Technical claims brief

Monthly update – September 2011

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News

Insurers face claims in excess of £200 million after riot damage

The Association of British Insurers (ABI) has estimated the cost to insurers of the recent spate of rioting in English cities as being in excess of £200 million.

Insurers and uninsured individuals and businesses will be able to recover some of the cost of the damage by bringing claims against police authorities under the ***Riot (Damages) Act 1886*** (RDA) although some liabilities are excluded. The government has agreed to the ABI's request to extend the 14-day deadline in which claims must be submitted, to 42 days to assist both insurers and the uninsured.

Insurers will themselves however have to bear some of the cost of RDA compensation as depending on their terms, at least some public liability insurance policies, held by police authorities will respond.

Comment: the estimated financial cost of the rioting has already been revised upwards once by the ABI and this may well happen again. The human cost remains incalculable.

Claimant lawyers fail to obtain judicial review of discount rate

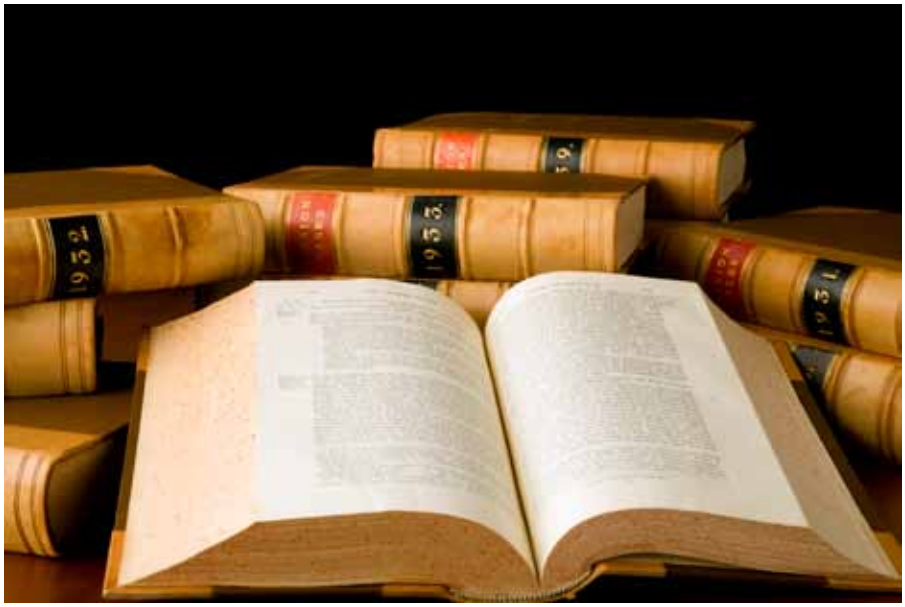
The Association of Personal Injury Lawyers' (APIL) application for a judicial review of the discount rate has been rejected by the High Court. The application was made in apparent frustration at the Lord Chancellor's slowness in carrying out a review of the rate ***(see May 2011 Brief)***.

APIL's application sought orders that the Lord Chancellor should review the rate and that he should change it. In response to the application the Justice Minister announced ***(see June 2011 Brief)*** that there would be a public consultation document issued in late September or October of 2011.

In refusing permission for a judicial review, the judge held that there was no prospect of success for the claimants on either limb. The Lord Chancellor was now reviewing the rate, so there was no point in making an order for him to do so. On the second point, now that a public consultation had been announced, no court could reasonably make an order for a change in the rate until the consultation was finished and the Lord Chancellor's decision and the reasons for it were known.

The judge declined to make an order that the unsuccessful claimants pay the Lord Chancellor's costs however as he recognised that without the application for a judicial review APIL might well not have got the Lord Chancellor to take the action he had.

Comment: any decrease in the discount rate would greatly increase the value of lump sum settlements for future loss. The failure of the application means that there will be no change in the discount until the public consultation has concluded and the Lord Chancellor has considered the responses. This is unlikely to happen until well into 2012.



