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General liability newsletter

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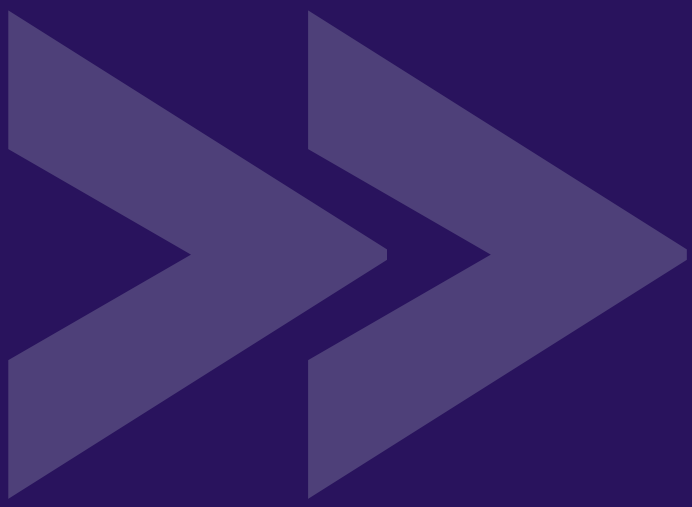

Introduction

Welcome to the October edition of our general liability newsletter. This month looks at recent cases involving; fraud, privilege, covert surveillance, non-party access and legal costs.

Covert recordings – a gateway to open recording of all medical examinations?

At an interim hearing in *Samantha Mustard v (1) Jamie Flower (2) Stephen Flower (3) Direct Line Insurance* [2019] EWHC 2623 (QB) (11 October 2019) a High Court judge considered the Third Defendant's application to exclude recordings made covertly by the Claimant of part of the examinations of her by two of the Defendant's medical experts. The experts knew, and had agreed to part of the examinations being recorded, but they did not agree to the Claimant recording psychological tests designed to assess her psychological state. The Claimant alleged that the tests had been incorrectly administered and the test results accordingly unreliable.

The Claimant's solicitor had advised her to record examinations of her by the Defendants' medical experts. The Defendants' solicitor knew about this. They and their medical experts agreed to part of the examinations being recorded, but they did not agree to the Claimant recording those parts of the examinations when the Claimant was answering questions in tests designed to assess the Claimant's psychological state. The Claimant also agreed to this, but recorded those parts of the examination without making the experts aware of this.

The Claimant alleged that the tests had been incorrectly administered and the test results accordingly unreliable, and relied upon the covert recordings in support of her allegations. The Defendants objected to the Claimant relying upon the recordings in evidence and applied to have this evidence excluded.

Following a hearing on 29 August 2019, Master Davidson delivered his reserved judgment on 11 October 2019. He decided that there were no Data Protection issues that prevented the covert recordings being made. He noted that even unlawfully or improperly obtained evidence might still be admissible in certain circumstances.

He decided that the approach of the Court should be to consider the way the evidence had been obtained together with its relevance and probative value, and to consider what effect admitting or not admitting the evidence would have on the fairness of the litigation process and the trial. After such consideration the Court should then decide whether to admit or exclude the evidence in accordance with the Overriding Objective so as to achieve justice in the particular case. The Master having considered this test, and applying it to the circumstances of the case, the Claimant was permitted to rely upon the covert recordings.

As a postscript to his judgment, Master Davison rejected the suggestion that the High Court should issue guidance on covert recordings, commenting that decisions relating to use of covert recordings should be decided on a case by case basis. He instead suggested the creation of an agreed APIL / FOIL protocol for open recording of examinations and delivery of the recordings which would avoid the need or incentive for covert recordings.

It is unclear whether the suggested protocol would be applied to all medical examinations, or only to those in high value cases or in cases where examination was being carried out by an opponent's medical expert. A protocol that requires medical experts to record and keep every examination would probably not be practicable, if only because this would impose an unwelcome burden upon medical practitioners which they would probably be unwilling to undertake. Lost or failed recordings would be problematic. There is no reason in principle for the subject of a medical examination to be barred from making a recording of an examination, and probably the better way forward is to encourage open recording by a Claimant who thinks this is necessary.

Discount rates north and south of the border expected to be different for years to come

On 27 September 2019, the Government Actuary announced that the discount rate in Scotland will remain unchanged at -0.75%, despite recent amendments to the calculation methodology that led to the discount rate in England and Wales being increased from -0.75% to -0.25%.

