QBE Business Insurance

Technical claims brief

Monthly update | March 2016

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Liability

Duty of care, foreseeability and breach of duty. *Lear v Hickstead & WH Security Ltd* [2016]

On 14 March 2016, after a 4 day trial in the Royal Courts of Justice, London, the claimant's claim for compensation for injury was dismissed. A QBE insured, WH Security Ltd, were supported through to trial, with the defence being prepared by Andrew Trott, Plexus Law.

WH Security manages large vehicle parking at equestrian events. The claimant, Mr Lear, was a horse trainer and horsebox owner. He tragically sustained catastrophic spinal injury on 30 July 2011, when his horsebox ramp fell on him while he was parked at an equestrian event at Hickstead, in a particular area of adjacent parking fields allocated to him by the insured. He had left his ramp down but some hours later he found persons unknown had interfered with his ramp by raising it. Mr Lear released the ramp and it fell on him with force. The principal causative factors were (i) his ramp had been raised manually and not by the hydraulic mechanism and (ii) the ramp was defective.

Mr Lear sued Hickstead as occupier, and WH Security in negligence, for parking his vehicle in circumstances where it created an obstruction and where as a consequence it was reasonably foreseeable that persons unknown might interfere with his ramp for access/egress their own vehicles.

The court made the following findings:

- WH Security owed Mr Lear a duty of care to have in place a system of parking vehicles that so far as reasonably possible prevented such vehicles from obstructing other vehicles. In so finding, the court held that as it was reasonably foreseeable that horsebox owners would raise or lower ramps from time to time, so WH Security should have taken that into account in managing the parking of horseboxes.
- The ramp would not have fallen, as it did, had it not been defective in manufacture. Having accepted that WH Security should have foreseen (albeit negligible) risk of injury from the act of manipulating ramps, the fact that injury occurred because the ramp was defective did not take the accident and the injury out of a class of injury that the insured should have reasonably foreseen might have occurred.

- The negligence of the individuals who raised the ramp did not take the occurrence out of the category of risks of injury that WH Security should reasonably have foreseen from ramp movement when deciding where to park horseboxes.
- WH Security did have a reasonably safe system of parking that sufficiently took into account steps that needed to be taken to ensure so far as possible vehicles did not cause an obstruction, even with their ramps down. Accordingly, Mr Lear failed to establish breach of duty and his claim had to fail.

The claim only failed after the trial judge made findings of law which demonstrate the extent to which the courts are prepared to extend the categories of persons and activities that should be in the mind of persons responsible for activities which may even indirectly carry a risk of even negligible injury to persons who might passingly be affected by their activities. Having found for Mr Lear on all issues of duty of care, remoteness, proximity and foreseeability, Mr Lear's claim failed at the last hurdle.

> This was a tragic accident, which left Mr Lear with life-changing injuries, and caused him to pursue compensation against our insured. From the outset, this appeared to be a claim that was capable of being defended, albeit every claim that reaches court carries with it an element of risk, as well as significant cost penalty if unsuccessful. The decision was taken to fully support our insured and ask the Royal Courts of Justice to adjudicate. The successful outcome reflects nearly 5 years of hard work, with a significant contribution from the insured's legal team, including Andrew Trott (Plexus Law) and Ben Browne QC.

Vicarious Liability – The Supreme Court delivers two judgments

The first, and more notable case, is *Mohamud v WM Morrison Supermarkets*. Mr Mohamud (deceased) visited Morrison's petrol station premises and entered the kiosk asking their employee, a Mr Khan, to print-off some documents. Mr Khan responded in abusive fashion, including the use of racist language. Following the abuse, Mr Mohamud left the kiosk and walked to his vehicle, immediately followed by Mr Khan, who opened the car door, punched him in the head and threatened that he should never to return to the premises. Mr Mohamud got out of the car and the attack continued. At the original trial the judge found that Mr Mohamud was in no way at fault and had not behaved offensively or aggressively at any time. He described the attack as "brutal and unprovoked".

The trial judge decided that Morrisons was not liable for their employee's actions and the Court of Appeal agreed, saying that there wasn't a sufficiently "close proximity" between a sales assistant's role and the assault. As such, there was no finding of vicarious liability as the "close connection" test had not been satisfied.

