

# INSURANCE PRACTICE GROUP LEGAL UPDATE

Welcome to the first edition of 2008 of Hill Dickinson's new Insurance Practice Group Legal Update. This regular bulletin will keep you informed of developments in current affairs, case law and legislation affecting the insurance industry.

To ensure you and your colleagues don't miss out, you can subscribe to the update by emailing [ipgupdate@hilldickinson.com](mailto:ipgupdate@hilldickinson.com), with 'subscribe' in the subject line.

If you would like to discuss any of the topics raised, or have any feedback on the update, please do get in touch, our contact details are on the back.

## News

### Ministry of Justice (MOJ) reform/insurance law reform

There remains uncertainty surrounding the proposed MOJ reforms. Hill Dickinson has previously commented on their potential impact, which could extend to far reaching time pressures, placing a heavy burden on insurers and potentially leading to more prevalent fraud. It is understood that a number of the proposals may now be watered down or possibly abandoned.

It is also understood that the Law Commission is proposing reforms to the UK's insurance law and is seeking to clarify duties and responsibilities of buyers, insurers and brokers. There appears to be a mixed reaction to these reforms with implementation scheduled for 2010.

### Are claims numbers on the increase?

The UK personal injury market is forecast to experience continued growth both in terms of volume and value of claims. Datamonitor anticipate the number of personal injury claims growing by an annual average rate of 2.6% between 2006 - 2007 and 2011 - 2012. With the number of accident claims being reported by the Compensation Recovery Unit in 2006/7 rising by 8.3%, there may be cause for concern.

**HD comment:** Advertising by accident intermediaries, alongside economic and social factors, incorporating the "credit crunch" and adverse weather conditions, may well play a factor in these forecasts over the forthcoming years.

### Benchmarking top UK general insurers

Datamonitor reports that the profitability of top 10 accident and health insurers deteriorated in 2006 due to increases in loss ratios.

The top 10 liability insurers enjoyed a mixed performance, with some seeing better profits whilst a few recorded significant losses. The top 10 motor insurers and pecuniary loss insurers both saw a move up in profitability.

### Personal injury actions: limitation and prescribed claims (Scotland)

Scottish Law Commission

In a move aimed at helping claimants and their representatives the Scottish Law Commission has recently recommended that the limitation period for personal injury actions be extended from three years to five years. The Commission thinks that allowing a longer period will be welcomed particularly in cases involving claims for occupational diseases, where gathering evidence to bring an action can be time consuming and difficult.

Click here to view the full report: <http://www.scotlawcom.gov.uk/downloads/rep207.pdf>

### The PLAS club - insurance law for personal injury lawyers

Barrister Richard Astor has launched the PLAS club, an online group which lists as its objects introducing a new law for "bad faith" claims handling and "to dejunk, decode, demystify and elucidate substantive and procedural insurance law, practice and procedure".

<http://www.theplasclub.com/>

### Surge in abuse claim losses

i-law.com reports that the true cost of abuse claims is difficult to assess because sexual abuse carries such a stigma, especially when it involves children, that it is often hidden from view.

All of those involved - the perpetrators, their victims, employers and insurers - prefer to keep it quiet and cases are generally settled before they come to court. But all the evidence, both in the UK and elsewhere, suggests that there has been a surge in losses and that the trend may well continue for the next 10 years.

See further Young -v- Catholic Care (Diocese of Leeds) & The Home Office (below), a recent groundbreaking Hill Dickinson case in which the House of Lords reinterpreted the provisions of the Limitation Act 1980 in favour of defendants.

## Corporate Manslaughter

The Corporate Manslaughter and Corporate Homicide Act 2007 comes into force on 6 April. The Act creates a dedicated offence of corporate manslaughter and aims to set out more clearly the duties owed by companies and other organisations to avoid serious health and safety risks.

The offence arises where there is fatal accident resulting from an organisation's gross breach of duty to the person involved. The Act removes Crown Immunity from certain organisations and extends the duty of care to people who are detained in custody or as a hospital patient.

