Technical claims brief

Monthly update – May 2011

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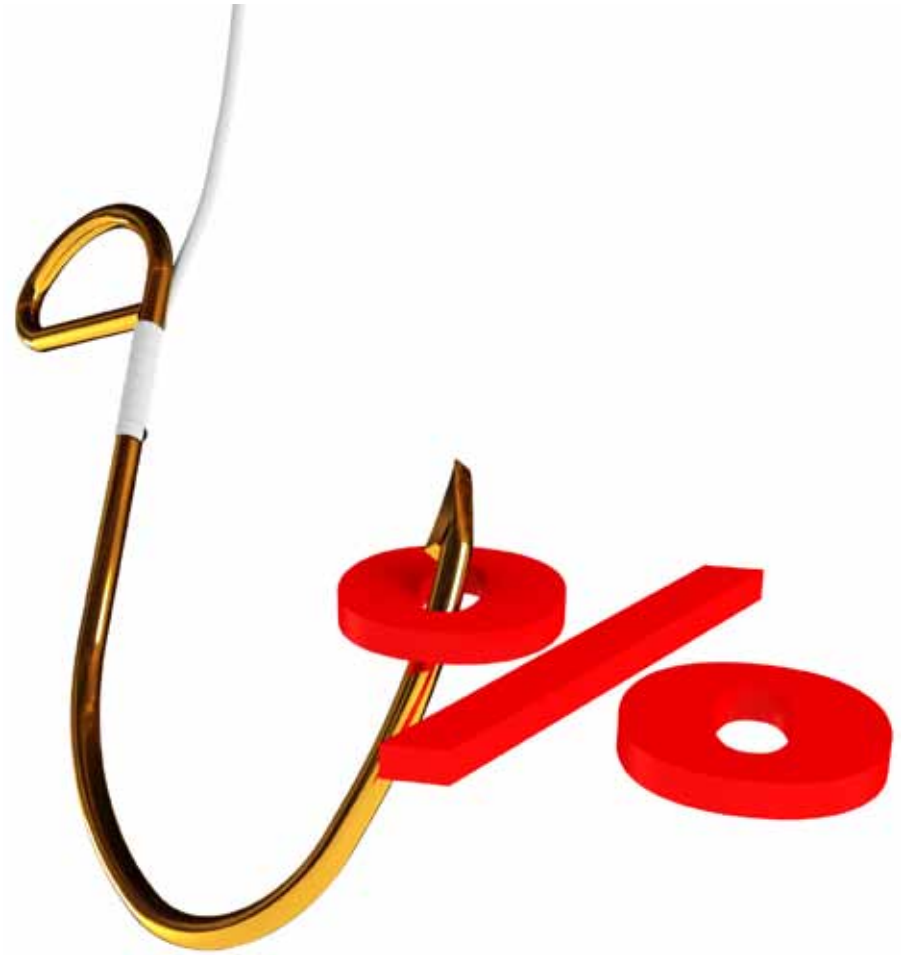
News

Association of Personal Injury Lawyers initiates judicial review of discount rate

The Association of Personal Injury Lawyers (APIL) has issued proceedings for a judicial review of the discount rate in England and Wales. The discount rate offsets lump sum damages awards in respect of investment return and the current 2.5% rate is arguably not reflective of the very low rates of return presently available. APIL first raised the issue with the Lord Chancellor Kenneth Clarke, QC, MP over nine months ago and were only able to secure his agreement for a review after threatening proceedings ***(see December 2010 Brief)***. There has been no announcement of any timetable for a review and APIL now say that they have no alternative but to issue.

The Scottish Government and Northern Ireland Assembly have devolved powers to set their own rates in their respective jurisdictions and are reportedly conducting their own reviews.

Comment: Governments are major compensators and are understandably reluctant to reduce the discount rate when they know that any change will significantly increase the size of lump sum settlements. APIL want a review of the rate to take place as soon as possible but a judicial review if it does not spur the Lord Chancellor to immediate action is unlikely to be completed quickly.



Ministry of Justice issues guidance on new Bribery Act

The Ministry of Justice (M.O.J.) has issued its long awaited guidance on the ***Bribery Act 2010***. The new act comes into force on 1 July this year.

- Corporate hospitality is permitted by the Act provided it is not simply a cover for bribery. It is for organisations or their representative bodies to establish appropriate standards. The giving of gifts, supplying of tickets for sporting events and taking clients to dinner are specifically referred to in the guidance as not being in breach of the Act provided that the expenditure is proportionate and reasonable
- An organisation may be held criminally liable if it fails to prevent a person who performs services for that business from bribing someone (including by non-financial inducements) on that organisation's behalf whether or not the organisation is complicit in the bribery. This is unlikely to apply to anyone who simply supplies goods to the organisation
- Where there are supply chains due diligence applies only to third parties with whom an organisation has a direct contract and does not extend to sub-contractors
- There is a full defence to any charges of bribery by a service provider if an organisation can show that it had adequate anti-bribery procedures in place

- There is no requirement to put anti-bribery procedures in place if there is no foreseeable risk of bribery taking place nor is there a requirement to have any procedures externally vetted
- The full guidance can be viewed at www.justice.gov.uk/guidance/bribery.htm

Comment: the wide wording of the Act had caused some concern that normal business practices such as corporate hospitality could become illegal and the published guidance will no doubt come as a relief to many businesses. The Act came about following international condemnation of serious cases of fraud associated with arms sales by British companies and interestingly the guidance refers to many organisations having little or no bribery risk especially if they operate primarily in the UK.