Surprisingly, the Supreme Court reached a different conclusion, but importantly agreed that the "close connection" test was the correct legal approach – it was the application of the test where contradiction arose. The Supreme Court identified the two key questions that had to be determined:

1. What functions or "field of activities" had been entrusted by the employer to the employee or, put more simply, what was the nature of his job This was a question that had to be approached broadly.
2. Was there sufficient connection between the position in which the employee was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice?

Applying that test, the Supreme Court said it was Mr Khan's job "to attend to customers and to respond to their inquiries. His conduct in answering the claimant's request in a foul mouthed way and ordering him to leave was inexcusable but within the "field of activities" assigned to him. What happened thereafter was an unbroken sequence of events."

As such, the conduct did not cease when he came out from behind the counter, and followed Mr Mohamud, as he had not "metaphorically taken off his uniform". When Mr Khan threatened that he should never to return his employer's premises, he was purporting to act in connection with his employer's business. It was a gross abuse of his position, but it was in connection with the business of serving customers. On this basis, the Supreme Court overturned the earlier decisions and found in favour of Mr Mohamud.

The second case is *Cox v Ministry of Justice*. Mrs Cox was a catering manager at HM Prison Swansea and had day-to-day responsibility for catering at the prison where approximately 20 prisoners would be assigned to work in the kitchen, under the supervision of the staff. The accident happened when she was supervising a delivery to the prison and a prisoner slipped and dropped a 25kg sack of rice onto her back.

The crux of the case was whether the use of prisoners to undertake work in the prison kitchen satisfied the test of an employment relationship, as identified by the Supreme Court in the leading case of *Various Claimants v Catholic Child Welfare Society [2012]*. The Court of Appeal had decided the MoJ was vicariously liable, in finding that the relationship between the prisoner and the defendant was one "akin to employment". Of particular relevance was the fact that the prisoners were paid for this work, that "employment" by the defendant had created the risk of injury and that the prisoner would have been under the MoJ's control.

The Supreme Court were in no doubt that vicarious liability applied and did not find it persuasive that one of the prison service's aims was serving the public interest by rehabilitating offenders, rather than being commercially motivated. Rather, prison workers were integrated into the prison's operation so that the activities which they were assigned became an integral part of the activities which the prison carried on in furthering its aims; in particular here, providing meals for prisoners.

> "The WM Morrison case is peculiar because the Supreme Court rarely interferes with the findings of the original trial judge or Court of Appeal. Their predominant function is to adjudicate on the application of the law (or points of law), leaving the lower courts to hear all the evidence and make the findings of fact. Here, the claimant's legal team conceded the Court of Appeal's decision was correct based on the current law, but the Supreme Court were able to reverse the decision without changing the legal test for vicarious liability.
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> The judgment may have the overtones of a public policy decision and indicate a level of judicial sympathy to those who are injured by an employee."

Legislation

Third Parties (Rights against Insurers) Act 2010 delayed again

There had been indications that the long-awaited Third Parties (Rights against Insurers) Act 2010 (the Act) would finally come into force in April 2016. However, it is now understood that the revised estimate for commencement is now the summer or October at the latest. The Act received Royal Assent on 25 March 2010.

The purpose of the Act is to make it easier for claimants to pursue insurers directly in circumstances where a defendant insured has become insolvent:

- Where an insolvent person/company is covered by a liability policy, it removes the need for separate proceedings to establish the insured party's liability before suing the insurer, thereby reducing time and costs.
- Insurers will be under a duty to give full disclosure of detailed information about policy terms to claimants within 28 days of request. This will allow claimants to anticipate any coverage defences that the insurer might raise and make an early decision of the likelihood of success.

The Act did not come into force in 2010 because the government realised that it was defective regarding certain insolvency matters. These defects were partly rectified by Section 20 and Schedule 2 of the Insurance Act 2015, but subsidiary legislation adding certain insolvency events which will trigger the application of the Act is still required, before it can come into force. The delay has been caused by difficulties in finding space in the legislative calendar for the proposed regulations to be debated and passed by each House of Parliament.

