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bto Insight

Insurance News

It's been Oh So Quiet...

Or perhaps not, given the recent flurry of legislative announcements which will have a bearing on the insurance industry and personal injury litigation both in Scotland and across the UK.

Discount Rate

The Lord Chancellor issued a statement on 7 September 2017 and placed a command paper before Parliament dealing with how it was proposed that the Discount Rate should be set in the future. The proposals only apply to England & Wales for the moment. However, the Scottish Government is expected to follow suit given its recent announcement that it would amend the Discount Rate following consultation with the UK Government.

The new rate is proposed to be set with reference to the investment practices of claimants and the real returns expected from those investments. It is to be reviewed every three years or more frequently and when a review commences it has to be concluded within 90 days. Finally, and perhaps most importantly, the review will be undertaken by the Lord Chancellor. It will be chaired by the UK Government Actuary and will include four others, including an actuary, an investment manager, an economist and an expert in consumer affairs.

The Lord Chancellor's proposals represent a radical departure from the current principle, set out in *Wells v Wells, 1 AC 435,* that the Discount Rate should be calculated on the basis of a claimant being assumed to be a very risk averse investor. *Wells* resulted in the rate being set with reference to Index Linked Gilts which, in practice, claimants did not solely use to invest their damages. The practical reality has been for claimants to spread their damages across a range of investments. The proposals are welcome as they appear to take account of the reality of what claimants do with their damages.

The UK Government's paper invites comments and suggests that if the rate were set today the real rate may fall within the range of 0% to 1%. It is not clear when the proposed legislation will be brought forward but it is clear that the new rate will not apply retrospectively. What is also clear is that the present -0.75% rate will continue to apply until the first review of the rate under the new regime is completed. That is to be done within 270 days of the new provisions coming into force, 90 days for the Lord Chancellor to initiate the review and 180 days thereafter to complete it.

There is no timescale for the proposals to be formed into a Bill which will then be scrutinised by Parliament. However, the Justice Select Committee has been asked to produce its report by 30 November 2017 and a decision on any potential sessions for oral evidence to be heard will be taken in the week following that once the evidence has been assessed.

The intention of the UK Government appears to be to legislate quickly but it remains to be seen if that will be possible. It therefore may yet be some time before any change to the Discount Rate is made.

Mark Hastings mfh@bto.co.uk

In this edition

"Is it too late now to say sorry?"

The Apologies (Scotland) Act 2016

Little could Margaret Mitchell MSP have known that when proposing her Apologies Bill to the Scottish Parliament back in March 2015., Justin Bieber's well-known song 'Sorry' would follow shortly thereafter. Was it fate? Perhaps not, but the legislation is now in force, having received Royal Assent back in February 2016, and came into effect in June this year with near unanimous cross-party support in Holyrood.

The aim of the Act is to encourage apologies by providing that an apology is inadmissible in most civil proceedings and cannot be used as evidence in determining liability. An apology is inadmissible if it has been given under a "without prejudice" statement, or is made in negotiations aimed at achieving settlement. The apology can either be oral or in writing. The definition of an apology can be found under section 3 of the Act which provides that:

"Any statement made by or on behalf of a person which indicates that the person is sorry about, or regrets, an act, omission or outcome and includes any part of the statement which contains an undertaking to look at the circumstances giving rise to the act, omission or outcome with a view to preventing the recurrence".

The Act is a fairly short piece of legislation with a broad scope. It applies to all civil proceedings except four types of specified actions which include inquiries under the Inquiries (Scotland) Act 2005, proceedings under the Children's Hearings (Scotland) Act 2011, Fatal Accident inquires and defamation proceedings

It is worth noting that, if an apology also includes a factual statement about the situation, or admission of fault, only the apology itself is inadmissible in evidence. Factual statements and admissions of fault are not covered by the Act. It is therefore important to be clear about what can and cannot be used as evidence of liability. Advice should therefore be sought at an early stage to avoid encountering difficulties later.

It remains to be seen whether an apology made to an injured party will reduce animosity and / or discourage a formal claim being made or whether, if made, it may serve to encourage a claim.

