

Technical claims brief

Monthly update – October 2010



Contents

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News

53rd update of the Civil Procedure Rules	1	Scottish court interprets workplace (Health, Safety and Welfare) regulations: Wallace v Glasgow City Council – Court of Session Outer House (2010)	8
Equality Act 2010 comes into force	2		

Tenth edition of Judicial Studies Board Guidelines on general damages published

	Quantum	9
	Guernsey sets negative discount rate: Manuel Helmot v Dylan Simon – Guernsey Court of Appeal (2010)	9

Fraud

Committal for contempt, false statements: Barnes v Seabrook, Hill v Gough, South Wales Fire and Rescue Service v Smith – Divisional Court (2010)	4
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Low speed impact not causative of injury: Cohen and Roe v T and K Gallagher Ltd – Salford County Court (2010)	5
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Liability

Cycling on pavement not contributory negligence: Kotula v EDF and Morrison Utility Services and Birch Utilities - High Court (2010)	6
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Railway infrastructure damage, contractual payments to train operating companies recoverable: Network Rail Infrastructure Ltd v Farrell Transport Ltd – High Court (2010)	7
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News

53rd update of the Civil Procedure Rules

The 53rd update of the Civil Procedure Rules comes into effect on 1 October.

The ever growing prevalence of electronic documents is reflected in new **Practice Direction 31B** which is intended to assist the parties in reaching agreement on what is reasonable disclosure of these. Guidelines are provided not only on helpful and proportionate disclosure but also on the preservation of electronic documents. An Electronic Documents Questionnaire is introduced which must be completed and supported by a statement of truth.

In an effort to avoid costly hearings and free up court time a pilot scheme for the provisional assessment of costs in Fast Track cases is introduced by **Practice Direction 51E**. The pilot scheme will apply to cases only in the Leeds, York or Scarborough County Courts where the base costs claimed are £25,000 or less and detailed assessment proceedings are commenced between 1 October 2010 and 30 September 2011.

Under the pilot the court will, within six weeks, undertake a provisional paper assessment based on the bill and supporting papers and the points of dispute and reply. Parties may apply for an oral hearing only after the bill has been

provisionally assessed if they wish to contest it.

The clinical disputes pre-action protocol is amended to allow four months to respond to a letter of claim and to require claimants to copy in the National Health Service Litigation Authority.

Full details of these and other changes may be viewed at: www.justice.gov.uk/civil/procrules_fin/#updates.

Equality Act 2010 comes into force

The majority of the provisions of the Equality Act are due to come into force from 1 October 2010. The Act consolidates the various existing pieces of legislation dealing with equality and discrimination and will hopefully make the law easier to understand and to comply with.

The Act protects individuals from discrimination on the following grounds referred to as "Protected Characteristics":

- Age
- Disability
- Gender Reassignment
- Marriage and Civil Partnership
- Pregnancy and Maternity
- Race
- Religion or belief (including lack of belief)
- Sex (gender)
- Sexual Orientation

There are no new characteristics but the definitions of "disability" and "gender reassignment" have been broadened.

As with previous legislation the Act prohibits direct and indirect discrimination, victimisation and harassment. It also extends to those who receive less favourable treatment for associating with people who have a "protected characteristic" or because they are mistakenly assumed to have one.

Prior to offering a potential employee a job, an employer will only be permitted to ask certain health-related questions such as whether a candidate can carry out a specific function and then only if it is essential to the job.



After a job offer has been made, an employer is permitted to ask a broader range of appropriate health related questions but if the offer is then withdrawn and the job candidate believes that they have suffered discrimination they can complain to the Equality and Human Rights Commission. The onus will then be on the employer to show that they have not discriminated.

The Act applies not just to the work place but also to the provision of goods and services to customers.

Some provisions of the Act such as the public sector equality duties (addressing gender pay gaps, social and economic inequality etc) and combined discrimination provisions (where people with more than one protected characteristic are discriminated against) are not due to be implemented until April 2011.

