Technical claims brief

Monthly update – December 2009

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News

Employers Liability Insurance Bureau Bill dropped

A private members bill which would have created a fund of last resort for employers' liability cases has been dropped after it failed to secure parliamentary time for a second reading. *The Employers' Liability Insurance Bureau Bill 2008-09* would have established an employers' liability insurance bureau to manage a compensation scheme for the benefit of employees with a fund (levied from employers) to pay claims where no insurance existed. It would also have assisted claimants in tracking down the insurers of former employers who were no longer trading. The new bureau would have been similar in principal to the Motor Insurance Bureau which deals with claims against untraced or uninsured motorists.

Comment: The new bureau would have had significant costs implications for the insurance industry especially if the Government was to legislate in favour of restoring compensation for symptomless conditions such as pleural plaques.

Lords to review Work at Height Regulations

The House of Lords' Select committee has invited evidence from interested parties on the *Work at Height Regulations (WAHR) 2005.*

The committee will look at the ease with which the regulations can be understood and applied, whether they have succeeded in reducing the number of accidents, the cost of implementation and whether there have been any unintended consequences.

Comment: The HSE have been criticised for exceeding the requirement of the European Directive on which the WAHR are based. It will be interesting to see if the committee's findings support this view.

M.O.J. reform of Road Traffic Accident claims process postponed?

The Post magazine has quoted an unnamed source "close to the process" as saying that the implementation of the Ministry of Justice's reforms will be delayed by at least a month due to the Rules Committee being unable to sign off the draft rule changes until 2010.

Comment: If correct this would see the reforms delayed until May 2010 at the earliest.

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Sentencing proposals for Corporate Manslaughter offences published

The Sentencing Guidelines Council has published proposals for sentencing under the *Corporate Manslaughter and Corporate Homicide Act 2007*. The proposals are contained within a consultation paper issued in October of this year and to which interested parties are invited to respond by January 2010.

Although the Act has been in force since April 2008, to date only one company has been charged with an offence under it and this case *(R v Cotswold Geotechnical Holdings Ltd)* is not due to be tried until February 2010.

A broad summary of the SGC's proposals is set out below:

- Companies should face punitive and significant fines but these should not be calculated as a percentage of annual turnover as previously suggested
- Multi-million pound fines should be the norm with fines rarely falling below £500,000
- In almost all cases companies should be forced to publicize convictions ensuring that shareholders, customers and other stakeholders are made aware of them
- Fines in respect of workplace accidents causing death but falling short of Corporate Manslaughter should be in the order of hundreds of thousands of pounds and rarely fall below one hundred thousand
- In deciding on the level of fine the court should not be influenced by the impact on shareholders or directors but may take into account the effect on innocent workers and on public services

- Aggravating factors and mitigating circumstances should also be taken into account

Comment: Although the consultation period is not yet concluded it is thought likely that the above proposals will be adopted.

Causation

Mesothelioma, Fairchild test, compensation act: Sienkiewicz v Grief (UK) – Court of Appeal (2009)

The claimant sought damages on behalf of her mother's estate following her death from mesothelioma. The deceased had been exposed to asbestos whilst employed in the defendant's factory but at very low levels, lower than the environmental levels of exposure in the claimant's home town Ellesmere Port.

The defendants successfully argued at first instance that for the claimant to succeed she would have to show that the occupational exposure had at least doubled the risk of mesothelioma (the test adopted in *Jones v Metal Box ltd and another*). The judge found that the occupational risk would have increased the risk of mesothelioma by only 18% and thus failed on the test applied.

The claimant successfully appealed. The Court of Appeal held that the judge at first instance had applied the wrong test. He should have applied the test in *Fairchild v Glenhaven Funeral Services Ltd* which required the claimant only to establish a materially increased risk to succeed. The judge should also have considered section 3 of the *Compensation Act 2003* the conditions of which could be satisfied by reference to a material increase in risk.

Comment: The Court of Appeal's ruling in this case is perhaps unsurprising in light of similar recent rulings on mesothelioma. An employer who negligently increases the risk of mesothelioma, to a more than a minimal degree, will be held liable.