Karina Manson kms@bto.co.uk

Bills, Bills, Bills

The Scottish Government has now introduced the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill. The Bill seeks to introduce Sheriff Principal Taylor's Review of Expenses and Funding of Civil Litigation in Scotland which recommended a fundamental change in the way that expenses are awarded within Scotland. The Bill aims to make the costs of civil court actions more predictable, increase the funding options for pursuing civil claims and to introduce a greater level of equality to the funding relationship between defenders and pursuers in personal injury actions.

The two key proposed legislative changes are (1) the introduction of damages based agreements for solicitors and, (2) the introduction of Qualified One-Way Cost Shifting (QOCS) for personal injury cases.

The Bill proposes to allow Scottish solicitors to enter into damages-based agreements (DBAs). This will permit 'no win no fee' arrangements whereby the solicitor's fee (i.e. the success fee) is calculated as a percentage of the pursuer's damages. The Bill proposes that the Scottish Ministers set the maximum amount of the success fee on a sliding scale depending on the level of damages. The Bill also seeks to introduce QOCS for personal injury cases and appeals. Under QOCS, the court will only make an award of expenses against a pursuer where the pursuer has made a fraudulent misrepresentation, has committed an abuse of process or has behaved in a way that falls below the standard reasonably expected by the court. Otherwise, the costs of the action will be met by the defender. This is one of the more controversial provisions in the Bill and represents a departure from the current approach in Scotland where expenses follow success.

The relationship between QOCS and the protection on expenses offered by Tenders also requires further consideration. Sheriff Principal Taylor had recommended that, if a pursuer does not accept a Tender and is not awarded a sum greater than the amount of the Tender, then the protection of QOCS should be lost. However, he recommended that the pursuer's liability to meet the defender's post-tender judicial expenses should be limited to 75% of the damages awarded. His recommendation does not appear in the draft Bill, as presently framed.

The Bill is currently at Stage One of Three in the legislative process. It was assigned to the Justice Committee who invited views and responses to the Bill. The Justice Committee heard evidence on the Bill on 19 and 26 September and on 31 October 2017 from interested parties including the Law Society of Scotland, the Association of British Insurers, the Forum of Insurance Lawyers and the Association of Personal Injury Lawyers, amongst others.

The next stage in the legislative process is for the Justice Committee to produce a report on the responses it has received to the Bill. Once the report has been published, Parliament will debate the general principles of the Bill. It is expected that Parliament will agree to these to allow it to move on to Stage Two when amendments to the Bill will be considered.

Rhona Cameron rca@bto.co.uk

Put that in your pipe and smoke it!

The recent case of the *Department for Communities and Local Government v Shirley Francis Blackmore (Executrix of the Estate of Cyril Leonard Hollow, Deceased) [2017] EWCA Civ 1136* provides a good example of how the Court has dealt with contributory negligence in disease claims.

The late Mr Hollow was employed by the defendant as a general decorator between 1966 and 1986 and spent approximately 20% of his working time in conditions where there was asbestos dust. He was not provided with a dust mask or any protective equipment. He started work at the age of 14 in 1950 and smoked 20 cigarettes a day until his death in 2010 at age 74. The post mortem analysis confirmed a fibre count above the level at which the risk of developing lung cancer doubles. As a result of this, parties agreed that the cause of his death was as result of the cumulative effects of smoking and his asbestos exposure with the defendant.

The issue concerned the apportionment, if any, for contributory negligence on account of the deceased's smoking. The Court held that contributory negligence could not be determined from a mathematical calculation based on the respective risks of smoking and asbestos exposure, even though the evidence was that the risk from smoking was between double or treble the risk from asbestos exposure. Contributory negligence was assessed at 30% at first instance.

The defendant was granted permission to appeal and sought to argue that the discount for contributory negligence should be between 85% and 90%, as smoking accounted for the greater risk of developing lung cancer. The Court of Appeal held that the Judge at first instance was correct in not simply applying a mathematical calculation to the relative risk of developing lung cancer and was entitled to draw a distinction between the blameworthiness of the employee and employer when assessing contributory negligence.

