Welcome

John Reid B.C.L., Dip.Eur.Law

Welcome to the first edition of O'Rourke Reid's Litigation News. Its publication coincides with a time of significant developments in the firm. Firstly, I would like to welcome the promotion of two partners and five senior associates within the firm. Secondly, we have just installed a new state of the art case management system. Both developments reflect the importance we place on investing in the future development of the firm in order to improve the efficiency and levels of service that we provide to our clients.

Our aim is to provide our clients with a proactive, customer-orientated and results-driven service. Our approach is to offer an integrated claims management role by working in partnership with you to achieve higher standards in an increasingly claims conscious world. Part of this approach is to provide you with added value services free of charge. (See page 3 for details of our upcoming costs seminar).

The first edition of Litigation News covers issues relating to changes in the workplace; in particular, combating bullying and liability for health and safety. We have also tackled the thorny issue of recoverability of undisclosed income, which will certainly be of interest to many of our readers. Our Leeds office provides us with useful insight on the human rights angle of using private investigators in defending insurance claims.

We would also like to draw your attention to the change of address of our Leeds office. As many of you are aware, O'Rourke Reid is the only Irish law firm to have a fully functioning UK office, staffed by UK-qualified solicitors. Accordingly, we are in a unique position to provide all aspects of legal advice on both sides of the Irish Sea. Due to an increase in the volume of business it has been necessary to move to larger premises. We are committed to expanding our Leeds operation and maintaining it as an integral part of our organisation. If you have any queries please contact Caroline Start on + 44 113 245 7811.

We are keen to get your views on all elements of our service to you as clients. We would also like to know what you think of this, our first Litigation News. Our aim is to provide you with useful advice and tips as well as keeping you updated on current and future developments in relevant areas of law. **Enjoy the read!**

Loss of earnings – what counts?

Declan Devereux (Senior Associate)

Is undeclared income taken into account when assessing future loss of earnings and dependency in claims for personal and fatal injuries?

A recent judgment of the Supreme Court has answered yes to this question – a ruling that may have implications for insurance companies involved in defended claims.

Background Claims for future loss of earnings arise when a claimant's injury is so severe that it prevents him from working at the same financial and occupational level as he had before the accident or, in some cases, prevents him from working at all. Dependency claims arise in fatal injury cases, where members of the deceased's family (usually spouse, children or parents) had relied on them for financial support and this support would have continued for a determinate or indeterminate period into the future.

In both scenarios the loss per week is determined and a multiplier, based on actuarial tables, calculates a capital value. Disputes on the level of income most commonly arise where the deceased was self-employed or employed on a subcontract basis.

The Case The Supreme Court, in the Downing case, rejected previous principles on calculation of earnings as being too severe. In a previous case, the court held that, as a matter of public policy, it could only take account of declared income in quantifying a dependency claim.

In rejecting the High Court principles in Fitzpatrick, the Supreme Court decided that undeclared income should be taken into account in assessing dependency claims. One of the judges even went so far to say that the same principle should apply when assessing future loss of earnings in personal injury claims.

In Downing, the deceased had run a successful small fruit and vegetable business. He had not prepared accounts nor made any returns to the Revenue before his death, but had made contributions to his mother, his partner and their child. The Revenue agreed a nil liability on the basis of accounts prepared after his death. During the proceedings it was accepted that these accounts were not an accurate reflection of the deceased's income. If they were, he would not have been in a position to make such contributions to his mother or partner. The High Court awarded damages to the deceased's mother and his child based on the contributions made.

continued inside

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LITIGATION NEWS

ISSUE **No. 1**
JULY 2001

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Jurisdiction of the Circuit and District Courts is to be extended to €100,000 (£78,756) and €20,000 (£15,751) respectively. The changes are likely to come into play in the next few months.

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The Equality Authority has published two decisions under the Equal Status Act, 2000, both relating to discrimination against travellers. In its first decision it found that a publican's refusal to serve members of the travelling community constituted unlawful discrimination. The publican was ordered to pay the travellers £300 each for humiliation and embarrassment suffered. In the second case, a traveller was awarded £1,000 damages where it was held that a publican's refusal to serve him constituted bias against travellers.

