Technical claims brief

Monthly update – July 2011

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News

Progress on Jackson reforms

On 21 June this year, the Government published the ***Legal Aid, Sentencing and Punishment of Offenders Bill***. Although there is no mention of civil law costs reform in the Bill's title this is the legislation that when enacted will end the recoverability of success fees and After the Event insurance premiums from Defendants. The Bill also contains a clause, which will enable new Civil Procedure Rules (CPR) implementing an additional Part 36 sanction of a 10% increase on damages.

Comment: the UK government remains committed to implementing Lord Justice Jackson reforms (applying to the Jurisdiction of England and Wales) and overall these are likely to lead to significant costs savings for defendants. The CPR committee is reported to be already working on new rules to implement the reforms with a planned implementation date of October 2012.

Corporate Manslaughter appeal refused

The Court of Appeal has refused leave for Cotswold Geotechnical to appeal against their conviction and sentence for Corporate Manslaughter. Cotswold became the first company to be convicted of Corporate Manslaughter in February 2011 ***(see March 2011 Brief)*** and were fined £385,000. They sought leave to appeal on the basis that a fine of more than their annual turnover was excessive and that their Managing Director's unavailability due to illness had prevented a fair trial.

The Lord Chief Justice found no grounds for criticising either the way in which the trial had been conducted or the level of the fine imposed. The sentencing guidelines recognised that sometimes the appropriate level of fine might force a company into bankruptcy. To impose a fine of less than the annual turnover would have resulted in a ludicrously small fine for such a serious offence.

Comment: it now seems likely that companies convicted of Corporate Manslaughter in future will face fines of around £500,000 i.e. in line with the published sentencing guidelines whether they can pay these or not.

Damages (Scotland) Act 2011 comes into force

The Damages (Scotland) Act 2010 comes into force for new actions raised after 7 July 2011. The Act changes the way in which Scottish courts award damages for dependency in fatal accident cases ***(see April 2011 Brief)***. The Act stipulates that loss of (financial) support claims should be calculated using a fixed 75% proportion of the deceased's income. The Act does not specifically exclude consideration of the surviving spouse's income but it is worded in such a way as to make this the likely default position, unless a "manifestly and materially unfair result" is produced.

Comment: the Act is a good example of how changes to the wording of Bills following consultation and parliamentary debate can lead to a loss of clarity. Those members of the Scottish Parliament opposing consideration of the surviving spouse's income and those in favour of it both claimed that the amended wording backed their position. It will now be left to Scottish judges to interpret the position but the most likely outcome will be that the surviving spouse's income will not in most cases be considered making Scottish fatal damages awards even larger and more out of step with other UK jurisdictions.

Claims referral fees escape ban

Following consultation carried out last year, the Legal Services Board (LSB) has announced that it will not be imposing a ban on claims referral fees paid by solicitors for new cases. The management of referral fees will be devolved to legal services regulators and the individual regulators asked to address lack of consumer understanding (of the way in which legal services work) and to ensure that information about "hidden" fees is provided to them in a consistent way by service providers.

The LSB has said that there is insufficient evidence to justify a blanket ban of referral fees and suggests that reforms of the legal services market may in any event greatly reduce their impact.

Comment: The LSB may well be right in suggesting that pending legal reforms will lead to the demise of referral fees. Andrew Dismore of the Access to Justice Action Group which opposes Lord Justice Jackson's proposed reforms, has recently been reported in the Guardian as saying that implementation of these reforms could lead to the end of all success fees which in turn may leave solicitors unable to pay referral fees.

Consumer Insurance Bill reaches House of Lords

The ***Consumer Insurance (Disclosure and Representations) Bill*** reached the House of Lords on 16 May 2011. The Bill is intended to improve consumer protection and reform principles of UK insurance contract law dating back to the 1700s.

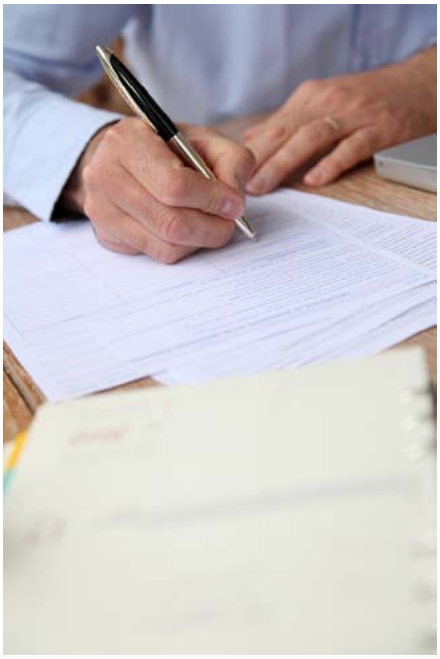
The Bill if enacted would abolish the insured's duty to disclose material facts and replace it with a duty to take reasonable care not to make a misrepresentation. An insurer would still be entitled to void a policy in the event of ***deliberate or reckless misrepresentation***.

