QBE European Operations

Technical claims brief

Monthly update | March 2013

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News

Second UK - wide discount rate consultation finally gets underway

The second consultation on the discount rate which was due to start in the Autumn of 2012 ***(see September 2012 Brief)*** has finally got underway with a consultation paper jointly released by the Ministry of Justice for England and Wales, the Department of Justice in Northern Ireland and the Scottish Government.

The last consultation, which ran from August to October 2012, looked at how the rate should be set under the current law, whereas the current one will look at the legal framework for setting the rate and whether this should be changed.

The two main issues considered are whether the current legal framework produces the right result and whether the use of periodical payment orders should be encouraged. The overall goal is to set a rate that delivers the right level of compensation and is transparent.

The consultation closes on 7 May 2013.

> *The discount rate is used to discount lump sum settlements to take into account investment return. Claimant lobbies such as the Association of Personal Injury Lawyers point to the low yields of Index Linked Government Stock (ILGS) and say that the current rate of 2.5% is too high, leading to the under compensation of claimants. Insurers believe that most claimants do not invest solely in ILGS but in broad portfolios that provide much better returns.*

Eighth QBE Business Sentiment Survey shows business pessimism on UK recovery

The eighth QBE Business Sentiment Survey conducted with 400 owners, managers and decision makers in businesses of all sizes across the UK, reveals a less than optimistic view of recovery prospects.

The survey shows that 87% of respondents expect no economic recovery within 2 years and 61% believe that recovery will take three years or more.

Other key findings were:

- Only 9% of UK businesses expect to see a full economic recovery within two years
- 'No growth' or 'slow growth' are becoming accepted as normal, with 57% of businesses expecting no change in turnover in the next six months (up from 44% in 2012) and only 30% expecting turnover to increase during 2013
- 71% of respondents expect their staffing levels to stay the same in the next 12 months. Only 15% plan to hire new staff, down from 26% in 2012.

> *Elliot Miller General Manager of UK National QBE European Operations has commented that whilst the economy still appears weak, UK businesses remain resilient..*

More Corporate Manslaughter prosecutions pending

The Crown Prosecution Service (CPS) has said that it is currently investigating 56 potential Corporate Manslaughter cases and has opened 141 investigations since 2009.

The CPS released this information to Pinsent Masons Solicitors in response to a Freedom of Information request.

There have been only three Corporate Manslaughter prosecutions since the Act came into force in October 2008, two in England and one in Northern Ireland.

The investigation figures that have been released show that, despite the small number of prosecutions to date, the CPS continues to invest time and resources in investigating potential cases. This may well lead to new prosecutions, which are highly expensive to defend.

Costs

Court of Appeal shows flexibility on costs budgeting: Henry v News Group Newspapers Court of Appeal (2013)

The claimant was a senior social worker in the "Baby P" case which had attracted wide spread press attention. She was forced from her job and was unable to obtain alternative employment working with children as a result of what was described as a sustained, vitriolic and unjustified campaign by the ***Sun***. The defendant ***News Group Newspapers,*** which owns the ***Sun,*** agreed to issue an apology and to pay substantial damages with costs, to be assessed.

The claimant had exceeded her original costs budget by almost £300,000. She had not sought court approval for any revised budget nor had she kept the defendants up to date. The judge at first instance held that the costs spent over budget were reasonable and proportionate but that the claimant had largely ignored the practice direction on cost budgeting and that consequently she could not recover her costs above the budget.

The claimant appealed arguing that she had had good reason to depart from the costs budget. The Court of Appeal allowed the appeal holding that the judge at first instance had interpreted the practice direction too narrowly. The direction was intended to place the parties on an equal footing. This did not refer to the continuous supply of information about costs incurred but to stopping a party from exploiting greater financial resources.

There were good reasons for the claimant to have departed from the budget including the conduct of the defendant and insufficient activity by the court itself. The defendants had known what the claimant's costs were prior to agreeing the damages settlement and had not been put at a significant disadvantage by a lack of updated costs budgets from the claimant.

> *Costs budgeting was brought into defamation actions and later to the Mercantile and Technology and Construction Courts as a pilot. It will be extended into ordinary proceedings as part of Lord Justice Jackson's costs reforms on 1 April 2013.*
>
> *The Court of Appeal has not rigidly enforced the costs budget in this case but it was at pains to say that the new regime, once in force on 1 April, will impose greater responsibility on the courts to manage costs and on the parties to the litigation, to keep budgets under review. Claimants should not expect to be able to exceed costs budget without good reason.*

Fraud

First death from "Cash for Crash" fraud: R v Skowron and Others – Reading Crown Court (2013)

Four conspirators who planned to cause an accident so that they could make fraudulent compensation claims for injury received custodial sentences after their plan went wrong and an innocent driver was killed.

The conspirators had planned to induce the innocent driver of a Ford Transit van to crash into the rear of one of the fraudsters' cars but the alert van driver realised that something was wrong and managed to brake in time when the car in front of him stopped suddenly.

Unfortunately, Miss Gill who was driving behind the Transit van failed to brake in time and her car hit the rear of the van. Miss Gill got out of her car to inspect the damage and was struck by another van (not involved in the fraud), receiving fatal injuries. Miss Gill was 34.