The discount rate is applied to anticipated future loss so that the sum awarded now, if invested prudently, will grow adequately to compensate fully for the future loss. A negative discount rate anticipates that the sum invested will not keep up with the rate of inflation. Applying a negative discount rate means that the sum awarded now will be higher than the anticipated future loss.

The difference arises because the analysis used by the Scottish Government Actuary Department is based upon different investment and risk assumptions to those used when setting the rate in England and Wales.

Because there was separate legislation implementing the review of the discount rate for Scotland the result is the application of different assumptions by the actuaries of factors including the content of investment portfolios, the level of risk of investments, and period of investment.

As in England and Wales, the rate will be reviewed every five years. The current actuary report for England and Wales envisages the possibility of more than one rate in the future, determined for example by the length of time of the anticipated loss. Such a development is unlikely to be welcomed by practitioners.

Non-party access to Court documents – open justice prevails – generally

The Civil Procedure Rules allow someone who is not a party to an action to ask the Court to provide a copy of a Court record or any filed at Court by a party. The scope of the documents that can be asked for has been clarified by the Supreme Court in *Cape Intermediate Holdings v Dring* [2019] UKSC 38 29 July 2019.

This was an asbestos claim. The Asbestos Victims Support Groups Forum UK sought access to documents used in the litigation on the basis that the documents disclosed by Cape were likely to assist other victims of disease arising from exposure to asbestos.

At first instance, access to what were considered key documents was permitted. The Court of Appeal widened the scope of access. In determining the appeal against this by Cape, the Supreme Court widened the potential scope of access further and set out guidelines for when such issues are determined. The Court decided:

- All courts and tribunals have an inherent jurisdiction to determine applications from non-parties for access to documents.
- The definition of "records of the court" in CPR 5.4C(2) is a fluid concept with no strict definition. It does not include every document created or filed at Court.
- Documents which can be applied for include those placed before the court and referred to during a hearing. However, these are not limited to what a judge has been asked to read or has read, and can include a clean copy of the trial bundle.
- The applicant must explain why access to the document is being sought and how granting access will advance the principle of open justice.
- When considering such applications, the Court should balance the principle of open justice with consideration of any risk of harm which disclosure may cause to effective judicial process or the interests of others, such as privacy issues, or prevention of disclosure of commercially sensitive material.

The guidelines are likely to be of significant use to others connected with any claim where there are potentially a large number of victims of disease or injury arising from a single source or event.

How long do documents subject to legal professional privilege remain privileged?

According to the Court of Appeal, the short answer is that they remain privileged for ever unless privilege has been waived.

Potential erosion of such privilege had started in *Garvin Trustees Ltd v The Pension Regulator* 31 October 2014, a decision of the Upper Tribunal Tax and Chancery Chamber.

In that case the Trustees of a Company pension scheme alleged that the Directors of the Company had made arrangements before the insolvent liquidation of the Company that led to the pension scheme being deliberately deprived of funds. The Trustees sought disclosure of legally privileged correspondence and documents still held by former Directors of the Company. The Tribunal decided that in circumstances where the Company had been dissolved, there was no one who could assert privilege over the documents which must be disclosed.

In Lee Victor Addlesee & others v Dentons Europe LLP (13 November 2018) the Claimants were unhappy investors in a gold dust investment scheme, run by a Cypriot Company. The scheme was closed in 2010 and the Company dissolved in 2016. The investors brought an action against Dentons Europe LLP, alleging that the scheme had been fraudulent and Dentons had enabled the scheme by endorsing it and thus affording it respectability. Relying upon the decision in Garvin Trustees Ltd. they sought disclosure of legally privileged documents arising between the Cypriot Company and Dentons.

On 13 November 2018 the High Court decided that legally privileged documents remained privileged where there was still a prospect that a dissolved Company could be restored to the Company register. In this case the Cypriot Company could be restored until 2036. The High Court agreed that when the Company could no longer be restored, then legal privilege could not be asserted.

On 2 October 2019 the Court of Appeal decided that the principle applied in Garvin was wrong. It said that legal advice privilege, once established, remained in existence unless and until it was waived. Privilege was not lost if there was no one entitled to assert privilege when a disclosure request was made. If no one was able to waive privilege because a Company had been dissolved the practical effect is that privileged documents remain privileged indefinitely.

Fraudulent personal injury Claimant imprisoned for eight months

On 10 October 2019, in *AIG Europe Ltd v Mohammed Bilal* (10 October 2019), the High Court sentenced Mohammed Bilal to eight months imprisonment for contempt of court arising out of his personal injury claim.

