BENTLEYS

PERSONAL INJURY UPDATE

31.03.14

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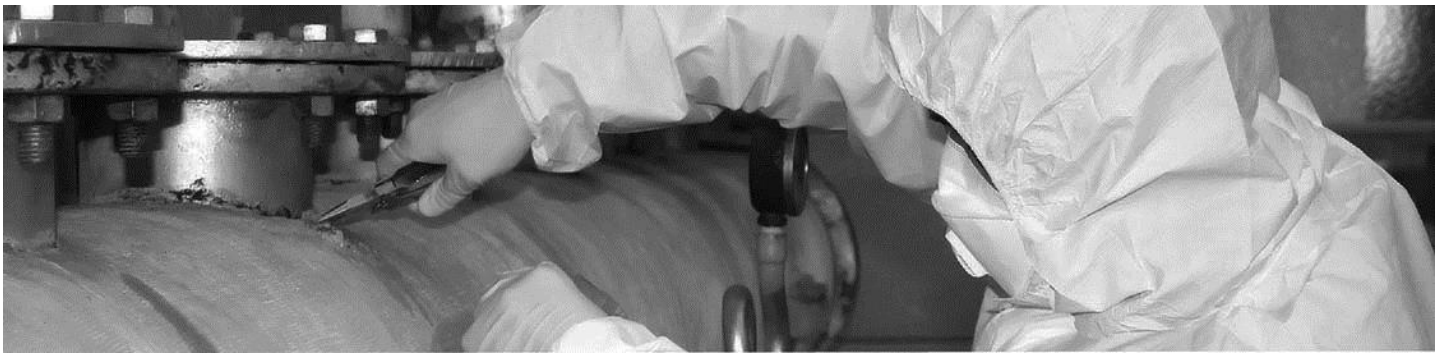


Mesothelioma Act 2014

On 30 January 2014 the Mesothelioma Bill received the Royal Assent, becoming the Mesothelioma Act 2014. Under the Act an annual 3% levy on the insurance industry will be used to compensate those who can demonstrate that they developed mesothelioma due to negligent exposure at work, but who cannot trace an employer's liability ("EL") policy for the period in which they contracted the disease. This is estimated to affect around 300 claimants annually who are unable to locate a former employer / insurer, but only those diagnosed after 25 July 2012 will be able to make a claim.

The 'Diffuse Mesothelioma Payment Scheme' ("the scheme") is due to commence in July 2014 and those eligible will receive 80% of the compensation they would have received if damages had been awarded to them in court. It was originally 75% but this was increased recently after some administrative savings in the scheme were made. Such payment is fixed and made on a sliding scale according to the age of the claimant at diagnosis. This percentage was strongly opposed by claimant lawyers (arguing it should be 100%), along with objections to the "arbitrary cut-off date" of 25 July 2012 (Paul Glanville of Slater & Gordon solicitors) and suspicions of a deal effectively having been done with insurers in the Bill's passage. The Department for Work and Pensions, however, have defended this and emphasise that if the levy on the insurers, or indeed the 80% damages were any higher, it would mean an increase in premiums for EL insurance.

It will also not compensate visitors to premises or those such as Mrs Haxton in our featured case below, i.e. a public liability case where, for example, a wife develops mesothelioma having been exposed to asbestos dust/material whilst washing her husband's work clothes. It only compensates those exposed negligently during employment. For this reason many claimant lawyers argue that the Act does not go far enough.

Defendant solicitors, insurers and P&I clubs would argue that where there are meritorious claims (i.e. there is evidence of employment and negligent exposure) they have made compensation payments on a regular basis in the past and will continue to do so, regardless of this Act. This is especially true of ship board asbestos-related claims in the marine industry where P&I clubs keep their own detailed records. They also liaise with each other regularly and can compare their information with a claimant's Seaman's Discharge Book, Certificate of Sea Service etc. or have regard to the various stevedoring agreements. Such cases often involve a claimant who has worked for several land-based employers, as well as being employed by a shipowner, so we will wait to see how these types of cases fare under the Act when no EL policy can be located.

Unfortunately the long-tail nature of mesothelioma means that symptoms often do not appear for 30-40 years following exposure, long after some employers / shipowners can no longer be traced or companies have merged and records lost. The problems faced by both claimant and defendant lawyers who deal with historical disease claims is, therefore, nothing new.

