

Periodical payments and indexation

Bad news for defendants

Following Mrs Justice Swift's judgment in *Thompstone v Tameside & Glossop Acute Services NHS Trust*, there have been three further High Court judgments on indexation:

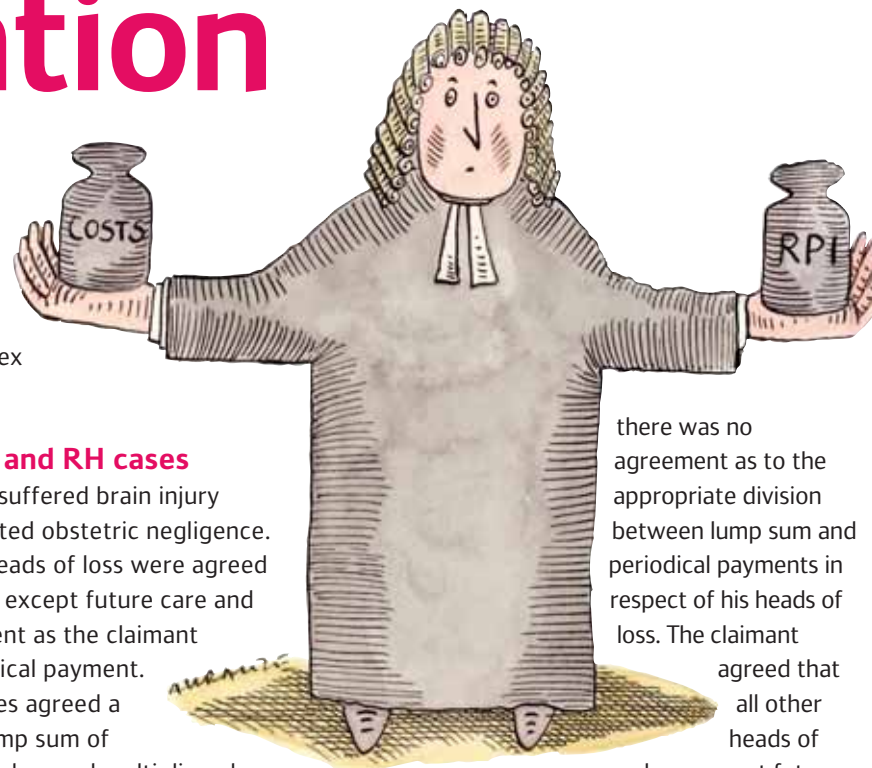
- *Corbett v South Yorkshire Strategic Health Authority* (in which Kennedys were instructed by the NHS Litigation Authority);
- *RH v United Bristol Healthcare NHS Trust* (in which Kennedys were instructed by the NHS Litigation Authority); and
- *Sarwar v Kamran Ali and the Motor Insurers' Bureau*

In all three cases, the court had to consider whether the annual increases in the claimant's periodical payments would vary by

reference to an earnings-related index rather than the retail prices index (RPI).

The Corbett and RH cases

Both claimants suffered brain injury following admitted obstetric negligence. In *Corbett*, all heads of loss were agreed and capitalised, except future care and case management as the claimant sought a periodical payment. In *RH*, the parties agreed a conventional lump sum of £4,713,100 and annual multiplicands, subject to indexation. The claimant sought a periodical payment, although



there was no agreement as to the appropriate division between lump sum and periodical payments in respect of his heads of loss. The claimant agreed that all other heads of loss, except future care and case management, should vary by reference to the RPI.

Inside this issue:

Page 3

A big opportunity

...in the Islamic finance market

Page 5

Payment of NHS charges

New rules impact on insurers

Page 6

Developing stem cell therapies

Manufacturers face serious challenges

Page 8

Reservation of rights

Failing to reserve rights may cost dearly

Page 10

Received wisdom

Receivers' liability in tort...

Page 12

The one that got away?

...receiving damages for pleural plaques

Page 14

Extra-territorial risk for professionals

The result of events in foreign jurisdiction

Page 15

Insurance in Spain

Intermediaries getting to grips with new rules...

Both claimants asked the court to exercise its discretion to disapply or modify the effect of section 2(8) of the Damages Act 1996 (which provides annual increases to periodical payments by reference to the RPI) and substitute an earnings-related index.

The claimants argued indexation by reference to the RPI was inappropriate, as it did not relate to the purchase of labour. Both claimants argued care costs are rising faster than the RPI, and other related indices provide a more reliable and accessible means of calculating annual periodical payments. If their future care costs were awarded by way of periodical payments but linked to the RPI, and the discrepancy between earnings and prices continued, this would inevitably lead to massive under-compensation.

Both claimants asked the court to apply indexation by reference to either:

- (1) the average earnings index (AEI) – the mean level of pay for all employees;
- (2) the annual survey of hours and earnings (ASHE) median – earnings data for all occupations; or
- (3) ASHE 6115 – a specific index measuring levels of earnings of care assistance and home carers. The index is published at 10 percentile intervals, with a range of hourly earnings being identified for each percentile.

The RH case addressed a number of additional issues, which were not ventilated in either Thompstone or Corbett:

- (1) The defendant relied on care market evidence from Barbara Scandrett, managing director of Complete Personal Assistance (CPA). The defendant provided data to show that carers

employed for a five-year period had annual increases in their rates of pay between 2003 and 2007 of 1.95%, in comparison to the RPI average rate of increase annually of 2.58%. It was argued the carers identified and tracked from the CPA data were far more likely to mirror the claimant's carers.

- (2) There was no agreement as to which heads of loss would be capitalised and which would be paid annually by periodical payment. The periodical payment was not restricted to care and case management.

Judgments in Corbett and RH

RPI. In both cases, Judge Bullimore (in Corbett) and Mr Justice MacKay (in RH) accepted RPI-linked periodical payments would not meet the claimant's care costs. Judge Bullimore had "no difficulty in concluding that the RPI is not a fair and appropriate indexation measure in this case". Similarly, Mr Justice MacKay said "that indexing future care costs to RPI will result in a significant and possibly substantial shortfall".

AEI. Both judges accepted that AEI was not a reliable and accurate indicator of the growth of carers' earnings, as it is based on the mean level of pay for all employees, which exceeds the pay for carers. It was accepted that, over the long term, there is likely to be over-recovery. Mr Justice MacKay did, however, say that "if the only choice was between the RPI and AEI, [he] would have been tempted to order its application notwithstanding the degree of bias".

ASHE median. This earnings measure was also rejected by Judge Bullimore who concluded that, as it included data from all

occupations, it again could lead to over-compensation. However, Mr Justice MacKay thought it was a better uprating measure than either RPI or AEI.

ASHE 6115. Both judges accepted the lead set by Mrs Justice Swift in Thompstone and modified section 2(8) with ASHE 6115 replacing the RPI as the appropriate measure to vary the annual increases of the claimant's periodical payments in respect of care and case management.

Judge Bullimore said he was looking for "a measure which will best ensure the costs of the claimant's care continue to be met in the future, namely one which, on grounds of logic and common sense, is likely to do so".

Mr Justice MacKay concluded: "I regard 6115 as the most accurate match to the target expenditure; it is of undoubted authority, coming from the ONS; it is statistically reliable as all agree, with tight CVs; it is freely accessible, albeit with a lag problem which I believe can be overcome; it is consistent over time past, although it does not go beyond 1997, not a serious flaw in my view; it is reproducible in the future...and is markedly superior to RPI."

Both judges rejected the defendant's objections to ASHE 6115, which included compositional changes, volatility, difficulties with reclassification and the workability of the earnings-related measure. Mr Justice MacKay was also not persuaded by the CPA data, saying that "the CPA evidence provides me with no justification for finding that the claimant's carers will not require wage increases in excess of RPI".

As to the format of the award in RH, the judge ordered that the claimant's proposed format regarding the appropriate division of certain heads of damage between lump sum and periodical payments should apply.

The Sarwar case

The claimant was seriously injured at the age of 17 in a road traffic accident, which rendered him tetraplegic. Liability was admitted with a reduction of 15% for contributory negligence, as the claimant was not wearing a seatbelt. Mr Sarwar initially argued that his loss of earnings and care and case management costs should be met with a periodical payment, linked to an earnings-related index. Subsequently, and before the end of the trial, he argued in favour of a lump sum award.

Loss of earnings. All the experts agreed that average earnings generally increase at a faster rate than prices and that, on the balance of probabilities, average earnings growth is likely to exceed growth in prices in the future. On the basis of historical data, linking periodical payments for loss of earnings to the RPI would under-compensate the claimant. There was a consensus among all the experts that RPI is not an appropriate index for periodical payments in respect of future loss of earnings and that an earnings-based index or measure should be applied.

