QBE European Operations

Technical claims brief

Monthly update | June 2013

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Costs

Limiting the cost of medical agency fees – Charman v Reilly (May 2013)

QBE recently shared an important victory in a number of test cases before the Liverpool County Court. They concerned the reasonableness and recoverability of medical report fees presented by agencies who are not signatories to the Medical Reporting Organisation Agreement (MROA). The MROA is the industry supported agreement which sets guideline charging rates. The cases and judgment are significant as arguments over medical reporting fees will become more prevalent post Jackson reforms, as they will remain almost the sole opportunity for cost variation/building in an otherwise fixed costs process.

In the case at issue, the claimant's solicitors had instructed a medical agency to commission a report from a GP (without the review of notes) and the fee claimed was £350 + vat. The agency used was owned by the firm of solicitors. The claimant refused to provide a breakdown of the fee charged to show what proportion of the fee related to work undertaken by the agency, and what was undertaken by the expert. In the absence of a breakdown the Judge decided a reasonable amount for the agency's work was £50 + vat and for that of the expert was £150 + vat. The sum claimed of £420 was therefore reduced to £240 on appeal.

There is particular significance in the fact that the judgment was handed down by Regional Costs Judge Woodburn, a specialist costs Judge. Although Judge Woodburn declined to find that the rates set within the MROA could bind non-signatories it is nevertheless the case that the fee awarded matches exactly that contained within the agreement. The judgment is certain to prove persuasive in future cases when defendants are faced with exorbitant medical report fees that have been inflated by the use of a captive medical agency.

In addition, QBE, as a member of the MRO Fees Committee, is leading the calls for this anomalous loophole to be closed through a change in the Civil Procedure Rules that would allow recoverable fees to be fixed at a proportionate level, cutting an unnecessary element of financial 'fat' from the process.

Civil litigation reform

Small Claims Track consultation – response delayed

The Government's consultation aimed at finding ways to reduce the number of whiplash claims (as discussed in QBE's January technical brief) closed in March. At the time there was some hope that measures contained within it might be incorporated into the raft of changes brought in under the banner of the 'Jackson' reforms for implementation on 1 April 2013. In particular, there was a prospect that the Small Claims Track (SCT) limit – the threshold value of claims below which a successful claimant can recover only very minimal fixed costs – might be increased for personal injury claims from £1,000 to £5,000.

However, it has now been confirmed by the Justice Minister, Helen Grant, that any announcement about the small claims limit will be delayed until after the Transport Select Committee has completed its own whiplash inquiry. That committee is due to start taking evidence in early June and there will be a further oral hearing towards mid-June. The exact date by which that inquiry will be completed is not known. However, given the Parliamentary recess over the summer, it looks more than likely that the extended personal injury protocols for RTA and Employers' and Public liability claims will be brought in well before there is any change to the small claims limit for personal injury claims.

> *The small claims limit for personal injury claims has been set at £1,000 since the implementation of the Civil Procedure Rules in April 1999, despite the continual rise of general damages. The limit has been previously considered by the Constitutional Affairs Committee in 2005 and the Ministry of Justice in 2007, but the government concluded that the limit should remain unchanged. It remains to be seen whether the present government will press through with an increase or succumb to pressure from the claimant lobby. Watch this space for more details.*

Legislation

Mesothelioma Bill announced

Last month, the government formally introduced the Mesothelioma Bill, which will eventually pave the way for a 'Diffuse Mesothelioma Payment Scheme'. The scheme is designed to make payments to victims of diffuse mesothelioma who are diagnosed with the disease from 25 July 2012 onwards and who, by reason of their employer's insolvency and an inability to trace the relevant employer's liability insurer, are otherwise unable to bring a claim for damages. The compensation payments will be funded by a compulsory levy on live employers' liability insurers.

Although the precise mechanics of the scheme are yet to be announced, awards would appear likely to be made on the basis of an age related tariff and with only limited fixed costs. In addition, the Bill provides for the creation of a technical committee which will make binding decisions in disputes between an insurer and a person with mesothelioma about whether the insurer was providing cover to a particular employer at the time the person was negligently exposed to asbestos.

