Technical claims brief

Monthly update – July 2012

QBE

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News

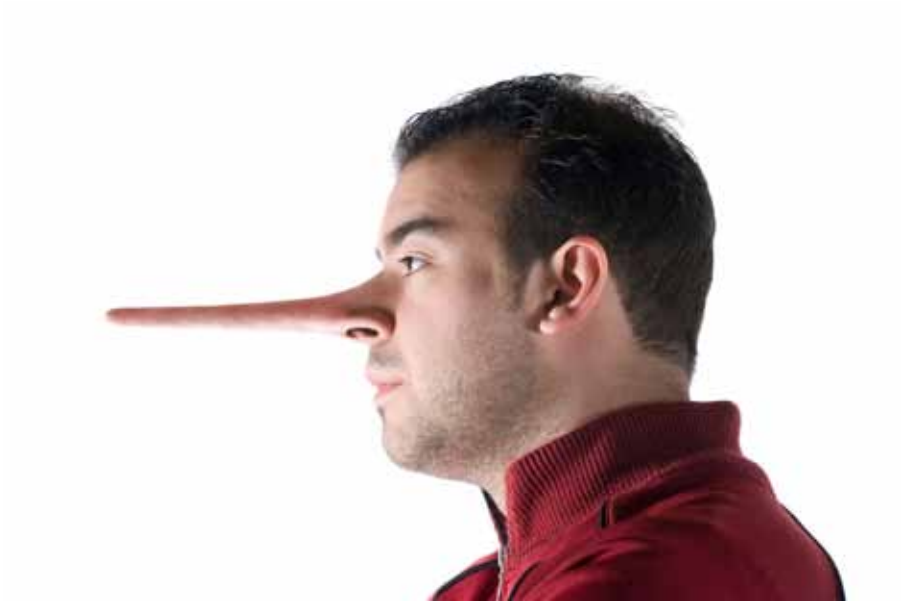
UK Supreme Court rules on striking out exaggerated claims

In ***Summers v Fairclough Homes*** the claimant, who suffered a genuine injury whilst at work, attempted to greatly exaggerate his claim but was thwarted by the defendant's insurers who obtained surveillance evidence proving he was exaggerating (and working).

The defendant applied to have the case struck out in its entirety arguing that the exaggerated claim was a substantial fraud and that dishonest behaviour such as the claimant's should be stamped out as a matter of public policy. The judge at first instance disagreed and awarded the claimant over £88,000 based on the true extent of his injury (the claimant had sought nearly ten times this amount). The judge also however, gave permission for an appeal to the Court of Appeal on the exaggeration issue.

Lord Justice Ward for the Court of Appeal referred to the claimant as ***"...an out and out liar, who quite fraudulently exaggerated his claim to a vast extent..".*** The Court of Appeal however followed its previous decisions in ***Ul Haq v Shah*** and ***Widlake v BAA Ltd holding*** that the Civil Procedure Rules (CPR) gave the court no power to strike out genuine claims even when associated with dishonesty.

The Court of Appeal refused permission to appeal but the Supreme Court agreed to hear an appeal after a direct application. The Supreme Court heard the case in April 2012 and handed down judgment on the 27June.



The Supreme Court has overturned the earlier Court of Appeal decisions in ***Ul Haq*** and ***Widlake*** ruling that the court does have the power to strike out claims on grounds of abuse of process at any stage including, in exceptional circumstances, post trial. The Supreme Court however declined to strike out Mr Summers damages despite accepting that his behaviour constituted a serious abuse of process.

Comment: Defendants will now be able to apply to the courts to strike out fraudulently exaggerated claims in their entirety, which should provide a useful discouragement to fraudsters. The Supreme Court did not however give any guidance as to when it would be "just and proportionate" to strike out an exaggerated claim and so it remains to be seen how the lower courts will apply this ruling.

Second successful UK Corporate Manslaughter prosecution obtained against Northern Irish company

JMW Farm Ltd (JMW) has become the second UK company (and the first in Northern Ireland) to be successfully prosecuted for Corporate Manslaughter.

The prosecution arose following the death in 2010 of employee Mr Robert Wilson who was crushed to death by a large metal bin that fell on him from the forks of a forklift truck. The forklift used was a replacement vehicle with forks that did not fit the sleeves on the bin creating an "inherent and foreseeable danger".

The Recorder who heard the case in Belfast Crown Court, referred to the sentencing guidelines for England and Wales, which says that fines will seldom be less than £500,000 but held that a £250,000 fine was appropriate. He then applied a discount of 25% to reflect a plea of guilty by the defendant company producing a net fine of £187,500. JMW were also ordered to pay prosecution costs of £13,000 plus vat at 20% with the total sum due within six months.

The fine was a record for a Health and Safety offence in Northern Ireland but was still much less than the £385,000 fine imposed on Cotswold Geotechnical, the first English company prosecuted under the Act ***(see March 2011 Brief)***. JMW also has a much larger annual turnover than Cotswold, £1.3 million as opposed to Cotswold's £350,000. JMW's directors may also think themselves fortunate not to have faced separate individual charges as in the Cotswold case.

