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INSURANCE PRACTICE GROUP LEGAL UPDATE

News

Corporate manslaughter laws are expected to impact heavily on the construction industry

Following the Health and Safety Executive's (HSE) announcement that one in three construction sites visited by its inspectors were putting workers at risk, Property Week reported that the new corporate manslaughter laws are expected to hit the construction industry hardest; between April 2006 and March 2007 the HSE recorded 77 deaths in construction.

The campaign group Centre for Corporate Accountability released a report in anticipation of the change in law criticising the relatively small amounts companies are fined in comparison with their annual turnover and profits.

Hill Dickinson's Denise Dowen, a regulatory partner, expects fines imposed under the new law to be "astronomical" and is providing a pro-active service which identifies exposure to risks within organisations and provides a range of solutions.

Statute book spring cleaned

The Ministry of Justice is planning to remove all or part of 328 Acts of Parliament to dispose of obsolete laws in the Statute Law (Repeals) Bill.

Father of deceased paratrooper to bring negligence action

It has been reported that the father of a dead British soldier is taking legal action against the Ministry of Defence after his son was killed in Afghanistan trying to fight without night-vision goggles, following the conclusion of a coroner that the Ministry of Defence's failure to provide the paratrooper with the correct equipment lead to his death. This could obviously have far-reaching implications.

"Popcorn worker's lung" case settled

An individual who developed a breathing condition (bronchiolitis obliterans) caused by diacetyl exposure in the food industry has settled his claim before trial. Diacetyl is an agent used in food manufacture, known to cause irreversible damage when inhaled. Whilst believed to be the first claim of its type in the UK, it is unlikely to be an isolated incident.

Hill Dickinson's Lisa Grey, insurance partner, is co-ordinating a strategy in response to this for a number of UK insurers. She said that insurers and brokers must ensure that they are alive to the condition and are in a position to expediently respond to these cases. Claimant solicitors are reportedly actively engaging with potential claimants and with so many employees in the UK potentially exposed to this chemical, it is only a matter of time before we see further claims.

Local authority test cases underway

Landmark litigation has been commenced to establish whether local authorities can insure themselves through a mutual rather than go through a commercial tendering process. It is considered that if successful, every council in England and Wales could save over £150,000. The case concerns not-for-profit mutual company London Authorities Mutual Limited, launched to pool authorities' spending on insurance premiums for risk of fire, damage and general loss on claims worth more than £1 million.

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£2.5 million compensation package agreed for norovirus holidaymakers

Almost 1,000 British holidaymakers brought an action against tour operators following illness during stays between 2000 and 2002 at a hotel in Torremolinos, Spain. A settlement paid to 790 holidaymakers was agreed three weeks before trial was due to commence.

Mediation to be first step in making a small claim

After successful trials in which 86% of small claims disputes settled in mediation, new government changes mean that Courts will have to propose mediation in all suitable disputes and an unreasonable refusal to participate can be penalised in costs by the trial Judge.

Government consults on Lloyd's reform

The Treasury has launched a consultation to modernise Lloyd's of London and remove restrictions which impede the way the Lloyd's insurance market operates. Consultation closes on 30 May 2008.

Plaques litigation

The government is considering the future of pleural plaques claims following lobbying by MPs, Trade Unions and claimants' solicitors. The Scottish Parliament is trying to legislate to overturn the House of Lords' decision in Rothwell and there are fears that the Government may react. Gordon Brown stated in March that: "On pleural plaques, we are looking at the matter at this very moment. We will publish a consultation document soon. We are determined to take some action." The publication of the consultation document is awaited with interest. The implications for insurers is considerable, with the Rothwell decision reportedly saving the industry £1billion.

Cases

Graham Calvert -v- William Hill Credit Ltd (2008)

Loss claimed was not caused by the breach of duty established

In Issue 2 of the IPG Update, Hill Dickinson reported that a compulsive gambler was suing William Hill, who he claimed negligently allowed him to carry on betting after he asked them to stop taking his money under the company's self-exclusion policy. On the facts, Mr Justice Briggs found that a duty of care was imposed on a narrow basis to stop the Claimant gambling on the telephone, but the claim failed on causation because if the Claimant had "been excluded by that bookmaker [he would] probably have ruined himself by betting with one or more of that bookmaker's competitors."

HD comment: This case provides important guidance on the imposition of a duty of care to novel situations and emphasises the importance of fully exploring causation of alleged loss for both claimants and defendants.

(1) Thomas Townsend (2) Therese Townsend (Deceased) -v- Persistence Holdings Ltd (2008)

Parties must be given the opportunity to deal with a point if it is to form the basis of a decision

The Privy Council held that it was a denial of justice to dismiss an appeal on the basis of a point which had not been argued or put to the parties to deal with before it was decided and the case must be remitted to a freshly constituted appeal Court for consideration.

