CLYDE&CO

Casualty and healthcare news

March 2015

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Clyde & Co news

Welcome to the first edition of the Casualty and Healthcare newsletter for 2015. In this issue we have included a selection of the latest case law and market developments and have explored their likely impact.

We are fast approaching the two year anniversary of the Jackson Reforms which is still making for very interesting times. There has been much judicial jostling with many of the new concepts and things have only just started to settle down. Views are mixed but Claimant lawyers seem to be largely unhappy; we leave it to you to decide whether this is a good thing or not!

The Casualty and Healthcare department has continued to expand at pace. We thought it would be a good opportunity to introduce the new members of the team:

Nigel Adams

Nigel Adams joins the Casualty and Healthcare group as a partner in the London office, further expanding the group's catastrophic injury capability.

Nigel has over 20 years' experience handling complex injury claims and is highly experienced in complex, multi-track, personal injury litigation. He acts for insurer clients dealing with all aspects of road traffic accident, employers' liability and public liability claims, and also advises on coverage, fraud, and product liability issues.

Nigel joins from Weightmans where his practice focused on employers' liability and public liability claims.

Nigel said "I'm excited to be joining such a dynamic team that has an outstanding and growing national reputation. I believe this is an excellent opportunity to develop my practice with leading insurers as part of a strong international network."

Jason Bleasdale

Jason is a Partner in the Casualty and Healthcare group with particular focus upon latent disease and legacy solutions. He undertakes employers' liability, environmental, industrial disease, disciplinary and regulatory work for major multinational corporates, insureds and professionals.

Jason has undertaken large loss, disease and regulatory work for the best part of 25 years. Throughout his career Jason has covered the widest range of disease claims including Hand Arm Vibration Syndrome, Noise Induced Hearing Loss, all aspects of musculoskeletal injury, catastrophic injury, chemical exposure, bladder cancer, MRSI, chronic regional pain syndrome and also stress and harassment. Jason and his team have a strong reputation for coordinating and defeating lead action cases across a broad spectrum of disease and employers' liability claims.

Jason said: "I am delighted to join Clyde & Co's disease team at a point in time where there are challenging and significant opportunities throughout the Insurance market. I am in no doubt that Clyde & Co are well placed to continue to lead on those developments and I look forward to contributing via my own area of practice.

Antonia Ford

Antonia specialises in all types of insurance fraud claims including road traffic accident, employers' liability and public liability cases. She has particular expertise regarding staged, fabricated and exaggerated employers and public liability cases and this specific experience is invaluable in assisting with the development of management strategies for claims validation teams. She has a strong reputation for service delivery and is already well-known to the insurance sector, acting for a number of market leading insurance clients.

Antonia said: "I am very pleased to join Clyde & Co's well-respected Casualty & Healthcare team. Clyde & Co has a long heritage in insurance and a leading reputation in this area, my practice will sit very well alongside their existing capability."

Judith Martin

Judith specialises in occupational disease litigation and has over 16 years' of experience in the defendant disease sector, having managed a range of cases including asbestos related cases, stress at work, repetitive strain injury cases, carbon monoxide poisoning and COSHH cases. She has also dealt with multi-party HAVS and deafness cases and other more unusual cases such as nasal cancer and chronic laryngitis.

Judith has extensive experience in abuse cases including physical and emotional historic abuse as well as claims involving the elderly. In addition she has considerable experience and expertise in retail robbery and Post Traumatic Stress Disorder claims and has successfully defended a number of such claims brought in the retail and gaming sector and led the Court of Appeal case of *Nicholls v Ladbrokes* (2013) ECWA Civ 1963.

Judith commented "I am delighted to be joining Clyde & Co, where I hope to make a significant contribution to their established Disease team. It is an exciting time in this area of law. With the range and number of disease claims on the rise, this area of litigation is a major focus for insurers."

Rob Wilson

Rob, who joins from Capsticks, is a highly respected partner who specialises in clinical negligence defence litigation. He works for both medical malpractice insurers and NHS bodies, and is a Nominated Partner, with specific delegated authority for the NHS Litigation Authority. He is ranked in Band 1 of Chambers "Leaders in the Clinical Negligence field" where he is described as 'second to none for clinical negligence work'.

Rob also has extensive inquest experience. He advised the London Ambulance Service in the Inquests into the London Bombings of 7 July 2005, and has been involved in the Hillsborough inquests. He has also undertaken advocacy in a number of high-profile inquests, including prison inquests.

Rob Wilson said: "This is an exciting time to join the healthcare team at Clyde & Co. It is an ambitious, expanding group and I am looking forward to playing a part in their continued success."

UK Citizenship comes

Two recent cases highlight the issue of mental capacity within litigation

Passing UK Citizenship test not an indication of mental capacity

Ali v Caton [2014] EWCA Civ 1313

Background

The Claimant claimed damages following a road traffic accident in which he was seriously injured.

