QBE European Operations

Technical claims brief

Monthly update | July 2015

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Contents

Costs

Judgment on additional liabilities – *Coventry v Lawrence [2015]*

On 22 July 2015 the Supreme Court handed down the long-awaited judgment. The case was first reported in our September 2014 edition and the court was asked to decide whether the former (pre-Jackson) regime of recoverable additional liabilities was incompatible with the European Convention on Human Rights (ECHR). The claim itself concerned a complaint of public nuisance against a nearby stadium, with damages valued at £74,000, but costs claimed in excess of £1 million (the majority being additional liabilities).

By a majority of 5 to 2, the Supreme Court has maintained the status-quo and held that it was not incompatible with the ECHR and as a result, there will be no change in the legal approach to additional liabilities. The key points are as follows:

1. There is no prospect of defendants, or their insurers, recovering money paid for additional liabilities on settled claims
2. There is no change to the position relating to ongoing cases featuring fixed success fees and modest ATE premiums
3. In ongoing cases with extremely expensive additional liabilities, the likelihood of successful challenge is reduced and thus they are more likely to be allowed in full.

The majority view of the Supreme Court was clear that the pre-Jackson regime was a reasonable response by the government to the funding problem resulting from the withdrawal of legal aid in civil cases. It follows that the regime could not be a disproportionate way of achieving a legitimate aim given the safeguards to which it was subject, namely the judicial control of the law relating to additional liabilities.

> “Unsurprisingly, the decision is intertwined with a strong policy element and the fact that the pre-Jackson regime has been replaced, with the aim of addressing the significant costs problems of that regime. The decision will likely be read by the lower courts, and their users, as providing a degree of certainty to the issue, despite the appearance of unfairness in individual cases.

Liability

Law on foreseeability – *Lowdon v Jumpzone Leisure Ltd [2015]*

The claimant's claim followed his use of the defendant's 'HyperJump' (the jump) on Brighton Beach on 4 August 2008. He had 2 rides, the first passed without incident, but the second was said to have caused whiplash personal injury. The claimant's head was down at the time of release. The injury only manifested itself the following day and was quantified at £17000 (general damages). The claim was successful at trial.

At trial, the judge made the following finding of fact:

The claimant had sustained injury as a result of the jump being released without warning, in contravention of the defendant's rule that its operator should always check that the customer is ready beforehand.

Fundamentally, the defendant was unable to adduce any evidence to challenge the claimant's version of events or the judge's finding on causation. Put simply, that the forces and movements involved in the jump must have caused the claimant's neck injury because he had not been given the chance to brace his neck as he had on his first ride.

The defendant submitted that it was not reasonably foreseeable to an operator of the ride that a customer who was properly strapped in could be caused injury by being released without warning while his head was down, notwithstanding that it was accepted that it was possible to suffer arterial injury as a result of no, or very minor, trauma. The defendant relied on the fact that the jump had operated for many years, with thousands of customers, without anyone having been injured.

There was no argument as to whether the defendant owed a duty of care to the claimant, due to the provision of the jump and the accompanying rules. The court took the view that the standard of care was closely related to the sense of those rules. Once the trial judge was satisfied that the defendant had breached its duty, the causation burden sat with the defendant to call evidence to prove the injury would have occurred even if a warning had been provided.

The trial judge was entitled, on the evidence before her, to conclude that it was reasonably foreseeable that injury would be caused if a customer was launched on a ride without warning. The defendant's argument that it was not a breach of duty of care to launch a customer without warning was rejected having fully taken into account the evidence of the defendant's own witnesses. She concluded on that evidence, that the defendant normally strictly followed its own guidelines when it came to giving a warning before launching the ride, although that might be modified during the operation of a second turn on the ride to simply asking the customer if he were ready rather than giving a 3,2,1, countdown.

Ultimately the Court of Appeal said:

"In my judgment, in all the circumstances the judge was perfectly entitled on the evidence before her, including the guidance provided by the manufacturers of the ride, the Defendant's guidelines and practice relating to the operation of the equipment and the Defendant's approach to training and ride safety, to conclude that the risk of injury to the neck was a foreseeable consequence of launching a customer without warning when he was not braced. Accordingly this is not a case in which it would be appropriate for this court to interfere with the judge's findings of fact in relation to liability and I would dismiss the appeal in this respect."

Whilst the case turned on its facts, it does serve to highlight the fundamental importance of adducing compelling evidence, in support of your legal argument. Whilst the absence of previous injury was a significant issue before trial, the defendant could not say that it would be without risk to launch a person without warning. It could not say that because the ordinary operation of the jump did not give rise to unexpected launches, because their own guidelines in relation to giving prior warning were complied with. As with much civil litigation, the application of hindsight should be used sparingly, but the risk to the defendant seems obvious.

Negligence & Duty of Care — *Dunnage v Randall [2015]*

The claimant's uncle (V) had visited him at his home. V was acting in an unusually agitated manner and making allegations against the claimant. He went outside saying that he was going to collect a magazine from his car, but returned with a petrol can and lighter. V became angrier and increasingly incoherent until he poured petrol over himself. The claimant tried to grab the lighter, but was splashed with petrol. They struggled over the lighter and the claimant tried to drag V outside. V ignited the lighter and both men were burned.

