Technical claims brief

Monthly update – March 2010

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Contents

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News

Corporate manslaughter sentencing guidelines published

Following the conclusion of the consultation on sentencing *(see December 2009 Brief)* the Sentencing Guidelines Council has now published its guidelines on sentencing for offences under the *Corporate Manslaughter and Corporate Homicide Act 2007* and for health and safety offences which result in the death of one or more people.

- The guidelines will apply to the sentencing of organisations sentenced on or after the 15 of February 2010
- This is the first offence guideline to apply to organisations rather than individuals
- The guidelines follow the proposals published in October last year
- Fines for the offence of Corporate Manslaughter (i.e. requiring a gross breach of duty of care at a senior level) will seldom be for less than £500k and may be of the order of millions of pounds
- Fines for other health and safety offences (i.e. not requiring a gross breach etc) if resulting in death will seldom be less than £100k and may be for hundreds of thousands of pounds
- Fines will not be based on a fixed percentage of turnover or profit but the resources of the defendant should be considered carefully by the court and extended time to pay (up to a number of years) may be allowed

- The guidelines give details of the factors to be taken into account when considering the seriousness of the offence and of the type of financial information that the court should be provided with in assessing the impact of fines.

Comment: at the time of writing only one prosecution for Corporate Manslaughter has been brought and the large fines recommended in the guidelines are unlikely to have much deterrent effect if prosecutions remain rare. Whether the guidelines will lead to an increase in fines for other fatal health and safety offences, remains to be seen.

The full guidelines can be viewed at:www.sentencing-guidelines.gov.uk/docs/guidleines_on_corporate_manslaughter.pdf

Court of Appeal refuses permission for further Appeal on Copley and Lawn

It has been reported that the Court of Appeal has refused permission for a further appeal by the defendants in the credit hire cases of Copley v Lawn and Madden and Haller.

Comment: as a result of the decision in these conjoined cases (see January and July 2009 Technical Claims Briefs) Defendants seeking to contain credit hire claims must now specify the cost to them of any replacement vehicle offered to a claimant

M.O.J. reform of low value RTA PI claims process postponed despite progress on CPR changes

The Ministry of Justice (M.O.J.) has announced that the Civil Procedure Rules Committee approved draft rule changes, practice directions and forms for use with the new process on 12 February 2010.

The M.O.J. anticipates that a Statutory Instrument bringing the new rules and practice directions into effect will be signed and placed before Parliament by the beginning of March this year.

In a further development: insurers, claimant solicitors and compensators can now register to use the electronic portal commissioned by the M.O.J. to support the new process by enabling the electronic exchange of claims information and documents.

Despite this progress, lobbying by the Motor Accident Solicitors Society (MASS) and other stake holders who have serious concerns about the limited time remaining for the implementation of the reforms, has led to the M.O.J. agreeing to put back the implementation date to 30 April 2010.

Further information is available on the MOJ's website for the new process: www.rtapiclaimsprocess.org.uk

Comment: There has been considerable press speculation about a possible postponement (see December 2009 Brief). There is no doubt that the implementation of the new process will pose significant challenges to both defendants and claimants alike and it remains to be seen whether further delay can be avoided.

Department of Transport launches consultation on commercial vehicles

- The department of transport has launched a consultation on proposed amendments to the maximum speed limits for commercial vehicles
- It is proposed that the speed limit for Heavy Goods Vehicle under 7.5 tonnes would be reduced from 70mph to a 60mph limit (currently in force for heavier HGVs) producing a single speed limit for all HGVs
- The speed limit for Passenger Carrying Vehicles (i.e. those adapted to carry more than 8 passengers) under 12 metres in length would be reduced from 70mph to 65 mph and the limit for those over 12 meters in length would be increased from 60mph to 65mph to create a single PCV speed limit
- The consultation will run until 27 April 2010.

Full details are available on: www.dft.gov.uk/consultations/open/2010-06/

NHS charges to increase from 1 April 2010

The Department of Health has announced an increase in NHS charges recoverable from compensators effective for accidents on or after 1 April 2010. The increase is 3.5% based on Hospital and Community Health Care Inflation.