The medical evidence was that the the Claimant has a significant cognitive deficit, yet he still managed to pass the UK Citizenship test. The Defendant submitted that this showed the Claimant had therefore exaggerated his injuries or was a malingerer.

The Court found that despite the medical evidence the Claimant had passed the UK Citizenship test without help, by learning the answer to the questions. It was found that the Claimant still lacked capacity for the purposes of the Mental Capacity Act 2005. As a consequence of this, the Claimant was found to need ongoing care and support for the rest of his life and had no residual earning capacity.

The Appeal

The Defendant appealed on the following grounds

1. The Judge had failed to consider the implications of the Claimant passing the Test and had placed weight on medical evidence that was unreliable as a result.
2. The Judge had failed to properly apply the provisions of the Mental Capacity Act 2005, particularly sections 1 – 3. It was submitted that the Claimant had capacity to manage his own affairs.
3. The Claimant was thought capable of some profitable employment and therefore had a residual earning capacity.

Findings

The Court of Appeal dismissed the Appeal and found the following:

1. The Claimant had passed the Test unaided. The medical evidence did not suggest it was impossible for the Claimant to pass the test, just unlikely. Moreover the test had to be considered in the wider context of all the evidence as a whole, which indicated the Claimant did suffer from a cognitive defect.
2. The question of whether a person has capacity is fact specific and depended on the answer to the questions "capacity to do what?" The Court was concerned with the Claimant's capacity to manage his property and financial affairs in this instance.

   The Judge was entitled to consider that the Claimant would struggle to handle large sums of money and to consider the evidence of experts from several disciplines, rather than solely relying on evidence from neuropsychologists.
3. There was no evidence to justify a "speculative calculation" of potential future earnings which had no evidential basis.

Key points for defendants

- The question of capacity was confirmed as being fact specific and is to be judged in relation to the specific decision or activity in question and not globally
- In cases where mental incapacity is considered, evidence that is not consistent with the general view of the Claimant's cognitive ability will be considered in the wider context of the case
- The burden on proof is on the Defendant to show that the Claimant has residual earning capacity. Defendants will need to evidence actual employment opportunities to have any prospects of success in argung for residual earning capacity

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Defendant caught in compromising position

Setting aside Compromise Agreements where the Claimant is a protected party

Dunhill v Burgin (2014) UKSC18

Background

The Claimant suffered a severe closed-head injury and soft tissue injuries to her leg when she stepped out from between parked cars on a dual carriageway and was struck by a motorcycle driven by the Defendant.

The Claimant obtained a report from an expert in Accident & Emergency medicine. There was no psychiatric evidence, despite reference in the documentation to various psychiatric issues.

The case was listed for trial on the issue of liability. When one of the Claimant's witnesses did not arrive at Court, the claim was compromised for GBP 12,500, plus costs. This settlement was recorded in a Consent Order and sealed by the Court.

The settlement was a gross undervaluation of the Claimant's claim which the Defendant and Claimant later estimated as being worth (on a full liability basis) around GBP 800,000 or over GBP 2 million respectively. There was no suggestion that at the time of original settlement the Defendant either knew or ought to have known of the Claimant's lack of capacity however.

Nearly six years after the Consent Order was made, the Claimant commenced professional negligence proceedings against her former solicitors.

That action was stayed pending the hearing of an application made in the original proceedings seeking a declaration that the Claimant did not have capacity at the time of settlement, so that the Consent Order should be set aside.

The Supreme Court was required to answer two questions, namely:

1. What is the test for deciding whether a person lacks the mental capacity to conduct legal proceedings on his/her own behalf (so that a litigation friend is required)?
2. What happens if legal proceedings are compromised without it being recognised that one of the parties lacks capacity?

Findings

On the first question the parties agreed that the issue of capacity was to be decided by asking if the Claimant had capacity to make decisions likely to be required of her in the course of "the proceedings" – *Mastermann Lister v Brutton & Co* [2003] 1 WLR 1511 applied.

However, the Claimant and Defendant disagreed as to whether or not "the proceedings" were those which the Claimant had actually brought, or whether the test should be the proceedings that should have been brought had her lawyers given her correct advice. If it was the latter, the parties agreed that the Claimant did not have capacity to conduct the larger and much more complicated claim which should have been brought on her behalf.

The Supreme Court decided that the answer must be whether the Claimant had capacity to make decisions in the larger claim that should have been brought on her behalf.

The Court then considered whether it could regularise the settlement actually agreed, or whether it needed to be re-opened notwithstanding the length of time that had passed.

The Court recognised that, provided everyone had acted in good faith and there was no manifest disadvantage to the Claimant, it would be usual for the Court to endorse the settlement actually agreed. However, each case turned on its facts and the Court did not consider it would be just to do that in this case.

The Court further considered that the normal rule of English law, namely that a contract made by a person who lacks capacity is valid (but voidable) except where the other party ought to have known about the lack of capacity does not apply to the compromise of civil claims.

The rules require that the Claimant should have had a litigation friend from the outset, and that any settlement should have been approved by the Court. Accordingly the Consent Order was set aside and the case was remitted for trial.

