The HSA – eager to prosecute

Katie McAuliffe (Solicitor)

The Health and Safety Authority was established under the Safety, Health and Welfare at Work Act, 1989 ("the Act"). Its primary function is to foster the prevention of accidents and injury to health at work in accordance with the provisions of the Act.

Part 10 of the Safety, Health and Welfare at Work (General Application) Regulations 1993 sets out the type of incidents which must be notified to the Health and Safety Authority ("HSA"). The HSA has power to direct an investigation and appoint an inspector if it feels that a company or employer has failed to fulfil any of its obligations under the legislation.

Inspectors powers

The HSA Inspector may:

- Enter work places at all times.
- Undertake examinations or investigations.
- Take photographs, copies of relevant documents and samples as necessary.
- Interview staff and take statements.
- Require workplaces, equipment etc to be left undisturbed during an investigation.
- Remove or render harmless equipment or substances in cases of imminent danger.

In addition, the HSA Inspector may make 3 types of enforcement notices:

Improvement directions

These directions are given where activities are being carried out which may pose a risk to health and safety. The direction requests employers to submit an improvement plan, specifying what actions they will take to rectify the risk areas specified in the direction.

Improvement notices

These notices are served on companies or employers who have contravened a legal duty or who have not submitted or implemented an improvement plan. This notice must state the nature of the contravention and provide the employer with a period of time in which to take corrective action. If an employer decides to appeal an improvement notice this will have the effect of suspending the notice until a final decision is reached by the District Court. Appeals must be made within 14 days of the notice being served.

Prohibition notices

A HSA Inspector will serve these notices on employers when there is likely to be a serious risk of personal injury. This type of notice may be served immediately ie a prohibition notice may be placed by a HSA Inspector on a piece of equipment immediately after an accident has occurred, requiring the equipment to be taken out of action. It should be noted that the prohibition notice will not be suspended if an employer makes an appeal. The notice will remain in effect until the District Court confirms otherwise.

If the HSA, on the conclusion of its investigation, decides to prosecute an employer, the District Court issues a summons specifying the particular breaches of legislation. When defending a prosecution by the HSA, it is very important for employers to ensure that the various sections pleaded in the summons relate particularly to the type of accident which occurred. It is not unusual for charges to be struck out on technical grounds in HSA prosecutions.

HSA prosecutions

The HSA now tend to plead breaches of section 6 (1) of the Act as a 'catch all' provision. Section 6 (1) sets out the duty of every employer "*to ensure, so far as it is reasonably practicable, the safety, health and welfare at work of all its employees*."

In recent times some summonses have been struck out because the HSA has not correctly named the defendant company or employer in the proceedings. The statutory time period within which the HSA must bring charges is one year from the date of the incident.

Once the HSA inspector concludes his or her investigation, a report is compiled. In most cases, the HSA inspector is the main prosecution witness for the HSA and the report is introduced into evidence at the hearing. It is vital for any employer, who is charged with an offence, to request a copy of the report from the solicitors acting for the HSA. If this request is refused, an application should be made to the District Court, prior to the prosecution hearing, for disclosure of the report. This allows the defendant company to prepare a defence to the case which will be made against it by the HSA.

Fines

Due to the increasing level of serious accidents and fatalities in industry, the HSA appears to be very eager to prosecute offending employers. Depending on the nature of the injury caused, the District Court can refuse jurisdiction and the case then goes forward to the Circuit Court or High Court for hearing. The fines and penalties enforceable in the various courts are as follows:

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LITIGATION NEWS

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MIAB recommendations

The Motor Insurance Advisory Board published its comprehensive report on the Irish insurance industry in April. The main message of the report is that of achieving balance between the interests of the consumer and that of competitiveness of the insurance industry. A total of 67 recommendations were made, many of which, if implemented will require legislative changes, and would result in significant changes to the procedures for litigation involving insurance claims.

