



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

STRESS AT WORK

Dickens v O2 PLC - 2008 (CA)

The claimant had been employed for a number of years and was then promoted to a position for which she did not have the necessary qualifications although appropriate training and support had been promised. This help was never provided and the claimant became exhausted and “at the end of her tether”. She asked to move to a less stressful job but was told that there were no vacancies at that time. She continued to struggle and requested 6 months off work as she lacked physical and mental energy and didn’t know how much longer she could carry on without taking sick leave. She did not use the in-house counselling service as advised by her manager because she was already undergoing private counselling. She again asked for a 6 month break and her manager agreed to refer her request to the occupational health department but that was not done. She was later signed off as unfit for work due to anxiety and depression and never returned. The court at first instance found that the claimant had lost the chance of not descending so deeply into illness due to the defendant’s failure to refer her to the occupational health department and because they did not send her home after she had made her condition known to them.

The Court of Appeal agreed that the claimant’s stressful condition had been known to the defendant and, as such, her injury was reasonably foreseeable and had been caused by their failure to take action once they were on warning. The presence of an in-house counselling service did not relieve the defendant of liability in these circumstances despite the indication in *Hatton v Sutherland* (2002) that a defendant would rarely be liable where they provided such a service. Although not a point argued in the appeal the court made obiter comments that the defendant’s negligence had made a material contribution to the injury and no apportionment should have been made by the trial judge for any part of the claimant’s injury that might have been contributed to by any stressful features of her private life.

Comment

*The fact that the claimant was able to recover damages in this case is not particularly surprising but it is the apportionment point that is bad news for defendants as it suggests that where the employer makes a material contribution to the injury that the claimant will recover 100% of damages even if there was a significant contribution to a claimant’s stress related illness caused by non-work related matters. According to the Court of Appeal who referred to the case of *Bailey v Ministry of Defence* a stress related injury is indivisible and the defendant is liable for the full loss if the tort made more than a minimal contribution to the injury.*

MOTOR ACCIDENT ABROAD - JURISDICTION

Lauren B (1) Tyler B (2) Noah B (3) v Mark B - 2008 (QBD)

The defendant’s family had arranged car hire through a British company. When the defendant collected the vehicle he was required to sign a rental agreement with the Spanish car provider. The terms stated that the agreement was between the defendant and the Spanish car provider and that the agreement was subject to Spanish law. On leaving the airport the defendant was involved in a head-on collision with a car. The incident was caused by the defendant driving on the wrong side of the road. The defendant’s family, the claimants, were all seriously injured. Judgment was entered for the claimants with damages to be assessed.

The court had to consider a preliminary issue relating to the applicable law in the claim for personal injuries. The defendant submitted that the applicable law should be the law of Spain pursuant to the Private International Law (Miscellaneous Provisions) Act 1995 section 11(1). The claimants sought to apply English law. The critical difference to the parties was that Spanish law does not permit a minor to claim for future loss of earnings. The general rule is that the law of the jurisdiction where the tort occurred should be applied. The judge acknowledged that the burden to displace the general rule under the 1995 Act falls on the claimants. The claimants would have to demonstrate that it would be ‘...substantially more appropriate for the applicable law for determining the issues arising in the case to be the law of another country.’



Whilst the claim would be paid by a Spanish insurer the factors in favour of English law were that all the parties were English nationals resident in England, and had only been in Spain for a week's holiday. The tortious act was that of D, an English national, and the consequences of it, as far as the instant claim was concerned, were visited upon English nationals. As far as the second claimant was concerned and, to a lesser extent, the first claimant, the consequences of the tort would be felt for a significantly longer period in England than in Spain; for the second claimant, for the rest of his life. In relation to the main issue, that of the second claimant's future loss of earnings, it was undoubtedly a loss that would be suffered in England. It was relevant that, although the hire and insurance contracts were Spanish, the arrangements for the hire were made in England through an English broker and paid for with English currency. Those factors meant that it was inevitable that the Spanish car hire company and its insurers must have been aware of the possibility, if not the likelihood, that an English family in those circumstances would use a Spanish car for their holiday in Spain. Weighing up all those factors in the balance, there was no doubt that the general rule should be displaced in favour of English law

HIGHWAYS

Jayne Spencer v Wirral Metropolitan Borough Council - 2008 (CC)

The claimant injured her foot after tripping over a protruding tree root in a village street. She brought a claim against the council for breaching its duty to maintain the highway under the Highways Act 1980 section 41. At first instance the judge held that although the tree root was a hazard it was not an actual defect in the highway and the council had not breached its duty. The claimant appealed.

The area of land covered by the tree roots constituted part of the highway and, as a result, the local authority was under a duty to maintain that highway under s.41. The fact that the tree root was a hazard was not sufficient to constitute the necessary element of danger. It was not apparent whether the judge had made a finding about the condition of the carriageway. If there was a danger presented by the tree roots it was not a danger that resulted from any want of maintenance or repair, it was a danger that arose from the layout of the highway. The judge was correct to hold that the local authority's duty to maintain, pursuant to s.41, had not been breached.

