Technical claims brief

Monthly update – November 2012

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News

Court of Appeal excludes existing Conditional Fee Agreement claims from damages increase

As reported in last month's Brief, on 25 September the Court of Appeal reconsidered its ruling in ***Simmons v Castle*** to introduce a 10% increase in general damages (in England and Wales) for all cases heard after 1 April 2013. The Association of British Insurers (ABI) had applied to the Court to reopen the case and to amend its ruling to exclude cases where a Conditional Fee Agreement (CFA) was signed before 1 April 2013.

On 10 October, the Court of Appeal gave its revised judgment excluding claims with CFAs signed prior to 1 April 2013.

The effect of this change is to prevent claimants from benefiting from both a 10% increase in general damages and a success fee mark up on their costs both payable by the defendants. The 10% increase in general damages (i.e. non-pecuniary losses such as pain, suffering and loss of amenity) was intended by Lord Justice Jackson to recompense claimants for the loss of success fee recovery from defendants. The Court of Appeal accepted the ABI's argument that it was unfair for them to receive this prior to the ending of success fee recoverability.

Comment: This judgment is good news for defendants who would otherwise have been faced with paying more money on damages, with no reciprocal reduction in costs. It will however have an inflationary effect on non-CFA cases where defendants will face increasing pressure to incorporate the 10% increase into their settlement offers as the date of the increase draws near.

11th edition of Judicial College Guidelines published

The 11th edition of the Judicial College Guidelines (JCG) formerly known as the Judicial Studies Board Guidelines has just been released showing overall increases for suggested awards in General Damages (Pain Suffering and Loss of Amenity) of between 8% and 9%

This is in addition to the 10% increase that the Court of Appeal announced in ***Simmons v Castle*** (see above).

The JCG will issue supplementary guidance on the ***Simmons v Castle*** increase in April 2013.

There are some much bigger increases for Mesothelioma where the bottom of the bracket has gone up by 43% to £50,000.

Comment: The new edition was expected and is based on a review of existing awards but the level of increase is much more than expected and will likely have an inflationary effect.

Progress on reform of Health and Safety Legislation

The ***Enterprises and Regulatory Reform Bill*** has passed its third reading in the House of Commons and will now be debated in the Lords.

The Bill if enacted will amend the ***Health and Safety at Work Act 1974*** by removing strict civil liability (under regulations such as the ***Provision and Use of Work Place Equipment Regulations)*** for statutory breaches. This would allow employers to defend claims from injured employees where they had taken all reasonably practical precautions to prevent an accident.

The reform is one of the main recommendations contained in Professor Lofstedt's report of 2011, intended to remove some of the threat of litigation from employers.

Comment: The Bill is a controversial one. The UK government see it as a means of reducing the regulatory burden on employers and encouraging economic growth whilst the opposition and trade unions oppose it on the basis that seriously injured employees may go uncompensated in future. The government's parliamentary majority ensured the Bill's passage through the Commons but it is likely to have a turbulent passage through the Lords.

Scottish Court of Session pre-litigation fee rises by 60%

The block scale fee chargeable by pursuers' solicitors for pre-litigation work in defended Court of Session cases will rise from £437.35 to £699.30 on 5 November 2012. The increase will apply to all work undertaken from this date.

Comment: Historically the block scale fees have helped to maintain Scottish costs at a level, which is generally cheaper than in England and Wales and have provided greater predictability. There is a risk, that this substantially increased (close to 60%) scale fee, may be used by the Auditor of the Court of Session as a minimum when exercising their power to vary the rate.

Fraud

Claim struck out as penalty for gross exaggeration: Fari v Homes for Haringey - Central London County Court (2012)

The claimant tripped over an uneven paving stone in 2008. The defendant admitted liability. The claimant sought over £740,000 in damages mainly for care she allegedly needed due to disability arising from the accident.

Following sight of covert surveillance footage however, both sides' medical experts agreed that she had suffered no more than a minor aggravation of a pre-existing condition in her right knee, which the judge valued as worth no more than £1,500 (less than 0.5% of the pleaded claim).

The Judge was persuaded by the defendants that this was a massive attempt to deceive the court and exactly the type of case that the Supreme Court had in mind when it ruled in ***Summers v Fairclough Homes (see July 2012 Brief)*** that grossly exaggerated claims could be struck out in their entirety as a breach of process.

His Honour Judge (HHJ) Mitchell struck the claim out (pre-trial), ordered an interim payment towards the defendant's costs and gave permission for the case to be transferred to the High Court so that contempt proceedings could be brought against the claimant and her husband.

Comment: This is an encouraging decision for insurers and other compensators who are trying to combat fraud. If other judges follow HHJ Mitchell's decision it could provide a useful deterrent to fraudsters.

Our thanks go to Plexus Law who acted for the defendant organisation, for their very helpful note on this case.

Liability

Electricity distributors escape liability for fire damage despite lack of inspection: Smith and Others v South Eastern Power Networks PLC (and four other cases)

The five claimants in these combined test cases were home and shop owners whose properties had been damaged by fire originating in cutout assemblies (effectively a type of junction box where mains power enters a building). The parties all agreed that the fires had been caused by 'resistive heating' in the cutouts which had ignited flammable material nearby. The defendants admitted a duty of care, the dispute being what if anything they should have done by way of inspection, maintenance, replacement or monitoring of the cutouts.

