In brief

**Industrial deafness claims** - the seven test cases in this litigation against Pretty Polly, Cortaulds and Coats Viyella have been dismissed although the claimants won on the generic issue concerning the existence of a duty concerning exposure below 90 dB(A)lepd (*Parks v Meridian Ltd*). One case will be appealed (*Baker v Coats Viyella*). The successful insurers, Zurich and Norwich Union, see the decisions as seriously undermining future claims and claimant lawyers’ ability to fund high-profile actions.

**Asbestos claims** – the rejection of two mesothelioma claims in recent cases (*Pinder v Cape plc* and *Brett v Reading University*) coincides with an announcement by the government that it intends to introduce new legislation to provide compensation to all mesothelioma sufferers. Lump sum payments for mesothelioma will be brought within the recovery of benefits scheme run by the Compensation Recovery Unit, which claws back benefit money from...
insurers defending civil compensation claims. The Association of British Insurers (ABI) has said that EL (employers’ liability) premiums will have to be increased to reflect these changes.

**Compensation Act** – the relevant provisions of the Compensation Act 2006 governing the regulation of claims management services came into effect on 6 April 2007. Those providing such services are required to be authorised to do so under the Act. The details are available from the [DCA website](#) and the Law Society’s guidance note. Sections of the Compensation Act which are already in force reversed the effect of the decision in *Barker v Corus* which left some claimants to shoulder the consequence of the insolvency of their employers and/or their insurers, and introduced consideration of whether a “desirable activity” was involved when determining whether an allegedly negligent defendant should have taken particular steps to meet a standard of care.

**Cost of care** – insurers can deduct care costs incurred by local authorities from awards of damages where the court is satisfied that a claimant will seek and obtain payments which will enable him to pay for some or all of the services for which he needs care (*Crofton v National Health Service Litigation Authority*). The same will not apply where the claimant does not want to rely on state funding (*Freeman v Lockett*).

**Auditors’ liability** – the EC’s consultation on reform of the auditors’ liability market proposes various different methods of limiting liability. There is concern that, given increased litigation against auditors who may be unable to obtain sufficient insurance, there is a real risk that one of the Big Four networks could be brought down by a claim. Capping the financial liability of accountants is one option but is not universally favoured and will not solve the problem for firms which have a global element since the cap will not operate in the US.

**Rome I and Insurance contracts** – the UK government is in the process of consulting over proposed changes to include insurance contracts in Rome I (the proposed regulation governing the applicable law of contracts in EC law). The UK has opted out of Rome I because of concerns principally about mandatory rules but it could opt in later – once adopted Rome I will affect cross-border contracts in other member states and so will affect companies in the UK. The proposed Art 5a brings both insurance and reinsurance contracts within the scope of the regulation.

**Brokers**

*Fisk v Brian Thornhill & Son* – apportionment of liability between brokers

CA 28 February 2007

This was an appeal by an independent insurance broker, Mr Fisk, against a placing or wholesale broker, Mr Thornhill, following Part 20 proceedings in which Mr Fisk’s claim against Mr Thornhill was dismissed. Both had been negligent in their handling of the renewal of insurance for a pub. Following a flood, the owners’ claim under the insurance was rejected on the ground that the fact that the pub had an oak-framed structure and wattle and daub walls had not been made known to them. Mr Fisk settled the owners’ claim against him, accepting that he had failed to make it clear to Mr Thornton that the property was a 16th century listed building. His Part 20 claim against Mr Thornton was rejected on
grounds of causation although the judge accepted that Mr Thornhill had been in breach of his duty to the owners by not making it clear that that a new policy with a different insurer was being proposed and that this in turn would have different terms and conditions.

The Court of Appeal allowed the appeal and ordered Mr Thornton to make a contribution of 25% of the sum agreed by Mr Fisk to be payable to the owners. Had Mr Thornton submitted a proposal form before placing cover on 19 October 2001 (he sent one two days after the flood), it would have become clear that he could not place cover with the proposed insurer. There would still have been time for Mr Fisk to place cover with another insurer before the flood on 21 October and the judge should not have held that Mr Fisk had failed on causation.

Costs order against insurers

Plymouth & South West Co-Operative Society Ltd v Architecture, Structure & Management Ltd – order under s51 Supreme Court Act

Insurance Day 16 Feb

Where the defence of a claim is pursued solely or predominantly in a professional indemnity insurer’s interest, the court will order the insurer to pay the costs of the successful claimant under s51 Supreme Court Act 1981. Such an order was appropriate in this case where the insured, ASM, was insolvent and had no commercial interest in defending the case, nor did it have a professional reputation to protect.