Once the scheme has been in place for a few years, and assuming mesothelioma claims start to fall (after around 2018) it has been suggested that the levy may allow the damages percentage to increase to 100% (Lord McKenzie of Luton). Time will tell if this will be the case, but we anticipate that defendants' insurers/P&I clubs dealing in particular with marine asbestos-related claims will continue to compensate meritorious claims as they have for many years and this scheme under the Act will simply run parallel to it.

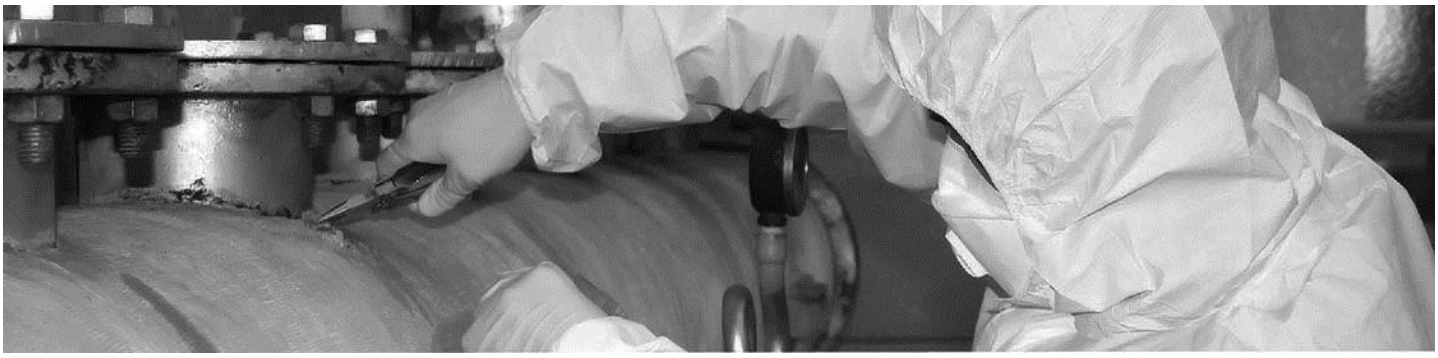
We will keep you apprised of developments regarding this Act once the scheme is implemented in July 2014.

Damages for diminution in value of dependency claim: *Haxton -v- Philips Electronics UK Limited*

It is unusual for a case concerning a claim for damages under the Fatal Accidents Act 1976 ("FAA") and Law Reform Miscellaneous Provisions Act 1934 ("LRMPA") to be reported in London's Evening Standard newspaper, but following a Court of Appeal ("CA") judgment on 22 January 2014, this case was covered.

Due to the somewhat novel nature of the head of loss allowed, the legal press have already commented that the decision may have far-reaching consequences for similar cases where it might be argued that there has been diminution in value of a dependency claim or indeed any other *chose in action*. Counsel for the defendant, Catherine Foster, has noted that it *"may well apply to other cases where the claimant has a cause of action that has been reduced in value due to a tortious act that occurred after the cause of action had accrued."*

Mrs Haxton was a widow following her husband's death in 2009 from mesothelioma. He had been employed by the defendant as an electrician from 1962, retired in 2004 and developed symptoms attributable to mesothelioma



in 2008. She had handled and washed her husband's work clothes containing asbestos dust and unfortunately following his death a few years later she also developed the disease.

Mrs Haxton issued two sets of proceedings against the defendant. The first was in her capacity as a dependant, alleging negligence and breach of statutory duty. The second was in her own right, seeking damages for negligence and breach of duty. Liability was admitted in both matters and for the most part damages were agreed. In the first action, the damages for loss of dependency following her husband's death were based on her estimated remaining life expectancy of 0.7 years. She accepted that this was the correct basis for this calculation, given that her life expectancy had been significantly reduced from the 23.9 years estimated prior to her diagnosis. In the second action, she sought to recover damages for loss of dependency on the basis that as a result of the defendant's negligence, her life had been cut short, when otherwise she would have recovered damages based on a longer life expectancy in the first action. The parties agreed that damages based on a longer period of life expectancy, and comprised mainly of lost pension benefits and earnings, would be £200,000.

At first instance, the defendant was successful, submitting that it would be misconceived to allow the claimant to recover this head of loss because if she did, she would be recovering damages for a period when she would never actually have been dependent.