Mr Justice Lloyd-Jones concluded that "the index most likely to secure that the periodical payments maintain their value is ASHE aggregate for male full-time employees at the 90th percentile".

Care and case management. The judge accepted there is no series or measure which

specifically relates to the earnings of employees who provide home care in the private sector, let alone in the locality where the claimant lives. He considered it appropriate to identify an index or measure that is most likely to match future movements in the costs of future home care which are likely to be incurred by the claimant.

Mr Justice Lloyd-Jones considered the advantages and disadvantages of the various options and concluded that indexation “on the basis of RPI would fail to meet the objective of ensuring, so far as possible, [that] the periodical payments would meet the claimant’s costs of future care”. He was persuaded there was a ‘real danger’ that, if AEI were used, it would result in an increase in periodical payments beyond that required to meet actual growth for carers. As regards aggregate ASHE median, he thought that, in this case, it would result in under-compensation. He concluded there were a number of “real advantages in the use of ASHE 6115 (90) for indexation for periodical payments in respect of costs of care in the present case”. He did not consider the practical difficulties arising from the use of ASHE 6115 to be particularly problematic, and the increased complexity in using ASHE 6115 was “entirely justified by the achievement of greater precision which is in the interest of both the claimant and second defendant”.

Interestingly, the claimant favoured a lump sum but Mr Justice Lloyd-Jones felt there was a “compelling case in favour of an award of periodical payments as opposed to a lump sum”. He concluded that periodical payments in respect of the claimant’s future loss of earnings should be indexed by reference to

ASHE aggregate (90) and ASHE 6115 (90) for the claimant’s future care and case management costs.

Conclusion

Following the Court of Appeal’s recent judgment in *Flora v Wakeham (Heathrow) Ltd* [2007] 1WLR 482, there are now in fact four judgments in favour of an earnings-related measure, ASHE 6115, when calculating the annual increases of the claimant’s future care and case management costs.

Thompstone, Corbett and RH are all being appealed, with the Court of Appeal hearing commencing on 13 November 2007. At the time of writing, it is uncertain whether the *Sarwar* case will also be appealed. A directions hearing is taking place on 30 July 2007 and will involve all those cases which will form part of ‘the basket of cases’ before the Court of Appeal in November. The NHS Litigation Authority and Insurers have taken a proactive and collaborative approach in identifying relevant issues and suitable cases to proceed to an indexation trial to join *Thompstone* on Appeal and this should be commended.

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A big opportunity

Britain is making a strong bid to become a world leader in the Islamic finance market.

Given the wealth created by the oil boom in the Middle East, Islamic finance has become an increasingly important business sector (a topic explored further in ‘The Big Draw’, Middle East Economic Digest (MEED) 30 March – 5 April 2007). In particular, attention has focused on the traditional concept of Islamic insurance (‘takaful’), and the issue of Islamic-compliant bonds known as ‘sukuks’.

Islamic finance

Some people are sceptical about Islamic finance because of the need for compliance with stringent principles deriving from Shariat (Islamic) law.

Shariat principles forbid unacceptable elements of risk and uncertainty often found in conventional insurance. The Shariat requirements – to make ethically sound investments and to abstain from receiving interest – are fairly daunting (a subject examined in greater detail in ‘Takaful Must Build on its Ethical Appeal to Expand’, Insurance Day, 12 April 2007).

However, with more than 25% of the world’s population professing to be practising Muslims, and ratings agencies such as Standard & Poor estimating growth rates of

40% a year in the takaful markets, the subject of Islamic finance (and takaful in particular) merits the attention of London’s financial professionals.

Takaful

Generally speaking, takaful is a profit-sharing business venture between the insurer (usually referred to as a ‘takaful operator’) and its policyholders (‘participants’). In essence, as with mutual insurance, the policyholders effectively choose to guarantee each other, subject to solvency. There is solidarity among the participants, who agree to contribute to a common fund with an understanding of ultimate self-benefit if certain specified contingencies occur.

The similarity with conventional insurance ends there because, in the case of takaful, the insurer is only permitted to invest the premium pool in Shariat-compliant products (see further ‘Takaful Take-up Rises as Insurers Increase Range’, Insurance Day, 16 June 2006). This makes it difficult – although not impossible – to comply with financial regulations (such as those created by the FSA) regarding the diversification of investments.

A takaful operating company generates its funds through the contribution of seed capital from founding shareholders. This

money covers start-up costs and initial investments. Additional funding may be raised through donations by further participants to the operating company's takaful fund. The founding shareholders appoint a Shariat advisory board, whose main purpose is to ensure that the company's actions are Shariat-compliant.

There are various models of takaful operators that address the part played by the company in relation to its participants. The differences usually relate to the role of the company as agent or partner – a distinction which determines whether the takaful operator is entitled to any profits in addition to its fees (see further the 'Takaful Take-up Rises as Insurers Increase Range' article cited earlier).

Retakaful

The number of Islamic-compliant reinsurers (known as retakaful operators) continues to grow. Currently, Middle Eastern retakaful operators benefit significantly from local regulations that require a fixed percentage of ceded lines to be placed with local retakaful entities.

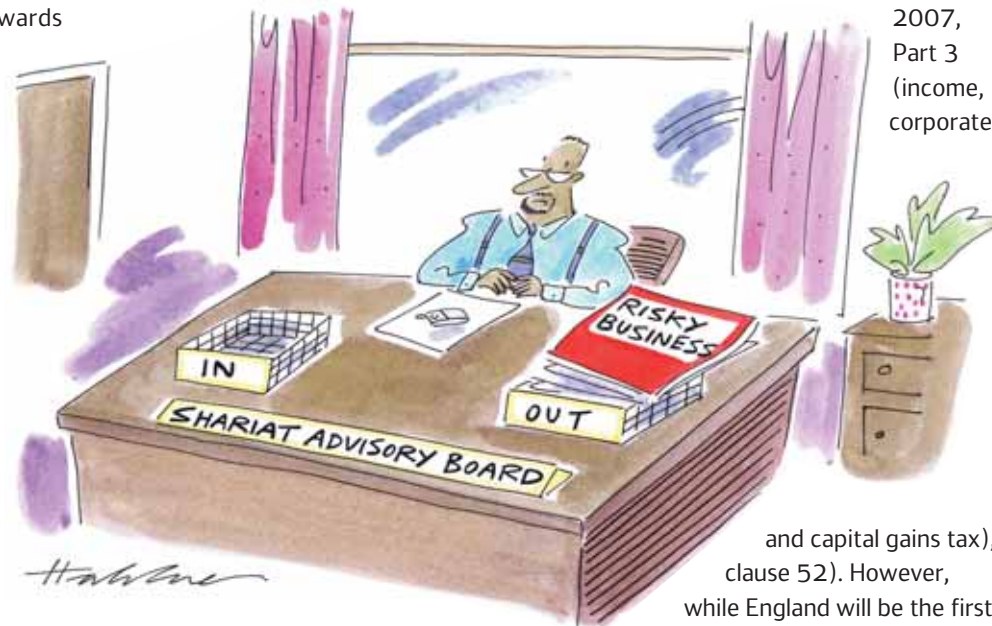
However, takaful operators sometimes look to reinsure further risks with reinsurers that do not necessarily make ethical investments with their premium pools. This arrangement does not appear Shariat-compliant and may lead to a conflict with the Shariat advisory board.

London's strong position

London is in a very strong position to benefit from the growth in Islamic financing because of its long-established reputation as a well regulated financial centre and because it possesses the professional skills required to

arrange and structure Islamic products effectively. By contrast, inherent risks and divisions have weakened other players – especially, Dubai and Qatar – as competitors (see further 'The Big Draw' article cited earlier).

Despite the Dow Jones Islamic market index, which tracks companies that meet the generally accepted criteria for Shariat-compliant investments, the US is not best placed to become a major player in the Islamic finance arena. This is partly because of a perceived hostility towards



Islamic funds and partly due to the stringent corporate governance requirements imposed by the Sarbanes-Oxley Act.

As for London, in 2001, the global index group FTSE initiated a 'green' index called FTSE4Good. Dubbed 'FTSEfeelgood' within the industry, it tracks companies that meet ethical standards as set by the Ethical Investment Research Service. A fair number of companies

that appear in the index ought to meet the requirements of any Shariat advisory board. Proposals in the finance bill covering alternative finance investment bonds also strengthen London's position with respect to Islamic finance and, in particular, takaful.

March's pre-Budget announcement allows for profit payments (interest) under alternative finance investment bonds – such as sukuk – to be tax deductible and so it will no longer be a constructive tax penalty to release profits under a sukuk in the UK (see the finance bill 2007, Part 3 (income, corporate

and capital gains tax), clause 52). However, while England will be the first western nation to issue sukuk – which are said to offer competitive returns and have a secular ethical appeal – other non-Middle Eastern countries such as Malaysia and Pakistan do have a long-standing reputation for dealing with this type of financial instrument.

