Technical claims brief

Monthly update – December 2011

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Contents

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News

Lofstedt's Review recommends major reform of Health and Safety Regulation

Professor Lofstedt's review of health and safety regulation was published on 28 November 2011, almost a month later than scheduled. The review, arising from Lord Young's ***Common Sense Common Safety*** report ***(see November 2010 Brief)*** recommends major changes to current regulation.

- Self-employed workers whose activities pose no potential risk of harm to others should be exempt from Health and Safety law
- The Health and Safety Executive (HSE) should review all of its Approved Codes of Practice (initial phase to be completed by June 2012)
- The Government should work more closely with the European Commission and others to ensure that both new and existing EU health and safety legislation is risk and evidence based (particularly during the planned review of EU health and safety legislation in 2013)
- The HSE should undertake a programme of sector-specific consolidation of regulation (like that currently in hand for explosives) to be completed by April 2015
- To ensure consistency of approach, legislation should be enacted to end the sharing of enforcement powers by the HSE and Local Authorities and to give the HSE authority to direct all local authority health and safety inspection and enforcement activity
- The original intention of the pre-action protocol standard disclosure list should be clarified and restated

- Regulatory provisions which impose strict liability should be reviewed by June 2013 and either qualified with "reasonably practicable" where strict liability is not absolutely necessary or amended to prevent civil liability from attaching to a breach of these provisions.

The full review can be seen at:

http://www.dwp.gov.uk/policy/health-and-safety/

"The general sweep of requirements set out in health and safety regulation are broadly fit for purpose but there are a few that offer little benefit to health and safety and which the Government should remove, revise or clarify.....

The much bigger problem is that regulatory requirements are misunderstood and applied inappropriately."

Professor Lofstedt

The Government has responded enthusiastically to the review and has promised an immediate consultation on the abolition of large numbers of health and safety regulations with the first regulations to be abolished within a few months. It has also promised to set up a new challenge panel from 1 January 2012 to allow incorrect decisions made by Health and Safety Inspectors to be overturned quickly.

Comment: reaction to the review has been mixed. Whilst some have applauded an anticipated reduction of bureaucracy, others have voiced concerns over potential reductions in work place safety. The removal of strict liability would undoubtedly be welcomed by most businesses and their insurers but this could be at odds with EU law in some cases. Many of Professor Lofstedt's recommendations call for further reviews and consultations and changes to primary legislation will need to be approved by Parliament. It is likely to be some years before the final impact of Professor Lofstedt's report can be properly assessed.

Legal expenses insurer predicts halving of claims numbers

Peter Smith, Civil Justice Committee member and managing Director of First Assist Legal Expenses Insurance, has predicted that claims against the NHS will fall by 50% due to a combination of legal aid cuts and reforms of litigation funding. His comments published in the ***Law Gazette*** also predict that Lord Justice Jackson's reforms, embodied in the ***Legal Aid Sentencing and Punishment of Offenders Bill,*** will make it materially harder for claimants in all areas of the market to pursue their claims.

Comment: Lord Justice Jackson's reforms are due to be implemented in October of next year and are intended to rebalance the disproportionate costs burden currently faced by defendants. Whether these will lead to the drastic fall in claims numbers predicted by Mr Smith remains to be seen.

New driving offence causing serious injury by dangerous driving to be introduced

The Lord Chancellor Kenneth Clarke has announced that the government will introduce a new offence of **Causing Serious Injury by Dangerous Driving,** punishable by a maximum of five years imprisonment. The new offence will be introduced by an amendment to the ***Legal Aid, Sentencing and Punishment of Offenders Bill***. The bill has now reached the Lords and should be implemented in October of 2012.

As the law currently stands, unless dangerous driving leads to death a convicted motorist faces a maximum of two years in prison and could be released after only six months. The issue was first raised in a private member's bill by MP Karl Turner. Mr Turner cited the case of an 11-month-old girl who was left paralysed and brain damaged by a dangerous driver who subsequently served only six months in prison.

Guidance has yet to be published as to what constitutes a "serious injury".

Comment: Hopefully the new offence will help to discourage dangerous driving.