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Key points for defendants

- When deciding whether a person has or lacks mental capacity to conduct legal proceedings, the capacity test has to be applied to the proceedings as they should have been brought, not as they were actually brought
- The Courts will set aside settlements entered by a person under a disability who has not had the benefit of a litigant in person and where the settlement has not been approved by the Court, unless there is no manifest disadvantage to the person under a disability in the position being regularised
- A Defendant, who acted in good faith throughout and had no reason to suppose a Claimant was under a disability, could find proceedings being reopened many years after they believe the matter had been resolved
- Defendants should ensure that the Claimant instructs the correct expert and ensure that the expert is instructed on the proper test of capacity (and if possible raise pertinent Part 35 questions)
- Defendants should ask the Court to invoke its inherent jurisdiction to approve settlement, even though it may be accepted that the Claimant is not a protected party at the particular juncture (in accordance with *Coles v Perfect* 2013)

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Court finds occupiers liable for assisting workmen

***Estate of Cyril Biddick (Deceased) v Mark Morcom* [2014] EWCA Civ 182**

Background

Mr Biddick was an 80 year old homeowner. The Claimant, a multi-skilled tradesman, had known the Defendant for a long period of time and had undertaken work for him on several occasions. Sometimes he was paid for his work, and sometimes he undertook it on a voluntary basis.

On the day of the accident, the Claimant had agreed to fit insulation to the hatch which provided entry into Mr Biddick's loft.

The hatch opened by being pulled downwards with a long pole which had a hook that fitted into a locking mechanism. It was possible to open and close the locking mechanism by means of simply turning the pole.

Although the Claimant did not think that he needed any assistance, Mr Biddick indicated that he would stand underneath the hatch holding the locking mechanism in place with the pole, as he was worried that a vibration from the Claimant's drill might be sufficient to cause the locking mechanism to work itself loose.

However, whilst holding the pole, Mr Biddick received a phone call and went to answer the phone. The Claimant overreached himself, applying a degree of force to the hatch door. The hatch door burst open and the Claimant fell through to the floor below sustaining serious injury.

The Claimant sued in common law/negligence and for breach of the Work at Height Regulations 2005.

Findings

The Court found that the 2005 Regulation did not apply, but decided that the accident occurred because Mr Biddick, when taking the telephone call, had partially dislodged the locking mechanism and that this was a material cause of the Claimant's accident, and was negligent.

Accordingly, he was found to be liable but the Claimant's damages were reduced by 2/3rds for contributory negligence.

As the Court noted, had Mr Biddick not chosen to involve himself in the operation, there would have been no basis at all to make any finding of negligence against him, but having voluntarily involved himself, he brought himself into sufficient proximity with the Claimant so that it was fair, just and reasonable to impose a duty on him.

On appeal, the Court of Appeal upheld the finding of liability and of contributory negligence.

The Defendant had relied, in particular, upon the speech of Lord Hoffman in *Tomlinson v Congleton BC* [2004] 1AC 46 and in which stated it would ordinarily be extremely rare for an occupier of land to be under to a duty to prevent people from taking risks which are inherent in the activities they freely chose to undertake.

The Court of Appeal however distinguished Tomlinson on the basis that the Defendant in that case had not chosen to participate in any way in the activity being undertaken by the Claimant whereas here, the Defendant had assumed responsibility to ensure that the latch on the loft hatch remained closed.

Once the Defendant had undertaken to ensure that the hatch remained closed, he had a duty to perform that task carefully, even if the Claimant did not himself see the Defendant's role as a necessary one in his own safety.

It will be interesting to see if the Social Action, Responsibility and Heroism Bill (the so called 'Good Samaritan' law) recently proposed by the Government will extend to cover instances such as this. As the law currently stand Mr Biddick would have been well advised to have offered no further assistance than the odd cup of tea!

Key points for defendants

- This case highlights the potential difference in outcome between failing to act and acting in a negligent way. An occupier can go too far to ensure a visitor's safety. Had the workman been left alone, no liability would have attached to the occupier
- It was found that the locking mechanism was only partially secure when the workman fell. Had the occupier's involvement not been related to the cause of the fall, it is not likely that liability would have attached. Causation is therefore still an important factor
- The Court of Appeal upheld an assessment of 2/3rds contributory negligence, which is encouraging for Defendants

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Claimants have no time to lose

Costs consequences following the variation of a Part 36 Offer

Burrett v Mencap Ltd (July 2014) Portsmouth County Court

Background

The Claimant claimed damages following three accidents at work. The Claimant alleged she sustained soft tissue injuries and subsequently developed fibromyalgia. Damages were claimed in excess of GBP 100,000.

On 19 July 2013 the Defendant made a Part 36 offer in the sum of GBP 15,000. This was not accepted by the Claimant.

The Defendant then instructed a medical expert to examine the Claimant and prepare a report. The Claimant was also placed under covert surveillance.

