Technical claims brief

Monthly update – January 2011

QBE

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Causation

Chronic Fatigue Syndrome: Masood v Kerr and Pal-Ker (Administrators of the Estate of Forrester, deceased) – Court of Appeal (2010)

The claimant was injured when his vehicle was struck in the rear by a van. The van driver later died and the claimant brought a claim against his estate alleging that the accident had caused him to develop Chronic Fatigue Syndrome (CFS). An alternative case advanced at trial was that if the accident had not caused the CFS it had exacerbated it or brought forward its onset.

At first instance the judge was unimpressed with the claimant's evidence and preferred the evidence of the defendants' medical expert to that of the claimant's. He held that the claimant already had the syndrome at the time of the accident and that any exacerbation was mild. He awarded the sum of only £1,000 against a pleaded claim of roughly £295,000.

The claimant appealed on the grounds that the judge had erred in finding him to be an unreliable witness, had erred in preferring the defendants' expert's evidence (specifically that the judge had no basis on which to find that the expert had relied on the claimant's own evidence and that the judge relied on the defendants' counsels notes of the medical expert's evidence at trial) and had failed to deal with the exacerbation case.

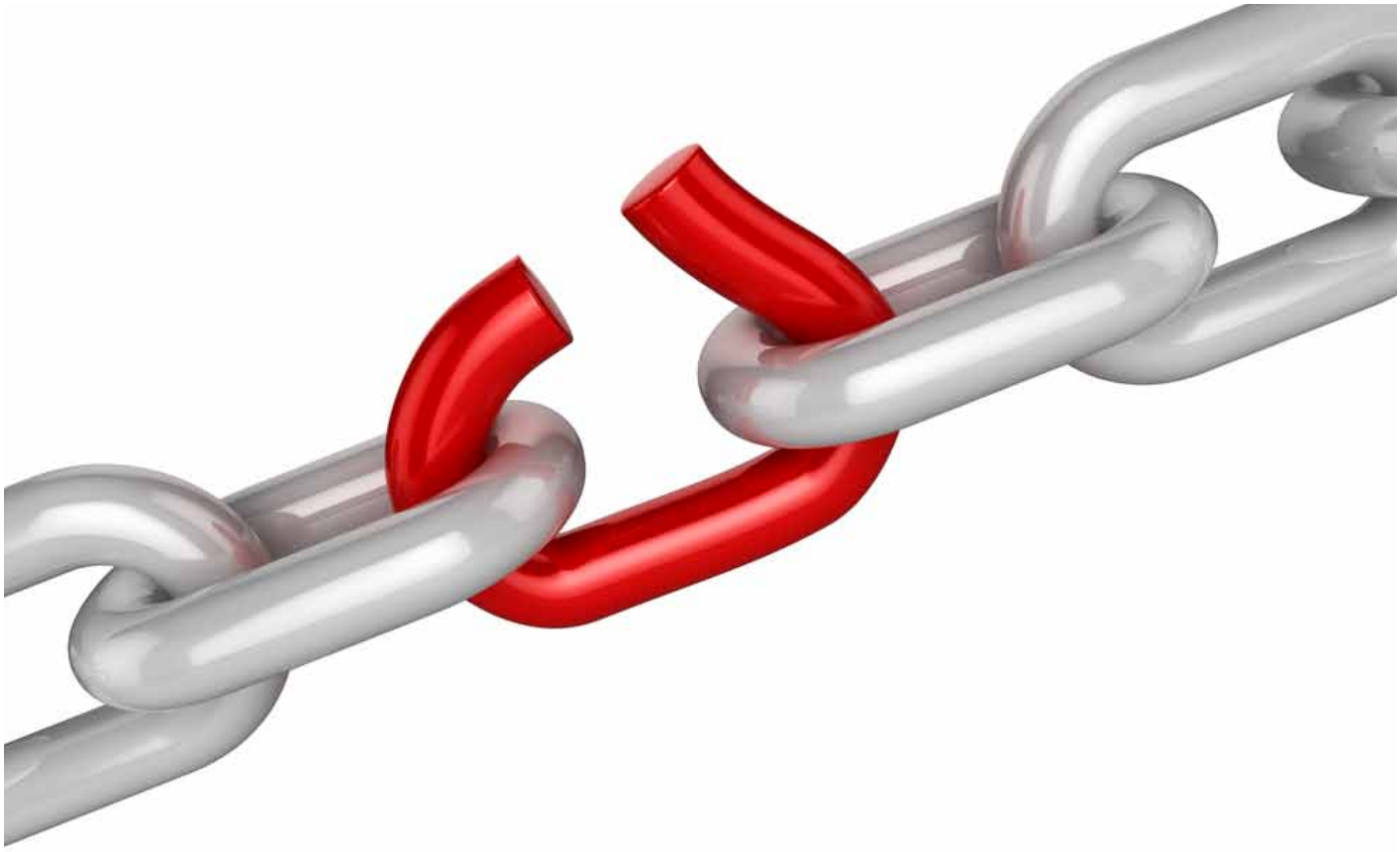
The appeal was dismissed. The judge had been entitled to find that the claimant was an unreliable witness and this was not something with which the Court of Appeal would interfere unless it was plainly wrong, which it was not. The judge had also been entitled to prefer the defendants' medical evidence which was reasoned and had no obvious flaws.

