QBE European Operations

Technical claims brief

Monthly update | June 2014

QBE

Technical claims brief

Monthly update | June 2014

Contents

News

Motor Insurers' Bureau (MIB) plans Periodical Payment Orders (PPOs) research

The MIB has announced it will be undertaking actuarial research into PPOs after their own figures showed mortality rates on long-term catastrophic injury payments were higher than expected. PPOs are an alternative to lump sum settlements, whereby the claimant typically receives an annual payment to cover their care costs for the rest of their lives. They are usually reserved for seven-figure settlements, where the majority of damages constitute future losses and are more common with road traffic accidents and medical negligence claims.

The MIB says it has built-up 'a vast amount of data' in the nine years since PPOs were introduced on 1 April 2005. They will engage a team of actuaries to study the data and plan to release a report with the findings. The MIB has presided over 130 PPOs since their introduction and continue to see a PPOs as the most appropriate settlement mechanism for catastrophic injury claims. Their point is that a lump sum settlement will inevitably over or under compensate a claimant, as the life expectancy at settlement is nothing more than expert 'ball-gazing' or a best-guess

Initial indications from the data have suggested that the mortality rate has been higher than expected . Should the actuaries agree, and if the findings were reflected across the industry, the research could have significant implications for reserving and the uptake of PPOs. The actuaries' study of the data should allow more considered and accurate conclusions to be drawn.

> *The MIB's report will be keenly anticipated by insurers and their actuaries. The publication of such a wealth of data on PPOs is rare and should help insurers consider their approach and appetite for PPOs. Higher mortality rates could equate to fewer periodical payments and thus allowing potential release of reserves as the total amount of damages paid would be less than anticipated at the time of settlement.*

Court Reform (Scotland) Bill Update (first reported March 2014 edition)

Key aspects of the wide-ranging Bill, which is aimed at reforming the Scottish civil court processes, have been questioned by the Scottish Parliament's Justice Committee in a report published on 9 May 2014. The Bill (drafted following Lord Gill's review of the civil court system) proposes major changes to the present system which has been labelled 'slow, inefficient and expensive'. In welcoming the general principles of the Bill, the Justice Committee has raised concerns about the proposal to increase the upper monetary threshold for a claim in the sheriff court (lower court) from £5,000 to £150,000.

The Justice Committee is unconvinced that the proposal will achieve the aim of improving access to justice. It acknowledges that freeing-up the Court of Session (higher court) to deal with the most complex and serious cases is a step in the right direction, but raising the monetary threshold to £150,000 might be too great a leap.

The concerns raised are centred on the potential structure, administrative resources and capacity of sheriff courts to deal with the increased number of cases. The Justice Committee recommends that the Scottish Government gives serious consideration to lowering the proposed monetary limit and this could lead to a revision of the proposed upper threshold to £50,000, which was originally proposed by the Law Society of Scotland and other lobbyists.

The Justice Committee welcomed the creation of a nationwide Sheriff Appeal Court and the establishment of a specialist personal injury court, as part of a package of measures to ensure that cases are heard in the most appropriate courts. As above, concerns were voiced about the capacity of the new courts.

The Justice Committee took submissions and evidence from a range of witnesses and interested parties, including justice bodies, victims' groups, unions and experts on human rights, personal injury, family law, immigration and environmental issues, as well as from the Lord President (Lord Gill) and Sheriff Principal James Taylor.
The Bill will now return to Parliament for its second reading and further debate, with the continued intention that the Bill will be enacted before the end of 2014, with implementation by late spring 2015.

> *The appetite for change in Scotland should be welcomed by insurers. The concerns raised by the Justice Committee should be properly considered and addressed by the Scottish Parliament before the Bill is enacted. Claimant lobbyists main criticism of last years Ministry of Justice and Jackson's reforms was their rapid implementation and failure to pause and consider any shortcomings. As to whether the original Court Reform (Scotland) Bill will be subject to revision, any amendment to the monetary threshold may be largely academic as the bulk of personal injury claims in Scotland are worth less than £10,000, so it would make little difference whether they increase the upper threshold to £50,000 or £150,000.*

Liability

Non-negligent exposure to Asbestos dust. Mrs Marie McGregor v Genco (FC) Ltd [2014]

Mrs McGregor started work for the defendant as a shoe sales assistant in the early 1970's, as a 15 year old school-leaver. She worked in their Liverpool Department Store and in 1976 the store underwent building works to relocate the escalators. The works were carried out during normal trading hours, the store remained open for business and no special precautions were taken to deal with asbestos.

It was agreed that asbestos insulation boards were used in the construction of both the new and old escalators. The defendant's evidence was that the work areas were enclosed by floor to ceiling wooden partitions, but with no airtight screening to prevent (asbestos) dust escaping. The claimant's evidence was that the works were very dusty and she had to routinely wipe dust off the shoes and shelving. The Court decided that on the balance of probabilities, the claimant was exposed to modest amounts of asbestos dust during 1976 works and the likelihood is that it caused her mesothelioma.

