Personal Injury

July 2012

PERSONAL INJURY BULLETIN

Welcome to the July edition of our Personal Injury Bulletin.

In this Bulletin, we have focussed on a number of recent decisions and developments which I hope you will find interesting and helpful.

Chandler v Cape reminds us that the corporate veil does not always withstand judicial scrutiny and Dawkins v Carnival reinforces the need to demonstrate that safe systems are actually executed. The "SEA EAGLE" is a salutary tale on the care needed with time bars.

We also look at proposed increases in compensation payable under the Athens Convention and the 1996 Protocol.

As always please do contact the writers of the articles featured or your usual contact if you have any questions.

Paul Dean, Partner & Head of Personal Injury

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A flutter in the corporate veil

The concept of limited liability companies form what has been described by the English judicial system as the building-block of capitalism. Issues of shareholder protection are at the fore of most of the regulations and in turn a subsidiary company is legally separate from its parent company. It is a distinct legal entity and traditionally solely responsible for its acts and omissions. This relationship has been particularly key for the maritime industry due to its inherent financial and physical risk, along with the existence of complex corporate structuring. In the past, the distinction between a parent and a subsidiary's legal personality has been fiercely upheld by the English courts. Indeed, even as recently as ten years ago, the question as to whether a company's actions amount to taking on a direct duty to its subsidiary's employees would not have been raised in the context of the corporate veil.

However, in the recent of case of *Chandler v Cape Plc.* [2012] EWCA Civ 525, the Court of Appeal re-examined this position in English law. The case concerned a dispute between Cape Plc. ("Cape") and Chandler, an employee of Cape Building Products ("CBP"), one of Cape's subsidiary companies. David Chandler developed asbestosis as a result of exposure to asbestos fibres during his employment at CBP between 1959 and 1962. He loaded bricks for CBP in the same yard in which asbestos boards were manufactured in an open-sided factory. Given the long-tail nature of the disease, he was not diagnosed until 2007, but when he came to sue, CBP no longer existed as a corporate entity and crucially he could not turn to the insurance policy as this was an excluded condition.

He therefore brought an action against Cape, the parent company, for damages for the injuries he had suffered. There was no dispute between the parties that CBP had breached its duty of care. However, Cape maintained that it was not responsible for the acts of CBP. It contended that CBP had a separate and distinct legal personality and it should not be held accountable for the acts of its subsidiary company.

Chandler's evidence illustrated that Cape had direct involvement in health and safety matters of its subsidiary company. It also showed that the companies shared directors, that Cape had approved the expenditure of CBP and the companies shared the same core business, namely the production of asbestos. Cape's argument was that these were matters inherent to a parent-subsidiary relationship. This argument was rejected by Arden LJ on the grounds that a "typical" parent-subsidiary relationship does not exist. Cape was found to be liable for damages for the breach of CBP and the Court of Appeal upheld the High Court's 2011 award of £120,000.

Although Arden LJ emphasised that this decision did not pierce the corporate veil and that the existence of a legal duty depends upon the facts, the decision demonstrates that the courts will no longer oppose the concept of a parent company having a legal duty of care to its subsidiaries' employees. To assist, the Court set out guidance in a four part test under which a parent company could be held liable for the breach of a subsidiary's legal duty of care to its employees. For a parent to be liable an employee must demonstrate that:

1. The parent and the subsidiary share the same business.

2. The parent knew or ought to have had superior knowledge of the dangers relating to certain practices.

3. The parent company knew or ought to have known that the subsidiary's practices were unsafe.

4. The parent knew or ought to have foreseen that either the subsidiary or its employees would rely on the parent using its knowledge for the employee's benefit.

Cape have applied to the UK Supreme Court for permission to appeal and therefore it remains a possibility that the decision could be overturned. If permission to appeal is refused, or the decision is upheld by the Supreme Court, there is a real concern that this is a step towards lifting the corporate veil, which has implications beyond the intended scope of this article and on which we will report as developments arise.

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The importance of contemporaneous evidence

Janet Dawkins v Carnival Plc (t/a P&O Cruises) [2011] EWCA Civ 1237

The claimant slipped on a spillage of liquid (probably water) near a clearing station in a restaurant on board the cruise liner 'ORIANA' and brought a personal injury claim for injuries to her knees and wrists.

As on most cruise liners, the restaurant was a busy area, staffed by crew members throughout the day. In defence, the defendant explained that it was inevitable that spillages would occur in the restaurant area, but that it had a safe working system whereby any spillages would be cleaned up almost instantaneously.

However, there was a lack of contemporaneous evidence from the defendant's employees and in particular from those with the duty to implement the safe working system at or around the time of this incident. In fact, the only evidence of how long the spillage had been there was from other passengers who reported the liquid was not on the floor when they arrived at the restaurant between 10 and 30 minutes before the incident.