Supreme Court to rule on trigger litigation

The UK Supreme Court is to hear the appeal against the Court of Appeal decision in the "trigger" litigation on 5 December 2011. The Supreme Court will consider the controversial issue of when differently constructed liability policies are triggered in mesothelioma cases. The Court of Appeal in ***Durham v BAI*** (see November 2010 Brief) held that where a policy wording refers to disease or injury "sustained" it will respond when a disease starts to develop. Where the wording used is "contracted", the policy will respond at the time of negligent exposure.

The Court of Appeal judgment was on a majority basis with no consensus on the main issues and has been criticised as failing to bring clarity to the issue. The Supreme Court in a hearing estimated to last eight days will now try to resolve the issues.

Comment: the Court of Appeal ruling has pushed claims towards more recently written policies and has led to some claimants finding that their employers had no insurance cover, which responded at the time of exposure. Based on previous Supreme Court decisions, judgment is unlikely to be given until well into 2012.

Costs

Disclosure of funding arrangements not contrary to Public Policy: Germany v Flatman and Barchester Healthcare v Weddall – High Court (2011)

The defendants in these two joined appeals had successfully defended claims and obtained costs orders against the claimants. Unfortunately, neither claimant had any funds and the defendants had little prospect of recovering their costs. The insurer who had funded both defences suspected that the claimants' solicitors might have overstepped their role and funded the actions themselves. Applications were subsequently made to the court for disclosure of the claimants' funding arrangements with a view to applying for third party costs orders against the claimants' solicitors if these suspicions proved to be correct.

The judge at first instance refused the applications on public policy grounds, saying that they could undermine the workings of the Conditional Fee Agreement (CFA) funding regime and that due to this public policy point, third party costs orders had no realistic prospect of success.

The applicants appealed saying that the judge had misdirected himself and that the threshold of requiring the applicants to show that a third party costs order would be made, was too high.

The High Court allowed the appeal. The court had the power to decide who should pay the costs of litigation and to order a third party to pay these in circumstances where they had funded the action. A solicitor who funded litigation in the expectation of benefiting from it in the

event of a successful claim must bear the risk of paying the defendants costs if the claim failed. A disclosure order was needed here to get to the truth of the funding position.

The judge at first instance had misdirected himself in over-estimating the impact of the defendants' applications. They were not trying to make third party costs orders the norm in all CFA cases they were simply trying to establish if the solicitors here had acted as funders. The applications should be allowed.

Comment: successful defendants are often frustrated in recovering their costs from claimants because they have no funds. Courts will generally grant a third party costs order against a funder where they substantially control the litigation and/ or stand to benefit from it.

Liability

Judge not obliged to identify motorist's breach of care: Smith v Kempson – High Court (2011)

The claimant was a motorcyclist who was struck by the defendant's car when it emerged from a side road. The motorcyclist had been obliged to drive on the wrong side of the road due to the presence of parked vehicles and the emerging car driver was unable to see him due to these same vehicles.

The judge found that on the balance of probabilities, the car driver had caused the accident in negligently pulling out when it was not safe to do so. The judge found as a matter of fact that the claimant had not driven at an excessive speed or otherwise ridden below the standard of a reasonable motorcyclist but made no specific finding as to what it was that the car driver had done or failed to do which was wrong.

"I accept ...that the Judge did not make a specific finding of what it was that the defendant did which she should not have done, or failed to do which she should have done, but in my judgment that does not preclude her from reaching a conclusion that the defendant failed to reach the high standard of care required. It is open for a judge to conclude that a person has acted in breach of a standard of care even if the judge is unable to say, or has not said, precisely what action or omission constituted the fault."

Mr Justice Tugenhadt

The defendant appealed arguing that in failing to make any finding about what she had done wrong, the judge effectively applied a test of absolute liability or if not, had failed to make a finding of fact to justify her conclusion on liability.

The appeal was dismissed. The judge at first instance had applied the correct test. If the chances were 51% that the accident had been caused by the defendant driving below the standard of a reasonable driver then it was open to the judge to conclude that she had acted in breach of the standard of care even if unable to identify what specific act or omission constituted the fault.

Comment: the HSE justify the proposals on the basis that those who break health and safety law should pay their fair share of the cost of putting it right. The HSE, like most government agencies, are facing significant cuts to their budget and the extension of their cost recovery powers will no doubt alleviate this to some extent.

