Technical claims brief

Monthly update – April 2011

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News

Government issues response on Jackson consultation

The Lord Chancellor Kenneth Clark MP announced to Parliament on 29 March that the government will be implementing the key proposals made by Lord Justice Jackson is his report on litigation funding in England and Wales.

Legislative changes will be made ***"as soon as Parliamentary time allows"*** and there is speculation that these could be in force by April 2012.

- The recoverability of success fees and After the Event (ATE) insurance premiums from defendants will end (except for ATEs covering expert investigations in medical negligence cases)
- Claimants who wish to enter into Conditional Fee Agreements (CFAs) with their solicitors may still do so but will have to pay the success fee themselves and the amount of the fee will be capped at 25% of the damages
- There is to be a 10% increase in general damages
- The costs rules will be amended so that unsuccessful claimants will not usually have to pay a winning defendant's costs

In addition there are to be further consultations on raising the threshold for cases to be heard by the High Court to £100,000, increasing the small track limit to £15,000 (excluding injury cases) and increasing the fast track limit to £25,000.

The full response can be viewed at:

www.justice.gov.uk/consultations/docs/jackson-report-government-response.pdf

There is also to be a consultation (closing 30.06.11) on the best means of extending the Ministry of Justice's scheme for low value (£1,000- £10,000) personal injury motor claims to all other classes of injury claim.

Comment: this is a complex series of measures whose full effects if implemented are difficult to predict. The insurance industry however has supported the implementation of the Jackson reforms as potentially offering substantial cost reductions especially in high value claims.

Supreme Court widens pool of potential asbestos claimants

In the conjoined appeals of ***Sienkiewicz (Administratrix of the Estate of Edith Costello) v Greif*** and ***Willmore v Knowsley Metropolitan Borough Council*** the Supreme Court considered causation in two mesothelioma cases where the deceased victims had been exposed to low levels of asbestos by single defendants.

In the first case, Edith Costello was a clerical worker who had been exposed to low levels of asbestos when visiting her husband on the factory floor of the manufacturing firm they both worked for. In the second case, Dianne Wilmore had been exposed to asbestos from ceiling tiles whilst she was a school pupil due to the tiles being damaged by other pupils and when occasional maintenance work was carried out. Both claimants had been successful at the Court of Appeal but the defendants appealed to the Supreme Court.

The defendants argued that for the claims to succeed the claimants must prove that on the balance of probabilities it was more likely than not that the negligent exposure to asbestos had caused mesothelioma and to do this they needed to establish that the exposure had doubled the risk when compared to the risk of contracting it from asbestos fibres in the general environment.

The House of Lords famously addressed causation in mesothelioma cases in ***Fairchild v Glenhaven Funeral Services*** where there were multiple exposures with different employers over the claimant's working life. It was impossible to say which asbestos fibre and consequently

which exposure had actually led to mesothelioma. Faced with this dilemma the Lords reduced the usual test for causation to one of whether negligent exposure had materially increased the risk and held that any of the employers who had done so were jointly and severally liable. The defendants argued that the ***Fairchild*** exception should not apply here because these cases involved only single defendants.

The Supreme Court dismissed the appeals holding that the ***Fairchild*** exception should apply. They cited section 3 of the ***Compensation Act 2006*** (which imposed joint and several liability) as giving a clear indication that Parliament wished to impose draconian consequences on any employer who had been responsible for even a small proportion of exposure.

They also rejected statistical evidence on mesothelioma cases as inappropriate for a disease where the latency (time between inhalation of fibres and symptoms) was so long.

Although expressing some scepticism about the lower courts' findings on the levels of exposure the Supreme Court did not interfere with them and more importantly did not define what constituted a ***de minimis*** level of exposure (i.e. one so low that the law was not concerned with it) or what level led to a material increase of risk.

Comment: the Supreme Court's ruling has increased the number of potential claimants not just in mesothelioma cases but possibly also for some lung cancer cases. The fact that the Court has failed to define what level of exposure creates a material risk will almost inevitably lead to further litigation on the issue.

Transport Select Committee calls for insurers' to act on motor fraud

The UK Government's Transport Select Committee has completed an investigation into the high cost of motor insurance premiums. The Committee says that the main reason for the increasing cost of premiums is widespread fraud which the insurance industry has not done enough to tackle and calls on the industry to fund a specialist anti-fraud police unit.

In response, the Insurance Fraud Bureau (IFB), which has been funded by UK insurers since 2006, has been quick to point out the number of joint anti-fraud operations it is currently carrying out, and has carried out in the past, with UK police forces. The IFB has also highlighted the insurance industry's efforts to prevent fraud through data sharing initiatives and the pursuit of fraudsters through both the civil and criminal courts.

