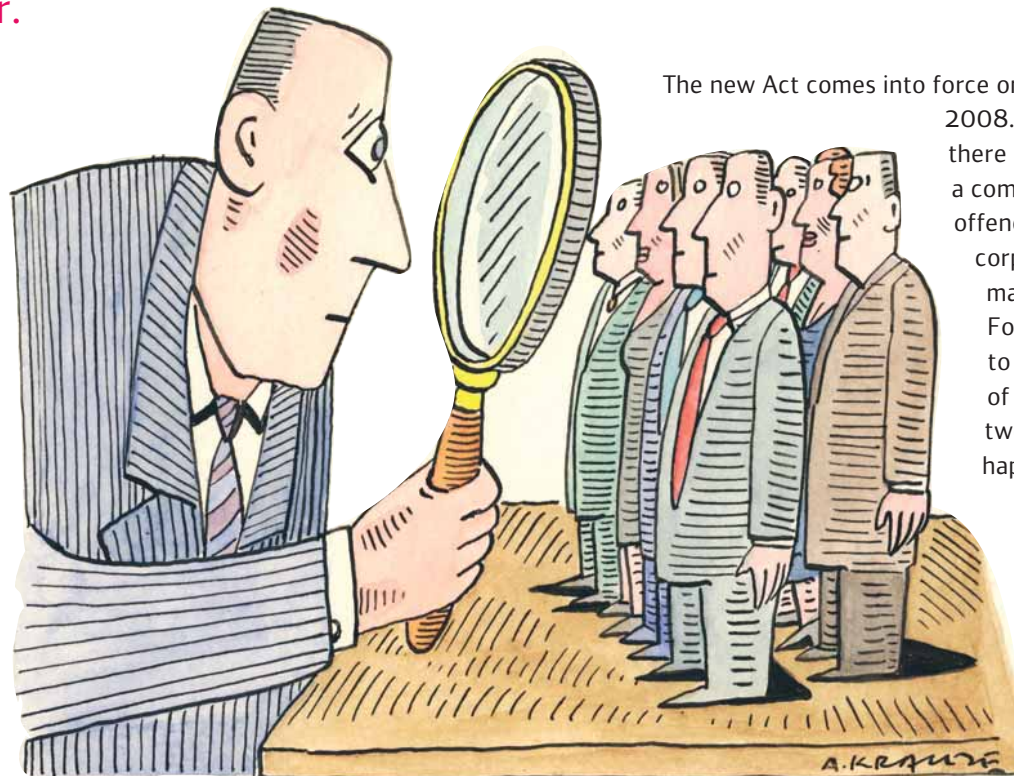


Corporate manslaughter

The new Corporate Manslaughter and Corporate Homicide Act 2007 comes into force in April this year.

The passing of the Corporate Manslaughter and Corporate Homicide Act 2007 – which introduces a statutory offence of “corporate manslaughter” (called corporate homicide in Scotland) – follows many years of promises by governments to reform the law of corporate manslaughter. It is important to emphasise that the Act is an offence-creating statute rather than a duty-setting one. The Act itself imposes no new health and safety obligations.



The new Act comes into force on 6 April 2008. Until now, there has only been a common law offence of corporate manslaughter. For a company to be convicted of that offence, two things must happen: an individual person has to be found guilty of gross

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The long awaited bill regulating the activities of direct offshore foreign insurers (DOFIs)

negligence manslaughter, and they must be so senior within the company that they represent its “directing mind”. This requirement is known as the identification principle.

The new offence

The Act is designed to make it easier to prosecute organisations where their gross negligence leads to death. As outlined above, under the outgoing law, a corporate body can only be prosecuted according to the identification principle. While efforts have been made to prosecute big companies under the outgoing law, all these attempts have failed.

The Corporate Manslaughter and Corporate Homicide Act abolishes the common law offence and replaces it with a statutory offence, creating a new framework for finding an organisation guilty of corporate manslaughter.

The wording of the offence is that an organisation will be guilty of an offence if the way in which its activities are managed or organised:

- causes a person’s death; and
- amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.

An organisation is only guilty if the way in which its activities are managed or organised by its senior management is a substantial element in the breach.

Organisations. Whereas the outgoing common law offence only applies to corporate bodies (which include NHS trusts and local authorities), the new offence will

apply to a much wider group of organisations, including corporations, specified government departments, police forces and partnerships.

Senior management. “Senior management” is defined as the persons who play significant roles in:

- the making of decisions about how the whole or a substantial part of the organisation’s activities are to be managed or organised; or
- the actual managing or organising of the whole or a substantial part of those activities.

The inclusion in the definition of a person “actually managing or organising...a

substantial part of those activities” is a major change. The definition is bound to catch a lower layer of management that, under the outgoing law, would not be classified as representing the directing mind. The other key point about the definition of “senior management” is that the new offence allows the prosecutor to aggregate the failures of a number of senior managers, rather than relying on the conduct of one single “directing mind”, as required by the identification principle.

These two points are the key changes from the old law and will undoubtedly increase the potential for the new offence to be investigated when it comes to medium-sized and bigger companies.

Gross breach. Under the new Act, there must be a gross breach of the duty of care. The requirement for a breach to be gross is a positive one, as it provides a jury with a reminder that the offence is reserved only for the most serious cases. Under the current law, “gross” is defined as requiring some form of wilful or bad conduct, rather than just making mistakes.

Penalties. The main sanction for a conviction of corporate manslaughter will be a potentially unlimited fine in the Crown Court, although perhaps the worst sanction that will apply is the stigma and reputational impact of being branded a “corporate killer”. There will also be the potential for remedial and publicity orders.

