

davies arnold cooper
reviews the year's highlights



product liability /
personal injury

top ten 2006

DAVIES ARNOLD COOPER

index

Foreword

- 1 **Time to take stock**
O'Byrne v Aventis Pasteur MSD
- 2 **Caps off to safety standards**
Tesco Stores and Another v Pollard
- 3 **England wins in Bangladesh Test**
Sutradhar v Natural Environment Research Council
- 4 **US turns back our huddled masses**
The Vioxx litigation
- 5 **Go through green channel for higher damages**
Harding v Wealands
- 6 **Parliament has last word on asbestos claims**
Barker v Corus (UK)
- 7 **Cancer phobia is not an injury**
Rothwell, Grieves and Others v Chemical and Insulating Company and Others
- 8 **Having a change of mind**
Sowerby v Charlton
- 9 **Challenging CFAs made easier**
Garrett v Halton Borough Council
- 10 **Nothing to do with us, gov!**
Hawley v Luminar Leisure and ASE Security Service

About Davies Arnold Cooper

product liability / personal injury top ten 2006

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foreword

Last year saw a number of important court decisions affecting product liability and personal injury claims. Common themes of many were the international nature of the issues that were grappled with. One case involved English claimants wishing to sue in the US whilst another concerned Bangladeshi citizens wishing to sue in England. Yet a third addressed the question of whether an English citizen injured whilst on holiday was entitled to English or Australian levels of damages. These cases demonstrate the international nature of product liability and personal injury claims with products manufactured in one country being marketed worldwide and the globalisation of international trade and travel.

We are therefore pleased to nominate our Top Ten cases for 2006 – in no particular order, as they say on *Strictly Come Dancing*.

More generally, 2006 continued to be a difficult year for claimants in group actions within the product liability and personal injury field. There are now very few cases supported by public funding, with the withdrawal of support for the MMR vaccine and the foetal anticonvulsant cases and the refusal to support other groups such as Vioxx and Seroxat. Group Litigation Orders also took a knock with the refusal of the court to issue a Group Litigation Order in the miners' case of **Hobson v Ashton Moreton Slack**.

The absence of many pharmaceutical product liability claims pending trial will deprive us of the opportunity to clarify the unsatisfactory position left by some aspects of Mr Justice Burton's seminal decision in **A v National Blood Authority**, particularly in relation to the development risk defence and the applicability of the learned intermediary rule to prescribed products – two aspects of his judgment most frequently criticised. Certainly, the signs of the most recent Court of Appeal decision in **Tesco v Pollard** suggest that Mr Justice Burton's purposeful approach to interpretation of the **European Product Liability Directive** might not be universally favoured by the English judiciary. Similarly in the case of **Palmer v Palmer**, which did not make the Top Ten, the court took a more traditional approach to deciding

whether a product was defective in the context of its being misused. The court found that a seatbelt which could have excessive slack if not properly fitted was defective because the risks were not adequately pointed out to consumers within the instruction leaflet.

On a broader front, July 2006 saw the DTI's consultation paper on Representative Actions. Its proposals envisage designated consumer bodies bringing claims on behalf of named consumers who have suffered similar but financially low-level losses and who would otherwise be unlikely to be able to seek redress. Consumer groups and the OFT have criticised the paper as being too modest and are pressing for wider reforms, including opt-out proposals whereby all members of a class are included within a claim unless they specifically choose not to be. These organisations are also seeking costs regimes inconsistent with the principle that the loser pays the costs of the winner. There will be a need to monitor developments on this front.

On the consumer safety side, the **General Product Safety Regulations** of 2005 have now implemented the revised **General Product Safety Directive** and apply to all products to the extent that sector-specific directives do not apply, and in respect of notification obligations, now cover all industries except for food and pharmaceuticals which are more comprehensively regulated by their own regulations.

Finally, the **Corporate Manslaughter and Corporate Homicide Bill** is going through Parliament. It will make it easier to prosecute companies for manslaughter by removing the focus on individual failings and looking at the conduct of senior management collectively. It is considered in our **D&O / Financial Institutions Top Ten 2006**.

With such major issues up in the air, 2007 is bound to be an interesting year.