First element of Jackson reforms comes into effect

The first small part of Lord Justice Jackson's reforms of civil procedure in England and Wales comes into effect on 1 October 2011. Civil Procedure Rule (CPR) 36.14 is amended so that whether a Part 36 offer has been beaten or not will be judged solely in terms of whether a claimant has received more money than was offered by the defendant, however small the difference.

The amendment reverses the effect of ***Carver v BAA*** where the claimant was held not to have done better in real terms than the offer made by the defendants. The additional £51 she received was judged to be less than her outlay in costs, other expenses and inconvenience incurred by continuing with her claim for a much larger amount of damages than she was offered.

More changes in CPR 36 are expected in October 2012 when the bulk of Lord Justice Jackson's reforms are due to be implemented. Claimants are to be encouraged to make Part 36 offers by the introduction of a 10% increase in damages if their offers are unbeaten.

Comment: Lord Justice Jackson (amongst others) has been highly critical of the uncertainty and satellite litigation that the decision in Carver has caused. The amended rule will ensure certainty but makes it even more important that defendants make Part 36 offers when dealing with inflated claims.

Police to close specialist vehicle theft unit

The Metropolitan Police Service is reported to be planning to shut down its specialist Stolen Vehicles Unit (SVU) in April or May of next year. The unit as well as specialising in tackling the theft of high value vehicles has also helped to combat insurance fraud and has seized a large number of vehicles used in organised crime.

The Lloyds Market Association has written to the Metropolitan Police urging them to reconsider the unit's closure.

Comment: the General Insurance Council has recently committed to providing £9 million funding for a new dedicated insurance fraud police unit (see August 2011 Brief) and to fund the police stolen plant national intelligence unit. The closure of the SVU is particularly disappointing set against this background of increased insurer funding for policing. Some insurers see this as part of a wider trend of the cost of policing passing from the state to the private sector.

Liability

Airline passenger awarded damages following allergic reaction to pesticide: James Lapham v Air France – Irish High Court (2011)

The ***Irish Independent*** has reported the case of an airline passenger who successfully sued Air France after suffering an adverse reaction to pesticide sprayed in one of their aeroplanes. The pesticide used was permethrin, approved for use on aircraft by the World Health Organisation, but banned by the United States as a possible cancer risk.

The claimant, who is asthmatic, suffered a severe reaction to the pesticide and had difficulty breathing. The plane was forced to make an emergency landing so that he could receive treatment. He was unable to fly for eight months after the incident. The claimant obtained €50,000 in damages from Air France, half the maximum damages permitted under the Montreal Convention.

Comment: pesticides are regularly sprayed in aircraft to control the spread of pests and diseases. The claimant is not the first person to complain about the effects of pesticides but he is reported to be one of the first to succeed in obtaining damages from an airline. Further claims from passengers and cabin crew may follow because of the claimant's success.

Claimant accepted risk of riding in Horse Trap: Bodey v Hall – High Court (2011)

The claimant suffered a severe head injury after being thrown from the defendant's trap. The horse pulling the trap had startled and lifted the trap causing both the defendant and claimant to fall out. The claimant argued that the defendant was strictly liable under the ***Animals Act 1971***.

To establish strict liability under the Act the claimant would have to show that sections 2(2) a, 2(2) b and 2(2) c applied. She must show that any damage (injury) caused by the animal was likely to be severe, that the likelihood of injury was due to characteristics of the animal which are unusual in that type of animal (or usual only in specific circumstances) and that the owner or person in charge of the animal was aware of these characteristics.

The defendant argued that the tendency for a horse to startle for unknown reasons was not a "characteristic" as defined by the Act. Both parties accepted that if the first two parts of the test applied then the third must follow by implication. The defendant also argued that if she was liable then there was contributory negligence on the part of the claimant due to her not wearing a riding hat.

The judge held that any injury caused by the horse was likely to be severe and that the tendency for a horse to run away when confronted by an unknown stimulus could properly be defined as a characteristic (the precedent set by the House of Lords in ***Mirvahedy v Henley*** applied).

The claim failed however because the exception of liability under section 5(2) applied, the claimant had voluntarily accepted the risks of travelling in the trap.