Directors’ duties

New guidance for health and safety leadership

In October last year, in advance of the Corporate Manslaughter and Corporate Homicide Act 2007 coming into force (see above), the Health and Safety Executive and the Institute of Directors published new guidance defining what private and public sector directors should do to lead and promote health and safety. This followed a lengthy period of research, debate and consultation.

The new guidance, entitled “Leading Health and Safety at Work”, comes against a backdrop of continued calls for stricter regulation of directors’ responsibilities when it comes to work-related safety. Workers’ organisations and groups representing victims have been particularly vociferous in asking for tougher rules. However, the guidance remains “voluntary” in nature.

It supersedes previous HSE guidance, published in 2001, and aims to clarify and further define directors’ duties. Research conducted on the HSE’s behalf between 2001 and 2005 concluded that, during that period, the percentage of organisations with directors with health and safety responsibility increased from 60 to 80. The research also concluded that the 2001 guidance played an important role in improving health and

safety; there was an ever-increasing awareness of it; and it was seen as one of the main factors in organisations’ decisions on safety direction. The decision to revamp the 2001 guidance – rather than to press government for new or amended legislation to codify directors’ safety duties – can largely be put down to the perceived impact of the 2001 guidance.

At its heart, the new publication has what is described as “a four-point agenda for embedding the essential health and safety principles”. Under the headings of “Plan”, “Deliver”, “Monitor” and “Review”, these include core actions, good practice guidelines and case studies.

The core actions are formulated so that they tie in directly with organisation’s legal duties and, in effect, set a standard. Although the core actions (like the new guidance) do not have the force of law, they are likely to underpin important elements of the authorities’ investigation of industrial incidents where senior management is implicated. It is also probable that, when considering the liability of defendant organisations, juries hearing future prosecutions under the Corporate Manslaughter and Corporate Homicide Act will be directed to consider the new guidance and whether or not its principles have been met.

It is likely that fines for conviction will be set at a very high level. A recent paper has suggested that fines for big companies could be many hundreds of millions of pounds.

Who will investigate? The police will be the sole investigators. The HSE may well be asked to assist but it will not be a prosecuting authority for corporate manslaughter.

Individual liability. The Act imposes no new liability on individuals. The enforcing authorities can still prosecute senior managers and directors under existing laws, including individual gross negligence manslaughter or health and safety offences.

Conclusion

The new offence creates a completely new framework for the prosecution of corporate manslaughter. It also has the potential to increase significantly the criminal liability of companies for manslaughter in cases where there have been serious failures, since it will no longer be necessary to convict one individual alone. The aggregated failures of a number of senior managers, who form the senior management, will be sufficient.

In addition, the second part of the definition of senior management will catch people lower down the management chain than those regarded as the “directing mind” under the outgoing law. As a result, the prosecuting authorities will look at a much bigger slice of the workforce when considering whether the offence has been committed. Having said that, the new offence has a number of safeguards that are designed to restrict its use to cover the worst cases only.

It seems likely, however, that more investigations and prosecutions for corporate manslaughter will result than under the outgoing law, where it has been rare. Although there may not be a flood of cases, one can envisage that some of the more serious incidents that may once have been subject to investigations only under the health and safety at work legislation will now be subject to police investigation. This will affect both organisations under investigation and insurers, who may be required to fund defence costs where relevant policies respond.

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When setting reserves

Insurers need to know if a legal action involves a claim for compound interest.

In *Sempra Metals Ltd v IRC* [2007] UKHL 34, the House of Lords concluded that the time has come to recognise the court’s jurisdiction to award a claimant compound interest for the restitution of money paid as a result of a mistake. Significantly, the court has jurisdiction to award interest, both simple and compound, as damages on claims for non-payment of debts as well as on claims for breach of contract and tort. The impact of this landmark judgment is likely to be far-reaching and felt by insurers when setting case reserves.

The Sempra case

Sempra, a UK subsidiary of a German parent company, was part of a group action to recover advance corporation tax paid to the Revenue prematurely by mistake. The tax had been paid according to UK legislation, which was contrary to EC law, and Sempra’s claim was for the time value of the money paid to the Revenue, to the extent the Revenue had been unjustly enriched.

The Revenue had enjoyed the benefit of this windfall for several years (in some instances, up to 10 years) and did not dispute its liability to pay interest on the premature payments. It did, however, dispute the method of calculation. The real battleground over how much interest should be paid and how it should be calculated came down to whether simple or compound interest applied.

Although compound interest is the norm in the commercial world, the Revenue argued that simple interest would be an effective legal remedy. The court disagreed. It said that the rule which had previously prevented claimants recovering interest on a compound basis in circumstances such as this did not reflect current commercial practice. Lord Nicholls said:

“We live in a world where interest payments for the use of money are calculated on a compound basis. Money is not available commercially on simple interest terms. This is the daily experience of everyone, whether borrowing money on overdrafts or credit

cards or mortgages or shopping around for the best rates when depositing savings with banks or building societies. If the law is to achieve a fair and just outcome when assessing financial loss, it must recognise and give effect to this reality.”

