Liability round-up

Issues forum – January 2010

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Liability round-up

2009: A year of recession

2009 was a tough year for UK businesses with the effects of global recession hitting hard. The Bank of England reduced interest rates to record low levels and pumped money into the economy as a "quantitative easing" measure. Even H.M. Customs and Revenue were being more lenient. There was no sign of the judiciary adopting a more lenient attitude but neither was there the same amount of new legislation and regulation as in 2008 and the numerous prosecutions under the *Corporate Manslaughter and Corporate Homicide Act*, forecast by some commentators, did not materialise. A bill to set up a fund of last resort for employers' liability claims was shelved when it failed to secure parliamentary time for a second reading.

"The opening of the Supreme Court is a major constitutional milestone and a change that will help build the country's future."

Lord Bach, Justice Minister

New supreme court for the UK

One important legal change which did take place was the foundation of the UK Supreme Court in October replacing the House of Lords as the court of final appeal for all UK civil cases and for criminal cases in England, Wales and Northern Ireland.

The 12 law lords who formerly heard appeals to the House became the first justices of the Supreme Court.

The change corrects a constitutional anomaly where previously law lords had a dual role as both judges and peers who were entitled to participate in political debates and to vote in the House of Lords. In practice this seldom happened but now leading judges will no longer be able to participate in the business of the House of Lords.

First Corporate Manslaughter Prosecution

The Corporate Manslaughter and Corporate Homicide Act took force on 6 April 2008 but it was not until June 2009 that the Defendant first appeared in court. Cotswold Geotechnical Holdings Ltd was charged following the death of an employee in September 2008, who was crushed when the pit he was working in collapsed.

The lack of prosecutions under the Act has prompted speculation that the police are struggling to deal with legislation which is aimed at organisations as opposed to offences committed by individuals, which they more commonly deal with. Supporters of the Act hope that a successful prosecution in this case may lead to a greater willingness to bring charges in future.

The hearing in this case is not due to take place until February of 2010 by which time sentencing guidelines should be in place. The Sentencing Guidelines Council has published proposals for sentencing as part of a consultation process due to conclude in January 2010. It looks likely that fines will be in the region of millions of pounds with companies also being obliged to publicise their convictions.

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In the news

The courts were asked to rule in some high profile cases in 2009 attracting widespread media comment.

Corby group litigation

In this well publicised case 18 children and young adults sought damages from their local council in respect of serious birth defects ranging from shortened fingers to missing limbs. These had allegedly been caused by their mothers' exposure to harmful substances during the council's reclamation work of a large disused steelworks. The court was asked to consider a number of preliminary issues.

In respect of 16 of the 18 claimants, the council was found to be in breach of its duty of care in exposing the pregnant mothers to mud and dust containing contaminants over a 15 year period and liable for public nuisance under Section 34 of the *Environmental Protection Act 1990*.

Further hearings are now pending for the 16 successful claimants who still need to establish that the exposure actually led to the birth defects suffered for their claims to succeed. In the 2 remaining claims the pregnancies fell outside of the 15 year period (where breach of duty was held to have occurred) and cannot succeed.

Benefiting from crime is against public interest

In *Gray v Thames Trains and Network Rail Infrastructure Ltd* the claimant was a passenger on one of the trains involved in the Ladbroke Grove rail crash. He escaped with only minor physical injuries but the horrific events he witnessed led to him suffering severe post traumatic stress disorder. He subsequently stabbed a stranger to death after a "road rage" incident and was convicted of manslaughter. He escaped a murder charge by reason of diminished responsibility and was detained in hospital with an indefinite restriction order.

The claimant brought an action seeking damages for loss of earnings, general damages and an indemnity against any claims from his victim's dependents. The defendants successfully argued that the principle of ex turpi causa (i.e. there can be no compensation for the consequences of the claimant's own illegal act) applied to the claim for general damages relating to the manslaughter and for the loss of earnings after that event.

On appeal however the Court of Appeal allowed the claim for loss of earnings after the manslaughter, holding that the loss stemmed from the psychiatric injury caused by the claimant's negligence and that the claimant would have suffered a loss of earnings whether or not he had committed manslaughter. The defendants made a further appeal to the House of Lords who unanimously rejected the Court of Appeals findings. The doctrine of *ex turpi causa* applied both in a narrow and a broad sense.

The claimant could not on the narrow interpretation be awarded damages that would lessen the impact of the sentence imposed by the court. In the broad sense also, compensation could not be awarded when it would offend public notions of fairness.