The claimant jumped from a balcony and V died at the scene. V was subsequently diagnosed as having suffered florid paranoid schizophrenia. The claimant sought damages in negligence for his injuries and sued V's household insurer. Section 3 of the insurance policy provided: 'We will indemnify ... your family against all sums which you become legally liable to pay as damages for ... accidental bodily injury ... to any person ... in the circumstances described in the contingencies.'

The claimant contended that V, despite his incapacity, owed him a duty of care and that mental illness was no bar to recovery of damages. V had not intended the claimant harm, rather it was a consequence of his unsound mind and was accidental.

The court said there was no principle that required the law to excuse from liability in negligence a defendant who failed to meet the normal standard of care partly because of a medical problem. The courts had consistently rejected the notion that the standard of care should be adjusted to take account of personal characteristics of a defendant. Only defendants whose attack or medical incapacity had the effect of entirely eliminating any fault or responsibility for the injury could be excused. The actions of a defendant who was merely impaired by medical problems, whether physical or mental, could not escape liability if he caused injury by failing to exercise reasonable care.

The fire and the injuries had undoubtedly been caused by V's own actions. On the basis of the evidence, the acts that had caused the injuries had been directed by his deranged mind and V had undoubtedly fetched the petrol and lighter. In bringing those items into the claimant's home he had failed to act with the care of a reasonable person. His disease, in circumstances where the experts had assessed him as having not been entirely absent of volition, had not excused him. Whilst the injury to the claimant had been accidental, V had clearly lost control of his ability to make choices and therefore he could not have been said to have intended to cause injury. For the same reason, he could not be said to have been wilful or malicious within the exclusionary wording of section 3 of the insurance policy. The claim would succeed.

> Whilst incidents of this nature will be very rare, the fact that damages were recoverable against the household insurance policy is noteworthy. These cases will always be fact specific, but do highlight the full scope of an individual's duty of care. This decision vividly illustrates the differing approaches of criminal and civil law to the concept of human responsibility. Had V attempted to kill his nephew, he may have been found not guilty by reason of insanity, with its subjective considerations. The law of negligence, by contrast, judges him objectively, despite his "absence of volition" being between 95% and 100%. Clearly there are different public policies at stake. Varying the standard according to their level of ability may introduce legal uncertainty, but holding the severely disabled to an objective standard – a standard that might for them be impossible to achieve – seems somewhat artificial.

Policy cover

Notification Condition Precedent — *Maccaferri Ltd v Zurich Insurance Plc [2015]*

A worker was seriously injured whilst using a tool which had been hired from the claimant. The claimant was insured under a public and products liability policy issued by the defendant insurer.

The policy contained the following notification condition precedent ("CP"):

"The Insured shall give notice in writing to the Insurer as soon as possible after the occurrence of any event likely to give rise to a claim with full particulars thereof. The Insured shall also on receiving verbal or written notice of any claim intimate or send same or a copy thereof immediately to the Insurer and shall give all necessary information and assistance to enable the Insurer to deal with, settle or resist any claim as the Insurer may think fit".

The accident occurred in September 2011. However, the claimant only received a solicitors' letter informing it that a claim was to be brought against it in July 2013, and notification was made shortly thereafter. The insurer argued that notice should have been given far earlier. It sought to argue that the use of the words "as soon as possible" in the notification CP indicated that the obligation to notify arises when an insured could with reasonable diligence discover that an event was likely to give rise to a claim. Coupled with the obligation to give full particulars, it was argued that the insured was under an implied duty to be proactive and make inquiries (and for that reason, notification was not required "immediately" – even though the insured was required to send the written notice of a claim immediately).

That argument was rejected by Knowles J. The phrase "as soon as possible" referred only to the promptness with which notification had to be made. However, notification was only required when an event was "likely" to give rise to a claim and this meant at least a 50% chance of a claim being made against the claimant (see Layher Ltd v Lowe [2000]). There was no need for the insured to carry out a "rolling assessment" of the likelihood of a claim.

Although the judge accepted that a claim may still be likely even if it is a bad claim that was not a relevant argument given the facts of this case. At the time of the accident, there had been a possibility (but not more) that the tool was faulty, but there had been other possibilities too, such as a fault in the way in which the tool had been used. Although the accident had been serious, the judge concluded that "seriousness does not increase the likelihood that the allegation would be that there was a fault in the [tool]. At least in context, the likelihood of a claim cannot simply be inferred from the happening of an accident".

Accordingly, the notification CP had not been breached.

"

Prior cases regarding the meaning of "as soon as possible" in a notification condition have focussed on the reasonableness of the time taken to notify by an insured once it has become aware of a relevant loss/event etc. This case rejects the idea that the phrase imports an obligation to make further reasonable inquiries. However, the overall conclusion in the case may appear harsh given decisions in other cases such as Alfred McAlpine Plc v BAI [1998], where it was concluded (and upheld on appeal) that notification had not been made "as soon as possible" in circumstances where the insured could have had (but did not in fact have) full details of the accident within a few days of its occurrence (notwithstanding that no claim was advanced by the third party for several months).

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