Davies Arnold Cooper
January 2007

The Insurance Top Ten 2006 publications are not a substitute for detailed advice on specific transactions and problems and should not be taken as providing legal advice on any of the topics discussed.

time to take stock

O'Byrne v Aventis Pasteur MSD Ltd
European Court of Justice (ECJ) 9 February 2006

facts

Under the **European Product Liability Directive**, consumers have ten years to commence a product liability claim from the date the product was "put into circulation". This case sought to clarify when this occurs in the context of vaccines produced by one company and sold to the NHS by a subsidiary in the same group of companies as the manufacturer. The claim against the English supplier was made well before the expiry of the ten-year period. It maintained that it was not the producer of the product. A second claim was then brought against the French producer and it became vital to determine the date the product was put into circulation. Was a product put into circulation at the time of a transfer of the product from the production company to the subsidiary, or when the product was supplied by the subsidiary to its customer?

The ECJ was also asked to consider whether there could be a substitution of defendants after the ten years had expired, in circumstances where the action was brought against the supplier under the mistaken belief that it was the producer.

decision

The court stated that there was a need to define "putting into circulation" with legal certainty in the interests of the parties. It concluded that a product is considered as being put into circulation when it leaves the production process operated by the producer and enters the marketing process in the form in which it is offered to the public. The court concluded, in respect of the substitution issue, that it was for the national courts to determine procedural mechanics when an error as to the identity of a defendant is made, thereby confirming the validity of the Court of Appeal decision in **Horne Roberts v SmithKline Beecham** 2001, that in appropriate circumstances, a substitution was possible.

comment

Although the European Court sought to establish an objective criterion, it is far from clear that the ruling will avoid competing arguments. It is likely that labelling and packaging must be completed before it can be deemed to be in final form ready for the consumer and this may be quite late in the production process, and undertaken by a subsidiary. It may be artificial to suggest marketing begins only when production is complete and an identifiable handover date may be difficult to determine.

The judgment clearly rules against any possibility that the time period does not begin to run until the product reaches the consumer, a position argued in some recent UK cases. The emphasis on the need for legal certainty is to be welcomed, even if it may not be achievable in every situation.

caps off to safety standards

Tesco Stores Ltd and Another v Pollard (a minor)
Court of Appeal 12 April 2006

2

facts

A toddler aged thirteen months ingested dishwasher powder by swallowing it direct from its plastic bottle. To do this, he first had to remove the supposedly child-resistant bottle cap. The parent claimed the bottle was defective. It was accepted that, in accordance with the mother's account, the cap had been securely fastened.

The relevant British Standards Certification for so-called "child-resistant closures" sets out the amount of torque that is required to open a bottle secured with such a cap – otherwise known as the "squeeze and turn" variety. At trial, it was demonstrated that, in fact, a much reduced level of torque would have been enough to open the bottle, when also taking into account the pressure applied by the child.

decision

The key point of interest is whether the British Standards Certification could be treated as the relevant level of safety under the **Consumer Protection Act (CPA)**, which imposes liability for safety failures which fall below a standard which persons generally are entitled to expect. In the Hepatitis C group litigation (**A and Others v National Blood Authority 2001**) – a victory for the claimants – reliance was placed upon a subjective standard of expectation, ie that the general public would expect blood transfusions supplied to them to be free from infection. On this basis, one would have assumed that members of the public purchasing dishwasher powder from Tesco should also be entitled to expect that such products would conform to the relevant British Standards, whether or not the precise details of those standards are known to them.

Lord Justice Laws declined to impose an objective standard of safety (based on the British Standards Certification) and held that all that the public was entitled to expect from a child-resistant bottle cap was that it was harder to open than a standard cap.

comment

The Court of Appeal's decision may well signal a more pragmatic approach to the development of case law under the CPA, but it remains surprisingly at odds with the detailed reasoning in more recent product liability judgments, such as the Hepatitis C group litigation. One could certainly speculate that the court reached its decision based on policy reasons and that its finding perhaps reflects a degree of unspoken scepticism as to the facts of the case.

In ruling that the public's expectation of relative safety is simply that a supposedly child-resistant bottle cap would be more difficult to open than an ordinary one, the court appears to have advocated a standard of relative liability, as opposed to the no-fault strict liability regime which underpins not only the CPA, but also the **European Product Liability Directive**, which gave rise to it. It is easy to distinguish the court's decision as a "one-off". However, the reality is that we are left with an unsatisfactory situation, in which the concept of defect is subjective and therefore likely to be dictated by the facts of each case, rather than in accordance with CPA strict liability principles.