Mrs Haxton appealed and the issue before the Court of Appeal, therefore, was whether she should be able to recover the discrepancy in damages in the second action, based on her life expectancy prior to her diagnosis or whether, as the defendant argued, she should recover only the sum which reflected her actual period of dependency, based on her much-reduced life expectancy post-diagnosis of 0.7 years.

The claimant's argument succeeded in the Court of Appeal, despite the fact that she had also pursued and recovered damages in her separate claim arising from her own injury. This element of the judgment has not really been covered in the legal press.

The court set out the starting point for assessing the value of a dependency claim in section 3(1) of the FAA which provides that it must award *"such damages … as are proportionate to the injury resulting from the death to the dependents respectively"*. The question as to what is 'proportionate' is then considered in light of the actual loss suffered. Significantly, Mrs Haxton's dependency would have ended, due to her own death, even if her husband had lived, so she would have suffered no losses after that date. Accordingly, damages in the FAA claim were bound to be limited to the claimant's life expectancy.

Counsel for the claimant (appellant), Mr Robert Weir QC, accepted that his client was *"necessarily limited to damages calculated by reference to her own life expectancy"* in the first claim. However, he went on to argue that if she had not contracted mesothelioma due to the defendant's negligence, she would have recovered more in her dependency claim given the longer estimated life expectancy. He also submitted that it is not material that the tortfeasor is the same in each claim.

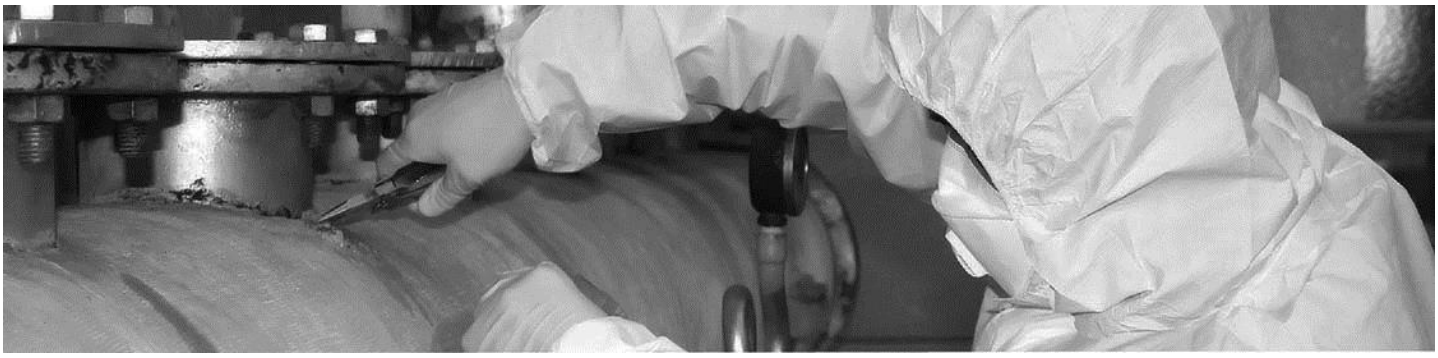
Lord Justice Elias delivered the judgment on behalf of the court and summarised Ms Foster's fundamental point as being that *"the claim undermines the legislation and ought not to be permitted as a legally recognised head of loss".*

However, his Lordship added, in paragraph 12 of the judgment, that Ms Foster was not in fact suggesting that the claimant should be treated unfairly, i.e. she should not be precluded from at least claiming damages for her "lost years". This is relevant given the practical set of circumstances which led to this dispute initially since the claim for this head of loss would never have arisen if the first case had been concluded before her own diagnosis.

Those who acted for the claimant in this case have celebrated this as a *"just result"* reached by having *"the right Court of Appeal"* which it is said demonstrated *"logical and creative thinking"* (LexisNexis interview with Irwin Mitchell Solicitors 06/02/14).

It was submitted that there was no policy objection either to prevent such a head of loss being recoverable. The defendant's counsel's view, however, is that it is *"notable that the case did not turn on the common identity of the tortfeasor"* in both claims and that it does indeed represent a *"novel head of damages"*, albeit justified on the basis of existing principles. The decision has not been appealed.

[2014] EWCA Civ. 4



Athens Convention: barring the remedy or extinguishing the right?

A personal injury case, mainly concerned with a limitation dispute, *Feest v South West Strategic Health Authority (1), UK Foundation Programme Office (2) and Bay Island Voyages (TP) [2014] EWHC 177 QB* recently came before the Mercantile Court in Bristol, on appeal, in the context of a claim for contribution. It developed into an argument over the correct approach to the construction of Article 16 of the Athens Convention.

