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bto Insight

Insurance News

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Symptoms beyond duration of "recognised psychiatric illness"

In the case of ***Davidson v North Lanarkshire Council***, the Pursuer drove a JCB into a shed, hit a door lintel and building rubble came crashing down in front of him. The Pursuer suffered from an adjustment disorder as a result for approximately 6 weeks and made a full recovery from his residual symptoms after 5 months. There were no physical injuries.

At first instance, the Pursuer was awarded a figure of £3,500 by way of solatium.

The decision was appealed by the Defenders on the basis that the award for solatium was excessive; that the Sheriff had erred in law in taking into account residual psychological difficulties experienced by the Pursuer after the adjustment disorder had resolved; and that the Sheriff erred in allowing oral evidence from the Pursuer and his wife to be heard when the psychiatric report had been agreed by way of joint minute.

The Defender relied primarily on ***Page* v *Smith* [1996] 1 AC 155** to argue that the award of solatium should not encompass residual psychological difficulties experienced by the Pursuer after he no longer fulfilled the criteria for an adjustment disorder. Lord Boyd of Berwick stated in **Page** that *"a defendant who is under a duty of care to the plaintiff, whether as primary or secondary victim, is not liable for damages for the nervous shock unless the shock results in some recognised psychiatric illness…"* .

It was held that the Sheriff was entitled to take into account residual difficulties following the Pursuer's recovery from the adjustment disorder. The residual difficulties had their origin in a recognised psychiatric illness, namely the adjustment disorder. The Sheriff Principal stated that he felt the award for solatium was '*generous'*, but did not interfere with what was at first instance a discretionary decision on the part of the Sheriff in light of the evidence which was placed before her.

The Sheriff Principal also held that the Sheriff was entitled to hear evidence from the Pursuer and his wife as the report was not entirely conclusive and their evidence clarified certain matters.

The decision in this case is another useful demonstration of the limitations of appellate court interference. The appeal courts will be reluctant to interfere with decisions which are highly fact sensitive and involve an exercise of discretion by the Sheriff or Judge who has had the benefit of hearing the evidence and submissions first hand.

The Sheriff Principal wasn't persuaded by the narrow concept of solatium advanced by the Defenders. He was clear that the residual psychological symptoms and the disruption to the Pursuer's life ought to be taken into account as they had their origin in a recognised psychiatric injury.

The decision also serves as a reminder that agreeing medical evidence does not necessarily mean that the Pursuer and his witnesses will not be able to give evidence at Proof to supplement this. As held by the Sheriff Principal, this remains a possibility where the medical report is not conclusive and some aspects require clarification. Difficulties are likely to arise, however, if the witnesses start to stray into areas not covered by the agreed medical evidence, or they give evidence which contradicts the medical expert's findings. It appears that this was an effective strategy by the Pursuer at first instance. The details of the impact upon his family life were heard by the Sheriff, which provided extra emotional weight to the claim. This contributed to an award for solatium which was in the view of the Sheriff Principal, generous.

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The Insurance Act 2015

The Insurance Act 2015 will come in to force in August 2016. Following a consultation of the Scottish Law Commission and the English and Welsh Law Commission, the Insurance Bill received Royal Assent in February 2015. The Act has three main parts, as follows:

1. The duty of fair representation
2. Warranties
3. Fraudulent claims

1. Disclosure and misrepresentation
The new "duty of fair presentation" still requires business policyholders to volunteer information, but what is required of them is made clearer. Insurers will be required to play a more active role in asking questions of the policyholder. The Act also introduces a new scheme of proportionate remedies to replace the existing single remedy of avoidance. Such remedies range from a blanket avoidance of the whole policy for a deliberate or reckless breach, to an amendment of the terms of the contract, or where a higher premium would have been paid, insurers may apply a proportionate reduction of the policy cover relative to the increased premium.

2. Warranties
Under this part of the Act, insurers will be liable to pay any claim that arises after a breach of warranty has been remedied. This would apply, for example, where a broken burglar alarm has been repaired before the claim arises. In addition, breaches of warranty that are irrelevant to the loss that occurs will no longer discharge insurers from liability. If the insured can show that failure to comply with any term in the contract (including warranties) could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred, insurers will no longer be able to rely upon the breach to exclude, limit or discharge its liability. The Act will further abolish "Basis of the contract" clauses, which can turn any statement from a policyholder into a warranty.

3. Fraudulent claims
The Act provides insurers with the ability to refuse a claim where a claim (or any part of it) is fraudulent. They will also have the right to reclaim any sums paid as a result of the claim and refuse any claim arising after the fraud (although they must still pay earlier, valid claims).