The Association of British Insurers (ABI) has said that in reality the main cause of increased premiums are the ever increasing levels of damages and associated legal costs in personal injury claims.

Comment: there appears to be reluctance on the part of judges to refer cases for criminal prosecution even when fraud is proved in the civil court. Where insurers have succeeded with private prosecutions custodial sentences have been the exception and many in the insurance industry believe that the courts are failing to provide any serious deterrent to fraudsters.

New Scottish Legislation threatens higher awards in fatal accident cases

The ***Damages (Scotland) Act*** was passed by the Scottish Parliament on 3 March 2011 and is expected to receive Royal Ascent in April this year. The Act sets out that the default position in calculating the loss of financial support by a widow or widower from their deceased spouse is to be based on 75% of the deceased's net income with the income of the surviving spouse not considered unless it produces "a manifestly and materially unfair result".

The current system deducts the surviving spouse's income from the pre-accident joint earnings (as well as the deceased's personal living expenses) and meant that in many cases where the deceased was not the main "bread winner" there was no claim for financial support. The Act does not define "manifestly and materially unfair" and it is likely that the surviving spouse's income will now be disregarded in many cases leading to significantly increased awards.

Comment: "Loss of Society" awards in Scotland also continue to increase with several recent cases seeing awards in excess of £100,000 for an individual relative and combined awards exceeding £200,000. Fatal accident damages are already much higher in Scotland than in other parts of the UK and this is fuelling the trend for claimants to find ways to have their cases heard in Scotland.

Northern Ireland Assembly legislates to reintroduce pleural plaque compensation

The Northern Ireland Assembly passed the ***Damages (Asbestos-Related conditions) (Northern Ireland) Bill*** on 21 March 2011. The bill once enacted will make pleural plaques, pleural thickening and asymptomatic asbestosis actionable again. The entitlement to claim damages will also be back dated to October 2007 when the House of Lords ruled that pleural plaques were not an injury, disease or impairment and that damages could not be claimed for them. Royal Assent is expected to be granted shortly.

Comment: it is very disappointing that a bill of this nature has been quickly passed with very little debate and with no formal vote. It may now be subject to challenge and a judicial review in which case implementation could be delayed as with its Scottish equivalent (see February 2011 Brief).

New NHS charges effective from 1 April 2011

Recoverable NHS charges increased with effect from 1 April 2011 to £737 a day for patients admitted to hospital, £600 (one off fee) for treatment without admission and £181 per ambulance journey. The overall cap on charges for treatment following an accident occurring on or after 1 April 2011 rose to £44,056. Increases are based on NHS inflation rather than the Retail Price Index.

(From) Accident Date	Out–patient Charge	In-patient daily charge	Charge per Ambulance Journey	Cap
01.04 2011	£600	£737	£181	£44,056
01.04.2010	£585	£719	£177	£42,999
01.04.2009	£566	£695	£171	£41,545
01.04.2008	£547	£672	£165	£40,179
01.04.2007	£505	£620	£159	£37,100

Gender no longer permitted as rating factor

In a widely publicised decision ***(Association Belge des Consommmateurs Test-Achats ASBL)*** the European Court of Justice has ruled that the use of gender in calculating insurance premiums breaches the principle of equality between men and women enshrined in the ***European Charter of Fundamental Rights***.

Previously an exemption to this rule had been allowed for insurance premiums where this was supported by reliable statistical data, subject to a regular five year review.

The exemption was next due for review on 21 December 2012 and will now cease on that date.

Comment: the decision is likely to lead to significant changes to motor premiums and to annuity premiums and payments. It could even form the basis of legal challenges to statistical tools like the Ogden Tables.

Government announces major review of Health and Safety Law

Work and Pensions Minister Chris Grayling has announced that following on from Lord Young's report ***Common Sense, Common Safety*** (see November 2010 Brief) a review of all UK work place health and safety law is to be carried out. The review group will be chaired by Professor Lofstedt of Kings College London, a specialist in Risk Management. The findings of the review are expected to be published in the autumn of 2011.

The Minister also announced plans to reduce the number of Health and Safety Executive (HSE) inspections by about a third and to charge employers found guilty of health and safety offences for the cost of HSE investigations.

Comment: the stated aim of the review is to prepare for a reduction in the unnecessary burden (sic) of current health and safety regulation on business and thus stimulate economic growth. Assuming that the review does find that current legislation is unnecessarily burdensome, any proposed measures seen as making UK work places less safe are likely to face considerable opposition.