Why the difference matters

Does it really matter to insurers whether they are liable to pay interest on a simple or compound basis? The difference between calculating interest on a compound basis as opposed to a simple basis is illustrated below:

Example A – Simple interest at 8% on £50m over five years. The interest amounts to £20m, giving a grand total of £70m

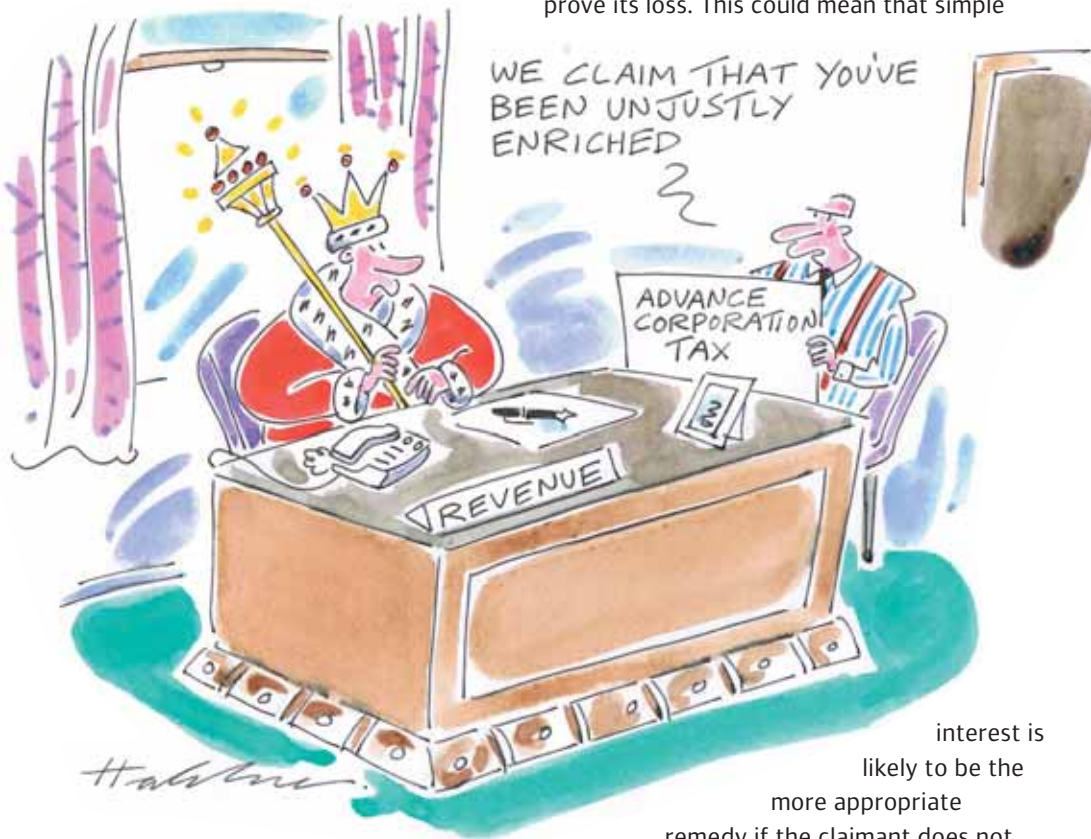
Example B – Compound interest at 8% on £50m over five years. Instead of a straight increase of £4m interest per annum, the interest accrues approximately:

Year 1	£4m
Year 2	£4.32m
Year 3	£4.66m
Year 4	£5.04m
Year 5	£5.44m

This gives a total interest figure of £23.46m and a grand total of £73.46m, an increase of £3.46m over the simple interest calculation. The longer the period involved, the more advantageous compound interest will be for the claimant and the more disadvantageous for insurers. Insurers may therefore find it necessary to increase reserves on current claims as claimants now look for compound rather than simple interest.

The loss suffered

The rate of interest claimed may also vary, as it is open to claimants to plead and prove actual interest losses caused by late payment of a debt. These losses would be recoverable, subject to the principles governing all claims for



damages for breach of contract, such as remoteness and failure to mitigate.

As the court explained in *Sempra*, the loss may, for example, be the loss of an opportunity to invest the promised money or the ordinary commercial cost of borrowing money. In the second case, that cost may include having to pay interest on a compound

basis when borrowing funds. If so, the claimant will seek to recover on the same basis.

Each case will depend on its own facts and the court will not assume that delay in the payment of a debt will, of itself, cause damage; in each case the claimant must prove its loss. This could mean that simple

expensive in the long run. Insurers might therefore need to review whether any claim is made for compound interest and to reserve appropriately.

interest is likely to be the more appropriate remedy if the claimant does not have to borrow money to replace the debt or if the interest period is short.

Possibly expensive outcome

It remains to be seen exactly what the implications are for insurers following this decision. But if the claimant can prove and compound its lost interest claim, the outcome for insurers could prove more

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Tour operators' duty of care

A recent Court of Appeal decision is good news for tour operators facing lawsuits from holidaymakers.

In the landmark *James Evans v Kosmar Villa Holidays plc* (23 October 2007) case, the Court of Appeal has finally defined the extent of a tour operator's duty of care and the status of the Federation of Tour Operators' (FTO) health and safety guidelines.

Background

In August 2002, Mr Evans (who was just short of his 18th birthday) was holidaying with a group of friends in Kavos, Corfu, booked through Kosmar Villa Holidays plc (Kosmar). On the fifth day of his holiday, in the early hours of the morning, he dived into the shallow end of the pool and hit his head on the bottom, sustaining serious injuries that resulted in incomplete tetraplegia. He brought a claim for personal injuries against Kosmar, who, at trial, was found liable, subject to a finding of 50% contributory negligence. Kosmar appealed.

Basis of the claim

The claim was based on three implied terms. The first was that the facilities at the apartments – in particular, the swimming pool and its surroundings – would comply with local regulations and safety standards applicable in Corfu in 2002. In the event, the apartments and the swimming pool did hold the necessary operating licence from the

Greek tourist authorities. The Court of Appeal nevertheless considered and reaffirmed the principle laid down in *Wilson v Best Travel Ltd* (1993) that the standard to be applied to a hotel abroad is that a hotel (or an apartment) must comply with local safety regulations rather than British safety standards.

