Liability round-up

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QBE

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Liability round-up

2010: A tale of two reports

For some time the number and cost of litigated claims has been recognised as a serious drain on business resources and one of the prime causes of escalating insurance costs. There is general agreement (other than from claimants' solicitors) that "compensation culture" needs to be addressed and that solicitors' costs were disproportionately high when compared to damages awarded.

In 2010 two important reports were published dealing with civil litigation.

Lord Justice Jackson

In January 2010 Lord Justice Jackson delivered his final report on the rules and principles governing the cost of civil litigation and made sweeping recommendations as to how to promote access to justice at a reasonable cost.

Key recommendations were:

- Conditional Fee Agreement (CFA) success fees should no longer be recoverable from defendants. Claimants should still be permitted to enter into CFAs with solicitors but any success fee should be borne by them
- Solicitors should be able to deduct success fees from the damages awarded capped at a maximum of 25% (excluding future losses)
- To preserve adequate compensation (following the loss of the ability to recover success fees from the defendant) awards of general damages for pain, suffering and loss of amenity should be increased by 10%
- Solicitors should not be permitted to pay referral fees in respect of personal injury cases
- After the event (ATE) insurance premiums should also cease to be recoverable from the losing party in litigation
- The need for ATE insurance could be removed by introducing qualified one way costs shifting. "One way" would mean that a successful defendant would be unable to recover their costs from the unsuccessful claimant but a successful claimant would be able to recover their costs from an unsuccessful defendant. This arrangement would be "qualified" by the courts retaining the power to impose a different costs order where a party's conduct is unreasonable (or their relative resources justify it)
- Costs should be fixed in all fast track cases (i.e. claims up to a value of £25,000 with a one day trial estimate). This would give the parties certainty as to their costs recovery if successful and costs exposure if unsuccessful. It should also remove potentially expensive costs disputes
- The availability of before the event (BTE) insurance should be publicised and used more widely
- Contingency fees (where a solicitor is paid as a percentage of damages awarded) should become lawful in personal injury cases
- The early settlement of personal injury claims for "acceptable amounts" could be encouraged by the production of a transparent and "neutral" calibration of existing software systems used by insurers to calculate damages
- The current provisions of CPR part 36 do not go far enough in terms of incentivising claimants to make settlement offers or defendants to accept them. Where a defendant fails to beat a claimant's offer the claimant's damages should be enhanced by 10%.

The Master of the Rolls who commissioned the report welcomed Lord Jackson's findings and called on the Ministry of Justice to give them "enthusiastic and practical support" but none of them has as yet been implemented.

Lord Young

Lord Young was commissioned by David Cameron before the last general election to report on the perceived "compensation culture" and Health and Safety Law. He delivered his report "Common Sense Common Safety" on 15 October 2010.

The report's stated aim was to free businesses from unnecessary bureaucracy and fear of litigation. Amongst other things the report recommended that:

- Lord Jackson's recommendations should be implemented especially the abandonment of Conditional Fee Success Fees and After The Event Insurance recovery
- Extension of the current personal injury claims process for low value motor claims to all personal injury claims valued at under £10,000 and to increase the motor claims limit to £25,000
- Restriction of referral agencies and personal injury lawyers advertising
- Prevent insurers requiring low hazard businesses to employ health and safety consultants *(QBE does not do this and provides free risk management advice)*
- Insurers should be encouraged to offer quotes for "worthwhile activities" which could not take place without insurance cover
- Simplify risk assessment procedures for school trips and activities, voluntary organisations and low risk work places
- Extend RIDDOR *(Report of Injuries, Diseases and Dangerous Occurrences Regulations 1995)* reporting threshold from 3 to 7 days absence
- Consolidate current Health and Safety regulations into a single set.

Both these reports offer the possibility of significant financial savings for both business and their insurers on legal costs and administration but implementation is unlikely to be easy. To what extents the two Lords' proposals are successfully implemented should become clearer during 2011.

"The aim is to free businesses from unnecessary bureaucratic burdens and the fear of having to pay out unjustified damages claims and legal fees. Above all it means applying common sense not just to compensation but to everyday decisions once again."

Lord Young of Graffham

New legislation

Equality act

Despite a change of government the majority of the provisions of the Equality Act came into force on the 1 October 2010. The Act consolidated the various existing pieces of legislation dealing with equality and discrimination and is intended to make the law easier to understand and to comply with.

The Act protects individuals from discrimination on the following grounds referred to as "Protected Characteristics":

- Age
- Disability
- Gender Reassignment
- Marriage and Civil Partnership
- Pregnancy and Maternity
- Race
- Religion or belief (including lack of belief)
- Sex (gender)
- Sexual Orientation.