The medical expert found that the Claimant did not satisfy the criteria for fibromyalgia and doubted whether the Claimant was suffering any injuries as a result of the accident.

The surveillance revealed that the Claimant had grossly exaggerated the extent of her symptoms; there was an abundance of inconsistencies between the Claimant's witness evidence and the footage obtained.

Accordingly, on 17 January 2014 the Defendant served notice of the Claimant amending the terms of the Part 36 Offer to GBP 2,500. The medical report and surveillance footage was served shortly thereafter.

Unsurprisingly the Claimant accepted the lower Part 36 Offer and made an application for determination of costs on the basis that the amended offer constituted a new Part 36 offer and she was therefore entitled to her costs to 7 February 2014 (the expiry of the relevant period; 21 days).

Findings

District Judge Ackroyd had to decide whether on amending a Part 36 Offer the relevant period began on the date the original offer was served or whether a fresh period began. CPR 36 and case law are both silent on this issue.

CPR 36.6(6) provides that "After expiry of the relevant period and provided that the offeree has not previously served notice of acceptance, the offeror may withdraw the offer or change its terms to be less advantageous to the offeree without the permission of the court".

The Judge found that the costs consequences of the Part 36 offer ran from the date of the first offer. Accordingly the Claimant's application was dismissed and the Claimant was required to pay the Defendant's costs of the application. The Defendant had to pay the Claimant's costs to 12 August 2013 and the Claimant had to pay the Defendant's costs thereafter.

The Claimant was granted permission to appeal, although the Claimant did not proceed with it.

Key points for defendants

- If a Defendant is to reduce an earlier offer, they should consider amending their original offer
- The reduced offer should be stated to be by way of CPR 36.3(6) (i.e. as an amended offer)
- Insurers who have made a Part 36 offer and then obtain evidence that a claim is exaggerated/fraudulent can reduce the sum on offer by way of variation without losing costs protection from the date the original offer expired
- Claimants are likely to term any increased offer as a variation of the original offer as this falls within CPR 36.3(6) "less advantageous to the offeree"

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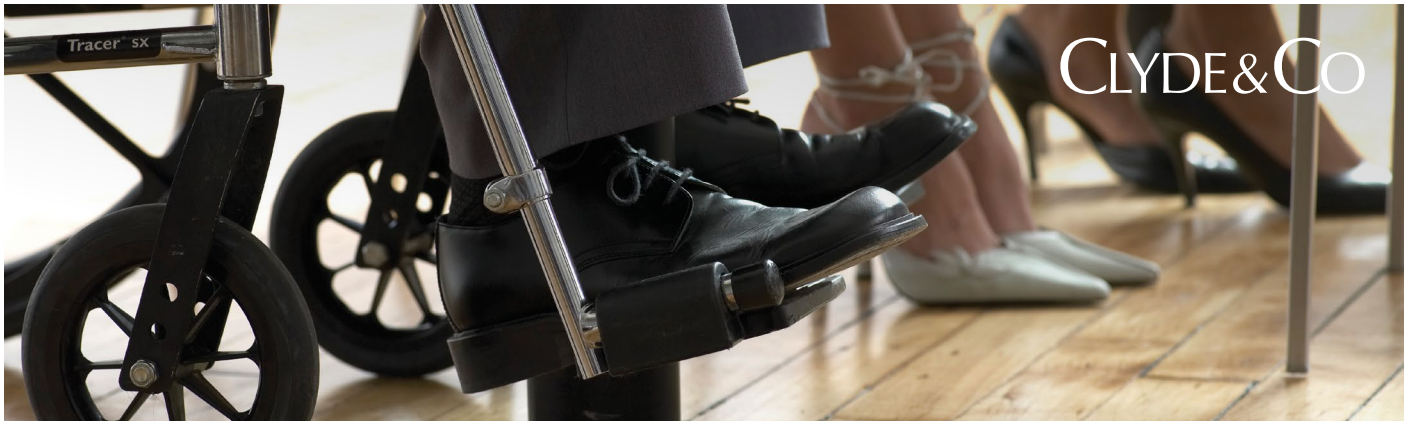

The Compensation Act 2006 should not be overlooked

***Humphrey v Aegis Defence Services Limited* [2014] QBD**

***Uren v Corporate Leisure (UK) Ltd* (2013) EWHC 353 (QB)**

Introduction

The much lauded Compensation Act 2006 was billed as something that would free organisers of fun events from liability on the basis that it is good for society to have exciting activities going on.

Section 1 of the Act provides that in considering a claim for negligence or breach of statutory duty, the Court can consider whether imposition of a duty might discourage desirable activities taking place.

The Act has been considered in two recent employers' liability claims.

Humphrey

The Claimant was a former marine and a bodyguard working for the Defendant, a security company.

The Claimant's work involved close protection escort for military personnel in Iraq, including working closely with interpreters.

Physical fitness was a condition of the Claimant's contract and his fitness was regularly tested. Interpreters were also tested but were likely to be employed even if they failed a fitness test.