The claimants' case was that the distributors had failed to carry out twice-yearly-inspections (although meter readers did attend more regularly than that), failed to replace the assemblies after 25 years service and failed to collate data as to which installations were a potential fire risk. The defendants argued that there was no evidence to prove that an inspection regime would have identified fire risks.

The court held that the defendants were in breach of duty in failing to implement or consider an inspection regime but even a careful visual inspection would not, on the balance of probabilities have detected any impending problems. The defendants were again in breach for failing to have any cutout replacement scheme but the claimants had not proven that the cutouts required replacement after 25 years. The evidence pointed to replacement being required only every 50 years. The lack of data on the type and age of the cutouts was not causative of the fires as their purpose would only to have been to show when replacement was due. Judgment was given for the Defendants.

Comment: A reminder that it is not enough for a claimant to prove breach of duty by the defendant: it must also be causative of the claimant's loss.

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Employers liable for workplace prank: Otomewo v The Carphone Warehouse Ltd

Two Carphone Warehouse employees took an I-phone belonging to their manager Mr Otomewo without permission and updated his status to read - 'Finally came out of the closet. I am gay and proud.' Mr Otomewo was not gay and did not believe that his colleagues really thought this either.

Mr Otomewo was later dismissed for an unrelated matter. He brought various claims against his employers at an Employment Tribunal (ET) including one for sexual orientation harassment.

The ET found that the comments were an unwanted intrusion into the claimant's private life in a public forum, which violated his dignity and caused humiliation. This was not a case of work place banter and the comments amounted to sexual orientation harassment. The comments were made in the course of employment and the employer was vicariously liable.

The ET will consider the penalty to be imposed on the employer at a later date.

Comment: This case illustrates the importance for employers of robust polices on the use of social media and on equal opportunities. Without these, a defence (under the Equality Act 2010) based on having" taken all reasonable steps" to prevent harassment is unlikely to succeed.

It is also a reminder that a claimant does not have to have the characteristic to which the discrimination relates to invoke the Equalities Act.

Property Insurer unable to recover outlay from Motor Insurer for driver's deliberate Act: EUI Ltd v Bristol Alliance Ltd Partnership - Court of Appeal (2012)

A depressed driver caused over £200,000 of damage when he attempted to kill himself by driving his car through a brick wall and into a shop. He was seriously injured but survived.

The insurers of the shop sought to recover their outlay from the motorist's insurers but the latter refused to pay saying that their policy excluded cover for deliberate acts. Whilst it would deal with any uninsured loss claim as Article 75 insurer, i.e. standing in the place of the Motor Insurers Bureau (MIB) under the Uninsured Driver's Agreement, any subrogated claim from the property insurer was excluded.

At first instance, the High Court found that ***Section 145 of the Road Traffic Act (RTA)*** required the policy to cover any liability on the part of the driver including that arising from deliberate acts. The motor insurers must therefore satisfy any outstanding judgment against their policyholder as RTA insurer.

The motor insurers successfully appealed to the Court of Appeal. It was a well established practice for insurers to limit cover to a particular use and that there would be no RTA liability on the part of an insurer where the use of the vehicle was outside of that specified in the policy. The RTA did not require cover for all property damage. There was no requirement for property damage over £1 million in value nor was cover for goods carried for hire or reward required. This list was not exclusive and other liabilities could be excluded by

agreement between the policyholder and insurer.

The RTA coupled with the MIB agreements complied with the European Union Motor Directives enabling third party victims to be compensated for property damage and personal injuries caused by vehicles but the MIB agreements did not extend to subrogated claims.

Comment: Insurers can now refuse subrogated claims arising from the deliberate acts of drivers and from other permissible cover exclusions. Insurers will also be able to rely on the other exclusions set out in Clause 6 (1) of the Uninsured Drivers Agreement i.e. where a passenger is knowingly carried in an uninsured vehicle, in furtherance of crime or escaping police pursuit.

Comment: The Scottish Government is currently participating in the first Ministry of Justice's consultation on the methodology of setting the rate with a second consultation on the legal framework planned for later this year (see September 2012 Brief). Any reduction in the rate would lead to significant increases in the level of lump sum settlements. It is reported that the pursuer in this case would have received £600,000 more in damages had the court agreed to a 0.5% rate.

Quantum

Discount rate challenge rejected: Tortolano v Ogilvie Construction Ltd – Court of Session (Outer House) Scotland (2012)

The pursuer suffered severe injuries after falling four metres in a work place accident, resulting in his needing care for the rest of his life. He asked the court to depart from the current 2.5% discount rate and instead use a 0.5% rate in calculating the lump sum settlement of his future losses. The pursuer argued that a 0.5% rate was a more realistic figure to offset the return on investment he would receive investing his damages, given the current economic climate.

The court rejected the pursuer's request finding that whilst the ***Damages Act 1996*** permitted a departure from the normal rate if the specific facts of a case made an alternative rate more appropriate, arguments about the general appropriateness of the rate were outside of the court's jurisdiction and were a matter for the Scottish Government.

The pursuer has lodged an appeal.

Completed 29 October 2012 – written by and copy judgments and/or source material for the above available from John Tutton (contact no: 01245 272 756, e-mail: john.tutton@uk.qbe.com).

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