The English Court of Appeal held that the presence of the spillage on the floor suggested that fault lay with the defendant, as the area of the spillage was under its control and that the presence of a hazard on a floor controlled by them gave rise to a prima facie case of negligence. The turning point of the case was the lack of evidence from members of staff who were responsible for implementing the inspection/ cleaning system. In the absence of this evidencen the Court could not assume that the spillage had only been present for a short period of time (consistent with the defendant's purported system that spillages are cleaned up almost instantaneously).

Accordingly, the claimant succeeded, as in the absence of evidence from the defendant, the only finding available to the Court was that on the balance of probabilities the spillage had been on the floor for longer than the short period in which the defendant would not have been negligent for the accident.

This case is a clear example of the importance of contemporaneous evidence in respect of all accidents on board vessels, irrespective of whether safety systems are in place. In order to defend claims of this kind, witness evidence from responsible personnel will be required to show appropriate systems were actually in operation at the relevant time.

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Is the claim time barred?

The "Sea Eagle" (Michael v Musgrave) Admiralty Court - 7 June 2011

This case examined the issue of whether a claim for injuries sustained during a trip around the coast of Anglesey on a Rigid Inflatable Boat ("RIB"), the "SEA EAGLE", would fall under the Athens Convention.

The claimant issued proceedings against the owner of the RIB for negligence, having sustained injuries when he fell overboard whilst standing up in the RIB when a wave struck. The defendant, as well as denying negligence, applied under CPR Part 24 for summary judgment dismissing the claim on the basis that it had not been brought within the two year period specified under Article 16 of the Athens Convention (given force in the UK under section 183 and Schedule 6 of the Merchant Shipping Act 1995).

The Athens Convention itself only applies to international voyages, but by the Carriage of Passengers and their Luggage by Sea (Domestic Carriage) Order SI 1987/670, this has been extended under English law to include domestic voyages where the points of arrival and departure are within the UK. The dispute centred around the issue of whether or not the RIB met the definition of a "ship" as a "seagoing vessel" for the purposes of the Convention.

The Court found that the "SEA EAGLE" did in fact meet the definition of a "vessel" for the purposes of the Convention due to its commercial certification, its design, the nature of its operations and the way it was used. On the question of whether

the type of voyage that the "SEA EAGLE" was engaged in at the time of accident was in fact "seagoing", the Court examined the categories of waters set out in Merchant Shipping Notice 1776 which are not classed as "sea" with the Merchant Shipping legislation in mind. At the time of the accident the "SEA EAGLE" had not been engaged on a voyage in those other categories of waters and was therefore engaged on a voyage at "sea".

As a result, the Court held that the "SEA EAGLE" was a "seagoing vessel" for the purposes of the Athens Convention, as given effect in English law. Therefore, the two-year limitation period applied and the claim had not been brought in time. The effect of this judgment means that passenger voyages taking place around the UK coast on smaller types of commercial craft will generally fall within the remit of the Athens Convention, and thus be subject to a two-year time bar.

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The Athens Convention new developments

The Athens Convention on the Carriage of Passengers and their Luggage by Sea 1974 (the "Athens Convention") is to be amended by a Protocol adopted in 2002 (the "2002 Protocol"). The 2002 Protocol, which has not yet been ratified internationally, changes a number of factors governing the relationship between the carrier and the passenger in terms of liability, claims and insurance coverage. The Athens Convention and the 2002 Protocol have been incorporated into EU Regulation 392/2009 (the "Regulation") which is due to come into force in the EU no later than 31 December 2012, regardless of whether the 2002 Protocol has been ratified by the international community. Various parties involved with the passenger shipping industry have raised concerns relating to the required insurance coverage and the EU's method of implementing the measures.

The Athens Convention entered into force on 28 April 1987, consolidating two earlier agreements on passengers and their luggage. An earlier Protocol, of 1990, has not come into force. The Athens Convention provides that carriers can be held liable for loss or damage suffered by a passenger which resulted from the fault or negligence of the carrier. It also allows carriers to limit their liability provided that such loss or damage was not caused by the recklessness or intent of the carrier. The 2002 Protocol raises the limits of liability, requires carriers to have mandatory insurance in place to cover passenger claims and introduces new methods to assist passengers in obtaining their compensation. One important aspect of the 2002 Protocol is that it replaces the fault liability approach with a strict liability approach for related claims on the basis that a carrier will have mandatory insurance coverage in place to cover such claims. The 2002 Protocol also allows IMO Member States to increase (but not reduce) limits of liability for carriers under their respective jurisdictions, provided that the IMO has been informed.

Key Features of the 2002 Protocol (reflected in the Regulation)

1. National courts can compensate for death, injury and/or damage up to the limits set by the 2002 Protocol.

2. The limits of liability have been raised significantly under the 2002 Protocol, to reflect present day conditions and the mechanism for raising limits in the future has been made easier.

3. For passenger death or personal injury, the limit of liability was increased by the 2002 Protocol from 46,666 SDR to 250,000 SDR per passenger. The UK has already increased the limits in respect of its own national carriers to 300,000 SDR.

4. A provision for compulsory insurance, of not less than 250,000 SDR per passenger per occasion has been introduced, for vessels registered in a country which is a party to the convention. The ship's registry must issue a certificate evidencing the insurance.

