CHILD & CHILD

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PETTMAN SMITH

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Legal UPDATE

A Promise is a Promise

A woman who was widowed mere hours after getting married has been ordered by the Court of Appeal to honour a promise her husband had made to his ex-wife.

Kathleen Soulsby married her husband Owen in 2000 at the London hospital where he was being treated for leukaemia. He was divorced from his ex-wife, Elizabeth, in 1986 and they had agreed a settlement under which he was to pay her £12,000 a year plus maintenance for their children. In 1993, he agreed to give her £100,000 on his death in exchange for being relieved of the obligation to pay further maintenance payments. His will was altered to give effect to the agreement.

Under UK law, however, marriage invalidates any previous will and Kathleen argued that the bequest was therefore invalid.

The Court of Appeal considered that the agreement between Owen and Elizabeth was enforceable. She had ceased to receive maintenance in 1993 and had not pursued him for the payments. She had therefore complied with her part of the bargain and his estate was bound to honour his side of it.

It is often forgotten that marriage or civil partnership invalidates an earlier will. It may not be very romantic, but it is practical to make sure that after the ceremony a new will is executed as soon as is practicable.

Credit Card Coverage Extends Abroad

The House of Lords has confirmed that UK credit card companies can be held liable under the Consumer Credit Act for breaches of contract or misrepresentations arising out of foreign credit card transactions.

The decision makes the card issuer jointly liable with the supplier where the misrepresentation or breach of contract applies to a purchase of between £100 and £30,000 and gives rise to a valid claim by the consumer.

The ruling will come as a welcome relief to holidaymakers who will now benefit from protection on their holiday purchases in certain cases. In practical terms, it is likely that banks will seek to recoup the extra cost by a slight amendment to the exchange rate applied in foreign currency transactions.

New HIPs Resolution Service

The rules governing Home Information Packs (HIPs) require that estate agents in England and Wales who market homes for sale with HIPs must belong to an approved redress scheme for HIP-related complaints. The schemes allow consumers to pursue compensation claims against agents where a complaint is justified. Two schemes already in operation have now been joined by another, known as the Property Adjudication for Consumers Scheme (PACS), which commenced on 1 December 2007. PACS differs from the existing schemes as it is run by an independent dispute resolution provider rather than an ‘industry ombudsman’. This may give an extra level of comfort to some complainants.

Animal Danger for Owners

Owners of animals that are known to be potentially dangerous are usually aware that if their animal causes an injury, they will most likely be held responsible. However, owners of animals not normally considered dangerous may well assume that they will not be held liable for an injury caused by their animal, for example if their animal causes an accident.

A recent case has brought further clarification to the law and spells out a warning for animal owners.

The case concerned a horse which reared up and threw its rider, a 17-year-old girl. The girl suffered a serious head injury as a result. The horse had no history of misbehaviour and the girl was considered competent to ride it. The girl sued the owners of the horse for negligence or, in the alternative, claimed that the owners were strictly liable for the injury under the Animals Act 1971.

The court rejected the allegation of negligence. However, it accepted that the owners of the horse were strictly liable under the Act.

The Act places strict liability on the keeper of an animal that does not belong to a dangerous species if the animal causes harm where the following points are satisfied:

a) where the damage is of a kind which, unless restrained, the animal was likely to cause or which, if caused, is likely to be severe; and

b) where the likelihood of the damage or its being severe is due to the characteristics of the animal which are not normally found in animals of the same species or are not normally so found except at particular times or in particular circumstances; and

c) where those characteristics are known to the keeper of the animal.

All three of these must be present for the animal's keeper to be liable under the Act. The court considered that it was clear that an accident involving a horse rearing is likely to be severe and that in certain circumstances horses are likely to rear if not restrained. The court accepted that in certain circumstances horses are likely to act unpredictably and that the owners, as experienced keepers of horses, would know this. Accordingly, the court found the owners liable.

The owners appealed. In the Court of Appeal the case turned on whether the behaviour of the horse was 'normal'. The Court held that normal means 'conforming to type' and that rearing is natural behaviour for horses in certain circumstances. The owners' appeal was therefore rejected.

The implications of this case for animal owners are potentially far-reaching. If the likely result of an accident is severe and it occurs because of the normal behaviour of the unrestrained animal in particular circumstances, then the owner is likely to be found liable, even if the behaviour of the animal is unusual.

Unless there is a change in the law, the practical solution to the problem this raises for animal owners is probably to be found in their insurance policies, which should be read carefully.

Hunting Ban Not a Breach of Human Rights

The House of Lords has ruled that the ban on hunting is not a breach of the human rights of people affected by it. It was argued that the ban adversely affected the private life, cultural life and use of home of some of those affected and would result in a loss of livelihood for others. It was also claimed that the ban infringed the rights of country people to assemble and associate with one another. All of these arguments were rejected.

Meanwhile, prosecutions of alleged illegal hunting have been postponed for the time being after Mr Tony Wright, the first person to be convicted of breaching the Hunting Act 2004, was acquitted on appeal at Exeter Crown Court of hunting illegally with dogs. Judge Cottle described the relevant law as…"far from simple to interpret or apply" with the result being "an unhappy state of affairs which leaves all those involved in a position of uncertainty." The Crown Prosecution Service is appealing to the High Court, seeking clarification of where the burden of proof lies in such cases.