Costs

Insurers entitled to use Collective Conditional Fee Agreements: Sousa v London Borough of Waltham Forest Council – Court of Appeal 2011

The claimant's insurers sought to recover their outlay from the defendant council after trees, for which the council was responsible, had caused damage to the claimant's property. The claim was a subrogated one i.e. brought by insurers in the policyholder's name.

Settlement was reached without proceedings and with the defendants also agreeing to pay costs. They objected however to paying the claimant's 100% success fee arising from the insurers Collective Conditional Fee Agreement (CCFA) with their solicitors. They argued that in reality the claimant was never at risk for costs and that the insurer who sat behind the claim had substantial resources with which to pay them. The premium they had collected from their policyholder was in part intended to cover these.

The defendants were successful at first instance in persuading the judge that no success fee should be allowed but lost when the claimant appealed. The defendants then appealed to the Court of Appeal which whilst expressing some sympathy for the defendants (who were being asked to pay the success fee at a time of austerity) held that as the law stood a wealthy individual or company was entitled to benefit from a Conditional Fee Agreement (CFA) or a CCFA as much as a poor one.

Comment: unless and until Lord Justice Jackson's reforms are implemented, success fees from both CFAs and CCFAs remain recoverable from the losing party.

Ironically had the defendants refused to pay any costs from the start, on the basis that the matter had been settled by tender before action, they would very likely have succeeded in paying no costs at all.

Fraud

Court of Appeal unable to strike out fraudulently exaggerated claim: Summers v Fairclough Homes Ltd – Court of Appeal (2011)

The claimant suffered genuine injuries as a result of the claimant's admitted negligence but fraudulently exaggerated his claim to a vast extent. His attempt to exaggerate his claim was thwarted by the defendants' insurers who obtained surveillance evidence against him. The claimant was however still awarded £88,000 in damages in respect of the genuine element of his claim.

The defendant (or in reality his insurers) had sought to have the entire claim struck out on the basis that the fraud was a substantial one and dishonest behaviour such as his should be stamped out. The judge at first instance refused but gave permission for an appeal to the Court of Appeal.

The Court of Appeal dismissed the appeal holding that they were bound by precedent. In ***Shah v Ul Haq*** and ***Widlake v BAA*** the Court of Appeal had held that the Civil Procedure Rules gave the court no power to strike out a genuine claim even where associated with dishonesty and that the only appropriate sanction was in costs. The Court of Appeal quoted from the ruling in Shah that to change the law to allow claims like these to be struck out was a matter for Parliament. Permission to appeal to the Supreme Court was refused by the Court of Appeal but was later obtained directly from the Supreme Court and a further appeal is likely.

Comment: as reported earlier in this Brief, the Government's Transport Select Committee has called on the insurance industry to do more to tackle fraud. In the above case the Court of Appeal said that they were unable to assist the insurers by penalising a fraudster as the law stood and suggested that this was a matter for Parliament. When QBE's Special Investigation Unit Manager Rob Smith-Wright asked the Law Commission to look at law reform on this issue however he was told that "The Ministry of Justice do not want to see the Law Commission undertake a project in this field". Perhaps the Transport Select Committee and the Ministry of Justice should confer!

Post trial surveillance not proof of fraud: Mark Noble v Martin Owens – High Court (2011)

The court awarded the claimant £3.4m in damages in respect of serious injuries sustained in a road traffic accident. Nine months after the hearing however the Insurance Fraud Bureau received a tip off that the defendant's level of disability was much less than he had alleged. The defendant's insurers arranged surveillance of the claimant and after obtaining a substantial amount of visual evidence successfully obtained an injunction freezing £2.25m of the award and an order for the case to be remitted back to the High Court for retrial (see April 2010 Brief).

The claimant testified that he had not lied about the severity of his symptoms at the original trial. He had been dependant on the use of crutches and a wheelchair but through a combination of working hard at physiotherapy and the frequent use of pain killers had achieved the level of mobility seen on the surveillance footage. It did not mean that he was without pain or able to work as he had been seen to (driving diggers for example) every day.

The judge held that it was for the defendant to prove that the claimant had dishonesty and knowingly misrepresented his level of disability but the defendant had failed to do so. The judge accepted expert evidence on behalf of the claimant that there was a credible medical explanation for the level of his recovery and he believed the claimant to be an honest witness. In addition pre-trial surveillance evidence was consistent with the disabilities alleged.

The claimant had elected not to spend the damages claimed for care and aids and appliances but this was a decision

the judge could understand and it did not mean that the claimant had lied about his disabilities.