In cases of ***careless misrepresentation,*** insurers could only void if they could prove that they would not have given cover at all had they known the truth about the risk. Where careless misrepresentation has led to a lower premium than would have been charged then an insured would be entitled only to a proportion of any claim made, reduced in the same ratio as the underpayment of premium.

A policyholder would be liable for any deliberate, reckless or careless misrepresentations made by an intermediary acting on their behalf.

The basis of contract clause would be abolished, preventing an insured's responses being treated as warranties (i.e. cover not deemed to have commenced if false information was given).

The Bill is unlikely to come into force before 2013.



Full details may be seen at:

http://services.parliament.uk/bills/2010-11/consumerinsurancedisclosureandrepresentationshl.html

Comment: on the face of it, the Bill if enacted would make it more difficult for insurers to decline claims but the courts already apply a very stringent approach when deciding whether to permit this and insurers may in reality, be no worse off. The new Act might at least bring some helpful clarity to a currently complex area of the law.

Costs

Small Track Costs apply for low value Child Injury Claims: Dockerill and Healy v Tullett – High Court (2011)

The claimant suffered minor injuries in a road traffic accident. Settlement was agreed at only £750 but still required court approval because the claimant was a child. The court approved the offer and ruled that given that the damages were less than a £1,000 the claimant should only recover the fixed costs allowed under the small track.

The claimant appealed arguing that costs should be assessed on a multi-track basis. At the first appeal the Deputy District Judge (DDJ) who heard the case agreed. His approach was that because court approval was required for child settlements the instruction of a solicitor was necessary throughout and provided the hourly rate charged and time spent was appropriate the costs were allowed.

The defendant however successfully appealed against the new costs order. At the second appeal the Judge found that the DDJ who heard the first appeal, had been wrong not to take into account that had the claimant been an adult, the case would have been allocated to the small track. There was nothing in the rules to exclude child cases from the small track and what the DDJ should have asked himself was whether it was really necessary to have a solicitor dealing with matters in a case that would ordinarily have fallen into that track.

"I conclude therefore that the Deputy District Judge erred in the test which he applied .....by failing to give any or any adequate weight to the highly material consideration that, but for the fact that the claimant was a child, the claim would have been allocated to the small claims track with the costs consequences that would thereby apply."

His Honour Judge McKenna

Comment: this is a very useful precedent for any defendants dealing with low value child injury claims. It should lead to significant costs savings.

Fraud

Successful recovery action against Fraudster: QBE Insurance and M.H. Installation v Azad Yaqoob - Stoke on Trent County Court (2011)

In the above case, QBE successfully obtained an order from the court requiring a fraudulent claimant to repay monies he had received for damage to his car and for hire charges and to repay QBE's outlay for the repairs to our own policyholder's car. The claimant was also required to pay QBE's legal costs and to pay £35,000 as an interim payment within 14 days of the date of the order.

The fraudster Yaqoob precipitated the accident by entering a roundabout, ahead of QBE's policyholder's car and slamming on his brakes. He then claimed for damage to his car, hire and storage charges. He later submitted a claim for injury and it was at this point that evidence of fraud emerged. When the Claims and Underwriting Exchange (CUE) database was checked it revealed that Yaqoob had been involved in two further accidents neither of which had been reported to the physician instructed to examine him in connection with his injury claim. As Yaqoob's claim was further scrutinised more inconsistencies were revealed.

By the time QBE's claim against Yaqoob came to trial we were able to put compelling evidence of fraud before the court. The Judge found that the accident had been staged and that Yaqoob was not injured. No one who deliberately and dishonestly caused an accident should benefit and although QBE's policyholder had been momentarily inattentive in crashing into the rear of Yaqoob's car he should not receive any damages for this.

QBE's solicitors will be making a formal complaint to Staffordshire Police, who attended the trial, so that Yaqoob will face the prospect of criminal prosecution in addition to the financial penalties already imposed.

Comment: cases like this send the important message to fraudulent claimants that insurers are working hard to detect fraud and to see that fraudsters are punished for their dishonesty.

Congratulations go to James Butcher whose evidence at the hearing on behalf of QBE helped to secure the recovery order.

Liability

Injury not caused by repetitive strain: Bashir v Geopost UK Ltd - Birmingham County Court

The claimant was employed by the defendants as a manual parcel handler for nearly two years. He resigned when back pain made him unable to continue in his job. He brought proceedings against his employers alleging that a previously asymptomatic back condition had been exacerbated by his work. He claimed that the work was repetitive, had not been subject to sufficient risk assessment and that his employers had failed to provide a safe system of work.

The defendants (insured with QBE) denied liability on the basis that the job was a simple and straightforward one, had been properly risk assessed and was not repetitive. There was no previous history of any injuries arising from this work.

It was accepted by both parties that the work could not have been done mechanically.

The judge accepted that the claimant had received a significant amount of training including manual handling and that this had been updated. There was no formal system of breaks in place but employees could and did cover for each other on an ad hoc basis. There was inevitably some element of repetition but the injury had not been caused by this but by the claimant's posture and his twisting whilst lifting both of which he had been trained to avoid. The judge found that the defendants could not have done more to protect the claimant from injury and dismissed his claim.