“In my view...the [FTO] handbook is referred to correctly as guidance. It is advisory in character and has no legal force. It does not lay down standards with which Kosmar is required to comply.”

The second implied term was that the facilities at the apartments would be of a reasonable standard, in accordance with the recommended minimum standards laid down by the FTO. These standards are often relied on by claimants and it was argued before the Court of Appeal that they lay down internationally recognised and uniform standards. Lord Justice Richards was having none of it, however. “In my view,” he said, “the [FTO] handbook is referred to correctly as guidance. It is advisory in character and has no legal force. It does not lay down standards with which Kosmar is required to comply.”

The case therefore came down to the court's interpretation of the third implied term – that reasonable skill and care would be exercised in the provision of the facilities and services at the apartment complex and, in particular, at the swimming pool and its surrounding area. Both parties accepted that there was such an implied term. The dispute was over the scope of the duty of care and whether, in these particular circumstances, Kosmar was in breach of that duty.

Kosmar's duty

At trial and before the Court of Appeal, Kosmar argued that it had no duty to guard against the risk that diving into shallow water (or into water of unknown depth) may cause injury. That risk was obvious to an ordinary able-bodied adult such as Mr Evans and, on his own evidence, he knew of that risk and was able to assess it for himself. He took a deliberate decision to dive into the swimming pool in the early hours of the morning when the pool lighting was off; and Kosmar had no duty to warn him against doing that or to take other measures to stop him from doing it.

Kosmar said that its duty should be assessed in line with the approach adopted by the House of Lords in *Tomlinson v Congleton Borough Council* (2004). This case concerned a claimant who had broken his neck diving into a shallow lake, despite the presence of

prominent warning notices. Mr Tomlinson based his claim on a breach of the duty of care owed to him as a trespasser under section 1 of the Occupiers' Liability Act 1984.

In rejecting the claim, Lord Hoffmann considered what the position would have been if the claimant had been a lawful visitor owed the common duty of care under section 2(2) of the Occupiers' Liability Act 1957. In such circumstances, there is “a duty to take such care as, in all the circumstances of the case, is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there”.

When assessing whether that duty has been discharged, an important consideration is the issue of free will and whether people should accept responsibility for risks they choose to run. In *Tomlinson*, the claimant was freely and voluntarily undertaking an activity which inherently involved some risk. In the court's view, the defendant local authority owed no duty under the 1957 Act requiring it to take any steps to prevent the claimant from diving or warning him against dangers which were perfectly obvious.

The Court of Appeal in *James Evans* also looked at the earlier *Ratcliff v McConnell* (1999) decision, which concerned a claim by a

trespasser who had dived into a closed swimming pool at night. Giving the main judgment in *Ratcliff*, Lord Justice Stuart-Smith pointed out that the danger of someone diving into a pool where there was insufficient water to accommodate the dive was a danger that was common to all swimming pools. There is no uniformity of shape, size or configuration of swimming pools. The danger is obvious to any adult and indeed to most children who are old enough to have learnt to dive. He continued “...even in the case of a lawful visitor there is no duty to warn of a danger that is apparent...”

Tort and contract

This line of authority was put before the trial judge, who rejected it on the basis that they were all cases in tort, under the Occupiers’ Liability Act, whereas Mr Evans’s claim was in contract and for breach of statutory duty. Lord Justice Richards said that this was the fundamental issue in the case. The key question was whether the conclusion reached in *Tomlinson and Ratcliff* that people should accept responsibility for the risks they choose to run – and that there should be no duty to protect them against obvious risks – could be applied to a case where there was a contract between a holidaymaker and a tour operator. Lord Justice Richards thought that it could.

Following this line, he said: “Kosmar’s duty of care did not extend... to a duty to guard the claimant against the risk of diving into the pool and injuring himself. That was an obvious risk, of which he was well aware. Although just under 18 years of age, he was of full capacity and was able to make a genuine and informed choice. He was not even seriously affected by drink.”

Accordingly, “there was no duty to give the claimant any warning about the risk of diving into the pool, let alone to have better placed or more prominent signs than those actually displayed, or to take any other step to prevent or deter him from using the pool or from diving into it. [His dive] and its terrible consequence are matters for which he must take full personal responsibility.”

if “no diving” signs of the kind that were put up after the accident had been present at the time of the accident, I think it improbable that they would have made any difference.

Causation

Although this was enough to allow the appeal, the court went on to consider the trial judge’s findings on causation, which caused them considerable concern. The trial judge had decided that causation was established on the basis that the claimant had acted in a brief state of inadvertence, and that better placed and more prominent warning signs would have brought him to his senses before he actually dived in. In arriving at this decision, the judge may have been swayed by photographs of signage put up after Mr Evans’s accident.

Lord Justice Richards noted that, on his own evidence, Mr Evans had not previously seen or taken in (even in daytime) anything that indicated the existence of the pool’s shallow end. In particular, he had not seen the steps that were close to the point from which he dived in, and the accident occurred in the

hours of darkness when the pool itself was unlit. Lord Justice Richards continued:

“In all the circumstances, if “no diving” signs of the kind that were put up after the accident had been present at the time of the accident, I think it improbable that they would have made any difference: it is unlikely that the claimant would have seen them or taken them in, nor would they have operated to bring him to his senses and prevent the accident... It is also unlikely that additional signage would have stopped other people from using the pool and diving in, or therefore from setting the example which the claimant said he followed.”