Recommendation on establishing Commercial Court

The Committee on Court Practice and Procedure has put forward options for a Commercial Court. The President of the High Court has announced his intention to establish a small group of judges, court staff and others to examine ways to implement these proposals.

Codes of practice for bullying

The Minister for Labour, Trade and Consumer Affairs has launched three Codes of Practice on Workplace Bullying and Harassment under the Safety, Health and Welfare at Work Act, 1989, the Industrial Relations Act, 1990 and the Employment Equality Act, 1998. These Codes provide guidelines on procedures and arrangements for employers and employees on tackling workplace bullying, harassment and sexual harassment in the workplace.

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The HSA – eager to prosecute

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District Court

The District Court may impose a maximum fine of

- €1,904.61 (£1,500.00) per offence for breaches of sections 6, 7, 8 and 10 of the Safety, Health and Welfare at Work Act 1989 (duties on employers, premises, controllers and manufacturers/suppliers).
- €1,904.61 (IR£1,500.00) for failure to comply with enforcement notices or court orders.
- €1,904.61 (IR£1,500.00) for all other offences ie failing to comply with health and safety regulations.

High Court/Circuit Court

The High Court and Circuit Court may impose unlimited fines in relation to offences within their jurisdiction. In addition, two-year prison sentences can be imposed where custodial sentences are specified.

It should be noted that if a decision of the District Court is appealed to the Circuit Court, the same jurisdiction is conferred on the Circuit Court where the case was prosecuted summarily in the first instance, ie the maximum fine which can be imposed on summary conviction cannot be increased on appeal to the Circuit Court.

Appeals

Employers should always give due consideration to appealing a decision of the District Court in a HSA prosecution. While previous convictions cannot be introduced in evidence during the hearing, if found guilty, the judge does take such previous convictions into account when exercising his discretion to impose the maximum fine applicable.

The majority of accidents at work tend to be fodder for civil actions. While a HSA conviction cannot be introduced in evidence during a civil trial, the employee's legal team generally maintain watching briefs during a HSA prosecution and use the valuable information from the prosecution as a basis for framing the civil action against the employer. Given the prevailing culture of compensation, it is in the interests of the employer that they provide a vigorous defence to HSA prosecutions.

Stress in the Workplace

Ailbhe Kirrane (Solicitor)

The English Court of Appeal recently heard four cases where the claimants had been awarded compensation in the County Court for stress-induced psychiatric illness. In *Sutherland v Hatton & Others* the claimants alleged that they had suffered psychiatric illness brought about by stress in their workplace, which had occurred as a result of their employers negligence.

The Court of Appeal allowed three of the four appeals by the employers and took the opportunity to review and refine the law in this evolving area.

Findings

Broadly, where an employee shows signs that he is in difficulties, the question of whether the problems were foreseeable will arise. An employer needs to ask if a psychiatric injury to the employee's health has occurred and if this injury is attributable to the workplace.

The nature and the extent of the work done are, of course, relevant. Comparisons should be made between the pressures of the job and the coping mechanisms of the employee. For an employee to succeed in such a claim, he must be able to demonstrate that he brought his specific difficulties to the attention of his employer, not merely to have mentioned them in a vague manner. Whether the employee had a history of such illness will also be a significant factor to be

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Exaggerated claims

Caroline Murphy
(Senior Associate)

We are, unfortunately, all too familiar with the malingering plaintiff and the type of claimant whose injuries miraculously disappear once a compensation payment has been made. Yet, frequently, these claimants attract the sympathy of the court and obtain an award of damages, well in excess of what we feel the case is actually worth. 2002 has seen a startling increase in insurance premiums, predominately as a result of September 11 and partially due to the collapse of Independent Insurance. But a higher incidence of exaggerated and suspected fraudulent claims, which unfortunately continue to be tolerated by the courts, (despite the most vigorous of defences) must surely be another factor.