England wins in Bangladesh Test

Sutradhar v Natural Environment Research Council (NERC)
House of Lords 5 July 2006

3

facts

In 1992, NERC, a UK statutory body, funded the testing of groundwater in Bangladesh, measuring levels of toxicity to fish and humans. The results of that analysis formed the basis of NERC's report, revealing the presence of aluminium, iron, magnesium and other elements. The presence of arsenic in the water was not tested for, nor detected, nor mentioned in the report.

Mr Sutradhar subsequently developed symptoms associated with arsenic poisoning, allegedly from the water he had drunk, and issued proceedings against NERC in the English courts. He alleged that NERC owed him a duty of care in its preparation of the 1992 report and that this duty was breached by the NERC's failure to test for arsenic and to draw attention to the fact that it had not tested for arsenic.

The Court of Appeal upheld the submissions of NERC that there was an insufficient relationship of proximity between NERC and the Bangladeshi public to find a duty of care owed to Mr Sutradhar in the preparation of the 1992 report. As a result, it was held that Mr Sutradhar had no real prospect of success in his claim, thus establishing grounds to both strike out his claim and give summary judgment in favour of NERC. Mr Sutradhar appealed.

decision

The House of Lords unanimously dismissed Mr Sutradhar's appeal. The House arrived at this conclusion for two predominant reasons. First, the relationship between NERC and the Bangladeshi people was not sufficiently proximate so as to establish a duty of care. As NERC had no connection with the drinking-water project in Bangladesh, nor had it been asked by any person to determine the potability of the water, there was no "proximate" relationship between NERC and the Bangladeshi public. Accordingly, there was no positive duty for NERC to test for arsenic simply because it had tested for other elements. Lord Hoffman asserted that the fact that a person had expert knowledge did not in itself create a duty to the world at large to apply that knowledge and solve its

problems. His Lordship added, "[NERC] can be liable only for the things they did and the statements they made, not for what they did not do".

Further, the House rejected Mr Sutradhar's submission that it was arguable that NERC owed a duty to the population of Bangladesh not to publish a report that implied, by what it omitted to say, that there was no arsenic. Again, Lord Hoffman returned to the argument that there existed no proximate relationship between NERC and the Bangladeshi people to establish a duty of care. Lord Brown put it that "*the essential touchstones of proximity*" were missing.

comment

Undoubtedly, policy considerations influenced the House's judgment. Had the House of Lords given the green light to Mr Sutradhar, the cost to the British taxpayer would have been enormous. The claimants were legally aided and the House was informed that the costs incurred by Mr Sutradhar and other Bangladeshi residents who wished to bring similar actions had already exceeded £380,000. The scale and cost of trial were, as Lord Hoffman stated in his judgment, "overwhelming". The class of potential claimants in Mr Sutradhar's case was "the entire population of Bangladesh". This case is a clear indication of the English courts' reluctance to open the floodgates to mass litigants from overseas, particularly when the cost to the British taxpayer is potentially so great. Further, the decision of the House of Lords clarifies the circumstances in which a proximate relationship is created when establishing a duty of care. One question to be considered now is when a "proximate" relationship will be established where foreign aid is offered to, or work is carried out in, third world countries.

US turns back our huddled masses

The Vioxx litigation
Superior Court of New Jersey 5 October 2006

4

facts

In September 2004, Merck announced a voluntary worldwide withdrawal of Vioxx (rofecoxib), an anti-inflammatory drug used to treat arthritis and acute pain. Vioxx was launched in the US in 1999 and marketed in more than 80 countries. The decision to remove Vioxx from the market was taken after a long-term study indicated it increased the risk of heart attack or stroke, if patients took it for eighteen months. No increased risk was found for the first eighteen months of treatment.

Litigation has commenced in the US, with Merck currently having won five cases but lost four. Several hundred British claimants said they suffered strokes and heart attacks after taking the drug. They asked the New Jersey court, the state in which Merck is based, to accept jurisdiction, after they were refused legal aid in the UK and insurers declined to fund the litigation. Merck applied to dismiss the claims in favour of an English forum.

decision

Judge Carol Higbee allowed Merck's application. She said the UK legal system would provide sufficient redress and that a US jury should not be expected to have to consider a foreign system of drug regulation. She said the claimants must challenge the manufacturer in the UK courts.

comment

A similar attempt by English claimants to sue American manufacturers in the US was rejected by a judge earlier this year in a case involving haemophiliacs who developed HIV or Hepatitis C following administration of imported Factor VIII products manufactured by the US companies. In **Gullone et al v**

Bayer Corp et al, the judge ruled that England was the appropriate forum for the claims. There has been criticism of this judgment for placing unrealistic expectations on the availability of conditional fees as a means of financing English product liability litigation. The judge also questioned the likelihood that the "loser pays" principle would be applied by an English court if the claimants' cases failed.