There are no new characteristics but the definitions of "disability" and "gender reassignment "have been broadened.

As with previous legislation the Act prohibits direct and indirect discrimination, victimisation and harassment. It also extends to those who receive less favourable treatment for associating with people who have a "protected characteristic" or because they are mistakenly assumed to have one.

The Act's new restrictions on health related questions have attracted some controversy. Prior to offering a potential employee a job an employer is now only permitted to ask certain health-related questions such as whether a candidate can carry out a specific function and then only if it is essential to the job.

After a job offer has been made an employer is permitted to ask a broader range of appropriate health related questions but if the offer is then withdrawn and the job candidate believes that they have suffered discrimination they can complain to the Equality and Human Rights Commission. The onus will then be on the employer to show that they have not discriminated.

The Act applies not just to the work place but also to the provision of goods and services to customers.

Some provisions of the Act such as the public sector equality duties (addressing gender pay gaps, social and economic inequality etc) and combined discrimination provisions (where people with more than one protected characteristic are discriminated against) are not due to be implemented until April 2011.

New Third Party Rights against Insurers Act

The new *Third Party Rights against Insurers Act* received royal ascent on 25 March 2010. The new act replaced the original 1930 act and simplified the process for claimants seeking recovery from an insolvent defendant's insurers.

- Under the new process the defendant's rights to the benefits of a liability policy are transferred to the claimant which allows them to pursue their claim through only one set of proceedings (the old process required claimants to first issue proceedings to establish quantum and liability and then to issue separate proceedings against the insurer)
- Claimants are no longer required to restore insolvent companies to the register of companies before issuing, saving further time and money
- The Act sets out a detailed procedure to enable a third party to obtain information about the insurance cover prior to obtaining judgment so that they can see if it is actually worthwhile bringing proceedings in the first place.

Corporate Manslaughter: A "Paper Tiger"?

The trial of Cotswold Geotechnical Holdings Ltd and its Managing Director Mr Peter Eaton for an offence under the *Corporate Manslaughter and Corporate Homicide Act 2007* has been further adjourned until 24 January 2011 (a charge of manslaughter through gross negligence has been dropped).

This will be the first trial of a Corporate Manslaughter charge and it had been hoped, 'by the Act's supporters', that if a conviction was obtained promptly the Crown Prosecution Service might be encouraged to bring further prosecutions under it. This is now looking increasingly unlikely as charges were first brought back in April 2009. Solicitors acting for the defendants have questioned the purpose of continuing with the prosecution of such a small firm. A large fine is not likely to be imposed and it is also unlikely that any useful guidance as to what constitutes "senior management" in terms of the Act will emerge.

Asbestos

Despite the importing and use of most asbestos products having been banned for some years in the UK, around 4,000 people are still estimated to die from asbestos related conditions each year. The issues of how the victims of asbestos exposure and their families should be assisted and compensated remain controversial and 2010 saw two major consultations launched by Government departments aimed at addressing them.

In February the Departments of Work and Pensions' (DWP) consultation proposed the setting up of two new bodies. An Employers' Liability Tracing Office (ELTO) to assist claimants in identifying the insurers of former employers and an Employers' Liability Insurance Bureau (ELIB) to act as a fund of last resort in much the same way as the Motor Insurers' Bureau compensates the victims of uninsured or untraced motorists.

Employers' Liability Tracing Office (ELTO)

The Association of British Insurers (ABI) responded to the DWP consultation by setting up an ELTO to take over the work of the existing Employers Liability Tracing Service from April this year. The previous service relied on individual insurers checking their own policy records under a voluntary code of practice. The new ELTO is constructing and using a UK wide data base of all new and renewed Employers' Liability policies, all lapsed policies with outstanding claims and all successful traces under the old and new schemes. Currently participation with the new ELTO is like the old scheme, voluntary with about 80% of the insurance industry involved.

In June 2010 the Financial Services Authority launched a consultation seeking responses to proposals to introduce regulation to compel all UK authorised Employers Liability insurers to register policy numbers, coverage dates and details of employers covered. The consultation closed in September 2010 and the ABI has predicted that regulation will be in force by January of 2011.

Employers' Liability Insurance Bureau (ELIB)

The creation of an ELIB has proved more controversial mainly because of the considerable amount of money which would be required to fund it. Many insurers regard funding by a levy on existing insurance premiums as unfair as it would impose additional insurance costs on current employers, most of whom have never exposed employees to asbestos, and could prove a disincentive to employing more staff.