Some international insurance companies and reinsurers have already tried to enter the takaful market in the Middle East, with

varying degrees of success. It is, however, difficult to obtain the requisite authorisations, so ratings agencies recommend that global players wishing to follow suit first establish relationships with the local players and then build on technical partnerships. (For more on this topic, see 'Unicorn launches takaful brand', MEED 27 April – 3 May 2007.)

Currently, there are UK takaful operators who do not appear to be specifically regulated. This is going to change. The non-life subsidiary of British Islamic Insurance Holdings (BIIH) has recently submitted a formal application and business plan to the FSA.

The way forward

Ultimately, success in the Islamic finance market vis-à-vis takaful will depend on two factors:

- understanding the intricacies of Islamic finance against the background of Shariat law; and
- the existence of a stable and regulated centre to this new market.

Given both these things, London stands an excellent chance of becoming a world centre for Islamic finance and building a strong bridge with the Muslim community.

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Payment of NHS charges

The new rules will have a major impact on insurers.

Recent changes to the rules relating to the payment of NHS charges mean that all insurers should review their reserves in cases where the third party has to attend hospital as a result of an accident. The new provisions, which stem from the Health and Social Care (Community Health and Standards) Act 2003, apply to all relevant incidents occurring on or after 29 January 2007.

Under the old scheme, only motor insurers had to repay the NHS trust the money which had been expended on an innocent party's attendance at hospital. These rules have now been extended to cover all compensators in cases involving motor claims; employers' liability, public liability, product liability disputes; and disease cases where the disease in question is directly attributable to the injury suffered by the third party. Among those now caught by the new rules will be defendants who pay compensation personally or within their deductible excess.

As before, charges must be paid within 14 days of making a compensation payment or within 14 days of the date that the certificate is issued if the certificate is issued after the settlement date. It is also possible to apply for a waiver of payment of the charges prior to any appeal on the grounds of excessive hardship.

Impact on defendants

The changes may well lead to a significant increase in the reserves that have to be held by non-motor insurers and self-insured motor defendants. Traditionally, such compensators have escaped liability for payment of such charges. Recoupment of charges now also includes the cost of any hospital transport used. This has to be repaid direct to the NHS Ambulance Trust. There is to be a standard ambulance charge of £159 per journey. This charge will be applied to all ambulance journeys, including those to (and between) hospitals.

Good news for defendants

Repayment of the NHS charges may be reduced as a result of a third party's contributory negligence. However, proof of an agreement on liability between the parties may have to be supplied to the Compensation Recovery Unit for it to consider whether any reduction in the NHS charges should mirror that agreement.

Previously, in motor claims, a defendant was still held responsible for the full repayment of the NHS charges incurred, even where the claimant had been found to be 99% responsible for the accident itself. That has now changed.

Tactically, defendants can still make global offers to a claimant by making no reference to a split on liability. However, in more serious cases, it would be prudent to

consider making a definite agreement on liability with the claimant. This could have a significant impact on the NHS charges payable.

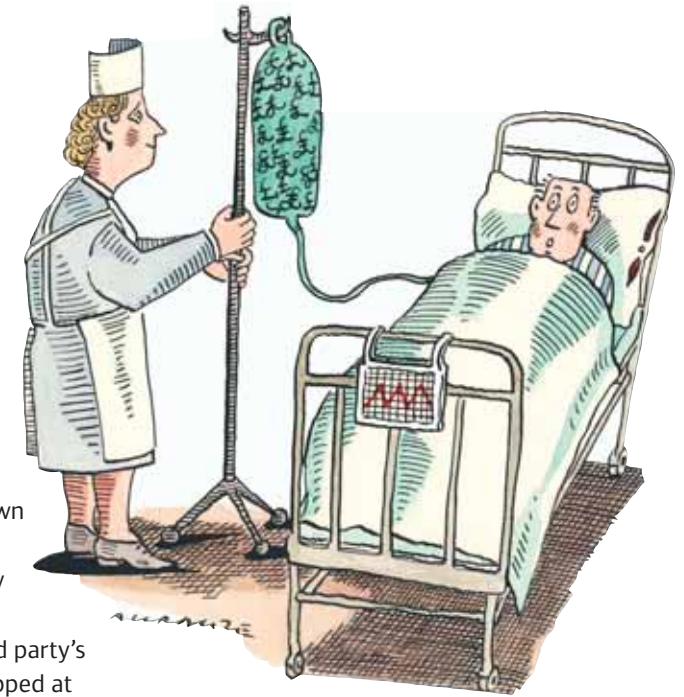
The future

The level of NHS charges has grown steadily over the years. Back in 1997, a motor insurer would only be charged for approximately the first week of an innocent third party's stay in hospital. Charges were capped at £3,000. In April 2006, that cap had risen to £37,100, based on the first two months' stay. To help compensators get to grips with the new provisions, it has been decided to freeze the cap from April 2007. The limit will then be reviewed next year. However, the current trend is for the NHS to try and recoup an ever-increasing amount of the costs of healthcare.

What should defendants do?

Defendants need to reassess the relevant reserves and ensure that NHS charges are factored in when the third party has received NHS healthcare as a result of the accident. This will be particularly relevant when dealing with serious non-motor cases where a third party has had a lengthy stay in hospital.

Global offers (by which a defendant may deliberately avoid making separate offers on quantum and liability) are still a useful negotiating



tool for defendants.

However, defendants need to consider negotiating a firm agreement about contributory negligence in cases where NHS charges are significant. Such an agreement could have a major impact on the charges payable.

Defendants will still be able to seek a review of – or to appeal against – the charges. Usually, the review or appeal focuses on arguments about contributory negligence and often involves cases where the claimant has been treated for some pre-existing or accelerated condition.

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Developing stem cell therapies

Manufacturers face serious challenges on the regulatory front and in terms of legal liability.

As the world of biomedical research continues to advance, the potential use of stem cell therapies to find reliable remedies for chronic debilitating disorders such as diabetes and Parkinson's disease has generated substantial media attention. This article looks at the development of this research and the risks that may arise in the future from its use in new medicines.

So what are stem cells?

Stem cells are essentially primitive cells with the potential to develop into all kinds of cells

and tissue types, including bone, nerves and skin. Basically, there are three groups of stem cells as set out below:

(1) Embryonic stem cells: These can be taken from the embryo at various stage of its development	The stem cells taken from the early stages of an embryo are capable of producing any type of cell in the body (totipotent), while those taken later can develop into most – but not all – types of cells (pluripotent)
(2) Umbilical cord stem cells: The blood inside the umbilical cord has stem cells that are genetically identical to the newborn child	These stem cells are multipotent, which means they can develop into only a limited type of cells
(3) Adult stem cells: Both infants and adults have stem cells in their tissues directing their growth	These stem cells are also multipotent and can only develop into a limited type of cells

Aim of stem cell therapy

Stem cells restore tissues which are either deficient in the body or which have been damaged by injury or disease. The aim of

stem cell therapy is to replenish or replace deficient or damaged tissue that is otherwise unable to heal itself – for example, by transplanting stem cells into the damaged

area and directing them to grow new, healthy tissue, or by trying to make stem cells already in the body expand and produce more tissue.

Stem cell therapies in use

Several stem cell therapies are already being used to treat human diseases. These include umbilical cord blood stem cell transplant; adult stem cell transplant of blood stem cells; and – perhaps best-known – adult stem cell transplant of bone marrow stem cells to treat (for example) deficiency in white cells caused by cytotoxic treatment of leukaemia and other types of blood-borne cancers.

Future stem cell therapies

Scientific researchers are striving to develop stem cell therapies that are more effective, less intrusive and safer. At present, such therapies usually rely on donations from others. However, this carries the risk of rejection from the host's immune system. In future, it may be possible for a person to use a sample of their own stem cells to regenerate tissue. This would reduce the danger of rejection.

Ethics

The ethical dilemma currently focuses principally around the use of embryonic stem cells. There are two main opposing schools of thought: those people who believe that the benefits to human beings are so great that the opportunities for research and treatment must be taken forward, and (on the other side of

the argument) those who oppose such research on the basis that embryonic stem cells are essentially human beings who cannot consent to being used. Other people take a halfway view: research on the surplus of embryos from infertility treatments is acceptable as they would otherwise be destroyed.

UK law and regulation

From April 2006, the UK regulatory framework for stem cell therapy was required to incorporate the provisions of the EU Tissue Directive 2004. This directive was designed to ensure the safety of cells and tissues that are transplanted into (or onto) the human body and applies (among other things) to cellular stem-cell-derived materials that are intended for human application. Currently, UK and Belgium are the only countries in Europe that allow the creation of embryos for the specific purpose of research.

