Technical claims brief

Monthly update – June 2011

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News

Justice Minister announces consultation on Discount Rate

In a written Parliamentary answer, Justice Minister Simon Djanogly MP has announced that the Lord Chancellor has decided to issue a consultation paper inviting views on the methodology of reviewing the discount rate in England and Wales.

The announcement comes shortly after the Association of Personal Injury Lawyers issuing proceedings for a judicial review in apparent frustration at the Lord Chancellor's delay in commencing a review (see May 2011 Brief).

Comment: the Lord Chancellor had stated that the review would be conducted on a narrow basis having regard only to investment return from gilts. The broader consultation should be welcomed by those opposing a decrease in the rate as it will allow them to put forward arguments about the effects of change and the availability to defendants of periodical payments which would protect them from poor investment returns.

The Scottish Government and Northern Irish assemblies have devolved powers to set their own rates. There has been speculation that the Scottish Government may opt for a lower rate than England and Wales in line with its aim to make Scotland the forum of choice for litigation.

New rules for uninsured vehicles come into effect

With effect from 20 June 2011 the owners of uninsured vehicles can be prosecuted and fined up to £1,000 regardless of whether they actually drive the vehicle on the highway or not. Under current legislation uninsured motorists can only be prosecuted if they are caught driving on the public highway by the police.

Only those vehicle owners who have submitted a SORN (Statutory Off Road Notification) to say that their vehicle will not be used or parked on the highway will be exempt from prosecution.

Comment: the new rules are intended to combat the problem of uninsured drivers who kill an estimated 160 and injure 23,000 people in the UK annually.

Government publishes Strategic Framework for Road Safety

The UK Government published its Strategic Framework for Road Safety on 11 May 2011 making a number of proposals for improvement:

- On the spot fines of £80-£100 to be levied by Police for minor incidents of careless driving such as undertaking, tail-gating and cutting in front of other vehicles
- A new offence for drivers found to have drugs present in their blood stream which would remove the need to prove that they were actually unfit to drive (development work on a "drugalyzer" is underway)
- Greater use of driver education as an alternative to prosecution for less serious offences

- An extended compulsory driving test for drivers finishing a period of disqualification
- Increasing the fixed penalty for driving offences to £80 or £100.

Full details of the framework may be viewed at:
www.dft.gov.uk/pgr/roadsafety/strategicframework/

Comment: unlike previous road safety, strategy documents there are no targets for reducing casualties. This has drawn criticism from groups like Brake which campaign for improved road safety. It is unlikely that any of the proposed measures will be implemented prior to 2012.

Fraud

Claimant less disabled than claimed but not dishonest: Connery v PHS Group Ltd – High Court (2011)

The claimant suffered a whiplash injury after the car she was driving was struck in the rear by one of the defendant's vehicles. She claimed that initial pain in her neck and right leg developed into severe pain spreading to her right arm and hand, greatly reducing her mobility and preventing her from returning to work as a community and "twilight hours" nurse. She was diagnosed with Complex Regional Pain Syndrome (CRPS) with a poor prognosis for recovery.

The defendant's medical experts believed her to be a malingerer. The defendant's insurers obtained surveillance evidence showing the claimant carrying some light items in her right hand, driving and walking some distance with a stick. When the surveillance evidence was disclosed to the claimant's experts, they revised her prognosis to "good".

The issues before the court were whether the claimant had any genuine disability and if so was it due to CPRS arising from the accident, what was the prognosis and what was the appropriate level of damages?

The court held that the claimant did suffer from CPRS with some genuine disability and that based on the timing of the onset of symptoms, it was caused by the accident. Her level of disability was

less than claimed but this was due to her mistaken perception rather than any attempt to mislead the court for financial gain (sic). Her prognosis was good and she should be able to return to nursing in 12 months albeit with a 25% reduction in her hours. She was awarded her past loss of earnings to date and future loss for a year with compensation for her reduced hours thereafter. She was also awarded general damages of £20,000 and a lump sum of £50,000 to reflect her diminished promotion prospects.

Comment: this case illustrates some of the common themes of chronic pain claims. The degree of disability is often exaggerated either consciously or unconsciously and surveillance can prove a valuable tool in reducing claims. Insurers are often suspicious of chronic pain claims from nurses and others such as firemen whose occupations involve a lot of heavy lifting and inevitable strain on the back, neck and arms. If there are no records of significant pain pre-accident a court is likely to accept that post accident pain is accident related.

