, publicity (to policy workers, carers, parents, children, etc);

2 Changing environment - engineering products, discussions with manufacturers;

3. Legislation - local, national, international, work with product standards and voluntary codes of practice.

None of these work in isolation. For example, with regard to seatbelts there were a large number of well publicised awareness raising schemes and discussions with manufacturers before legislation came into being.

Dr Hayes noted that there were three types of prevention: primary (preventing the event happening, eg using stairgates); secondary (minimising the injuries, eg use of bike helmets); and tertiary (minimise the injuries, eg first aid training, appropriate medical care, counselling, etc). Long term consequences involving parents/classmates.

CAPT's work includes:

(a) *Supporting practitioners and providing information to parents and children*

CAPT publish guides for practitioners, the media, and for parents/carers. They have also developed training material (in conjunction with the DTI). CAPT are involved in an international journal 'Injury Prevention'. They have also set up a postgraduate course. They conduct research into safe practices.

Two of the main publicity events that CAPT are involved with are: Child Safety Week (now in its 9th year) and Safe Kids Campaign.

(b) *Representing the safety interests of children and young people in the UK and beyond*

CAPT are involved in a number of taskforces, including:

DH Accidental Injury Taskforce

DTLR Road Safety Advisory Panel

DfEE/DTLR School Transport Advisory Panel

NI Ministerial Group into Home Safety

HSE Education Group

Activity Centres Advisory Group

(c) *Providing expert advice and consultancy*

Involved in standardisation (British, European and International). For example, the tops in BIC biros now have holes in them (9 children died in a 15 year period as a result of swallowing them and being unable to breathe).

Other items that are currently being considered are cigarette lighters, toy safety and nursery furniture.

Provision of consultancy to high street stores and for products under development.

Involved in criminal and civil cases re levels of supervision and training on play equipment, and Trading Standards (product safety).

Dr Hayes noted that much of his work surrounded 'child appealing' products, eg cigarette lighters designed to look like model cars, etc. A defence often raised is that the child is using the product in the wrong way, however, Dr Hayes noted that the child was often using the product in a way that would be 'reasonably foreseeable for a child'.

(d) *Providing a bridge between research and practice*.

When involved with academic research CAPT are able to advise about how a

product/event would actually work in real life away from the safe confines of research.

Dr Hayes asked what drove product safety - standards and legislation (which governments don't like doing)? Technology (eg invention of the airbag)? Increasingly litigious society? Customer expectations? (ie demanding a greater level of safety, which may occur if we are prepared to pay more for a product). It was noted that some manufacturers advertised their products on the basis of safety, eg the Renault Megane.

Developments in Product Safety

- Provision of better information - see statistics from Home Accident Surveillance System (HASS) and Leisure Accident Surveillance System (LASS). Apparently, the UK leads Europe in this field.

NB useful website for HASS/LASS

http://www.dti.gov.uk/CACP/ca/work6.htm

- Better European co-operation and co-ordination for product standards

- Mandates and ISO/IEC guides. Mandates are where companies are asked to take on board certain considerations eg child safety, older people and disabled people and product information

- General Product Safety Directive re recalls.

NB useful website (DTI)

http://www.dti.gov.uk/CACP/ca/safety/newsletter/pdf/safety14.pdf

Dr Hayes reported that many domestic products ignore the interaction of their products with children on the basis that children should not use electrical equipment

CAPT look at the specific safety needs of children and also the ways in which products are actually used, eg child restraints and domestic appliances. With regard to child car seats CAPT look at how easy/difficult the seats are to fit/get the child in and out of, etc. Performance tests do not show the

usability of the products on a day to day basis.

Dr Hayes noted that CAPT had been involved in a research project with the Universities of Newcastle, Huddersfield and Northumberland to consider the lifestyles and leisure risks of 11-14 year olds. The project was lead by concerns that young adults were in the transitional phase to adulthood but lacked experience (and may also be subject to peer pressure).

Interviews with a large number of 11-14 year olds took place, together with focus groups and asking the young adults to keep diaries of where and how they spent their leisure time.

The conclusions of the study showed that the young adults wanted responsibility, freedom from adults supervision, to participate in a variety of activities, greater access (to transport, etc), and be able to take risks. The participants were aware of the effect of their actions on adults.

Dr Hayes reminded the group about the UN Convention on Rights of the Child. He noted that Articles 12 and 24 were particularly important (right to good health and right to be heard and have their opinion taken into account).

CAPT websites:

http://www.capt.org.uk/

http://www.capt.org.uk/pdfs/Stats%201999.pdf

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Mr Rob Wheway

Mr Wheway showed a number of slides of obvious dangers in playareas (eg bolts under roundabouts, unsuitable handrails, electrical sockets within easy reach, etc).

Mr Wheway started his talk on playgrounds by reminding everyone that whilst there were dangers in playgrounds, etc the greatest danger, in his opinion, was the road - there are far more cars on the roads today. There is also the fear of 'stranger danger' and as a result children are being kept away from play areas and not getting healthy exercise or the opportunity to make friends.

