



A regular review of legal developments in the world of property and casualty insurance claims July 2010

MOTOR - NEED FOR HIRE NOT SELF PROVING

Beechwood Birmingham Ltd v Hoyer Group - 2010 (CA)

The claimant is a large car dealership, damages were claimed for the loss of one of its vehicles following a road traffic accident. The claimant had entered into a credit hire arrangement with Accident Exchange and sought £33,345.40 for the hire of a replacement vehicle for a period of 120 days whilst the repair was completed. At first instance the court found that there was no need for the hire as the vehicle could have been replaced from the claimant's fleet of vehicles and, therefore, it had not mitigated its losses. The judge, however, awarded damages for the loss of use based on the equivalent spot hire rate following *Lagdon v O'Conner (2002)*. The Court of Appeal distinguished between private motorists and commercial concerns in upholding that there had been no need to enter into a hire arrangement. In overturning the award of damages it was held that as the claimant could have replaced the vehicle from its own stock the correct measure of damages would reflect the actual cost to the business and would be based upon interest on the capital value of the vehicle at 5% for the period of the loss plus a modest sum for depreciation. Damages were agreed at £3000.

Comment

Whilst this case is of limited application, applying as it does to corporate claimants, it is nonetheless a common sense decision and demonstrates that claimants have to show a real need for a replacement vehicle. Enquiries should be conducted in all cases into the claimant's resources, whilst the need for hire is not self proving it will be easier for an individual to demonstrate this than a corporate claimant with a fleet of vehicles.

COSTS - PART 36 OFFERS

Gibbon v Manchester City Council: LG Blower Specialist Bricklayer Ltd v Reeves & Reeves - 2010 (CA)

The Court of Appeal considered the operation of Part 36 offers in this conjoined appeal. It was held that Part 36 was a self contained code which prescribes the manner in which an offer is made and the consequences flowing from accepting, or failing to accept, it. In *Gibbon* it was held that Part 36 did not allow for an offer to lapse or become incapable of acceptance upon its rejection, it is open to acceptance until withdrawn. Withdrawal of an offer requires express reference to the date and terms of the offer being withdrawn. In *LG Blower* the offer was not as advantageous as the amount awarded, in reaching this conclusion the Court of Appeal was

required to consider its decision in *Carver v BAA plc 2008*.

Carver requires the court to consider all aspects of the case in considering if the offer was more advantageous than the judgement, including emotional stress and financial factors. This remains a matter for the judge but it is important to see things from the litigant's perspective. A party should be able to evaluate a Part 36 offer by its own rational assessment of the case without having to try too hard to second guess what the court's view might be. In most cases financial success will be the overriding consideration. The Court also noted, obiter, that it was possible for a party to make several offers in different terms all of which could at any one time be capable of acceptance.

Comment

*The Court of Appeal decision reinforces the need to keep all Part 36 offers under consideration to ensure they reflect the party's current and on-going view of the litigation. If you do not want an offer to be accepted then you need to be very clear that it is withdrawn. The decision also removes some uncertainty by stating that financial success is the key element in determining whether an offer has been beaten or not. This reflects the criticism levelled at *Carver* by Jackson LJ in his review of civil litigation costs*

LOCAL AUTHORITY - TRIPPING HAZARD - OCCUPIERS LIABILITY

Esdale v Dover District Council - 2010 (CA)

The claimant was injured when she tripped on a defect in the pathway forming the entrance to her home in a block of flats. The change in level was between $\frac{3}{4}$ " - 1". The defendant had a policy of repairing defects measuring more than $\frac{3}{4}$ ". The path had been inspected but the defect had not been regarded as requiring attention, this was based on a visual inspection only. There was no record of any complaint or of any previous accident. The defect was repaired after the accident. The Court of Appeal said the test under the Occupiers Liability Act 1957 (to take such steps as are reasonable to ensure visitors are reasonably safe) did not depend on the standards the council sets itself as a matter of policy. The test is an objective one based on all the circumstances and in this case it was correct to find that the path was reasonably safe and regular inspections were sufficient to satisfy the common duty of care.