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The Government is to establish a Personal Injuries Assessment Board by early 2002. The Board will only decide the level of compensation to be awarded with the issue of liability open to the courts to decide. We will keep you updated in future issues of Litigation News.

ISSUE **No. 1**
JULY 2001

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Loss of earnings – what counts?

contd. from cover page

The defendant appealed this decision to the Supreme Court. While it cited the Fitzpatrick case in support of its arguments it did not seek to rely on its full rigours. The defendant argued that the court is obliged to assume that the deceased would have paid tax had he survived and, as a result, the size of the contributions to his dependents would have been reduced. Both Justices Denham and Geoghegan agreed that had the deceased lived, he would have properly paid his taxes. All three judges held that calculation of loss dependency should be based on actual income and if some or all of this had not been declared or taxed then the sum should be analysed to arrive at a figure net of tax. However, they refused to reduce the amount of damages. They accepted the plaintiff's argument that had the deceased survived there would have been a future improvement in his business and he would have continued to make the contributions at the same level even after paying tax.

Geoghegan J, in particular, commented on the reasoning of Laffoy J in the Fitzpatrick case. He felt her decision was strongly influenced by the fact that both the deceased and the plaintiff had made false declarations to the Revenue. The proper test was whether, if the trial judge had sufficient evidence before her in relation to undeclared income, she could quantify the net amount of that income if tax were paid, and she could assume that the deceased would have paid tax had he survived.

It is worth noting that Downing was a fatal injury claim where both Justices Denham and Geoghegan confined their comments almost entirely to issues in relation to loss of dependency.

The Future? Downing is an important case in that it clearly states the principles on which loss of dependency ought to be calculated. It has given a strong indication that the same principles will apply in cases of future loss of earnings. While a defendant may no longer be able to assert that a claim for future loss of earnings should be restricted to declared income, the spectre of the Revenue hovering in the background may persuade a claimant that it might be more prudent to restrict his claim to declared income. If the claimant wants every last penny he may face the prospect of giving evidence in the presence of a note-taking Local Inspector of Taxes who is seated in the back of the court.

Storm in a teacup or Pandora's box?

Declan Devereux
(Senior Associate)

A recent Supreme Court case has raised some interesting issues in relation to the liability of non-owner managers and their duties to employees in the context of workplace injuries.

In Shinkwin, the plaintiff lost three fingers when he was adjusting the jig of a saw while the saw was in motion. He had never been instructed to do otherwise. Mr Quinlan, the second defendant, was the effective sole shareholder and controller of the first defendant, Quin-Con Ltd. The first defendant was uninsured, had no assets and did not defend the claim. The trial judge found against both defendants holding that the second defendant owed a duty of care to the plaintiff as manager of the factory. The second defendant, Mr Quinlan, appealed to the Supreme Court.

Mr Quinlan argued that the duty to provide a safe system of work was an obligation for the company, as employer, and to impose a personal liability on him would establish a new category of liability for factory managers. The plaintiff argued that Mr Quinlan had a duty of care because he exercised complete control over the factory and the plaintiff.

In his judgment, Fennelly J held that Mr Quinlan involved himself so closely in the operation of the factory and, in particular, the supervision of the plaintiff that he was personally liable. The proximity of the relationship with the plantiff was such that he did have a duty of care; he had employed a young untrained man to work in a factory managed by him and personally put him to work on a potentially dangerous machine over which he exercised control to the extent of giving some, though, inadequate instructions to workers.

continued on page 4

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Bullyboy tactics

Killian O'Reilly (Partner)

Recent high profile cases on bullying in the workplace have attracted significant media attention as well as highlighting the potential dangers, both legal and economic, for employers. A recent study by the Economic and Social Research Institute found that 7 per cent of the male workforce described themselves as having been bullied with one in ten females having suffered bullying at work.

In a recent highly publicised case, Liz Allen, a former Sunday Independent journalist, claims constructive dismissal, alleging that she had been shouted at, intimidated and made to feel isolated and marginalized in the workplace. The Tribunal have still to make their finding in this case.

