

Technical claims brief

Monthly update – February 2012



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News

Prime Minister declares war on Health and Safety “Albatross”

On 5 January this year the Prime Minister, David Cameron pledged support for a wide range of reforms intended to stimulate the economy by tackling compensation culture and freeing business from bureaucracy.

In a wide-ranging speech, the PM promised to:

- Extend the capped costs scheme for low value personal injury claims (a reference to the Ministry of Justice portal scheme currently only applying to low value motor claims)
- Reduce overall costs in “no win no fee cases” (the Jackson reforms)
- Change the law on strict liability in civil litigation (recommended in the Lofstedt review)
- Investigate the role of insurers in forcing businesses to exceed the requirements of health and safety regulation as a condition of cover and invite them to discuss ways to reduce bureaucracy.

More controversially, he also promised to:

“...wage war against the excessive health and safety culture that has become an albatross around the neck of British business.”

He went on to say that, “health and safety culture” was a massively important issue for British businesses, which battled every day:



“...against a tide of risk assessment forms and faced the fear of being sued for massive sums”.

These comments provoked some strong criticism, being described as **“appalling and unhelpful”** by Richard Jones of the Institution of Safety and Health (IOSH). Mr Jones said that health and safety legislation was intended to prevent death and injury in the work place and thus protected livelihoods.

Even some business leaders whilst welcoming efforts to tackle “compensation culture” warned against confusing this with health and safety regulation.

Comment: The extension of the Ministry of Justice’s scheme, for processing low value injury claims quickly, to all classes of business was proposed for October of this year but little progress has been made and this time frame now seems unlikely. The Jackson reforms may also be delayed as the Legal Aid Sentencing and Punishment of Offenders bill, which underpins them, is currently facing 197 amendments in the Lords.

The Government has promised immediate action to begin the implementation of the Lofstedt reforms but the process involved in amending the law on strict liability is likely to be a lengthy one.



Comment: Insurers know very well that it is easy for a claimant to dishonestly claim that they are suffering from a whiplash injury and how ready the courts are to accept these claims in the absence of hard evidence of fraud. A reliable and objective test of whiplash symptoms would be welcome but medical science has thus far failed to produce one.

The practice of paying referral fees has no doubt led to an increase in claims numbers and the insurance industry has called for an outright ban. To be effective however, a ban must be comprehensive and apply to all those selling information including garages and the police. We hope that the Legal Aid Sentencing and Punishment of Offenders Bill will contain such a ban when enacted.

Select Committee calls for action on whiplash and referral fees

In a follow up report on the cost of UK motor insurance published on 12 January this year, the Parliamentary Transport Committee has called for action to ensure that only genuine claimants are compensated for whiplash injuries and for greater transparency on referral fees.

Whiplash claims have been identified as one of the causes of increasing motor insurance premiums. The Committee heard evidence from insurers that whiplash injuries are difficult to disprove and expressed concern that claims are being paid with little or no objective evidence of injury. They recognised however, that if it were possible to change this by bringing test cases through the courts, insurers would have done so by now. If the costs reforms (in England and Wales) did not lead to a significant reduction in the number of whiplash claims then the Committee's view was that there would

be a strong case for primary legislation to require more objective evidence to prove the extent of alleged injuries.

The Committee welcomed the introduction of the Legal Services Board's new guidance on the transparency of referral fees (money paid in return for details of accident victims) but said that it did not go far enough. The guidance referred solely to fees paid by solicitors and not to other who made money from these. The Government should send a clearer signal on the need for transparency including guidance to insurers on what information they should provide to consumers. Insurers should be prohibited from receiving referral fees across the board, not just in relation to legal action.

In addition, there should be a review, within the next six months, of the fixed costs involved in the Ministry of Justice protocol for low value injury claims and whether use of this protocol was leading to insurers paying claims, which should otherwise be defended.



Control of Asbestos Regulations to be tightened

Following a consultation last year, the Health and Safety Executive is expected to release a report later this month setting out changes to the **Control of Asbestos Regulations (2006)**. The consultation was launched after the European Commission (EC) issued a reasoned opinion (ruling) that the UK Government had not fully implemented a Directive on protecting workers from asbestos exposure.

In order to comply with the EC opinion, it is planned to amend Regulation 3 (2) to use exactly the same wording as the Directive. The changes will mean that more types of lower risk work must be notified, the workers engaged on it medically examined and a register kept for each worker detailing the work done with asbestos.

