

Morgan Cole



INSURANCE BULLETIN NOVEMBER 2005

Welcome to the November 2005 issue of Morgan Cole's E-bulletin Insurance update. We welcome your feedback on the form and content, and if you wish to discuss any of the issues that arise or make any suggestions, please contact Simon Cradick on 029 2038 5464 or at simon.cradick@morgan-cole.com

LIABILITY

The role of medical experts in HAVS claims

Whalley v Montracon Limited

CA [2005] EWCA Civ.1383

The Claimant alleged he had developed HAVS as a consequence of exposure to vibrating tools. The trial Judge found that, for at least five years from 1993, the Claimant had been exposed to vibration of at least 3.6 m/s^2 and the real issue was whether the Claimant did, in fact, have HAVS. His expert, Mr Morris-Jones, took a history that was consistent with HAVS and diagnosed a moderately severe HAVS. For the Defendant, Dr Cooke concluded that the Claimant's description of symptoms was inconsistent with the vascular component of HAVS. The Defendant alleged that the Claimant was lying about his symptoms. In giving evidence, the Claimant described his hands as going "blotchy" at the start of an attack. Upon hearing this, Mr Morris-Jones said that he had changed his opinion because a blotchy appearance was inconsistent with a diagnosis of HAVS. He signed a joint opinion with Dr Cooke stating that, in their view, the Claimant did not have HAVS and they were concerned about the apparent change in history given by the Claimant. The Defendant submitted that there was no case to answer but the Judge said that he was not bound to accept the evidence of the experts.

The Judge then held that the experts had misinterpreted the Claimant's evidence about his skin going "blotchy". He found that the reference to blotchiness was to the Claimant's hands immediately before the attack and not after it started. Hands could appear "blotchy" at any time. This appearance lasted moments only, as the Claimant had said that his hands "straightaway" turned white down to a line. A blotchy appearance after the attack had started would be inconsistency with the HAVS but this was not what the Claimant had described and the doctors had misinterpreted his evidence. The Judge found the Claimant to be a truthful and accurate witness and concluded that he did have HAVS.

The Defendant appealed on the grounds that: (1) It was not open to the Judge to reject the agreed medical evidence as to diagnosis, thereby usurping the position of the medical experts; (2) The experts had not misunderstood or misinterpreted the Claimant's evidence and had been quite aware of what he meant; and (3) The Judge had erred in recalling that the Claimant had said that his hands turned white "straightaway" after the blotchiness.

The CA held: (1) The Judge was not bound to accept the experts' opinion. All issues of credibility are for the Judge and if evidence is ambiguous it is for the Judge to decide upon the correct interpretation. (2) The Judge had been entitled to interpret the Claimant's evidence as he did and find that his reference to a blotchy appearance was not inconsistent with a diagnosis of HAVS. (3) Although the Judge had mis-recorded the Claimant's evidence, he had still been entitled to reach the decision that he had.

Moreover, even if the Judge had not been entitled to interpret the Claimant's evidence as he did, Smith LJ said that the appeal would still have been allowed. The

issue was whether the Claimant genuinely had the symptoms or was lying. The Judge had been satisfied that he was honest. Save for the reference to blotchiness, his description was entirely consistent with HAVS. She went on:

“Where the civil standard of proof applies, it is not necessary for every piece of the evidential jigsaw to fit. To require that is to apply too high a standard of proof”.

The case is another example of the Court emphasising that the Judge’s assessment of the Claimant is often more important than the expert evidence. In a case where the diagnosis depends on the Claimant’s evidential history rather than any diagnostic test, it is for the Judge not a medical expert to determine whether the Claimant is truthful. The Court declined to take a narrow view of interpretation of the evidence which might exclude claims where the symptoms do not fit exactly into the diagnostic pattern of HAVS but instead held that evidence should be looked at in the round. One is faced with the prospect that, where the Judge finds that the Claimant is an honest witness, he may well accept a diagnosis of HAVS even where the symptoms described are only approximately consistent. The decision will not make the task of identifying fraudulent HAVS claims any easier!

Time limits and breaches of claims co-operation clauses

Shinedean Ltd v. Alldown Demolition (London) Ltd and AXA Insurance UK plc [2005] EWHC 2319 (TCC)

The Claimant intended to carry out development of its premises and took out a PL and CAR policy with D2. D1 was sub-contracted to do demolition work and, on 25.04.02, its actions caused the partial demolition of a wall on a neighbouring property. D2 was notified of the claim and instructed Mr Fox of Cunningham Lindsey to investigate. Following a meeting on 30.04.02, Mr Clarke of D1 agreed to supply Mr Fox with all the relevant documentation. Despite repeated requests, the Judge found that the documentation was not supplied in its entirety until the end of 2004 or early 2005. In the meantime, D1 went into liquidation on 02.09.02. On 05.06.03, D2 notified D1 that it declined to grant an indemnity on the ground that it had failed to provide information and assistance in accordance with policy conditions. The Claimant settled a claim from its neighbours for £110,000 and pursued D1 for indemnity for that and its own losses. A claim was subsequently made against D2 under the Third Party (Rights Against Insurers) Act 1930.