Comment

Whilst directly relating to the duty of care as an occupier the Court of Appeal did refer to highways case law reaching its decision. As such this case serves as a useful reminder that compliance with policy is only partly relevant to the question of whether a defect is a real source of danger.

DAMAGE TO PROPERTY - DUTY OF CARE

Lambert & ors v Barratt Homes Ltd & Rochdale MBC - 2010 (CA)

The local authority sold part of some land it owned to a developer. The developer caused a drainage ditch and culvert to become blocked on its land. This caused water to accumulate on the remainder of the local authority's land and damage other adjacent properties. Claims from the adjacent property were brought against the developer and the local authority. The Court of Appeal overruled an earlier finding that the local authority had been in breach of its duty of care in failing to abate the nuisance, in failing to co-operate in solving the problem and in failing to construct the necessary drainage. The local authority was not responsible for the cause of the flooding but it could reasonably be expected to permit access to the land to remove the hazard. That the developer caused the problem and the adjacent land owners had a right to recover damages from the developer was a powerful factor in considering the scope of the local authority's duty of care. It was not fair, just or reasonable to expect the local authority to carry out and pay for the work.

LIABILITY - CAUSATIVE NEGLIGENCE

Vaile v London Borough of Havering - 2010 (QBD)

The claimant was an experienced teacher of children with difficulties. She was assaulted by a pupil sustaining injuries from which she was eventually ill-health retired. There had been a short history of incidents between this pupil and the claimant. The claimant alleged that she had not been provided with a safe place of work to protect her from the pupil's aggression, that she had not been informed the pupil was autistic, and that the school had failed to properly assess the risk to its teachers. The court found a number of failings by the school in making appropriate educational provision for the pupil and in not identifying appropriate teaching techniques that should have been applied. Following the earlier assaults the pupils conduct should have been assessed, it was not. There was no suggestion he should have been removed from the class. The assault was not out of the ordinary for the school and the claimant had been able to cope with the pupil's behaviour during this period. It was held that the failure to adopt the correct strategies had not caused the assault and the claim failed.

PRODUCT LIABILITY - EU LAW - LIMITATION

O'Byrne v Aventis Pasteur MSD Ltd & Aventis Pasteur SA (proposed defendant) - 2010 (SC)

The claimant brought a product liability claim against the English distributor of a vaccine product but later successfully applied to substitute the French manufacturer. The manufacturer appealed contending that the claim was statute barred because the product had been placed into circulation more than 10 years before proceedings were commenced (the claim had been brought against the distributor within 10 years of it receiving the consignment of vaccine). The ECJ had determined that national laws could not be allowed to permit a claim against the manufacturer after 10 years. Further

guidance was given that where the action was brought against a wholly owned subsidiary of the manufacturer substitution may be allowed if there was evidence that it was responsible for putting the product into circulation. In the present case there was no evidence that the distributor was controlled by the manufacturer and the claim failed.

EVIDENCE - DEAFNESS CLAIMS

Keefe v Isle of Man Steam Packet Co Ltd - 2010 (CA)

The claimant had worked for several years in the galley of ships. He had sustained hearing loss. The defendant, in breach of its duty, had not taken any measurements of the noise to which employees were exposed. The Court of Appeal held that the breach of duty meant that the defendant could not assert that the noise levels were not in fact excessive. There was sufficient evidence from the claimant that justified a finding that the noise levels had been in excess of 90 decibels over at least an 8 hour period. In such circumstances the claimant's evidence should be treated benevolently and the defendant's critically.

COSTS - RELIEF FROM SANCTION - ATE PREMIUM

Hayden v Strudwick - 2010 (SCCO)

The claimant failed to provide the defendant with sufficient information about an ATE policy which had been taken out in a claim for personal injuries. Simple reference to 'additional liabilities' was insufficient to infer whether or not an ATE policy had been put in place. The purpose of the relevant Practice Direction was to inform the parties to the litigation of the manner in which the proceedings were being funded and to provide information to assist the disposal of the case in an efficient way. The claimant was unable to recover the relevant ATE premium.