The seriousness of workplace bullying is reflected in the establishment of a Task Force to investigate this phenomenon. Employers may find its report useful in tackling issues related to bullying at work.

Taskforce on the Prevention of Workplace Bullying

The Government established the Taskforce in 1999 to identify the size of the problem and the sectors most at risk, to develop practical programmes and strategies to prevent workplace bullying as well as to produce a co-ordinated response from state agencies.

While the Task Force found that there was no need to introduce new anti-bullying legislation (existing employment and health and safety legislation being adequate) it has proposed to develop codes of practice under existing legislation as well as providing a universal definition of bullying:

"Workplace bullying is repeated inappropriate behaviour, direct or indirect, whether verbal, physical or otherwise, conducted by one or more persons against another or others, at the place of work and/or in the course of employment, which could reasonably be regarded as undermining the individual's right to dignity at work.

An isolated incident of the behaviour described in this definition may be an affront to dignity at work but as a once off incident is not considered to be bullying."

This, in itself, is a useful tool for employers in deciding what behaviour constitutes bullying. No doubt, it will be incorporated in the Codes of Practice to be developed by an Advisory Committee over the next three months.

Action

As an employer there are a number of steps you can take to ensure that the working environment you provide is one in which the dignity of your employees is preserved.

- Implement an Anti-Bullying Policy (Under the Employment Equality Act, 1998 you should already have a written policy in place on harassment. However, this has a narrower application than will be set out in the Codes of Practice)
- Draw up a Dignity at Work Charter (as recommended by the Task Force)
- Train all employees, as part of the induction process, on the provisions of the Anti-Bullying Policy and the Dignity at Work Charter
- Encourage employees to report any incidences of bullying
- Implement grievance procedures to swiftly address any complaints of bullying or harassment
- Implement and enforce the Codes of Practice shortly to be drawn up by the Advisory Committee. Ensure that you have procedures in place to monitor the efficiency of your Anti-Bullying Policy and Dignity at Work Charter.

As well as limiting your exposure to claims of constructive dismissal and breach of duty to provide a safe place of work from employees who have been victims of bullying, implementing these guidelines may reduce levels of absenteeism as well as improve the morale and productivity of your employees. And that, for sure, can be no bad thing!

Office news

Promotions

John Reid, Dermot O'Rourke and John O'Sullivan are delighted to announce the appointment of Mary Purtill and Killian O'Reilly as partners in the firm. Gordon Murphy, Louise O'Rourke, Caroline Murphy, Claire McCormack and Declan Devereux have been promoted to Senior Associate level. The promotions are a reflection on the pace of growth in the firm and recognition of the necessity of investing in the future.

Direct dial

You can now contact our solicitors and legal executives by direct dial (with voicemail facility) or email. For a list of direct dial numbers and email addresses please contact our office manager, Vivienne Darbey (01 240 1227)

Video conferencing

Our boardroom now has a state of the art video conferencing facility. As well as being able to conduct meetings with clients abroad, the satellite TV technology allows us to catch the latest scores in the domestic Moldovan league! Contact Vivienne Darbey for more information.

Case management

We have recently installed the Opsis case management system. This investment will enable us to provide a faster and more efficient service to our clients and proves our continuing commitment to quality and excellence.

Seminars

In the next few months we plan to host a seminar on Legal Costs, to be presented by a leading legal cost accountant. The emphasis will be on reducing legal costs through proactive claims handling and achieving the best deal on conclusion of a case. If you or any of your colleagues are interested please contact Caroline Murphy (01 240 1212)

Private investigators – the UK perspective

Paul Townshend (Associate, Leeds Office)

The recent implementation in the UK of the European Convention on Human Rights ("ECHR") has highlighted the right of individuals to privacy. This case study demonstrates the effect of the Human Rights Act, 1998 on the use of investigators by insurers.

Proportionality is a key concept of the Human Rights Act, 1998. This means that a public authority, when exercising its powers, must show that the action is in accordance with established law, that the objective is sufficiently important to justify the action being taken, that the decisions taken are objective and not taken on arbitrary considerations and that the methods used are no more than necessary to accomplish the legitimate objective.