In these circumstances, the court decided that – even if a breach of duty had been established (which it had not been) – the claim would still fail for lack of causation.

Need for caution

This is a significant victory for tour operators who, for many years, have been faced with claims from holidaymakers who have thought that the mere fact of travelling abroad in some way allows them to abrogate responsibility for their own actions to the holiday company.

It may also persuade claimant’s solicitors and defence costs insurers to tread more carefully in future. In particular, they may want to be cautious about pursuing claims on behalf of severely injured holidaymakers in the hope that the potential sums involved will persuade the tour operators’ insurers to compromise the claim, thus allowing them to recover their fees at an enhanced rate under the provisions of a conditional fee agreement.

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Courts and cars

Defendant insurers are having a hard time when it comes to vehicle hire claims.

The courts are making it increasingly difficult for insurers to defend (or reduce) claims for the hire of a replacement vehicle following a road traffic accident. While the amount of money involved in individual cases may be relatively small, the cumulative effect of these judicial decisions is having a significant impact on insurers and the approach taken when settling such cases.

Key questions

There are several questions that the courts have had to tackle. The first relates to how you quantify the hire claim. In a straightforward case, an innocent claimant will recover the costs of repairing their vehicle, plus damages to compensate them for not being able to use their vehicle while it is off the road. Here, damages are generally quantified by looking at the reasonable costs of providing the claimant with a suitable replacement.

Things become more complicated, however, once credit hire companies become involved. The courts have dealt with many of the issues in the cases of *Dimond v Lovell* [2002] 1 AR 384, *Burdis v Livsey* [2003] QB 36 and *Lagden v O'Connor* [2004] 1 AC 1067. These decisions have ended the arguments advanced by defendant insurers with regard

to credit hire rates being higher than spot rates and the enforceability of [credit hire] contracts under the Consumer Credit Act 1974. The general conclusion is that if a claimant is impecunious and cannot afford the costs of hiring a replacement vehicle upfront, they are entitled to use a credit hire company, even though higher rates will be charged.

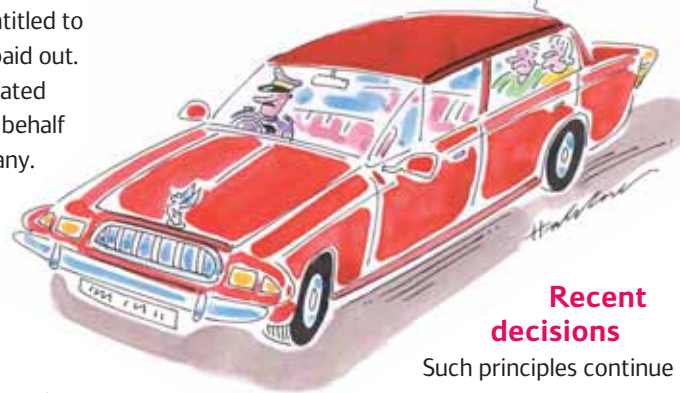
What is recoverable?

Recent discussions have focused particularly on what is actually recoverable by the claimant. Insurers have tried to argue that a claimant should only be entitled to recover what has actually been paid out. Most hire claims are now subrogated claims, brought by a claimant on behalf of their insurer or the hire company. The claimant will not have paid the charges out of their own pocket. So there is a question about the appropriate level of damages.

This was considered in *Lagden v O'Connor* and, more recently, in *Bee v Jenson* [2007] EWCA Civ 923. The hire claim can be looked on as either a claim for general damages – in which case “a fair approach to quantum would be to award a sum based upon the spot hire charge for a comparable vehicle” – or, alternatively, as one for special damages, based on the actual cost of hire.

It seems therefore that the only line of attack open to defendant insurers relates to mitigation of loss and the extent to which delays in repairs and the subsequent increase in hire period can be said to be the claimant’s responsibility. Again, the law is heavily weighted in favour of the claimant. *Mattocks v Mann* [1993] RTR 13 and *Burdis v Livsey* both ruled that the defendant must show a specific failure by the claimant to mitigate their loss, as opposed to any delays caused by (for instance) the claimant’s insurers.

ARE YOU SURE THIS IS AN APPROPRIATE REPLACEMENT CAR FOR OUR MINI?



Recent decisions

Such principles continue to be applied in the county courts and it is only a matter of time before they are considered by the higher courts. Recently, in *Brain v Yorkshire Rider Ltd* (Leeds County Court), the critical issue was the type of vehicle that the claimant was entitled to hire. The judge said that there was “no principle which requires a claimant to put up with a car that is of a different and less expensive type”. It

was up to the defendant to show that the claimant had not mitigated their loss.

By contrast, in *Evans v TNT Logistics Ltd* (Pontypridd County Court), the court considered the position when a claimant is offered a hire vehicle by a defendant insurer, but decides to proceed with their own hire vehicle through a third party company. The correct test was whether the claimant had acted reasonably. On appeal, it was decided that the fact that the hire car from the third party cost far more than the hire vehicle offered by the defendant insurer did not mean that the claimant could not recover any damages. The claimant was entitled to make the choice that he had made, but the defendant was only liable for the costs that they would have incurred if the claimant had accepted their original (and reasonable) offer.

The cumulative effect of all of these decisions is to limit severely the options open to insurers when it comes to reducing or limiting the hire claims made against them.

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Dealing with product liability

A look at the General Product Safety Regulations 2005 two years on.

The largest drug recall in history took place in September 2004, when Merck voluntarily withdrew its painkiller VIOXX, after it became aware that its users were at risk of heart attacks, strokes and adverse skin reactions. There were approximately 20 million users in the US alone. In November 2007, Merck agreed to pay \$4.85bn (£2.4bn) to settle the bulk of lawsuits arising from injuries allegedly caused by VIOXX.