5. The carrier's limit of liability for loss or damage to luggage varies,

depending on whether the loss or damage occurred in respect of cabin luggage, of a vehicle and/or luggage carried in or on it.

6. The liability of the carrier for the loss of, or damage to, cabin luggage is limited to 2,250 SDR per passenger, per carriage.

7. Liability of the carrier for the loss of, or damage to, vehicles, including all luggage carried in or on the vehicle, is limited to 12,700 SDR per vehicle, per carriage.

8. Liability of the carrier for the loss of, or damage to, other luggage is limited to 3,375 SDR per passenger, per carriage.

9. The carrier is liable unless the carrier proves that the incident resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or was wholly caused by an act or omission done with the intent to cause the incident by a third party.

10. If the loss exceeds the limit, the carrier is further liable (up to a limit of 400,000 SDR per passenger on each occasion) unless the carrier proves that the incident which caused the loss occurred without the fault or neglect of the carrier.

The 2002 Protocol was originally due to be ratified 12 months after being incorporated into the national laws of ten IMO Member States. However, the ratification of the 2002 Protocol internationally proved to be a slow process and the EU wished to expedite it. The EU subsequently adopted the Regulation, which incorporates the requirements of the Athens Convention as amended by the 2002 Protocol. The Regulation was stated to come into force after the 2002 Protocol had been ratified, but in any case no later than 31 December 2012. At the time of the adoption of the Regulation, it was generally expected that the Regulation would encourage EU Member States to incorporate the 2002 Protocol into their respective national laws. In turn this would achieve the minimum number of IMO Member States required for ratification, bringing the 2002 Protocol into force.

In practice, incorporation of the 2002 Protocol at a national level has remained relatively stagnant. Some EU countries including the UK, Finland, Sweden and Germany have signed it "subject to ratification" and do not yet apply it directly. Other countries, such as France, Italy and Denmark have failed to sign it at all. It now appears that the Regulation will come into force prior to the implementation of the 2002 Protocol at IMO level. Furthermore, following the consent of the European Parliament, the Council of Ministers has approved the accession of the EU, as a contracting party, to the 2002 Protocol. This effectively means that the amended Athens Convention will almost certainly only become law within the EU.

It is unclear what effect the EU's adoption of the 2002 Protocol will have on the passenger shipping industry. Various concerns have been raised by the industry about this, including the following:

- The Regulation is likely to apply to EU Member States prior to the 2002 Protocol being recognised internationally, which was never the intention when the 2002 Protocol was drafted.

- Due to the complexities of ratifying the 2002 Protocol at the national level of the 27 EU Member States, coupled with the implementation of the Regulation, the provisions are likely to be enforced and interpreted inconsistently.

- The Regulation lays down supplementary requirements extending the regime to vessels which were never intended to be caught by the Athens Convention (for example, vessels on domestic voyages).

- The recognition of insurance certificates by other nations is potentially an issue.

- Sovereignty issues relating to whether an EU Member State could now use the "opt-out" clause of the 2002 Protocol without violating EU law.

The Regulation will come into force across the EU by the end of 2012, whether or not the 2002 Protocol comes into force internationally. This will therefore bring the Athens Convention (as amended) into force in all EU countries, including those (notably Italy and France) which have not previously adopted the Athens Convention or equivalent provisions. The requirement for compulsory insurance, in particular, may be a burden for carriers, and the issues raised above may cause problems, but this is an opportunity for a unified regime across EU Member States, and it remains to be seen whether this is a wholly positive step.

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Increase to limits of liability

The IMO announced earlier this year that the limits of liability for claims against shipowners under 1996 Protocol to the Convention on Limitation of Liability for Maritime Claims (the "Convention") are to be increased. The IMO reported that the increase has been made taking into account the experience of accidents, as well as inflation rates, which have in recent years shown the 1996 limits to be inadequate.

The Convention sets limits of liability for claims for loss of life or personal injury claims, and for property claims. The new limits are expected to enter into force 36 months from the date of notification of the adoption, which is expected to be on 8 June 2015.

The new limits for claims for loss of life or personal injury are as follows:

- For ships not exceeding 2,000 gross tonnage - 3.02 million SDR or approximately US$4.5 million/£2.9 million (up from 2 million SDR).
- For each ton from 2,001 to 30,000 tons - 1,208 SDR (up from 800 SDR).
- For each ton from 30,001 to 70,000 tons - 906 SDR (up from 600 SDR).
- For each ton in excess of 70,000, 604 SDR (up from 400 SDR).

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Conferences & Events

National Shipping Industry Conference
Melbourne
(6-8 August 2012)
Gavin Vallely and Robert Springall

IISTL 8th International Colloquium on Carriage of Goods
London
(6-7 September 2012)
Craig Neame

ALB Awards
Hong Kong
(7 September 2012)
Paul Apostolis and Paul Hatzer

IMCC
Dublin
(26-28 September 2012)
Toby Stephens and Richard Neylon

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