	Current rate	New tariff
Flat rate for treatment without admission	£566	£585
Daily rate for in-patients	£695	£719
Charge per ambulance journey	£171	£177
Cap per claimant	£41,545	£42,999

Costs

Small track costs appropriate despite Consent Order referring to Costs on Standard Basis: O'Beirne V Hudson – Court of Appeal (2010)

The claimant's claim for a modest £400 in general damages and £719.06 in hire charges was settled without a hearing taking place and without the case being allocated to any track.

The parties signed a Consent Order saying that the defendants would pay costs on "the standard basis".

The District Judge at first instance agreed with the defendants that had the case proceeded it would have been allocated to the small track but the Consent Order could not be amended and she accepted the claimant's argument that it formed a binding agreement to pay costs on a standard basis i.e. precluding reference to the small track. She subsequently assessed the claimant's costs at £3,987.

The defendant appealed arguing that the wording of the Consent Order did not preclude assessment by reference to the small track.

The appeal succeeded with H.H.J. Stewart holding that there was nothing in the Consent Order stopping the defendant from arguing that costs should be assessed on a Small Track basis. The Consent Order did not fetter the discretion of the court in assessing costs.

The claimant then appealed to the Court of Appeal. The Court of Appeal agreed that the District Judge's decision should be reversed and that a judge assessing costs should take into account the fact that the case should have been allocated to the small track had it proceeded.

The Court did however make the distinction that the terms of the Consent Order did preclude costs being fixed solely by

reference to the Small Track and that the correct test was "whether it was reasonable for the paying party to pay more than would have been recoverable in a case that should have been allocated to the small claims track".

Comment: This case emphasises that a costs order cannot be altered by a judge assessing costs and if a defendant intends only to pay costs on a small track basis (and if they wish to avoid arguing all the way to the Court of Appeal) then a Consent Order should say so. It should also be borne in mind that had the sum agreed for general damages been only a few hundred pounds more and thereby closer to the Fast Track threshold the assumption that the case would have been allocated to the Small Track might not have been made.

Parties may raise new points with a Costs Judge: Drew v Whitebread – Court of Appeal (2010)

In this case the Court of Appeal considered many of the same issues as in *O'Beirne v Hudson* above. The case was allocated to the multi-track but the claim was substantially reduced at trial with total damages awarded of only £9,291.

The trial judge made an order for the defendant to pay costs on the standard basis but allowed the parties' to raise issues of conduct and exaggeration before the costs judge. The claimant lodged a costs bill for assessment totalling £78,458 which the defendant argued was disproportionate. They also alleged exaggeration.

The district judge who assessed costs in the first instance ruled that the case was in reality a fast track case and that she would assess the trial costs on that basis. The claimant appealed on the first occasion without success but following a further appeal to the Court of Appeal the case was passed back to the district judge to review her decision.

The Court of Appeal held that for the district judge to assess the costs of the trial as if the case had been allocated to the fast track would be for her to ignore the trial judge's order on costs. This was not a permissible approach.

The correct approach would be to assess the costs on the standard basis but taking into account that the case should have been allocated to the fast track. The difference between the two approaches might not make much practical difference in many cases but in this one it meant the difference between automatically excluding the costs of the second day of the hearing rather than considering whether the second day of the hearing was justified because of a liability dispute.

The defendants had not raised the point of whether the trial should have been concluded within one day with the trial judge but the express provisions of the Civil Procedure Rules (that the court's duty is to ensure that costs are proportionate and reasonable) meant that the parties were permitted to raise new issues with the cost's judge provided that these were relevant and had not already been ruled on by the trial judge.

Comment: The two cases above illustrate that whilst costs judges have very considerable discretion in the awards they make they cannot alter or ignore costs orders made by the trial judge. New relevant points may be raised before a costs judge but parties wishing to reduce the uncertainty of assessment might do better to get the trial judge to rule on them.

Success fee recoverable by insurer on subrogated claim: Sousa v London Borough of Waltham Forest – Leeds County Court (2010)

The claimant's household insurers sought the recovery of their outlay from the defendant after settling a small subsidence damage claim caused by tree roots. The insurers brought the action in their policyholder's name under the right of subrogation.

