General Liability update

January 2017

Case Law update

The long arm of the law

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More pedestrian law – the obligations of occupiers is a balance between risk and cost

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Any comments or queries?

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Case Law update

The long arm of the law

The long-standing problem of establishing an Employers' Liability insurance history has been addressed by the establishment of the Employers Liability Tracing Office, which keeps a database of EL policies issued by Insurers. Insurers are obliged to provide updating information on an on-going basis.

Although the database is an essential component that allows the Claims Portal to work, it also allows Claimants to identify their previous employers' insurers when bringing a claim for injury arising from historic exposure to noise and vibration and dust, particularly asbestos dust.

The database also allows Insurers to identify other Insurers who might contribute towards settlement or the defence of historic disease claims.

This growing record of EL Insurers' cover will provide increasing efficiency. Less time and resources will need to be spent investigating coverage. Obtaining agreement on apportionment between Insurers will be less reliant upon co-Insurers response times. However, this increasing ease of identification of Insurers is currently not matched by corresponding ease of access by Insurers to the information necessary to assess the justification for the claim.

With long-tail disease claims such as those arising from exposure to noise, vibration and asbestos, by the time a claim is made it is common for employers to no longer exist. Those that still trade have often destroyed the Claimant's employment records (sometimes as a matter of policy not to retain records for more than a few years). Staff turnover typically means that current employees have no knowledge of the Claimant or his work conditions or activities, or knowledge of previous employees who had knowledge of the Claimant's work environment.

The dynamics of business mean that even if an employer is still trading, it is not unusual for the premises where the Claimant worked to no longer exist, or for historic health and safety records such as noise assessments, risk assessments, and other control measures, to have been destroyed.

The practical effect of this is that an Insurer often has no evidence to rebut the Claimant's allegations. If the Claimant can prove injury then his evidence, unchallenged by documentation or other witness evidence, is likely to be accepted. This inevitably leads to the Claimant establishing an Insured's breach of duty or negligence, whether or not the Insured was actually at fault.

The limitation period in disease claims is based upon the Claimant's date of knowledge of injury which might not occur until decades after the alleged exposure.

If employees suffer a traumatic injury at work the problem is not only obvious but there is an immediate adverse financial impact to the employer through having to pay employees who are not working through injury, lost productivity and increased insurance premiums.

Injury arising from exposure to noise and vibration and injurious dust is usually not apparent during employment. There is no immediate adverse financial consequence to the employer, and through insurance the financial risk of a disease claim is passed to the Insurer. The commercial nature of the Insured's business makes it likely that as a result of the financial risk of a claim having been passed to someone else, no resources need to be put into preserving evidence (if it exists at all) of compliance with Regulations.

Until recently, Insurers might have been justified in taking the view that the risks of such long-tail claims could be accommodated in adjustments to premiums charged to those businesses deemed to be at risk of such claims. However, the easier identification of Insurers through the ELTO database means that an Insured is now more likely to be a potential target of litigation far into the future. Further, if the need to obtain and retain evidence needed to defend potential future claims is not addressed by the Insured during the period of cover, then it is more likely that employees will be exposed to injurious hazards.

Businesses regard insurance as a price-sensitive commodity. They are paying for someone else to carry the risk and having done so, probably want to be left alone.

Is there a way of persuading Insureds to provide information on a yearly basis that will enable Insurers to keep sufficient information to be able to resist future disease claims? Probably not universally. Cover for the risk of long-tail claims is only part of the overall insurance product. However, the Public Liability element of commercial Policies often contain conditions and restrictions to specific risks such as hot works, and although there is limited scope for restricting potential liability in Employers' Liability claims, incentives could be included in the product being offered to an Insured.

For example, offering free electronic archiving of certain health and safety documents such as noise and vibration surveys, Risk Assessments, Method Statements and Health and Safety policy documents would preserve evidence and could be presented as an additional free service to the Insured. It could even be presented as a service that, if used regularly, could add value / saleability to the Insured's business should the current owners wish to sell in the future. Current scanning and electronic archiving techniques are cheap ways of preserving evidence indefinitely. They would help to pass control of historic evidence to Insurers, who are the ones with the financial interest in such evidence.

Such preservation of evidence has potentially far-reaching effects. The collation of information should alert Brokers and Insurers to potential breaches of Regulations, and an informed Insured will then be in a position to rectify this, thus avoiding injury to employees. In turn that will lead to fewer future claims, and those claims that are made will be more easily and quickly defended.

The need for preservation of evidence by Insurers is further demonstrated by the reported proposal by Companies House to delete the details of companies that have been dissolved after six years. Although the Association of Personal Injury Lawyers represents this proposal as a threat to access to justice by preventing potential Claimants from identifying their former employer (unlikely, given the National Insurance Contributions Office keeps such records) such loss of information would prevent Insurers from identifying former Directors who might be able to provide information with which to defend future claims.

This approach requires a good relationship between the Insurer / broker and Insured, which is a goal with significant benefits. An Insurer which can demonstrate how it can help to make a business safer and thus more efficient, and offers to take some of the burden of record-keeping required by Health and Safety Regulations from an Insured is likely to diminish the perception of insurance as a commodity, and make an Insured more likely to renew cover.