Costs

RTA costs rules applied to EL Claims: Blackburn and Whittle v First West Yorkshire – Leeds County (2009)

Both claimants were bus drivers who suffered personal injury due to mechanical defects with their vehicles on the highway. They successfully sued their employer for damages under the *Provision and Use of Work Equipment Regulations.* Post settlement the defendants argued that although these were Employer's Liability cases the circumstances fell within the wide definition of a road traffic accident (RTA) set out under CPR 45.7 and that the success fee should be only 12.5%.

The claimants successfully argued at first instance that as these were EL cases RTA cost rules should not apply. On appeal however the judge found that the wording of CPR45.7 was clear and unavoidable and he could not consider the intention behind it. A 12.5% success fee was awarded.

Comment: Where an accident resulting in personal injury is caused by or arises out of the use of a motor vehicle on a road or other public place (in the jurisdiction of England and Wales) and the damages fall within the £1,000 to £10,000 range CPR45.7 can be applied even in what would not otherwise be an RTA case.

Unwillingness to concede contributory negligence insufficient to justify costs order: Sonmez v Kebabery Wholesale Ltd – Court of Appeal (2009)

The defendant made two Part 36 offers on liability prior to a preliminary hearing initially offering a liability split of two thirds to one third and then a three quarters to one quarter split. The claimant declined both offers maintaining that the defendant was 100% to blame but at trial 20% contributory negligence was awarded against him.

The claimant was ordered to pay the costs of the hearing as he had rejected the defendant's offers and had not been prepared to concede any element of contributory negligence himself. The claimant however, successfully appealed against the order.

The claimant had been successful at a trial, where the issue of contributory negligence was an integral part, in establishing 80% negligence on the part of the defendants.

In these circumstances the judge at first instance was bound by the Court of Appeal decision of *Onay v Brown* and had erred in ordering the claimant to pay the costs of the hearing.

Since the court at first instance had erred the Court of Appeal was entitled to reconsider the issues and could use its discretion but still found for the claimant. The claimant's case on liability had been very largely if not completely accepted and it was not entirely unreasonable for him to have maintained his position that the defendants were 100% liable. The costs order was reversed.

Comment: Another example of the courts considering the conduct of the parties when ruling on costs. In this case where there was only a relatively small finding of contributory negligence on the claimant's part his conduct in not accepting any degree of contribution was not so unreasonable as to warrant an order for costs against him.

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Costs capping orders, limit of ATE cover: Barr and others v Biffa Waste Services Ltd - High Court (2009)

The defendants applied to the court for a costs capping order limiting the claimants' costs to the amount of their After the Event (ATE) cover which was £1m at the time of the hearing. The judge recognized that the parties were in an unequal position. There were 163 claimants who brought their action by virtue of a Group Litigation Order. This would make recovery of costs by the defendants very difficult if they won, the most that they would be likely to be able to recover would be the £1m limit of the ATE cover. The judge however considered a link to the ATE cover to be too random a way of setting a costs cap as the limit of the ATE cover was both outside of the control of the defendant and of the direct control of the court.

The judge also held that the CPR only permitted a costs capping order where disproportionate costs could not be contained by case management or detailed assessment . On the evidence this was not the case here. Instead the judge made an order with the consent of the claimants that their costs should be limited to their estimate of £1.47m with a proviso that they could apply to vary this order if it transpired that the basis on which the estimate was calculated did not reflect how the case progressed in the event.

Comment: Whilst the courts are mindful of the need to try and ensure that litigation takes place on a "level playing field" they remain reluctant to make costs capping orders whilst other avenues for controlling costs remain open.