In the UK, the primary legislation includes the following:

- the Human Fertilisation and Embryology Act 1990 (HFE Act 1990);
- the Human Fertilisation and Embryology (Disclosure of Information) Act 1992;
- the Human Reproductive Cloning Act 2001; and
- the Human Tissue Act 2004.

Applicants for research licences must justify to the Human Fertilisation and Embryology

Authority (HFEA) why embryonic stem cells are to be used rather than adult stem cells. (The HFEA was established in 1991 to enforce the provisions of the HFE Act 1990.) Applicants are also required to provide detailed information on the fate of the stem cells throughout the process, and to place a sample of all cell lines in the UK Stem Cell Bank.

On 14 December 2006, the government announced its intention to amend the HFE Act 1990 so as to clarify its policy regarding human, animal and hybrid and chimera embryos. The draft bill is expected to be presented to parliament shortly.

Manufacturers of stem cell medicines should also be aware of the Medical Devices Regulations 2002 (the MD Regulations 2002), following the recent implementation of regulation 3 of the Medical Devices (Amendment) Regulations 2007.

Regulation 3 came into force in March 2007 and provides

that the MD Regulations 2002 apply to active implantable medical devices or in vitro diagnostic medical devices, or accessories to such devices, if they:

- incorporate human blood, blood products, plasma or blood cells of human origin;
- are transplants or tissue or cells of human origin, or incorporate or are derived from such tissues or cells; or
- are transplants or tissue or cells of animal origin (other than non-viable animal tissue).

Stem cell therapy case law is beginning to emerge as well. One example is the House of Lords case of *Quintavalle (on behalf of Comment on Reproductive Ethics) v Human Fertilisation and Embryology Authority* [2005] UKHL 28. In that case, the question was whether the HFEA is empowered to license tissue typing. This is a process by which embryonic cells are tested for their compatibility with the tissue of a sick sibling, with a view to planting a compatible embryo into the mother's womb and the eventual treatment of the sibling through the

donation of the baby's umbilical cord stem cells (or, failing that, with bone marrow to be taken when the newborn child is older).

The House of Lords ruled that the decision taken by the HFEA was lawful and that the HFEA can continue to issue treatment licences for families who want to conceive an IVF baby that could provide tissue-matched cord blood to help treat a sick sibling.

Looking ahead

The development of adult stem cell medicine, particularly autologous adult stem cells, continues to accelerate. Manufacturing companies are keen to produce a whole variety of adult stem cells, and patients want to be treated by them. The question then arises as to how these complex cellular products and devices can be safely characterised, stored, packaged and delivered. The regulatory system will also have to find ways of reassuring patient recipients that such products and devices are safe.

Future risks

Overall, the UK regulatory system appears to be working well, promoting safe and high-quality stem cell research for therapeutic use. However, two crucial questions appear to have been overlooked: how will the system ensure compliance and how can manufacturers be rendered properly accountable to patients injured by stem cell therapies?

The EU Tissue Directive 2004, for example, makes no specific provision about compensation where a patient is harmed by tissue therapy. Consequently, UK claims will have to be

made on the basis of ordinary product liability laws (in particular, consumer protection legislation and common law negligence). However, this may prove difficult in the light of the Consumer Protection Act 1987's development risks defence, whereby a producer can escape liability if it shows that, at the relevant time, the state of scientific and technical knowledge was such that it could not be expected to discover the defect.

There are significant risks and challenges facing manufacturers (and insurers) who become involved in this field. For example, manufacturing companies will be responsible for ensuring that stem cell medicines do not carry viral or infectious diseases. Furthermore, as the stem cell market develops, manufacturers will have to conduct clinical trials to show clinical efficacy, as well as safety and quality. Stem cell therapy is cutting-edge technology and problems are bound to arise.

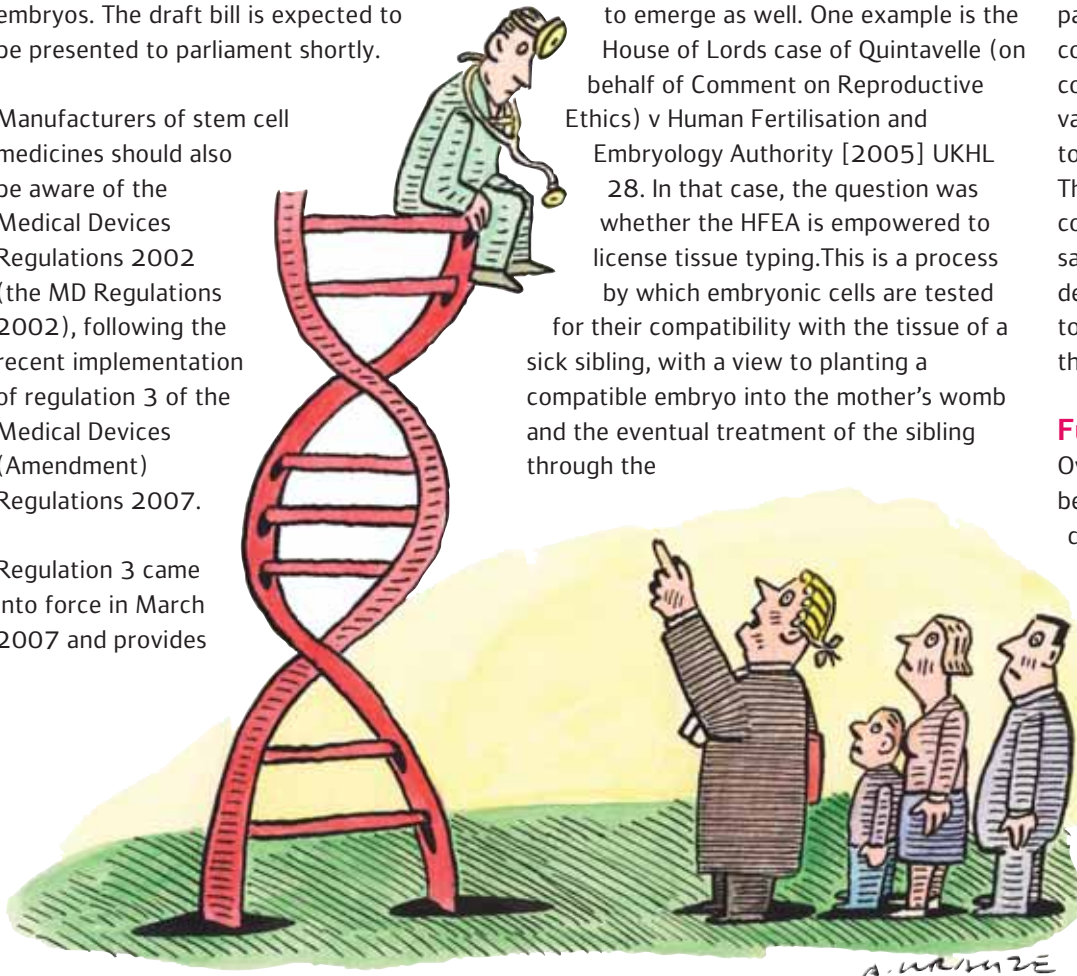
In any event, one thing is for sure. Before mobile stem cells overtake cell mobiles in terms of commercial popularity and necessity, UK manufacturing companies and their insurers need to do two things: they must seek ways of ensuring compliance with the regulatory system, and they must prepare for potential biomedical product liability claims of unknown complexity.

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Reservation of rights

Failing to reserve rights may cost insurers dearly.

“It seems very aggressive.” “The brokers don’t like it.” “It will upset the insured.” These remarks (and others on very similar lines) are often the initial response to the suggestion that an insurer client should issue a ‘reservation of rights’ letter before proceeding further with a claim or investigation. Of course, there may be good commercial reasons for not writing such a letter or, alternatively, an insurer simply may not wish to reserve its rights. However, before making any final decision on the point, the insurer should know what it is surrendering and the consequence of doing so.

There are two different situations where the issue is likely to arise:

- policy validity – where there is some doubt about the insured’s compliance with the duty of utmost good faith; and
- policy terms and conditions – where there is an apparent failure to comply with a term of the policy.

Issues concerning policy coverage are not included on the premise that one cannot waive or affirm into cover something which was never there. This is an area outside the scope of this article.

Policy validity

If an insurer has sufficient knowledge of a right available to it and then says or does something inconsistent with that right, it will be treated as having affirmed the contract or waived its entitlement to avoid it.

The difference between affirmation and waiver is a legal technicality that is not analysed here because the effect is identical: in either case, the right to avoid is lost.

To give a practical example: An insurer is faced with a claim and, at first sight, there is clear evidence of non-disclosure which would entitle avoidance.