> *"That he has cheated the Revenue and has not used his damages on acquiring the services and facilities for which they were awarded counts against him, but it does not follow from these matters that he is guilty of dishonestly misrepresenting the true extent of his disability. Once compensation is in the hands of an injured claimant, I can see how he might decide .....to forgo some or most of the aids and assistance for which he claimed and spend the money instead on other things which in his mind compensated him for his loss of amenity."*
>
> *Mr Justice Field*

Comment: insurers have long debated whether more attempts at post settlement surveillance should be made. This case highlights a serious problem with such surveillance in that unless it is obtained very soon after trial it is not necessarily proof of the claimant's pre-trial condition.

Perhaps a more frustrating issue for insurers is that as the law stands a claimant can be awarded very large damages for future care (in Mr Noble's case over £2m) but, provided they have mental capacity to handle their own affairs, are not obliged to actually have the care that the insurer has paid them for.

Custodial sentence for fraudster: Shikell v Motor Insurers Bureau (MIB) – Leeds District Registry 2011

The claimant in this case accepted a Part 36 offer of only £30,000 after his claim for brain injury, pleaded in excess of £1.3m, was discredited by surveillance evidence obtained by the Motor Insurers Bureau (MIB).

The MIB was granted permission to bring proceedings for contempt of court against the claimant, his father and one of the claimant's friends on the basis that they had attempted to pervert the court of justice by lying about the claimant's alleged disabilities.

The test for contempt in cases like these is that the applicant must prove beyond doubt for each statement which is alleged to be false that the statement:

- Is false
- The statement if maintained as true would interfere with the course of justice
- The maker of the statement had no belief in the truth of the statement and knew that it was likely to interfere with the course of justice.

Exaggeration of a claim alone is not automatically proof of contempt of court.

The claimant was found guilty on 14 of 16 counts against him and along with his father was given a 12 month custodial sentence. The claimant's friend was fined for verifying a document he had not actually read but escaped a more serious penalty as he did not know that his false

statement was likely to affect the damages the claimant would receive.

Comment: where a judge is unwilling to refer a fraudulent claim to the Director of Public Prosecutions a defendant who wishes the claimant to face a criminal penalty can apply for permission to bring proceedings for contempt of court. The legal costs involved however can be prohibitive and as shown above the test to prove contempt is not an easy one. Even when found in contempt a claimant may receive only a relatively small fine. In Kirk v Walton the claimant settled for £25,000 after her claim in excess of £750,000 was discredited by surveillance (see May 2009 Brief) but was fined only £2,500.

Cases like this one where fraudulent claimants are jailed remain relatively rare. Only when custodial sentences are much more common are they likely to serve as a significant deterrent.

Thanks go to the MIB and their solicitors Weightmans for their helpful note on this case.

Liability

Breach of Highway Code not necessarily evidence of negligence: Goad v Butcher and Butcher and Sons – Court of Appeal (2011)

The claimant lost control of his motorcycle and crashed after braking heavily to try and avoid a tractor and trailer that was turning right across his path into a country lane. The motorcyclist was travelling at 55-65 mph and the judge held that he would have been able to control his motorcycle and pass safely to the rear of the tractor (and trailer) had he been travelling at a reasonable speed.

The tractor driver when turning into the lane had cut the corner in breach of the Highway Code but the judge at first instance considered this to be irrelevant. The important question was whether the tractor driver had been negligent in making his turn when he did. He had a clear view of 110 metres in the direction that the claimant was approaching and had not acted unreasonably in commencing his turn when the claimant was out of sight. The sole cause of the accident was the claimant's excessive speed and the judge dismissed his claim.

The claimant appealed arguing that the judge had erred in holding the breach of the Highway Code to be irrelevant. Had the tractor driver not cut the corner he would have had a slightly longer view of oncoming traffic (about 20m). He was negligent in starting his turn too early and not reaching the point where his visibility would have been best.

The Court of Appeal dismissed the appeal holding that the judge had applied the correct test and that whilst a breach of the Highway Code might be evidence

of negligence it would depend on the circumstances of the accident. In this case the tractor driver was not negligent in relying on his 110m view and could not have reasonably foreseen that the claimant would have been travelling at a speed so far in excess of the speed limit.

Comment: this case is another illustration that the Courts recognise that excessive speed can be the primary or sole cause of a motor accident.

Owner / Occupier of warehouse owed statutory duty to Contractors Employees: Lynch v CEVA Logistics and Lynch Electrical Contractors – Court of Appeal (2011)

The claimant Lynch was employed by his brother as an electrician and was working in a warehouse owned and occupied by CEVA. Whilst walking along an aisle he was struck and injured by a reach truck (similar to a fork lift truck) driven by one of CEVA's employees.