US courts do offer advantages to claimants, including jury trials where the outcome can be affected by subjective influences, higher damages including the prospect of punitive damages, and wider disclosure of documents. US courts have however been reluctant over recent years to entertain foreign claimants. The driving force behind both these instances of forum shopping by English claimants is the tightening of the Legal Services Commission's funding provision for large-scale product liability cases.

Many commentators, for both claimants and manufacturers, accept that the conditional fee system for personal injury litigation in the UK does not provide a viable model for funding large-scale product liability cases. The insurance market has shown no enthusiasm for providing cover in such cases, given the expense and uncertainty of such claims, having seen the Legal Services Commission back a number of costly but unsuccessful high-profile actions over the years. Public funding afforded protection from paying costs to a successful defendant but claimant lawyers are hesitant to pursue claims on a conditional fee basis without protecting their client's exposure to defendants' costs.

Claimant and defendant lawyers have expressed concerns that, as a matter of public policy, such cases raise fundamental questions about the availability of access to justice. Solutions need to be found but also require careful examination so that the UK does not import unwanted features of the US system. The Vioxx litigation will only increase the calls for change.

go through green channel for higher damages

Harding v Wealands
House of Lords 5 July 2006

5

facts

A road accident on a dirt track in New South Wales gave rise to a House of Lords' decision earlier this year which increases the likelihood of claimants going "forum shopping" for the jurisdiction which offers the most favourable levels of compensation.

Mr Harding, a passenger in a car driven by Ms Wealands, was severely injured and rendered tetraplegic whilst they were both on holiday in Australia.

Proceedings were commenced in the English courts and, liability having been admitted, only damages remained to be determined. At first instance, the assessment of damages was calculated with reference to principles of English law, regarded as the appropriate damages regime by the court.

The Court of Appeal, upholding the first instance court's approach, agreed that the calculation of damages should be in accordance with the substantive law of England. If the court had ruled in favour of Australian law, Mr Harding's damages would be reduced by 30% because the claim would have been calculated in accordance with a statutory motor accidents compensation scheme in operation in Australia, as opposed to the common law principles of compensation applied in the English courts. The insurers appealed to the House of Lords.

decision

The House of Lords was required to decide whether the former common law position, that remedies were a matter for the forum in which the claim was brought rather than where the accident occurred, was still applicable, in view of the enactment of the **Private International (Miscellaneous Provisions) Act 1995** which was intended to crystallise the common law position in statutory form.

The House of Lords unanimously concluded that the 1995 Act preserved the common law position. Lord Hoffman embarked on a detailed analysis of the 1995 Act as well as key cases on tort law.

The House also had to consider whether the Australian compensation legislation gave rise to substantive rights of action or procedural issues relating to remedies available. Lord Hoffman cited the Australian case **Stevens and Head 1993** as authority for the position that such provisions were procedurally based. He therefore concluded that it was appropriate that the Australian legislation was not applied by the English courts.

comment

The upshot of the House of Lords' decision, as technical as it may sound, is that it effectively incentivises claimants to pursue claims for damages wherever possible through the English courts so that they may benefit from the English principles of damages assessment, which are often significantly more favourable than those of other jurisdictions, as was the case here.

The courts should therefore brace themselves for a wave of "compensation tourism" inspired by this decision.

Parliament has last word on asbestos claims

Barker v Corus (UK) Plc
(formerly Saint Gobain Pipelines Plc)
House of Lords 3 May 2006

6

facts

Following the House of Lords' decision in **Fairchild v Glenhaven Funeral Services Limited** 2002, an employee who contracted mesothelioma after being harmfully exposed to asbestos by a number of employers could recover damages from all or any of them notwithstanding that he could not prove which of them caused the injury.