However, the insurer fails to reserve its rights. It then appoints adjusters to investigate the claim’s value with the insured. In these circumstances, the insurer will have lost any right to avoid: it has behaved like an insurer dealing with a claim in the ordinary way, as if it was insured by a valid policy. Put another way, the insurer had the choice of avoiding the policy or affirming it, and, by its conduct, chose to affirm it. The interposition of a suitable reservation would have saved the insurer’s right at least for a time.

Of course, there are many types of conduct that could be regarded as inconsistent with a right to avoid: for example, the making of an interim payment, the acceptance of a premium, or reliance upon a policy term or

condition. Each case will have its own particular facts.

Policy conditions

Until recently, it was not clear whether there was any real difference between how the law treated policy validity and policy conditions. A recent case (in which Kennedys acted for the claimant) suggests, however, that there is a difference.

In *Kosmar Villa Holidays plc v Trustees of Syndicate 1243*, a 17-year-old boy called James Evans dived into a swimming pool at the Marina Beach apartments in Corfu on 22 August 2002 and fractured his spine. Kosmar had exclusive use of the pool. As a result of the incident, Mr Evans became tetraplegic. Kosmar had a liability policy which required immediate notice of ‘the occurrence of any injury’ and similar notice of claims as conditions precedent to insurance cover. Notice of Mr Evans’ injury – and of a claim by him – was given on 4 September 2003 (over a year later).

The insurer then notified Mr Evans’ solicitors of its interest and asked for further and more up-to-date information. It wrote to Kosmar with 25 questions about Mr Evans and his claim and, shortly after that, wrote to Mr Evans’ solicitors about facilities for inspection of the pool. All of the correspondence was without reservation of rights. On

30 September, the insurer wrote to Kosmar, asked for an explanation of the delay in notification and purported to reserve its rights.

The key question was whether the insurer could rely on the condition precedent and the late notice of the occurrence of injury. The answer was no, they couldn’t, said Mr Justice Gross, giving judgment on 4 April this year. The law regarding election, he said, had been accurately summed up by Lord Goff in *The Kanchenjunga* (1996): “When a state of affairs comes into existence in which one party becomes entitled ... to exercise a right, he has to decide whether or not to do so. His decision, being a matter of choice for him, is called an election.”

Mr Justice Gross went on to say that reliance by the other party is irrelevant. As at 4 September 2003, the insurer had sufficient knowledge of the facts to realise that there had been a failure to comply with the notice condition. It had, however, behaved in a manner that was inconsistent with a rejection of the claim for indemnity under the policy. He discounted the argument that the insurer had not had ‘a reasonable time’ to make its decision.

Kosmar’s claim for indemnity therefore succeeded but it is clear from the remarks of the judge that, had Euclidian reserved its position on or shortly after 4 September (and

before it wrote its various letters), the court's view would have been different.

The reservation

What should an insurer do if it wants to reserve its position despite the commercial difficulties that may flow from that decision?

The reservation must be expressed in plain words. In *Hill v Citadel* (1996), a reinsurer made it plain, without using express words, that its position was reserved pending inquiries and the provision of information which had previously been promised. It was held that two particular sentences, written in these circumstances, could not be treated in isolation as amounting to affirmation. Merely expressing concerns about placing of the risk may not be enough to constitute reservation, either. The argument that, by taking particular steps, insurers were "impliedly reserving their rights [was] dismissed by the court, on the basis that every businessman knows how to reserve his rights".

Any letter recording a reservation of rights should reserve the position as regards all identifiable defences, as a failure to include potential defences may constitute a waiver of them. In *Vitol SA v Esso Australia Ltd* (1989), Lord Justice Mustill said that where rights are reserved in respect of one contention made by the claimant, but are not reserved in relation to another matter known to the insurer then this amounts to a tacit representation that the insurer will continue not to reserve its rights in relation to that second matter. Although initially a general reservation may be appropriate, specific issues should be highlighted by further reservations as soon as these can be identified. (for safety's sake, though, the

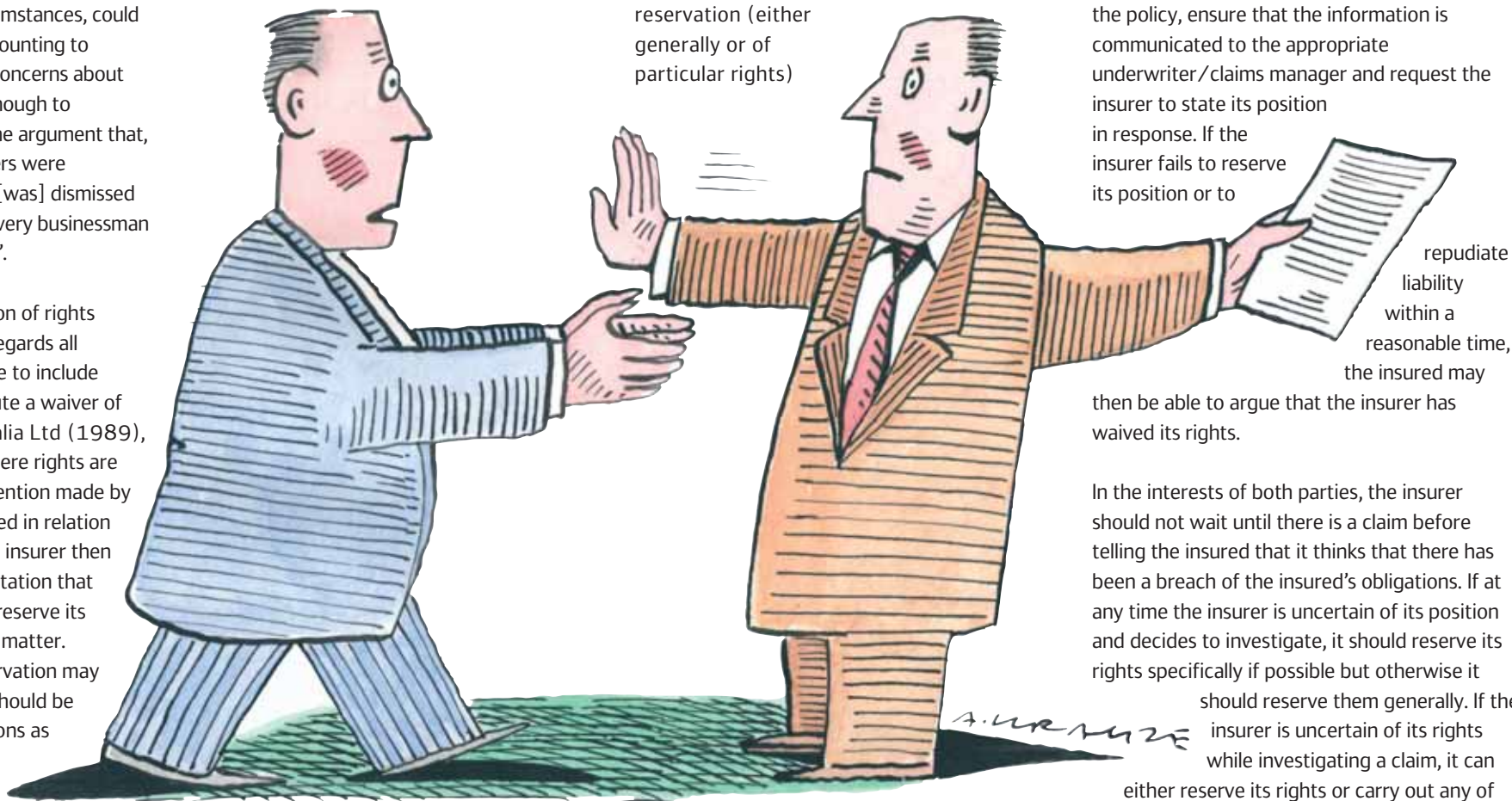
general reservation should be maintained as well). When rights are reserved, the insurer must then take care to ensure that any subsequent conduct is not inconsistent with that reservation.

Consequently, if the insurer impliedly or expressly accepts the claim under the policy, the fact that it has also reserved its rights will not stop it from being treated as having waived its rights (see *Reid v Campbell Wallace Moule & Co Pty* (1990)). By contrast, a mere acceptance of the payment under the policy may not be inconsistent with the insured's

reservation of rights (see *Barber v Imperio Reinsurance Co (UK) Ltd* (1996)).

Given this uncertainty, a prudent insurer should not accept payment of any premium under the policy if it has reserved its rights and, in most cases, the best course of action will be for the insurer to decide swiftly whether it wishes to remain on risk and act accordingly. If the insurer does decide to repudiate liability, the insurer should return the premiums (see *Simon Haynes Barlas and Island v Boubert* (1946)).

Where there has been an initial reservation (either generally or of particular rights)



but things have to be dealt with pending a final conclusion, the wisest course is to repeat the reservation – with whatever variation is necessary – every time there is a need to do anything inconsistent with the rights reserved (see further *TSB Bank v Robert Irving & Burns* (1996)).