An alternative approach would be to review the benefits paid under the *Pneumoconiosis etc (Workers' Compensation) Act 1979* with a view to improving the tariff sums payable but any proposals involving greater expenditure by insurers and ultimately their policyholders are likely to remain controversial in the current financial climate.

The campaign by Trade Unions and some MPs for an Employers Liability fund of last resort continues and 2011 may well see further developments.

The trigger litigation

Where mesothelioma victims are able to identify an Employers Liability insurer and liability is admitted they may still have difficulty obtaining compensation if the policy cover is not deemed to have been triggered. In *Durham v BAI (Run Off) Ltd and others* the Court of Appeal attempted to resolve this thorny issue.

Litigation first came about when proceedings were issued against four insurers in run-off who had suspended payment of mesothelioma claims following the earlier Court of Appeal ruling in *Bolton v MMI and Commercial Union.* The Court of Appeal ruling in *Bolton* had concluded that Public Liability policies written on an "occurrence" basis engaged when mesothelioma manifested itself as opposed to the date of negligent exposure some years before.

The insurers' policy wordings referred to disease and bodily injury "contracted" or "sustained" during the period of cover. They argued that these had the same meaning as "occurred" and that the decision in Bolton applied equally well to E.L. policies which meant that their policies did not respond until much later.

At first instance the court concluded that the insurer's Employers Liability policies should respond to mesothelioma claims on a traditional "causation" basis. In other words their policies engaged at the date of negligent exposure. The decision was appealed.

The Court of Appeal has now reached the following conclusions:

- Where the wording used is "sustained", the policy in force when the disease starts to develop (manifests) responds
- Where the wording used is "contracted", the policy in force at the time of negligent exposure responds
- Employees covered by insurance policies written after 1972 (when the Employers Liability Compulsory Insurance Act 1969 came into force) at the time they contracted the disease i.e. at date of exposure should receive compensation regardless of the policy wording but their employers may have to repay their insurers if the policy is written on an "injury sustained" basis.

The judgment was on a majority basis with the Court of Appeal failing to reach consensus on most of the main issues. No clear guidance has emerged and the Supreme Court will now rule on the issue. What they will decide is difficult to predict but there could be a shifting of liabilities away from Insurers in run-off to those currently trading or the adoption of a US style "triple trigger" approach activating continuous cover from exposure, through development of the disease to manifestation.

Pleural Plaques

In February 2010 the Ministry of Justice announced that following its consultation on the issue it would not "at this time" overturn the Lords' 2007 decision that pleural plaques are not actionable although they did undertake to make one-off payments of £5,000 each to those claimants who had brought but not yet settled claims at the time of the Lords' ruling.

This was an encouraging development for insurers and other compensators at least as far as England and Wales were concerned but the situation was very different in Scotland.

Almost immediately on the House of Lords ruling a bill was drafted by the Scottish Nationalist Party to prevent the Lords' decision from affecting Scottish cases. The bill received cross party support in the Scottish Parliament and the Damages (Asbestos–Related Conditions) (Scotland) Act 2009 became law in June 2009.

A group of insurance companies challenged the Act by way of a judicial review in the Court of Session. At first instance their arguments were thoroughly rejected. An appeal was heard in July but at the time of writing judgment is still awaited. Whatever the outcome there is likely to be a further appeal to the UK Supreme Court by the losing party.

If the Supreme Court does rule that the Scottish Parliament's act is legally valid pleural plaques would be actionable in Scotland and non-actionable in the rest of the UK paving the way for "forum shopping" and some complex disputes on jurisdiction.

Minimal levels of inhalation

There is no known safe level of asbestos inhalation and most of the UK population may have inhaled enough fibres from the general environment to cause mesothelioma although fortunately very few of us are sufficiently susceptible to actually develop the disease.

Recent years have seen a move in the source of asbestos claims from those working in asbestos manufacture or other heavy industry to lighter trades such as builders, electricians and carpenters. Most recently claims have arisen from some quite unexpected sources.

In October the Supreme Court heard a joint appeal in the cases of *Wilmore v Knowsley Metropolitan Borough Council and Sienkiewicz v Grief (UK) Ltd*. The claimant in *Willmore* had allegedly contracted mesothelioma after being exposed to asbestos fibres from ceiling tiles used in the school she attended in the 1970s. It was accepted by both sides that the mere presence of asbestos did not give rise to liability but the claimant alleged that she was exposed to fibres when the tiles were worked on and when they were mistreated by pupils.

In *Sienkiewicz* the deceased was an office worker who whilst not exposed to asbestos in her normal work at the defendant's factory occasionally visited parts of the building where asbestos fibres were present.

