

INSURANCE PRACTICE GROUP LEGAL UPDATE

News

Changes to the fast track limit and RTA claims handling process - 21 July 2008

The Ministry of Justice has published its response to earlier consultation on case track limits and the claims process for personal injury claims (CP(R) 08/07) <http://www.justice.gov.uk/docs/case-track-limits-response.pdf>

The fast track limit is to be increased from £15,000 to £25,000 and a new claims procedure of application to road traffic accident claims under £10,000 will be introduced.

Case track limits:

- The small claims track limit will remain at £5000 for non personal injury and £1000 for personal injury
- The fast track limit will be increased to £25000

Hill Dickinson comment

The increase in the fast track limit will impinge on a significant amount of insurance litigation, bringing many claims to trial sooner and further restricting the number of cases in which the Courts will be amenable to defendants introducing their own expert evidence. It has become even more important that insurers and insureds ensure they do act to influence the outcome of the claim at an early stage.

Claims process

- The new claims process will only apply to RTA claims valued at more than £1000 and up to £10,000.
- Claimant's solicitors must complete a Claim Notification form and submit it to the appropriate insurer within 5 working days of their receipt of the required information.
- The insurer then has 15 working days to respond with a decision on liability. This period will not be extendable.

Where liability is admitted:

- The claimant's solicitor will obtain a medical report and once checked for factual errors will submit it within 15 working days to the insurer as part of a 'settlement pack' that will also include details of special damages and the claimants offer to settle.
- The insurer then has 15 working days to consider the offer and respond.
- If the offer is rejected and a counter offer is made a further 20 working days is allowed for negotiation.
- Where quantum cannot be agreed or either party fails to act within the above timescales an application for a quantum hearing can be made where a Judge will decide the amount of compensation. Unless both parties agree for this to be dealt with 'on paper' it will be a hearing.
- Fixed costs will apply to the above process in three stages. The precise amount of those costs is yet to be decided and an Advisory Committee on Civil Costs is working on this.

Where a claim is denied or contributory negligence is alleged:

- An insurer denying a claim or asserting contributory negligence will need to provide the claimant's solicitor with all the documentation upon which they are basing their decision.

- In cases where liability is not admitted, denied or the insurer fails to respond the claim will leave the new process and fixed costs will not apply.
- Where an insurer alleges contributory negligence and/or causation arguments the claim will leave the new process at that point and fixed costs will not apply thereafter.

The Advisory Committee on Civil Costs will provide advice on the levels of fixed recoverable costs and the Civil Procedure Rules Committee is to be asked to consider draft rules, practice directions and pre-action protocols.

Proposals to standardise certain heads of special damage will be taken forward and a further announcement can be expected. A date for implementation has yet to be announced.

Hill Dickinson comment:

Whilst the precise manner in which the scheme will move forward and be implemented remains unclear, several observations can be made; the new road traffic accident procedure imposes a tight timetable where liability is admitted, but, to the advantage of insurers, will see more claims regulated by a fixed costs regime. Claims handlers should be slow to deny liability or allege contributory negligence to escape the new timetable as insurers making unfounded denials or allegations of contributory negligence will be faced with uncapped costs.

Decisions on liability will need to be taken before medical evidence is obtained. An insurer admitting liability but wishing to reserve causation should ensure that any admission is appropriately worded.

Insurers will also want to review the notification clauses in policies and communicate effectively the importance of early notification to their policyholders. In many cases they may be faced with a claim within five days of an accident and it will be imperative for the policyholder to have made a prompt report. Hill Dickinson anticipates that the change may negatively impact on clients that are not geared to the change and may result in increased fraud.

"Although the insurance industry's view is that these reforms are not nearly as far reaching as they were envisaged to be, of primary concern to insurers will be the adequacy of their own internal processes to be able to deal swiftly and efficiently with the assessment of liability. It follows that a sophisticated and integrated anti-fraud capability, such as Hill Dickinson's Netfoil, will be of significant benefit to ensure that claims can be validated before liability is admitted. In addition successful third party capture and intervention will inevitably reduce the risk of litigation." Nerys Parry, Partner - Head of Transport, One Liability Services (the Claims Management Division of Hill Dickinson LLP) For further information contact: Nerys Parry, Partner or Sarah Venn, Barrister

Insurance fraud rising

In the last three months Absolute has recorded a 13.3% increase in fraudulent insurance claims on the first three months of 2008 and a 14.3% increase in policy misrepresentation of risk. The ABI has also revealed that £575m of insurance fraud was detected in 2007 - almost £100m than the previous year.

