Personal Injury

December 2012

PERSONAL INJURY BULLETIN

Welcome to the December edition of our Personal Injury Bulletin.

In this Bulletin, we cover a number of recent legal changes that are particularly important and topical.

We start with a report on the Maritime Labour Convention, which is coming into force in August 2013 and how owners need to prepare to avoid being caught out. It is also important to be aware of the Privy Council decision in *Simon v Helmot*, which is likely to lead to personal injury claimants in many common law jurisdictions seeking higher multipliers in calculating future losses.

We look at how operators and private maritime security companies can try to reduce potential claims for psychiatric injury caused by piracy attacks. We also cover upward revisions of Hong Kong statutory compensation for employees injured at work, or affected by certain industrial diseases.

Should you require any further information or assistance on any of the issues dealt with here, please do not hesitate to contact any of the contributors to this Bulletin, or your usual contact at HFW.

Paul Dean, Partner & Head of Personal Injury, paul.dean@hfw.com

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Introduction of the Maritime Labour Convention

The Maritime Labour Convention (MLC) will come into force on 20 August 2013, and will affect all commercial shipping companies and their insurers. The MLC was established by the International Labour Organisation (ILO) in 2006 and is designed to be the "fourth pillar" of the international regulatory regime for shipping, alongside the STCW, SOLAS and MARPOL, acknowledging that the shipping industry *"requires an international regulatory response of an appropriate kind - global standards applicable to the entire industry"*[1].

The MLC comes into force 12 months after ratification by 30 ILO member states representing 33% of the world's gross shipping tonnage. The tonnage requirement was met in 2009, and the recent ratification by the Russian Federation and the Republic of the Philippines fulfils the 30 states requirement. These 30 countries represent nearly 60% of the world's gross shipping tonnage, so the MLC will affect the majority of the world's seafarers.

Key aims of the MLC

The MLC aims to provide comprehensive rights and protection for the world's 1.2 million seafarers and has been referred to as the seafarers' Bill of Rights. In doing so, it will replace 68 international labour standards relevant to the maritime sector, adopted over the last 80 years, and consolidates 36 existing ILO conventions and one protocol dating from 1920 to 1996.

It aims to achieve a level international playing field for those countries and shipowners which are committed to providing acceptable global conditions of work for seafarers, thus ensuring secure economic interests in fair competition for shipowners. It applies to all commercial vessels over 500 grt, trading internationally, whether publicly or privately owned. It does not apply to vessels trading exclusively in inland waters, to traditional vessels such as dhows and junks, or to warships and naval auxiliaries. If there is doubt over whether the MLC applies to a vessel, the flag state will decide.

As a consolidating convention, in some states the changes may be fairly small. In fact, the MLC provides that if a national provision implements the rights and principles of the convention in a different manner, it may be considered "substantially equivalent" to the MLC provisions, as long as the member state satisfies itself that it gives effect to the general object and purpose of the provision.

Seafarers covered by the MLC are defined as *"any person who is employed or engaged or works in any capacity on board a ship to which this Convention applies"*. This definition is broad, and may include armed guards, guest entertainers based on board for a period or scientists onboard a research vessel, even if they are not employed by the shipowner. Where there is doubt over whether a category of person is to be regarded as a seafarer, the flag state will decide, and clarification at national level may be required.

The MLC covers conditions of employment, hours of work and rest, accommodation, recreational facilities, food and catering, health protection, medical care, welfare and social security protection, with principle areas of concern, dealt with under 5 "Titles":

- Title 1: Minimum requirements for seafarers to work on a ship.
- Title 2: Conditions of employment.
- Title 3: Accommodation, recreational facilities, food and catering.
- Title 4: Health protection, medical care, welfare and social security protection.
- Title 5: Compliance and enforcement.

UK implementation of the MLC

Although the UK has not yet ratified the MLC, it is intended that it will be ratified shortly, with the intention that it will come into force in the UK around the same time as the MLC comes into force globally. The Maritime and Coastguard Agency (MCA) is overseeing implementation in the UK.