The Defendant organised a fitness test which involved teams carrying a man on a stretcher. The Claimant had some reservations about the fitness of one of the interpreters but the test went ahead.

During the test and without warning, an interpreter let go of one of his handles, causing serious injury to the Claimant's arm.

The Defendant accepted that it had been in control of the fitness test, and also that it owed the Claimant a duty of care.

The Court dismissed the claim and found that it was foreseeable that an unfit interpreter would drop a stretcher, but that this would cause a minor injury only.

The Court accepted however, that the Defendant's work in Iraq was a desirable activity within the meaning of the Compensation Act 2006. As interpreters were essential, it was reasonable to apply more lenient fitness standards to them because of their scarcity, and this was relevant when considering the extent of any duty of care. As the social value of the activity was sufficiently important, it justified an increased assumption of risk.

Uren

The decision perhaps rows back slightly from the comments made in the retrial in *Uren*. The Claimant was injured in an RAF "Health and Fun Day" when he took part in a game where participants had to run up to a shallow inflatable pool and enter it to retrieve various items. The Claimant went in headfirst and was left tetraplegic as a result.

At a retrial in 2013, Mr Justice Foskett found that:

1. The risk of serious injury arising from headfirst entry into the shallow water was more than minimal and should have been foreseen and steps should have been taken to reduce or prevent it. Given the very serious consequences from a headfirst entry, a warning was not sufficient and banning would have been a proportionate measure in the circumstances.
2. It was recognised that social events are of great value and that they always involve some risk, but the risks should be fully assessed and all proportionate steps should be taken to minimise foreseeable risks.

Mr Justice Foskett, dismissing submissions in respect of the Compensation Act 2006, stated that his decision did not put social events in danger, as long as an adequate risk assessment has been carried out and proportionate steps have been taken to avoid the risk identified.

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It may be that the position changes further if the Government's so called Good Samaritan Act is enacted. Lord Edward Faulks QC, a Barrister routinely instructed by Clyde & Co has stated that "the Compensation Act has not done enough to address people's worries about liability" and it is hoped that "the Bill will do more than the Compensation Act did to increase public confidence in the law and increase participation in socially valuable activities".

Key points for defendants

- Whilst cases turn on their own facts, do not overlook the Compensation Act 2006
- Whilst it did not assist the Defendant in *Uren*, some Judges will have regard to its provisions, including (in certain circumstances) within the context of an employers' liability claim
- The Good Samaritan Act may yet again change the position for the better and add more protection for Defendants
- For accidents occurring after 1 October 2013, which will be subject to Section 69 of the Enterprise & Regulatory Reform Act 2013, consider whether the activity of a Defendant employer might, arguably, consist of a "desirable activity" which might be prevented or discouraged by a finding of liability

Novel extension to loss of dependency

***Haxton v Philips Electronics* (2014) EWCA Civ 4**

Background

The Claimant was the widow of an electrician who had been employed by the Defendant. The Claimant's husband had died from Mesothelioma, contracted as a result of negligent exposure to asbestos in the course of his work with the Defendant.

Following his death, the Claimant brought a claim for dependency but, prior to her case coming to trial, the Claimant herself was diagnosed with Mesothelioma. Her condition was caused by exposure to asbestos dust through washing her husband's work clothes.

The Claimant's life expectancy was reduced to 0.7 years, and the value of her dependency claim was, accordingly, reduced by about GBP 200,000.

The Claimant bought separate proceedings, in her own right, for negligence and breach of statutory duty against the Defendant. She included a claim for GBP 200,000 diminution in value of her first dependency claim, on the grounds that, but for the Defendants negligence, her life would not have been cut short and the assessment of her dependency claim in the first action would have been significantly greater.

At first instance, the Judge disallowed the claim on the basis that it was against principle and policy to allow the Claimant to recover this sum in her own right.

Findings

The Court of Appeal thought differently.

The Court considered that there was no reason in principle why the Claimant should not recover damages for the loss she had suffered as a result of the reduction in her life expectancy by reason of the Defendant's negligence.

The Court did not consider that allowing such a claim, would improperly interfere with the statutory scheme established under the Fatal Accidents Act, and considered that there was nothing to suggest Parliament intended to deny a Claimant in this situation a right to recover. This was a common law claim for loss of dependency.

Furthermore, the Court rejected the argument that the loss was too remote. It was reasonably foreseeable that a reduction in life expectancy might lead to a diminution of value of an existing claim and, if the Claimant had such a claim, then the wrongdoer must take their victim as they find them.

Indeed the Judge indicated that this would be the case even if the Claimant's tortfeasor had not been the same as her husband's.