Naturally, an insured will want the insurer to waive as many of its rights as possible. However, if the insured attempts to manufacture a waiver, the court will react unfavourably. The best course that an insured can adopt is to pass on in writing all information relating to breaches of the policy, ensure that the information is communicated to the appropriate underwriter/claims manager and request the insurer to state its position in response. If the insurer fails to reserve its position or to

repudiate liability within a reasonable time, the insured may then be able to argue that the insurer has waived its rights.

In the interests of both parties, the insurer should not wait until there is a claim before telling the insured that it thinks that there has been a breach of the insured's obligations. If at any time the insurer is uncertain of its position and decides to investigate, it should reserve its rights specifically if possible but otherwise it should reserve them generally. If the insurer is uncertain of its rights while investigating a claim, it can either reserve its rights or carry out any of

the standard inquiries that are made in every case, whether or not the claim is actually met at the end of the day.

There are three caveats to the above, though:

- The fact that the insurer has reserved its rights in one regard will not protect the insurer in relation to other rights, which may be treated as having been waived.
- Second, the courts have sometimes said that an insurer has waived its rights despite a prior reservation. Where an insurer acts wholly inconsistently with the reservation – for example, by calling for performance under their contract – the courts will be reluctant to allow the insurer the benefit of such inconsistency. They will be equally antipathetic towards an insurer that is trying to avoid the provisions of the contract in circumstances where it would be unmeritorious or impracticable for it to do so.
- On occasions, the courts have said that a waiver is a conclusion of law to be reached whenever the necessary facts are established. If this line is taken in a particular case, then, once the elements of a waiver are made out, the court will override an insurer's protestations to the contrary, as well as any purported reservation of rights.

All these approaches should be treated with caution. If an unequivocal representation is required to establish a waiver, the only way in which a reservation of rights will not protect the insurer is if the court concludes that, on the particular facts of the case, the reservation of rights is a sham, with the insurers intending it to have little or no effect. This will happen rarely. The third caveat is also limited in its practical impact because it is obviously correct that a waiver is a conclusion of law. As with all legal

conclusions, it will necessarily be based on an individual set of facts.

Effects of silence

If an insurer has taken no action to affirm or repudiate the contract – and a reasonable time for a decision or a reservation of rights letter has elapsed – it risks being treated as having affirmed the contract.

Where an insurer delays its decision to such an extent that the rights of the insured are prejudiced, any entitlement to avoid or rely on a breach of condition is likely to be lost.

Consequently, an insurer facing circumstances that may entitle it to avoid or rely on a breach of condition should expressly reserve its rights, so that the insured cannot argue later that it was led to believe that there was cover.

Final advice

If an insurer can see a chink of weakness in the insured's case when staring down the barrel of a claim, then it should reserve its rights unless there is a compelling commercial reason not to do so. But if all it can see is the bullet, then it is better off resolving the claim as rapidly as possible.

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Received wisdom

The House of Lords has had some important things to say about receivers' liability in tort, and the law of conversion.

In the recent case of OBG Ltd v Allan, the House of Lords has ruled on key aspects of economic torts and the law of conversion (that is to say, the wrongful dealing with property in a way that is inconsistent with the owner's rights). The law lords decided that the receivers should not be held liable for the damage which a company may have suffered as a result of the loss or under-realisation of business contracts. The case was heard alongside Douglas v Hello Magazine and Mainstream v Young, since all three appeals concerned claims in tort for economic loss caused by intentional acts.

OBG v Allan: the Background

Mr Allan and Mr Stevenson of Smith & Williamson were appointed as receivers in June 1992 under a floating charge and took over OBG's business (including its assets and undertakings). It rapidly became clear that the business was insolvent and could not be saved. OBG ceased trading. A liquidator was appointed a month later and assumed control of OBG.

The receivers, who acted in good faith throughout, had been advised by solicitors that their appointment was valid. No one at

the time suspected that this advice was wrong. Long after the receivership ended, the liquidator of OBG sued the receivers for damages for conversion. In turn, the receivers sought an indemnity from the solicitors who had advised on their appointment.

In 2001, the trial judge concluded that the receivers were clearly liable to the claimants for damages for conversion. However, the level of damages was left to be assessed at a later date. Resolution of the issue of who should pay those damages – the receivers or the solicitors who advised on their appointment – was also for a later date.

OBG argued that the receivers were responsible for the loss of several of their contracts or (in other cases) had failed to realise the full value of contracts. Such contractual or proprietary rights qualify as 'intangible' assets and, in law, receivers can only be liable for the conversion of 'tangible' assets such as buildings, plant and machinery. However, the judge ultimately held at trial that the claimants could recover some of the damages claimed in relation to the value of the contracts, as well as the tangible assets. On that basis, the claimants were awarded approximately £1.8m, plus interest.

Subsequently, and by a majority of 2:1, the Court of Appeal overturned the trial judge's

decision regarding conversion of the business contracts. The damages were reduced significantly. The case then went to the House of Lords, where the claimants argued that the receivers were liable for the value of the contractual claims because they had committed either an 'economic' tort or conversion.

Economic loss

The allegations that the receivers had committed one of the economic torts – inducing breach of contract, unlawful interference in contractual relations or causing loss by unlawful means – were considered at length by Lord Hoffman, who gave the leading judgment. "Unlawful interference" or "causing loss by unlawful means" requires the use of means which are unlawful. The person who

has committed the tort (known as 'the tortfeasor') must also have intended to cause damage to the other party. Lord Hoffman confirmed that the tort of inducing breach of contract arises where someone not party to the original contract procures one of the contracting parties to act so as to breach the agreement. Again, the tortfeasor must intend one of the contracting parties to breach the contract.

pronouncements and the law lords approved the Court of Appeal decisions not only in *OBG v Allan* but also in *Douglas v Hello Magazine* and *Mainstream Properties v Young*.

In addition, the decision clarifies the law relating to economic torts by confirming there are essentially only two such torts, namely causing loss by unlawful means and inducing breach of contract. Any attempt to blur the distinction between the two, or to create some type of unified or hybrid economic tort, was considered likely to confuse and therefore discouraged.