The point for the Court of Appeal was that the defendant was under a strict statutory duty to protect the claimant and had not complied with that duty. It held that the Judge was entitled to find that the defendant, as the employer, should bear the greater responsibility given their blameworthiness in exposing the deceased to asbestos given its breach of statutory duty and where the dangers were well known. The deceased could not be considered to be equally blameworthy given the lengthy period of time during his life during which the dangers of smoking were not known. In light of this, the Judge's assessment of 30% contributory negligence was well within the range open to him. The defendant's appeal was dismissed.

The decision in *Blackmore* is fact specific, however the finding of 30% contributory negligence is high against the background of the claimant being considered not to have been aware of the risk of smoking to his health for the majority of his life. The judgment will hopefully assist in there being more findings of contributory negligence due to smoking in lung cancer cases.

Jennifer Stewart jhs@bto.co.uk

Periodical Payment Orders

The Scottish Government's consultation on the proposed introduction of Periodical Payment Orders (PPOs) in Scotland closed on 11 September 2017. The consultation invited comments upon draft legislative provisions which may go on to form the basis of an amendment to section 2 of the Damages Act 1996. The intention of the provisions is to place the Scottish Courts on an equivalent footing with the rest of the UK by requiring the Scottish Courts to consider PPOs in every case in which damages for future pecuniary loss are awarded and the draft legislation seeks to allow the Courts to impose PPOs without the consent of the parties, if appropriate.

The Scottish Government will now consider the responses submitted to the consultation and it is likely to publish those responses, together with its intentions to move the legislative amendment forward.

Mark Hastings mfh@bto.co.uk

We didn't start the fire...

The case of *PT Civil Engineering v Davies (2017) EWHC 1651 (QB)* provides an interesting example of the application of the doctrine of *res ipsa loquitur* i.e. that the accident itself is evidence of negligence on the part of the defendant.

The claimant was a self-employed ground worker. He was travelling in a van owned by the defendants, together with two passengers. The vehicle was travelling along the A470 when a fire broke out within it. The injured claimant brought an action for damages alleging that the accident was caused by the defendants' negligence in that they had failed to maintain the vehicle. It was claimed that prior to the incident the vehicle had a history of reported faults.

The claimant and the two passengers gave evidence that they noticed a sweet smell and then saw a flame from underneath a plastic area immediately in front of the driver. However, the expert witnesses instructed for each side agreed that the location of the seat of the fire was the back of the driver's seat cushion and the seat back. There was no fire damage in the driver's foot well. The witness evidence was inconsistent with the physical evidence, as interpreted by the expert witnesses, who were unable to find a link between any of the reported faults of the vehicle and the cause of the fire.

"...the Judge at first instance found in favour of the claimant, applying the res ipsa loquitur doctrine."

Notwithstanding the fact that the exact cause of the fire was unknown, the Judge at first instance found in favour of the claimant, applying the *res ipsa loquitur* doctrine. He drew an inference that the fire would not have occurred without the defendants' negligence in failing to adequately maintain the vehicle.

This decision was overturned on appeal. The Court of Appeal held that the Judge was not entitled to draw such an inference. The evidence showed that the previous defects in the vehicle were not the cause of the fire. There was no evidence that a defect in the vehicle could have caused the fire. It could not therefore be said that the circumstances were such that they pointed to the negligence of the defendants.

"The burden of proof lay upon the claimant to show that the defendants had failed to take reasonable care and that their failure to do so caused the accident."

The Court of Appeal's view was that for the doctrine of *res ipsa loquitur* doctrine to apply, there needed to be (1) an unexplained occurrence (2) which would not have happened in the ordinary course of events without negligence and (3) the circumstances are such that they point to the defendant having caused the occurrence by his negligence.

The burden of proof lay upon the claimant to show that the defendants had failed to take reasonable care and that their failure to do so caused the accident. Whilst the defendants had not been able to prove a negative that they were not negligent, they were able to show that the fact of the accident itself was not enough to infer that the accident was caused by their negligence.