Comment: this case illustrates the importance of adequate training and of keeping records of it to produce in evidence in the event of a claim.

Congratulations go to the QBE claims adjuster Katie Jackson who successfully defended this claim.

Pub owners not liable for bannister sliding accident – Geary v J.D. Wetherspoon plc – High Court (2011)

The claimant had been drinking in the defendant's pub when she decided to slide down the banister of a long open staircase. Unfortunately, she overbalanced and fell backwards nearly four metres onto a marble floor. The fall damaged the claimant's spinal cord rendering her tetraplegic.

The claimant alleged that the defendant was in breach of a common law duty of care and argued that although she had taken the risk of falling her actions were only relevant to contributory negligence.

The pub staff were aware that some customers would from time to time attempt to slide down the banisters and kept a look out for people who looked like they might try it. They had considered putting up a "no sliding" sign but rejected the idea on the basis that it might actually suggest sliding to customers who would not otherwise have thought of it. Some six months after the claimant's fall there was another incident where a customer fell and injured his head. After that incident, a thick rope was coiled around the banister to make sliding impossible.

The banisters were below the minimum height specified in the building regulations but the requirement to raise them during restoration work had been waived by the local authority. The building was listed and English Heritage had objected to any changes being made to the banisters.

The issues before the court were was there a voluntary assumption of an obvious and inherent risk by the claimant so as to negate any liability on the part of the defendant and whether there was an assumption of responsibility by the defendant for the claimant.

Having considered a very large number of precedents the judge found for the defendant. Given the evidence of the obvious risk the claimant ran, her voluntary assumption of that risk was fatal to her claim. There was no duty on the part of the defendant to protect her from such obvious and inherent danger. The fact that the risk of injury to someone sliding down the banisters was foreseeable was not by itself sufficient to establish a duty of care.

Comment: this welcome judgment for defendants follows on from Court of Appeal decisions such as Poppleton v Trustees of the Portsmouth Youth Activities Committee and Tomlinson v Congleton BC where the very obvious risks taken by the claimants were fatal to their claims.

Pedestrian more at fault than driver: Waldemar Belka v Joseph Prosperini - Court of Appeal (2011)

The claimant was struck by the defendant's taxi whilst crossing the road in the early hours of the morning. He was attempting to cross where a dual carriageway joined a roundabout. Pedestrians were not prohibited from crossing there but vehicles had precedence.

The claimant had reached a refuge in the middle of the road when he saw the defendant's car approaching. His companion stayed on the refuge to wait for the car to pass but the claimant tried to run in front of it and it struck him.

At first instance, the judge found liability to be two thirds to one third in the defendants favour. The claimant had taken a serious risk in setting off when he did but the driver was also at fault as he could have avoided the collision had he slowed down when he spotted the claimant and his companion on the refuge.

The claimant appealed arguing that the trial judge should have found the driver to be more at fault than him and that the judge had failed to consider causative potency properly. A car can inflict far more serious damage to a pedestrian than a pedestrian can to a car and the actions of a driver were thus more important in causing injury.

The Court of Appeal rejected both arguments. The claimant in electing to run in front of the approaching car was more to blame than the driver who had simply failed to anticipate that the claimant might cross the road in an unwise way.

With regard to causative potency, the Court referred to the 2003 Court of Appeal case of ***Eagle v Chambers***. The "destructive disparity" between a vehicle and a pedestrian meant that it was rare for a pedestrian to be found more blameworthy that a driver unless the pedestrian has suddenly moved into the path of an oncoming vehicle which was what had occurred here. The judge at first instance was not therefore wrong in finding that there was no greater causative potency on the part of the driver than the on the part of the pedestrian.

Comment: pedestrians are often able to establish a greater proportion of liability on a motorist's part because their causative potency (i.e. the relative importance of the acts of the driver in causing the damage apart from blameworthiness) is usually greater because vehicles can inflict more harm. This will not apply however where a pedestrian runs into the path of an oncoming vehicle.

Procedure

Part 36 offer wording clarified: C v D – Court of Appeal (2011)

At first instance ***(see December 2010 Brief)*** the court held that the claimant's offer to settle was not a Part 36 offer because it stated that the offer was "open for 21 days" and was thus a time-limited offer incompatible with Part 36 of the Civil Procedure Rules (CPR).

The defendant, who wished to accept the offer after the twenty-one days had expired, successfully appealed.

The Court of Appeal held that whilst a time-limited offer was not consistent with Part 36, the offer made by the claimant was not time-limited because the phrase "open for 21 days" when looked at in context meant simply that no attempt to withdraw the claim would be made within that period.

The Court of Appeal restated that for Part 36 of the CPR to remain effective, a Part 36 offer can only be withdrawn if a formal notice of withdrawal is served.

Comment: Part 36 offers are widely used (in the jurisdiction of England and Wales) to obtain protection on costs. They offer the advantage of clearly set out costs consequences but depending on the circumstances of a particular case, a Calderbank offer may be a more flexible and a more appropriate option.

Completed 24 June 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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