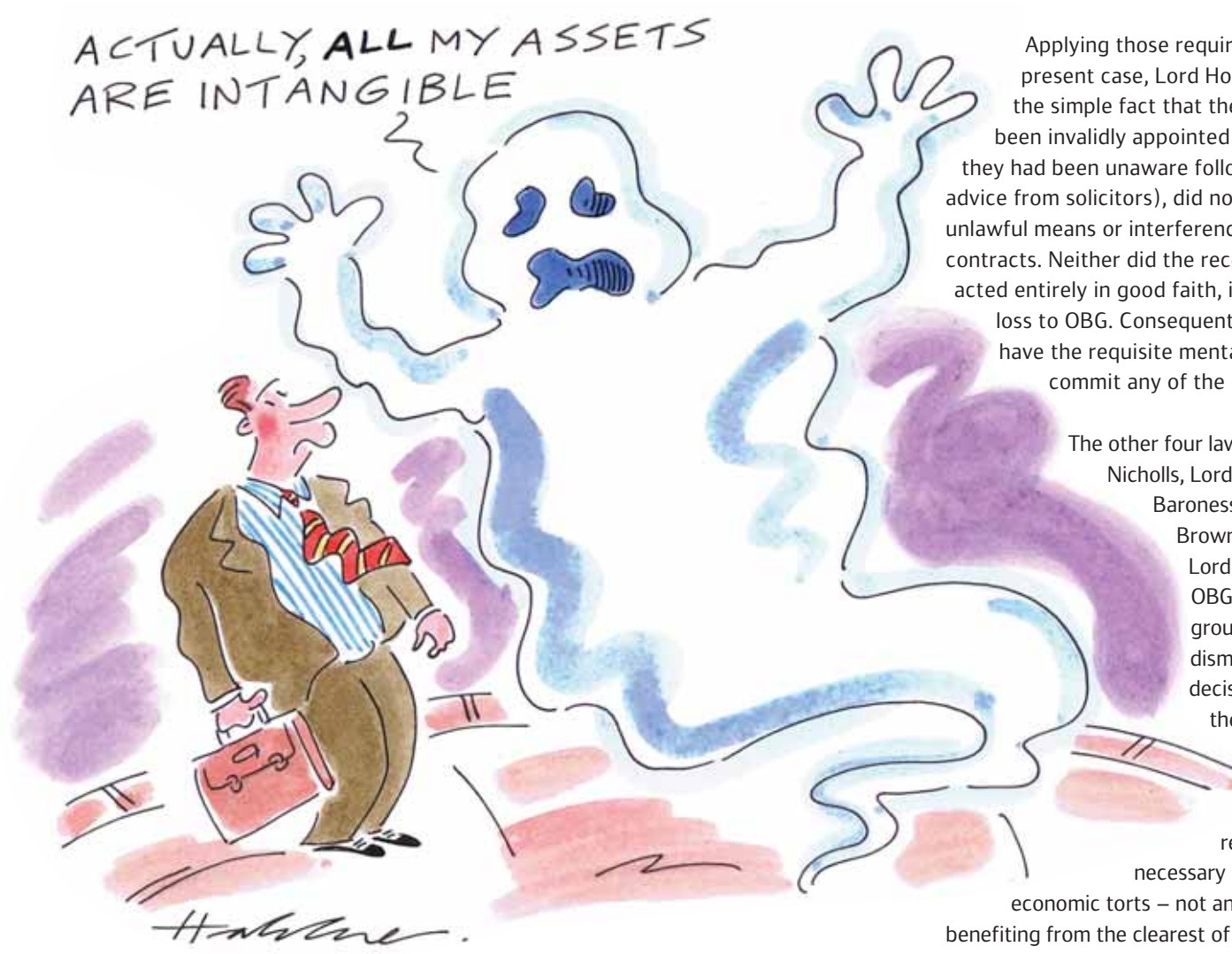
Conversion

The law lords' comments on this subject reveal a sharp divergence of opinion and are perhaps the most interesting part of the decision. When it comes to the tort of conversion, UK law has always been clear that a tortfeasor can be strictly liable for converting tangible assets but cannot be liable for the conversion of intangible assets.

The claimants referred to the law of two Commonwealth jurisdictions (Canada and Australia) and certain North American states, which allow the recovery of damages for the conversion of intangible assets. They argued that English law was effectively out of step with these jurisdictions and had not moved with the times in that, nowadays, the distinction between tangible and intangible assets makes no commercial sense. The claimants pointed to the illogical distinction between shares which, if evidenced by paper certificates, would qualify as tangible assets but, if not evidenced on paper and dealt with purely electronically, would count as intangible assets.

Applying those requirements to the present case, Lord Hoffman said that the simple fact that the receivers had been invalidly appointed (a fact of which they had been unaware following poor advice from solicitors), did not constitute unlawful means or interference in OBG's contracts. Neither did the receivers, who acted entirely in good faith, intend to cause loss to OBG. Consequently, they did not have the requisite mental element to commit any of the economic torts.

The other four law lords (Lord Nicholls, Lord Walker, Baroness Hale and Lord Brown) agreed with Lord Hoffman and OBG's appeal on this ground was dismissed. The decision is significant therefore in clarifying and reaffirming the law as regards the necessary ingredients for economic torts – not an area previously benefiting from the clearest of judicial



This argument found favour with two of the law lords – Lord Nicholls and Baroness Hale – who agreed that the distinction between tangible and intangible assets was illogical and could see no basis for a distinction between documents on paper and non-paper rights. Lord Nicholls, who gave a lengthy judgment, considered the long-standing distinction should be discarded and that the tort of conversion should apply to contractual rights regardless of whether they are represented or recorded in writing. He was careful, though, to state that such an extension should not apply to intellectual property rights.

However, the majority of the law lords agreed with Lord Hoffman in considering it a step too far, and potentially confusing, to contemplate such an extension of the law, particularly since parliament had not chosen to do so. It was up to the legislature to change the law in this area if, for policy reasons, such a reform was considered appropriate. It is clear that Lord Hoffman was not overly impressed with the Commonwealth or US authorities and, more importantly, he did not sympathise with the claimant's position in this case. In his concluding remarks, he said: "[This] is not a case in which a wrongful appointment of receivers caused damage to a solvent company. The judge found that the company was inevitably headed for insolvent liquidation."

In Summary

The law lords' speeches represent an interesting debate and divergence of opinion in this area. If damages had been awarded for conversion of intangible assets, it would have

represented a very significant change in the law and had far-reaching implications both for those acting as receivers and for numerous other agent/principal relationships.

Given the generally conservative instinct of the law lords, it is not surprising that the majority were reluctant to take this step without at least an indication from parliament that such a reform was on the legislature's agenda. Since Lords Hoffman, Walker and Brown clearly considered change undesirable for public policy reasons, it is perhaps surprising that Lord Nicholls and Baroness Hale were willing to contemplate such a reform. It may be that parliament will now examine this area of the law, given the views expressed by the Nicholls/Hale minority. Practitioners will wait with interest to see whether parliament will in fact review and revise the law of conversion.

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The one that got away?

The claimant in the Hindson case may possibly be the last symptom-free victim to receive damages for pleural plaques.

For more than a year, claims about asbestos pleural plaques have remained in suspended animation while claimants and defendants alike wait for the House of Lords to affirm or overturn the Court of Appeal's decision in Rothwell v Chemical & Insulating Co Ltd (2006) EWCA C:U 27.

The House of Lords' decision is not expected until October 2007 and many pleural plaque cases are currently the subject of 'standstill' agreements under which, for limitation purposes, any unexpired period as at the date of the agreement will cease to run against the claimant until 28 days after the Lords' decision is published.

As dust accumulates on pleural plaque files, it has been easy for practitioners to overlook the case of Hindson v Pipehouse Wharf (Swansea) Ltd (2007) LTL 2/3/2007. Hindson was one of the many cases considered by the Court of Appeal at the same time as Rothwell. But Hindson was the only case where liability had been admitted by the defendant, so that the appeal was limited to the question of quantum and was remitted to the High Court, where Mr Justice Wyn Williams assessed the damages in accordance with the principles expounded by the Court of Appeal.

These principles will be relevant to the Rothwell group of cases in the event that the

House of Lords overturns the Court of Appeal's decision. (But should the Lords affirm the decision, Mr Hindson could turn out to be the last symptom-free victim of pleural plaques to receive compensation.)

The Rothwell case

Ten claims – where pleural plaques had not given rise to symptoms – were tried together by Mr Justice Holland.

The claimants argued that, even where the person concerned was symptom-free, pleural plaques still constituted personal injury and should be considered in conjunction with concomitant factors, including the risk of further and more significant injury.

The defendants' response was that pleural plaques could not be regarded as a disease and, in any event, could not give rise to physical impairment or have any impact on bodily function. The defendants went on to argue that anxiety engendered by the risk of further injury did not give rise to compensation and did not contribute to damage so as to found a claim.

Mr Justice Holland ruled that significant permanent physical penetration of lung tissue raised a potential for damage but no more. Nevertheless, he considered himself bound by Cartledge v Joplin (1963) AC 758 and went on to find that anxiety engendered by

physiological damage did give rise to a cause of action. He then set a tariff for damages which was significantly lower than levels customarily applied in some county courts.

By a majority decision, the Court of Appeal reversed the decision of Mr Justice Holland on the basis that the development of symptom-free pleural plaques was insufficiently significant to constitute damage that could give rise to a claim for negligence. Further, no claim could be founded on the chance of contracting a future disease where this was not consequent on some physical injury. The law did not recognise a duty to take care not to cause anxiety. A claimant could not recover damages for psychiatric injury caused by anxiety about the risk of contracting a disease where a person of reasonable fortitude would not react in this way.

The Hindson decision

Mr Hindson was symptom-free but radiological tests revealed that he had pleural plaques. His claim differed from the other appeals because the defendant employers chose not to dispute their liability and so the only issue was that of quantum. At first instance, Mr Justice Holland had awarded £7,000 general damages for pain, suffering and loss of amenity. He declined to award the claimant anything to cover financial loss.

On appeal, the Court of Appeal (Lord Justice Smith) expounded the principles upon which damages should be awarded and remitted the claim to the High Court where quantum was reconsidered by Mr Justice Wyn Williams. In his judgment of 21 February

2007, the judge said that, while pleural plaques, of themselves, do not cause disability, anyone with these plaques who had been exposed to asbestos was likely to be anxious about the future.

The award in Hindson

Before evaluating the claim for pain, suffering and loss of amenity on a full and final basis, the judge had to consider the claimant's life expectancy. There were several matters the judge had to take into account: the claimant suffered what was termed a 'coronary event' in March 2003; he had been a cigarette smoker throughout his adult life; and he continued to smoke 20 cigarettes a day. The judge reached the conclusion that the claimant would survive until at least the age of 70.

In awarding general damages, Mr Justice Wyn Williams indicated that, had he been assessing damages for the pleural plaques and anxiety on a provisional damages basis, he would have followed the suggestion of Lord Justice Smith in the Court of Appeal and awarded the claimant £5,000. But, in awarding damages on a full and final basis, he had to factor in the risks of further injury identified in the medical evidence.