The crucial question for the Court was whether the exposure was negligent. To determine the alleged negligence, it was necessary to apply the common law test of foreseeability, which is not the likelihood or probability of injury, but the risk that it may occur. To satisfy that test, the claimant would have to show that the risk of personal injury should have been reasonably foreseeable to a careful employer and one that should have taken precautions or advice, at that time.

The claimant's case was that by 1976 there was a clear obligation on an employer that where work was being carried out that generated large quantities of dust there was an obligation to make the workplace safe. Further, that it was known that there was a real risk of injury as a result of slight exposure to asbestos dust and thus there was a clear duty on the defendant to make enquiries, which would have established the risk from exposure.

The defendant's case was that the mere presence of dust did not prove inadequate separation between the works and the shop floor, and nothing had been identified that indicated that the works constituted an obvious hazard, rather than a nuisance and inconvenience. The amount of dust was minimal.

The judge decided that the exposure was for a relatively short period, a matter of months, and was 'light'. The floor to ceiling enclosure would have been regarded as adequate protection at the time of the works and there was nothing to put the defendant on sufficient notice that the small amount of dust created a foreseeable risk of injury. Therefore, the defendant was not negligent and the claim was dismissed.

> *The judge applied the law and the area of developing knowledge correctly. Her judgment includes a thorough chronological review of asbestos related legislation and publications, and whilst the guidance in place at the time (Technical Date Note 13) has been the subject of considerable criticism, that cannot be transposed on the defendant to establish a legal liability and merely represented the standard of knowledge at the time. This is a useful reminder of the negligence test to be applied, the available defence and the importance of assessing the evidence at the time of the exposure.*

Police immunity eroded. DSD & NVB v Commissioner of Police for the Metropolis [2014]]

This important High Court decision reverses the established position that victims of flawed police investigations could not sue the police force for damages on grounds of public policy. The leading authority for that position was Hill v Chief Constable of West Yorkshire [1987]when the mother of the Yorkshire Ripper's last victim had her claim struck-out. The House of Lords confirmed the police immunity and gave several public policy reasons for barring the claim, essentially trying to uphold the police's sense of public duty and not wishing to second-guess their investigations with the application of hindsight. The High Court has now changed the law, without addressing the public policy reasons which prevented claims from being pursued previously.

The claimants were two victims of John Worboys, the convicted 'black cab rapist', who during the course of 2002 to 2008 committed well in excess of 100 rapes and sexual assaults on women he was carrying in his cab. The first claimant, DSD, was one of the earlier victims in 2002, and the second claimant, NVB , was one of the last with the offence being committed in 2007. Mr Worboys was convicted of 19 offences following police investigations and sentenced to life imprisonment in 2009. The claimants claimed damages, contending that the police had failed to carry-out investigations of sexual assaults as required by Article 3 of the European Convention of Human Rights (ECHR, prohibition of torture). The claims were brought under the Human Rights Act 1998 (HRA).

Prior to Mr Worboys' attacks starting in 2002, the defendant police authority had issued guidelines on the handling of drug facilitated sexual assaults. That guidance underlined the critical importance of an early and correct identification of a woman as a victim of sexual assault. Both claimants complained about the manner in which their situation had been handled by the defendant. DSD repeatedly felt that she was not being taken seriously and there was a significant failure to 'join the dots' between similar complaints, which would have allowed the police to catch the Mr Worboys. The claimants sought a remedy for the police's failure to conduct an effective investigation in a timely and efficient manner.

The issues to be determined by the Court were whether:

- The police owed any duty to investigate, to victims of particularly severe crimes perpetrated by private parties; and

- If such a duty existed it was breached on the facts presented.

Both issues were in dispute. The defendant argued that the HRA did not provide a remedy to victims of crimes committed by private parties where the core of the allegation was that the police had failed properly to investigate. The defendant did not accept that in the absence of any direct or indirect police responsibility or complicity there could be any liability. The claimants argued that there was clear authority, from both the Strasbourg and English courts, that in certain situations when the police had no culpability for the violence perpetrated but they could still be liable for a failure to investigate. The application of the ECHR allowed the judge to determine the case without reference to our domestic law of negligence, specifically Hill.

The High Court confirmed there was a positive duty imposed on the police to conduct investigations into particularly severe violent acts, perpetrated by private parties, in a timely and efficient manner. That duty covers the duration of a case and is not conditional upon the police being guilty of misconduct. The Court were keen to point out that not every act or omission of the police which might be categorised as a failing would lead to damages and nor would every failure to adhere to the police's own operating standards and procedures trigger liability. The Court would have to undertake a factual assessment and decide the outcome on a case-by-case basis.

The failings in this case were sufficiently serious to establish liability. The breach of duty arose due to a series of systemic failings which went to the heart of the failure of the police to apprehend Mr Worboys and cut short his 5-6 year spree of violent sexual attacks. The police's failures included:

- A substantial failure to train relevant officers in the intricacies of sexual assaults and in particular drug facilitated sexual assaults
- Serious failures of senior officers to properly supervise investigations in accordance with the standard procedure mandated for drug facilitated sexual assaults
- Serious failures in the collection and use of intelligence sources to cross-check complaints to see if there were links between them
- A failure to maintain the confidence of victims in the integrity of the investigative process and a failure to create an environment where victims were incentivised to bring their complaints to the police
- A failure to allocate proper resources to sexual assaults, including pressure from management to focus resources on other allegations that were easier to clear up and a resultant pressure on officers to reject complaints of sexual assault.