> ***"It seems entirely random to link the amount at which the claimants' costs should be capped to the amount that the defendant can recover against the claimant under the ATE policy, particularly when the latter figure is outside the control of the defendant and, at least directly, outside of the control of the court."***
>
> *Mr Justice Coulson*

Indemnity

Insurers not entitled to summary judgment on draconian interpretation of Policy Wording: A C Ward and Sons Ltd v Catlin (Five) Ltd and Ors – Court of Appeal (2009)

The claimants warehouse was burgled. A burglar alarm and CCTV cameras both failed and the thieves were able to escape with about £450,000 worth of stock in the form of cigarettes and alcohol. The claimants' made a claim for the loss under their policy with the defendants but this was rejected on the grounds of breach of warranties requiring the claimants to fit and operate a burglar alarm specified in the policy schedule (and to maintain it in good working order) whilst their premises were closed for business and at all other appropriate times.

The claimants brought proceedings against the defendants who in turn sought reverse summary judgment against the claimants on the basis that the warranties were effectively "suspensive conditions" removing cover during any period of non-compliance and that the claimants had no realistic prospect of succeeding at trial. The judge at first instance refused the application holding that the warranties were just that and that the claimants had an arguable case on the issues which they were entitled to present at trial.

> ***"It is a well-established proposition of contractual interpretation that the more unreasonable the result, the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they should make their meaning clear ...."***
>
> *Lord Justice Etherton*

The defendants unsuccessfully appealed to the Court of Appeal who supported the decision not to grant them reverse

summary judgment. It could not be said that the claimants had no prospect of succeeding at trial. The requirement in the warranties to operate an alarm specified in the schedule was inherently unclear because no alarm had actually been specified. The wording in both warranties "at all other appropriate times" was also too vague to be used for such a "draconian" interpretation of the policy cover and the claimants should be entitled to produce evidence in support of an alternative interpretation at trial.

Comment: For insurers to successfully apply stringent policy conditions the wording of their policies must be entirely clear. The Court of Appeal also expressed concern about setting a precedent for summary judgment where the policy wording in question was widely used.

Liability

Two emergency vehicles in collision: Craggy v Chief Constable of Cleveland – Court of Appeal (2009)

In a highly unusual accident a police car and a fire engine on their way to two separate emergencies collided at a traffic light controlled cross roads. The police driver had a green light in his favour and the lights were red against the fire engine. The fire engine driver treated the red traffic light as a give way signal as the driver of an emergency vehicle is entitled to do, not anticipating the presence of the police car. Both vehicles were displaying flashing blue lights and sounding their sirens.

The fire engine driver was injured and sued the police for damages. At first instance the judge held that the police driver was negligent in that he should have been able to stop when another emergency vehicle

entered the junction. He found two thirds contributory negligence on the part of the fire engine driver.

> ***".....the possibility that another emergency vehicle might drive into the junction against a red light at the very moment that PC Price drove into it was remote in the extreme. I consider that in imposing a duty on him to drive in such a manner that he could stop in the event of another emergency vehicle emerging from Linthorpe Road, the judge placed an unreasonably high burden upon him".***
>
> *Mr Justice Owen*

The police driver successfully appealed. The Court of Appeal held that to expect the police driver to have driven in such a way as to be able to stop in case another emergency vehicle had entered the junction at the same time was to impose an unreasonably high standard on him. The circumstances of the accident were highly unusual and not ones that a driver could reasonably be expected to anticipate. The cause of the accident was the claimant's negligence in entering the junction against a red light when it was unsafe to do so.

Comment: The Court of Appeal does not expect even professionally trained drivers to anticipate highly unlikely occurrences.

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Procedure

Criminal posecution under HSWA: R v Electric Gate Services Ltd – Court of Appeal (2009)

A 9 year old boy was crushed to death by electrically operated gates. He had leant through a gap between one gate and the pillar it was mounted on and had managed to reach a button that caused the gates to open. As the gates swung open the boy was trapped between the gate and the pillar.

The defendants who had installed the electronic components that operated the gate were prosecuted under section 3 (1) of the *Health and Safety at Work Act 1974* which imposes a duty on employers to ensure the safety of persons not in their employ.

At first instance the defendants were able to persuade the Crown Court that there was no case to answer. The judge relied on the House of Lords ruling in *R v Chargot* (see March 2009 TCB) and held that the prosecution had failed to establish that there had been a material and foreseeable risk and had not therefore established that any offence had been committed.