Against the background of this headline case and other significant product liability settlements, this article provides a brief overview of the General Product Safety Regulations 2005 (the GPSRs) and examines their impact (particularly on insurers) since their introduction in October 2005.

Scope of GPSRs

The GPSRs cover all new and (with some reservations) second-hand products used by consumers, whether intended for them or not. They also apply to all UK suppliers of products used by consumers, whether intended for them or not and whether the goods were intended for use in the UK or another member state.

“Products” are all goods that are or could be placed on the market, or supplied or made

available during a hire period or in the course of providing a service to consumers for their private use. So, for example, products such as nursery goods, gym equipment and machinery are caught by the regulations. Products that pass from professional use through to consumer use (known as “migrating products”) are also covered. This would include, for instance, DIY power tools that were originally designed for professional use but which have subsequently made their way into the consumer market.

Safety requirement

The GPSRs require products to be “safe”. Under the regulations, a “safe product” is one that:

- (1) under normal or reasonably foreseeable conditions of use, presents no risk or only the minimum risk compatible with the product’s use; and
- (2) is consistent with a high level of protection for consumers.

This is a stringent test and sets a very low hurdle for anyone thinking of pursuing a claim.

Duties

Under the GPSRs, producers and distributors have several obligations. These are designed to ensure the safety of their products and to improve the traceability of goods if things go wrong.

As well as their primary duty to put only safe products on the market, producers are also required to provide relevant information and warnings to enable consumers to assess the inherent risks in a product throughout the normal (or foreseeable) period of its use.

Notification obligations

One of the most fundamental changes introduced by the GPSRs is the obligation on producers and distributors to notify the local authority immediately they become aware that they have put an unsafe product on the market.

This is the first time in the UK that such an obligation has been imposed on producers and distributors of consumer products.



Penalties

A producer or distributor convicted in the crown court of breaching either the general safety requirement or a safety notice faces a maximum penalty of £20,000 and/or imprisonment for up to 12 months. For other offences, the maximum penalty is a £5,000 fine and /or imprisonment for three months.

Impact of the GPSRs

The GPSRs have led to a huge rise in the number of product recalls being notified. In turn, there has been a notable increase in the need for recall insurance. The enforcement authorities now also have greater powers to control product safety. So producers, distributors and their insurers cannot afford to be complacent about product safety and need to have comprehensive risk management procedures in place.

Practical steps

It is essential for both producers and distributors to establish systems for assessing product risk effectively and to take appropriate steps to ensure that an unsafe product is discovered. In particular, they need to review internal management structures, market/product research procedures, sales and distribution agreements and quality control systems. Insurers should check that their insured producers and distributors have done this adequately.

Considerations for insurers

Given the increased number of product recalls and (in the aftermath of the VIOXX case) potentially very high-value claims, companies will want their product liability policies to address some of the likely costs. A speedy re-evaluation of contract wording and premiums

would therefore be prudent. For example, the risk attached to a products liability policy will necessarily depend upon how well-prepared the company is for a product recall and upon its ability to reduce the commercial impact of such a recall. If the company has a recovery plan and/or quality control system in place, it will find it easier to minimise the effect of a widescale product defect.

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A question of harassment

Anxiety claims under the 1997 Act may drop following a recent Court of Appeal decision.

Following the House of Lords 2006 decision in *Marjorowski v Guy's & St Thomas' NHS Trust*, many claimants saw the Protection from Harassment Act 1997 as an easier way of making stress-related claims than under common law. In *Marjorowski*, the law lords ruled that employers could be held vicariously liable for acts of their employees that breached the 1997 Act. Since then, insurers have had to deal with an increased number of employers' liability (EL) claims based on anxiety caused by harassment.

Until the introduction of the Act, employees suffering pressure at work had to establish injury or a recognised psychiatric illness that was a reasonably foreseeable consequence of their employment. This was difficult to establish and the appellate courts were careful not to open the floodgates to a rush of claims.

The 1997 Act

However, under section 3 of the Protection from Harassment Act 1997, damages can be

awarded for anxiety or other conditions falling short of a recognised psychiatric disorder. Further, a claimant does not have to prove reasonable foreseeability, which (as mentioned earlier) was often the main hurdle for claimants in common law stress-related cases. The Act also allows a six-year limitation period, which makes it harder for defendants to obtain evidence to rebut the claimant's case.

In order to succeed under the Act, a claimant has to prove a course of conduct by a person that amounts to harassment – in this context, a “course of conduct” must involve conduct on at least two occasions – and which the perpetrator knows (or ought to know) amounts to harassment. The question of whether the perpetrator ought to know that their conduct amounts to harassment will be judged according to whether a reasonable person in possession of the same information would think that it constituted harassment.

The term “conduct” includes speech; and “harassment” includes alarming a person or

causing them distress. In order to establish vicarious liability, the conduct must arise during the course of employment.

So the scope of the Act is wide but, unlike its common law counterpart, a statutory claim for harassment does require conduct intended to cause alarm or distress. This concept does not fit easily within liability policies, and is closer to conduct normally associated with disciplinary or employment tribunals than with the civil courts.