Background

The claim arose following a significant spinal injury sustained by Doctor Kathleen Feest on 26 August 2008 on a boat trip in the Bristol Channel organised by her employer, D1. This was a team outing in a RIB called "CELTIC PIONEER", owned and operated by Bay Island Voyages (TP). Dr Feest's first solicitors missed the two year Athens Convention time limit (Article 16.1) for suing Bay Island Voyages. Her second solicitors then sued her employer for damages and issued the proceedings on 25 August 2011, only just within the three year limitation period for personal injury claims.

In June 2012 D1 filed their defence and at the same time brought TP into the proceedings as Part 20 defendant. Relying on the Civil Liability (Contribution) Act 1978 ("the 1978 Act") they sought a contribution from TP towards any liability to Dr Feest that they incurred. TP argued that as the contribution claim was brought *almost four years* after Dr Feest had disembarked, D1 was out of time to do so by reason of the two year time limit in Article 16.1 of the Athens Convention.

Further, the contribution claim had also been brought outside the three year "backstop" limit in Article 16.3.

Having argued that D1 was out of time, TP applied for Summary Judgment dismissing the contribution claim, and succeeded. D1 appealed.

Arguments

The Convention Relating to the Carriage of Passengers and their Luggage By Sea ("the Athens Convention") 1974 was enacted into UK law by section 14 of the Merchant Shipping Act 1979 and the Carriage of Passengers and their Luggage by Sea (Interim Provisions) Order 1980. The UK legislation contained a modification so that the Convention applied to voyages where the place of departure and destination were within the UK, Channel Islands and Isle of Man, i.e. domestic voyages. The Athens Convention therefore applied in this case.

D1 argued that as their contribution claim was made under the 1978 Act, the time limit under the Limitation Act 1980 was two years from the date on which the right to recover contribution accrued. Thus they were within time to seek contribution from TP. TP argued that the original claim had been extinguished by the time bar in Article 16 of the Convention and thus s. 1(3) of the 1978 Act applied.

Section 1(3) of the 1978 Act provides: *"A person shall be liable to make contribution … notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, unless he ceased to be liable by virtue of the expiry of a period of limitation or prescription which extinguished the right on which the claim against him in respect of the damage was based*".

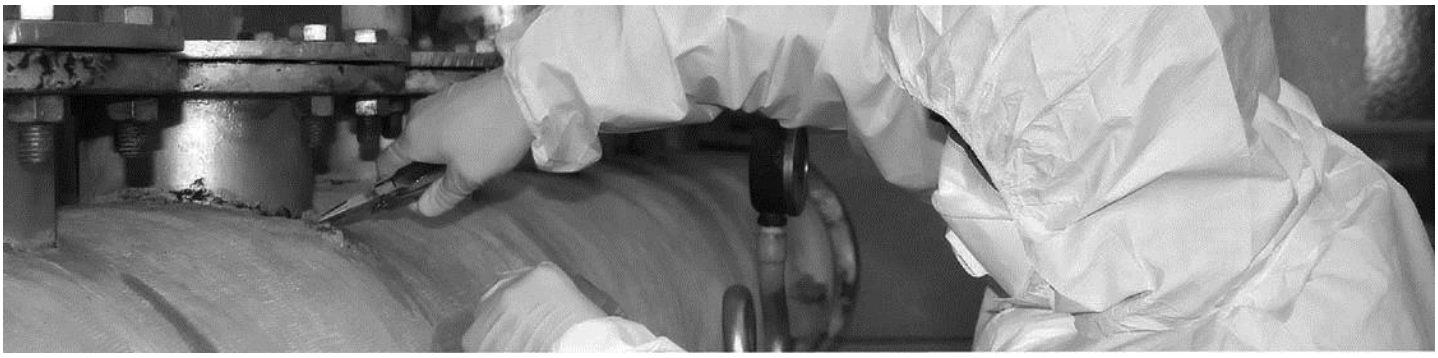
Article 14 of the Convention provides that "*..no action for damages……shall be brought against a carrier ….otherwise than in accordance with this Convention*" Article 16 provides that *"Any action for damages arising out of the … personal injury to a passenger …. shall be time barred after a period of two years*".