> When the Act becomes law, it will provide greater certainty for all concerned, particularly so when an insurer declines policy indemnity, and then an insured becomes insolvent. The present situation causes problems for a claimant and the insurer, where costs can quickly escalate, control can be lost and the outcome becomes unpredictable. With the Insurance Act becoming law in August 2016, which rewrites insurance law relating to policy cover, claimants and insurers will need to carefully consider the Acts' interplay, so satellite litigation seems quite likely in the short to medium term.

Irish Court of Appeal finds motor insurers liable to pay Setanta claims

On 2 March 2016, the Court of Appeal unanimously upheld the decision of the High Court that the Motor Insurers' Bureau of Ireland (MIBI) would be liable to meet the claims that are outstanding after the collapse of the insurance company Setanta in 2014. The alternative was that the financial burden (estimated at €90m) would fall on the broader base of the statutory insurance compensation fund. It has been reported by the Irish Times that this cost will have to be funded by a one-off additional charge of €50, on average, on every motor policy issued in Ireland.

The decision comes only a few months after the Irish Central Bank issued a thematic review of the insurance industry's handing of bodily injury claims, which recognised "growing claims costs, stemming from legislative and judicial changes and changing macroeconomic conditions". Specifically, it pointed out that motor claims frequency was increasing by an average of 8.3% and that average cost per claim was rising by around 8% (in private motor business).

It seems likely that the Court of Appeal judgment will precipitate the development of a new MIBI agreement between the insurance industry and the Irish Government – once one has been formed in the aftermath of the general election held on 26 February. That process of change looks certain to be much wider than merely dealing with the fallout from Setanta and, in any new agreements, the Irish Government and the insurance industry will have to seek to concur on the following points.

- Where the liability for any future motor insurer insolvency should lie? (With the MIBI and the insurance compensation fund probably being the only realistic options.)
- At what level should it be funded – the insurance compensation fund currently pays claims at only 65% of value – and how it should be funded?
- How, assuming the enabling legislation for periodical payments is implemented, the compensation fund and the Bureau manage any associated liabilities?
- How the extended motor insurance obligation – arising from the Vnuk decision of the European Court of Justice – is to be catered for?

Whilst these are largely technical questions, the resolution of each should provide greater protection to those claiming against either the MIBI or the compensation fund. Such protection comes at a cost and there will inevitably be further upward pressure on motor premiums in Ireland as a result of tackling these issues.

> "This is a developing situation and one to watch. It could be sometime after Easter before a meeting takes place between the Industry and The Department of The Environment, given the situation post general election. The current situation cannot be allowed to continue given the issues with particular reference to Vnuk and Periodical Payment Orders, so debate and resolution is to be welcomed across the industry."

Quantum

Supreme Court hands down multiplier decision on fatal cases

The Supreme Court considered the long-established rules set out in *Cookson v Knowles [1979]* concerning the calculation of multipliers in fatal accident cases, including dependency claims. Cookson established that the multiplier was to be selected as arising at the date of death, with the number of years between death and trial being deducted from the multiplier to give the multiplier applicable to the claims for future dependency.

Having considered the issue, and acknowledging the criticism levelled at Cookson over the last three decades, a unanimous 7-judge Supreme Court had little hesitation in departing from the previous decision of the House of Lords.

Cookson had been decided in an era when the selection of multipliers was governed by judicial guesswork, sometimes educated and sometimes not, rather than the present actuarial approach of the Ogden Tables.

From now on, multipliers will be calculated from the date of trial (as with non-fatal cases), rather than the date of death. This should result in a relatively modest rise in the value of most, if not all dependency claims. Initial estimates suggest a global figure of approximately 10%, but the final result will be dependant upon the value of the dependency claim (the multiplicand).

> “Insurers will need to review the reserves being held, in light of this decision and apply the correct multiplier going forwards. The Supreme Court decision will increase the award of damages for fatal dependency claims, ignoring the effect of annual claims inflation. The number of fatal accidents at work recorded by the HSE is fairly static at circa 140 per annum, but for road traffic accidents the number rose 4% in 2014 to 1775.”

Completed 30 March 2016 – written by QBE EO Claims. Copy judgments and/or source material is available from Tim Hayward (contact no: 0113 290 6790, e-mail: tim.hayward@uk.qbe.com).

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