HD comment: An unsurprising decision, which, in the speech delivered by Lord Neuberger, was described as "inevitable".

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Cases continued

(1) Earl of Malmesbury (2) William John Maltby (3) Kathleen Hobbs (4) Wilsco 283 Ltd -v- Strutt & Parker (A Partnership) (2008)
Mr Justice Jack held that a party who agreed to a mediation but then took an unreasonable stance was to be placed in the same position as a party who had unreasonably refused to mediate and this should be taken into account in the costs order.

The Claimants had claimed significant sums which the Defendant had succeeded cutting down to a fraction of what was claimed and a deduction was made to the balance of costs to reflect this.

HD comment: Further evidence that the Court will take into account all the circumstances in which a claim is conducted when determining the appropriate award of costs.

Furniss -v- Firth Brown Tools Ltd (2008)
A Court must consider whether an injury is significant when considering knowledge for the purposes of section 14 Limitation Act 1980
The Claimant successfully appealed against a declaration that his action for damages for noise induced hearing loss was statute barred under the Limitation Act 1980 in circumstances in which the trial Judge had failed to deal with the question of when the Claimant knew or ought to have known that his injury was significant for the purposes of section 14 of the Limitation Act 1980.

HD comment: A claimant does not have "knowledge" for the purposes of section 14 unless he knows that the injury in question is significant and would reasonably have considered it sufficiently serious to justify instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

Smith -v- Northamptonshire County Council 2008
No strict liability under PUWER 1998 where an employer has no power to maintain equipment without the consent of another
The Claimant contended that the local authority was liable under the Provision and Use of Work Equipment Regulations (PUWER) 1998 for failure to maintain an access ramp at a person's home. The Claimant was employed by the local authority as a carer/driver and whilst pushing the person in a wheelchair down the ramp from her home stumbled and injured herself. The ramp had been inspected by the local authority and was not observably in a state of disrepair. The Court of Appeal held that the local authority was not strictly liable under the Regulations; in order for someone to have an obligation to maintain something, it would normally have to be within their power to be able to do so without obtaining someone else's consent. If dissatisfied with the ramp and having requested that it be changed it was not, the most the local authority could do would be to refuse to allow its employees to use it.

HD comment: Had the Claimant's claim succeeded, the consequences for any employer who regularly sends staff to customers' homes would have been manifest; this is a reassuring and practical decision in many respects.

McKenny & Anor -v- Foster (T/A Foster Partnership) (2008)
No strict liability for damage caused by an animal when the animal's dangerous and causative behaviour could not be described as normal and was not known to the keeper
An escaped cow strayed into a road, colliding with a vehicle being driven by the Claimant. The Claimant's partner died in the collision. The keeper of the cow was not strictly liable under the Animals Act 1971, section 2, for damage done by the cow because on the evidence, the cow's dangerous and causative behaviour, namely exceptional and exaggerated agitation on being separated from her calf, could not properly be described as normal as it was not known to the keeper.

HD comment: The Court of Appeal unanimously followed the leading judgments of the majority in Mirvahedy -v- Henley [2003] 2 AC 491 and refused to impose liability where the behaviour of the animal was not reasonably foreseeable.

Blerim Ethemi -v- Robert Shiels (2008)
Relief from sanctions not inevitable where refusal will result in a claim for personal injuries being struck out
The Claimant brought an action for personal injuries and signed a consent order by which he agreed to provide signed authorisation for the release of documentation and for the disclosure of various documents. The Claimant failed to comply with that order and a further order was made that provided that in default of disclosure the Claimant's claim would be struck out. The order was breached and the claim struck out, and the Claimant sought relief under CPR 3.9, which was refused. The Judge had correctly considered all the considerations in CPR 3.9(1) and in particular noted that the trial date would need to be adjourned and that there was a real possibility that the Claimant could not meet the substantial costs likely to be occasioned by the adjournment.

HD comment: A strong warning to parties illustrating the consequences that can arise from a failure to comply with case management decisions.

Hill Dickinson cases of note

Hill Dickinson Costs Team
Hill Dickinson's specialist costs team is currently saving the firm's clients an average over 35% on opponents' bills of costs – over £6,000 per file. In three recent cases, very significant savings were made: in Hunter -v- Hill Dickinson Client a claim for costs of £58,020.21 was settled for £10,000; in Stewart -v- Hill Dickinson Client a claim of £64,184.54 was reduced to £26,750; and, in Odell -v- Hill Dickinson Client £46,117 was saved on the claim put forward.