Asbestos

Pleural plaques

Back in 2007 the House of Lords ruled that claimants who had pleural plaques but no other condition or symptoms were not entitled to claim damages. Almost immediately a bill was drafted by the SNP in Scotland to counter this ruling and after intensive lobbying by claimant solicitors, trade unions and others the *Damages (Asbestos –Related Conditions) (Scotland) Act 2009* was introduced.

Insurers however successfully campaigned for a judicial review of the new Act and all new actions in Scotland have been put on hold until the review is completed.

South of the border the *Damages (Asbestos –Related Conditions) Bill* received its first reading in the Lords on 19 October. At the time of writing, it remains to be seen if this bill will be enacted.

Minimally symptomatic and asymptomatic asbestosis

After the Lords ruled that damages were not recoverable for pleural plaques alone there was considerable speculation about whether there would be a new focus for small asbestos related claims.

In 2009 four test cases were heard inthe Newcastle County Court where claimants sought compensation for asbestosis even though they were experiencing either minimal or no symptoms. In *Beddoes and Others v Vinters Defence Systems and Others* two of the claimants were held to have suffered no material injury and their claims were dismissed.

The remaining two claimants however, Beddoes and Cooksey, were successful even though the levels of their respiratory disabilities were small. Beddoes had an estimated respiratory disability of 5% of which 1.6% was due to asbestosis. Cooksey also had respiratory disability of 5% of which only 1.25% was asbestosis related. Taking into account the likely future progression of the disease in each case the claimants were awarded £11,375 and £13,612 respectively.

The lung damage in these cases was picked up by CT scans rather than due to the claimants experiencing symptoms. Whether these cases will lead to a rash of further actions, arising from speculative medical investigation remains to be seen.

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WHEELCHAIR SECUREMENT LOCATION
LIFT

PUWER

In 2008 the Court of Appeal set another important precedent limiting the very wide scope of the *Provision and Use of Work Equipment Regulations*. In 2009 the House of Lords upheld this decision.

The case of *Smith v Northamptonshire County Council* involved a care worker's claim against her employers for injury caused when a ramp, that she was pushing a wheelchair-bound client down, collapsed. The ramp was not owned or maintained by her employers and they had no authority to repair or replace it. The Court of Appeal held that for the ramp to come within the definition of work equipment the employers must have some degree of control over it and clearly in this case they did not. By a majority of 3-2 the Lords agreed.

Later in the year the Court of Appeal once more considered what fell within the definition of work place equipment but this time the issue was not one of control but of whether the use of the equipment had been permitted by the employer

In *Couzens v T McGee and Co Ltd* the claimant had been injured in a road traffic accident when his tipper lorry overturned due to excessive speed. The claimant alleged that his employers were responsible for the accident. He had been unable to take his foot off the accelerator and put it on the brake as his trouser leg had snagged on an L-shaped piece of angle iron which he carried in the side pocket of the lorry door.

The claimant's case was that his employers were negligent in failing to provide a safe place for the storage of this make-shift tool! The employer's drivers were supplied with shovels for cleaning out spoil left in their trucks after tipping but they also used smaller sharper tools such as trowels or paint scrapers for cleaning mud from locking mechanisms and tyres.

The defendants pleaded that these tools were unnecessary and that they did not know that they were being used. At trial the defendant's health and safety director admitted that he was in fact aware that tools like these were used but he had never seen a piece of angle iron used before. Lorries were inspected regularly and had the angle iron been spotted he would have stopped it being used. There was no evidence produced to show that the angle iron had been in use for a long time.

At first instance the court accepted that the angle iron did fall within the definition of work equipment despite also finding that it was not "*a reasonably necessary item of equipment*". It might not have been supplied by the employer but it had been used by the employee at work. The defendants however were not liable. There was no breach of section 4 of PUWER because both the use of the angle iron and the method of storage were unforeseeable. There were also no breaches of regulation 9 because the driver should have been suitably "trained" by his long experience to store it safely without the need for formal training.

The claimant unsuccessfully appealed. The Court of Appeal agreed with the earlier decision that the defendants were not liable but for very different reasons. It was held that an item of equipment not supplied by an employer could not be considered work equipment under the regulations unless its use was permitted by the employer either expressly or such permission was implied or could be deemed to apply (i.e. where an employer ought to have known that an item was being used). Since on the facts of this case the angle irons use was not permitted it was not work equipment and there was no breach of regulation.

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Occupiers liability

The Courts continued to take a pragmatic view with regards to obvious hazards and claimants acting in a dangerous way at leisure facilities.