The claimant had told his medical expert that the fatigue he felt post accident was different to that he felt before. The expert had relied on this information as the trial judge had found. The judge had not acted improperly in referring to the defendants' counsels notes on the evidence, these were the only ones available. The judge had understood the exacerbation case and indeed had made an award in respect of it.

Comment: claims in respect of chronic pain or chronic fatigue conditions arising from relatively minor injuries are all too common and often raise difficult questions of causation and exaggeration.

As in this case the outcome of a hearing is often a question of whether the claimant is a credible witness and which evidence the judge prefers. The Court of Appeal has made it clear that it will not interfere unless such findings are plainly wrong.

> *"I have already said that the judge did not form a favourable view of Mr Masood's evidence. That is particularly the province of a trial judge and this court will not interfere with such an assessment unless it is plainly wrong.*
>
> *Lord Justice Longmore*



Costs

ATE Policy insufficient security for costs: Michael Phillips Architects Ltd v Cornel Clark Riklin and Susan Oglesby Riklin - High Court (2010)

The defendants made an application for an order for security for costs in the sum of £60,000 against the claimants. The claimants held an After the Event (ATE) insurance policy with a limit of indemnity of £100,000 covering costs and contended that this provided sufficient security for the defendants' costs if they were successful in the action.

Under ***Civil Procedure Rule (CPR) 25.13*** the court has complete discretion whether to order security depending on all of the facts of the case. The judge held that whilst there was nothing in principle to prevent an ATE policy providing part or total security it would be a rare case where one would provide as much protection as a payment into court or a bank bond or similar guarantee. Most ATE policies contained conditions enabling the insurers to decline payment in various circumstances outside of the defendants' control.

In this case the judge concluded that policy provided little or no security as cover was excluded for the defendants' costs if they were successful in the counter claim they were pursuing. There were also a large number of other conditions affecting policy cover and the limit of indemnity might also be insufficient as it encompassed both the claimants' costs and any order for the defendants' costs. In the circumstances it was appropriate that security for costs be given in the amount of £30,000.

Comment: the existence of an ATE policy is unlikely to provide sufficient security for costs and will not in most circumstances prevent a successful application by a defendant for an order for security.

Conditional Fee Agreements distort Part 36: James Pankhurst v Lee White and Motor Insurers Bureau: Court of Appeal (2010)

The claimant was seriously injured by an uninsured motorist and brought proceedings against him and the Motor Insurers Bureau (MIB). He signed a Conditional Fee Agreement (CFA) to finance the action. The CFA had two stages with a success fee of 22.5% if the case settled short of a hearing rising to 100% if the case went to trial.