Although the MLC definitions are subject to interpretation at national level, as well as being subject to the MLC's concept of "substantially equivalent" provisions, the UK intends to ensure that the UK definitions have exactly the same meaning and implications as the MLC definitions. However, it is important that the provisions can be interpreted in accordance with English law principles, and therefore some adjustments to the MLC wording may be necessary.

1. Source: ILO website following 2001 joint resolution by seafarers' and shipowners' organisations.

With regard to the definition of "shipowner", the government has concerns over the use of the word "agent", as the MLC use of the word is not its usual English law meaning. The definition of "seafarer" is potentially very wide, and the UK government has concerns that it could cover people working onboard any ship for any period, perhaps even including passengers who are working on their laptop while travelling. Of particular concern are cruise ships which have a wide range of staff in shops, shows and catering, as well as sailors. The MCA and British Chamber of Shipping are therefore working to clarify this. It can be assumed that the intention is to cover anyone who normally works onboard a ship, and it seems likely that if the principal place of work is on-shore, the employee will not be regarded as a seafarer.

Application of the MLC

As part of the MLC, vessels of 500 grt or over, which are engaged in international voyages, or vessels which fly the flag of one country while operating from or between the port or ports of another, must be certified as being in compliance with the MLC, requiring a "Maritime Labour Certificate" and a "Declaration of Maritime Labour Compliance". Certificates last for a maximum of five years, and there must be an interim review between years two and three. The certificates will cease to be valid, with new certificates required, on a change of owner, a change of flag or a substantial change to the structure of the vessel. Smaller vessels do not have to obtain these certificates, but they can do so on a voluntary basis.

Inspections required under the MLC, and prior to implementation, may be done by appointment or at the next survey, following which the vessel is issued with interim paperwork and a Statement of Maritime Labour Compliance, pending entry into force of the Convention. Most cargo and passenger vessels will need to obtain such a Statement before the international implementation date. There may be a shortage of trained surveyors in some locations to begin with, and therefore it is advisable to make appropriate preparations sooner rather than later, to avoid missing the deadline.

Inspectors will examine employment policies and agreements, health and safety policies and the other documents required under the Convention. The inspection will also include a physical inspection of the vessel and private interviews with selected crew.

Implications

Owners must ensure that all policies required by the Convention are in place before the implementation date, the appropriate certificates are in hand and that all Seafarer Employment Agreements fulfil the requirement to be between the shipowner and seafarer (and meet the requirements of the MLC).

While for many shipowners there may seem to be few changes (particularly where there are "substantially equivalent" provisions), this Convention is a major restructuring of maritime labour conventions and will have implications for all employers of seafarers in the shipping industry. For other shipowners, there may be some bigger changes as standards and requirements change, and the MLC strives for universal ratification. Owners will also need to be aware that the broader definition of seafarer will affect more workers.

The ILO aims for this convention to have near universal acceptance, thus potentially affecting a much wider range of owners and seafarers than the conventions it replaces. All owners should ensure they are aware of the MLC, and its requirements, in readiness for August 2013, to avoid being caught out.

For more information, please contact Eleanor Ayres, Associate, on +44 (0)20 7264 8320, or eleanor.ayres@hfw.com, or your usual contact at HFW.

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Privy Council applies negative discount rates on future damages

On 7 March 2012, the Privy Council handed down a landmark decision in *Simon v Helmot* [2012] UKPC 5 on the calculation of future losses. The decision upheld the Guernsey Court of Appeal's decision to adopt, for the first time, a negative discount rate of -1.5% for calculating earnings related to future loss, resulting in much higher multipliers and substantially higher lump sum awards of damages. This decision could have a significant impact on the mechanism used to calculate damages in personal injury claims in common law jurisdictions, including Hong Kong.