In both cases the Court of Appeal had found that the levels of exposure whilst relatively small had led to a material increase in risk and that the defendants were liable. The defendants in their appeal to the Supreme Court argued that for an increase in risk to be material it must be at least double the background risk. The respondents for their part argued that any inhalation above background levels constituted a material increase in risk.

The Supreme Court now appears to have a choice between finding that any increased level of inhalation will lead to liability or to define minimal exposure and material risk in a meaningful way. Their judgment is expected sometime in 2011 and if the appeals are rejected a much larger group of potential claimants may emerge.

Asymptomatic asbestosis

The courts have taken a fairly robust approach to asymptomatic cases. In *Derek Smith v Deanpast Ltd and Others* the High Court considered the case of a claimant with a 15% respiratory disability who sought damages on the basis that this had been caused by his exposure to asbestos. Scans confirmed the presence of asbestosis, folded lung and visceral pleural thickening but the claimant's lung function tests were normal.

The defendants argued that the claimant's disability was in reality due to his being obese. The asbestosis affected only 1% of one lung and did not have a material effect on his breathing. The pleural thickening was not "diffuse" it covered only a small area and was not causing any disability.

HHJ Walton (who dealt with the Beddoes test cases in 2009) held that the claimant had not suffered a material injury and the claim was dismissed. The principle that the presence of lung disease alone is insufficient for an award of damages remains.

Leisure activities - accepting risk

Lord Young's appeal for "common sense" seems to have every chance of being heeded by the senior courts who have handed down a number of pragmatic decisions this year dealing with claims arising from recreational activities, occupier's liability and schools.

In *Uren v Corporate Leisure (UK) Ltd, M.O.D., David Lionel Pratt and Ors (Syndicate 2525)* the claimant was an RAF serviceman taking part in a fun day run by the first defendants who had been hired by the RAF. The unfortunate claimant broke his neck when diving head first into an inflatable pool during a novelty relay race. He was rendered tetraplegic and sought damages from the organisers of the event and his employers.

The claimant argued that the race was unsafe. It was reasonably foreseeable that diving head first into the pool could result in serious injury and this should have been forbidden either at the outset or when competitors were observed doing it during the race.

The defendants argued that the game was reasonably safe and that all sporting activities involved some risk. The defendants' expert testified that the risk had been very small and that the claimant had been very unlucky to sustain the injury he did. To have banned diving would have rendered the game dull and pointless.

The court held that the risk assessment carried out was "fatally flawed" but this was not enough for the claimant to succeed on liability. On the evidence the risk of serious injury had been very small and the contestants had been told to take care when entering the pool. In considering the balance between the risk posed and the benefits of the activity the judge found that neither the first or second defendants had been obliged to ban diving which would have "neutered "the game of much of its challenge.

At the time of writing there is an appeal pending but in recent years the Court of Appeal has been reluctant to give judgments which might discourage "desirable activities".

"Enjoyable, competitive activities are an important and enjoyable part of the life of the very many people who are fit enough to enjoy them. This is especially true in the case of fit service personnel. .....such activities are almost never risk- free."

Mr Justice Field

Occupiers liability: More common sense from the Court of Appeal?

Visitors

In Harvey v Plymouth City Council the claimant who had been drinking heavily ran across land owned by the defendant whilst fleeing from a taxi to avoid paying the fare. It was night and the claimant was thought to have tripped over a chain link fence which had been partially pulled down and which he could not see in the dark. After tripping over the fence he fell over a nearby drop in ground level five and a half metres onto a car park suffering a serious brain injury when he landed.

The claimant sued the local council who owned the land. The judge at first instance held that the claimant had entered the land, which was regularly used for informal recreation, not with criminal intent but "in youthful high spirits". He was not therefore a trespasser but a visitor for the purposes of the *Occupier's Liability Act 1957*. The council owed the claimant a duty of care under the Act and should have foreseen that the risk of serious injury as the land was frequently used by youths at night. The council had failed to maintain the fence in good order and were held to be primarily liable with 75% contributory negligence on the part of the claimant.

The council appealed arguing that whilst they had effectively permitted people to use the land for informal recreation this did not extend to cover the claimant's reckless behaviour in running across the land in the dark under the influence of alcohol.

The Court of Appeal agreed. The duty of an occupier under the 1957 Act was to make the premises reasonably safe for the use or purpose for which a visitor was invited or permitted. Even if the claimant's actions were foreseeable this was not the correct test. The test was whether the defendant had given implied consent to the claimant's activities. The council had permitted the use of its land for normal recreational purposes but this did not extend to any activity however reckless. There was no liability under the Act.