The claimant obtained summary judgment against the uninsured motorist but with contributory negligence to be determined. At the liability hearing the claimant was successful in persuading the court that the defendant was 100% liable. Prior to the liability hearing the claimant had made a Part 36 offer of £3.4m which had been rejected and was withdrawn after the hearing.

Eventually the amount of periodical payments was agreed but not the lump sum element and the case went to a hearing on quantum. The MIB made an overall Part 36 offer valued at £6.8m which the claimant failed to beat and the claimant agreed to pay the MIB's costs from the last day that the Part 36 offer could have been accepted. The judge then ruled that the MIB must pay the claimant's costs on an indemnity basis from the date of the liability hearing until the end of the MIB's Part 36 offer but with no award of enhanced interest on future loss damages or costs.

The claimant appealed. He argued that if claimants were not entitled to enhanced interest on future losses then they would have little incentive to make a Part 36 offer in respect of them. In addition to have to pay the defendant's costs and to fail to recover their own costs of the quantum trial amounted to a double penalty.

The defendants countered that to say the claimant was out of pocket was misleading. The defendant had been obliged to refund to the claimant a substantial premium for an After the Event (ATE) insurance policy which covered the claimant's full liability to pay the MIB's costs so that in reality the claimant would not pay the MIB a penny.

> *".... I regard the arrangements made by the claimant's solicitors in this case as grotesque. In addition to their base costs (i.e. their proper costs for conducting the litigation) they are extracting from MIB a "success fee" of some £100,000 for running a risk which simply did not exist."*
>
> *Lord Justice Jackson*

The Court of Appeal dismissed the appeal. The claimant had paid nothing for failing to beat the MIB's offer whereas the MIB were out of pocket for failing to beat the claimant's earlier offer. The ATE had distorted the normal operation of Part 36. The claimant's solicitors were being paid a success fee of £100,000 when in reality they were at no financial risk.

The judge at first instance had taken the view that it would be unjust to order the MIB to pay interest on top of indemnity costs and there were no grounds on which this decision should be disturbed.

With regards to enhanced interests on future damages, the court was bound by the decision in ***McPhilemy and Times Newspapers*** and could not award enhanced interest on items that did not already warrant interest. Even if the rules of part 36 were unfair to claimants the court could not re-write them. The issue was already the subject of government consultation and at the end of that process the Ministry of Justice and the Rules Committee would decide if Part 36 needed reform.

Comment: the very strong condemnation of the current CFA system by the Court of Appeal demonstrates that senior judiciary understand the way in which it unfairly impacts on defendants and increases the cost of litigation.

Lord Jackson in his report on Civil Litigation published last year called for an end of the recoverability of both success fees and ATE premiums from defendants and it appears that he has strong judicial support for these proposals.

Our thanks go to Berrymans Lace Mawer Solicitors who acted for the MIB for telling us about this case.

Credit Hire

Consumer Regulations made Credit Hire Agreement unenforceable: Chen Wei v Cambridge Power and Light Ltd – Cambridge County Court (2010)

The claimant's car was damaged in an accident caused by a vehicle owned by the defendants. The claimant took his car to a Mercedes garage for repair which put the claimant in touch with the credit hire company Accident Exchange (AE). AE delivered a replacement car to the claimant's home where he signed the credit hire contract.

At first instance the credit hire claim was dismissed as unrecoverable. The judge held that as the contract had been made at the claimant's home the ***Cancellation of Contracts made in Consumer's Home or Place of Work etc Regulations 2008*** applied. The regulations required the hirers to supply the claimant with written notice of his right to cancel the hire contract within seven days. No such notice had been given rendering the agreement unenforceable.

The claimant appealed arguing that the regulations did not apply because the contract had effectively been made by telephone prior to the delivery of the replacement car and because the claimant had affirmed the contract and abandoned the protection of the regulations.