In the High Court case of *Baldachinno v West Wittering Estate PLC* the then 14 year old claimant was paralysed from the neck down after he jumped off a navigation beacon into shallow water on the defendant's beach.

The claimant alleged that the defendants were either in breach of their statutory duties as occupiers or negligent in common law for failing to warn him of the risks of diving and for failing to supervise him on the beach.

The judge, whilst clearly sympathetic to the suffering of the claimant, could find no liability on the part of the defendant. He held that the claim under the *Occupiers Act 1957* could not succeed because the claimanthad not been invited or permitted to climb on the beacon and was not therefore a "visitor".

The judge accepted the defendant's evidence that the claimant's group had been warned by lifeguards earlier of the dangers of jumping from the groynes and although it could not definitely be said that the claimant had heard this warning it was clear that the lifeguards had not ignored or condoned jumping from structures on the beach.

The judge also considered the *Occupier's Liability Act 1984* which covers trespassers. He summarised the test for liability under both Acts as "was the relevant part of the premises inherently dangerous?" He concluded that it was not.

So far as common law negligence was concerned, the judge concluded that the system of lifeguards on the beach provided adequate supervision and that there was no duty to warn against dangers that were perfectly obvious.

First reported application of the Compensation Act

Following a number of high profile claims involving public leisure facilities the *Compensation Act 2006* was introduced in part to try and stop litigation risk discouraging leisure activities. Section 1 of the Act allows the courts to consider whether their decision will prevent or discourage a "desirable activity". The Act was not considered in the *Baldacchino* case but it was applied for the first time in 2009 in very different circumstances to those which were probably intended when it drawn up.

In *Hopps v Mott MacDonald and Ministry of Defence* the unfortunate claimant was injured, whilst working in Iraq, by an improvised explosive device. He sued both his employers and the Ministry of Defence on the basis that they had failed to take reasonable care of his safety. The claimant had been travelling in a soft skinned vehicle (escorted by soldiers) and argued that he should only have been transported in an armoured vehicle which would have prevented some or all of his injuries.

Dismissing the claim, the court found that the decision to transport the claimant in a soft skinned vehicle was not unreasonable given what was known by the army about the security situation at the time. There was also no evidence that an armoured vehicle would actually have made a significant difference to the extent of the claimant's injuries.

The court also found that the *Compensation Act 2006* applied. Although the incident occurred prior to the enactment of that legislation it was in force by the time that the court came to consider the case. Section 1 of the Act allows the court to take into account whether their decision will prevent or discourage a "desirable activity".

In this case the confinement of key workers to base until armoured vehicles were available would have prevented vital reconstruction work to Iraqi infrastructure thus preventing a "desirable activity".

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Harassment threshold remains high

The courts continued to apply a high threshold in claims for harassment. In *Dowson (and Eight Linked Claims) v Chief Constable of Northumbria* the High Court considered whether the defendant police force were exempt from the *Protection from Harassment Act 1997* under the provisions of section 1(3) (a) which excluded conduct preventing or detecting crime.

The 9 claimants sought damages for alleged work place bullying and the court held that as the conduct complained of was not specifically pursued for the purposes of crime prevention or detection the exemption did not apply.

The court did however grant an early application by the defendants to strike 3 of the 9 claims out because the conduct had not, been of sufficient seriousness (in one case little more than work place banter), had not been specifically targeted and had not amounted to a *course* of conduct (each of the three claims being based on a single event).

This case follows earlier judgments to the effect that unless claimants can demonstrate that the conduct, of their superiors or colleagues, is not merely unattractive but oppressive, their claims will not succeed and may well be struck out at an early stage.

"I am in no doubt that the conduct with which DC Miler complains does not begin to amount to harassment.

I am afraid that I consider it risible to suggest that DCI Pallas's remark about there being "too many shaven headed detectives from Newcastle" could possibly amount to harassment."

Mr Justice Coulson

Conclusion

2009 has been overshadowed by recession and concerns over the long term stability of the economy. Businesses did have to contend with some legal change but not nearly to the same extent as 2008.

This year will see a general election and a new round of legal reform may well commence thereafter. We can only hope that by then the UK economy will be moving firmly out of recession.

Further information

You can find further information at **www.QBEeurope.com/RM**

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John was recruited to the then Ensign Claims Department in 2004 to provide support on catastrophic injury claims. He joined the Strategic Claims Team when it was set up in 2006 and specialises in acquired brain injury claims.

John has worked in the insurance industry for over 25 years.

Completed 11 December 2009 – Copies of case judgements and source material for the above items can be obtained from John Tutton (contact no: 01245 272756, e-mail: **john.tutton@uk.qbe.com**).

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