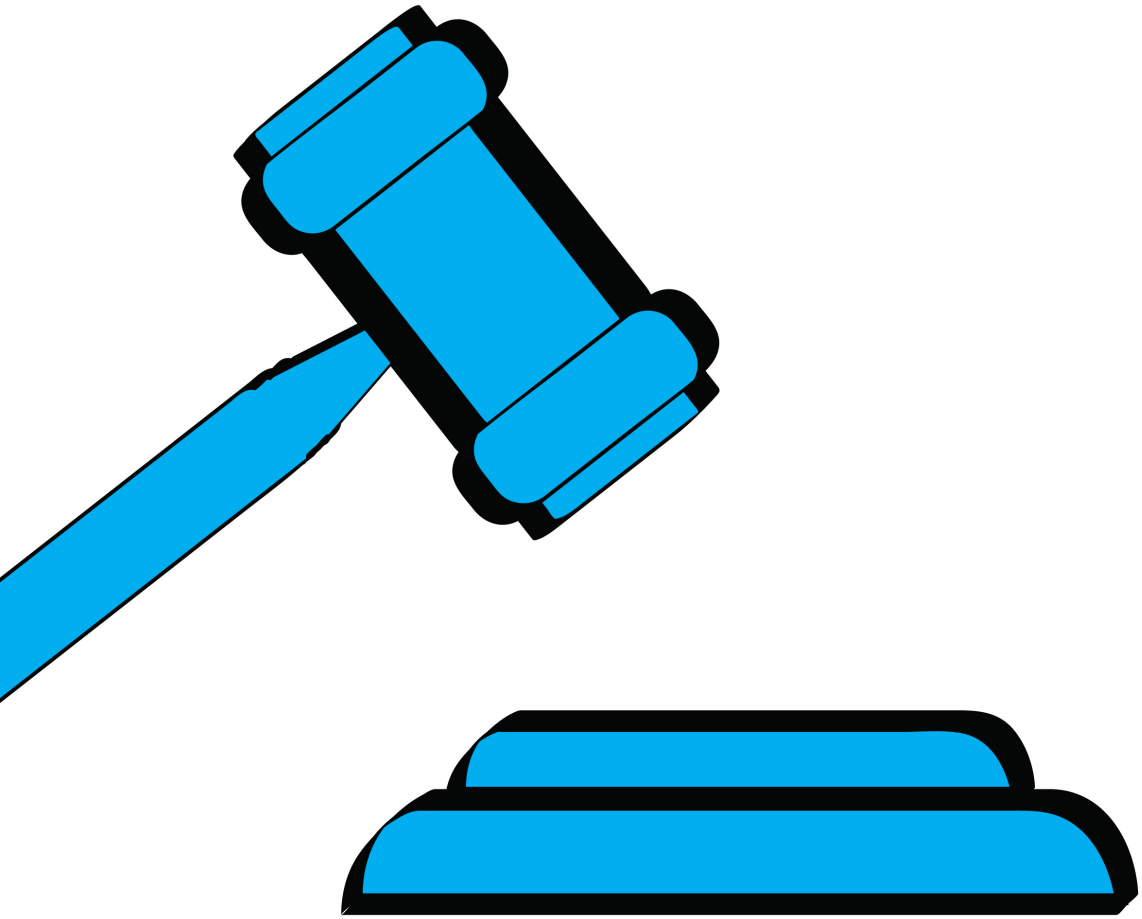
Technical claims brief

Monthly update – January 2010



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News

Third Party Rights against Insurers Bill reaches Committee stage

- The Bill is intended to replace the Third Parties (Rights Against Insurers) Act 1930 and aims to create a more efficient and cost effective process for third parties bringing claims against the insurers of insolvent defendants

- Under the new process the defendant's rights to the benefits of a liability policy would be transferred to the claimant and would allow them to pursue their claim through only one set of proceedings (the current process requires claimants to first issue proceedings to establish quantum and liability and then to issue separate proceedings against the insurer)

- Claimants are no longer required to restore insolvent companies to the register of companies before issuing, saving further time and money

- The Bill sets out a detailed procedure to enable a third party to obtain information about the insurance cover prior to obtaining judgment so that they can see if it is actually worthwhile bringing proceedings in the first place.

Comment: The Bill has made rapid progress thus far and may well be enacted prior to Parliament being dissolved for the next general election.

CRU issues reminder on time limits to claim reductions on NHS charges

Following pressure from the insurance industry the CRU has issued a reminder detailing the procedure and time limits for claiming a reduction in NHS charges where claims are settled net of contributory negligence (for accidents occurring on or after 29 January 2007).