Investing time and resources in this way will help Insurers overcome a perennial evidential problem when dealing with future long-tail disease claims. The combined effects of the introduction of the Employers' Liability Insurers' database and Qualified One Way Costs Shifting has made the need for Insurers to preserve evidence even more pressing.

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The shorter arm of the law

As reported in RPC's December 2016 Health and Safety update, ignoring the long-term risks of exposing employees to vibration or noise might have more immediate consequences.

Following a guilty plea under Regulations 6(2) and 7(1) of the Control of Vibration at Work Regulations 2005, Thanet District Council was fined £250,000 and ordered to pay £18,325.84 costs after an HSE investigation found that the Council had failed to take steps to eliminate or control exposure to vibration or to inform their workers about the risks of exposure to vibrating tools and how to control it.

Now that employers have had plenty of time to recognise and address their obligations under the 2005 Vibration and Noise Regulations, the HSE appears likely to take a more proactive interest in businesses with long-term health hazards. The possibility of criminal prosecution makes it even more necessary to address the factors that cause industrial disease, and to secure evidence of compliance with the relevant Regulations at Policy inception.

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Pedestrian law

Although absence of evidence in disease claims always has an adverse effect for employers, it can sometimes have positive benefits in other types of claim, as a recent Court of Appeal decision shows.

On 20 October 2016 the Court of Appeal overturned the decision of a County Court Judge who had decided that a pedestrian's employer was vicariously liable for an accident caused when the employee walked in front of a policeman cyclist in a cycle lane on a public road.

The County Court judge had decided that the employer was vicariously liable for the accident because its employee, T, had been acting in the course of his employment when he crossed the road. The judge's reasoning was that T had been heading for his employer's shop, was wearing his work clothes including a logo shirt, and had given the shop's address as his address. The judge said he did not know why T had left the shop in the first place but it did not matter as he was going back there in the course of his employment. The employer appealed.

The Court of Appeal noted the evidence was that T was a shop assistant who had been due to finish work at mid-day, and that the accident happened at 12:45pm. Even if T had been at work at that time, it was impossible to know if crossing the road at 12.45pm was sufficiently connected to T's work to make it reasonable to hold his employer to account because neither T nor his employer had given any evidence explaining why he was crossing the road. The Court of Appeal said the test of connection was to first consider the functions entrusted to the employee and then to decide whether there was sufficient connection between his wrongful conduct and the position in which he was employed. Because the trial judge did not know why T was crossing the road, he had no option but to decide that there was no sufficient connection to make the employer vicariously liable.

Case: *Fletcher v Chancery Lane Supplies Ltd* (2016) Court of Appeal 20/10/2016

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More pedestrian law – the obligations of occupiers is a balance between risk and cost

On 9 November 2016 the Court of Appeal provided important clarification of the test to be applied when determining whether an occupier might be liable under the Occupiers' Liability Act 1957.

Mr Debell had been using a road owned by Rochester Cathedral. Concrete bollards had been erected at the end of the road to prevent cars from entering it. However, a car had hit one of the bollards, partially knocking it over and in the process lifting the road surface next to the bollard by about one inch, which protruded into the two-foot gap between the bollard and a wall by about two inches. As Mr Debell walked through this gap, he tripped on the raised pavement, sustaining injury.

At trial, the judge decided that the Cathedral was liable for the accident, on the basis that it was foreseeable that someone would trip on the damaged surface. He thought that the narrow gap made it all the more important that it was not in any way obstructed in a way that caused a danger. He gave judgment in Mr Debell's favour. The Cathedral appealed against this judgment on the basis that the judge had applied the foreseeability test incorrectly.

The Court of Appeal decided the Cathedral was not liable for the accident. It said that whilst the test of liability included foreseeability of the risk of an accident, this does not mean that any foreseeable risk is sufficient to establish liability. It said that there will always be some weathering and wearing of roads, pavements and paths resulting in small divots, slopes or broken edges which might cause some kind of risk to the unwary and lead to accidents. The Court said that although the hazard in this case arose from damage to the bollard, the obligation on the occupier is to make the land reasonably safe for visitors, and not to guarantee safety.

The Court of Appeal said that in order to impose liability, there must be something over and above the risk of injury from the minor blemishes and defects which are habitually found on any road or pathway, and that the law has to strike a balance between the nature and extent of the risk on the one hand and the cost of eliminating it on the other.

The Appeal Court decided that the Claimant had tripped on an extremely small piece of concrete which could not be said to pose a real danger to pedestrians, and that it was very unlikely in this case that a pedestrian would walk so close to the bollard or sustain injury if he did.

This decision reiterates that when a judge considers whether the danger complained of is sufficiently serious to require an occupier to take steps to eliminate it, the judge must also take a practical and realistic approach to the kind of dangers an occupier is obliged to remedy.

Case: *Dean & Chapter of Rochester Cathedral v Leonard Debell* (2016) Court of Appeal [2016] EWCA Civ 1094 9/11/2016

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