



A regular review of legal developments in the world of property and casualty insurance claims **June 2008**

STATUTORY DUTY - CONTROL AND NON EMPLOYERS

Mason v Satelcom Ltd & East Potential Ltd - 2008 - CA

This case provides guidance on what is meant by 'control' for the purposes of the Construction (Health, Safety and Welfare) Regulations (1996), and, Provision and Use of Work Equipment Regulations (1998). In particular, the Court of Appeal considered the duties of an occupier of premises rather than the employer (details of the first instance decision can be found in the November 2007 edition of the Claims Legal Bulletin).

In summary, the Claimant was a field service engineer, his employers had contracted with a local authority to maintain equipment, including machinery contained in a cabinet at premises owned and managed by East. The Claimant used a ladder he obtained from a room below the cabinet in order to access it and, whilst doing so, fell suffering injury. The Court held that the ladder, whilst not provided by the employer, was work equipment and was unsuitable for use. The employers were therefore in breach of the regulations. The premises in question were in the control of East and they retained keys to the room. At first instance the court found that they must have been aware of the presence of the ladder and that its position meant that it might be used as a means of access to the cabinet. Once someone used it at work, it was work equipment over which they had control and would be under a duty to ensure that the ladder was suitable.

The Court of Appeal has taken a fresh look at the concept of control. Reg 3(3)(b)(i) of the 1998 regulations imposes duties on a person who has control to any extent of work equipment... to the extent of that control. The basic facts were not challenged and it was accepted that East had control over the ladder to the extent that they could have removed it or placed a notice of some kind preventing its use. The parties did not show that East had any control over the way in which the ladder was used. It is necessary to look at the purpose for which control was to be exercised. It was not,

in this case, to inspect it, train others in the use of it or for imparting information and instructions in relation to it. Neither was it for the purpose of ensuring that it was so constructed or adapted so as to be suitable for the purpose for which it was to be used. The cause of this accident, according to May LJ, was the way in which the claimant foolishly chose to use this perfectly sound ladder, over which East had no control.

Comment

It is noteworthy that East did not own the ladder, had they done so the analysis of the extent of their control may have been different. Each case will depend on its own facts, however, it is refreshing that the courts are taking a real world view in the application of the workplace regulations to non-employers and have now provided some guidance on how the regulations are to be interpreted. For a further consideration of the meaning of control with the PUWER regulations readers are referred to the subsequent decision of the Court of Appeal in Jennings v Forestry Commission [2008] EWCA Civ 581.

OCCUPIERS LIABILITY - STANDARD OF CARE

Tedstone v Bourne Leisure Ltd (t/a Thoresby Hall Hotel & Spa) - 2008 - CA

A hotel was not liable under the Occupiers Liability Act 1957 for injuries caused when the claimant slipped on a pool of water in the vicinity of a jacuzzi. Evidence was given that the area was clear of water 5 minutes before the accident but also that some areas held water and required repair. At first instance it was held that the pool of water had been caused by the jacuzzi bubbling furiously and the presence of water was a breach of the act. The Court of Appeal agreed with the defendant that the standard of care expected by the judge was too high. No reasonable system would have dealt with the unusual occurrence in the time available.



NEGLIGENCE - SUPERVISION - DUTY OF CARE

Harris (a minor & a patient suing by his mother & litigation friend Janet Harris v (1) Perry (2) Perry & (3) Harris - 2008 - QBD

The Perrys had organised a birthday party for their children. They hired a bouncy castle and other play equipment and erected it on a playing field that was open to the public. The claimant and a friend, whilst not invited to the party, asked if they could go on the bouncy castle. It was disputed as to whether permission was granted. In any event, they got onto the bouncy castle, where the claimant's friend performed a somersault. The claimant followed suit but before he had got up again another, older, boy also somersaulted and as he did so his heel struck the claimant on the forehead causing serious injury. The claimant alleged that the Perrys had been in breach of their duty of care towards him in that they had failed to maintain continuous supervision, had failed to forbid the children from doing somersaults and failed to ensure that only children of a similar size and weight played on the bouncy castle at the same time. The court held that the bouncy castle required constant supervision, the defendants had not provided this. The defendants argued that the accident happened so quickly that supervision would not have prevented the accident. The court did not accept this argument accepting the evidence of the older boy that if he had been told to be careful he would have refrained from somersaulting. A complaint was also made that no one was in a position to stop the activity as soon as the claimant's friend first performed a somersault. It was also found that the defendants were negligent in allowing children of different ages to all play at the same time. The failure in supervision was causative of the accident. Separate allegations against the claimant's father for a failure to supervise his son were dismissed.

Comment

This case attracted considerable publicity at the time of trial and, following the verdict, as another example of a growing compensation culture. Whilst the claimant has been seriously injured and would clearly attract the sympathy of the court it perhaps is surprising to see a change in the approach from the courts where they had been taking a somewhat more pragmatic approach in recent times towards activities which in themselves carried some level of risk. Subject to any appeal there are some fairly wide ranging implications in this case exposing ever greater numbers of potential defendants to claims and in such circumstances where they are either underinsured or not insured at all.

LIMITATION - ABUSE CLAIMS - SCOTLAND

Bowden v Poor Sisters of Nazareth & ors - 2008 - HL

The pursuers issued proceedings for damages arising from physical abuse whilst resident at a children's home in the 60's and 70's. The House of Lords required to consider the application of the Prescription and Limitation (Scotland) Act 1973. It was held that the claims were statute barred, the courts refused to also to exercise its discretion to allow the cases to proceed. The lapse of time in bringing proceedings and the loss of evidence was sufficient for the defenders to show prejudice.