A compensator must apply for a review of the certificate detailing the charges within 3 months of either the date of issue of the certificate or of the date on which compensation is paid if this is later.

Comment: A number of compensators have lost out on reductions in NHS charges due to missing the deadline for application. The deadline was not previously mentioned on the CRU website or guidance notes.

Draft European Bus and Coach Passengers rights directive amended

Following successful lobbying by Insurers' representative bodies, draft regulation before the European Transport Council has been amended to remove strict liability and the requirement to make interim payments in respect of bus and coach passenger claims.

Article 6 if implemented could substantially increase the maximum bereavement awards in England and Wales to 220,000 Euros per person but this may be limited to passengers travelling internationally. Article 8, which replaces the article requiring Interim payments, now requires only that the carrier shall provide reasonable assistance with regard to the passengers' immediate practical needs post accident.

Comment: This is very good news for bus and coach companies and their insurers. There had been grave concerns that the introduction of strict liability for bus and coach passengers coupled with a requirement to make interim payments would be hugely expensive.

Law commissions publish consumer insurance bill

The law commissions of England and Wales and of Scotland have published a report and draft bill proposing changes to the law for individual consumers purchasing insurance. The Consumer Insurance (Disclosure and Representation) Bill if enacted would abolish the obligation of consumers to report all material facts when incepting an insurance policy. Instead they would be required to take reasonable care to answer insurers' questions fully and accurately.

The bill sets out three types of misrepresentation:

- If it is done unwittingly and is due to an error that a "reasonable person" might have made then the insurer will still be obliged to pay any subsequent claim
- If the misrepresentation is the result of carelessness then the insurer is allowed a proportionate remedy such as paying only part of the claim
- If the policyholder made a "deliberate" or "reckless" misrepresentation then the insurer will be permitted to avoid the policy but it is intended that this would only be permitted in the most serious cases.

A consumer may be bound by careless, deliberate or reckless misrepresentation by an intermediary but only if they are the consumer's agent and not the insurer's.

The bill would also abolish "basis of contract" clauses (where all answers on a proposal form are treated as warranties breach of which would enable avoidance).

Comment: Supporters of the bill say that it will update and simplify existing law and better protect the interests of consumers. It is however unlikely to be enacted prior to the next general election.

Costs

Minors, small track costs appropriate - Aurangzeb v Walker – Supreme Court costs office 2009

The claim involving a minor was settled for £500 without recourse to proceedings and with a parental indemnity form rather than court approval. The defendant argued that small claims fixed costs should apply whereas the claimant argued that predictable costs should apply as any infant approval hearing should be allocated to the multi track.

Master Rogers held that there was nothing to prevent the claim of a child being allocated to the small track and where damages were agreed below the small track limit small claims fixed costs should apply.

Comment: This is a useful judgment for defendants which should help limit costs in child claims.

Small claims costs not precluded by Part 36 offer – Carole Stillwell v Clancy Docwra Plc - Supreme Court costs office 2009

The defendant made a settlement offer of £750 "pursuant to Part 36". The claimant accepted the offer on the basis that the provisions of Part 36 applied with regard to costs. They submitted costs of £6,727 and argued that the implication of Part 36 was that their costs should be assessed on the standard basis failing agreement. The judge made an order on those terms.

The defendants argued in their points of dispute that the costs should be assessed with reference to the small claims costs provisions. As a preliminary issue the SSCO was asked to consider whether the order prevented the Court from assessing costs on that basis.

The costs judge held that an order for costs to be assessed on "a standard basis" in no way fettered the court's discretion to award costs under the small claims regime if it considered this to be just but by the same token they were free to award a more generous sum if despite the small sum agreed in damages the amount of work actually done justified it.

Comment: Although the defendants may yet succeed in paying only small claims costs they might well have avoided any risk of paying more than small track fixed costs by specifying these in their settlement offer.

Costain Ltd v Charles Haswell and Partners Ltd – Technology and Construction court (2009)

Despite being described by the judge as "clear winners" of the action the claimants were awarded only £620,000 (38.75%) of their £1.6m costs. The judge based the award on which party had been successful on each of the areas of dispute and on their conduct.

The claimants had largely succeeded on the liability issues but on quantum were only successful on four of the eleven heads of damages. They were also criticised for

initially exaggerating their claim which had reduced from £3.5m to £1.8m before the trial had even begun.

Comment: This case is a good illustration of the current approach of the courts to costs in complex cases: modifying costs orders to reflect the relative successes and failures of the parties on the issues.