Comment: this decision does not change the law but provides a useful reminder of the risks insurers face if they pursue litigation in their own interests. Previous case law, culminating in Cormack v Excess Insurance Co Ltd, identified the following factors which must be present before it will be appropriate to order the defendant’s insurers to pay the claimant's costs:

- The insurers funded the defence.
- The defence failed in its entirety.
- The insurers, rather than the defendant, determined to defend the claim.
- The insurers had the conduct and control of the litigation.
- The insurers fought the claim exclusively (or predominantly) to defend their own interests.

These factors are only likely to be present in a relatively rare class of cases in the context of liability insurance. Firstly, the policy must contain a limit and secondly, either because the insured has no assets or the claim is thought to be well within the policy limit, the litigation is controlled by the insurers and not jointly by them and the insured. In cases of professional indemnity, it is generally less likely to be appropriate to make an order for costs against the insurers. Concern about the insured’s reputation will usually indicate that the insurers were also acting in the insured’s interest. This case is unusual, therefore, since the insured’s reputation was no longer a relevant concern.
Fraudulent claims

Churchill Car Insurance v Kelly – effect of fraudulent head of claim
Gibbs J 8 February 2007

In negligence claims a claimant should not forfeit his entire claim because he has dishonestly claimed in respect of unjustified heads of loss. The rule which applies to insurance claims, recently illustrated in Axa v Gottlieb, that the entire claim is forfeit where it is tainted by dishonesty, does not apply where the claim is not made against insurers but they are merely picking up the bill. Sums already paid out to the claimant can be recovered by insurers where a claim tainted by dishonesty is made under a policy.

In this case, the claimant was involved in a car accident and claimed damages for injury and loss. After the insurers had paid £1,500 for damage to his vehicle, they discovered that the claimant’s claim for loss of earnings was fraudulent. The claimant had been dismissed from his job not because of the accident but because he had been caught stealing and the letter of dismissal he relied upon was forged.

The judge refused to order the claimant to repay the £1,500 but rejected the fraudulent loss of earnings claim and the award of £1,800 for his injuries on the ground that his perjury concerning the former made his evidence about his injuries unreliable. He also ordered the claimant to pay the defendant’s costs on an indemnity basis.

Comment: this is a useful illustration of the different approaches taken to partly dishonest claims in insurance contract law and at common law. In practice, however, this case shows that the courts have ways of penalising the dishonest claimant in negligence claims although they have previously been less robust – see for example Molloy v Shell UK Ltd where the Court of Appeal failed adequately to penalise a claimant who had deceived his experts and fraudulently claimed for loss of earnings. In that case, Laws LJ commented that, when faced with manipulation of the civil justice system on so grand a scale, he doubted whether the court should entertain the case at all. This simple if harsh solution has not been adopted by the courts.

Insurance

C A Blackwell (Contracts) Ltd v Gerling allegemeine Verischerungs-AG – “all risks” policy
HHJ Mackie QC QBD Comm 30 January 2007

The claimant contractor’s “all risks” policy covered damage to road construction works by heavy rainfall. The defendant insurer’s arguments were rejected, namely that the policy was not an “all risks” policy, the damage caused was inevitable and not fortuitous and the loss was caused by wilful misconduct of the insured, an exclusion under the policy.

Comment: this decision provides a salutary reminder to insurers that the courts will not help them to escape liability where they are satisfied that the cover in question is intended to be “all risks”. An “all risks” policy removes from the insured the need to demonstrate the precise cause of his loss, as long as it is fortuitous. The Court of Appeal in Tektrol Ltd v International Insurance Co of Hanover Ltd indicated the strict approach that will be taken to
exclusions under “all risks” policies. They upheld Tektrol’s claim for business interruption loss resulting from the loss of a code required for the operation of its main product, an energy saving control device. The exclusion clauses relied upon by the insured could not properly be used to exclude liability for loss as a result of a virus or a burglary. An “all risks” policy should be presumed to cover all risks except when they are clearly and unambiguously excluded. Buxton LJ rammed the message home by concluding that it is open to insurers to make “things much clearer in their own favour if that was their intention when they drew the policy”.