Mr Wheway noted that there is a duty to clear up broken glass.

With regard to signs quoting byelaws, etc Mr Wheway said that they were no defence. The phrase 'parental responsibility' was very limited. Where children are using an outdoor playground they should be free to use the equipment without supervision. If indoors, eg 'Wacky Warehouse' type facilities, the parents should be nearby but cannot be expected to be using the facility.

In addition, the defence that a child was using a piece of equipment the 'wrong way' was inappropriate, eg, children will often try to climb up a slide the wrong way.

Mr Wheway also advised that the impact absorbing surfaces used in playgrounds don't prevent accidents but help to prevent serious head injuries, ie if a child falls awkwardly onto the surface it will not prevent a fracture of a long bone.

Mr Wheway reported that there were standards and codes of practice for all types of play facilities, although they were usually advisory rather than mandatory. The operator of a facility must know of these standards and codes. If he/she has willingly ignored or gone against the codes without an assessment of risk then he/she is probably negligent. It should be noted that the codes/standards are not retroactive, so the date of installation determines the relevant codes/standards. However, where a long period of time has elapsed then perhaps the potential Defendant should have updated the equipment, eg impact absorbing surfaces were developed in 1979, so if a play facility does not have impact absorbing surfaces in 2002, they should by now.

If a child is cared for by a paid carer the care provided is covered by the Childrens Act.

Potential Claims

The first thing to do is obtain photographs before the potential Defendant can effect a repair. If possible, ensure a child is the photograph to give a degree of perspective.

Secondly, make an informal inquiry of an expert as to the issues that need to be considered and what documents should be requested from the potential Defendant. For example, regular inspection reports (daily, weekly, monthly - depending on the area involved), eg for a small area in a rural village, weekly visual checks will be enough but an indoor play area should be checked daily. More thorough checks

should be performed weekly to 3 monthsly depending on the type of facility. Annual inspection reports (preferably by an independent competent person), installation reports (it is good practice to arrange for an independent inspection as a condition of contract, if not done it is not necessarily negligent), etc. If any recommendations were made during these inspections check they were followed up. There should be a post-installation inspection report too. This is not mandatory but once again evidence of good practice.

Also need to check if a risk assessment has been carried out. This is mandatory under the Management at Work Regulations.

When looking at specific pieces of equipment need to look at whether the manufacturers have tested the equipment on children. Mr Wheway reported a case he had investigated against a local authority. However, as the LA had bought in good faith and had brought it from a reputable manufacturer he could not find negligence. However, he reported that a few weeks later he saw a similar piece of equipment in a school and spoke to a number of children there who had said that only 1 child in the school could use it properly, because it was so difficult. Mr Wheway also spoke to a child in a playground who reported that his sister had broken her arm following a fall from the equipment. Mr Wheway submitted a further report to the solicitors advising that the manufacturers had probably not had children testing the equipment.

Discussion

A query was raised re the case mentioned by Mr Wheway - noting that this case should be referred back to the solicitors recommending that they consider the Consumer Protection Act as it is no-fault based objective test and negligence is not required.

A question was raised about Bull Bars on cars and whether they would come under the CPA, particularly as there is a lot of literature stating they serve no purpose (ie are cosmetic). It was felt that the CPA should not be used in cases where there is 100% liability on the part of the driver (double recovery). However, it might be worth considering if there is contributory negligence or if the accident was the child's fault. In which case one might be able to argue that the child's injuries were worse than they would have been but for the Bull Bars.

With regard to playground equipment Mr Wheway was asked about swinging tyres - in that children could often swing one way quite safely but problems sometimes occurred when the tyre went backwards. Mr Wheway noted that with some pieces of equipment they were designed to be easier to use one way to discourage them being used the other way, eg the steps on a slide are easier to use to climb than to descend but that did not stop children coming down the stairs.

It was noted that indoor play areas often require children to take their shoes off. A concern was raised that this increased the risk of accidents (of slipping). Mr Wheway confirmed that generally speaking stockinged feet was the appropriate footwear.

With regard to school activity centres it was noted that there had been a number of high profile accidents. Mr Wheway was asked whose responsibility it was to check the suitability of a centre.

Mr Wheway advised that activity centres did not come under his remit. However, he noted that if a school wanted to use a centre either the school had to check out the centre (that it had appropriate facilities, and suitably trained and qualified instructors who are used to dealing with school aged children). Alternatively, they can pick a centre from a Local Authority approved list. It was important that the school could show that it had made the appropriate checks. A risk assessment with regard to number of people/instructors required per group of children in a defined age group should be made. On this basis Mr Wheway felt that the schools or their staff were not sufficiently expert and should look to the Local Authority for risk assessment.

Cathy Leech asked what notices should be available to show if a piece of equipment was suitable for a particular aged child, ie what demarcation should there be for equipment for children aged up to 5 years of age, and which equipment suitable for the over 5's. Mr Wheway stated that the view of the inspectors and ROSPA was that all equipment in a communal playground should be suitable for all. However, if there is more challenging equipment then it should be separated by design, ie it should be obvious if it is unsuitable for a particular child.