Mr Marjorowski's success

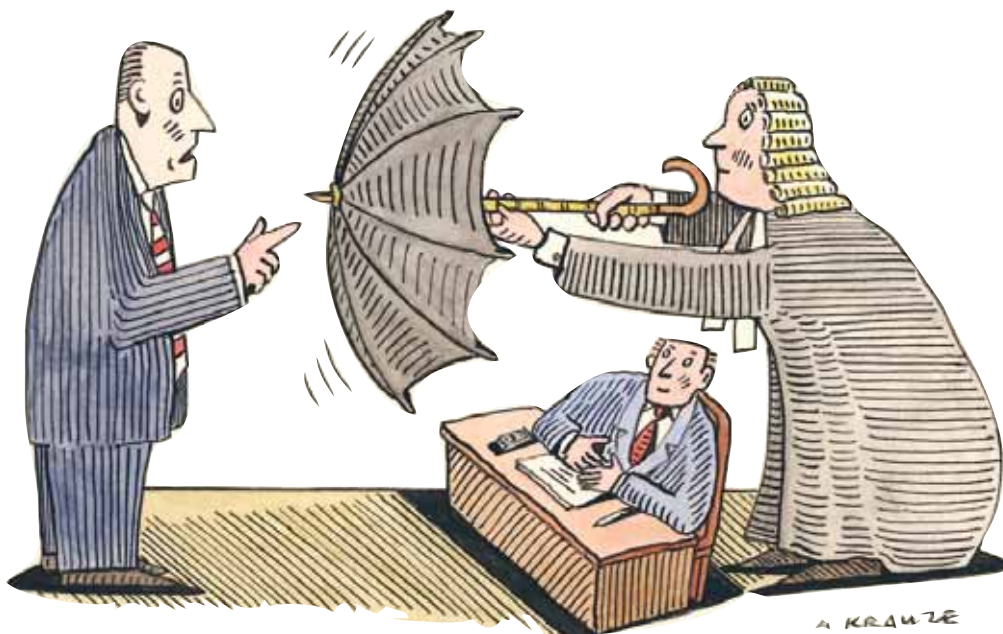
Mr Marjorowski successfully alleged harassment in the course of his employment. The facts of the case were typical of many stress-related claims. Mr Marjorowski's departmental manager was extremely critical of his timekeeping and work, set him unrealistic targets and was abusive to him in front of other staff. Following Mr Marjorowski's success, many claimants felt encouraged to follow suit and have tried to recover damages under the Act for anxiety inflicted by overzealous management.

The Conn case

Fortunately, the Court of Appeal in *Conn v Sunderland City Council* (7 November 2007) has now made it clear that the misconduct must be sufficiently serious to justify a criminal conviction under section 2 of the Act.

In *Conn*, the claimant alleged that his foreman had bullied him on five separate occasions. At first instance, the county court judge found for Mr Conn, who (the judge concluded) proved that, on two of those five occasions, the manager had indulged in an unacceptable course of conduct as covered by the 1997 Act.

On the first of these occasions, the foreman had demanded information from three of his subordinates (including Mr Conn) about who had been leaving work early. In the course of making this demand, the manager lost his temper, threatening to smash the window of a portakabin and report them all to the personnel department. On the second occasion, the foreman was incensed at being given the silent treatment by Mr Conn. He swore at Mr Conn, and threatened him with a hiding. Damages of £2,000 were awarded for such harassment.



The Court of Appeal overturned the trial judge's decision, dismissing the conduct complained of as simply "boorish and ill tempered". While the second incident could conceivably amount to qualifying conduct – being a direct threat of physical violence against the claimant – the initial incident fell

far short of the type of behaviour criminalised by the 1997 Act. Such conduct had to be "oppressive and unacceptable". Accordingly, Mr Conn had not established the course of conduct required by the Act.

Lord Justice Gage said: "The touchstone, as to whether the facts in a particular case crossed the boundary from the regrettable to the unacceptable, was to ask whether the gravity of the misconduct was of an order which would sustain criminal liability under section 2."

Michael Porter QC, counsel for the successful appellant, later commented: "This case will be particularly useful to those who are called upon to defend actions brought under the Protection from Harassment Act. The requirement of criminality is re-emphasised in strident terms. This is not an easy cause of

action to tag onto a stress at work case, to fall back on in the event that anxiety, but not recognised psychiatric injury, can be proved".

The future

Looking ahead, it is to be hoped that, as a result of the Court of Appeal's decision in *Conn*, the number of anxiety claims faced by insurers under the 1997 Act drops sharply.

However, it is still important for insurers to examine their insurance policies to see whether or not anxiety claims fall within the scope of the standard EL policy. Where the policy defines "injury" as meaning either bodily injury or mental injury, anxiety would not fall within this definition unless it had advanced to such a level as to be classified as a mental illness or psychiatric disorder.

However, if (despite *Conn*) anxiety claims do become commonplace, insurers may face pressure to extend the definition to cover conditions falling short of a recognised psychiatric disorder. Alternatively, the insured could be required to take out more specific cover against harassment by its officers.

For the time being at least, though, it would seem that *Conn* has shut the floodgates on a rush of anxiety/stress claims founded on the 1997 Act.

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Direct offshore foreign insurers

The long awaited bill regulating the activities of direct offshore foreign insurers (DOFIs) has recently been released (Financial Sector Legislation Amendment (Discretionary Mutual Funds and Direct Offshore Foreign Insurers) Bill 2007).

This follows the announcement on 3 May 2007 by the Minister for Revenue and Assistant Treasurer of various measures to enhance the integrity of the Australian insurance market. These relate principally to DOFIs and discretionary mutual funds.

These important measures continue to generate much debate in Australia. This has been ongoing since the release of the Potts report in May 2004, a response to the HIH Royal Commission's observations on DOFIs for the protection of less sophisticated purchasers of insurance from these types of insurers.