Scotland first to move towards legislation on plaques

The Damages (Asbestos-related Conditions) Scotland Bill (SP Bill 12) was introduced on 24 June 2008 and provides that pleural plaques are a personal injury which is not negligible and is compensable. The full text of the Bill is available here: <http://www.scottish.parliament.uk/s3/bills/12-Asbestos/b12s3-introd.pdf>

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In England and Wales the MOJ has responded to the decision in [Rothwell](http://www.justice.gov.uk/docs/cp1408.pdf) with a consultation paper <http://www.justice.gov.uk/docs/cp1408.pdf>

Plaques warning as diffuse pleural thickening are evolved

Dr Charles Hind, Consultant Chest Physician, claims that radiologists appear to be evolving the criteria for what constitutes diffuse pleural thickening (DPT, a compensatable condition) after the House of Lords' decision which rendered symptomless pleural plaques un-compensatable. Dr Hind warned that "the danger is now that certain radiologists are trying to evolve the criteria for DPT. They place further importance on whether the underlying lung is affected rather than how large the thickened area is." Dr Hind said he had seen radiological abnormalities labelled as 'parenchymal bands', 'folded lung' and 'pseudotumour'. "These are nothing more than a slight visceral thickening of the visceral pleura - essentially what used to be diagnosed as pleural plaques," he said.

Europe extends discrimination law

In Issue 2 of 2008 we reported that it appeared that Europe might extend the scope of discrimination law in the case of [Coleman -v- Attridge Law](#). The case was recently heard by the EJC, which held that discrimination at work on the grounds of disability is not limited to disabled people themselves, but extends to those caring for them. The ruling is considered a landmark victory for the UK's six million carers.

Mesothelioma Lump Sum Payments (conditions and amounts) Regulations 2008

Regulations providing for a lump sum payment to be made under section 46 of the Child Maintenance and Other Payments Act 2008 to a person with diffuse mesothelioma or the person's dependant have now been published in draft, with an intended coming into force date of 1 October 2008.

Asbestos test cases begun

Six test cases have begun in the High Court on the interpretation of employers' insurance policies. Insurers arguing that injury occurs not when exposure to asbestos occurred but when the cells lining the lung began to turn malignant (which happens roughly 10 years before symptoms appear, when many former employers are no longer in business) await the outcome of the cases; some 2,000 people a year are diagnosed with mesothelioma in the UK alone.

Cases

[A -v- Chief Constable of South Yorkshire \(2008\)](#)

Recoverable costs to be assessed at the level of an experienced local solicitor

The Claimant brought proceedings against the Chief Constable of South Yorkshire, which were listed to be heard in Sheffield. The Claimant then instructed a London solicitor on the basis that he considered it was appropriate that he receive "specialist counsel" as he asserted that he had developed schizophrenia as a consequence of the wrongful action of police officers. The Claimant was successful in his claim and on considering the amount of recoverable costs, the Judge held that it had been incumbent on the Claimant to look for a specialist firm in the locality, which ought to have been able to deal with the matter properly, with the assistance of experienced Counsel if necessary. On appeal the Court found that a reasonable litigant would make himself aware of the comparative charges between a London and Sheffield firm and considered it was not reasonable or proportionate to instruct a London solicitor because of the substantial additional cost involved. Accordingly, it was appropriate to assess the Claimant's recoverable costs at the rate which would have been charged by a local solicitor.

Hill Dickinson comment: With many claimants now being introduced to solicitors by claims management companies, it is increasingly common for a claimant to be represented by a solicitor outside their locality. This is a useful authority for those seeking to reduce costs on the basis that they should be assessed in line with the guidance rates provided for in the Court where the claim is heard and that only exceptional cases merit the instruction of a niche firm.

[Spencer-Franks -v- Kellogg Brown and Root Ltd \(2008\)](#)

Apparatus is work equipment for the purposes of PUWER 1998

Spencer-Franks sustained an injury during the course of his employment with Kellogg Brown & Root Limited at the Tartan Alpha oil rig; he was asked to repair a defective door closer, which the Defendant argued could not be "equipment" for the purposes of the Provision and Use of Work Equipment Regulations 1998. The House of Lords held that the door closer fell within the scope of PUWER and this position was not changed because the closer was being repaired rather than being used as a door closer.

Hill Dickinson comment: Whilst a Scottish case, the decision is of relevance within this jurisdiction as it provides important guidance on PUWER from the House of Lords. The decision in [Hammond -v- Commissioner of Police of the Metropolis](#) was disapproved and it is clear that defective equipment being repaired falls within the scope of PUWER. This creates a difficult situation for employers sending employees to repair equipment known to be defective and capable of causing injury, to which the only obvious solution is to provide complete training and instruction in order that a high degree of contributory negligence can be asserted if an accident occurs.

[John Shortell \(executor of the estate of John Joseph Shortell, deceased & litigation friend of Eileen Shortell\) -v- Bical Construction Ltd \(sued as successor to Bic Construction Ltd\) \(2008\)](#)

Antecedent history of smoking only relevant to contributory negligence where primary liability is established

The Deceased had been exposed to asbestos which had more than doubled his risk of developing lung cancer. However, the Deceased had also been a smoker for a number of years before giving up smoking more than twenty years before his death. The Deceased died of lung cancer, but there was no evidence that he had suffered from asbestosis, though there were signs of bilateral pleural plaques and pleural thickening. Once it was accepted that the exposure to asbestos had more than doubled the Deceased's risk of contracting lung cancer the claim was successful, subject to a 15 per cent reduction for contributory negligence.

Hill Dickinson comment: Mr Justice McKay stated that where the claimant has proved causation against the defendant by showing a more than double risk it is not relevant to show that another agent may have also contributed to the development of the disease when determining primary liability.