Mr Bilal had brought a claim against the driver of a BMW car (whom he alleged had negligently driven into his Mercedes car) and the BMW's Insurer, AIG Europe Limited.

The claim was struck out when Mr Bilal failed to pay a hearing fee. By that time lay and expert witness evidence had been exchanged. The experts agreed that Mr Bilal's car had been stationary when hit and not moving as he alleged. There was evidence to suggest that Mr Bilal, who had worked for a law firm, had handled the BMW drivers' claim arising from the accident, and had regular contact with him afterwards. There was also evidence that Mr Bilal knew the person who had sold the BMW to the person driving it at the time of the accident, and who had also previously employed him. Mr Bilal denied lying to conceal his connection with the driver of the BMW, but admitted using several aliases after previously denying this.

AIG Europe Ltd applied to commit Mr Bilal to prison for contempt of court arising out of a personal injury claim.

Judge Gargan decided that Mr Bilal's evidence about the speed of collision was inconsistent with the damage sustained; the BMW driver's description of his friend he was allegedly on his way to visit at the time of the accident vague and implausible; there was a possible connection between the parties before the accident and a clear connection between them afterwards, which was not coincidental; he had lied when he denied using another name; there had been no genuine account of events, and the BMW had deliberately driven into the Mercedes for the purpose of making a fraudulent personal injury claim; his statements had been false when he made them, and he had no honest belief in them. The contempt of court and particulars of deceit were made out and he was sentenced accordingly.

Failure to disclose relevant information that goes to the heart of a claim is fundamentally dishonest conduct that warrants the disapplication of Qualified One Way Costs Shifting

In *Haider v DSM Demolition Ltd* [2019] EWHC 2712 QB, the Claimant alleged that the Defendant's driver was negligent in running into the back of his vehicle after the Claimant had slowed down to accommodate a manoeuvre by a vehicle ahead of him. The Defendant alleged that the Claimant had staged the accident so as to make a claim. Part of the Claimant's claim included a claim for £30,000 for car credit hire charges because he could not afford a replacement car.

The Defendant alleged that the Claimant's claim was fundamentally dishonest after establishing in cross-examination at trial that the Claimant had two credit cards and two bank accounts which he had failed to disclose in his list of documents and in response to Pt 18 questions, and he might therefore have been able to organise replacement car hire without resorting to a credit hire arrangement.

The trial judge decided that the defendant had not been negligent and that the Claimant had over-reacted to the manoeuvre ahead of him by over-braking, leaving the Defendant no time to avoid the collision. He dismissed the claim, but made no finding on the issue of fundamental dishonesty.

The Claimant appealed against the dismissal of his claim and the Defendant appealed on the basis that the judge should have found the Claimant's claim to be fundamentally dishonest.

The Appeal judge decided that the trial judge had been justified in dismissing the claim.

The Appeal judge also decided that the Claimant could not have forgotten or overlooked the existence of his credit cards and bank accounts. The Claimant had time to consider this and should have disclosed their existence through the relevant paperwork. His alleged failure to remember because of the passage of time was not accepted. The documents in question related to a core matter that formed a substantial part of his claim. The only reasonable inference was that the Claimant had intentionally failed to make full disclosure and, in the circumstances, that failure could only be labelled as fundamentally dishonest.

Qualified One Way Costs Shifting was disapplied and consequently the Defendant was allowed to enforce the costs order made against the Claimant when the claim was dismissed.

CPR16.5 – Defence required to deal with all allegations in the Particulars of Claim

In *Patel and another v Patel and others* [2019] EWHC 2643 the Defendant submitted that its Defence did not have to respond to every allegation in Particulars of Claim once a positive defence had been pleaded to the claim as a whole.

On 4 October 2019 Peter Knox QC (sitting as a High Court judge) disagreed and ordered the Defendants to serve amended Defences that dealt with every allegation made by the Claimants.

The judge said that the Defendants had confused the word "allegation" in Civil Procedure Rule 16.5(2) with the words "claim" and "cause of action". The Defendants had wrongly assumed that once a claim or cause of action was denied with reasons, the requirements of this rule had been met. He said that the term "allegation" was clearly different from "Particulars of Claim", as highlighted in the wording of rule 16.5(1).

The judge also referred to rule 16.5(3) which says that a Defendant who fails to deal with an allegation, but has set out in his Defence the nature of his case relevant to that allegation, shall be taken to require the Claimant to prove it. This allows a Defendant to plead the nature of the Defence case only when genuinely unable to admit or deny an allegation. This contrasts with rule 16.5(1) which is mandatory and requires the Defendant to state which allegations are admitted and which are denied.