Insurance law reform

Issues paper on intermediaries

This third issues paper from the Law Commissions of England and Scotland considers the relationships between intermediaries, insureds and insurers. The main area of concern once again is the position of consumers who may be unaware of the principles of agency and prejudiced by mistakes of intermediaries who are deemed to be acting on their behalf. To meet this, the Commissions propose that the intermediary should be regarded as the insurer’s agent for the purpose of obtaining pre-contractual information where they are single tied and multi tied agents. This should not affect commercial insurance which is usually placed through independent brokers. When completing a proposal form, they propose that an intermediary who is acting as agent for the insurer should remain as its agent when completing the form. To protect the insured still further, where they sign the proposal form, it is suggested that the present rule that the insured will be bound by the information provided should be changed to allow the insured to adduce evidence concerning their state of mind when signing. This could complicate matters considerably for insurers and is likely to be resisted.

Professional indemnity

Reader v Molesworth Bright Clegg Solicitors – dependency claim
CA 2 March 2007

Where a personal injury claim brought by a claimant before his death was discontinued after his death, a dependency claim under the Fatal Accidents Act 1976 was not thereby extinguished. If at the moment of his death, an injured claimant had an existing cause of action arising from the wrongful act which caused his injuries and if he died as the result of the same wrongful act, a second cause of action for the benefit of his dependants came into being at that moment. Also at the moment of death, the existing cause of action was transmitted to his estate pursuant to the Law Reform (Miscellaneous Provisions) Act 1934. Different limitation periods govern each action. The personal injury action is governed by ss11 and 14 Limitation Act 1980. The dependency claim is governed by s12 Limitation Act, which provides that the claim must be brought within three years of the date of the death.

Comment: following the claimant’s suicide, brought on by depression caused by a motor accident, the solicitor with conduct of his personal injury claim discontinued the action without instructions from his widow. Furthermore, he failed to advise her of the possibility of a claim for damages for bereavement or loss of support for the children. Although he did not owe the children a duty of care, Smith LJ noted in her judgment that any solicitor who is
consulted by a person who is responsible for bringing a dependency claim on behalf of children has a professional responsibility to advise the administratrix in such a way as will seek to ensure that the claim for the benefit of the dependants is brought with proper expedition.

**Pearson Education Ltd v Charter Partnership Ltd** – liability for negligent design
CA 21 February 2007

Architects who designed an inadequate drainage system for a warehouse were liable in negligence to the occupiers for resulting flood damage where a third party had discovered the inadequacy following an earlier flood but had not conveyed that information to the occupiers. There was no break in causation between the architect's want of care and the damage caused.

The architects relied on *Baxall Securities Ltd v Sheard Walshaw Partnership* (2002) which supports two principles, either of which could explain its result:

- Where it is reasonable to expect an occupier to inspect a property before entering into occupation, no duty of care will be owed in respect of any defect that such an inspection should disclose.
- Where an occupier could reasonably have been expected in his own interests to carry out an inspection that would have revealed the defect, failure to carry out such an inspection, or to carry it out with reasonable skill and care, will break the chain of causation.

The Court of Appeal were not happy with either principle (noting that *Baxall* may require consideration by the House of Lords) but in any event concluded that neither could be applied in the present case so as to afford a defence to the architects. The fact that a third party becomes aware of a latent defect should not be deemed to make the defect patent to others. Mills & Reeve acted for the defendant architects.

**Laing v Taylor Walton** – collateral attack on previous judgment
Langley J 20 February 2007

The judge refused to strike out the claim against the defendant solicitors on the basis of issue estoppel or as an abuse of process. This was so despite the fact that the judge recognised that the present claim raises the same issues which have already been decided in proceedings taken against Mr Laing by a Mr Watson concerning his investment in a development project promoted by Mr Laing. In those proceedings, HHJ Thornton held that Taylor Walton were not retained by Mr Laing. Mr Laing did not appeal from the judgment and relies upon no new evidence or arguments in the present proceedings.

**Comment:** where there is a collateral attack on the findings of a previous judgment, the relevant criteria are whether it would be manifestly unfair to the defendant to permit the attack or whether it would otherwise bring the administration of justice into disrepute. The fact that Taylor Walton considered that they were acting for both Mr Laing and Mr Watson when drafting the documentation which enabled Mr Watson to succeed in his claim against Mr Laing weighed heavily with the judge, as did his view that Mr Laing had a real prospect of
establishing that Judge Thornton's decision was wrong. One cannot help feeling, however,
that this claim is likely to be dismissed at a later stage given the direct attack it involves on
the earlier judgment against which Mr Laing decided not to appeal.

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