For the purposes of this case study the relevant provisions of the ECHR are Article 6 (the right to a fair trial) and Article 8 (the right to respect for private and family life, home and correspondence).

A claimant seeks compensation of £100,000 in respect of injury. As the defendant's medical expert considers these injuries to be overstated the defendant's insurers instruct video surveillance agents. The claimant is filmed in a public street cycling a mountain bike at speed. Further cameras are focused on the claimant's garden and into his sitting room. Using these cameras, the claimant is seen vigorously digging up his compost heap and also watching television with his family and entertaining guests in the sitting room.
Were there any breaches of Article 8?

- **Filming in the street**

The filming was done in public so it does not deprive the claimant of the very essence of his right to privacy and there would not appear to be a less restrictive alternative available. It is clearly exercising the opposing party's right to gather evidence in support of their right to a fair trial under Article 6.

- **Filming in the garden**

As there was a less restrictive alternative, this action may infringe the claimant's right to respect for privacy under Article 8. The filming is limited to the claimant in his back garden so does not deprive him of the very essence of his right to privacy and it does go to the claimant's injuries which are the subject of the dispute. This is clearly an exercise of the defendant's right to a fair trial under Article 6.

- **Filming of the sitting room**

Less restrictive alternatives are available. This filming goes to the very essence of the claimant's right to a private family life and the footage gathered does not go to the claimant's alleged injuries. It is debatable whether a court would consider this a lawful exercise of the defendant's Article 6 rights as the footage does not take the defence any further forward and is likely to be excluded by the court.

Even if the claimant had suffered only whiplash and was pursuing compensation in the sum of £3,000, the filming of the claimant in the back garden may be considered a disproportionate tactic given the value of the claim.

If the defendant's medical expert did not raise any suspicions as to the claimant's injuries, the most important element of proportionality is absent. While it may be considered sufficient justification that a medical expert considers a claimant to have exaggerated his injuries, it is yet to be seen whether or not the same reasoning will apply to the intuition that claims handlers or solicitors sometimes have about a claim.

Insurance companies should also note that they may be committing a criminal offence under the UK Data Protection Act, 1998 if an investigator they have employed attempts to access data relating to an individual without the person's express consent or without going through official channels.

In Ireland, the European Convention on Human Rights Bill has passed first stage in the Dáil. If enacted as it stands its provisions will be incorporated into domestic law but will, of course, be subject to the Constitution, which contains its own inherent privacy protections.

continued from page 2

Storm in a teacup or Pandora's box?

Unfortunately, the judge did not express a general opinion on the potential exposure of factory managers to personal liability. No doubt the court was influenced by the fact that Mr Quinlan was effectively proprietor as well as manager and was motivated to ensure that the plaintiff would recover some of the award at least. However, in many instances non-proprietary factory managers would exercise at least the same level of control over the factory floor and its employees as the second defendant did in this case. It can be said that a non-proprietor factory manager does not assume responsibility; rather it is imposed by the terms of his contract of employment. Whether this is sufficient to distinguish the position of proprietor and non-proprietor factory managers remains a moot question. It seems certain that the Supreme Court will have to revisit this issue to give more certain guidance on it.

Strange...but true!

Clowning around?

Martin "Zippo" Burton, honorary vice-president of Clowns International has warned members to take out "custard pie insurance" against the risk of being sued by spectators who are "splatted" and "sloshed" in the Big Top. Zippo warned clowns to exercise careful judgment in selecting victims for a potential "splat" and try to ensure that those targeted were not averse to getting a bit of egg in their face!

Could this herald the potential demise of "clowning around"?!

Source: Reuters

Image is everything?

Redheaded defendants beware! At a recent District Court sitting in Carrick-on-Shannon, Co Leitrim, the presiding judge passed sentence on a redheaded man accused of public order offences. Passing sentence the judge said "I am a firm believer that hair colouring has an effect on temper, and your colouring suggests you have a temper". The defendant was fined £225.

Maybe a quick trip to the hairdressers is in order before appearing before certain members of the judiciary?!

Source: Reuters