D2 argued that it was a condition precedent of its policy that D1 should supply *“all such proofs and information relating to the claim as may be reasonably required”* and also that it should *“give all information and assistance [D2] may require”*.

Judge Havery QC held: (1) Compliance with the claims co-operation clause was a condition precedent to D2’s liability. (2) In the absence of an express time limit, the policy must be interpreted as meaning that the Insured would do things by way of notification and co-operation within a reasonable time and *“...what is a reasonable time must be interpreted generously in favour of the Insured so far as it is reasonable to do so, rather than strictly, in favour of the Insurer”*. (3) Prejudice to the Insurer

was one of the tests for judging reasonableness. On the facts, D2 could not demonstrate any more than minor prejudice. (4) It followed that the documents had been delivered within a reasonable time and D1 was not in breach of a condition precedent, so D2 was not entitled to decline indemnity.

Despite the lengthy delay, the Judge was not prepared to find that there had been any substantive prejudice to D2. Ordinarily, the absence of prejudice will not assist an Insured which breaches a condition precedent. However, the absence of prejudice meant that D2 could not show that there had been a breach of condition precedent because there was no specific time limit for compliance with the co-operation clause. Underwriters may wish to take note.

Claimant proves existence of unidentifiable defect despite expert evidence

Hall v. Jacto Transport Limited [2005] EWCA Civ. 1327

The Claimant was injured when using a torque wrench which he alleged made a sudden movement causing him to break his leg. He said the malfunction must have been due to a defect which made the Defendant strictly liable under Reg. 5 PUWER 1998. The Defendant alleged that the accident was due either to operator error or to him misusing it by kicking it. There had been no prior problem with the wrench and, following the accident, no defect was found in it and it continued to be used for a further three years. The Claimant could not identify a defect but suggested that it could have been due to dust in the mechanism. An engineer was instructed as a single joint expert and he concluded that, if the wrench had behaved as the Claimant alleged, it must have been defective. He could not identify a defect but conceded that the presence of dust was a possible explanation, although not a "reasonable" one as the workshop was not dusty and such wrenches were commonly used in similar workshops without dust causing a problem. The Judge found that the Claimant was an honest and straightforward witness. He concluded that the accident had probably occurred as a result of a defect and then went on to consider the expert evidence which did not cause him to change his mind. The Defendant appealed on the basis that the expert evidence should have been considered before any finding of fact was made and that there was no evidence of an unexplained defect.

The CA held: The Judge had approached the evidence incorrectly and should have considered the expert's evidence when reaching his conclusions as to the credibility of witnesses and factual issues. However, Smith LJ reviewed the evidence and concluded that the accident was probably due to an unidentified defect, probably caused by dust or grit. Although the expert had said this was unlikely, she considered it more likely than the alternative theory of operator error, given the Judge's finding that the Claimant was honest and straightforward. Pill LJ expressed serious doubts as to whether the Claimant had established that there had been a defect in the tool but said that he had to respect the Judge's impression on credibility and he was thus not prepared to over-rule his finding.

One could see why the Defendant found it difficult to accept that a wrench which had never caused a problem previously, was found to be operating correctly afterwards and was used for some years without a problem, could

have had a one-off unidentifiable defect. The case is another example of the Court's reluctance to accept expert evidence if it contradicts the evidence of a Claimant found to be an honest and accurate historian.

Slipping on invisible material can give rise to liability!

Bassie v. Merseyside Fire & Civil Defence Authority
[2005] EWCA Civ. 1474

The Claimant fireman was injured during a fitness session in the Appliance Room. The Judge found that he slipped, suffering a serious knee injury. He was wearing suitable footwear and there was nothing wrong with the floor. Prior to the training session, it had been swept with a brush. A witness described testing the area after the accident with his foot and not finding it slippery although, when he felt by hand, he discovered a fine film of dust. The evidence was disputed but accepted by the Judge who found that the Claimant had slipped on an invisible layer of dust which put the employers in breach of Regs. 5(1) and 12(3) Workplace (Health, Safety and Welfare) Regs 1992 and also liable in negligence. The Defendant appealed.