The issue of exaggerated claims recently arose in the case of *Patrick Vesey v Bus Éireann*. The Supreme Court, in a decision handed down on 13 November 2001, considered whether exemplary damages could apply to a plaintiff where his or her conduct in relation to the manner in which he advanced his claim, merited the court's strong disapproval. Unfortunately, despite finding that the plaintiff had grossly exaggerated his claim and that he had, on occasion, lied to the court, he was nonetheless awarded significant damages.

The unfortunate effect for insurers in this case therefore, is that it has sent out a clear message to say that while a defendant can be punished by the award of exemplary damages to a plaintiff who may have suffered at the hands of his conduct, the converse would not apply to a plaintiff who lies to the court. Accordingly, cases which might have been appropriately reserved on grounds of logical analysis of evidence are now exceeding reserves, and otherwise reluctant claimants are pursuing their claims right into court, in the almost certain guarantee of a tidy sum of compensation.

Closer scrutiny to reserves and political pressure on the industry to fight claims harder and bring premiums back down has meant that insurers must pay more attention than ever to suspicious and exaggerated claims.

Vesey v Bus Eireann - case summary

Judge Johnson, who heard this case in the High Court, found that the plaintiff had been involved in a road traffic accident on 9 September 1996, but only because Bus Éireann had admitted it. Had they not done so, Judge Johnson stated that he would have had "the gravest difficulty in coming to that conclusion", finding that the plaintiff had lied to the judge, his doctors, and that his work history was "one of the great mysteries". He reluctantly concluded that the plaintiff did suffer some injury but could only "speculate" as to its nature.

Yet, he awarded the plaintiff damages of £72,500. Bus Eireann appealed to the Supreme Court, citing (as one of their grounds) that the trial judge erred in law and on the facts in making any award of damages, having regard to "the dishonesty" of Mr. Vesey in that he had failed to satisfy the court as to the injuries he allegedly sustained. Counsel for Bus Eireann argued that the damages to which the plaintiff may be entitled should be reduced or extinguished as a mark of the court's disapproval of the sustained dishonesty which characterised Mr. Vesey's prosecution of his claim.

Hardiman J, delivering the judgment of the Supreme Court, stated that he was not satisfied that there was a direct analogy with an award of exemplary damages, to mark the court's disapproval of the conduct of the defendant, and a power to reduce the plaintiff's damages. While he did ultimately reduce the damages to £30,000, he indicated that it was not the responsibility of a trial judge to "disentangle" the plaintiff's case when it became entangled as a result of lies and misrepresentations systematically made by the plaintiff himself.

Conclusion

It is difficult for a defendant and his insurers to contest the logic in Vesey when even the courts avoid the responsibility to "disentangle" claims, but insurers realise that allowing a less than honest claimant to succeed (or even making it easy for them) serves only to

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Office news

O'Rourke Reid on the run

Staff members of O'Rourke Reid took part in the 2003 RTE Road Race at Belfield on 11 May 2002 as part of their fundraising efforts to support the 2003 Special Olympics World Summer Games which are to be held in Dublin. It was a great day out for the staff and the money raised will be handed over to the Special Olympics Fundraising Committee.

Bookmark extra

New Circuit Court Rules came into force on 3 December 2001. They consolidate and revise the existing Rules which have been in force for over half a century. The Rules introduce significant changes in relation to the procedure for lodgments/tenders, notices of trial and particulars of claim.

High Court revisits discount rate: good news for insurers

Laurence McMahon (Solicitor)

In the recent case of *Boyne v Bus Átha Cliath*, the High Court revisited the subject of discount rates in calculating the costs of future loss of earnings and medical care for personal injuries. The case also dealt with the area of contributory negligence in cases involving intoxication.

Facts

The plaintiff, a 38-year-old man, had sustained serious personal injuries when he was run over by the rear wheel of a bus from which he had just disembarked. Both the bus driver and another passenger gave evidence at the trial that the plaintiff was very drunk at the time of the accident.

The case was heard by the President of the High Court who concluded from the evidence that the plaintiff, due to his intoxicated state, stumbled, fell against and then under, the wheels of the bus.