In assessing damages for future losses and expenses, the Hong Kong Courts have followed English law, which is based on the principle that compensation is intended to put the Plaintiff back in the position he would have been in had the accident not occurred; the Plaintiff should be compensated as fully as possible, but neither under-compensated nor over-compensated.

Future loss calculations have been based on the so-called Conventional 'multiplier/multiplicand' Approach (the multiplicand being the annual loss or expense, which is multiplied by the multiplier, being the number of years over which provision is to be made), based on the notional assumption that injured persons with large lump sums would behave like a prudent investor. The assumption was that these funds would always attain between 4-5% over and above inflation. Thus, the sum of money an injured Plaintiff ought to receive for future losses should be based on a 'discounting factor' of 4-5% off the lump sum. This was removed annually for the number of years the multiplier was awarded for accelerated receipt, and future inflation could be additionally and safely ignored. This assumption was better known as the *Cookson v Knowles* approach.

The issue of discount rates was last examined by the Hong Kong Courts in *Chan Pui-ki v Leung On & Anor* [1995] 3 HKC, 732, which involved an infant Plaintiff (aged ten at the time of the accident and 16 at the date of trial), who suffered serious injuries in a road traffic accident.

The Plaintiff claimed (amongst other things) loss of future earnings and the cost of future care. Although the Court accepted that the multiplier/multiplicand was the appropriate method of assessing future loss, it allowed the Plaintiff to adduce actuarial evidence, which showed that wages had increased annually by more than the rate of inflation in Hong Kong, so that the English investment return or discount rate of 4-5% was not capable of giving the Plaintiff fair compensation. A 1.2% discount rate was applied and a multiplier of 30 for loss of future earnings for a young girl who would not be able to lead an independent life. The Court awarded a multiplier of 35 for future domestic help, abandoning the Conventional Approach.

This decision was overturned by the Court of Appeal in *Chan Pui-ki v Leung On* [1996] 2 HKC 565. The Court of Appeal said that nothing in evidence before the trial judge pointed to the conclusion that Hong Kong Plaintiffs had been under-compensated for future loss of earnings by the use of the conventional multipliers and that the trial judge had been wrong to abandon the Conventional Approach.

In linked appeals, the House of Lords in *Wells v Wells* [1999] 1 AC 345, held that in awarding damages in the form of a lump sum, the Court had to calculate as best it could the sum that would be adequate, by drawing down both capital and income to provide periodical sums equal to the Plaintiff's estimated loss over the period during which that loss was likely to continue.

The House of Lords said that a Plaintiff was not in the same position as an ordinary, prudent investor, and was entitled to greater security and certainty achieved by Index-Linked Government Stocks (ILGS). The House of Lords held that the trial judges had been right to assume that for the purpose of their calculations, the Plaintiffs would invest their lump sum in ILGS, as that was the most accurate way of calculating the present value of the Plaintiff's future loss, and that the lump sum should be calculated on the basis of the rate of return available on ILGS, which for the present case, was 3%.

The case *Smith v Helmot* concerned an accident in which a car driven by the Defendant collided head-on with the Plaintiff, who was riding a bicycle. The Plaintiff was a cyclist who had previously represented Guernsey at the Commonwealth Games. He suffered severe head injuries and would not be capable of undertaking any paid employment for the rest of his life.

The Plaintiff brought an action against the Defendant and liability was admitted, leaving damages

to be assessed. The matter was first decided by the Royal Court of Guernsey, which adopted a reduced discount rate (to arrive at the multiplier for future losses) of 1%, accepting expert economic evidence as to likely future economic trends based on historical data.

The Plaintiff appealed and the Defendant cross-appealed to the Court of Appeal. The Court of Appeal replaced the 1% discount rate by a discount rate of -1.5% for earnings related losses and 0.5% for other losses. This resulted in a higher multiplier and increased the total award of damages by about £4.5 million, making a combined total of almost £14 million (the highest lump sum award ever made in the United Kingdom and Crown Dependencies). The Privy Council upheld this decision and recognised that the process of applying a "discount" was really a process of adjustment.