The judge at first instance held that CEVA were in breach of statutory duty imposed under the ***Workplace (Health, Safety and Welfare) Regulations 1992 regulation 17***. The claimant's employer was also in breach of his duty of care for failing to provide a safe system of work and the Judge apportioned liability 60% against CEVA and 40% against Lynch Electrical with 25% contributory negligence on the claimant's part.

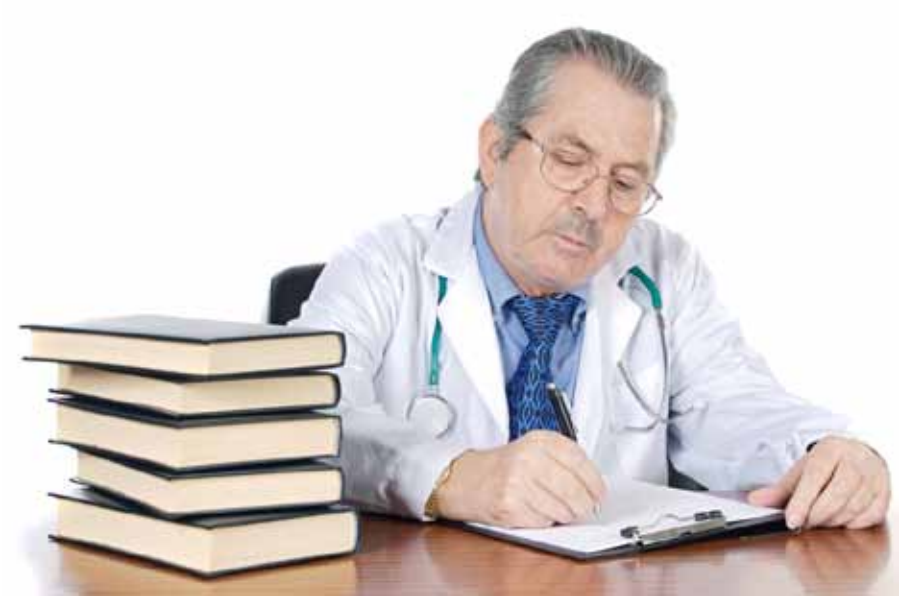
CEVA appealed arguing that under regulation 17, which deals with the organisation of traffic routes, they only had a duty to their own employees. The appeal failed. Regulation 4(2) (c) limited the responsibility of the owner or occupier of the workplace for visiting contractors and their employees to matters where it was able to give instruction. CEVA could and should have instructed the claimant not to enter the aisles without first blocking the ends of the aisles to stop vehicles entering. It had breached both its common law and statutory duty to the claimant in failing to ensure proper separation between vehicles and pedestrians.

Comment: the Court of Appeal has ruled that a work place owner or occupier owes visiting contractors and their employees a duty of care where it is able and competent to give them instructions. This duty is not limited to the separation of pedestrians and traffic and a main contractor or owner/occupier must be alert to any unsafe practices of subcontractors.

Procedure

Court of Appeal acts against "Expert Shopping": Edwards-Tubb v JD Wetherspoon PLC – Court of Appeal 2011

The claimant who was injured in a fall at work obtained an orthopaedic report on his injuries. The claimant complied with the pre-action protocol by supplying the names of three experts whom he might instruct and having received no objection from the defendant he proceeded to obtain a report from one of them. That report was not however disclosed or relied upon and when proceedings were issued a report from a different orthopaedic expert was served.



At first instance the defendants successfully sought an order for disclosure of the first report but that order was overturned on appeal and a further appeal was made to the Court of Appeal.

The claimant argued that whilst they might require the court's permission to change experts after the issue of proceedings this was not the case pre-issue and that the court was not permitted to override the claimant's privilege in the report. The defendants argued that the court had control under Civil Procedure Rule (CPR) 35.4 both pre and post issue on whether or not an expert could be called and that it should use that power to discourage "expert shopping" and promote openness.

The Court Of Appeal allowed the appeal and restored the order to disclose the first report. The court held that once a party had embarked on the pre-action protocol procedure, which involved cooperation in the selection of experts, there was no justification for not disclosing a report form an expert who had been put forward, accepted and written a report. There was no difference in principal in the position pre or post issue.

Comment: the Court of Appeal has shown its disapproval for "expert shopping" and parties (usually claimants) who seek to replace an initial unhelpful report are now likely to have to disclose it if they wish to make use of a second report in the same discipline.

Completed 25 March 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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