
RPC

Legal review of the year

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EL/PL claims Portal

- Web-based claims handling system
- The new Portal went live on 31 July 2013
- Applies to claims up to £25,000
- Claims with a value over £25,000 continue to be handled in the normal way

Very limited time to investigate liability

Protocol

- The defendant must complete the ‘Response’ section of the Claim Notification Form and send it to the claimant
  - in the case of an Employers’ Liability claim, within 30 business days of the Claim Notification Form being sent (about 6 weeks)
  - in the case of a public liability claim, within 40 days of the Claim Notification Form being sent (about 8 weeks)

Claim leaves Portal if

- No response
- Late response
- No admission of liability
- Contributory negligence alleged

Claims Portal not used for some claims, including

- In the case of a disease claim, where there is more than one employer defendant
- Claims for clinical negligence
- Mesothelioma claims
- Claims where the claimant or defendant acts as personal representative of a deceased person

Portal Fixed costs

Claim value up to	£10,000	Value £10,000 to 25,000
Stage 1	£300	£300
Stage 2	£600	£1,300
Stage 3 (paper hearing)	£250	£250
(oral hearing)	£500	£500

Employers' Liability Non-Portal fixed costs settled pre-issue

Claim settled at £9,000

- Fixed costs £1,855 + 12.5% of damages over £5,000 = £2,355

  (£900 under Portal)

Claim settled at £20,000

- Fixed costs £2,500 + 10% of damages over £10,000 = £4,500

  (£1,600 under Portal)

Claimant strategy

- Exit Portal if possible

Defendant strategy

- Keep claim in Portal if possible
- Requires active Insured co operation

Law Society Gazette, July 8, 2013 (Online edition)

- Figures collected by Claims Portal Ltd show that 53,895 road traffic accident claims notification forms opened during May 2013
- The figure represents a fall of 31 per cent from April 2013 and a decrease of almost 25 per cent in comparison with the same month in 2012

Portal terms

- Authorised Users shall at their own cost provide Portal Co with such assistance as is reasonable to allow Portal Co to conduct user acceptance testing of changes to the Portal
- Users shall allow Portal co or its appointed agents access to any of Your premises, relevant records, personnel, equipment and systems (including Your System) as may be reasonably required
- Portal Co intends to apply a charge to be met by Authorised Users in consideration for their use of the Portal

Portal terms

Authorised Users agree to indemnify Portal Co against any losses, claims, liabilities in full and on demand against any and all reasonable costs, claims demands expenses liabilities, fees or losses or damage suffered of whatever nature arising out of or in connection with

- The misuse or loss by You of the Identification Details
- Abuse or misuse by You of the Portal in any form
- Any breach by You of these General Conditions of Use

Qualified one-way costs shifting

- Applies to claims with funding arrangements were created after 1 April 2013
- Applies to
  - Personal injury claims, including Clinical Negligence
  - Fatal accident claims
- The Government intends introducing this to all claims

Shifting costs…to the Defendant

The principle is

- Claimant wins - costs paid in the normal way
- Claimant loses - he does not have to pay the Defendant's costs
- Claimant wins but fails to beat a Part 36 settlement offer
  - Claimant pays Defendant's costs from expiry of offer
  - Payment limited to the damages he is awarded unless Court orders otherwise
- No recoverable success fee or ATE premium

Exceptions to normal rule

No permission needed to enforce costs orders where the claim has been struck out because

- There are no reasonable grounds for bringing the claim
- The claim is an abuse of the court's process
- The conduct of the claimant or representative is likely to obstruct the just disposal of the proceedings
- Success fee and ATE premium recoverable in Mesothelioma claims

Kerry Underwood has stated

"New CPR 44.13 to 44.17 set to be the most contentious legislation in funding and costs history"

Damages based agreements – likely to be avoided

International Energy Group Ltd v Zurich Insurance Plc UK Branch

Court of Appeal 6 February 2013

[2013] EWCA Civ 39

On appeal to the Court of Appeal

Held

- The trial judge had erred in holding that the House of Lords had created a new basis of liability in tort in mesothelioma cases
- The position was governed by the Supreme Court decision in *Durham v BAI (Run Off) Ltd* [2012] UKSC 14 which post-dated the decision of the judge in Guernsey.

In Durham the court had reviewed *Barker and Fairchild v Glenhaven Funeral Services Ltd (t/a GH Dovener & Son)* [2002] UKHL 22, [2003] 1 A.C. 32, and decided

- There was no new form of liability consisting of increasing the risk of mesothelioma by exposing someone to asbestos
- As a matter of causation, wrongful exposure to asbestos in the course of employment met the necessary causal requirement for the victim to be entitled to hold the employer responsible in law for his illness

- For the purpose of EL Insurance, liability for mesothelioma following upon exposure to asbestos created during an insurance period involved a sufficient causal link for the disease to be regarded as caused within the insurance period
- There was a sufficient causal link between the Claimant's exposure to asbestos during the years when IEG was insured by Zurich Insurance and his contraction of mesothelioma for IEG to be liable for causing his disease
- IEG had a contractual right of indemnity under the policy against that liability