However, as it was clear that the bus driver was aware of the plaintiff's intoxication, and ought to have taken particular care by keeping him under observation, the Court apportioned liability 75% to the defendant and 25% to the plaintiff.

The judgment is important as it changes the discount rate (otherwise known as the real rate of return) allowed when calculating the costs of general future loss as previously set out in the High Court in the matter of *McEneaney v Monaghan County Council and Ors* (see Issue No 2 of Litigation News).

Discount rate

In the McEneaney case, the High Court had set out changes in the method of calculating the cost of future loss and medical care for serious injuries. These are the costs that will have to be paid out of a lump sum awarded to a seriously injured person so as to ensure that they have adequate resources to pay for future medical costs and to compensate for future loss of income.

The effect of the McEneaney case was to reduce the discount rate from 4% to 2.5% when calculating the cost of future general losses (but not when calculating the costs of future medical care).

In the case of *Boyne v Bus Átha Cliath* the plaintiff was also making a large claim for future loss of earnings. However, in this case a discount rate of 3% has now been allowed when calculating the costs of future loss of earnings. This is good news for insurers, as the higher the assumed real rate of return on capital, the lower will be the lump sum awarded.

Interestingly, the method for calculating future medical care costs was not altered.

Whilst the Court in *Boyne v Bus Átha Cliath* accepted the plaintiff's evidence that the real rate of return would be 2.9%, it also felt that some adjustment was required to take into account the possibility of re-investing income to some extent, and felt that the appropriate rate was, therefore, 3%.

Contributory negligence and intoxication

The case also proves to be an interesting one as it deals with the courts' treatment of contributory negligence having regard to the plaintiff's state of intoxication.

The Court adopted a two-pronged approach when dealing with this issue, analysing the conduct of both the plaintiff and defendant:

- It noted the fact that the defendant was aware of the intoxicated condition and extent of the intoxication of the plaintiff.
- In assessing the plaintiff's conduct for the purposes of contributory negligence the intoxicated state was disregarded. In other words, the Court evaluated the plaintiff's conduct as if he were sober and the plaintiff was not allowed to rely on his self-induced state to rebut the defendant's plea of contributory negligence.

Conclusion

In his judgment, the President of the High Court has reviewed and restated the law in two important areas of personal injury practice. The judgment kills two birds with one stone and, as such, is likely to be cited frequently as a precedent in future cases.

Exaggerated claims

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increase the likelihood that they or someone else will succeed elsewhere. Accordingly, the industry as a whole must not be afraid to take on these claims and must continue to vet, scrutinise, monitor and investigate at the earliest possible opportunity, any suggestion of an exaggerated claim.

Detailed witness statements, close analysis of special damage documentation (with particular reference to loss of earnings), background and insurance link checks and medicals should be commissioned as early as possible and the contents closely examined. Priority should be given to getting these types of cases listed for hearing as soon as possible, as there is nothing a malingering plaintiff likes more than a malingering defendant who might allow his 3-year-old injury to become a 6-year-old one.

Most importantly, the publicity that comes with successfully defending or attacking an exaggerated claim is powerful. It sends out a message to those who try that, while they may attempt to take on the insurance empire, they will have a tough fight on their hands and that empire will most certainly strike back.

Stress in the Workplace

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taken into account. It is only fair that the employer can take what the employee says at face value.

The indications of impending harm to the employee must be plain enough for a reasonable employer to realise that something must be done to redress the situation. An employer can only really be expected to take steps that are likely to do good, but a court will compare what an employer did do with what it should have done. Any steps taken by an employer will be dependent on the size of the employer's operation and its resources, balanced against the competing interests of co-workers.

This English decision, while not binding on the Irish courts is, nonetheless, highly persuasive in its detailed analysis of this area of the law. Undoubtedly, we will revisit this subject in further issues of Litigation News when the Irish courts are asked to follow this decision.