Supreme Court backs employers' appeal on Hearing Loss and Factories Act

By a 3 to 2 majority the Supreme Court has ruled that an employer, without specific knowledge of risk, is not liable for noise induced hearing loss at noise levels of 90dB(A) or below for unprotected exposure occurring prior to January 1990 either at common law or under statutory duty imposed by Section 29 of the ***Factories Act 1961***.

An employer with specific knowledge of the risk (e.g. required through previous complaints of hearing loss from staff or from published research it should have known of) will be liable two years from the date of acquiring the knowledge of risk. The date of knowledge would be determined in each individual case and two years allowed to devise and implement a system of hearing protection.

The decision in ***Baker v Quantum Clothing Group and Pretty Polly Ltd and Meridian Ltd*** effectively restores the original trial judge's decision and overturns many of the Court of Appeal's findings.

The Court of Appeal had held that 'safe' as defined by the ***Factories Act,*** was absolute and should be judged objectively with no reference to whether the risk of injury was reasonably foreseeable. On that basis the claimant's employers were liable for any risk that gave rise to injuries whether it was foreseeable or not. The duty to keep the workplace safe was however qualified by the employer only being required to take preventative measures which were 'reasonably practicable'. From late 1976 to early 1977 employers could have assessed the risk of Noise Induced Hearing Loss (NIHL) using British Standard B5330. Allowing 6 to 9 months for implementation employers were liable for noise exposure causing injury from 1978.

The Supreme Court held that it was wrong to retrospectively impose a higher standard of care on industry than had been applied at the time. The issue of what was 'safe' as defined by the ***Factories Act 1961*** should be judge objectively but it was not an absolute concept and foreseeability of injury was relevant.

The average' employer would only have been aware of the risks posed by noise exposure between 85dB (a) and 90Db (A) from 1988 when consultation on a draft European directive on work place noise levels took place. Allowing two years for implementation of safety measures (rather than the Court of Appeal's 6 to 9 months) employers would be liable for NIHL below 90Db(A) from January 1990 (also the implementation date of the ***Noise at Work Regulations 1989***).

Comment: the decision is good news for employers and their insurers and not just because it reduces the number of potential NIHL claims. The Court of Appeal's interpretation of the factories Act meant that an employer's breach of statutory duty could be judged in the light of knowledge not available at the time and without consideration of reasonable foresight of injury and acceptable standards. The ruling had it not been overturned could have been used to support thousands of claims for a variety of work place diseases.

Insurers lose appeal on Scottish Pleural Plaques Act

The Inner House of the Court of Session has refused the appeal of a group of insurers operating in Scotland against the rejection of their challenge to the legality of the ***Damages (Asbestos – related Conditions) (Scotland) Act 2009***. The Act (only applicable in the Scottish jurisdiction) overturns the 2007 House of Lords ruling in ***Johnston v NEI International*** that pleural plaques are not actionable injuries and allows claims for these and other asymptomatic asbestos related conditions ***(see February 2010 Brief)***.

The insurers challenged the Act on the grounds of common law irrationality and as a breach of the European Convention on Human Rights i.e. the insurers' rights to their property. The court held that the Act was not irrational and that any breach of the insurers' rights was offset by the public interest in compensating claimants with pleural plaques.

The insurers are now appealing to the Supreme Court.

Comment: the insurers value the cost to them of pleural plaques claims in Scotland over the next twenty years as potentially being in excess of £600m. A similar Act has recently been passed in the Northern Ireland Assembly (see April 2011 Brief) and may too be subject to a legal challenge.

There is a government compensation scheme currently in force for claimants in England and Wales who had begun but not settled compensation claims for plaques at the time of the House of Lords ruling in 2007 and it seems unlikely that the UK government will take any further action to compensate those with pleural plaques at least in the short term.

Fraud

Judge gives guidance on use of social network evidence: Daniel Locke v James Stuart and Axa Corporate Services Ltd – High Court (2011)

The claimant sought damages for personal injury and other losses following an alleged road traffic accident. The second defendants who were the first defendant's insurers alleged that the accident had been staged and was in fact one of nine related staged accidents involving a number of conspirators. The accidents had all been referred to the same firm of solicitors by the same individuals and had all occurred in the same area over a six month period. The vehicles involved had been on short-term hire and had multiple passengers resulting in 97 individual claims. The defendants produced evidence from "Facebook" that the claimants knew each other.