The case serves as a useful reminder of the requirements of the *res ipsa loquitur* doctrine, and its limits given that the defendant's negligence was clearly not the only reasonable explanation for the cause of the fire.

Megan Lafferty mla@bto.co.uk

National PI Court Update

The National Personal Injury Court continues to grow its jurisprudence. Decisions have been appearing much more regularity with the number reported in 2017 already exceeding those in 2016. Two recent cases involving the certification of expert witnesses, modification of expenses, and sanction for Counsel, are discussed below.

In *Boyle v CIS Ltd & Another, 2017 SC EDIN 36,* the Court issued a useful reminder of the test which will be applied when considering whether certification of a skilled witness is merited. The issue in *Boyle* centred over certification of one of the pursuer's skilled witnesses, a neuropsychiatrist.

For certification to be granted, the Court must be satisfied that (a) the person was a skilled person; and (b) it was reasonable to employ the person, assessed at the point of instruction. There was no issue in *Boyle* over the neuropsychiatrist's qualifications. The issue turned upon whether it had been reasonable to have instructed him in the first place.

The pursuer sought to argue that she had instructed an eminent neuropsychiatrist who was an expert on somatoform disorder (which was an issue in the case). Certification was opposed on the basis that it was not clear why the expert had been instructed, standing the fact the pursuer already had opinion from a clinical psychologist; a consultant psychiatrist and a consultant neurosurgeon.

The Court refused to certify the neuropsychiatrist on the basis that the involvement of the consultant psychiatrist suggested there had been duplication of effort. The question was whether the neuropsychiatrist had been asked to address an issue that the psychiatrist was not able to comment upon. The Court was not satisfied that it was reasonable to have instructed the neuropsychiatrist, absent the letters of instruction sent to both experts which may have identified the distinction between what each was asked to comment upon or the reports themselves.

"This decision is a useful reminder that the pursuer must be able to justify the basis for the instruction of the skilled witness, otherwise certification is likely to be refused."

This decision is a useful reminder that the pursuer must be able to justify the basis for the instruction of the skilled witness, otherwise certification is likely to be refused.

In *Harrison v Compass Group UK & Ireland Ltd, [2017] SC EDIN 42,* the Court was tasked with resolving the issue of whether there ought to be any modification to the pursuer's judicial expenses, together with whether sanction for Counsel ought to be granted.

The general rule is that expenses follow success. However, the Court has ultimate discretion over expenses. The Court can also order that a successful party's expenses be subject to a percentage modification, normally to mark its displeasure at the conduct of a successful party.

The defenders sought modification of the pursuer's expenses on the basis that a key medical report was disclosed in January 2017 with just five days allowed for an offer to be made before litigation commenced. The defenders' submitted that litigation may have been avoided had they been allowed an appropriate amount of time to respond to the disclosure of the medial evidence.
The pursuer's position was that the triennium was due to expire on 4 February 2017 which gave them little room for manoeuvre. The defenders had access to another expert report dating from July 2016 which suggested that the pursuer undergo a further review in November 2016. It was submitted that the defenders could have obtained their own report. Although there had been a delay in obtaining medical evidence, this was due to the pursuer undergoing surgery and recuperating.

The Court refused to modify the expenses on the basis that it could not criticise the pursuer's conduct. It also noted that the defenders had not been proactive and could have pressed the pursuer for disclosure prior to litigation.

Modification is a useful tool with the potential to restrict expenses where there has been unreasonable conduct on the part of a successful party. However, the Court must be satisfied that there is sufficient cause to exercise its discretion and it ought to be borne in mind that the conduct of the losing party will not escape scrutiny in any motion for modification.

The defenders separately opposed sanction for Counsel on the grounds that, if the action had been settled pre-litigation, Counsel would not have been required. Only two months passed before settlement was reached after disclosure of the medical report in January 2017. The alternative submission was that sanction should be limited to one consultation to discuss the defenders' Tender (part 36 offer).
The pursuer's Counsel submitted that sanction should be granted, reminding the Sheriff that the action settled for £45,000 which was a substantial sum of money for the pursuer. Without the issue of contributory negligence (which the defenders introduced for the first time in their defences) the claim may have been worth £80,000. It was submitted that the case was of great importance to the pursuer given her concern over whether, given her injuries, she would be able to continue to care for her husband.