Trespass

In *Paul Mann v Northern Electric Distribution Ltd t*he claimant then aged 15 had climbed into an electricity substation and had been electrocuted when he touched a bus bar carrying 66,000 volts. He suffered devastating burns and subsequently lost one leg below the knee.

The claimant sought damages from the defendant in respect of alleged breach of the *Electricity Supply Regulations 1988* requiring substations with live exposed equipment to be surrounded by a fence (or wall) at least 2.4 metres high. The substation was surrounded by a wall of over four metres in height topped with a rotating anti-climb device (RACD). The claimant had overcome these formidable obstacles by climbing onto the top of adjacent railings then scaling a buttress and jumping from the top of this over the RACD. This had required remarkable athleticism and the use of three pieces of wood inserted into the structure to give him purchase. The judge at first instance dismissed the claim holding that it was not foreseeable that a trespasser would climb the wall as the claimant had and that the defendants had done all that was reasonably practical to prevent the entrance of trespassers.

The claimant appealed on the basis that the defendants had not discharged their duty as occupiers simply by building a wall of the required height and that they had failed to fit RACD to all sides of the brick buttress which the claimant had climbed. A subsidiary argument was that the wall erected was not actually of the required height when measured from the top of the railings which the claimant had first scaled.

The Court of Appeal held that the regulation might require the occupiers to take additional security measures, in addition to building a fence or wall of the required height, depending on all of the surrounding features. The Recorder at first instance had been correct in enquiring into the reasonable practicality of the steps that the claimant argued should have been taken.

The means adopted to climb the wall was however found by the Recorder to be unforeseeable and that finding was unassailable. Since the means was unforeseeable it was not reasonably practical for the defendant to take steps to prevent it. The subsidiary argument was also rejected with the court holding that the regulations referred to the wall's height as measured from the ground.

"No amount of security measures will keep out a sufficiently determined trespasser."

Mr Recorder Fairwood

Schools

In Webster and Others v Ridgeway Foundation School the claimant was a white pupil at a school with a history of racial tension. He had punched an Asian pupil and then arranged to fight with him after school hours on the school tennis courts. The fight had been arranged on a one-to-one basis but the Asian pupil used his mobile telephone to summon several friends and relations to assist him, one of whom attacked the claimant with a hammer. The claimant suffered serious head injuries and was found by members of his family unconscious and covered in blood. Those immediately responsible for the assault were convicted and jail sentences were imposed.

The claimant sought damages from the school as did three members of his family who witnessed the aftermath of the incident. It was alleged that the school:

- had failed to secure the site by erecting a fence around its perimeter and having a member of staff present in the tennis court after school hours
- had failed to establish good discipline and to deal effectively with racial tension
- had failed to adequately protect the claimant including by banning mobile telephones
- had failed in its obligations under the Human Rights Act.

Following a lengthy trial with 52 witnesses the claim was defeated on all counts. The court held that:

- the school had not breached its duty of care by failing to erect a perimeter fence (there would have been considerable local opposition, planning difficulties and expense)
- the failure to impose a ban on mobile telephones was not negligent
- the type of injuries suffered could not have been foreseen
- the school had a race relations policy and even if this had been better implemented it could not be shown that the injuries suffered would have been avoided
- the actions of teachers were of an acceptable professional standard
- the types of injury which might reasonably have been expected did not constitute inhuman or degrading treatment as defined by the Human Rights Act
- the Deputy Headmaster could not be expected to have anticipated the fight.

Had the claimant succeeded there would have been far ranging implications for the education sector. Other claims from pupils involved in fights after school would no doubt have followed and risk adverse policies by schools and education authorities proliferated.

Conclusion

The impact of the reports of Lords Young and Jackson should become clearer during 2011 but whether these reports will lead to widespread legal reform is difficult to predict. The suggested reforms will not be straightforward to implement and may face considerable opposition. Lord Young's resignation as enterprise advisor to the Prime Minister, following his unwise comments about many people never having it so good during the recession, is a reminder that in politics there are many banana skins.

There does seem to be an increasing number of "common sense" judgments from senior judges who recognise the danger that they could promote risk adverse behaviour if they too readily find liability on the part of those providing recreational and other public facilities. The loss of public parks and recreational events would be a detriment to us all and fortunately whatever the outcome of the legal reform process the welcome trend towards protecting worthwhile activities seems to be continuing.

Completed 31.12.10 – written by and source material obtainable from John Tutton (contact no: 01245 272756, e-mail: john.tutton@uk.qbe.com).

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