Mr Wheway noted that the British Standards for Indoor Equipment was due out any day. He said the British Standard was likely to incorporate much of the Code of Practice which has been in place since 1999. With regard to guidelines for the number of children that should play in a particular area $2m^2$/ child is considered reasonable. There are no guidelines for the number of children using a local park. If a child is being cared for by a paid carer there are strict ratios.

For Outdoor Play the British Standard is BS5696 (31/12/98). The European Standard came into being on 01/01/99. There is also an industry led code of practice "Risks and Safety at Play".

It was noted that that there is no register of 'defective' products. However, if there is a particular problem the inspectors would report it to each other on an informal basis. It was also noted that Trading Standards would keep reports. Further reference was made to the LASS figures produced by the DTI which offers a free search facility.

Mr Richard Holt - EC update

Richard noted that the case of *Callery -v- Gray* was going up to the House of Lords on 24th and 25th April 2002. At the same time the *Fairchild* (asbestosis) case was going to the House of Lords. With regard to *Fairchild* Richard noted that a practitioner group was being set up at APIL headquarters to seek a reversal of this decision. Members are asked to check the APIL website particularly if they have any information or cases.

The *Sarwar* case was also mentioned. Need to consider before the event insurance, however, having considered any documentation may be able to argue that the indemnity is too low or too strict then may be appropriate to consider a CFA.

Members were also referred to the February newsletter re MIB, clause 13. Concern has been raised about the phrase 'as soon as reasonably practicable'. Does this mean the day the client comes through the door, ie before you have assessed the risks of the case? It has been suggested that a proforma be prepared and given to the client during the first meeting so that he/she can complete it and send it off.

Richard noted that Jordans are publishing a number of books/articles for APIL members including model letters and CFAs (the CFA book will be published after the decision in *Callery -v- Gray* has been made.

With regard to the nominations for the EC elections Richard noted that the posts were unopposed. He also noted that there were 4 vacancies for which nominations must be received by 28th March 2002.

Ms Amanda Stevens

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Amanda reported a recent case of Simon John's (The Daily Telegraph 20/2/02) where an award of £50K had been made following a stillbirth. In this case the mother was carrying a brain damaged baby and this had not been communicated to her. No effort was made to save the baby who was stillborn after delays in arranging caesarean section. The mother argued that she would have wanted to keep the baby whatever condition he had been born in. The Right to Life under the Human Rights Act was argued.

Ms Cathy Leech

Cathy advised the group of a personal injury case she had dealt with (acting for one of defendants) - Roberts -v- Iberotravel (t/a Sunworld) and another (owners of the Spanish hotel).

Background

Family of 5 - mother, father, 9-year-old boy, 6-year-old boy and toddler staying in a hotel in Majorca. The hotel had a swimming pool complex. On the first day of the holiday the 6 year old and the 9 year old were in the shallow end of a pool (not a children's pool). The 6 year old was not wearing arm bands and could only do doggy paddle. The parents were with the toddler - getting him ready to go in the pool. When they got to the pool they couldn't see the 6 year old. They split up and walked round the pool but couldn't see him.

Unbeknown to them he had been pulled out of the pool unconscious. A bystander had started CPR (although had not done it properly). A doctor had been called (who took about 7 minutes to get there), once he arrived an ambulance was called. The doctor started CPR and gave adrenaline. The child had suffered a catestrophic brain injury (having been unconscious for 15 minutes).

Case

Initially sued Sunworld and the hotel. The parents were brought in under Part 20.

It was found that the pool had an unexpectedly steep gradient 14-16%. Spanish law states the maximum gradient for a children's pool was 10%. However, as this was an adult's pool this did not apply.

A crucial document in the case was that Sunworld had prepared a report that stated that the pool needed depth markings, that it was unsuitable for children and that the information book for guests should say this. This had not been complied with. Their brochure stated that the hotel was suitable for a 'family holiday with superb amenities for young children'.

With regard to the hotel the allegations were that it failed to provide life-saving equipment or banjoles (not qualified lifeguards but people in the vicinity who can keep any eye on the pool and provide first aid, if required). The hotel were unable to prove that there was anyone in the vicinity. If there had been, it is

argued, the child would have suffered less brain damage.

It was argued that the parents were negligent in allowing their child to go into the pool without armbands given that he was unable to swim.

The judge determined that Sunworld were not entitled to a full indemnity from the hotel. With regard to the immersion of the child in the pool the judge held that the parents were 1/3 liable and Sunworld were 2/3 liable.

With regard to the resuscitation Sunworld were held 50% liable and the hotel were held 50% liable.

Quantum = £2,642,694.

The hotel suffered a substantial loss on costs (as a result of an earlier Part 36 offer that had been made). Hotel are currently arguing that as quantum would have been less in Spain any application to the Spanish court to enforce the Order will reduce the level of their payment.

Cathy noted the difficulties of obtaining instructions from the hotel.

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