"...the time-honoured rubric that "costs follow the event" is no longer applied automatically in this kind of situation even though a clear winner of the litigation has emerged."

Richard Fernyhough QC

Credit Hire

Appeal permission refused: Copley v Lawn and Madden v Haller – Court of Appeal (2009)

Permission to appeal the Court of Appeal's decision to the Lords in the above conjoined credit hire case has been refused.

The Court of Appeal's decision confirmed that claimants who reject offers of replacement vehicles out of hand will be held to have failed to mitigate their losses if they then opt for more expensive credit hire but only if the offer is specific as to the cost to the defendant and the defendant genuinely has replacement vehicles available. Failure to mitigate will restrict the hire claim to the amount that the defendant would have paid for a replacement vehicle (see July 2009 TCB).

Comment: Few commentators expected the defendants to succeed on appeal and insurers are already using alternative strategies. Whilst one chapter of credit hire litigation has now ended there will undoubtedly be further cases particularly over the rates charged.

Credit hire company penalised for delaying repairs: Tiller v Green – County Court (2009)

The defendants successfully challenged the duration of the credit hire period on the basis that the credit hire company, who were acting as the claimant's agents, had unnecessarily delayed repairing their client's vehicle.

The credit hire company Accident Exchange tried to blame the repairing garage but after they were brought into the action by the defendants the garage were able to prove that they were blameless. The judge held that the delay had been due to Accident Exchange's failure to instruct an engineer and to authorise repairs promptly. As a consequence the defendants were only liable to pay £1,790 of the £9,303 hire charges. Accident Exchange was ordered to pay the defendant's costs on an indemnity basis and those of the garage.

Comment: Historically it has not been possible for defendants to penalise credit hire companies for delays with repairs. In this very welcome judgment for defendants the credit hire company was held accountable for the delay which will hopefully encourage credit hire companies to authorise repairs more promptly in future.

Causation

Defendant liable to pay for consequences of 2nd accident: Spencer v Wincanton Holdings Ltd – Court of Appeal (2009)

The claimant injured his right knee in an accident at work and subsequently suffered such extreme pain that he opted for an above knee amputation of his leg. His employers admitted liability for the accident and its consequences but prior to damages being assessed at trial the claimant fell suffering further injuries which left him unable to use prosthesis and confined to a wheelchair.

The fall occurred when the claimant unwisely decided to fill up his car at a petrol station without first putting on his prosthetic leg or using crutches which he had in his car.

The defendants argued that the second accident had been due to the claimant's own unreasonable behaviour and that damages should not reflect the increased level of disability caused by it.

At first instance the Judge held that the defendants were liable for the consequences of the second accident which flowed from the first accident, subject to a one third deduction in respect of the claimant's contributory negligence.

The defendants appealed citing the House of Lords decision in *McKew v Holland and Hannen and Cubitts (Scotland) Ltd* where the claimant's unreasonable conduct which lead to a second accident was found to be a break in the chain of causation (a novus actus interveniens) and the defendant's liability was limited to the consequences of the first accident.

The Court of Appeal however rejected the appeal finding that the claimant's carelessness was insufficient to cross the high threshold of "unreasonable conduct" set out in *McKew.* The Judge at first instance's approach to the law was not wrong nor his approach to the question of fairness.

Comment: A disappointing judgment for defendants which arguably raises the bar for "unreasonable conduct" in terms of a finding of a break in the chain of causation.

Liability

Harassment, 1997 Act: Veakins v Kier Islington Ltd - Court of Appeal (2009)

The claimant sought damages from her employers after her supervisor allegedly harassed her, making her life hell (sic). Following the alleged harassment she went on sick leave with depression and did not return to work.

At first instance the Recorder found that the supervisor's conduct was unpleasant and upsetting but it did not constitute harassment within the meaning of the *Protection from Harassment Act 1997* largely because it was not conduct that could realistically lead to a criminal prosecution.

The claimant appealed on the basis that the Recorder failed to properly evaluate the conduct complained of beyond the conclusion that it would not justify a criminal prosecution and that he had taken a superficial approach to the criminal liability question.

The Court of Appeal held that the Recorder should have applied the test of whether the conduct complained of was "oppressive and unacceptable". In the Appeal Court's view the conduct did satisfy this test and indeed would have been sufficient to establish criminal liability in the event of a prosecution. The court upheld the appeal on liability and transferred the case to the County Court for damages to be assessed.