Comment: The main stated aim of the Act is to draw together all of the existing legislation into a single act which should bring greater clarity to equality law. The Government Equalities Office believe that employers and others who are already following current best practice equality guidelines should not find the changes in legislation difficult to comply with. Guidance is available to employers on the ACAS (Advisory, Conciliation and Arbitration Service) website at www.acas.org.uk.

Tenth edition of Judicial Studies Board Guidelines on general damages published

The tenth edition of the Judicial Studies Board Guidelines was published in September with the first copies reaching solicitors mid month. The average increase is roughly 3% across all categories matching the increase in the Retail Price Index since the ninth edition was published in 2008.

Perhaps the most common injury in personal injury litigation, “whiplash” injury to the neck conforms well to the general 3% increase.

There are some more marked changes in the level of awards for non-facial scarring with the upper limit for “a large proportion of awards” increasing by 66% from £9,000 to £15,000 and the upper limit for less serious scarring with “some minor cosmetic defect” doubling to £5,000. The valuation of scarring by the courts remains unpredictable and this is perhaps the category of injury where the guidelines have least effect.

The lower level award for mesothelioma has reduced from £52,500 to £35,000 but the text referring to unusually short periods of pain and suffering being worth £25,000 or less has been removed. It is difficult to predict the net effect on mesothelioma awards of these changes.

Comment: General damages usually forms only a relatively small proportion of the overall value of moderate to high value claims and the overall inflationary effect of these changes is likely to be modest.



Fraud

Committal for contempt, false statements: Barnes v Seabrook, Hill v Gough, South Wales Fire and Rescue Service v Smith – Divisional Court (2010)

In these three conjoined cases the original defendants sought permission from the Divisional Court to begin committal proceedings against three unsuccessful claimants for Contempt of Court.

All three of the original claimants had been found to have exaggerated their personal injury claims and to have made various false statements. In two of the cases the claimants pleaded that they could no longer work but were later found to be working full time as taxi drivers. The third claimant was obliged to agree to a settlement of only £5,000 after surveillance evidence demonstrated gross exaggeration of her symptoms and undermined her £1.7m pleaded claim.

The original claimants argued that **Civil Procedure Rule 32.14** prohibited a direct application to the Divisional Court and that the County Court judges who had originally heard their cases should first be asked to refer them to the Attorney General. The Divisional Court disagreed holding that the **Rules of the Supreme Court Order 52** permitted a direct approach to the Divisional Court. It was also in the public interest that contempt proceedings were brought against those knowingly making false statements to the court.

The court granted permission for committal proceedings in two cases but in **Hill v Gough** it was refused due to the long delay in bringing the proceedings (the surveillance evidence of exaggeration was obtained in 2003).



Comment: These actions were funded by insurers wishing to raise awareness of insurance fraud with both the public and the judiciary and to try and deter fraudsters. It is encouraging to see the Divisional Court reaching a decision which assists committal proceedings but whether these proceedings will eventually lead to any significant punishment of the fraudulent claimants remains to be seen.

Low speed impact not causative of injury: Cohen and Roe v T and K Gallagher Ltd – Salford County Court (2010)

The claimants in this case alleged that they had both suffered injury when the defendants' employee reversed his van into their car. The first claimant Ms Cohen pleaded that she was the driver of her car at the time and Ms Roe pleaded that she was travelling in the front passenger seat.

The defendants (insured by QBE) argued that the speed of the collision was too low for any genuine injuries to have been suffered by the claimants. They also denied that the second claimant had been in the car as the defendants' driver had reported seeing only a dog in the front passenger seat.

"He believed there was a dog in the passenger seat but I believe on the balance of probabilities and Miss Roe I am sure you won't like this but I believe Mr Bain mistook you as a dog."

HHJ Platts

The Judge agreed that on the evidence the speed of the collision was too low for any injuries to have been sustained. There was no damage caused to the claimants' car by the impact and there were inconsistencies in the claimants' evidence about their injuries. He accepted however that the second claimant was in the car and found that the defendants' driver had mistaken Ms Roe for a dog!