The prosecution however applied to the Court of Appeal who whilst agreeing that the judge was correct in referring to the Lords' decision in *Chargot* he had interpreted the judgment incorrectly. There was no requirement for the prosecution to prove that the risk was foreseeable. Foreseeability could only be taken into account as part of a reasonable practicability defence which must be specifically pleaded by the defendant.

The Court of Appeal also criticised the judge at first instance for dealing with whether the risk was material (i.e. not fanciful) and whether it was foreseeable instead of leaving these issues to the jury.

Comment: The Court of Appeal's interpretation of the judgment in Chargot is a controversial one and may be appealed. If it remains unchallenged it may well lead to an increase in the number of prosecutions under the HSWA.

Applicable law on damages and interest: Maher and Maher v Groupama Grand Est - Court of Appeal (2009)

The claimants were an English couple injured in a Road Traffic Accident in France. They issued proceedings in England directly against the third party's insurers who were based in France. There was no dispute on their right to do this nor was liability disputed.

The issues before the court was whether damages and interest (for the period prior to Judgment) should be assessed according to English or French law.

At first instance the court held that, in line with numerous precedents, the assessment of damages was a matter of procedural rather than substantive law and that the law of the forum i.e. English law should apply.

The issue of interest was more complicated. If the court awarded interest using their discretion under Section 35a of the *Senior Courts Act 1981* then this was a procedural matter subject to English law.

The defendants however argued that French law set out when interest was payable and the rates that applied. The law operated in the same way as a contract with specific terms on interest. There was however no evidence submitted to the court to support these assertions about French law. The judge at first instance ruled that in this case both English and French law might apply depending on the facts of French legislation.

The defendants appealed arguing that as the claim was brought against the insurers directly it was a dispute over contract and that French law should apply to both damages and interest.

The Court of Appeal dismissed the defendant's appeal. The underlying issue was one of assessment of damages for tort not of a dispute over contract and English law should apply. With regards to interest both English and French law were relevant.

The right to recover interest on a particular head of damages was a matter of French law but whether such a substantive right existed or not the court had the available remedy under Section 35a of the 1981 Act which was a procedural matter. That said, the court had wide discretion under Section 35a and could take into account any relevant provisions of French law relating to the recovery of damages.

Comment: The above case related to an accident which occurred in 2005 and was thus outside the scope of the EU 864/2007 regulations on jurisdiction known as "Rome II". Whether the application of "Rome II" will simplify disputes such as the above in future remains to be seen.

Quantum

Interim payments, effect of periodical payments: Johnson v Compton-Cooke – High Court (2009)

The claimant suffered very serious brain injuries in a road traffic accident for which liability was not in dispute. Her solicitors (Stewartslaw) sought an interim payment of £1.67m on their client's behalf to cover care costs to trial and a move to new accommodation (this was in addition to previous voluntary interim payments totalling £913k) They argued that at trial their client was likely to receive £3.25m and £1.67m was a reasonable proportion of such an award.

The judge was not convinced that the award would be so large and was concerned that the lump sum element (as opposed to those heads of damages paid on a periodical payments basis) would not be sufficient for such a large interim payment.

The judge was also sceptical about a real need to find new accommodation. The current accommodation was more than adequate. It was rented and it was possible that the property would not be available after the early part of next year but this was by no means certain.

The judge made an interim award of £600,000 expressing the hope that the case would come to trial in approximately 12 months time.

> ***"Before the advent of periodical payments, the courts were able to make very large interim awards. Everything had to be capitalised, and it would rarely be necessary for the courts-in a case such as this-to refuse an application of this sort."***
>
> *Mr Justice MacDuff*

Comment: The judge here followed the Court of Appeal decision in Eeles v Cobham Hire services. The case is a good illustration of the way in which the increasing use of periodical payments has helped to contain the levels of interim payments awarded by the courts.

Completed 24 November 2009 – Copies of case judgments and source material for the above items can be obtained from John Tutton (contact no: +44 (0)1245 272756, e-mail: john.tutton@uk.qbe.com).

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