In addition to these systemic failures there were numerous individual omissions in the specific cases of DSD and NBV which reflected the wider police failings but which, when viewed in isolation, could also be said to be of sufficient seriousness such that had they not occurred the police would have been able to capture and stop Mr Worboys at a much earlier time.

> *The police's immunity from civil liability on public policy grounds has been significantly eroded by this decision. A Court will now be required to examine the police's operational and policy decisions, whilst public policy and the public interest will have to play 'second fiddle' to the outcome for a particular claimant. The serious issues raised by the House of Lords in Hill (1987) are still relevant today and whilst policing standards should be monitored, assessed and improved, whether the judiciary should be left to apportion liability remains to be seen.*

The consequences of a riot. Mitsui Sumitomo Insurance Co (Europe) Ltd and another v Mayor's Office for Policing and Crime [2014]

This case was first reported in our October 2013 issue, following the Commercial Court's decision on a number of claims brought under the Riot (Damages) Act 1886. The claims followed the August 2011 riots and arose from an attack and looting of a Sony warehouse in Enfield. The total compensation claims are reported to total £75m.

The Commercial Court had decided the attack fell within the scope and definition of a riot for the purposes of the 1886 Act, but that consequential losses were not recoverable against the compensating police authority (only physical loss). Both decisions were appealed and judgment was handed down by the Court of Appeal on 20 May 2014.

The Court of Appeal was not prepared to interfere with the initial conclusion that those involved demonstrated behaviour amounting to a 'riotous and tumultuous assembly'. There was overwhelming CCTV evidence to support this conclusion, including the use of petrol bombs, widespread violence and property destruction. The question required a factual assessment and was not to be determined based on whether the police could have prevented the damage.

On the second issue, the Court of Appeal confirmed there was nothing within the wording of the 1886 Act which supported an argument that consequential losses could not be recovered. The fact that the compensation recoverable for property damage appeared to the compensating authority to be just did not determine whether it included compensation for consequential loss. Further, there was nothing elsewhere in the 1886 Act which showed that consequential losses could not be awarded. Thus, a right was provided to compensate for all heads of loss proximately caused by physical damage to property, except as those specifically excluded or varied by the statute.

Underpinning the decision was a clear message from the Court of Appeal that it was for Parliament to exclude consequential loss had that been the intention, but it had not done so. It was not for the compensating police authority to fix the level of compensation it considered to be fair and just.

This has been described as a landmark decision as the first since the 1886 Act was enacted to confirm losses are not limited to physical damages. Further claims from the victims of the 2011 riots may follow, with insurers looking to recover business interruption losses already paid. The Government's response may be the Riot Damages Act (Amendment) Bill. An independent review commissioned by the Home Secretary was published on 8 November 2013 and recommended that the police would continue to be liable under the 1886 Act and that:

- In the event of widespread riots a 'riot claims bureau' staffed by loss adjusters and insurance experts should be set up to manage claims
- Riot compensation payments made in future should be made on a new-for-old basis rather than the current old-for-old approach
- The language in the Riot Damages Act should be modernised
- The amount of compensation that can be provided to insurers should be capped

The full review can be found at www.gov.uk/government/news/new-proposals-to-reform-riot-damages-act .

Completed 08 May 2014.
Written by Tim Hayward, QBE EO Claims.

Copy judgments and/or source material for the above available from tel: 0113 290 6790, e-mail: tim.hayward@uk.qbe.com

Disclaimer

This publication has been produced by QBE European Operations, a trading name of QBE Insurance (Europe) Ltd ('QIEL'). QIEL is a company member of the QBE Insurance Group ('QBE Group').

Readership of this publication does not create an insurer-client, or other business or legal relationship.

This publication provides information about the law to help you to understand and manage risk within your organisation. Legal information is not the same as legal advice. This publication does not purport to provide a definitive statement of the law and is not intended to replace, nor may it be relied upon as a substitute for, specific legal or other professional advice.

QIEL has acted in good faith to provide an accurate publication. However, QIEL and the QBE Group do not make any warranties or representations of any kind about the contents of this publication, the accuracy or timeliness of its contents, or the information or explanations given.

QIEL and the QBE Group do not have any duty to you, whether in contract, tort, under statute or otherwise with respect to or in connection with this publication or the information contained within it.

QIEL and the QBE Group have no obligation to update this report or any information contained within it.

To the fullest extent permitted by law, QIEL and the QBE Group disclaim any responsibility or liability for any loss or damage suffered or cost incurred by you or by any other person arising out of or in connection with you or any other person's reliance on this publication or on the information contained within it and for any omissions or inaccuracies.

QBE European Operations Plantation Place 30 Fenchurch Street London EC3M 3BD
tel +44 (0)20 7105 4000 www.QBEeurope.com

4974CC/TechnicalClaimsBrief/May2014

QBE