It is open to parties to contract out of the provision of the Act, but this would only apply to non-consumer insurance contracts. That said, any agreement to opt-out will be subject to compliance with transparency requirements and therefore the legitimacy of any opt-out is not certain.

Another feature of the Act is the inclusion of various minor provisions relating to Third Parties (Rights Against Insurers) Act 2010 which received royal assent on 25 March 2010, but is still awaiting a further statutory instrument to bring it into force - Autumn 2015 is the anticipated timeframe.

The Insurance Act 2015 will come in to force on 12 August 2016. Going forward, insurers ought to be aware of the implications of the Act and at the outset, ensure that when entering contracts with consumers, their standard terms comply with the new requirements of transparency.

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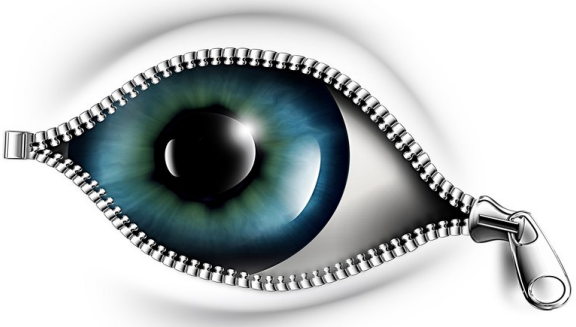
Eyes Wide Open - Hayward v Zurich Insurance Company [2015] EWCA Civ 237



The Court of appeal has rejected an argument of misrepresentation made by an insurance company who argued that a claimant had given a fraudulent account of his injuries in a claim that was settled by insurers some 6 years previous.

The claimant was injured in an accident at work in 1998. He sustained an alleged back injury and raised an action for damages. The insurers obtained video surveillance allegedly showing the claimant carrying out heavy lifting at home. The insurers, however, settled the claim just prior to the trial for a sum in excess of £130,000.

Two years after the claim settled, the claimant's neighbours contacted his employers to advise that they felt his claim for his back injury had been dishonest. The employer informed their insurers who then raised proceedings against the claimant for damages, alleging that in the original claim, his injuries were fraudulently misrepresented.

At first instance, the claimant was held to have acted dishonestly and exaggerated his injuries and on that basis the settlement agreement should be set aside. The claimant appealed, not the finding of dishonesty, but the decision to set aside the settlement agreement.

On appeal, it was held that a defendant who has made an allegation of fraud against the claimant, but decided in the end not to have it tested in the court, should not be allowed to revive that allegation as a basis for setting aside the settlement. To quote Underhill LJ, "*parties who settle claims with their eyes wide open should not be entitled to revive them only because better evidence comes along later*".

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Calculating the Basic Hire Rate

In the case of **Stevens v Equity Syndicate Management Ltd [2015] EWCA Civ 93**, the Court of Appeal provided useful comment upon the method of calculating the basic hire rate (BHR) in claims involving credit hire. The Court of Appeal started by reiterating its findings in the Bent appeal:

- Determining the BHR is an objective exercise. Accordingly, evidence from the claimant as to what he or she would have been willing to pay on the ordinary market is irrelevant.

- The aim of this exercise is to strip out the irrecoverable costs contained within the credit hire charges being claimed. These are the costs related to the provision of credit. Conversely, the analysis can be aimed at ascertaining the part of the charge which is attributable to the basic hire.

Evidence of the BHR

The possibility of the credit hire company disclosing the components of the credit hire charges was once again discussed. However, it was recognised again that many of the claims for credit hire progressing through the courts were of low value, and that the level of disclosure and analysis required in separating out the various components of the credit hire charges would far exceed the cost of the claim.

In many cases, the easiest or the only way of calculating the BHR is comparing the credit hire rates with the rates quoted by companies on the open market. As per the Bent appeal, a judge faced with a range of hire rates should try to identify the rate or rates for the hire, in the claimant's geographical area, of the type of car actually hired by the claimant on credit hire terms.

Calculating the BHR

Predictably, the court rejected the argument advanced by the claimant that the court could simply look at the highest figure in the range and, if it is greater than or equal to the claimed credit hire rate, conclude that the defendant has failed to prove that the BHR is less than that rate. The court considered this to be manifestly unjust. It was agreed that the judge at first instance erred by taking an average of the four rates he felt were relevant. Interestingly, the court held that the search must rather be for the lowest reasonable rate quoted by a mainstream supplier for the basic hire of a vehicle of the kind hired by the claimant. It was held that this was a proportionate way to arrive at a reasonable approximation to the BHR.