In Shah and others -v- Hill Dickinson Client the Claimant driver and four passengers brought a claim for damages for personal injuries and losses arising out of an RTA, which were pursued as one claim. The matter settled with modest damages of less than £1,500 each being agreed. A bill for more than £33,000 was presented. Through careful cross referencing and consideration it was identified that there were considerable levels of duplication and double charging; on one day the Claimant's solicitor claimed to have spent 14.5 hours reviewing this straightforward claim! Serious breaches of the indemnity principle were also identified including claims about the Claimant solicitor's experience and who had actually undertaken the work. Detailed Points of Dispute were served with an offer of £12,000 together with a request that the signatory to the bill attend any detailed assesment to give evidence. The offer was accepted, a saving of over £21,000 or 64%.

The team is also adept at recovering costs on behalf of clients, frequently recovering the costs of assessment hearings with minimal reductions applied.

HD contact: Paul Edwards. For further information, please email Paul, paul.edwards@hilldickinson.com.

Harrison -v- Hill Dickinson Client
The Claimant brought claims for asbestosis against two different companies alleging exposure to asbestos as an oxcyacetylene burner during the course of his employments. Hill Dickinson performed a detailed review of the Claimant's medical records and established that the Claimant was considerably out of time in bringing his claims. Notably the Claimant had also told medical professionals on several occasions, during the course of investigations into various chest complaints, that he had never been exposed to asbestos during the course of any of his employments, but had been exposed to asbestos dust as a child whilst assisting his father, a former lagger, in dust-down work overalls. The claim was strongly repudiated and the Claimant discontinued his action, leading to substantial savings in damages and costs to our insurer client.

HD contacts: Lutty Choudhury, Emily Smith

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Mahony -v- Hill Dickinson Client

The Claimant claimed for loss and damage after a car accident. Liability was conceded and the matter was initially disposed of by way of consent, the claim settling for £50,000 with a deduction of £21,197.89 for CRU. The Claimant appealed the CRU certificate and was successful in part, resulting in Hill Dickinson receiving a cheque for £15,300.46 from the Benefits Agency together with a revised CRU certificate.

The Claimant's solicitor contended that the money belonged to the Claimant and issued an application for its immediate payment. Hill Dickinson denied that the Claimant was entitled to the money and successfully argued that the consent order needed to be set-aside and the matter reconsidered to investigate the illness which the Claimant had not informed either expert of, but had resulted in the significant reduction in CRU liability. The saving to Hill Dickinson's client is expected to exceed £16,000 on damages alone; the cost implications of the Claimant's failure to disclose material facts to the Court are manifest.

HD contact: Graham Lynch

R -v- Shell (UK) Oil Products

Hill Dickinson's Simon Parrington, one of only three solicitor advocates on the Attorney General's panel of junior counsel for non-CPS prosecution work, prosecuted Shell following an escape of hydrogen fluoride at its Stanlow plant, resulting in a fine of £266,000 and prosecution costs of £37,000.

HD contact: Simon Parrington

Bilal Adam -v- Lick (UK) Limited

In concluding that this case was another (unsuccessful) attempt to defraud the insurance industry, HHJ Grenfell heavily criticised the practice of a vehicle examiner who has been the subject of a cross insurer investigation for motor insurance fraud.

The examiner has operated in the field of vehicle examinations for thirty years and inspected 50,000 accident damaged vehicles in that time, providing reports relied upon in legal proceedings as "expert" evidence. He was found to have used a number of aliases, including the names of two honest motor engineers, and a number of trading names. The Judge made 17 findings in respect of the vehical examiner which broadly fell into three categories: unreliable expert witness; use of aliases; conflicting business interests. The Judge found that he had instructed and permitted employees to "pp" expert reports containing expert declarations when they lacked the insight, knowledge or expertise to do so and that he used letters after his name calculated to misinform. The examiner claimed to be unfamiliar with the Civil Procedure Rules and his duties to the Court. The Judge concluded that "his own inability to separate the professional production of expert reports from his business interests in the field of accident management, in [his] judgment, have compromised him as an expert on whom the Court can safely rely".

Unfortunately, the vehicle examiner is believed to be operating under new aliases and Hill Dickinson will produce updates to clients as information comes to light.

HD contact: Martin Stockdale. For further details, please email Martin, martin.stockdale@hilldickinson.com.

Mr & Mrs Wright & Ors -v- Hill Dickinson Client

The Claimants brought an action for damages arising out of substantial fire damage occasioned to their property which they alleged started in a tumble drier supplied to them under a hire agreement. Significant fire damage was also occasioned to the adjoining properties. The trial Judge found that he was unable to determine the cause of the fire on the basis of the evidence presented to him and found in favour of the Defendants. The claim was valued in the region of £500,000.

HD contact: Anthony Curley

This bulletin is intended as a general overview and discussion of the subjects dealt with. It is not intended, and should not be used, as a substitute for taking legal advice in any specific situation. Hill Dickinson LLP will accept no responsibility for any actions taken or not taken on the basis of this publication. If you have a particular query or issue, we would strongly advise you to contact a member of the insurance practice group, who will be happy to provide specific advice, rather than relying on the information or comments in this newsletter.

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