In order to convict an organisation for corporate manslaughter the prosecution will have to prove that the way in which an organisation's activities were managed by senior managers was a substantial element in the failure of the duty of care.

An organisation convicted of corporate manslaughter will face an unlimited fine. No individual can be prosecuted under the Act, hence, a court cannot impose a custodial sentence. However, individuals can still be convicted for the common law offence of gross negligence manslaughter.

**HD Comment:** It is to be anticipated that claimants will rely upon criminal convictions in civil claims and insurers are likely to see a correlation between convictions and civil claims.

## Hill Dickinson launches Counsel team

Hill Dickinson has appointed Sarah Venn, Barrister, formerly of Halliwells LLP, to head up an in-house Counsel and advocacy service, expanding the range of services offered to clients.

## Cases

[\(1\) Trevor Francis \(2\) Cecilia Henry \(3\) Tyrone Reeves -v- \(1\) Donna Wells \(2\) Churchill Insurance Co Ltd](#) (2007) [2007] EWCA Civ 1350 19/12/2007

### Aggregating evidence in suspect claims

The first three Claimants were passengers in a vehicle being driven by the First Defendant, who was said to have driven out into the path of a third party driver causing a collision. On behalf of the Insurers it was contended that the accident had been staged or invented because the Third Claimant had been involved in two other accidents involving the the same third party driver in the space of eleven months.

The Judge at first instance described the witness evidence as inconsistent, "unsatisfactory" and "unimpressive" but still found in favour of the Claimants. The Court of Appeal concluded that the trial Judge should have looked at the matter as a whole and considered the combined effect of the striking coincide of the three previous incidents and the difficulties and inconsistencies of the witnesses to determine whether this was sufficient to satisfy himself that the claim was not genuine, or at least show that the Claimants' cases were not proved on the balance of probabilities. Remitted for re-trial.

**HD comment:** A useful authority for defendants in future suspect claims which emphasises the importance of looking at all the facts in context. Possibly too many claims are settled without challenging the facts!

[Hugh Martins -v- Mohammed Choudhary](#) (2007)

### Damages for psychiatric injury and injury to feelings

It was accepted at first instance that Mr Martins had pursued a course of conduct against Mr Choudhary which amounted to the statutory tort of harassment (including racism) and had deliberately collided with Mr Choudhary's vehicle. The Judge awarded damages for injury to feelings and psychiatric harm. The Court of Appeal indicated that "there should be no hard and fast rule about whether separate awards should be made".

If the award for psychiatric damage is modest it is appropriate to make a global award. If the award for psychiatric injury (as occurred in the instant case) is not insignificant, it is appropriate to make two awards and this will lead to transparency.

**HD comment:** Coverage issues may arise where an award for "injury to feelings" is made. Where such an award is sought, these issues should be clarified as soon as possible. Where global awards are made Judges will need to be asked to provide a breakdown.

[Hall & ORS -v- Stone](#) (2007) CA (Civ Div) 18/12/2007

### Costs; over-inflated claims; global sums

The Claimants were successful in a personal injury action following a road traffic accident and recovered £1,000, £400 and £699 respectively. Their schedules of loss alone had claimed £3,000, £1,250 and £2,750. Pursuant to CPR 44.3(4), the trial Judge ordered that the Claimants should only receive 60% of their costs to reflect the totality of the case, offers made and their conduct.

The Court of Appeal held that a Judge could not cut down the costs of the successful party under CPR r.44.3(4) merely because he had not done as well as he had hoped. The initial exaggeration of the claims had not had any real effect on the costs of the action.

**HD comment:** A defendant seeking costs protection on what appears to be an over-inflated claim should make a Part 36 payment and not seek to argue for a global discount on conclusion of a claim where the over-inflation has been of no material consequence to the action.