The CA held: (1) The Judge had been entitled to find that the invisible layer of dust had caused the slip. Uncontaminated, the floor was safe and, if the Claimant slipped, something must have caused him to slip. (2) Although there was a system of cleaning in place, it would have been reasonably practicable to have damp-mopped the floor before commencing the training session, which would have removed the invisible layer of dust so there was a breach of statutory duty.

One can see why the Defendant appealed, given the finding that the Claimant slipped on something invisible! However, once the disputed issues of fact had been determined at first instance in favour of the Claimant, the Court of Appeal did not have any difficulty in finding reasons to reject the appeal. The presence of something that caused a slip and that could have been removed by a mop meant there must be a breach of Reg. 12.

Duty of care of driver approaching group of adults and children in the road

Goundry v Hepworth
CA 30.11.05

The four year old Claimant was one of a group of adults and children who had crossed to the middle of a single carriageway road, waiting for oncoming traffic to pass. A vehicle in front of the Defendant passed in front of the group as it waited. The Defendant approached at about 25 mph and hit the Claimant who suddenly ran forward as she drew level. The Trial Judge held that, although the group of pedestrians included adults, the Defendant should have slowed right down or stopped to let the group cross and her failure to do so was negligent. She appealed.

The CA allowed the appeal: The Judge's finding was based on the premise that the Defendant had a duty to stop and let the waiting group cross the road in front of her. That proposition was incorrect. On the evidence, the Defendant approached an

orderly group apparently waiting for her to pass and she was not negligent in continuing with her journey at an appropriate speed and with proper care.

PROCEDURE

Delivery of a Claim Form constitutes service unless expressed to the contrary

Asia Pacific (HK) Ltd v. Hanjin Shipping Co Ltd and MV Hanjin Pennsylvania [2005] EWHC 2443 (Comm)

The Defendant's solicitors sought confirmation that proceedings had been issued by the Claimant and said they had instructions to accept service. The Claimant's solicitors replied by fax and attached a copy of the Claim Form but the letter did not purport to serve it. After the 4 month period expired, the Defendant applied to strike out the claim on the basis that the Claim Form had never been served as service must involve the delivery of a document in such a way that it was apparent that it was delivered by way of service and not for information only. The Claimant argued that the absence of the words "by way of service" did not mean that the Claim Form had not been served and that it did not matter that there was no Response Pack attached.

C Clarke J. held: There had been good service. The Claim Form had been delivered by a permitted method of service. The Claimant did not state that it was provided for information only. When a Claim Form was delivered to the recipient by a method allowed for in CPR, it was deemed served unless it was made clear by the person delivering it that it was not, in fact, formally being served. The absence of the words "by way of service" did not demonstrate that service was not intended.

The important point to note is that the Claim Form was delivered in a manner permitted for service. If, for example, a copy is sent to an Insurer, it could not constitute service because service on an Insurer is not permitted in the absence of a specific direction.

Resiling from an incorrect admission of liability in a mesothelioma claim

Barnard v-Sappi Europe Ltd & Another [2005] EWHC 2169 (QB)

The Claimant was diagnosed with mesothelioma and, on 27.10.04, instructed solicitors to pursue a claim against his previous employers. He had worked at Star Paper Mills in the 1960s. The solicitors found the Defendant trading from the same address so wrote enquiring if it was the successor to the liabilities of the Claimant's employers. Other enquiries suggested possible identities for the employer including K Papers (Blackburn) Ltd, a dissolved company previously called Star Paper Mills Ltd. On receipt of the letter of claim, the Defendant instructed solicitors who made some enquiries and confirmed that the Defendant was still trading from the same premises along with Sappi (UK) Ltd. The Claimant's solicitors pursued the Sappi companies requiring disclosure of purchase documentation etc. On 8.2.05, Sappi's solicitors wrote to say "*We confirm that Sappi took over Star Paper Mill in or around 1990 and*

are indeed the correct Defendants in this case.” In a subsequent conversation, the solicitors confirmed that Sappi would be dealing with the claim. No point would be taken as to whether it should be Sappi Europe or Sappi (UK). On 26.4.05, proceedings were issued and on 31.5.05 a Defence was filed admitting that the Claimant had been “employed by the Defendant and/or their predecessors in title”. Not long afterwards, it was realised that the Defendant may well not have taken on the liability of the employers.

On 21.6.05, Directions were given for an expedited trial on liability on 25.7.05. There was then a change of solicitor and the Defendant applied to resile from the admission that it was the successor to the liabilities of the employers. The application was heard on 15.7.05, ten days before the trial date.

J. Hegarty QC held: On the available evidence, it was virtually certain that the Defendant would escape liability if the application was allowed because it was almost certainly not the successor to the liabilities of the employers. However, balanced against that was the fact that the Defendant was the author of the prejudice it would suffer. Given the Deceased’s illness and life expectancy, together with the proximity of trial, the balance of prejudice rested in favour of the Claimant. Had the admission not been made in February, the Claimant’s solicitors would have pursued other avenues and would probably have reached the same situation against the correct employer, very probably with an insurer identified. (It appeared that K Papers (Blackburn) Ltd was the correct employer and that it was insured by Equitas).