Comment: With UK asbestos related deaths still exceeding 4,000 a year, the dangers of asbestos exposure cannot be denied. This change in regulation is likely to be controversial however as it will impose additional expense on employers at a time when the Government is trying to reduce work place regulation. Professor Lofstedt commented in his report on UK

Health and Safety regulation, on the high proportion of UK regulation that is derived from EC Directives and called on the UK Government to work more closely with the EC to ensure that regulation was risk and evidence based.

£185 million bailout for NHS Litigation Authority

The Government has been obliged to provide an additional £185 million in funding for the NHS Litigation Authority (NHSLA) to fund damages for the victims of medical negligence.

The NHSLA were running short of money after seeing large increases in claims payments. There has been a three-fold increase in damages paid over the last ten years, reaching £863 million in the financial year 2010-2011.

NHS managers blamed the increase on claims funded by “no win –no fee” arrangements and aggressive marketing by claimant lawyers and intermediaries. They also said that the linking of periodical payments to the average cost of carers’ wages rather than to the Retail Price Index (following the **Thompstone** decision five years ago) had a significant inflationary effect.

Claimant lawyers retorted that the NHSLA were guilty of escalating costs by trying to deny liability in cases where they were clearly liable in the hope that the claims would go away. They also criticised the NHS for failing to do more to prevent medical negligence in the first place.

Comment: The Legal Aid, Sentencing and Punishment of Offenders Bill (LASPO) if enacted in its current form is predicted to greatly reduce the numbers of claims made against the NHSLA and other compensators through a combination



of cuts in legal aid and changes to civil litigation funding (see December 2011 Brief). The LASPO Bill has come under sustained attack in the Lords largely over concerns about access to justice.



Liability

Cyclist 80% liable for jumping red light - Malasi v Attmed – High Court (2011)

The claimant was a cyclist who had been seriously injured after colliding with the side of the defendant's taxi at a T-junction.

Both parties' experts agreed that the defendant had been travelling at a speed in excess of the speed limit (41-50 mph in a 30 mph zone). The defendant argued that the cyclist had not been paying attention to the road ahead, had gone through a red traffic light and could have avoided the collision if he had applied his brakes in time.

The judge held that based on the consistent evidence of the taxi driver and his passenger the cyclist had gone through a red light. In considering the issue of contributory negligence, the judge held that there were three causes of the accident: the excessive speed of the taxi driver, the cyclist's failure to apply his brakes and the cyclist ignoring a red traffic light. The defendant had a reasonable expectation that other road users would comply with the traffic signals and the balance of fault lay heavily with the cyclist. The cyclist's damages were reduced by 80%.

Comment: The judge was at pains to point out the importance of abiding by fixed speed limits. The cyclist had jumped the lights and had not been paying attention but this did not absolve the taxi driver of responsibility for the accident in so far as his excessive speed had contributed to it.

Procedure

Court of Appeal simplifies procedure for contempt committal: *Tariq Ali v E-Sure Services Ltd – Court of Appeal (2011)*

The claimant brought proceedings in the County Court in support of a fraudulent claim. He tried to discontinue his claim when the defendant's insurers joined themselves to the action and pleaded fraud. The claimant was not permitted to discontinue. Instead, the claim was transferred to the High Court on the insurers' application, so that they could apply to commit the claimant for contempt of court for making a false statement.

The insurers argued that the application for committal should be heard by the same High Court judge who would hear the evidence in the contempt trial rather than have the case heard in the County Court and then make an application for committal in the Divisional Court. This would save both court time and help contain legal costs. The High Court judge struck out the claim with a costs order against the claimant and also granted the application for committal for contempt.

The claimant appealed arguing that the High Court judge did not have jurisdiction. The statement of truth (for which he faced a contempt committal) had been in connection with proceedings in the County Court and Order 52 r.1 (3) of the Civil Procedure Rules (CPR) meant that a committal for contempt could only be granted by the Divisional Court.

The Court of Appeal held that the High Court did have jurisdiction. Order 52 r.1 (3) applied to "any proceedings in the High Court" and this included proceedings transferred into the High Court from the



County Court. The Divisional Court had adopted a different approach in *Brighton and Hove Bus and Coach Co Ltd v Brooks* but the simplified approach avoiding referral to the Divisional Court was in the view of the Court of Appeal, more in keeping with the overriding objectives of the CPR being quicker, cheaper and having less impact on court resources.

Comment: This decision will be welcomed by insurers and other compensators who

wish to take action against fraudsters. It will make committal for contempt in respect of false statements much quicker and cheaper and may improve the chances of success as the judge who will hear the contempt case will already be familiar with the facts of the original claim.

Completed 24 January 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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