She was an experienced rider and had even had the horse in her care on previous occasions. The horse had no hidden characteristics that the defendant should have warned her about and the risks of riding in the cart were essentially the same as riding the horse. She had therefore given her informed consent to the risk.

If liability had attached then there would not have been any contributory negligence. There was no clear-cut advice or guidance on wearing riding hats in traps.

Comment: voluntary assumption of risk is one of three statutory exceptions to strict liability under the Animals Act.

Disrepair claim undermined by claimant's conduct: Skliris v Homes for Islington Ltd – Clerkenwell County Court (2011)

The claimant suffered a fractured ankle and ligament damage after falling down a partially covered external staircase that provided access to her first floor flat. It had been raining and the stairs were wet. She brought a claim against her landlord alleging breach of duty under the ***Landlord and Tennant Act 1985*** and the ***Defective Premises Act 1972*** for not keeping the stairs in repair and failing to maintain and repair the building. She also alleged breach of care under common law.

The claimant initially claimed that the painted surfaces of the steps had become slippery when rainwater got onto them but later changed her allegations when it emerged that the stairs had been painted with anti-slip paint. She then pleaded that the stairs were slippery where the paint was worn away. She also alleged that anti-slip grooves on the stairs were worn down. The defendant, insured by QBE, denied any breach of duty and entered a defence to the proceedings brought by the claimant.

At trial, the court heard that the external stairs frequently had water on them when it was raining but that the tenants did not consider this a problem. The claimant herself had used the stairs on an almost daily basis for three and half years and had every opportunity to report any problem with them either directly by telephone to the defendant or verbally to the caretaker but did not do so until six months after the accident. When she did telephone, the local authority she admitted that she knew that rainwater collected on the stairs

and said that normally they were safe. She also admitted that she had not held on to the stair rail, as she did not consider that it would make the stairs safer.

The judge found that the claimant had failed to establish any breach of statutory duty on the part of the defendant local authority or that they were negligent.

Comment: a tenant who fails to bring alleged defects with their building to the attention of their landlord is likely to face some difficulty in convincing a court that they were hazardous especially if they have lived with them safely for a long time.

Householder not liable for pool accident: Kylie Grimes v David Hawkins and Frimley Park Hospital NHS Trust – High Court (2011)

The claimant was rendered tetratplegic after diving into the first defendant's private swimming pool and striking her head on the bottom.

The first defendant was the owner of the pool. He had not been at home when the accident occurred. His eighteen-year-old daughter had invited a group of young students back to their home after an outing to a local pub. She had permitted her guests to use the pool.

The claimant alleged that the defendant was in breach of duty under both the ***Occupier's liability Act 1957*** and at common law. The pool was unsafe for diving and the defendant should have forbidden the claimant from diving or using the pool at all.

The judge did not agree that there was any duty on the part of a householder to forbid adults from diving into a private swimming pool whose dimensions were clearly visible. The pool in question had no hidden or unexpected hazards and was not inherently unsafe for diving. The defendant was not therefore in breach of duty under the ***Occupiers Liability Act***.

The claim also failed at common law. The House of Lords in ***Tomlinson v Congleton Borough Council*** had held that an occupier only had a duty to protect against obvious risk or self-inflicted harm where there was no genuine or informed choice by the claimant or where the defendant had in some way assumed responsibility.

The claimant was an adult who had admitted on the first day of the trial that she was aware of the dangers of diving into shallow water. She had been in the pool for about half an hour before the accident and had plenty of opportunity to see its dimensions. She had known the risks of her actions and accepted them. There was no suggestion that the defendant had assumed responsibility for her safety.

Applying the ***Caparo*** test, it was not fair, just and reasonable to find that the defendant owed a duty of care to the claimant.

Comment: the judgment records that the public policy points made in Tomlinson and similar cases (i.e. that it would be extremely rare for an occupier to be under a duty to prevent people taking risks inherent in activities they freely chose) had even greater force where the claimant was a visitor to a private house. This must be good news for householders who are very unlikely to have the same level of financial resource or insurance cover that businesses or public bodies do.