Key points for defendants

- This case has far reaching implications. It could apply to other cases where the value of a Claimant's claim is reduced due to wrong doing of a tortfeasor that occurs after the original cause of action arose
- For example it could apply to multi-casualty RTA claims where the tortfeasor causes the death of two members of the same family; when the dependent dies following the death of the main income provider. Indeed the Court of Appeal also opined it could also apply when the family members are injured by different people in two unconnected accidents
- The claim has specific implications for calculations of damages where there are two successive torts, although it is unlikely there will be many claims where such circumstances arise. When they do, the Court of Appeal has unequivocally stated that it would not be in the interests of justice to allow the negligent employer to benefit from a potential saving

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Occupiers to prove Asbestos Regulations 1931 do not apply

***McDonald (Deceased) (Represented by Mrs Edna McDonald) v The National Grid Electricity Transmission Plc* [2014] UKSC 53**

Background

The Claimant had been employed as a lorry driver by the first Defendant during the 1950s. He alleged that he had been exposed to asbestos dust, from which he had developed Mesothelioma, whilst attending premises controlled by the predecessor of the second Defendant. He bought claims against both Defendants under the Asbestos Industry Regulations 1931, and the Factories Act 1937.

At first instance the claim was dismissed, on the basis that the exposure had been modest and on a limited number of occasions only over a relatively short period of time. The Claimant appealed.

Court of Appeal

The Court of Appeal agreed that, with the state of scientific knowledge at the time, no-one could have foreseen the harm from the exposure, so the case in common law negligence against both Defendants failed.

The Claimant's claim under the Factories Act 1937 similarly failed because the Claimant was not able to show, as required under Section 47(1) that a "substantial quantity" of dust of any kind had been given off. The Claimant, in this respect, was simply unable to garner sufficient evidence as to the quantities of dust discharged. The Claimant was also unable to show that he was a "person employed" as required by the Act.

The Court of Appeal then considered the Asbestos Industry Regulations 1931. The Court noted that their scope was defined in a way which is unfamiliar in modern legislative drafting but, essentially, provided that regulation in respect of the operation said to have been responsible for the Claimant's condition, namely the mixing of asbestos with water in drums, would not be governed by the regulations if the mixing process was carried out "only occasionally" and the person injured was not employed on the part of the factory for more than eight hours per week.

As the regulation was drafted in such a way as to apply to the occupier of the premises unless the occupier established an exception, the burden of proof fell on that occupier to demonstrate that the Claimant was outside the ambit of the regulations and the second Defendant had failed to do this, then the second Defendant was liable.

Supreme Court

The second Defendant appealed to the Supreme Court against the decision that it was liable under the Asbestos Industry Regulations 1931 and the Claimant appealed against the decision that Section 47(1) of the Factories Act 1937 did not apply.

The Supreme Court dismissed the appeal and the cross appeal.

The Court found (on a majority of 3 to 2) that the Asbestos Industry Regulations 1931 were not confined to the asbestos industry, but all factories using asbestos.

It was also held that the term "mixing" under regulation 2(a) was not to be given a restricted, meaning, but was to be construed more broadly and taken to cover the mixing of asbestos powder with water.

It was also found that the Claimant was a "person employed" for the purposes of Section 47(1) of the Factories Act 1937. The relevant test was whether the Claimant was a person employed in the factory and not whether he was employed by the occupier. However the Claimant failed to prove that a "substantial quantity" of dust had been given off by the lagging work.

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Key points for Defendants

- Whilst the claim is bought under the Asbestos Industry Regulations 1931, the burden of proof of establishing that an exception to liability is on the occupier (rather than the Claimant proving he comes within the regulations)
- Claimants are more likely to succeed with pre-1965 (the generally accepted date of knowledge for mesothelioma) exposure cases. The position in the Court of Appeal case of Cherry Trees 2001 therefore remains unchanged. Further cases that have previously not been brought may now surface
- Defendants are still able to defend against these earlier cases if the process did not involve "mixing"
- Section 47 applies to all types of dust and fumes, bringing bronchitis, silicosis, asthma and cancer within the remit
- Practically, Defendants will need produce evidence to show either that the initial production of dust was not "substantial" or that they took the practicable steps, as required by s.47(1)
- Given the wide interpretation of "person employed" in the Factories Act 1937 insurers may now see cases previously regarded as public liability are now brought under employers' liability

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Market news

Criminal Justice and Courts Act 2015 receives royal assent

The Criminal Justice and Courts Act 2015 received royal assent on 12.2.2015, although it is not yet known when it will come into force.

The Act includes clause 57 which introduces provisions where a claim for personal injury is found to be fundamentally dishonest, including dismissal of the whole claim. It should be noted that fundamental dishonesty will not apply to proceedings issued before the section comes into force.

The Act also prohibits inducements to make personal injury claims and following amendment in the House of Lords these were extended to cover inducements offered through third parties.

Phase 2 of the whiplash reforms

Rules to fix the costs of medical reports in low value personal injury claims arising from road traffic accidents came into force from 1 October 2014.

The first report has been limited to GBP 180 with a second fixed cost report between GBP 180 to GBP 420 dependant on the expert required (providing that it was recommended in the first report).

Medical experts are also no longer able to have already treated the Claimant or to recommend treatment from themselves.

The second tranche of reforms have now been announced, concerning both the accreditation and independence of medical experts.