The claim was quickly settled without the need for proceedings. The defendant agreed to pay damages and reasonable costs but refused to pay a success fee. At first instance the defendant successfully argued that it was unreasonable for the

claimant to have entered into a Conditional Fee Agreement (CFA) as he was never at any risk on costs which would be paid by his insurer.

The claimant however successfully appealed. The court held that in line with the House of Lords' decision in *Campbell v MGN Ltd* a wealthy claimant who could have funded their own litigation was not acting unreasonably in making use of a CFA. The court then considered the question of subrogation and held that an insurer who brings a subrogated claim and which stands in the shoes of a policyholder is entitled to all of their rights and remedies including a CFA with a success fee.

Comment: Success fees have been criticised by Lord Justice Jackson and others as a major contributor to the disproportionate costs of litigation but short of reform of the Civil Procedure Rules they are likely to remain payable on subrogated claims.

Liability

Allergic reaction foreseeable: Bhamra v Prem Dutt Dubb (t/as Lucky Caterers) – Court of Appeal (2010)

The claimant's husband died after eating food containing eggs to which he was severely allergic. The claimant and her husband had been attending a wedding at a Sikh temple and had not anticipated that the food served might contain eggs as their consumption is forbidden by the Sikh religion.

The claimant brought proceedings against the caterers. At first instance the court held that the caterer should have been aware that there might have been people attending the wedding who had egg allergies and that these people would not suspect that their food contained eggs being served as it was in a Sikh temple. The duty of care of the defendant in these unusual circumstances was extended to include personal injury caused by eating food containing eggs.

The defendant appealed. The Court of Appeal held that for the judge at first instance to find that the defendant had failed to take reasonable care, he needed first

to find as a matter of fact that the claimant was aware (or should have been aware) that the dish in question (which he had obtained from a third party) was sometimes made with eggs as an ingredient. The Court of Appeal rather than remitting the case back to the trial judge to rule on this point used its discretion to infer from the defendant's evidence that he was so aware.

Dismissing the appeal the court held that in the absence of any explanation as to how the error occurred the fact that the food served did contain eggs was sufficient to establish a breach of a duty of reasonable care.

Comment: In deciding the scope of the defendant's duty of care in this unusual case, the Court of Appeal considered the 1990 House of Lords decision in Caparo Industries plc v Dickman. . Foreseeability and proximity of harm are not always enough to establish a duty of care, the imposition of a duty must be fair, just and reasonable in all the circumstances.

Failure of defendants to remove very small risk not breach of duty: Uren v Corporate Leisure (UK) Ltd, M.O.D., David Lionel Pratt and Ors (Syndicate 2525) – High Court (2010)

The claimant was an RAF serviceman taking part in a health and fun day run by the first defendants who had been hired by the RAF. The claimant broke his neck when diving head first into an inflatable pool during a novelty relay race. The claimant was rendered tetraplegic and sought damages from the organisers of the event and his employers.

The claimant argued that the race was unsafe. It was reasonably foreseeable that diving head first into the pool could result in serious injury and this should have been forbidden either at the outset or when competitors were observed doing it during the race.

The defendants argued that the game was reasonably safe and that all sporting activities involved some risk. The defendants' expert testified that the risk had been very small and that the claimant had been very unlucky to sustain the injury he did. To have banned diving would have rendered the game dull and pointless.

> "Enjoyable, competitive activities are an important and enjoyable part of the life of the very many people who are fit enough to enjoy them. This is especially true in the case of fit service personnel. .....such activities are almost never risk- free."
>
> ***Mr Justice Field***

The court held that the risk assessment carried out was "fatally flawed" but this was not enough for the claimant to succeed on liability. On the evidence the risk of serious injury had been very small and the contestants had been told to take care when entering the pool. In considering the balance between the risk posed and the benefits of the activity the judge found that neither the first or second defendants had been obliged to ban head first diving which would have "neutered" the game of much of its challenge.

Comment: The judgement is helpful to defendants and is another example of the courts' reluctance to discourage "desirable activities" such as physically challenging sports and leisure events.