Inspectors exercised reasonable care in assessing tree branch that killed child: Harry Bowen (a child etc) and others v The National Trust - High Court 2011

The claim arose from a school trip to a forest owned by the defendant. A group of children had been exploring a trail in the woods supervised by a teacher when they took shelter from rain under a mature beech tree. Without warning a large branch, weighting nearly two tons fell from the tree striking some of the children. One eleven-year-old boy was killed and three of his classmates were seriously injured. Other children who escaped physical injury suffered psychological trauma as a result of witnessing this horrific event.

Claims were brought on behalf of the three seriously injured children and by the mother of the deceased child against the National Trust, which owned and maintained the forest. There were nearly a quarter of a million trees in the forest and the frequency of any individual tree's inspection depended on how often its location had visitors. The tree in question was in a remote part of the forest but was occasionally passed by school groups and so was inspected annually.

The branch that fell had "bulges" or "ears" around it where it joined the trunk, caused by adaptive growth (AG) which is a response to stress in the join. These features had been seen on inspection and it was the claimants' case that the presence of AG alone was a warning sign of possible failure and that further investigation of the join should have been carried out. The defendant's case was that AG is a common feature of mature beech trees and by implication, that detailed inspection of all the trees with AG would have been impractical.

Having heard expert evidence that there was no such thing as an entirely safe tree and that inspection was an art not a science (sic), the judge found for the defendant. The judgement of the defendant's inspectors had been wrong but they had used all the care to be expected of reasonably competent persons doing their job and the defendant had given them adequate training and instruction in how to approach their task (the ***Bolam*** test). Although it would have been desirable to have compensated the victims of the accident, to do so would have meant imposing a greater duty on the defendant than the reasonable care that the law required.

Comment: this very sad case has attracted widespread media coverage. Although the judge was clearly sympathetic to the claimants' case, he gave a pragmatic judgment recognising the difficulties faced by the defendant in maintaining such a large forest and avoiding the temptation to apply hindsight in considering the reasonableness of the inspection regime.

Inspection would not have revealed that tree branch was dangerous: Joanne Micklewright (as Executrix etc) v Surrey Count Council - Court of Appeal (2011)

The claimant's husband was killed by a large branch that fell from a tree. The tree was the responsibility of the defendant local authority.

Shortly after the accident, the fallen branch had been collected by the defendant's employees and cut up before any investigation had taken place. Later, it had only been possible to retrieve about 5% of it for inspection. The judge at first instance recognised that the defendant's action in disposing of the branch had disadvantaged the claimant and directed himself that he must assess the claimant's evidence "benevolently" and the defendant's evidence "critically" to counter this (as per ***Keefe v Isle of Man Steam Packet Co***).

The defendant had conceded that there was not yet any proper system of inspection in place and that there was no written record of any inspection of the tree. The defendant's expert however having seen what remained of the branch, maintained that there would have been no outwardly visible signs of decay to see on inspection and that the danger would not have been spotted even with a proper system of inspection. The claimant's expert said that the branch would have had extensive internal decay and that it would have had discoloured leaves that should have been clearly visible on inspection.

The judge at first instance preferred the evidence of the defendant's expert witness and found that the branch would not have any external sign of decay and that the defendant's failure to have in place a proper system of inspection was irrelevant because it would not have revealed the risk of the branch falling.

The claimant appealed arguing that the judge at first instance had not been sufficiently benevolent in considering her evidence or sufficiently critical of the defendant's evidence. Had he been he would have found that the branch was severely decayed and that there were external signs of this.

The appeal failed. The Court of Appeal held that the judge had directed himself correctly in matters of law and were unwilling to interfere with findings of fact that he had been entitled to make. Looking at the claim in context the defendant local authority had failed to implement inspection measures required by the Department of the Environment but it was also the case that they had responsibility for some two million trees and limited resources.

Comment: this is another tragic case involving a fatal accident caused by a falling branch, where the court has recognised the considerable practical difficulties of inspecting a large number of trees.

Risk of Mesothelioma not foreseeable - Asmussen v Filtrona UK Ltd – High Court (2011)

The claimant developed mesothelioma. She brought proceedings against her former employers alleging that she had been exposed to asbestos fibres whilst working in their factory. She alleged that her employers had been negligent and/or that they were in breach of statutory duty under the ***Factories Acts*** of 1937 and 1961.