Having found in favour of the defendants on the injury point the Judge ordered the claimants to pay 75% of the defendants' costs and the defendants to pay 25% of the claimants' costs.

Comment: Judges are not always receptive to defence arguments based on low speed collisions and it is encouraging to see a judge of HHJ Platt's seniority accepting them in this case.

Liability

Cycling on pavement not contributory negligence: Kotula v EDF and Morrison Utility Services and Birch Utilities - High Court (2010)

The claimant, whilst either riding or walking with his bicycle on the pavement, fell into the road and was struck by a lorry. He was only 24 years of age at the time and suffered a serious spinal injury which left him paraplegic. At the time he had been passing through a pedestrian management system consisting of barriers and ramps which had been erected by the Defendants around an excavation. The system had created a hazardous route and primary liability on the part of the Defendants was agreed leaving the court to rule on whether there had been any contributory negligence on the part of the claimant (there was no allegation of negligence on the part of the lorry driver).

The defendants alleged that the claimant had been riding his bicycle at speed through the system when he fell off, in line with the version of events given by the lorry driver in evidence. The judge however rejected the driver's evidence as being inconsistent and accepted the claimant's evidence that although he was in the habit of riding on the pavement he always walked his bike through road works due to having suffered a previous accident when he had fallen into a hole in the road.

The judge described the route that pedestrians were forced into as "... hazardous because it was narrow, curved, ramped, adjacent to the kerb drop, and obstructed by a metre high leaning permanent wooden post..." and held that the Defendants were wholly liable for laying out "...a very hazardous, multi-layered trap..." which was dangerous to all pedestrians not just cyclists.



"In my judgment, although it is illegal for cyclists to use the pavement when weighing up the danger to himself (danger to pedestrians) it was a reasonable decision by the Claimant to ride on the pavements in this area rather than the road in the context of the duty of care owed to himself

HHJ Simon Brown QC

He went on to state that even had the Claimant been riding his bike rather than wheeling it in the circumstances it was not "blameworthy" so as to amount to contributory negligence although it would be potentially negligent in the event of any collision with a pedestrian.

Comment: Defendants who set up hazards (in this case a very serious one) for pedestrians or road users which lead to injury are unlikely to find the courts receptive to arguments of contributory negligence. Cyclists who ride on the pavement may not be negligent in respect of collisions with road users if the pavement is on balance a safer place for them to be than the road.

Railway infrastructure damage, contractual payments to train operating companies recoverable: Network Rail Infrastructure Ltd v Farrell Transport Ltd – High Court (2010)

In two separate incidents heavy goods vehicles owned by the defendants damaged a railway bridge and electrical equipment at a level crossing operated by the claimant. As a result of the damage there was significant disruption to rail services and the claimants were contractually obliged to pay substantial compensation to the train operating companies whose services were affected. Whilst the defendants admitted liability and were willing to pay for the repairs to the damaged infrastructure they disputed that the payments to the train operators were recoverable in law.

Economic loss is only recoverable in tort if consequential upon the physical damage and closely associated with it and/or its subsequent repair. The defendants argued that it was not closely associated and that it was not reasonably foreseeable.

The court disagreed, finding that a loss of use and revenue must inevitably result from serious damage to railway infrastructure and that the losses were reasonably foreseeable. There was no doubt that the payments made to the operating companies arose directly from the railway lines being closed as a result of the defendant's negligence and it was common ground that the fact that the consequential losses were paid through the medium of a contract was no bar to recovery. The claimants were entitled to recover the payments to the train operating companies.



Comment: There are thousands of “bridge strikes” where vehicles (often double-decker buses) negligently collide with low railway bridges and other railway infrastructure every year. The cost of the subsequent disruption to rail services is now likely to pass from Network Rail to the insurers of the vehicles involved.

Scottish court interprets workplace (Health, Safety and Welfare) regulations: Wallace v Glasgow City Council – Court of Session Outer House (2010)

The pursuer who worked as a clerical assistant in a school suffered an accident at work whilst trying to open a toilet window. The pursuer was only 5ft 1in tall (155cm) and to reach the window decided to stand on a toilet bowl which then toppled over. As a result she suffered fractures to her heel and one toe.