Criminal standard of proof for contempt not met: Bruce Montgomery v Carl Brown – High Court (2011)

The claimant was injured in a road traffic accident. The defendant conceded primary liability and the claimant received damages of £63,750 net of 25% contributory negligence.

Documents subsequently came to light that suggested that the claimant had not been truthful about his employment after the accident. The defendant brought proceedings against the claimant for contempt of court alleging that the claimant had lied in both statements and documents verified by statements of truth and to medical experts. He had claimed to have done very little or no work whereas in reality he was undertaking well paid work often overseas, a year and a quarter post accident. The defendant alleged that the claimant had deliberately and dishonestly presented an inflated claim.

The claimant admitted to making some misleading and incorrect statements and to being careless and irresponsible in the way in which he had presented his case but denied any dishonest intent and complained that he had been ill served by his solicitors.

The claimant had given his solicitors full details of his post-accident employment and had signed a mandate enabling the defendant's insurers to have access to his employment records. He had claimed to have only "part-time" work but the ad hoc nature of his employment, in the judge's view, made the "part-time" description not entirely untrue.

"Whilst the Respondent must accept, and does accept, his share of the blame for various aspects of his handling of the claim, on the material before me there are real and legitimate concerns as to the extent to which this Respondent was provided with the advice and assistance he was entitled to expect from the solicitors representing him."

The Honourable Mrs Justice Cox DBE

The claimant had not expressly authorised his solicitors to sign statements of truth on his behalf and they had failed to warn him of the consequences of signing false statements.

Dismissing the case against the claimant the judge held that in all the circumstances, including concerns over the conduct of the claimant's original solicitors, there was a degree of doubt as to whether the claimant was guilty of contempt and he was entitled to the benefit of it.

Comment: this case illustrates the difficulty that insurers face in trying to deter exaggerated claims by having claimants committed for contempt. The test for contempt in these circumstances is that a claimant must be proved to have knowingly made false statements, which they were aware, would interfere with the course of justice and this proved beyond reasonable doubt. The test is not an easily met one.

Liability

Homeowner not liable under Health and Safety Regulation: Kmiecic v Isaacs – Court of Appeal (2011)

The claimant was seriously injured when he fell from a ladder whilst carrying roofing material up to the flat roof of a domestic garage. The claimant's employer was uninsured and so the claimant brought an action against the householder who owned the property he was working on.

The claimant argued that the defendant, who had refused to allow him to access the garage roof by climbing out of a bedroom window, had effectively taken control over his work and had forced him to use an unsuitable ladder to access the roof. Because of this control over how the work was done, the defendant had adopted a duty to ensure the claimant's safety under the Construction ***(Health Safety and Welfare) Regulations 1996*** and the ***Work at Height Regulations 2005***. At first instance the judge rejected this argument.

The defendant had done no more than exercise her right to decide whom she permitted to enter her home. Although the ladder was obviously inadequate and had come from the defendant's garage, she had not selected it. It was the claimant's employer, who was responsible for both the means of access and the selection of equipment.

The claimant appealed arguing that the 1996 and 2005 regulations imposed a duty on occupiers who exercised control over the means of access to their property.

The Court of Appeal rejected these arguments. Although the regulations could impose a duty on persons others than employers it did so only if they had

adopted control of the work carried out. Control of the means of access did not mean that an occupier had adopted control of the work as defined in the regulations. To impose such a duty on a householder who knew nothing about construction would be against the objectives of the regulations.

Comment: a householder who declines to let builders access work by entering their homes will not be deemed to have adopted a duty for their safety but anyone who starts directing how work should be carried out runs the risk of being held liable under the regulations. The question of "control" is judged on the facts of each individual case.

No liability for ice falling from lorry: A. Glen v John Pearce (Glynneath) Ltd – Liverpool County Court (2011)

The claimant sought compensation for injury and vehicle damage after a large block of ice fell from the top of the trailer towed by the defendant's lorry and struck his windscreen. The defendant's insurers QBE denied liability on the grounds that, there was no requirement under the Road Haulage Association Operators Licence to inspect the roofs of lorry cabs or trailers and that such inspections were neither reasonable, safe or practical.