The appeal was dismissed. Whether there was indeed a pre-existing contract in place prior to the delivery of the car was a matter of fact and of law to be decided by the original trial judge. Even if the court should find that a pre-existing contract was in place prior to delivery there was an express condition of the hire agreement signed at the claimant's home to the effect that it

revoked all previous agreements. The judge at first instance had been correct to find that the regulations applied. The hire agreement was therefore unenforceable against the claimant and consequently not recoverable from the defendants.

Despite the claimant's contention that he had waived his rights under the regulations there was an important public policy point that consumers should be protected from traders who failed to apprise them of their rights. Even if the claimant did not take the point on the regulations the court had a duty to do so.

Comment: on the face of it this is an encouraging decision suggesting a means by which defendants may successfully challenge credit hire agreements. Where hire charges have actually been paid however arguments about enforceability are likely to be ineffective.

Liability

Detritus not part of road fabric: Valentine v Transport for London and Hounslow London Borough Council - Court of Appeal (2010)

The claimant sought damages from both the highway authority and the local authority. Her husband had skidded on surface grit whilst driving his motorcycle and had been fatally injured. She alleged that the highway authority Transport for London (TFL) had breached its duty under Section 41 of the ***Highways Act 1980*** to maintain the highway and that the local authority Hounslow LBC were negligent either in failing to properly clean and inspect the road and in causing or permitting it to be dangerous. At first instance her claim was struck out on the basis that section 41 did not extend to the clearance of surface debris. Permission to appeal was refused but the claimant applied directly to the Court of Appeal to challenge the refusal of the appeal.

The Court of Appeal agreed that there was no duty to remove surface grit and that the claim against the first defendant TFL should be struck out. Grit was not part of the fabric of the road.

The position with regards to the second defendant was different. Although there was no duty on the part of the local authority to sweep the road it had done so. The authority had not swept the sliver of tarmac where the claimant's husband had skidded and it was open to the claimant to argue that the authority had made matters worse by sweeping material onto the sliver and effectively creating a trap. The court did not suggest that this argument would necessarily succeed but the claimant was entitled to argue her case at a hearing. Her claim against the local authority was reinstated.

Comment: the local authority had no legal obligation to sweep the highway and no complaint of omission could succeed but once it elected to do so any negligence in carrying out the sweeping was actionable.

No Right of Action against Local Authority for Overgrown Footpath: Ali v Bradford City Council – Court of Appeal (2010)

The claimant was injured when she slipped on mud and debris covering some overgrown stone steps which formed part of a footpath. The claimant brought an action against the local highway authority on the basis of breach of duty under section 130 of the ***Highways Act 1980*** and nuisance. It was common ground that the path was a "highway" for the purposes of the Act.

At first instance her claim was struck out on grounds of no cause of action. She was unsuccessful at first appeal but persevered taking her case to the Court of Appeal.

The Court of Appeal also rejected her appeal holding that Parliament had not intended that section 130 should give rise to civil action for damages. This section of the Act was not about the safety or condition of the highway but concerned with preserving the rights of the general public to use it. There was no express obligation to remove obstructions nor should such an obligation be implied especially when to do so would have dire financial consequences for local authorities.

To impose a liability through the law of nuisance would interfere with a complex statutory code and usurp the role of parliament.

Comment: many local authorities will no doubt be heaving a sigh of relief that this case was not decided in the claimant's favour.

"To require highway authorities to carry out regular precautionary inspections of public footpaths of all descriptions to see that they are kept free from obstructions would have substantial economic implications for local authorities. The courts do not have the tools for carrying out a cost benefit analysis for deciding the merits of imposing such a duty.... "

Lord Justice Toulson

Scope of pure economic loss: Linklater Business Services v Sir Robert MacAlpine and Others – High Court (2010)

Ten years after completion of major refurbishment work to the claimant's offices, corrosion was discovered on metal pipe work due to the failure of the insulation around the pipes to protect them from water vapour.