The Judge ordered the Defendants to file revised Defences that complied with these rules.

Counsel's fees are recoverable as disbursements after a claim exits the EL/PL Protocol – if justified – part 1

In *Scott Dover v Finsbury Food Group Plc* (10 October 2019) [2019] 10 WLUK 155 Master Brown at the Senior Courts Costs Office dismissed an Appeal by the Defendant against the part of the Assessment of the Claimant's costs which allowed Counsel's fees to be claimed as a disbursement (and not subject to fixed costs) in a claim which had commenced in the Pre-Action Protocol for Low Value Personal Injury claims and had exited the Portal process before settling.

The Claimant had sustained serious injury to his fingers in an accident at work (the claim was settled by the Claimant accepting a Part 36 settlement offer of £70,000 without proceedings being issued). The Claimant claimed as a disbursement the cost of quantum advice from Counsel of £650. £500 was allowed on assessment and the Defendant appealed this award on the basis that if Counsel's fees were allowed at all they should be limited to £150 as provided for in the fixed costs tables in the Civil Procedure Rules.

In his judgment, Master Brown examined the background to the relevant rules in detail, and set out each issue in dispute and provided his analysis. He considered that the cost of obtaining quantum advice from Counsel in a claim that had exited the EL/PL Protocol could be claimed as a disbursement defined in CPR45.29I(2)(c) as "the cost of any advice from a specialist solicitor or counsel as provided for in the relevant Protocol".

In contrast to a Court of Appeal judgement delivered 15 days later (and on which we comment below), the Master did not regards that Counsel's fee as falling within the definition of an allowed disbursement in CPR45.29I(2)(h) as "any other disbursement reasonably incurred due to a particular feature of the dispute."

He decided that the rules permitted Counsel's fees to be recovered as a disbursement (ie not subject to fixed costs) where they were justified, and that they were in this case because the initial valuation of the claim was much lower than the actual claim value and that the change in circumstances justified the instruction of Counsel.

Counsel's fees are not recoverable as a disbursement after claim exits the EL/PL Protocol – part 2

In *Philip Aldred v Master Tyreese Sulay Alieu Cham* (25 October 2019) [2019] EWCA Civ 1780 the Court of Appeal considered a similar issue to that in *Scott Dover v Finsbury Food Group plc*.

In this case the Claimant was a minor who had been injured in a road traffic accident. The claim was commenced in the RTA Portal and exited it when liability was denied. However, liability was admitted shortly afterwards and the Defendant's offer to settle at £2,000 was accepted. Because the Claimant was a minor, Court rules required an opinion on the merits of the settlement to be provided by counsel or solicitor for the purposes of obtaining the Court's approval of the settlement. Opinion from Counsel was obtained, and the settlement was approved by the court. Counsel charged £150 for the advice. The Defendant challenged this fee on the basis that the fixed costs regime did not allow it to be recovered.

In the first instance and on Appeal to the High Court, the sum was allowed on the basis that it fell within the definition of "any other disbursement reasonably incurred due to a particular feature of the dispute" specified in CPR45.29I(2)(h). Contrary to the decision in *Scott Dover v Finsbury Food Group Plc*, neither of the lower courts considered Counsel's advice on quantum to fall within CPR45.29I(2)(c).

The Court of Appeal unanimously decided although the rules required the settlement to be approved by the Court and an opinion on the merits of the settlement obtained for that purpose, the need for the advice from Counsel did not arise from a particular feature of the dispute but from a characteristic of the Claimant being a minor. Accordingly the disbursement did not fall within the definition in CPR45.29I(2)(h) and therefore could not be recovered from the Defendant under the fixed costs regime.

The Court of Appeal commented that if it had decided that Counsel's fee had been for advice on a particular feature of the dispute, then it would have been a disbursement as defined in CPR45.29I(2)(h). However, the relevant fixed costs table operated on the premise that all of the costs which might ordinarily be expected to be incurred would be deemed included in the fixed costs specified in the costs table. Because obtaining an opinion on the merits of the settlement was a routine feature of a claim involving a minor, Counsel's fees could not be recovered as a disbursement in this case: CPR 45.29I(2)(h) had to be carefully and narrowly interpreted.

Whilst this decision appears to wholly overrule the decision in the Scott Dover case, it seems to remain the case that in claims which settle after being commenced in but then leaving EL/PL Portal process, it is possible in limited circumstances to recover Counsel's fees incurred because of a particular feature of the dispute.

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