Possible implications

It is clear from the above that since the Hong Kong courts last considered discount rates in 1995 and 1996, in *Chan Pui-ki,* there have been changes which seriously question whether the *Cookson v Knowles* assumption of a real rate of return of 4.5% is still appropriate, namely:

- The significant change in Hong Kong's economic landscape, with high inflation and extremely low interest rates.
- The English House of Lords decision in *Wells v Wells*, which rejected as unsound the conventional assumption of 4.5% net rate of return and preferred a 3% net rate of return.
- The recent Privy Council decision in *Simon v Helmot* (which adopted a negative discount rate (-1.5%) for future earnings related losses and 0.5% discount rate for non-earnings related losses).

The Privy Council's decision is likely to have an impact in many common law jurisdictions. The courts in Hong Kong may come under pressure to make a substantial adjustment, which may be reflected in much higher awards of future losses for seriously injured Plaintiffs, to enable them to fund their care arrangements. *Simon* will be persuasive in Hong Kong, and most useful in re-examining the methodology, and particularly with respect to how to deal with inflation.

It is likely that Plaintiffs will now seek to argue for a higher multiplier in calculating future losses in personal injury cases, especially in light of the current low-interest environment and concerns about inflation. If the courts allow this, then insurers will need to factor this into the pricing of their policies and reserves.

For more information, please contact Selma Masood, Associate, on +852 3983 7714, or selma.masood@hfw.com, or your usual contact at HFW.

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Piracy and mental health risks

While successful pirate attacks have been on the decrease in 2012, piracy continues to be a major issue for shipping, with periods spent in captivity typically getting longer. The Seaman's Church Institute reported earlier this year that piracy incidents, which can range from one-off attempted attacks by pirates which last only moments, to month or even year-long periods of captivity, are putting an ever-increasing strain on the mental health of mariners. The Institute highlights issues such as disturbed sleep patterns, loss of energy, alcoholism and even suicide, which they say are on the increase among seafarers as a direct result of piracy. They also suggest affected seafarers suffering in silence after a piracy incident may be more likely to behave in ways that lead to accidents, putting other crew, vessel and cargo at risk. The Institute has called for improved international aftercare standards, as well as industry-wide protocols for resilience training.

Owners are increasingly employing armed guards to try to enhance the security of vessels passing through the affected areas, so attempted and actual hijackings now have an impact not only on the mental health of crew, but also potentially on the armed guards themselves. It has recently been suggested that there is an increasing need for private maritime security companies (PMSCs) to care for their contractors' mental health. Although there is little data on how common post-traumatic stress disorder (PTSD) is amongst private security contractors, it has been highlighted that, following attacks, such contractors may be at risk of PTSD in the same way as crew members. PMSCs, like any employer, have a duty of care to their employees, and this can include both physical and

psychological care. Under the voluntary International Code of Conduct for Private Security Providers, PMSCs are required to have in place policies that must address these issues, but as with many health and safety issues, even if such policies are in place they may not be fully acted upon.

While no cases have yet come before the English courts, lawsuits are now proceeding in the US courts, as seafarers seek compensation for psychiatric as well as physical injury suffered as a result of pirate hijacks in the Gulf of Aden, on the basis that the seafarers were inadequately prepared for such attacks. It is also possible that future actions could be brought alleging inadequate aftercare following piracy attacks. In light of these cases, it is important for Owners to regularly review and consider tightening up their policies for training for attacks and care after attacks, taking into account not only the physical, but also the mental impact on crew members. Theoretically, such claims could also be brought by private security guards, so PMSCs will also want to conduct the same policy reviews.

Many operators already have appropriate policies in place, and provide both good training and preparation for their crews, as well as support for both crew and families affected by piracy incidents. However, although individual owners are often very supportive, while there is no consistent international standard it can be difficult for owners and PMSCs to know how far they should go. So as long as piracy continues to be a significant danger to crew and security guards, both shipping operators and PMSCs will need to consider the mental health risks of piracy for both crew and private security guards.