So the question that arose was whether the Article 16 time bar was substantive, which would extinguish the cause of action; or procedural which would prevent proceedings being brought on the cause of action but would leave the claim intact. By contrast with many civil law jurisdictions, English law traditionally regarded time bars as procedural rather than substantive. This 'English Rule' has subsequently been modified by statute (Foreign Limitation Periods Act (UK) 1984), so that foreign limitation periods are now treated as substantive. Against this background, how should the court treat the Athens Convention time bar?

HELD: The court agreed with TP that Article 16 was substantive i.e. the right was extinguished. Liability under a contribution claim existed only if the contributor could be shown to be liable to the original claimant for the same damage, so TP's appeal was successful.

Counsel for TP, Mr Simon Kverndal QC comments:

"The draftsmen of the 1978 Act clearly had in mind the 'English Rule' that time bars are, with a few clear exceptions, procedural in character and bar the remedy but do not extinguish the right. But that distinction is lost on civil lawyers, and other common law jurisdictions have in recent years recognised that the English Rule is anachronistic. This decision emphasises that International Conventions should be construed in their international context and through the prism of internationally



accepted legal principles. In that context the English Rule has little or no place. "

In our view, this decision should be a warning to practitioners who fail to understand the various time limits in marine-related personal injury cases. It may be of considerable significance in the maritime leisure industry where there is potential for bringing a claim against a third party other than the shipowner in the event that the two year time bar is missed.

An application for permission to appeal has been served so we will keep you informed on any developments in this case in the next Update.

Maritime Labour Convention 2006 update

Current ratifications to the Convention by Member States: 56 countries *List of country ratifications*

The MLC has now been in force since 20 August 2013 and following the UK's ratification last August, it will come into force here on 7 August 2014. There have already been detentions arising as a result of non-compliance with the MLC, mainly reported by seafarers' unions to Port State Control ("PSC") for unpaid wages.

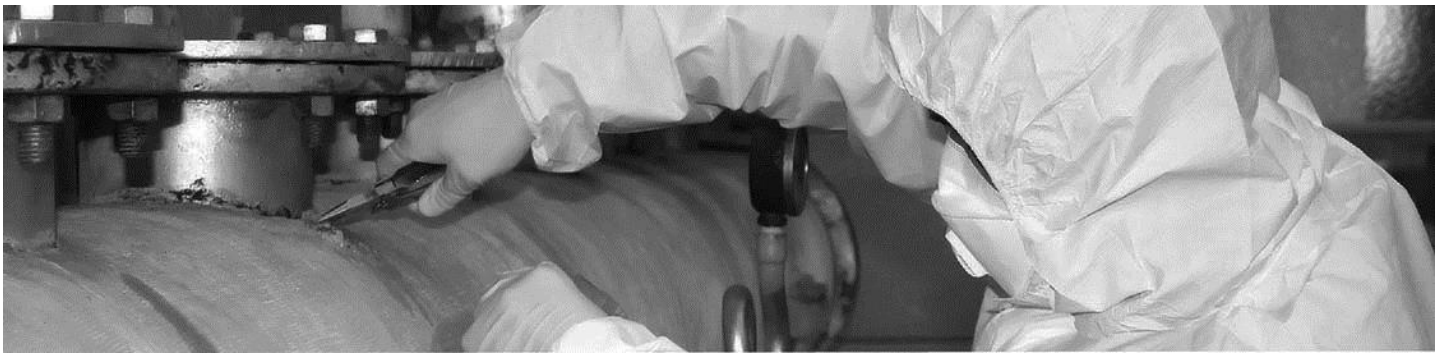
Unions have denied that they are reporting each wage dispute with a view to the vessel being detained under the MLC to force wage agreements, but insist that they are doing this to improve the welfare of seafarers. Owners are increasingly concerned, however, that this is not the case and there are examples where there have been existing collective bargaining agreements in place and yet the vessel has been detained nonetheless, for example, Canada's detention of "LIA M" and "HYDRA WARRIOR".

Some instances where the welfare of seafarers has been a genuine concern have arisen however. The poor conditions on two vessels detained in the UK by PSC have led to allegations of mistakes being made about the adequacy of the MLC certification. Unsanitary conditions were found in Ellesmere Port on board the Marshall Islands flagged "GEORGE" in October 2013. The vessel had been provided with its MLC Certificate by Lloyds Register. Then in mid-November 2013 extensive cargo hold rusting and shattered deck railings were found on Panamanian flagged "DONALD DUCKLING" which has been in Tyneside ever since, abandoned by her owners and with the crew's wages unpaid. Both flag states involved are supporters of the MLC but despite certification, this seems to have had little effect in preventing the types of issues seen on these vessels that it was hoped the MLC would address i.e. payment of wages, better health and safety protection and decent working/living conditions for the seafarers.