From 6 April 2015 medical experts must be registered with MedCo in order to provide the initial fixed cost medical report in a soft tissue injury claim and from 1 January 2016 experts must be accredited by MedCo in order to provide the same report.

It is hoped that a robust monitoring system is implemented in respect of the expert database with 'real' sanctions being imposed when required. Failure to give the accreditation system teeth will only allow the problems presently experienced with certain experts to continue.

There is a clear need to break the current direct financial link between the claimant law firm who commissions the reports and medical expert who prepares it. The MoJ has advised it will achieve this with the introduction of a new IT system which will provide a list of appropriate experts to choose from, excluding those which the claimant law firm has a direct financial link with.

Sadly there has been no mention of random allocation of experts which would guarantee independence. The anticipated phase two may therefore still be open to abuse from expert and claimant law firms who simply do not satisfy the financial link embargo.

One additional safeguard to be implemented from 1 June 2015 requires the Claimant's legal representative to undertake a previous claims check on their potential client (and to thereafter add a unique reference number generated by the search to the CNF). It is hoped this new requirement will act as a first layer of protection against fraudulent claimants, however it is likely to do little to deter unscrupulous Claimants and their representatives.

Discount rate changes stalled?

The Chancellor is to appoint a panel of three experts to assist with the discount rate review.

The panel is to consist of a financial management investment expert to advise on what services and advice is given to claimants, an actuary to consider rate issues and an academic specialising in the working of the financial services market and the economic cycle.

Although the panel was expected to be appointed by the end of September 2014, this has not yet taken place.

The discount rate has been set at 2.5% since 2001, however since then there have been significant changes in the financial markets leading to claimant representatives to call for the discount rate to be reduced. The Court of Appeal in Hong Kong reduced the discount rate, possibly pre-empting a reduction in the UK.

Due to the delays a decision is unlikely to be made prior to the general election, possible causing further delays in the new parliament. Insurers should welcome this delay as it provides some certainty for the short term at least.

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SARAH Act receives Royal Assent

The Social Act, Responsibility and Heroism Act received Royal Assent on 12th February 2015, although the commencement date has not yet been set.

The so called SARAH Act has noble intentions and will require Courts to consider the context of an action that is the subject of a liability claim, hopefully allowing people to carry out good deeds without worrying about the risk of liability should something go wrong.

However, there has been much opposition to the Act on the basis that legislation does not alter the current law of negligence and the concepts it contains are hard to define in practice.

Lord Faulks, on behalf of the Government, has argued that requiring courts to consider whether defendants had acted generally responsibly with regard to the safety of others represented a change in the law.

It remains to be seen how the Act will operate in practice, although it is to be hoped that it will genuinely offer further protection to defendants acting in a socially beneficial way.

Portal and fixed fees needed for deafness claims

The ABI has called for urgent reform to the system of industrial deafness claims. The number of claims has increased from 1,000 in March 2012 to 3,500 in March 2014 with claims taking on average 17 months to settle, leading to significantly spiralling costs for insurers.

As deafness claims commonly involve multiple Defendants they are not suitable for use in the present MoJ Portal system and accordingly do not attract fixed fees.

The ABI has suggested an extension of the current portal or the creation of a bespoke deafness portal is required in order to reduce costs and settlement times.

The ABI's plea follows the Court of Appeals rejection of a claim from a former railway worker who claimed hearing loss as a result of working at an engineering works between 1953 and 1988.

The Claimant had attended 11 medical consultations for hearing problems between 1982 and 2011. It was not until 2011 that he was told part of his hearing loss was noise induced. The Court of Appeal held that it was reasonable to expect a Claimant to make further enquiries once the issue of noise exposure had been raised in 1982, which he had failed to do.

A Claimant is required to show they had no actual or constructive knowledge of the cause and the Judgment shows the threshold is fairly high. It is hoped that the judgment assists in discouraging spurious claims.

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Motor sector likely to report loss for 2014 as claim numbers return to pre-Jackson levels

It appears that claims figures are likely to return to pre-Jackson levels, resulting in a return to loss for the motor insurance industry despite rising motor premiums.

Figures released by the AA in October showed a 1.2% increase in the average cost of an annual comprehensive car insurance premium. However this is thought insufficient to prevent an immediate return to loss, partly due to the 13% decrease in premiums during 2013.

Indeed the motor insurance industry only recorded a profit in 2013 due to a reduction in the number of claims, which allowed for reserves to be released.

Claim figures have not continued to fall in 2014 however and reached their highest level in 2014 since the peak between October 2012 and April 2013.

Insurers have called for further reform to the justice system, particularly the accreditation of medical experts.

Claims down by 10%

The Institute and Faculty of Actuaries reported in October that insurers have seen a 10% reduction in the number of third-party injury claims. Additionally, the average cost of settlement fell by 5% to GBP 4750.

The IFOA concluded the reduction was as a result of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which banned referral fees amongst other things.