The defendants manufactured cigarette papers and although there was a large amount of paper dust in the factory, the only source of asbestos was in lagging around pipes suspended above the factory floor. The claimant recalled an occasion when she had walked under one of these pipes when the asbestos lagging was damaged and under repair.

The claimant had worked for the defendant between 1955 and 1960 and then again between 1962 and 1972. In 1965 a medical paper was published which recognised the link between asbestos exposure and mesothelioma. This paper had received widespread press coverage and marked a change in the state of knowledge that should have been available to employers.

The court found that exposure to asbestos in the defendant's factory during her first period of employment (1955 to 1960) when she walked under the damaged pipes, was the most likely cause of her mesothelioma.

Based on the standards of knowledge at the time the defendants could not have reasonably foreseen the risk to the claimant. The practices they used were in line with the recognised practices of the day and they had not had an opportunity to develop specialist knowledge of their own which might point to the risk. They were not negligent.

Neither were they in breach of the Factories Acts. The wording of the Acts required a degree of foresight but this was to be judged on the prevailing standards and knowledge of the time.

Comment: this judgment follows the UK Supreme Court's ruling in Baker v Quantum Clothing. In this developing field of knowledge, the actions of an employer are not to be judged with the benefit of hindsight but by the standards of the time of the exposure.

Tyre blowout entirely responsible for accident: Divya and Others v Tokyo Tyre and Rubber Co Ltd and Paranirupasingham – High Court (2011)

The claimants were passengers in the second defendant's car. The car had been travelling in the third lane of a motorway in the early hours of the morning when one of its tyres blew out causing the driver to lose control and crash into the central reservation. No other vehicles were involved.

Experts acting for the claimants and the second defendant respectively testified that the tyre had blown out due to a manufacturing defect with the steel cords within it, which were not properly bonded. An expert called by the tyre manufacturers however testified that the tyre had blown out due to impact damage either at the time of the crash or some miles before. The first defendant tyre manufacturers produced evidence showing that despite producing some 9.6 million tyres a year they had not had a single bonding failure reported to them since March 2002.

The judge absolved the driver of blame finding that the sole cause of the accident was the blow out. Despite the manufacturers' exceptional lack of complaints, he preferred the evidence of the claimants' and second defendant's experts that the tyre had failed due to a manufacturing defect. Three witnesses had described the car being driven safely and there was no evidence that it had either struck debris in the highway or made contact with the crash barrier prior to the accident. The manufacturers had also conceded in evidence that although it was unlikely for a tyre to be produced

with weak bonding it was by no means impossible and in all the circumstances, the judge concluded that this was what had happened. Judgment was given against the manufacturers.

Comment: as stated in the judgment, the standards required of tyre manufacturers are of the highest level. It is not required for a claimant to show where in a tyre manufacturing process a failure to exercise reasonable care has occurred.

Procedure

Claim struck out due to failure to serve proceedings on nominated solicitors: Lucine Wilson v Faisal Mehmood – Birmingham County Court (2011)

The defendant's insurers nominated solicitors to accept service of proceedings after negotiations with the claimant's solicitors broke down. The claimant's solicitors ignored this nomination, served directly on the defendant and later obtained default judgment.

The defendant's solicitors successfully applied to the court to have the judgment set aside on the basis of ineffective service. In addition, as more than, four months had now passed since the Claim Form had been issued but effective service had not been made, the defendant's solicitors persuaded the court to strike out the claim for non-compliance with Civil Procedure Rule 7.5. The claimant was also ordered to pay the defendant's costs of the proceedings.

Comment: whilst it was unusual for a claim to be struck out in these circumstances, the nomination of solicitors can provide some protection to insurers whose policyholders do not forward proceedings to them. This will at least allow default judgments to be set aside which can be very useful particularly where insurers are otherwise legally obliged to settle unsatisfied judgments.

Our thanks go to Horwich Farrelly who acted for the defendant, for telling us about this case.

Completed 25 August 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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