The claimant brought proceedings against Sir Robert MacAlpine and How Engineering the main contractors and sub-contractors respectively. How Engineering in turn joined the sub-sub-contractors who had actually insulated the pipes, Southern Insulation, to the proceedings.

Southern Insulation sought to have the claim against them struck out on the basis that they had no contract with the claimants and as the claim amounted to pure economic loss it could not be recovered in tort. The application for strike out was refused ***(see August Brief)*** on the basis that the case raised important points of law particularly with regards to the scope of pure economic loss.

When the action was heard the judge held that the corrosion had arisen from sub-specification insulation and that Sir Robert MacAlpine and How Engineering were liable to the claimants under collateral warranties they had given. It was not proven that Southern the sub-sub-contractors had breached any duty of care in the insulation work (if such duty existed) or that any breach by them had caused the corrosion.

On that basis there could be no award against Southern but the judge went on to deal with the pure economic loss point. He dismissed How Engineering's argument that the pipe work was "other property" damaged by the defective insulation and

held that the insulation and the pipe work were in reality one installation. Authority held that the scope of a duty of care did not extend to the "thing itself" and thus there was no breach of a duty of care on the part of Southern.

"....the insulated chilled water pipe work was essentially one "thing" for the purposes of tort. One would simply never have chilled water pipe work without insulation because the chilled water would not remain chilled and it would corrode. The insulation is a key component but a component nonetheless. It would follow that no cause of action arises in tort as between Southern and Linklaters. This is not at all unreasonable in any way because Linklaters or people in their position can protect themselves, as Linklaters did, with the securing of contractual warranties..."

Mr Justice Akenhead

Comment: in Murphy v Brentwood District Council the House of Lords held that no duty of care (absent a contract) can arise in respect of damage caused to a product itself or the works done. This principle is well established but as the judge commented in this case there is little direct authority as to what constitutes a component part of the "thing itself" and what is "other property". In this case the judge held that pipes and insulation were part of one thing. Had he found that the pipes were "other property" the effective scope of Brentwood and Murphy could have been significantly reduced.

Our thanks go to Clyde and Co LLP, who acted for Southern, for telling us about this case.

Procedure

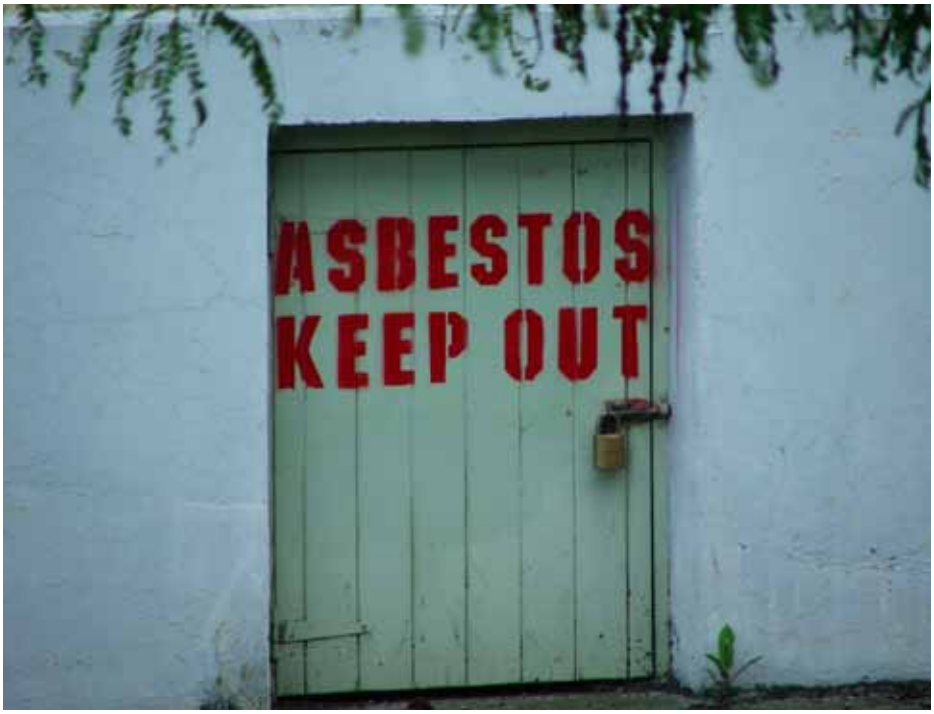
Asbestosis claim struck out under Limitation Act: Hinchliffe (Executor of the Estate of Aubrey Whitehead decd.) v Corus UK Ltd – High Court (2010)