Mr Barker died of asbestos-related mesothelioma in 1996. During his working career, he had had two exposures to asbestos from employers' breaches of duty and one during a period of self-employment. Thus, unlike in **Fairchild**, not all of the exposure involved breach of an employer's duty.

decision

The House of Lords had to decide whether the self-employed exposure took the case outside **Fairchild** and whether it was fair in all circumstances for defendants to be individually and jointly liable for any damages awarded to the claimant. Lord Hoffman confirmed that the **Fairchild** exception provides that each of the causal factors contributing to the claimant's condition must have operated in the same way. The exception will apply only where the defendant, or the claimant, has materially increased the risk of disease through the same agent. **Fairchild** imposed liability on defendants on the exceptional ground that they may have harmed the claimant, not that they actually caused harm, which is the usual basis on which damages are calculated. The House held that in cases involving multiple exposures to asbestos, damages will be apportioned amongst the defendants according to the extent to which they "*materially increased the risk*" of injury to the claimant.

Following an immediate public outcry, Parliament intervened, and what is now the **Compensation Act** 2006 section 3.2 allows a claimant to recover all his damages for mesothelioma from one culpable defendant whether or not there were other culpable defendants. The **Financial Services Compensation Scheme** (FSCS) is

being amended to make it easier for solvent defendants / their insurers to recover contributions under the scheme where a potential contributor's insurer is no longer trading or is insolvent.

comment

Mesothelioma claims will now be settled against one culpable defendant who will recover a contribution from other culpable defendants if possible. The claimant recovers his damages in full. This should reduce costs, because settlement need not be delayed while other potential defendants are traced. It may however increase damages paid by defendants, because it will be difficult to recover contributions from insolvent uninsured employers. Further, it may be equally difficult to achieve a discount for periods of self-employment, even though the **Compensation Act** specifically does not prevent a finding of contributory negligence. At least a contribution from the FSCS should be available in most cases where a culpable defendant's insurer is no longer trading.

However, as the **Compensation Act** is limited to mesothelioma claims, there is a potentially anomalous and unfair position between types of claimants: one suffering from asbestos-related lung cancer who can trace a viable employer / insurer for only 5% of the exposure, may recover 5% of his damages under **Barker**, whereas a claimant in the same position but with mesothelioma will recover 100%.

cancer phobia is not an injury

Rothwell, Grieves and Others v Chemical and Insulating Company Ltd and Others
Court of Appeal 26 January 2006

7

facts

Ten claimants were harmfully exposed to asbestos in the course of their various employments and sued their respective employers for damages. All ten contracted asymptomatic pleural plaques (ASP) which would not necessarily develop into a more serious asbestos-related disease (ARD) but, being evidence of earlier asbestos exposure, were giving rise to anxiety. The claimants were concerned that they might contract a new serious ARD in the future. They succeeded at first instance, although the judge restricted the level of damages awarded and disallowed future loss claims. The defendants appealed on liability and damages in five cases. Five claimants cross-appealed on damages and one, where liability was not in issue, also appealed on damages.

decision

In a majority decision, the Court of Appeal held that ASP do not amount to loss for which damages may be sought, because where a physical change to the body, negligently caused, is so insignificant that it cannot found a claim, it follows that there can be no recovery for risk of future injury or for anxiety. The court effectively rejected the trial judge's two-part requirement that ASP plus anxiety equals a recoverable loss. One judge disagreed on liability and quantum and the court ruled that the case where liability was not in dispute would be valued using the dissenting judge's (higher) damages figures.

The court took policy considerations into account, including an observation that trivial claims should be discouraged, particularly as a claim for future risk will be too small if the condition develops and a windfall if it does not. It was also found that there is no duty not to cause anxiety as opposed to a psychiatric injury, and that claims should be brought promptly in a single action for all the consequences of a wrong. Immediate leave was granted to the claimants to appeal to the House of Lords.

comment

There are many ASP cases in progress, both issued and in the pre-litigation stage. All these are necessarily stayed pending the House of Lords' decision which will cause distress to claimants and uncertainty for insurers.

There are now three schools of thought spread over four judges as to whether ASP are compensatable. Two deny that ASP are compensatable at all, one requires there to be ASP plus anxiety and one says ASP alone are enough. The views are therefore split 50/50 as to whether or not damages are payable.

If the Lords confirm the Court of Appeal decision, the claims fall away (for now at least), but if they overturn the present decision and adopt the dissenting view, ASP claims will be compensatable without anxiety and damages will return to pre-first trial levels. In that situation, most of the stayed claims will become payable at the same time and numerous further claims will probably be brought which will hit insurers hard and make it difficult to set reserves.