Indeed the case of the "DONALD DUCKLING" has been widely reported. The question as to whether she should be considered 'abandoned' delayed the repatriation of the mainly Filipino crew, as did the fact that it was unclear whether the owner was in Chapter 11 bankruptcy filing in the US, so not technically insolvent, hence the seafarers could not rely on the owner's P&I cover for repatriation. In that case much criticism has been levelled by the ITF at the parties who in theory should have complied with the MLC, including the owners and the flag state and even the government of the Philippines. It seems that in this instance, the MLC has fallen short in achieving its purpose. The wages have not been paid, the ITF sent the crew home (and are still pursuing the wages and the costs of repatriation), the vessel has been arrested by the scrap metal cargo owner and still none of the vessel safety defects for which it was detained have been rectified. However, it is still early days and it could be argued that if the MLC were still not in force there would be little focus currently on these types of detentions which are now certainly not going unnoticed.

Whilst the ILO publically hails the 'milestones' reached since August 2013 and the level of global cooperation in its implementation, they recognise that there was always going to be a period of uncertainty. In April 2014 the first meeting of the 'Special Tripartite Committee' will take place in Geneva (7-11th). Nicknamed the 'MLC Committee' its main role will be to continually review how the MLC is working and allow flexibility in making swift changes where needed. In April it will consider amendments to the MLC to address the financial security requirements and shipowners' liabilities regarding compensation for seafarers who are abandoned or suffer personal injury or death. For example, shipowners themselves are being encouraged (rather than relying on crew managers etc.) to ensure they are complying with the requirement in Part II of the Declaration of Maritime Labour Compliance ("DMLC") to indemnify a seafarer's unpaid wages and other losses.

We will let you know the outcome of the meeting of the MLC Committee in our next Update, along with other MLC detentions and developments. In the meantime, please click *here* for the proposals for amendments to the Code relating to Regulations 2.5 and 4.2.



Personal injury cases and incidents / regulatory developments and prosecutions

CREW MEMBER FATALLY INJURED ON BOARD BULK CARRIER "NIREAS" – CHINESE SHIPYARD CRITICISED BY AUSTRALIAN ACCIDENT REPORT

A Ukrainian engineer was fatally injured on 20 March 2013 on the maiden voyage of bulk carrier "NIREAS". He was carrying out a routine task of draining water from the ship's main air receiver when the observation window exploded. Fellow crew members found him shortly afterwards but he had died by the time the paramedics arrived by helicopter.

The vessel had sailed to Australia from Nanjing on 6 December 2012, loaded coal, discharged it at Shanghai on 17 February 2013 and returned to Australia to load further coal. She anchored on 2 March 2013, waiting for a berth off Queensland, so the crew carried out routine maintenance tasks. They were still anchored on the day of the accident.

The Australian Transport Safety Bureau ("ATSB") reported that *"the drainage pot observation window glass exploded when it was exposed to the air receiver pressure. The pressure accumulated in the drainage pot because the water being drained restricted the flow into and through the pot outlet line."* Contributing factors included a change in the design of the drainage arrangements made by the ship yard, as requested by owners, which was then not tested by the yard in accordance with their own procedures and meant that they were unaware of the extent of the pressure accumulation. The conclusion was that the condensate drainage pots were *"not fit for purpose as they were not capable of withstanding the internal pressures that were likely to accumulate"*.

A civil claim on behalf of the deceased engineer is to be anticipated but in light of the ATSB report, it may be directed against the yard rather than the shipowner in the first instance. We will provide further information on this if it becomes available but in the meantime please click *here* for the full ATSB Transport Safety Report dated 4 March 2014.

STEVEN WALL -v- MUTUELLE DE POITIERS ASSURANCES (COURT OF APPEAL) 20 FEBRUARY 2014

Case law arising from an RTA would not normally feature in a marine-based bulletin, but here the French insurer defendant company (M) appealed against a decision in which it was held that English law (law of the forum) not French law (the applicable law under article 15 of Rome II [Council Regulation 864/2007]) should determine the way the court dealt with expert evidence in assessing W's damages. This multi-jurisdictional aspect could arise in an accident on board a ship.