Mesothelioma risk not foreseeable by defendants: June Williams (on behalf of the estate of Michael Williams deceased) v University of Birmingham and Another – Court of Appeal (2011)

The claimant's husband had died of malignant mesothelioma. He had been a physics student at Birmingham University and in his final year had carried out experiments in an underground tunnel where piping had been lagged with asbestos. Dust from the tunnel was later found to contain asbestos of every type.

At first instance, the judge found that the levels of asbestos in the tunnel had led to a material increase in the risk of contracting mesothelioma and there was a breach of duty. The defendants were negligent in allowing the deceased to conduct experiments in the tunnel and judgment was given against them with damages to be assessed.

The defendants appealed on the basis that the judge had applied the wrong test. They argued that they could only have been in breach of duty of care to the deceased if they could have reasonably foreseen that the levels of asbestos in the tunnel would have exposed students to the risk of asbestos-related disease. They also argued that the judge had made no finding that the condition of the lagging was such that it should have alerted them to the risk of asbestos being present in the atmosphere in significant quantities.

The Court of Appeal agreed that the correct test of negligence and breach of duty was whether the risk of developing mesothelioma from the asbestos fibres present in the air was reasonably foreseeable and this must be judged by reference to the state of knowledge and practice at the time i.e. 1974. The judge did not ask the right question.

Finding that there was a material increase in risk was insufficient on its own to establish breach of duty. On the state of knowledge of the time it had not been established that it was reasonably foreseeable that the low levels of asbestos present gave rise to an unacceptable risk of asbestos related injury. The appeal was allowed.

Comment: the courts have been willing to accept that very small levels of asbestos fibres can lead to a material increase in risk of injury. In this case the Court of Appeal did not interfere with the judge's finding on causation (i.e. that the low levels present did materially increase the risk) but they did helpfully set out the correct legal test. To succeed, a claimant must be able to show that the risk from asbestos was foreseeable and this must be judged on the state of knowledge (and the practices current) at the time of exposure.

Successful defence of QBE insured climbing centre: Develin and MOD v Richardson t/as Avertical World Climbing – Newcastle County Court (2011)

The claimant was employed by the first defendant as a Corporal in the Territorial Army (TA). He was taking part in adventure training at an indoor climbing centre owned and operated by the second defendant (insured by QBE) when he fell from a climbing wall suffering significant injuries to his ankle.

The claimant alleged that his foot had fallen through a gap in the safety matting and that the second defendants had failed to carry out a suitable and sufficient risk assessment and/or taken adequate precautions for his safety.

The judge was impressed with the witness evidence on behalf of the second defendants and found that the claimant's foot had not gone through the matting as alleged and that it was suitable for purpose. The facilities generally provided a safe environment and a reasonable risk assessment had been carried out and kept under review. Judgment was given in favour of the defendants.

Comment: this case, which concerned an accident that took place in 2005, illustrates not only the importance of maintaining safety equipment and having rigorous inspection regimes but also of being able to produce credible witness evidence in support of these at trial.

Quantum

Scottish Periodical Payment: D's Parent and Guardian v Greater Glasgow Health Board – Outer House Court of Session (2011)

The pursuer was a child who was rendered paralysed from the neck down after a forceps delivery in the defender's hospital went wrong. Liability was admitted and a trial commenced to assess damages, which were claimed at £23,000,000.

The trial was adjourned on the second day to allow the parties to discuss the best means of settlement. The parties reached agreement that settlement would be on the basis of an initial lump sum payment with annual payments for the life of the child to cover the cost of care and case management.

The presiding judge, having approved the settlement was asked to give an opinion on it to publicise its features. The judge was happy to do so as the settlement was a new approach to catastrophic injury in Scottish jurisdiction. The Scottish courts have no powers to impose Periodical Payment Orders (PP0) and there is no guarantee scheme for them. In this case, a PPO was agreed between the parties and both the pursuer's solicitors and the court were confident that the continuity of payment would be secure.

Comment: Unlike England and Wales, Scotland does not have a legal framework for periodical payments. Periodical payments may however be made by agreement between the parties. The Scottish Government encourages public authorities to settle catastrophic injury claims on this basis where it can reasonably be done but this is the first case where it has been.

Periodical payments avoid the risk of a claimant running out of money for care if they live longer than expected and allow a compensator to spread the cost of settlement.

Completed 23 November 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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