Two of the conspirators were sentenced to ten years and three months in prison and one to ten years for causing death by dangerous driving, conspiracy to commit fraud and perverting the course of justice. A fourth conspirator was sentenced to 12 months for perverting the course of justice.

> *Insurers and the police have been warning for some time that an induced accident was likely to lead to death or serious injury. We can only hope that this tragic accident and the punishment meted out to the perpetrators will discourage others from risking the lives of innocent road users for financial gain.*

Liability

Teenage pedestrian, no contributory negligence for failing to wear high visibility clothing: Probert (A Child etc) v Moore – High Court (2012)

The claimant, who was 13, was struck by the defendant's car when she was walking home from stables where she had been visiting her horse. The accident occurred at night, as the claimant was walking along an unlit rural road with no pavement. As the result of the impact, the claimant was thrown into a ditch suffering serious head injuries. The court was asked to rule on liability.

The defendant argued that there was at least contributory negligence on the part of the claimant for attempting to walk home along an unlit road at night when she could have waited for her mother (who was on her way) to pick her up or obtained a lift home from someone else at the stables.

The claimant had failed to take reasonable precautions for her own safety by wearing dark clothing, listening to her headphones and walking with her back to on-coming traffic. She should have worn high visibility clothing (which she would have been used to as a horse rider) or carried a torch to alert motorists to her presence.

The judge found that the defendant was wholly to blame for the accident. He was driving too fast in the circumstances and should have been aware of the possible presence of pedestrians on the road close to the stables. His concentration was focussed on avoiding on-coming traffic on the narrow road and he would not have seen the claimant even had she been wearing high-visibility clothing or carrying a torch. The claimant's headphones made no material difference. She was forced to walk with her back to the traffic due to the presence of thick vegetation on the right hand side of the road.

A 13 year-old child could not be expected to be as cautious as an adult and could not be criticised for failing to wear high visibility clothing or for deciding to walk home rather than wait for her mother. This was ill advised but not culpable. It was not just and equitable to make a finding of contributory negligence.

> *The news that the defendant's insurers Churchill have decided to appeal the case on the issue of contributory negligence has caused outrage in the tabloid press. They have predictably, if unfairly reported the case as one of a wealthy and powerful insurer unreasonably holding up the compensation needed by a severely injured child.*
>
> *Churchill for their part will no doubt argue that a 13-year-old pedestrian should be aware of the need to look and listen for approaching traffic and to be visible to drivers. The claimant's solicitors are seeking a quick decision from the Court of Appeal.*

Quantum

Scottish Court raises the benchmark for fatal accident damages: McGee and Others v R.J.K. Building Services Ltd – Court of Session (2013)

In the ***September 2012 Brief*** we reported on the Scottish fatal accident case of ***Kelly v UCS*** where the jury had been receptive to guidance from the judge on the level of appropriate damages for loss of society and had consequently made more modest awards than in previous fatal cases.

The recent judgment in ***McGee and others v R.J.K. Building Services Ltd*** may see the end to any reduction in loss of society awards. In his judgment, Lord Drummond-Young criticised some previous judicial awards as markedly undervaluing loss of society claims and made awards at the top end of the range set out by the judge in Kelly. He also made allowance for the very close relationships that two of the deceased's grandchildren had with him. The awards are set out below.

	Amount awarded
Widow	£80,000
Daughters	£35,000
Son	£27,500
Granddaughter (close relationship)	£20,000
Grandson (very close)	£25,000
Two other grandchildren	£12,000

Loss of society awards in Scottish fatal accident claims is one of the few heads of damages in Scotland which exceed those south of the border. The introduction of judicial guidance for juries on these awards looked like it might reduce awards but the intervention of the Court of Session seems intended to push them back up again.

Our thanks go to HBM Sayers and to Simpson and Marwick for their helpful notes on this case

Inner House rejects attempt to vary discount rate: Tortolano v Ogilvie Construction – Court of Session (Inner House) 2013

As reported in the 'News' section above, the second UK-wide consultation on the discount rate is now at last under way. Pending a possible change in the rate, some claimants and pursuers have attempted to persuade the courts to exercise their power under Section 1(2) of the ***Damages Act 1996*** to vary the rate in individual cases.

In the ***November 2012 Brief*** we reported on the Scottish case of ***Tortolano v Olgivie*** where the pursuer attempted to persuade the Outer House of the Court of Session to set a split discount rate of 0.5% for non-earnings related future losses and -1% for those that were earnings related. The Outer House rejected the attempt finding that to vary the rate required the case to have special or exceptional features. An argument that the rate was generally too high in the current economic circumstances could not succeed.

The pursuer appealed to the Inner House, which has now also rejected the attempt to vary the rate on the same basis as the Outer House. It was, they said, a thinly veiled assault on the statutory rate inappropriate in the context of the litigation.

> *The statutory discount rate provides consistency and certainty and the courts have been loath to exercise their power to vary it on an individual basis either north or south of the border. The best hope for those wanting rate change remains the current consultation.*

Completed 25 February 2013 – written by and copy judgments and/or source material for the above available from John Tutton (contact no: 01245 272 756, e-mail: john.tutton@uk.qbe.com).

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