The pursuer's case was that her employers were in breach of Regulation 15 of the **Workplace (Health, Safety and Welfare) Regulations 1992**. The regulation prohibits the exposure of employees to the risk of injury by likely methods of opening windows and imposes a strict liability on employers.

The method of opening the window had clearly exposed the pursuer to injury and the case turned around the question of whether her chosen method was "likely" in the context of the regulation. The pursuer's case was that "likely" meant "possible" or that there was a foreseeable possibility. The defenders argued that it meant "probable".

The judge held that to accept the pursuer's definition of "likely" would place too high a duty on employers and found for the defenders. In the context of the regulation the judge held that "**likely**" meant "**more likely than not**" and in this case where there were safer options open to the policyholder her method of opening the window did not meet this definition. The judge commented that had strict liability attached he would have found 50% contributory negligence on the part of the pursuer.



Comment: Just as in England and Wales the courts in Scotland will carefully consider the precise wordings of workplace regulations when ruling on liability. The ruling here whilst only "persuasive" for English and Welsh cases is generally helpful in raising the threshold for strict liability to apply under this regulation.

Quantum

Guernsey sets negative discount rate: Manuel Helmot v Dylan Simon – Guernsey Court of Appeal (2010)

The plaintiff suffered serious brain and other injuries when he was struck by a car whilst riding his bicycle. He was left needing care for life but as he was resident on Guernsey was unable to apply for a Periodical Payment Order which in UK jurisdiction would have provided annual payments to fund care for the plaintiff's life time. Instead his claim was settled on a one-off lump sum basis.

At first instance the Royal Court were faced with the difficult task of assessing an appropriate discount rate (i.e. to offset the investment return that the plaintiff would receive on the lump sum settlement so that he was not overcompensated). There is no statutory discount rate in the Guernsey jurisdiction and after much deliberation the court opted for a 1% discount rate based on the 2.5% UK rate reduced for Guernsey's unique economic conditions.

The plaintiff appealed arguing that the UK rate was irrelevant in Guernsey and should not have been used as a starting point in calculating an appropriate rate. The rate should have been based on a realistic assessment of rates of return on investment and the extent to which the earnings of the plaintiff's carers were likely to outstrip the Retail Price Index.

The Guernsey Court of Appeal held that in the absence of corresponding legislation on discount rates in Guernsey the only relevance of the UK discount rate was as evidence of the likely rate of investment return in the UK but, given the dramatic decline in yields since 2001, it was not even good evidence. The fact that there was



no equivalent to the UK Annual Survey of Hours and Earnings on Guernsey (ASHE), to provide accurate data on increases in levels of earnings, should not be regarded as a barrier to the Guernsey Court setting an entirely independent discount rate. An equivalent to ASHE might be essential for indexing periodical payments but it was not required to assess the level of a lump sum.

The Court accepted that to apply the same discount rate for non-earnings related costs such as equipment would lead to over compensation and so set two different discount rates for future loss. The rate for earnings-related losses (for the plaintiff's own loss of earnings and the cost of employing carers) was set at -1.5% and for non-earnings related items at 0.5%.

The overall effect of the change in discount rates increased the damages awarded from just over £9.3m to £13.75m.

Comment: The effect of reducing the discount rate in this case led to an increase in damages of over £4m and the ruling will no doubt fuel the campaign by some claimant solicitors for a reduction in the UK rate.

With the current low yields on fixed interest securities it is difficult to argue that the current UK rate does not lead to the under compensation of claimants on a lump sum basis. But, it should be remembered that UK claimants can avoid under compensation by opting for periodical payments. Any reduction in the current discount rate would greatly increase the levels of damages payable by the National Health Service Litigation Authority and other public bodies and this must be a powerful disincentive to the Lord Chancellor to reduce the rate.

Completed 24 September – Written by (and copy judgments and source material available from) John Tutton (contact no: 01245 272756, e-mail: john.tutton@uk.qbe.com).

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