It was noted that there remained a correlation between and claims hot-spots such as London, Liverpool and Manchester and the locations of claims management companies, suggesting opportunism and fraud continues to plague the market.

The Single County Court

From 22 April 2014 the County Courts of England and Wales have become a "single county court". Therefore the title of proceedings should now be, for example "In the County Court sitting at Manchester".

Experts

Revised guidance for the instruction of experts (which replaced the current Protocol contained in the practice direction to CPR 35) came into force on 1 December 2014.

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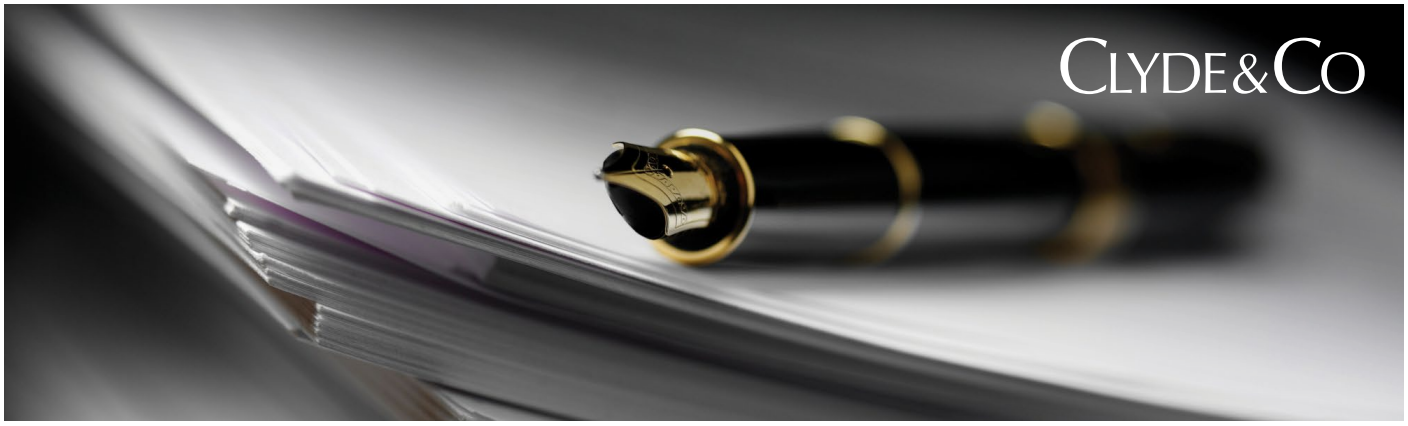

Coming soon….

Rehabilitation Code

A draft of the revised code is expected in March 2015, with the final version to be published in June.

Mesothelioma (Amendment) Bill

Lord Alton's private members bill is now being debated in the House of Lords. The Bill seeks to amend the Mesothelioma Act 2014 to allow for research of the disease within the levy on employers' liability insurers.

Diffuse Mesothelioma Payment Scheme

These regulations, which came into force on 28 November 2014, place an obligation on insurers to pay a proportion of the costs of the levy based on their market share.

The Department of Work and Pensions has announced that the total amount of the levy for the first year, (2014-15) will be GBP 32 million.

Between April and October the Scheme had received 232 applications and made 131 payments totalling GBP 16.5 million. The average payment is said to be around GBP 126,000.

From 10.2.2015 tariff payments will be increased from 80% to 100% of the average damages victims would have achieved in the courts. The increase will only apply to those diagnosed after 10 February and there has been call to backdate the increase. To do so however would imbalance the process as insurers are paying these claims when they have not taken any premiums for them.

Although concerns remain as to the future affordability of the scheme in light of the increase, use of the scheme has only been a third of that anticipated and therefore there appears to be room for manoeuvre before problems of this nature arise.

Insurance Act 2015

The Insurance Act 2015 received Royal Assent on 12 February 2015. When it comes into force in August 2016, it will (together with the consumer insurance reforms that came into effect in 2013), represent the greatest change to insurance contract law in this country in over 100 years. It will amend certain key sections of the Marine Insurance Act 1906, although it is worth noting that (despite suggestions in some quarters to the contrary) the 1906 Act has not been repealed. Please refer to the briefing note on our website for analysis of the key changes.

Third parties (Rights against Insurers) Act 2010

The Act received Royal Assent on 25 March 2010 but was not brought into force, has now been further amended by the Insurance Act 2015.

The 2010 Act is intended to make it easier for third party claimants to bring direct actions against insurers where an insured has become insolvent. Although no deadline to bring the Act into force is set out in the Insurance Act, the Government has advised that it hopes the Act will be in force by Autumn 2015.

It seems likely that the Act will result in an increase in requests to insurers for information relating to insurance policies, which could place an additional administrative burden on them. It is also expected that there might be an increase in claims from third parties directly against insurers. However Insurers may also find they are involved in claims by third parties at an earlier stage than they would otherwise have been and this may allow some claims to be resolved at an earlier and more cost effective stage.

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Further advice should be taken before relying on the contents of this Newsletter.

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