Despite hearing statistical evidence Mr Justice McKay felt unable to adopt a mathematical approach to apportioning blame between the defendant's breach of duty and the Deceased's smoking. He was, however, concerned that primary liability should not be emasculated by a high finding of contributory negligence. Litigators will need to be prepared to address apportionment arguments on a case by case basis.

[Trustees of the Portsmouth Youth Activities Committee \(a charity\) -v- Poppleton \(2008\)](#)

No duty of care owed by an occupier in respect of obvious risks voluntarily undertaken

The Defendant ran an indoor climbing centre which the Claimant, an inexperienced climber, utilised. Rules forbidding jumping were displayed outside the climbing room but the Claimant was not referred to them. The Claimant attempted to jump across walls and lost his grip, falling to the matting below and landing on his head.

The Claimant was left tetraplegic and sued the Defendant under the Occupiers' Liability Act 1957 on the grounds that the Defendant had failed to provide sufficient supervision. The Court of Appeal held that it was extremely rare for an occupier of land to be under a duty to prevent people from taking risks which were inherent in the activities they freely chose to undertake; the Claimant was climbing of his own free will and the risk of falling was plainly obvious. If the law required training or supervision in the instant case, it would equally be required for a multitude of other commonplace leisure activities which carried with them a degree of obvious inherent risk.

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Hill Dickinson comment: A practical and sensible approach by the Court of Appeal which refuses to impose on land occupiers a duty to protect against inherent and obvious risks which are voluntarily accepted.

[Kilby -v- Gawith \(2008\)](#)

No discretion to waive fixed success fee in RTA claim

Gawith appealed a costs decision made in favour of Kilby. Gawith had admitted liability for a road traffic accident and Kilby had entered into a CFA with her solicitor. Gawith disputed the success fee fixed at 12.5 per cent by CPR 45.11(2) and argued that the Court had discretion whether or not to allow the success fee. The appeal was dismissed: if the draftsman had meant for there to be discretion to grant the success fee he would not have fettered that discretion by specifying the amount of the success fee.

Hill Dickinson comment: Further reason to make early decisions about liability and settle claims pre-issue of proceedings wherever possible.

[Andrew Gravil -v- \(1\) Richard Carroll \(2\) Redruth Rugby Football Club \(2008\)](#)

Rugby club vicariously liable for the tortious assault by one of its rugby players as it was a reasonably incidental risk to the playing of rugby and was closely connected with the player's employment

Gravil appealed against a decision that Redruth Rugby FC ("RRFC") was not vicariously liable for the tortious assault on him by Carroll, a rugby player with RRFC. Carroll had a contract with RRFC which expressly stated that he should not physically assault an opponent and that RRFC might be vicariously liable for Carroll's acts during his employment. After the whistle had been blown in a match, Carroll had punched Gravil in a melee, causing him injury. It was held that Carroll's wrongful act was so closely connected with his employment that it would be fair and just to hold RRFC vicariously responsible. When the punch was thrown there had been a melee of the kind that frequently occurred during rugby matches and the Court held that throwing of punches after the whistle could fairly be regarded as an ordinary incident of a rugby match. The provisions in the contract were a point in favour of vicarious liability.

Hill Dickinson comment: Further expansion of the scope of the activities for which an employer may be held vicariously liable and which will be deemed to form part of the "course of employment" of an individual. One may anticipate further claims against employers from those pursuing "deep pocketed" compensators.

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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[Jenny Adams -v- Hill Dickinson Client](#)

The Claimant issued proceedings seeking recovery of credit hire charges in the sum of £11,482.69 following a road traffic accident. Within 24 hours of the accident the Defendant had offered a suitable vehicle, which was accepted by the Claimant. However, it then transpired that the Claimant had arranged for a hire vehicle through accident exchange. The trial Judge held that the Claimant had been unreasonable not to accept the Defendant's offer and had failed to mitigate her loss accordingly; and, had she taken up the offer from the insurer, she would have avoided any loss of use altogether, such that she was not entitled to any compensation. The Claimant was ordered to pay the Defendant's costs.

Hill Dickinson contact: Nasreen Rehman

[Hooper -v- Hill Dickinson client](#)

The Claimant alleged that the Defendant had reversed into his vehicle. The Claim was repudiated on the basis that there was no contact between the vehicles and in the alternative that there was insufficient contact between the vehicles to cause injury. When the Claimant's vehicle was inspected substantial damage was found, however, the Defendant's engineer was adamant that the Defendant's vehicle had not been involved in any collision and moreover the rear bumper had not been replaced. The Claimant discontinued prior to the facts being heard.

Hill Dickinson contact: Katherine Totty

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

Simms was a duty manager in a retail outlet and alleged that two members of the public walked through the store, accessed an upstairs office and thereafter assaulted him. Enquiries showed that the assailants were known to the Claimant and that they had sought out the Claimant without attempting to steal cash or stock. Liability was denied and upon disclosure of witness evidence the Claimant agreed to discontinue his claim and pay the Defendant's costs.

Hill Dickinson contacts: Kari Hansen and Hayley Riach