Comment: the brief details of the harassment suffered by the claimant which were published in the judgment (swearing at the claimant once, ripping up a complaint letter she wrote in front of her and seeking out gossip about her private life) do not on the face of it meet the test for harassment set out in other recent cases. It may well be that claimant solicitors will try to use this case as a precedent to lower the harassment threshold. It should be borne in mind however that this was a highly unusual case where the defendant's version of events and medical evidence were unchallenged and where the precise details of harassment are unreported.

No Duty of Care owed by Council to visitors at Horse Fair: Glaister and others v Appleby-in-Westmorland Town Council – Court of Appeal (2009)

The first claimant was severely injured when he was kicked in the head by an untethered horse at a horse fair on the defendant's land (the second and third claimants were members of his family who suffered psychological injury). The owner of the horse was not identified and the claimants sued the council for economic loss on the basis that failure to arrange public liability insurance for the event had left them with no means of obtaining compensation.

At first instance the Recorder accepted this argument and held that the council had sufficient control over the organisers of the event so as to have a duty to visitors to arrange insurance cover for them.

The defendants however successfully appealed to the Court of Appeal who held that in the absence of special relationship between the council and the visitors to the fair (especially the lack of any transaction likely to have economic consequences for them) no duty to provide insurance cover existed. To hold the council liable for the consequences of the accident would be equivalent to holding them responsible for the conduct of a third party for whom they had no legal responsibility.

Comment: The Court of Appeal recognised that many city and county councils assist local tourism by supporting events such as public fairs. Imposing a duty on them to organise and fund insurance for these events could not be supported from a public policy point of view.

Tour operator not bound to repeat safety instructions, absence of risk assessment not material: Susan Parker v TUI UK Ltd – Court of Appeal (2009)

The claimant suffered serious injuries after she crashed her toboggan into frozen straw bales whilst on a winter holiday. The tobogganing event had been organised by an Austrian company but participation was arranged through the defendant's tour operators who also sent four of their staff along to supervise. The four staff members were spaced out amongst the participants.

All of the participants had been warned that at the end of the toboggan run (clearly marked with a flashing red light) they must get off their toboggans and walk down the road to the toboggan shed and bus. The claimant however remounted her toboggan once out of sight of the tour operator's staff and slid down the road where she lost control and crashed. The judge at first instance dismissed the claim finding no negligence on the part of the defendant.

The claimant unsuccessfully appealed, amongst other things citing the failure of the defendant to carry out a risk assessment of the road and to station a member of staff beyond the end of the run. The Court of Appeal held that had the risk assessment been carried out it would have made no material difference to the precautions taken: participants were already told not to toboggan on the road.

The purpose of stationing a member of staff beyond the end of the run would have been to repeat instructions already clearly given not to toboggan on the road and the court was not prepared to find that there was any such duty on the defendant's part.

"I cannot bring myself to hold that it is the duty of a tour operator dealing with rational adults on a winter holiday to repeat simple warnings already given with clarity or to point out obvious dangers... So to hold would only encourage potential claimants to believe that whenever an accident occurs someone must be to blame. That is not what the law of negligence is about."

Lord Justice Longmore

Comment: Once again the Court of Appeal has refused to find in favour of a seriously injured adult claimant who has disregarded clear safety instructions and obvious hazards.

Plant hire agreement does not oblige hirer to contribute to Employer's Liability Claim: Thomas Jose v Macsalvors Plant Hire Ltd and Brush Transformers Ltd – Court of Appeal (2009)

Macsalvors Plant Hire Ltd supplied a crane to Bush Transformers Ltd with an operator who was their employee. On the first day of the hire the operator fell from the crane suffering serious injuries. The operator sued his employers for negligence and breach of statutory duty.

Macsalvors settled their employee's claim but then sought a contribution from the hirers on the basis that clauses 8 and 13 of the hire contract required the hirer to be responsible for and to indemnify the owners of the plant in respect of any injury claim arising from the use of the crane.

The judge at first instance held that the intention of the hire contract (which followed the standard terms of the Construction Plant-hire Association) was intended to cover incidents where the operator negligently caused damage or personal injury to a third party. There was also no express exemption for the owner's own negligence.

Macsalvors appealed but the Court of Appeal supported the Judge at first instance's decision. Clause 8 of the contract was clearly intended to relate to claims from third parties arising from the operator's negligence. The terms of Clause 13 were wide but did not expressly cover the plant owner's own negligence.

Comment: The judgment follows the 1982 Court of Appeal decision on the interpretation of clause 13 of E Scott (Plant Hire) Ltd v British Waterways Board.

Completed 2 January 2010 – Case transcripts and source material for the above items can be obtained from John Tutton (contact no: 01245 272756, e-mail: john.tutton@uk.qbe.com).

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