It is estimated that around 3,000 mesothelioma victims in the UK could be eligible to receive compensation as a result of the Bill and that this would result in approximately £355 million in payments in the first 10 years. These payments will be in addition to the estimated £200 million the insurance industry already pays each year in compensating mesothelioma victims.

The Bill will now pass through the various parliamentary stages and any relevant changes will be communicated. It is expected that the Bill will receive royal assent in early 2014 and come into force immediately.

At the time of introducing the Bill the government also announced that a consultation will begin this year into matters relating to insured mesothelioma claims; specifically the creation of a pre-action protocol, an electronic claims portal and a fixed costs regime for mesothelioma claims. Such reforms, if implemented, would hopefully result in the quicker and lower cost resolution of such claims.

> *It is trite law that negligent or breach of statutory duty exposure to asbestos has allowed mesothelioma victims to recover compensation from their employer or employers' liability insurer. The introduction of the Bill will come to the aid of those victims who were previously unable to bring a claim. The Financial Conduct Authority is also considering requirements around the tracing of employers' liability insurance policies that will mirror those operated by ELTO which should result in more evidence of cover being passed to people with this terrible disease.*

Case law

Blackburn Rovers, the £2.25 million 'admission' and the overriding objective

Henning Berg's recent 'win' in claiming £2.25 million compensation from Blackburn Rovers undoubtedly provided a concerning insight into corporate governance within the club. It also an altogether more familiar scenario involving a claim, an admission of liability and then an application by the defendant for permission to withdraw that admission when the 'dawn of realisation' reached a higher level within the business.

Henning Berg, the ex-Manchester United and Blackburn player was appointed as Blackburn Manager on a three year fixed term contract in November 2012. He was dismissed after only 57 days in the post. His dismissal triggered a clause in his contract under the terms of which he became entitled to a payment of basic salary (calculated on the basis of a set formula) for the balance of his fixed term. Initially, the club admitted the claim and sought time to pay. It then applied to the High Court to withdraw its admission. The High Court dismissed the club's arguments and ordered them to pay the full amount claimed.

The parties' arguments led Judge Pelling QC, sitting in the High Court, Chancery Division in Manchester in the case of ***Henning Berg v Blackburn Rovers Football Club & Athletic PLC (2013)*** to comment that the overriding objective has been radically amended with effect from 1 April 2013 and that its amendment is likely to have,

"... a significant impact on the approach to be adopted to applications of this kind, which will now be approached by courts much more rigorously than perhaps has been the practice in the past, particularly where formal admissions are made on behalf of parties represented by experienced and specialist professional advisors."

The recent changes to the Civil Procedure Rules have been well-documented. We are now beginning to understand the implications for the day-to-day management of claims and litigation when previous Court of Appeal authority

(***Woodward v Stopford, 2011***) gave confidence of at least one 'second chance' to take a more focussed view on a given case and reach a different liability decision.

Every insurer's claims department, claims solution provider and insurance broker should properly be regarded as 'specialist professional advisors'. They and any of their corporate (or personal lines) clients could therefore find themselves in the same position as Blackburn Rovers, wanting to revisit a previous liability decision but feeling the straps on the procedural straightjacket tighten.

Any claimant practitioner striving to hold onto an early admission of liability will seek to rely on this decision. All the more determined an effort will be made by a claimant whose claim has become a significant, high value or complex loss that could entail a level of compensation comparable to the award made to Henning Berg.

> *Defendants have previously had success in applying to the court to withdraw a pre-litigation admission, especially where the value of the claim has silently increased when proceedings are issued. This first instance decision cannot be ignored - it undermines the chances of being able to put the defendant back on a level playing field where liability has previously been admitted, whether for commercial or other reasons. Getting those early liability decisions right, within much tighter timelines, is an ever-increasing priority for insurers, brokers and corporate defendants. The newly amended CPR has narrowed the goal posts, shortened the match and seemingly made it much harder to get the ball back if erringly launched into the neighbour's garden!*

Completed 29 May 2013 – written by QBE EO Claims. Copy judgments and/or source material for the above available from Jonathan Coatman (contact no: 0113 2906713, e-mail: jonathan.coatman@uk.qbe.com).

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