Comment

This case follows the decision of A v Iorworth Hoare earlier this year. It demonstrates that it may be difficult for a claimant to discharge its burden of proof and persuade a court to exercise its discretion where there has been extensive delay and this can be a significant element of any prejudice suffered by defendants in being able to investigate allegations dating back decades.

FATAL ACCIDENTS - BENEFITS RECEIVED AS A RESULT OF DEATH

Arnup v M W White Ltd - 2008 - CA

The claimant, whose husband had been killed in the course of employment, appealed against an earlier decision (Claims Legal Bulletin – June/July 2007) that a payment she had received under a death in service benefit scheme could be deducted from her claim for damages. The court at first instance had also held that a payment from an employee benefit trust could not be off-set, the employer cross appealed this finding. The judge had sought to apply the common law exceptions on deductibility having held that s.4 of the Fatal Accidents Act 1976 did not require either payment to be disregarded as they had not resulted from the husband's death rather the independent decision of others. The Court of Appeal held that the judge had been wrong in his conclusions. Had he been correct on the question of causation (so that s.4 did not apply) he could not hold that either payment fell to be deducted. The common law position was that benefits, which did not result from death, were equally to be disregarded because of that very lack of relationship with the death. The court also considered that in the alternative s.4 was wide enough (or otherwise as a result of his death) to cover benefits in kind whether or not yet accrued.

Comment

The appeal court added by way of obiter that in any event causation was not of any great importance in these cases. It does not matter how a benefit accrues, it can not be deducted in any event.



HOUSE OF LORDS TO CONSIDER INDEXATION

RH v. United Bristol Healthcare NHS Trust

Regular readers will be aware of the arguments that have been aired in the courts in recent times over the question of whether it is appropriate to substitute the RPI with an alternative earnings related index. The Court of Appeal judgement in January upheld the first instance decisions that such substitution was appropriate in the circumstances. Permission has now been granted by the House of Lords to hear the appeal on two grounds, whether the use of an alternative index can only be ordered in exceptional circumstances and whether in ordering any modification the court could and should take into account the principle of distributive justice.

DAMAGES - LOCAL AUTHORITY PROVISION OF FUTURE CARE

Peters v East Midlands Strategic Health Authority & Ors - 2008 - QBD

The local authority must disregard any damages award in assessing the claimant's capital for the purpose of determining any contribution towards the cost of care. However, it is also reasonable for the claimant not to rely on the statutory obligation of the local authority to provide care. The court had regard to the evidence of the local authority that they could not guarantee continued provision should a cheaper alternative be made available. The court accepted that whilst the claimant would have access to state funded care for the rest of her life there was no guarantee that the quality would be maintained. Further it was accepted that the claimant would not seek state funding if awarded damages thereby avoiding double recovery.

Comment

Whilst the defendants have been given permission to appeal this decision it does seem that there is an expectation of a lack of any willingness on the part of the courts to order that the cost of future care should be borne by the general taxpayer rather than the tortfeasor.

PRE-ACTION NEGOTIATIONS - EVIDENCE - WITHOUT PREJUDICE

Galliford Try Construction Ltd v. Mott Macdonald Ltd - 2008 - TCC

This case reflects the court's approach of encouraging parties to attempt to resolve disputes without the need for litigation. Both sides had met, prior to any claim having been made, to seek to resolve problems with the design of a construction project. The claimant had sought to refer to an alleged admission at that meeting in a witness statement in support of a later claim for breach of duty. The defendant sought to have reference to that admission removed. The lack of any claim was irrelevant and it was held that the material was 'without prejudice' and inadmissible as it related to genuine negotiations between the parties to resolve disputes on site.

EU MEDIATION DIRECTIVE APPROVED BY EUROPEAN PARLIAMENT

EU Member States must by April 2011 give effect to new rules on certain aspects of mediation in civil and commercial matters.

Key elements of the directive include:

- The development and use of voluntary codes of conduct and quality control mechanisms;
- Judges to have the right to invite parties to attempt mediation;
- Agreements reached through mediation may be given similar status to court judgments to aid enforcement;
- To preserve confidentiality, submissions and disclosure in mediation may not be used in any subsequent legal proceedings and mediators may not be compelled to give evidence in any subsequent legal proceedings;
- Parties' claims will not be statute-barred as a result of time spent on mediation.

Comment

This directive does not appear to change current practice significantly but will add further impetus to the current emphasis on parties resolving disputes without resort to litigation.

INSURANCE - ECONOMIC LOSS AND PUBLIC LIABILITY

Tesco Stores Ltd v. Constable & Ors - 2008 - CA

Tesco had a policy of insurance with the defendant which provided an indemnity for "all sums for which the insured shall be liable at law for damages in respect of ... loss or damage to property ..." The court had to consider whether this policy provided any cover for claims for pure economic loss. The claimant had entered into a covenant to pay compensation to a train operating company for all losses arising from works to build a supermarket over a railway cutting. A collapse of the building occurred but did not cause any damage to the property of the rail company. The Court of Appeal held that as a public liability policy it did not, as a general rule, extend to cover claims in contract for pure economic loss when it arises solely under a contract of indemnity.

Comment

This case reinforces the need to carefully consider the level of cover required in any given instance. Cover for contractual liability that is not in itself co-extensive with a liability in tort will not be covered under a standard public liability wording. Increased levels of cover can of course be considered with a suitable declaration of the contract, agreement of underwriters and payment of an appropriate premium.



List of abbreviations used:

CC	County Court
HC	High Court
QBD	Queens Bench Division of the High Court
Ch D	Chancery Division of the High Court
CA	Court of Appeal
HL	House of Lords
SCCO	Supreme Court Costs Office
ECJ	European Court of Justice
TCC	Technology and Construction Court

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