On a strictly arithmetical approach, those risks would have been worth around £12,000 but the judge considered this to be too high because:

- it was very unlikely that the claimant would contract all the conditions identified in the medical evidence;
- it was necessary to discount for the accelerated receipt of the sum awarded; and

- the court normally sets its face against compensating for different injuries but instead adopts a global approach.

In the light of this, total general damages were awarded in the sum of £15,500. As to future financial loss, the claimant was 59 years of age and "highly motivated in terms of his work". He worked as an insulating engineer in a supervisory capacity at a power station and was also a partner in a business selling electrical equipment. His net annual income at the date of trial was between £40,000 and £50,000 and his schedule of loss was predicated on the basis that he would work until he was 70. His net annual income after the age of 65 was projected to be £34,000. The judge found that the claimant might (health permitting) work beyond the age of 65, but that it was unlikely that he would work as hard.

Refusing to adopt an arithmetical approach because of the various imponderables, the judge assessed the claimant's damages for the risk of future financial loss at £8,500 which, together with £2,000 for nursing care, produced a total award of £26,000.

Conclusion

If the House of Lords affirms the Court of Appeal's decision in Rothwell, then Mr Hindson may well be the last symptom-free person to be compensated for pleural plaques in the UK.

But there is scope for the House of Lords to find:

- that pleural plaques, of themselves, are capable of constituting a physical injury which affords the victim a cause of action; and/or

- that anxiety engendered by the risk of further injury constitutes damage which is sufficient to found a claim.

Either of these findings would mean that a claimant will still have to elect whether to seek damages in the bracket of conventional or provisional damages. Older claimants – where the risk of further injury is minimal – are likely to opt for damages on a conventional basis. Younger claimants – or cases where the risk of further injury is significant – are likely to seek provisional damages. In her dissenting judgment in the Court of Appeal, Lord Justice Smith considered the damages bracket (suggested by Mr Justice Holland) to be too low and she went on to expound how damages in these cases should be quantified.

Although Mr Justice Holland had sought to curtail the escalating level of damages awarded in the county courts, clearly Lord Justice Smith had other ideas. Unless the majority decision of the Court of Appeal is upheld, the quantification in cases involving pleural plaques will require rather more science and the value of these claims will be somewhat greater.

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Extra-territorial risk for professionals is increasing

Extra-territorial risk is risk to UK-based professionals as a result of events in foreign jurisdictions.

One prominent example is the internet gambling saga. For several years politicians and authorities in the United States have been zealously pursuing internet gambling companies and their officers for alleged breaches of US law.

Alarming for professionals and their insurers, it was reported recently that US authorities were no longer content to pursue the companies operating internet gambling and their directors but that a number of UK professional firms which had advised those companies had also received requests for 'assistance' and for production of documents.

It doesn't take a huge leap of logic to infer that the US authorities might see the professional as a party of interest if they have advised on transactions which lead to an allegedly illegal activity.

This raises a significant business risk because whenever it is asserted in the US that a corporate crime has been committed the claimant bar is quick to emerge and seek civil redress.

Anti-competitive behaviour

The same concerns arise in relation to advisors to companies alleged to have engaged in anti-competitive behaviour. Rules against cartels in the US are far broader in application to that of those in the EU. US courts have jailed more than 30 non-US directors since 1999 and there is a pending House of Lords appeal against the extradition of the former chief executive of Morgan Crucible. Could he have a claim against his professional advisors? If a situation arose after 1 October 2007, when minority shareholders can bring derivative actions against directors, is it possible a professional could be joined by a director as a third party to a shareholder's derivative action?

Nationalisation

Consider also this hypothetical situation: a multi-national oil producer enters a joint venture with a Russian company to extract oil and natural gas from the former Soviet Union. The joint venture is majority-owned by the multi-national company. Just as the project is about to come online the Russian authority suspends

licences on the basis of alleged tax deficiencies. The problem is only resolved after the multi-national cedes effective control of the joint venture to a Russian state-owned oil company.

To the extent that there was a share offering or revenue raising for the joint venture from public markets, claims might be made against the advisors – the stock brokers, the accountants, or the lawyers, depending upon what they



advised the directors to say in the offering documentation about this 'political' risk.

The insurance position

How do the professionals' insurers respond? Most professional indemnity policies have an insuring clause which indemnifies against civil liability. The minimum terms for solicitors provides that the policy must insure against "civil liability to the extent that it arises from private legal practice". The ICAEW by contrast insures in respect of any "civil liability whatsoever or whensoever arising in connection with the conduct of any professional business carried on by, or on behalf of, the insured".

In the case of internet gambling, an allegation by the US authorities that a professional firm conspired to conduct internet gambling in the US is clearly not a civil liability, but a claim by Gamblers Anonymous to the effect that the professionals had promoted and facilitated gambling to addicted gamblers (which can only be compensated by damages) would be a civil liability. Any claim by an investor that they were misled by statements in a circular or prospectus for a share offering or bond issue could easily give rise to a civil liability.

Investigation

Even if claims wouldn't fall into the civil liability category, most professional indemnity policies include extensions to the insuring clauses, including in respect of defence costs in relation to investigations or enquiries. Notably, exclusion 6.7 of the Minimum Approved Wording for solicitors excludes a) fines or penalties; or b) orders or agreements to pay the costs of a

complainant, regulator, investigator or prosecutor of any professional conduct complaint against the insured. There is no blanket US exclusion and 'defence costs' includes "investigating, reducing, avoiding or compromising any actual or potential claim".

The ICAEW wording contains exclusionary language in relation to US exposures but only if the action is brought in the US or arises from the professional business carried out from an office situated in the US.

It is by no means certain that a claim for investigation costs is covered. But equally there is 'wriggle room'.

All things considered, it is my view that professionals have more to fear from unexpected happenings of this type than professional indemnity insurers. But some policy terms are ambiguous, and as professionals recognise the risks to their clients – especially from e-commerce and governments with protectionist agendas – the prospects of unusual claims arising increases.

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Insurance in Spain

Intermediaries are having to get to grips with new rules.

It has been almost a year since the Insurance Mediation Directive was implemented in Spain, a mere 18 months late. The implementation was effected by the enactment of the Law on Mediation of Private Insurance and Reinsurance of 18 July 2006, which came into force on 19 July 2006.

The Law laid down rules of conduct for the intermediaries' market that are likely to last for many years to come. The new regime can be summarised in three basic principles: a clear separation of roles; similar treatment; and transparency.

The three basic principles

A clear separation of roles. It is widely recognised that there are many different types of intermediaries besides the classic insurance broker figure. The Law introduces and regulates two new entities:

- the reinsurance broker and the agent linked to several insurers (sometimes known as a 'tied agent').

Intermediaries can therefore now be divided up into exclusive agents, tied agents, insurance brokers, exclusive bank-assurance operators, tied bank-assurance operators and reinsurance brokers.

Similar treatment. Intermediaries have similar (although not identical) rights and

duties. For instance, they all have to obtain certain professional accreditation, but the detailed requirements differ between each type of intermediary.

Transparency. Like most (if not all) EU legislation, consumer protection is at the heart of this new statute. For instance, intermediaries must take certain measures to disclose their remuneration; the source and number of proposals (which should be at least three) offered to the insured; and their financial capacity.

The regulator has also agreed to post online the single register of intermediaries created under the Act. Traditional duties – such as helping the insured to complete the proposal form and (in the case of the insurance broker) presenting claims – remain unchanged.

Market reaction

Broadly speaking, the market has welcomed the new regime. However, as with any legislative reform, there are challenges and questions. The regulatory authority has adopted a novel approach in trying to resolve any such difficulties that might arise. Instead of enacting secondary legislation, it has chosen to deal with any questions via notes posted on its website. This is certainly a transparent process but some argue that it is hardly an orthodox way of implementing the Insurance Mediation Directive.



now chosen the second option. Because of Lloyd's special nature and the fact that it is registered in Spain as a single insurance entity, though, it seems that the regulator will accept coverholders binding risks on behalf of various syndicates. However, there is nothing to prevent a reinsurance broker from acting as a coverholder.

conclusively, at least in the immediate future. Guidance may have to be sought from the regulatory authority either via direct consultation or by interpreting the notes posted on its website.

Looking ahead

The one-year holiday given to intermediaries to adapt to the Law expired on 19 July 2007. The market appears to be happy about the new statutory requirements. Indeed, intermediaries have seen the Law as an opportunity to improve their internal processes and their external communication with insurers and insureds. Nevertheless, there are still some grey areas about which it will be difficult to advise

Coverholders

One issue that deserves particular attention is the new treatment of coverholders in Spain. Unlike some of its European counterparts, the Spanish regulatory authority has taken the view that insurance brokers cannot act as

coverholders with delegated authority to bind risks on behalf of insurers.

The question is then whether a coverholder can act for a variety of insurers or should be restricted to act for one. The regulator has

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