[Hutchinson 3G Ltd -v- \(1\) O2 \(UK\) Ltd \(2\) Orange Personal Communications Services Ltd \(3\) T-Mobile \(UK\) Ltd \(4\) Vodafone Ltd](#) 2008

[2008] EWHC 50 (Comm)

### Pre-Action Disclosure: jurisdiction and discretion

Mr Justice David Steel emphasised that the scope of a pre-action disclosure request needs to be carefully refined to show that the documents sought would fall within the scope of standard disclosure. Furthermore, it is incumbent on the applicant to show that pre-action disclosure would be useful in achieving settlement or otherwise saving costs. When exercising its discretion, the court should consider: (1) whether the issues have been sufficiently identified; (2) what is "essential"; and, (3) the cost of the exercise and potential for wasted costs.

**HD comment:** an important case which emphasises the jurisdictional threshold an applicant must satisfy before the court should consider exercising its discretion to make an order for pre-action disclosure and provides guidance on the exercise of discretion. See further [Baker -v- Hill Dickinson Client](#) below.

## Hill Dickinson cases

### [Holland -v- Hill Dickinson Client](#)

The Claimant settled her claim with over £7,500 in benefits to be dealt with separately by the Defendant. Hill Dickinson successfully argued that the CRU certificate should be reduced to NIL on the basis that the payment of benefits did not arise as a consequence of the accident, saving £7820.90.

This is a point routinely pursued and won by Hill Dickinson but often overlooked by claims handlers. A successful CRU appeal can produce a significant saving for defendants and insurers should be alive to the advantages of this and check claims for potential CRU savings.

Fee earner: Kathy Perrin.

### [Baker -v- Hill Dickinson Client](#)

Hill Dickinson has successfully tackled again the long-standing problem generated by claimants' solicitors seeking a signed list of documents in addition to extensive disclosure at the pre-action stage. Such applications are always rigorously opposed and in one application recently taken to a full hearing we successfully argued that an applicant is not entitled to a signed list of documents or standard disclosure at the pre-action stage. The case provides further important guidance on the nature and extent of a defendant's pre-action disclosure obligations, which all our clients will find useful when seeking to refute onerous and disproportionate requests by claimants' solicitors.

Fee earner: Kendrah Graham; advocacy: Sarah Venn, in-house Counsel.

### [Young -v- Catholic Care \(Diocese of Leeds\) & The Home Office](#)

The House of Lords heard six appeals on the question of whether abuse claims were statute barred by operation of the provisions of the Limitation Act 1980.

The House has endorsed an interpretation of the Act which is less favourable to claimants and reduces the primary limitation period from six years to three. The House also held that section

14(2) (significant injury) imports an objective test: a judge should ask what the claimant knew and what he should be treated as having known; the reasons for delaying litigation are factors to be considered under section 33 (discretion to disapply the primary limitation period), when a judge should look at the matter broadly and take into account the guidance offered by Lord Brown.

Young's claim was declared statute barred and remitted for consideration of the section 33 discretion.

As a result of the Young decision it would appear that most claimants who have been subjected to serious abuse will be out of time unless they issue proceedings within the primary limitation period, i.e. by their 21st birthday. The majority of claims will therefore be statute-barred under section 14 and will fall to be decided on the basis of the section 33 discretion.

However many claims will now be brought on the basis of an employer's vicarious liability for abuse committed by his employees. This means that the matters to be taken into account when considering the exercise of judicial discretion under section 33 have changed. Whereas defendant employers would routinely argue that they would be prejudiced in attempting to defend a stale claim brought on the basis of their negligence because of a lack of witnesses and documentation, now the only question will be whether the abuse was perpetrated by an employee of the defendant acting in the course of or closely connected to his employment. Thus, the factual issues are narrower. It will be crucial for defendants to establish the outcome of any relevant criminal proceedings. If there are convictions relevant to an individual claimant, the discretion is likely to be exercised in favour of the claimant. If not, and particularly if the claim has come "out of the blue" with no prior recorded complaint, the weight of prejudice may shift in the defendant's favour. However, these will remain very much fact-specific claims with the courts exercising their unfettered discretion on the basis of the evidence to determine on a case by case basis whether it would be equitable to disapply the limitation provisions.

Contact the fee-earner, Kathy Perrin, on [kathy.perrin@hilldickinson.com](mailto:kathy.perrin@hilldickinson.com), for further information and our in-depth review.

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