Highways Authority's duty to maintain verge: West Sussex County Council v Russell –Court of Appeal (2010)

The claimant suffered serious injuries after losing control of her car on a frosty road. She was driving within the speed limit but too fast for the icy conditions. Her nearside wheels left the carriageway and dropped six inches due to the verge having sunk relative to the road.

This forced the claimant to steer sharply to her right resulting in her car going onto the wrong side of the road. She then steered sharply left and struck a tree.

A police accident investigator found that the difference in height of the verge relative to the road (varying between six inches and a foot) was a significant hazard to road users.

The claimant brought an action against the local highway authority alleging that their failure to maintain the level of the verge following resurfacing work was a breach of their duty to road users under Section 41 of the *Highways Act 1980.*

The Judge at first instance found that Section 41 applied as the verge was part of the highway and that the defendants had a duty to maintain it. They had not established a defence under section 58 of the act (i.e. taking such care as was reasonably required in the circumstances to ensure that the highway was not dangerous for traffic). He also found 50% contributory negligence on the part of the claimant in view of her speed in icy conditions.

The defendant highway authority appealed on the basis that the judge had not held that they were in breach of the duty of care imposed by Section 41 (if he had he was wrong to do so) and that he should not have rejected their defence under Section 58. If the difference in levels was a hazard it was only to drivers travelling at excessive speeds. The claimant cross-appealed against the finding of contributory negligence arguing that the cause of the accident was the state of the highway and that the judge had not identified what speed constituted negligence.

The court rejected both the appeal and cross appeal. The judge at first instance had considered the relevant case law at length and he had held that the authority was in breach of its duty under Section 41. This conclusion was based on the expert evidence heard at the trial.

The highway authority clearly recognised that the heights of the verge and the carriageway should be equivalent because they had made efforts to raise the verge by putting soil on it. The ease with which the police accident investigator and the experts at trial had identified the hazard fully justified the judge's view that they should have been aware of the danger. The highway authority with constructive knowledge of the hazard had failed to establish that they had taken the required action to ensure that the road was not dangerous and had no defence under Section 58.

With regards to the contributory negligence of the claimant, she had admitted driving too fast in icy conditions. The judge's finding based on his hearing of live evidence that the accident had been caused in equal measure by excessive speed and by the state of the highway could not be faulted.

Comment: At the hearing the defendant's counsel pointed out the concerns of highway authorities about the standard of maintenance the first instance decision placed on them. Sunken roadside verges are not uncommon and now that the Court of Appeal has upheld the decision any motorist losing control after crossing one may be more inclined to pursue a claim against the highway authority. On behalf of the Court of Appeal however, Lord Justice Wilson commented that decisions of this nature are extremely fact-sensitive.

School not liable for injuries suffered by pupil in fight: Webster and Others v Ridgeway Foundation School – High Court (2010)

The claimant was a white pupil at a school with a history of racial tension. He had punched an Asian pupil and then arranged to fight with him after school hours on the school tennis courts. The fight had been arranged on a one-to-one basis but the Asian pupil used his mobile telephone to summon several friends and relations to assist him, one of whom attacked the claimant with a hammer. The claimant suffered serious head injuries and was found by members of his family unconscious and covered in blood.

Those immediately responsible for the assault were convicted and jail sentences were imposed.

The claimant sought damages from the school as did three members of his family who witnessed the aftermath of the incident. He alleged that the school:

- had failed to secure the site by erecting a fence around its perimeter and having a member of staff present in the tennis court after school hours
- had failed to establish good discipline and to deal effectively with racial tension
- had failed to adequately protect the claimant including the banning of mobile telephones
- had failed in its obligations under the Human Rights Act.

Following a lengthy trial with 52 witnesses the claim was defeated on all counts. The court held that:

- the school had not breached its duty of care by failing to erect a perimeter fence (there would have been considerable local opposition, planning difficulties and expense)
- the failure to impose a ban on mobile telephones was not negligent
- the type of injuries suffered could not have been foreseen
- the school had a race relations policy and even if this had been better implemented it could not be shown that the injuries suffered would have been avoided
- the actions of teachers were of an acceptable professional standard
- the types of injury which might reasonably have been expected did not constitute inhuman or degrading treatment as defined by the Human Rights Act
- the Deputy Headmaster could not be expected to have anticipated the fight.