Comment

Overall, this is a useful decision for insurance companies helping to further dispel some of the myths surrounding the Bent appeal. Pursuers' agents in Scotland frequently deployed similar arguments to those used by the claimant in this case regarding the calculation of the basic hire rate in the wake of the Bent appeal. It is clear, however, that these arguments never had any real basis in the Bent appeal. This had already been confirmed in several recent sound decisions from the County Courts in England and now by the Court of Appeal.

However, the Court of Appeal appears to have gone further and has held that the lowest rate of a range of basic hire rates would be a fair way to arrive at a reasonable approximation of the basic hire rate. This decision is therefore likely to have a significant impact on the way credit hire claims are negotiated.

The Scottish courts have traditionally taken an average of the applicable rates. It remains to be seen whether they will continue to do so in light of this approach again being rejected by the Court of Appeal. The Scottish courts also frequently take into account evidence directly from the pursuer as to what he or she would have been willing to pay on the open market. The Court of Appeal's objective, hypothetical approach to calculating the basic hire rate may prove to be attractive to the Scottish courts in future cases.

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Illegal Activity No Bar To Claim

The claimant, a 16 year old boy, was riding along a cycle track on the back of a stolen trials bike which was being driven by his friend who did not have a driving licence or insurance to drive the bike. Neither of the boys were wearing a helmet and the bike was not designed to carry passengers. They collided with a minibus after the bike failed to stop at give way markings on the cycle track. The claimant suffered a severe brain injury which affected both his speech and the movement down the left hand side of his body. He brought a claim against the driver of the bike, the Motor Insurers' Bureau (MIB) and the minibus driver.

The claimant's friend was found liable to the claimant in negligence.

The defendants raised the defence of '*ex turpi causa non oritur actio'*, arguing that the claimant should not be compensated for injuries sustained as a result of his own illegal activity. They argued that the claimant was part of a joint criminal enterprise by riding on the back of a stolen bike which was not adapted for road use, had no insurance and was being driven dangerously by his friend.

The *ex-turpi causa* argument was rejected in respect of the claim against the driver of the bike and the MIB. The MIB had failed to prove that he knew or ought to have known that the bike was stolen or unlawfully taken. They did, however, manage to prove that the bike was being used without insurance and therefore their liability was excluded.

With regard to the minibus driver, he was found to have driven negligently and as such, liability was found against him in the sum of 20%, with the bike driver being responsible for the lion's share at 80%. The minibus driver's liability was further reduced by 45% due to the claimant's own contributory negligence (inclusive of 15% for his failure to wear a helmet which had been agreed prior to trial).

The minibus driver appealed the judgment in respect of the *ex turpi causa* argument and the finding that he was negligent. Should the Appeal Court maintain that he was negligent, he was also appealing the assessment of contributory negligence at 45%.

All of the arguments failed on appeal, other than the calculation of contributory negligence which was increased to 65% (i.e. 50%, plus the agreed deduction of 15% for failure to wear a helmet).

In handing down his judgment, Lord Justice Richards held that the Judge at first instance was wrong to reject the *ex turpi causa* argument against the bike driver and the MIB. That was not the subject of this appeal. In relation to the minibus driver, the *ex turpi causa* defence could not apply. The dangerous driving of the bike had no effect whatsoever on his duty of care. Lord Justice Richards stated that the accident had two causes, the dangerous driving of the bike and the negligent driving of the minibus. The claimant's injury was a consequence of both, not just of his own criminal conduct and not just of the minibus driver's negligence.

For an *ex turpi causa* argument to succeed, there must be a causative link between the illegal activity and the negligent act. The Courts will look at whether the relevant injury was so inextricably linked with the claimant's illegal act when faced with such an argument. The simple fact that the claimant was involved in a criminal activity at the time of the relevant incident is not enough. The judgment re-affirms the difficulties in arguing a defence of *ex turpi causa* and begs the question of when a criminal act will be classed as sufficiently serious and indeed causative so as to deny a claim in damages.

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Update

The response period in relation to the Scottish Government's Consultation Paper on the Expenses and Funding of Civil Litigation in Scotland Bill closed on 24 April 2015.

Scottish Ministers invited views on plans to create a more accessible, affordable and equitable civil justice system for Scotland. Views were sought on proposals to introduce primary legislation aimed at increasing access to justice by making the costs of court action more predictable; increasing the funding options for pursuers of civil actions; and to introduce a greater level of equality to the funding relationship between claimants and defenders in personal injury actions.

bto submitted a response both in conjunction with FOIL and independently and the outcome of the consultation process is now awaited with interest.

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