The case highlights the need to take care when making any admissions in claims of this nature. If it is not clear that one company is the successor to the liabilities of another, I recommend making no admission or maintaining a denial as the burden of proof rests with the Claimant. And remember that “TUPE transfers” did not exist before 1 May 1982. Sappi’s actions in looking to deal with the claim and investigate the insurance position were to be lauded given the absence of a liability but their actions did not sway the Court.

Claimant proves future loss of earnings despite expert evidence

Watt v Tucker

[2005] EWCA Civ.1420

The Claimant was a qualified optometrist aged 33 who suffered whiplash injuries in a road accident. She alleged that ongoing symptoms had caused her to change her method of work and restricted her working week from 4 days to 3 days. She instructed an orthopaedic surgeon who provided two medical reports which suggested that a significant factor in her ongoing symptoms was her underlying psychological state. Late in the day, the Defendant produced video evidence demonstrating an optometrist at work. He asked the orthopaedic surgeon, by then adopted as a single joint expert, whether from a clinical standpoint there was a reason why the Claimant could only work 3 days a week. He replied that, from an orthopaedic view point, he could see no reason why she should not have continued undertaking the work she was doing prior to the accident. The Defendant maintained that her decision to reduce to three days a week was purely personal and not a consequence of ongoing pain.

The Claimant applied to adjourn the trial date to enable the expert to be called to be cross-examined. The Defendant resisted the application, submitting that it was matter for the Trial Judge to determine whether the Claimant's decision was reasonable or not. At trial, though, the Defendant argued that the Judge was bound to accept the expert's evidence that the Claimant was medically fit to work the same hours as before the accident. However, the Judge was not prepared to place any reliance on the expert's replies to the Defendant's questions because the Court would not know what the evidence would have been had the expert been fully informed and tested in cross-examination. The Claimant was an impressive witness and he accepted her evidence, awarding future loss of earning of £287,648. The Defendant appealed.

The CA held: The expert's evidence was inconsistent and appeared to have changed. His reasoning was not entirely clear. Ultimately, the reason for the Claimant changing her working practice was a question of fact for the Court on the basis of all the evidence. The Judge had been entitled to find as he did. The Defendant had chosen to conduct his case without the expert being present so it was not open to him to argue that the Court was bound by the written evidence.

COSTS

A useful reminder of what costs can be recovered by litigants in person.

Sisu Capital Fund Ltd and Others v. Energy Holdings (No. 3) Ltd in Liquidation and Energy Group Overseas BV (in Administration)
[2005 EWHC 2321 (Ch)]

A litigant in person, even if a professional such as an accountant or solicitor, could not recover in respect of time incurred in relation to litigation apart from time spent on matters within his/her own professional expertise and requiring the attention of an expert.

Indemnity costs award in "hopeless" claim

Wates Construction Ltd v. HGP Greentree Allchurch Evans Ltd
[2005] EWHC 2174 (TCC)

The Claimant in Part 20 proceedings informed the Part 20 Defendant on the day of trial that it was discontinuing its claim and agreed to pay costs. The Defendant sought an order for indemnity costs on the basis that the claim had been hopeless and should not have been pursued.

Held: It should have been apparent that the claim was weak from the outset. However, after exchange of witness statements and especially after an agreement reached between experts, it should have been clear beyond doubt to the Part 20 Claimant that there was no case. The claim should have been discontinued at that point and from then on the Part 20 Claimant's conduct was so unreasonable as to justify an order for indemnity costs.

The case is a stark reminder of the dangers of pursuing speculative claims in the hope of extracting an offer of settlement. If a claim is doomed to failure, the Claimant is at risk of paying not only standard costs but indemnity costs.

MORGAN COLE OCCUPATIONAL DISEASE HANDBOOK

The Morgan Cole Occupational Disease Handbook has been revised and updated so as to cover developments in the last 12 months. Substantial additions have been made to the sections on asbestos, HAVS and stress in particular. It comprises the following sections:

- Stress at work claims
- Respiratory disease claims
- Asbestos disease claims
- NIHL claims
- Dermatitis claims
- VWF/HAWS claims
- ULD/"RSI"/Cumulative Trauma claims
- Appendices – Extracts from COSHH Regulations 2002 and Disease Pre-action Protocol

The revised Handbook is now available on line in PDF format free of charge. It can then be downloaded, printed and copied. If you would like an on-line version, please e-mail your request to Simon Cradick.