The case started out as a negligence claim brought in England arising from an accident in France in 2010. The English claimant W had been seriously injured whilst on holiday in France when his motorbike was hit by a car negligently driven by a man insured by M.

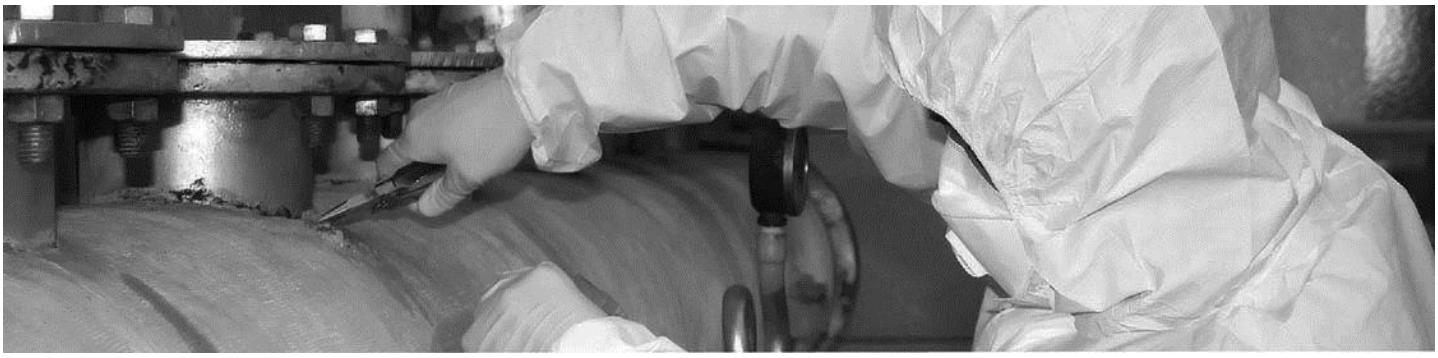
M admitted liability but the court required the assistance of expert evidence in order to assess damages. Following a request by W to call eight experts, M objected because this is not the approach taken in France where usually there is a single expert selected by the judge to assist the court. Master Cook ordered a preliminary trial on the issue before he was prepared to make an order. As the accident happened in France, M argued that under Rome II the 'applicable law' should be the law of the country in which the damage occurred, French law. However, given his significant spinal injuries, W had sought permission to rely on a number of expert witnesses under CPR 35.

W argued that the issue of which expert evidence the court should order should be determined under English law (law of the forum) as this is an issue of "*evidence and procedure"* within Article 1.3 of Rome II. M contended that, on the true construction of the Regulation, the English court must arrive (as nearly as possible) at the sum of damages the French court would have awarded, if the action had been tried in France. The best way to achieve that was to have a French-style expert report.

The dispute ended up in the *Court of Appeal [2014] EWCA Civ 138*, which dismissed M's argument. Longmore LJ noted that: *"It cannot be the case that the Regulation envisages that the law of the place where the damage occurs should govern the way in which evidence of fact or opinion is to be given to the court which has to determine the case".* He added that such an approach would involve disclosure difficulties and further that this could cause problems with a French-style expert giving evidence which may incorporate material outside their expertise and would then be "*meaningless"*.

HSE PROSECUTION: A & J SCOTT LTD OF NORTHUMBERLAND (4 MARCH 2014) £4,000 FINE IMPOSED

Following a serious injury to a right handed, 55 year old sawmill worker, Berwick Magistrates Court fined his employer, A&J Scott Ltd in



Northumberland, £4,000 on 4 March 2014 following a Health and Safety Executive ("HSE") prosecution. He suffered a permanent impairment following the partial amputation of his middle and ring fingers.

The employer pleaded guilty to breaching Regulation 11 of the Provision and Use of Work Equipment Regulations 1998 ("PUWER") by failing to provide any safety guards on the industrial-size 'rig saw' the worker was using to cut logs in one of the mills on 12 June 2012.

Section 11 of PUWER states that *"Every employer shall ensure that measures are taken … to prevent access to any dangerous part of machinery or to any rotating stock-bar; or to stop the movement of any dangerous part of machinery or rotating stock-bar before any part of a person enters a danger zone."*

The accident happened as the worker tried to clear a jam as a section of wood was caught on the blade. He left the machine running, tried to clear the section when his hand contacted the blade. Had a safety guard been fitted, it was held he would have been prevented from taking this action.