The Judge accepted that the defendants had proved their case to the required standard and gave judgment in their favour but raised concerns about the volume of evidence produced to the court. He recommended that in future cases like this the parties prepare a schedule for the court of which facts were accepted or disputed and that a document explaining how 'Facebook' entries were generated and what inferences could be drawn from them be compiled as a guide to the courts. He also warned that the details of individuals obtained from 'Facebook' or other social networking sites should not appear in trial bundles with any suggestion that they were involved in fraud unless there was proper supporting evidence.

Comment: social networking sites are increasingly popular and can be a useful source of evidence that conspirators know each other or that claimants might not be as seriously injured as they allege. Claimants have even been known to boast about their frauds to friends on them. It is encouraging that the courts appear to recognise the evidential value of these sites.

Procedure

Defendant entitled to wait for Signed Witness Statement before disclosing surveillance: Douglas (A Litigation Friend ...) v O'Neill - High Court (2011)

The claimant was seriously injured when he was run over by the defendant's car. Liability was agreed in the claimant's favour with a 12.5% deduction for contributory negligence. Many of the claimant's disabilities and symptoms were accepted but the extent of his long-term brain damage and reduced mobility were disputed.

The defendant obtained surveillance evidence of the claimant driving and refuelling a manual car, dealing with a bank employee, using a cash machine and shopping unaided all of which were at odds with the symptoms the claimant presented on medical examination. The defendant had completed the surveillance in October 2010 but did not serve it until January of 2011, some two months before trial.

The claimant argued that the late service of the evidence so close before trial amounted to an ambush in breach of the Civil Procedure Rules and that the evidence could not be relied upon without first obtaining the court's permission.

The defendant duly applied to produce the evidence arguing that the delay serving it had been caused by the claimant's own delay in serving his signed witness statement. The claimant had missed various court deadlines during the course of the case and had not served his witness statement until 21 December 2010, some fifteen months after the exchange of witness evidence was first scheduled. The defendant had waited for the claimant's witness statement so that he could know the extent of the pleaded claim and had served the surveillance evidence as soon as he could after the court's Christmas break.

The court held that in the interests of justice the defendant should be permitted to use the surveillance evidence. The evidence was a 'document', not witness evidence and was a privileged one. It was only disclosable when and if the defendant chose to waive privilege. The defendant was entitled to wait until the claimant had completed his evidence before deciding whether to disclose covert surveillance footage as otherwise a potentially fraudulent claimant would be alerted to it and the defendant would be deprived of the opportunity of gathering evidence.

Comment: this helpful judgment (for defendants) makes it plain that a defendant is entitled to wait until the extent of the claimant's claim is made clear (usually by serving a signed witness statement) before disclosing surveillance evidence. Provided this evidence is served at the first reasonable opportunity after the claimant has finished pleading their case, then it should be permitted. Otherwise, a dishonest claimant would have an opportunity to tailor their case to the defendant's evidence.

Expert witnesses lose historic immunity: Jones v Kaney – Supreme Court (2011)

The claimant Jones brought proceedings against the defendant Dr Kaney who had been instructed by him as an expert witness in an earlier action. Dr Kaney who was a clinical psychologist prepared an initial report saying that Mr Jones had suffered Post Traumatic Stress Disorder (PTSD) following a road traffic accident. The defendant's expert in that case had reported that Jones had exaggerated his symptoms and the court ordered a joint report.

The joint report was highly damaging to Mr Jones' case saying that he had not sustained PTSD and had been dishonest. When Dr Kaney was asked to explain her apparent change of heart, it emerged that she had signed the joint statement without comment or amendment even though it did not reflect her views!

At first instance the Judge expressed sympathy for Mr Jones. If his allegations were true he had suffered 'a striking injustice'. The Judge however was bound by the Court of Appeal decision in ***Stanton v Callaghan*** that gave expert witnesses blanket immunity in relation to the evidence they gave in proceedings. He was obliged to strike the claim out ***(see March 2010 brief)***.

Mr Jones appealed to the Supreme Court which held by majority decision that the immunity of expert witnesses was no longer justified. The House of Lords had removed advocate's immunity in ***Arthur J S Hall and Co v Simons*** and there was no good reason why it should continue for expert witnesses alone. It was in reality unlikely that expert witnesses would be discouraged from offering their services or expressing their views freely especially as

they were usually insured against claims for professional negligence.

Comment: it seems likely that at least some claims may now be made against expert witnesses where they have negligently damaged their client's case. An expert who simply changes his or her mind however and reports this in line with their duty to the court would in the view of Supreme Court Judge Lord Justice Kerr, be able to successfully defend a claim against them.

Thanks go to Berryman Lace Mawer solicitors who acted for Dr Kaney for their helpful note on this case.

Completed 27 April 2011 – written by and copy judgments and/or source material for the above available from John Tutton (contact no: 01245 272 756, e-mail: john.tutton@uk.qbe.com).

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