Ruined Holiday? What to Do

If you are subject to a long delay or the cancellation of your flight when on holiday, the airline is required to give you a leaflet outlining your right to compensation. If the delay or cancellation means that you must rearrange your holiday or incur significant extra cost, make sure you get an exact explanation of the reasons for it. We can give you advice on your rights in these circumstances if the airline or tour operator fails to compensate you adequately.

If you are on a package tour and suffer illness as a result of poor hygiene or some other preventable cause or you have an accident on

account of a lack of proper safety considerations, make sure you get as much evidence as possible and as quickly as possible. Photographs or films of unsafe areas and unhygienic food preparation procedures can be very useful in cases of accident or illness, for example. Also, make sure your complaints are formally noted in writing and given to the holiday representative and/or the resort manager and make sure you keep a copy. Exchange addresses with any potential witnesses or fellow sufferers. If you are admitted to hospital, retain a copy of your medical notes.

If through no fault of your own you have suffered a preventable accident whilst on holiday or had a holiday ruined by illness caused by procedural failings at your resort, contact us as soon as possible for advice on the next step to take.

Children Say 'No' and the Court Agrees

In what has been described as a highly unusual decision, two English boys who disliked living in France with their mother have had their wish to remain in the UK with their father granted by the Court of Appeal.

The two boys, aged 11 and 16, were taken to France by their mother in 2005. At that time neither spoke French and they found that they were unable to settle into their new life. When they came to England to visit their father, in July 2007, they refused to return to France. Their mother alleged that the father had abducted the boys and started court action to recover them.

The Court was critical of the mother's attitude towards her sons. She was described as dealing with their concerns by ignoring or stifling them and closing her eyes to their problems.

Lord Justice Thorpe, one of the three Appeal Court judges who heard the case, commented that he had "rarely, if ever, heard such strongly expressed views by children of this age." The mother was refused the right to appeal against the decision and will now have to apply to the court for contact arrangements with the boys to be settled.

Although this case was described as 'not just exceptional, but very exceptional', the courts are paying an increasing amount of attention to the views of the children involved when matters of residence are concerned. With one in six marriages in the UK now involving a spouse from abroad, such 'cross-border' disputes are likely to become more common.

Compensation for Reduced Earning Capacity in Marriage

A recent case, in which a man's ex-wife sought an increase in the financial provision originally made for her following their 1988 divorce, has raised an interesting issue regarding the calculation of the division of the financial spoils on the break-up of a marriage.

In the original settlement, even though the couple had been married for 24 years, the woman was awarded only 26 per cent of the capital of the marriage. She was, however, awarded 35 per cent of her husband's income at that time.

Subsequent to their divorce, the woman's ex-husband was able to increase greatly the value of his assets, becoming a multimillionaire. She had found a job after their divorce, but her argument that she should have an increase in her financial settlement was based not only on her increased financial need but also on the basis that she should be compensated for her reduced earning capacity during the marriage because she had not worked whilst bringing up their children.

The court accepted this line of reasoning and awarded her a six-figure settlement.

Dementia is Health Care Issue

A 94-year-old Plymouth woman has won a landmark decision that could mean hundreds of elderly people will no longer be required to fund their nursing home fees out of their own pockets.

Hilda Atkinson had been diagnosed with Parkinson's disease, osteoporosis and angina, but needed around the clock nursing care mainly because she suffers from dementia.

Mrs Atkinson's local health authority, Plymouth Teaching Primary Care Trust, argued that her need was one of 'social care', which in practice meant that the cost of the care was met in part out of Mrs Atkinson's savings. She and her family argued that her health problems were such that her care requirement was dictated by a medical need, not a social one. In case of medical need, the responsibility for paying for the care falls on the NHS.

The High Court accepted the Atkinsons' argument and ordered the Trust to repay £43,000, which Mrs Atkinson had paid for nursing care since 2004, and to pay for her future nursing care costs.

Families seeking the best care for elderly relatives who are unable to look after themselves often fail to realise that social care can be charged for by councils, whereas medical care is free under the NHS. It is not uncommon for the NHS to try to pass responsibility for the elderly and infirm to the local council, which, in turn, often claims that what seem to be medical issues are social ones – passing the financial liability on to the infirm person and their family. If you think your NHS or council has attempted to avoid its responsibilities in this way, we may be able to help.

Bankrupt Ex-Spouses – Court of Appeal Rules

The Court of Appeal has reversed the decision of a lower court and decided that the financial settlement between a man and his ex-wife could not be used to pay the ex-husband's debts when he became bankrupt two years after their divorce.

The claim by the man's receiver in bankruptcy that the arrangements under which the wife retained the family home constituted a 'transfer at an undervalue' was not accepted by the Court.

The decision will be welcomed by those who are divorced and whose ex-spouses have become insolvent. Had the receiver's argument carried the day, the ex-spouse of a bankrupt would not have known for certain that assets derived from the financial settlement would be safe from a future claim. However, the relief may be short lived. An appeal to the House of Lords is said to be likely.

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