The appeal is listed to start on 25 June 2007 and it is to be hoped that the judgment will be handed down shortly thereafter.

having a change of mind

Sowerby v Charlton
Court of Appeal 21 December 2005

facts

The claimant suffered catastrophic injuries in a fall at the defendant's premises. The defendant admitted a breach of duty in open correspondence and proposed settlement. The claimant rejected the proposal and commenced proceedings whereupon the admission was withdrawn and primary liability denied.

decision

Although summary judgment on primary liability was entered for the claimant because on the facts it was inconceivable the defendant would not be partially liable for the accident (which prompted the initial admission), the Court of Appeal ruled that the part of the **Civil Procedure Rules** (CPR) dealing with admissions applied only to admissions made after proceedings had commenced. Accordingly, in a claim where the value exceeds £15,000 (categorised by the CPR as a "multi-track" claim), a pre-action admission could be withdrawn in litigation without the court's permission being required.

comment

The position in claims of a value less than £15,000 (categorised by the CPR as "fast-track" claims, or potentially "small claims" where the value is under £5,000) is different. There is provision in the **Personal Injury Pre-action Protocol** (section 3.9) which states that where liability is admitted, the presumption is that the defendant will be bound by this admission for all claims with a total value of up to £15,000. The court made clear this presumption does not apply to multi-track claims.

The court also offered guidance on the factors to be considered when deciding whether to permit post-action withdrawal of an admission namely:

- the reasons and justifications for applying to withdraw an admission must be in good faith
- the balance of prejudice to the parties
- whether a party suffering prejudice has been responsible for it (for example by failing to properly investigate liability issues at the outset)
- the prospects of success and
- the avoidance of satellite and disproportionate litigation.

The decision has caused concern amongst claimants' lawyers groups who argue that, unless made contractually binding, pre-action admissions cannot be relied upon. They contend that if they proceed with liability investigations (despite an admission having been made) they risk an adverse costs order, but if they do not and the defendant resiles, the evidential trail goes cold, and there could also be potential limitation problems.

The CPR Committee therefore instigated consultations in Autumn 2006 regarding the impact of this judgment. Our view, expressed through the Forum of Insurance Lawyers (FOIL), is that the decision appears unequivocal and requires no tampering.

challenging CFAs made easier

Garrett v Halton Borough Council
Myatt v National Coal Board
Court of Appeal 18 July 2006



facts

Most injury claims are funded through Conditional Fee Agreements (CFAs), which must comply with the detailed requirements of the **Conditional Fee Agreement Regulations 2000**. Regulation 4(2)(c) requires the claimant's solicitor to have considered the availability of alternative funding such as before-the-event (BTE) insurance policies. Regulation 4(2)(e) requires the solicitor to declare any financial interest when recommending an after-the-event (ATE) insurance policy to fund the claim. Two important cases heard together shed light on the enforceability of CFAs when the Regulations are breached.

decision

In **Myatt**, the solicitor failed to advise about alternative funding, thus breaching Regulation 4(2)(c). However as the claimants did not have any BTE cover they suffered no prejudice. The question for the Court of Appeal was whether the breach was material and therefore rendered the CFA invalid.

The court concluded that "materiality" related to "protection afforded to the client", not whether the claimant had suffered any prejudice. The CFA scheme was designed to protect claimants and encourage compliance with detailed statutory requirements. The fact the claimants suffered no loss was immaterial – the CFA was held to be invalid and no costs were recoverable.

In **Garrett**, the claimant's solicitors, who had the case referred to them by a claims management company, failed to inform the claimant that they had an indirect financial interest in recommending the referrer's insurance product. Had they not recommended that product, they would have lost their place on the company's panel, losing considerable fee income. Failure to disclose this indirect financial interest when recommending the insurance policy was held to be a material breach, rendering the CFA invalid.

The court gave useful guidance as to enquiries which solicitors should make to ensure proper compliance with Regulation 4(2)(c):

- the more sophisticated about insurance matters the client appears, the more the solicitor can rely upon his answers
- the circumstances in which the solicitor instructed are relevant – for example, if the client is seriously ill in hospital, the enquiries will have to be less onerous
- the nature of the claim is relevant, in particular if the claim is of a type which is unlikely to be funded by standard insurance policies. In such a case, fewer questions need to be asked
- the cost of the ATE premium is a factor – if it is modest, the solicitor will not need to spend disproportionate time investigating alternative insurance
- if the claim has been referred to a panel solicitor, although the referring body may have investigated availability of BTE, the solicitor must exercise his own judgment.

comment

These cases have a crucial impact on pre-November 2005 CFAs of which there are thousands. Although the court discouraged defendants from embarking on fishing expeditions to ascertain whether with sufficient questions they could establish a breach of the Regulations, these judgments give rise to the possibility of significantly more challenges. Where defendants suspect the CFA Regulations may not have been complied with they should make comprehensive enquiries to establish whether the Regulation requirements have been met.

nothing to do with us, gov!