It is possible that the coming years may see increased regulation and standardisation of the obligations on shipowners and managers to safeguard their employees' mental, as well as physical, well-being.

For more information, please contact Eleanor Ayres, Associate, on +44 (0)20 7264 8320, or eleanor.ayres@hfw.com, or your usual contact at HFW.

Recent revisions to the levels of compensation under the Employees' Compensation Ordinance in Hong Kong

In Hong Kong, an employer is liable to pay statutory compensation in respect of injuries (and certain occupational diseases) sustained by his employees as a result of an accident arising out of and in the course of employment under the Employees' Compensation Ordinance (ECO). The ECO establishes a no-fault, non-contributory compensation system for work injuries, which applies to all employees (full and part-time) employed under a contract of service or apprenticeship. Employees injured while working outside Hong Kong are also covered, if they are employed in Hong Kong by local employers.

Under the ECO, employees injured at work can recover compensation for permanent total/partial incapacity (section 7/section 9); compensation for temporary incapacity (section 10); and payment of medical expenses (section 10A). Compensation for permanent total incapacity is calculated with reference to the age and monthly earnings of the injured employee, subject to a minimum. Where the permanent incapacity is partial, the amount of compensation is reduced proportionately.

On 17 July 2012, the Hong Kong Legislative Council passed a resolution to increase compensation for permanent total or partial incapacity, applicable to work accidents occurring on or after 21 July 2012. Following these revisions, the ceiling of monthly earnings for calculating compensation for permanent incapacity has been raised from HK$21,500 to HK$23,580 (approx US$3,042). The minimum compensation for permanent total incapacity has also been raised from HK$352,000 to HK$386,110 (approx US$49,806). The change represents an approximately 9.7% increase from the previous levels set in August 2010.

The implications

It is not uncommon for an injured employee to bring a claim under the ECO, as well as for common law damages. Employees' compensation claims are typically issued earlier and pursued more speedily than claims for common law damages, because they are subject to a shorter limitation period (two years) and under the no-fault system the injured employee is not required to prove fault or negligence by the employer. Common law damages awards are likely to be higher than the statutory compensation, but any compensation received under the ECO will be taken into account when assessing the net damages payable in the corresponding common law claim.

For employers and their insurers, the upward revisions in the level of compensation under the ECO mean that they may have to pay more at

the earlier stage (i.e. when the ECO claims are pursued), though they can seek credit for the compensation already paid when assessing common law damages. This in turn may reduce interest payable on special damages in the common law claims, currently awarded at 4% per annum.

The upward revisions under the ECO not only affect employers, their workers and the insurers concerned. Where the accident was caused by the fault or negligence of a third party, the ECO allows the employer to bring a claim against the third party tortfeasor for recovery of its ECO outlay, which includes the compensation and interest paid to the injured employee, as well as legal costs incurred by both sides. As such, the upward revisions bring about higher exposures for third parties (and their insurers) in recovery claims that may be brought against them by employers.

For more information, please contact Lee Tam, Associate, on +852 3983 7712, or lee.tam@hfw.com, or your usual contact at HFW.

Conferences & Events

Marine Insurance Seminar
HFW, Friary Court, London
(17 January 2013)
James Gosling and Alex Kemp

World Shipping Forum
Chennai
(7-9 February 2013)
David Morriss and Paul Dean

IATA Legal Symposium 2013
Berlin
(17-19 February 2013)
Pierre Frühling, Richard Gimblett, Sue Barham, and Giles Kavanagh

Sea Asia 2013
Singapore
(9-11 April 2013)
Paul Aston and
Chanaka Kumarasinghe

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Lawyers for international commerce

HOLMAN FENWICK WILLAN LLP
Friary Court, 65 Crutched Friars
London EC3N 2AE
United Kingdom
T: +44 (0)20 7264 8000
F: +44 (0)20 7264 8888

hfw.com