The claimant was the executor of Aubrey Whitehead who died of asbestosis in 2009. Mr Whitehead had worked for the defendants between 1950 and 1965 where he was exposed to asbestos. He experienced breathing difficulties in 2001 and in 2002 was diagnosed with lung fibrosis. There was no diagnosis of asbestosis at this time but exposure to asbestos was discussed.

The claimant instructed solicitors in 2004. In 2008 a medico-legal expert instructed by the claimant diagnosed asbestosis but only after the claimant amended an earlier statement about the frequency of his exposure to asbestos to say that it had been daily rather than weekly.

Proceedings were issued in January 2010 and the court was asked to decide as a preliminary issue whether the claim should be struck out as being statute barred.

The judge ruled that the date of knowledge for the purposes of the ***Limitation Act 1980*** was in 2002 when the claimant was diagnosed as suffering a serious lung disease associated with asbestos exposure. If that was wrong then limitation should run from the date that the claimant instructed solicitors in 2004 when asbestos exposure was again discussed. In both cases limitation had expired and the court should not exercise its discretion to allow the claim to proceed. Had proceedings been issued promptly the claimant would still have been alive when the case came to trial and the defendants would have had an opportunity



to test the inconsistencies in his evidence, about the frequency of exposure, through cross-examination. They could not now do this and their defence was prejudiced.

Comment: a useful reminder that a limitation defence can succeed in an asbestosis claim where the defendant has clearly suffered prejudice due to delay.

Quantum

Court continues to apply current discount rate: Love v Dewsbury – High Court (2010)

The court was faced with the task of assessing quantum in the case of a severely brain injured minor. The claimant had highly variable care needs which made a Periodical Payment Order (PPO) impractical. Due to this and the fact that the defendant's insurers were in run-off and unable to self-fund a PPO the court decided that a lump sum settlement would be appropriate.

Referring to the Lord Chancellor's pending review of the discount rate the claimant's counsel invited the court to either postpone the assessment of an award pending completion of the review or to calculate an award using the current discount rate but give the claimant the right to reapply for a revised amount in the event that the discount rate was altered.

The defendants argued that there was no guarantee that the rate would be changed and that to hold up the settlement of the claim for what could be a considerable period of time when the current rate was clearly established could not be justified.

The judge agreed that the current discount rate should be applied. It was not for him to change the law and no evidence had been put before him of "exceptional circumstances" sufficient to allow him to depart from the normal rate. The claimant's representatives had been well aware of the discount rate throughout the case but had not previously sought an application to adjourn and the judge was not prepared to adjourn it now. He was also not prepared to allow the claimant to reapply should the rate be changed as this would leave matters unresolved for an indefinite period.

Comment: it is perhaps unsurprising that claimants would seek to benefit from any reduction in the discount rate. With no time frame yet announced for the review however it seems unlikely that any change will take place in the near future. For the time being at least the courts appear unwilling to put off the assessment of damages or to depart from the current discount rate.

Completed 24 December – written by and copy judgments and/or source material for the above available from John Tutton (contact no: 01245 272756, e-mail: john.tutton@uk.qbe.com).

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