WITHDRAWAL OF ADMISSION - SCOTLAND

Jeroen Van Klaveren v Servisair UK Ltd - 2008 (Outer House, Court of Session)

This case has set out the position relating to pre-litigation admissions of liability in Scotland. In this case, Lady Clark upheld the pursuer's argument that insurers should not be allowed to withdraw a seemingly unconditional admission of liability once in proceedings. The pursuer sought damages of £200,000 following an accident at work in Aberdeen on 12 August 2004. On 23 March 2006, insurers admitted liability

and specifically stated that costs would be paid in accordance with the Civil Procedure Rules. The insurers argued that the admission had been made prior to a detailed investigation being carried out and with a view to avoid an application for pre-action disclosure under the CPR. The file handler mistakenly assumed that the case would be raised in England and at that time a withdrawal of such an admission was permitted by the CPR. A sworn statement by the file handler to that effect was put before the court. Lady Clark, however, held that the correspondence itself did not allow insurers to withdraw the admission. An objective test was applied, considering only the written word and not what was in the mind of each party and as a result the insurers were not allowed to withdraw their admission.

Comment

Clearly a claim handler should be aware of the applicable jurisdiction when making any admission of liability, or indeed when making any reliance on the Civil Procedure Rules which only apply in England and Wales.

CONTRIBUTORY NEGLIGENCE

Ryan St George (a patient) v Home Office - 2008 (CA)

The claimant was a prisoner with a 13 year history of drug and alcohol abuse. Before the accident he informed prison staff that he had previously suffered withdrawal seizures but, despite that information, he was allocated a top bunk bed. He subsequently suffered a withdrawal seizure and fell 7 feet to the floor suffering a head wound which caused a "status epilepticus" leading to brain damage. At first instance the judge held that the claimant's lifestyle choices gave rise to a risk of harm from becoming addicted to drink and drugs of which he was well aware and that this had contributed to his accident. He reduced the claimant's damages by 15% for his contributory negligence.

The Court of Appeal disagreed. The Law Reform (Contributory Negligence) Act 1945 states that where the claimant is partly at fault "the damages recoverable in respect thereof shall be reduced to such an extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage". However, the addiction was not a "potent" cause of the injury because it was too remote in time place and circumstances and was not sufficiently connected with the negligence of the prison staff. Whilst it may have been a factor in the background of the claimant's history leading up to the accident it was not closely connected with the defendant's negligence in allocating a top bunk bed to someone who had informed them that he was likely to suffer a fit.

Comment

The analogy used in court to explain this decision was that a smoker in hospital for an operation on his lung cancer who was injured by the negligence of the surgeon would not be held to have contributed to his injury because of his past history of smoking.



HEALTH AND SAFETY (OFFENCES) ACT 2008

This act which received the royal assent on 16/10/08 amends the Health and Safety at Work Act 1974 to increase the maximum penalties available to the courts in respect of certain health and safety offences. In the Magistrates Courts the maximum fine is increased to £20,000 for most offences and a prison sentence of up to 12 months is now an option or both a fine and imprisonment. In the Crown Courts imprisonment for up to two years is now an option, or a fine unlimited in amount, or both. Many offences may now be tried in either court rather than only in the Magistrates Court.

HMRC - WITHDRAWAL OF DISCRETIONARY ARRANGEMENTS IN RELATION TO VAT ON CARE CHARGES

Current arrangements permit companies supplying temporary workers, such as carers, to exclude the wages element from the supplies they make thus avoiding the charging of VAT. HM Revenue and Customs has now withdrawn that concession so that with effect from **1 April 2009** VAT will be chargeable thus potentially increasing care costs by up to 17.5%. Some organisations are exploring alternative business models which may enable them to levy the VAT only on their margin. This would involve, for example, the agency introducing temporary staff to the claimant; the claimant engaging the carer(s) direct (through a contract for services) and paying them through a third party payroll provider. Whatever happens total care costs will be higher. Whether or not the moves to mitigate the impact succeed it can be anticipated that as claimant solicitors become aware of these changes they will wish to defer settlement until the full implications can be ascertained or they will look to defendants to pay an additional 17.5% on care costs payable from the 1 April next year. Correspondingly, defendants may wish to be a little more generous than they had at first intended to ensure that as many claims as possible are settled without taking the additional levy into account.

LAW COMMISSION CONSULTATION ON PUBLIC BODIES AND THE CITIZEN

This consultation will look at the law relating to public bodies and their liabilities in areas such as human rights, the different treatment of similar bodies such as the ambulance service and the fire service, the exercise of statutory powers, misfeasance in public office and the breach of statutory duties. A new regime is proposed on the principles of "modified corrective justice" which will require breaches to be "sufficiently serious" to attract liability. A special scheme is suggested for actions that are "truly public" such as those involved in special statutory powers or duties and which confer benefit on the individuals who have suffered harm. For liability to arise the standard of conduct would have to fall well below the standard expected in the circumstances. Changes are also being considered in relation to joint and several liability and pure economic loss. The period for responses to the consultation closed on 7th November.

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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