- The Claimant's exposure to asbestos during the rest of his employment was a cause of the disease but was irrelevant to IEG's right to a full indemnity from Zurich Insurance
- Once exposure during any policy period met the causal requirement for the employer's liability to the victim for which the employer was potentially entitled to indemnity from the insurer, to withhold part of that indemnity from the employer on account of its conduct in other years would be to deprive the employer of insurance coverage for which it had paid. To regard an employer as self-insuring in respect of any period for which it was unable to find details of any coverage which might have been issued could itself produce injustice

Civil Procedure Rule changes on 1 April 2013

- Tighter court control of cases:
  - Costs budgets - *Mitchell v News Group Newspapers Ltd* [2013] EWHC 2179 (QB)

CPR Rule 3.14 - Failure to file a budget

- Unless the court otherwise orders, any party which fails to file a budget despite being required to do so will be treated as having filed a budget comprising the applicable court fees only

Service of evidence

Dass v Dass [2013] EWHC 2520 (QB) (8 July 2013)

New CPR 3.9 states

On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need

- For litigation to be conducted efficiently and at proportionate cost; and
- To enforce compliance with rules, practice directions and orders

Applications for disclosure of documents

Constantin Medien AG v Ecclestone and others [2013] EWHC 2519 (Ch) (24 July 2013)

Trend

Reversal of previous approach to forgive delay and non-compliance with Court Orders

The Enterprise and Regulatory Reform Act 2013

Comes into force on 1 October 2013. Law changed so that

- There is a reasonableness defence in the consideration of some health and safety cases
- Those who have taken all reasonable precautions cannot be liable for a technical breach of Regulations

Revised Section 47 Health and Safety at Work etc Act 1974

- Failure to comply with the relevant sections of the Health and Safety at Work etc Act 1974 (general duties owed by employers to employees and others) shall not confer a right of action in any civil proceedings
- Breach of a duty imposed by a statutory instrument containing health and safety regulations shall not be actionable except to the extent that regulations under this section so provide
- Regulations may be made which include provision for a defence to be available in any action for breach of duty

Hide v Steeplechase Co (Cheltenham) Limited & Other (2013) [2013] EWCA Civ 545

Provision and Use of Work Equipment Regulations 1998

Section 4 — Suitability of work equipment

- Every employer shall ensure that work equipment is so constructed or adapted as to be suitable for the purpose for which it is used or provided
- In selecting work equipment, every employer shall have regard to the working conditions and to the risks to the health and safety of persons which exist in the premises or undertaking in which that work equipment is to be used and any additional risk posed by the use of that work equipment
- Every employer shall ensure that work equipment is used only for operations for which, and under conditions for which, it is suitable
- In this regulation "*suitable*" means suitable in any respect which it is reasonably foreseeable will affect the health or safety of any person

Court of Appeal decision

- The European Directives from which the Provision and Use of Work Equipment Regulations derived did not define the word "*suitable*"
- However Regulation 4 of PUWER defined "*suitable*" as suitable in any respect which it is reasonably foreseeable will affect the health or safety of any person
- Regulation 4 of PUWER therefore introduced the concept of reasonable foreseeability which was not in the European Directives. It was therefore questionable whether the Regulations had correctly implemented the European Directives into English law

Court of Appeal decision

- However, the words "reasonably foreseeable" could be construed in a way which was consistent with the limited concept of foreseeability envisaged by art.5(4) of Directive 89/391. This meant that a Defendant had to prove that the accident was due to either
  - unforeseeable circumstances beyond his control; or
  - to exceptional events, the consequences of which were unavoidable despite the exercise of all due care on his part
- The trial judge was incorrect to import into regulation 4 the classic common law phrase of reasonable foreseeability. Whilst the Claimant's accident was not likely, it was possible, and in that sense foreseeable
- The Defendant could not show that the accident was due to unforeseeable circumstances beyond its control or to exceptional events, the consequences of which were unavoidable

Personal Protective Equipment Regulations 1992, Section 4

Chief Constable of Hampshire v Kerry Ann Taylor [2012] EWCA Civ
Court of Appeal 15 March 2012

Defence argument

- The judge was wrong to find that the 1992 Personal Protection Equipment Regulations applied to opening a window
- Even if the Regulations applied, the Claimant did not need gloves when dealing with the cannabis plants since at that point there was no risk from sharp edges
- The Claimant should have shown that she would have worn the gloves if they had been available, and there was no evidence to demonstrate that she would have done

Court of Appeal decision

- If risk more than de minimis, an employer had to provide suitable equipment
- There was a low but not de minimis level of risk in the cannabis factory generally. The employer had a duty under the 1992 Regulations to provide thick gloves to prevent against those risks
- The Claimant might have been required to do other work at the cannabis factory which could have involved contact with sharp edges. It was unrealistic to distinguish between those duties which placed the Claimant at risk from sharp edges and those which did not
- Once an employer was in breach of duty to provide equipment, the assumption was that the equipment would have been used unless the employer proved otherwise

Ayres v Odedra (2013)
QBD 18 January 2013

Q&A


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