Scope of the proposals

The intention of the bill is to subject DOFIs to prudential regulation in Australia through amendments to the Insurance Act 1973 (Cth). This will be achieved by extending the current definition of "carrying on insurance" so that it captures anyone carrying on insurance both directly or through the actions of another. Marketing activities and advertising activities will be considered insurance business for the purposes of the Act if they have (or are likely to have) an effect in Australia.

The bill will cover captive insurers, who, it was thought, might be subject to a specific exemption. It will capture DOFIs, their direct and indirect onshore agents, direct and indirect brokers of DOFIs, and brokers' agents.



The Bill bans financial services licensees and their authorised representatives from dealing in general insurance products unless it is through a general insurer or a Lloyd's underwriter within the meaning of the Insurance Act 1973 (Cth). There is scope for an exemption for a person authorised under the Act by the Australian Prudential Regulatory Authority.

In September 2007, the Treasury published an exemption discussion paper. This proposed three exemptions from the requirement that a DOFI should be authorised under the Act. The proposed exemptions are:

- High-value insureds;
- Atypical risks exemption; and
- Customised exemption

High value insureds

This exemption will apply to DOFIs providing insurance products to Australia's largest publicly listed and private businesses.

The test for whether an insured is "high value" will require an insured to have:

- a consolidated gross operating revenue for it and the entities it controls of \$200m or more for the financial year; or
- consolidated gross assets for it and the entities it controls of \$200m or more, as

- at the end of the financial year; or
- 300 or more employees at the end of the financial year.

Two alternative tests are also being considered: a premium-based test (an aggregate premium in excess of \$30,000 per annum) and an insurance-cover based test (insurance cover in excess of \$30m).

Atypical risks exemption

This exemption is for risks which cannot currently be placed as standalone insurance with authorised insurers.

Examples will include kidnap and ransom, malicious product tampering, commercial shipping hull, asbestos, nuclear, political environmental impairment and war.

Customised exemption

This exemption is for specific risks that authorised insurers may not be willing to insure and which do not fit within the first two exemptions afforded to entities on a case-by-case basis.

It is intended to deal with circumstances where, for example, authorised insurers refuse to renew insurance for a risk where a high-profile or expensive claim has resulted in the past; where the necessary terms and

conditions are not offered; or where there has been a significant increase in premium prices as a result of the hardening of the insurance cycle.

In conclusion

Comments have been sought by the Treasury in relation to the recently released discussion paper. There will be an accompanying change in the prudential framework imposing a different level of prudential stringency for insurers in a lower risk category. The idea is to recognise the differing risk profile of captive insurers that only insure the risks of their own corporate parent company or group, as compared to the risk profile of an open market insurer.

Discretionary mutual funds (DMFs) will not be subject to prudential regulation at this stage. A rigorous and compulsory data collection regime will be established to determine whether the regulation of DMFs is in fact warranted.

The amending legislation is expected to be enacted in 2008.

Sumiya Basha

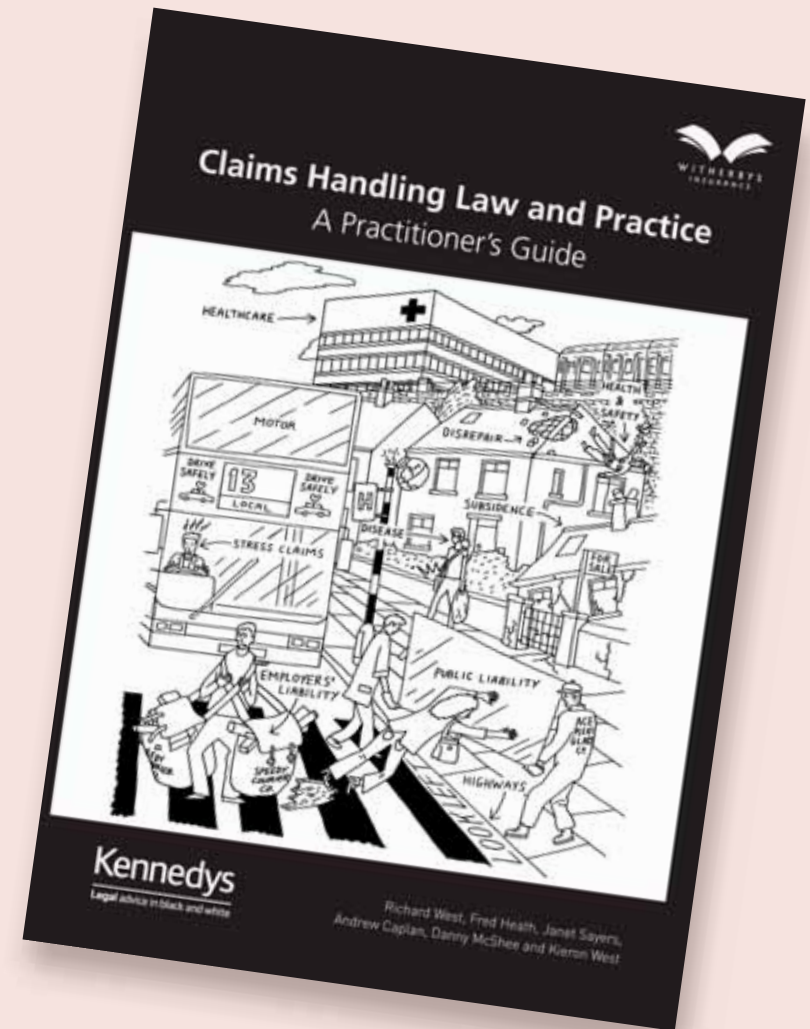
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