The trial judge accepted the defendant driver's evidence that he had not had to defrost his windscreen and thus had not been put on notice of the risk of ice. She also accepted that he had no general duty to check for ice on the top of the trailer and gave judgment in favour of the defendant.

Comment: Congratulations go to Sukhvinder Kaur of QBE (ably assisted by Richard Edgecombe of Plexus Law) for maintaining a firm denial of liability.

Parent Company owed Duty of Care to Asbestosis victim: David Chandler v Cape plc - High Court (2011)

The claimant had developed asbestosis whilst working for a wholly owned subsidiary company of the defendants. By the time the claimant discovered he had developed the disease his employers were no longer trading and there was no Employer's Liability policy covering the period of his employment. Seeing no prospect of making a recovery from his employers, the claimant successfully brought an action against his employer's

parent company (still trading) on the basis that they were jointly liable.

In finding for the claimant, the High Court had applied the three-stage test set out in the House of Lords decision of ***Caparo Industries Plc v Dickman*** (i.e. foreseeability, proximity and whether it was fair, just and reasonable for there to be a duty of care in the circumstances).

The risk of asbestosis from the claimant's exposure to asbestos dust was obvious and the defendants were well aware of the working conditions at their subsidiary. The test for proximity was also met as the parent company employed specialist staff to advise on health and safety matters for all staff including subsidiary companies. The defendants also had a high degree of control over the employers working practices and considering all the facts of the case it was fair, just and reasonable to hold that there was a duty of care on the part of the defendants.

Comment: the trial judge was at some pains to point out that the case turned on its specific facts. Simply because a company was the parent company of a negligent employer did not mean that a duty of care would exist; the Caparo test must be met.

Publicans did not owe Duty of Care to drunk driver: Flanagan v Houlihan and Kelly and Kelly (Third Parties) - Irish High Court (2011)

The plaintiff was seriously injured in a road traffic accident involving a drunk driver John Connolly who was found to be three times over the legal limit. Connolly was killed in the crash along with the plaintiff's daughter.

The plaintiff sued Connolly's estate who in turn brought Third Party Proceedings against Mr and Mrs Kelly who owned the bar where Connolly was drinking prior to the accident. The representative of the estate argued that the Kellys were negligent in serving Connolly more than two pints of beer given that he was likely to have been driving and were in breach of the criminal law by supplying alcohol to an obviously drunk customer. They were also negligent in failing to prevent him from driving home.

The judge rejected all these arguments. It had not been established that Connolly was drunk within the meaning of the ***Intoxicating Liquor Act 2003***. He did not appear intoxicated or incapable of taking care of himself. He had been a regular customer at the Kellys' bar and had been known to leave his car there when he felt he had had too much to drink.

The judge was not willing to place an "impossible burden" on publicans by finding that they had a duty to question every customer as to their plans for travelling home. Neither could they be expected to restrain or falsely imprison customers to stop them leaving as this would amount to a criminal act.

Comment: in reaching his decision, the judge followed the approach of English and Australian courts that held that there was generally no duty owed to the intoxicated without either an assumption of responsibility or exceptional circumstances.

Quantum

Loss of Society Awards must be guided by Juries: Bellingham v Todd – Court of Session Outer House (Scotland) (2011)

Following the death of a motorcyclist, the judge in this Scottish jurisdiction case made the following awards under Section 1 (4) of the Damages Act (Scotland) 1976 (known as "loss of society" awards) to the bereaved relatives:

Pursuer	Award
Mrs Alison Bellingham (widow)	£50,000
Ben Bellingham (son)	£25,000
Abbie Bellingham (daughter)	£25,000
Clifford Bellingham (father)	£15,000
Mrs Kathleen Bellingham (mother)	£15,000
Mark Bellingham (brother)	£10,000
Steven Bellingham (son)	£15,000
Total	**£155,000**

In assessing the damages the judge commented that this was a "jury question" because awards should reflect the expectations of society and that jury awards therefore provided a surer guide to the correct level of damages than past awards made by judges.

Comment: the overall award of £155,000 is in sharp contrast to the statutory bereavement award of £11,800 that qualifying relatives would have had to share between them had the case fallen under the jurisdiction of England and Wales.

The rate of increase of jury awards in fatal claims is a great concern to insurers and other compensators operating in Scotland. The bad news for these compensators is that as and when a consistent pattern of damages emerges from jury awards, Scottish judges will be obliged to refer to them in assessing damages.

Completed 25 May 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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