Comment: Had the claimant succeeded there would have been far ranging implications for the education sector. Other claims from pupils involved in fights after school would no doubt have followed and risk adverse policies by schools and education authorities proliferated.

Our thanks go to Nick Yates of Everatt and Co. Solicitors, who acted for the defendants, for his very helpful note on this case.

Procedure

Immunity of expert witness: Paul Wyne Jones v Sue Kaney – High Court (2010)

The claimant Jones brought proceedings against the defendant Dr Kaney who had been an expert witness instructed by him in an earlier action. In that earlier action Jones had sought damages for psychiatric injury following a road traffic accident. Dr Kaney, a consultant clinical psychologist, prepared an initial report which suggested that Jones had suffered from Post Traumatic Stress Disorder (PTSD). The defendant's expert in that action reported that Jones had exaggerated his symptoms. A joint statement was ordered by the court.

The joint statement said that Jones had been not suffered PTSD and that he was "very deceptive and deceitful" in his reporting. When Jones' solicitors asked for an explanation from Dr Kaney as to why she had changed her opinion they were allegedly told that she had signed the joint statement without comment or amendment even though it did not reflect her true views or what was agreed during the discussion with the defendant's expert.

Mr Jones' solicitors were unable to persuade the court that Dr Kaney should no longer act as an expert and the very damaging joint statement led to a much reduced award of damages.

Mr Jones then brought proceedings against Dr Kaney who pleaded witness immunity in accordance with the Court of Appeal decision in *Stanton v Callaghan.* She made an application to strike out the claim against her. Jones' solicitors argued that *Stanton* was no longer binding due to the subsequent enactment of the *Human Rights Act 1998* (the act required the court to comply with the *European Convention on Human Rights* which included the right to a fair trial and this was at odds with the immunity provided by *Stanton*).

The case was transferred to the High Court where the Judge held that *Stanton* remained good law. It had never been directly challenged on grounds of the *Human Rights Act* and was a binding authority. The application to strike out was granted but the Judge also expressed concerns about the public policy implications of a blanket immunity for witnesses and Mr Jones was granted a certificate enabling to him to apply for leave to appeal to the Supreme Court.

Comment: The decision in Stanton is binding on the Court of Appeal and the lower courts but the Supreme Court could overturn it on public policy grounds. As Mr Justice Blake commented in his judgment, if the claimant's allegations were true he had suffered a striking injustice at the hands of his expert witness and should have a remedy.

"Rome II", Applicable law for compensation of English claimant injured in Spain: Clinton David Jacobs v Motor Insurers Bureau – High Court (2010)

The High Court was asked to rule on the preliminary issue of whether the claim for compensation should be assessed by reference to English law, Spanish law or a combination of the two.

The MIB contended that EU Regulation 864/2007 (known as "Rome II") should apply and that damages should be assessed according to Spanish law. The claimant argued that damages should be assessed according to English law either because Regulation 864/2007 did not apply by virtue of the UK regulations governing the MIB or if it did apply, the applicable law

was that of England or Wales as this was the law most closely associated with the incident.

The court ruled that Regulation 864/2007 applied. The general rule 4(1) of the regulation specified that the applicable law was that of the country where the damage occurred and there were no good grounds on which to invoke the exceptions to this rule set out under 4(2) and 4(3). Damages must be assessed in accordance with Spanish law.

Comment: This is an important decision for anyone dealing with cross- border (non-contractual) litigation. There has been considerable speculation that UK Courts might interpret Regulation 864/2007 so as to still award UK levels of damages to UK resident claimants injured abroad. The judge in this case however has applied a strict interpretation of the new regulation. This must be a welcome development for UK insurers (and other UK compensators) as UK damages are usually far higher than in other EU nations.

Completed 23 February 2010 – Copy judgments and/or other source material for the above items may be obtained from John Tutton (contact no: 01245 272756, e-mail: john.tutton@uk.qbe.com).

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