Hawley v Luminar Leisure Plc and
ASE Security Service Ltd (ASE)
Court of Appeal 24 January 2006

10

facts

The law relating to seconded employees and vicarious liability has been examined again.

The key prior authority was the case of **Viasystems v Thermal Transfer** 2005, where a contractor employed to install air conditioning subcontracted the work to an installation company, in turn subcontracted with a third company for fitters. A fitter, under the supervision of his “general” employer and a supervisor from the installation company (the temporary employer), negligently caused a flood in the factory. The Court of Appeal had to decide whether the general employer, temporary employer or both were vicariously liable for the damage negligently caused. It held that both employers were liable. It applied the **Mersey Docks** tests, namely considering who engaged and paid the employee and who controlled his work and could tell him how it was to be done. The court also added a further test – the assessment of whether the employee is so much part of the work or business it is just to make both employers liable for his negligence.

In this case Luminar Leisure (LL) was the proprietor of a nightclub to which ASE supplied doormen. One such doorman intervened in an altercation outside the nightclub and punched the claimant “flat out” causing severe brain injury. He was convicted of assault. It transpired he did not have a valid licence and used a fake badge. The claimant sued both ASE and LL as general and temporary employers.

decision

The Court of Appeal held that the doorman was an embedded employee of LL which was therefore liable for his actions, and despite his contract of employment with ASE, ASE’s liability pursuant to the **Civil Liability (Contribution Act) 1978** was nil.

The factual findings were that LL controlled the doorman because he wore an LL uniform and worked at the premises for two years, and LL retained the right to terminate his employment. Although ASE had a supervisor at the club, it was LL’s club manager who ultimately controlled the actions of the doormen and had the final say in what they were to do and how they were to do it, including the mode of restraint. The doorman was effectively “embedded” within the LL organisation.

comment

Until **Viasystems**, it was a “*presumption of antiquity*” that dual vicarious liability was not possible. In modern business environments, however, where contracting-out and secondment are common, it will now be easier for general employers to demonstrate their “loaned” employees were embedded in other organisations, particularly where unskilled labour-only services are provided, so as to escape any finding of liability. Tighter indemnity clauses, joint names insurance and joint supervision provisions are essential if temporary employers are not to shoulder greater blame.

about davies arnold cooper

Davies Arnold Cooper is an international law firm specialising in dispute resolution and real estate. Our dispute resolution capability includes leading teams advising on insurance, construction and product liability matters as well as general commercial litigation.

Our team of more than 80 specialist insurance lawyers advises in relation to fraud, professional indemnity, directors' and officers' liability and property and construction insurance for both insurers and corporate buyers of insurance as well as companies operating in the Lloyd's market, underwriting agents, brokers, intermediaries and risk managers.

Product liability

Our product liability team is regarded as the best in the UK (ranked number one by both Legal 500 and Chambers directories). We provide specialist advice on product safety, risk management, product recall, health and safety, personal injury, asbestos liability, environmental liability, employers' liability, disaster recovery, life sciences and transnational litigation. Our experience of handling some of the most high-profile product liability cases in the UK over the past two decades is second to none. We act for the National Blood Authority and all NHS Trusts, on the instruction of the National Health Service Litigation Authority, in the Hepatitis C litigation and co-ordinated the NHS defence in the HIV Haemophilia litigation.

Personal injury

Our team of lawyers and personal injury specialists provides advice to both insurers and businesses facing claims concerning all types of insurer and business facing personal injury claims. We advise on cases concerning claims under motor and household policies, holiday and travel insurance and employers' liability.

Our network

Our London offices are complemented in the UK by our Manchester office, which has a strong commercial insurance team. Our Madrid office is widely recognised as Spain's leading insurance law specialists. The success of our work in Spain led to the opening of an office in Mexico City in 2003, which is dedicated to providing services to the London, European, Latin American and US insurance markets.

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