The regulatory fine of £4000 (plus £8,911.85 costs) may have taken into account a prompt guilty plea. However, if the injured man now intends to bring a civil claim against his employer, the damages he may be awarded could be higher. The Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases (12th Edtn) provides guidance on damages for various injuries to the middle and ring fingers. Without the full transcript of the sentencing comments we are not aware of the full extent of the worker's injuries but if he has lost the top part of both fingers, the 'terminal' or 'distal' phalanx, then the bracket of suggested damages is £2,900 - £5,750 (rising to £3,190 - £6,325 with 10% uplift). However, if the injuries are more serious the damages potentially rise quickly to sums above £10,000 for both fingers, plus any 10% uplift.

From a defendant's point of view, if a civil claim follows, there is at least a chance to seek a reduction to any award of damages to take into account contributory negligence by the claimant. There may be evidence to enable the defendant to ask the court to consider whether the worker's actions were contrary to any training he received for example and/or whether he simply failed to take care for his own health and safety. In this case, for example, the worker kept the saw running whilst he tried to clear the jam so questions as to whether he went against standard procedure by doing so, or whether this was usual practice would be an obvious starting point.

Whilst this is a land-based prosecution, firms are instructed by P&I clubs to advise on accidents on board involving similar significant hand injuries where the prosecuting authority is the Maritime and Coastguard Agency ("MCA") instead of the HSE and where, if the prosecution is successful, civil claims seeking damages for the injuries are often likely to follow. Please click *here* to for the HSE's press release on the case below.

VICARIOUS LIABILITY CASE: AHMED MOHAMUD -v- WM MORRISON SUPERMARKETS PLC (2014)

The fact that a sales assistant was required to interact with customers in the course of his employment was not sufficient reason, by itself to make his employer vicariously liable for an assault on a customer.

Whilst this case is shore-based, and quite factually specific, there have been similar incidents on board cruise ships where a shipowner (the employer) has been sued for the actions of one of its employees against a passenger. This is a useful case for those defending such claims at least in English law and jurisdiction scenarios.

This claim arose out of an incident at a petrol station run by the supermarket ("W") and staffed by three employees, including "K". He had received specific instructions on confrontational situations with angry or abusive customers. The customer "M" visited the kiosk and asked, politely, if there was a printing facility. K responded by abusing and assaulting M, for no apparent reason, despite his supervisor's attempts to stop him.

M submitted that W should be vicariously liable (to enable him to recover damages) because the assault had arisen from his interaction with K as a customer, and it had therefore been committed whilst K carried out his duties.

On appeal, the Court of Appeal held that the attack on M was *"brutal and unprovoked"*, but that K had carried it out purely for reasons of his own. The judge in the court below had properly considered the test set out in *Lister v Hesley Hall Ltd [2001] UKHL 22, [2002] 1 A.C. 215*. The question was whether the connection between the assault and the employment was sufficiently close to make it fair and just to hold W vicariously liable. The fact that the assault had taken place while K was on duty at his place of work was relevant, but not conclusive.

[2014] EWCA Civ 116

Bentleys, Stokes and Lowless
International House
1 St Katharine's Way
London E1W 1YL

Phone +44 20 7782 0990
Fax +44 20 7481 7978
Web www.bentleys.co.uk

24/7 EMERGENCY RESPONSE		**+44 20 7477 2771**
Paul Griffiths	pgriffiths@bentleys.co.uk	+44 7973 228059
Vernon Sewell	vsewell@bentleys.co.uk	+44 7770 273623
William Chetwood	wchetwood@bentleys.co.uk	+44 7973 228076
Joanna Steele	jsteele@bentleys.co.uk	+44 7976 930386
Nicholas Wilson	nwilson@bentleys.co.uk	+44 7971 049355
Paul Crane	pcrane@bentleys.co.uk	+44 7787 558140
Jamie Wallace	jwallace@bentleys.co.uk	+44 7971 256764
ADMIRALTY		
Joe Quain	jquain@bentleys.co.uk	+44 7771 633958
Philip Gregson	pgregson@bentleys.co.uk	+44 7971 049307
PERSONAL INJURY MANAGER		
Rachel Butlin	rbutlin@bentleys.co.uk	+44 7834 518814