The Court granted sanction for Counsel for the whole cause. It had no difficulty accepting the pursuer's position that the case was complex and the value of the claim was of great importance to her. The decision in *Harrison* is regrettably another reminder of the difficulties faced in opposing sanction for Counsel. However, the Court appears to have accepted that it had the power, even if sanction was to be granted, to restrict the extent of Counsel's involvement. Therefore defenders should consider carefully the pieces of work for which Counsel has been instructed and continue to choose the cases in which they oppose sanction for Counsel with care.

Lewis Richardson lri@bto.co.uk

Shut up and drive! The potential impact of driverless cars

The Government is expected to introduce the new Automated and Electric Vehicles Bill this autumn to replace the Vehicle Technology and Aviation Bill which lapsed earlier this year. The new Bill has been designed to 'smooth the road' for driverless car technology and will include an extension of car insurance to cover the use of automated vehicles.

There are several ongoing trials of driverless cars ongoing in the UK, with the first set of public road trials due to take place by the end of 2017. A consortium of British companies have plans to test driverless cars on motorways in 2019. As the development of automated technology accelerates, what impact can we expect to see in the not so distant future?

The Government is reportedly investing more than £200 million in research and testing infrastructure with the hope that the introduction of driverless technology will have a positive effect on reducing road traffic accidents. If human error is the biggest cause of road traffic accidents, the advent of driverless technology may theoretically lead to a reduction in road traffic accidents.

The potential exists in the proposed Bill for the principles of motor insurance to apply to product liability insurance where accidents involve driverless cars. This raises issues over what policy ought to respond and whether drivers will require both a motor and product liability product when insuring a driverless vehicle.

Liability will no doubt vary from case to case depending on the circumstances. For example, incidents that occur where the driver has the option to step in and resume manual control of a vehicle will require close investigation.

Another consideration is the potential requirement for statutory rights of recovery to be created to allow insurers to claim back costs from potentially responsible parties, depending on the precise cause of a given accident. A non-exhaustive list of these could include the vehicle, system and software manufacturers.

The potential implications of driverless technology are far reaching. In addition, to potentially complex questions over liability and the necessity to extend the current insurance requirements and legislative framework, driverless technology presents other concerns such as criminal liability, together with privacy and cyber risk. These are all matters which will require detailed consideration before driverless cars are eventually rolled out.

Garry Ferguson gfe@bto.co.uk

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Update

FREE BTO SEMINAR: Employment Law Update 2017

Employment law and practice continues to be a fast paced area of law. The removal of fees in the Employment Tribunal system might well result in increased litigation.

Our annual employment law update looks back at the most important employment law developments in 2017, from legislation to case law.

This is always a very popular session and spaces will be limited. Book now to secure your place.

PROGRAMME:
12:00 Registration
12:30 Seminar + Q&A
13:30 Buffet

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Edinburgh, EH3 9QG

TO BOOK:
Click here + SEND or
E: marketing@bto.co.uk

GLASGOW:
Date: 12 December 2017
Venue: The Supper Club
29 Royal Exchange Square
Glasgow, G1 3AJ

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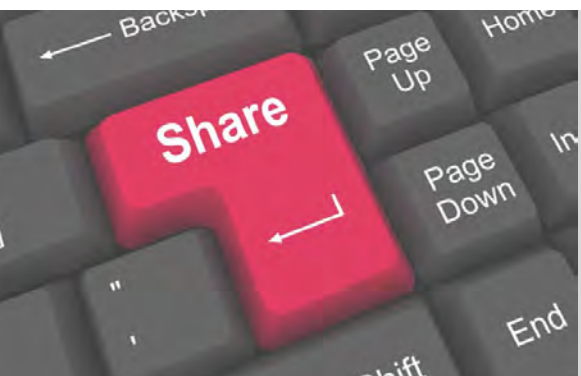

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