EVIDENCE - CREDIBILITY OF WITNESS

Bell v Havering LBC - 2010 (CA)

In the vicinity of where the claimant lived there were a number of brick edged 'planters' where trees had once been planted. At the time of the accident they had been filled with concrete. The claimant alleged that she had trod on the edge of the planter which at this point was raised 4". Her foot buckled and she fell sustaining a fracture to her left ankle. Liability had been admitted but later withdrawn when the medical records were obtained. The records revealed a number of inconsistencies in the claimant's account of the accident, recording that the claimant fell from steps. Earlier correspondence had also been inconsistent and muddled as to the exact circumstances. The defendant contended that the accident circumstances were a fabrication. The claimant's evidence was accepted at trial and she succeeded in her claim despite the inconsistencies. The Court of Appeal refused to interfere with the findings of the judge at first instance who had had the advantage of hearing the oral evidence of all the witnesses including cross examination of the claimant as to the circumstances of the accident.

Comment

It is not uncommon for different accident circumstances to be given in a letter of claim to those recorded in contemporaneous records and for these to form a challenge to the claimant's credibility. The Court of Appeal noted specifically that such inconsistencies can arise in records because patients tend to be in a state of confusion or distress and doctors and nurses may be

working under pressure and such records should be viewed with caution. If the differences are not that dissimilar then, everything else being equal, the claimant is likely to be believed. This case also demonstrates again the reluctance of the appeal court to interfere with findings of fact, they will only do so in extreme cases. It is also worthy of note that the claimant was found to be 1/3 contributory negligent, this too was upheld.

DAMAGES - FUTURE LOSS OF EARNINGS - OGDEN 6 *Hiom v Wm Morrison Supermarkets plc - 2010 (QBD)*

The claimant sustained, among other injuries, a serious compound fracture to his left leg which required treatment over a number of years and would continue to remain damaged despite some further expected improvement. Prior to the accident the claimant had drifted between casual work and receiving benefits. There was no mathematical basis for calculating a future loss of earnings but he was entitled to compensation for the fact he would be disadvantaged in obtaining work. The Court found that, following *Blamire v South Cumbria HA* (1993), that the appropriate award was £25K. This also reflected that the claimant had little motivation or initiative even before the accident but the accident made this worse.

Comment

This is a useful demonstration of the sums that may be awarded where a future loss of earnings is claimed but there is little evidence of a consistent history on which to undertake a mathematical calculation under the Ogden tables approach.

PUBLIC LIABILITY - APPORTIONMENT BETWEEN CONTRACTORS

Swain v Geoffrey Osbourne Ltd & P J Brown Ltd - 2010 (QBD)

The claimant, a visiting HGV driver, attended a building site. He experienced difficulty manoeuvring his vehicle into the entrance and so descended from the cab to walk in front of the lorry to check his position. In doing so he slipped on mud sustaining an injury to his ankle. During initial remediation work on site there had been a system in place to wash the wheels of vehicles before they left the site. After these works had been completed the second defendant, the sub contractor, took full responsibility for the subsequent ground works. Whilst there was still a system for checking and sweeping the road and footway this was ineffective, further, there was no system to wash the wheels as previously. It was found that the main contractor had substantially discharged its responsibilities by contracting with the second defendant to implement safety measures but the drop in safety measures reflected a lack of attention and supervision by the main contractor once the initial remedial period had ended. With that in mind the court found that the main contractor must bear some of the responsibility for not ensuring an adequate system was in place. The court was not required to apportion responsibility but did say that the sub contractor should bear a greater proportion of the blame. The claimant was found 25% contributory negligent for failing to take more care walking on a muddy surface.

List of abbreviations used:

CA	Court of Appeal
CC	County Court
Ch D	Chancery Division of the High Court
ECHR	European Court of Human Rights
ECJ	European Court of Justice
HL	House of Lords
MOJ	Ministry of Justice
QBD	Queen's Bench Division of the High Court
SC	Supreme Court
SCCO	Supreme Court Costs Office
TCC	Technology and Construction Court

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