A copy of the full Judgment can be viewed at www.courtsni.gov.uk

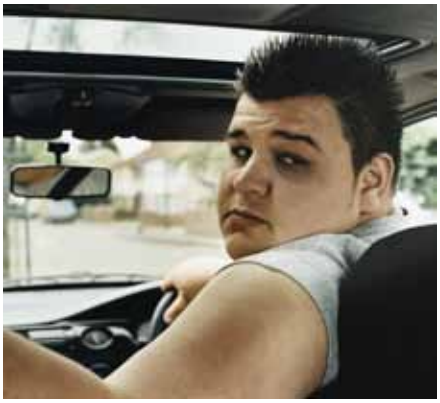
Comment: Despite JMW's larger turnover it is still, like Cotswold Geotechnical, a relatively small company run by its directors without intervening layers of management. There has still been no prosecution of the sort of large and complex company, which the Act was intended to tackle.

Young uninsured driver numbers decrease

The UK Motor Insurers Bureau (MIB) has reported that the number of uninsured drivers aged 17-20 has dropped by almost 50% in the last three years.

The improvement is largely attributed to the ***Continuous Insurance Enforcement*** legislation, which allows the Driver and Vehicle Licensing Agency database of vehicle keepers to be crosschecked with the Motor Insurance Database and vehicle keepers without insurance identified.

The overall number of uninsured UK drivers of all ages has also dropped but despite the improvement an estimated 1.2



million drivers remain uninsured costing the insurance industry some £400 million in uninsured claims picked up by the MIB.

Comment: In addition to the financial cost inflicted by uninsured drivers, they are also responsible for a disproportionately higher number of serious and fatal injuries. Any reduction in the number of uninsured drivers is therefore very welcome news.

An end to uncertainty - Scottish jury trials reformed

The very large and unpredictable awards made by Scottish juries have long been a cause of concern for insurers operating in the Scottish jurisdiction. Jury awards have pushed up damages especially in fatal accident cases, with awards for "loss of society" in some cases exceeding £100,000 per bereaved relative (compared to a statutory bereavement award in England and Wales capped at £11,800 split amongst qualifying individuals).

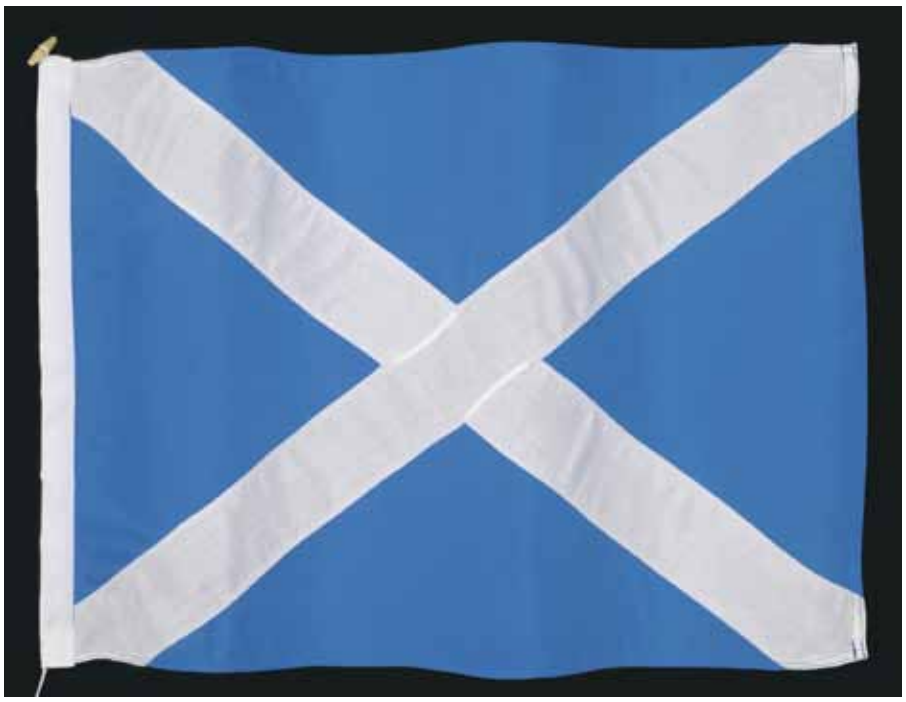
Historically, neither counsel or judge was allowed to make reference to any past awards made by judges or juries meaning that the only information the jury was given was the amount sued for (i.e. what the pursuer wanted) and the heads of damages (contained in a document called the Issue lodged by the pursuer with the court).

In the conjoined appeals of ***Hamilton and Anr v Ferguson Transport (Spean Bridge) Ltd*** and ***Thomson v Dennis Thomson Ltd*** the Inner House of the Court of Session not only granted a re-trial of the jury awards of damages in two fatal accident cases but also approved a new process suggested by the defenders (defendants) in the case.

In future judges will hear the views of the opposing counsel on the value of the claim (based on case law) and then give the juries a range of values. The juries will be free to disregard this advice but if they do, it should be easier for a defender to argue that the award was excessive and obtain a retrial.

Comment: This very helpful decision should produce far greater consistency in Scottish jury awards and help contain the rise in the level of awards particularly in fatal accident cases.

Our thanks go to John Morrison of HBM Sayers, who acted for both defenders, for his helpful note on this case.



Law Society warns of overloading of extended low value injury claims portal system

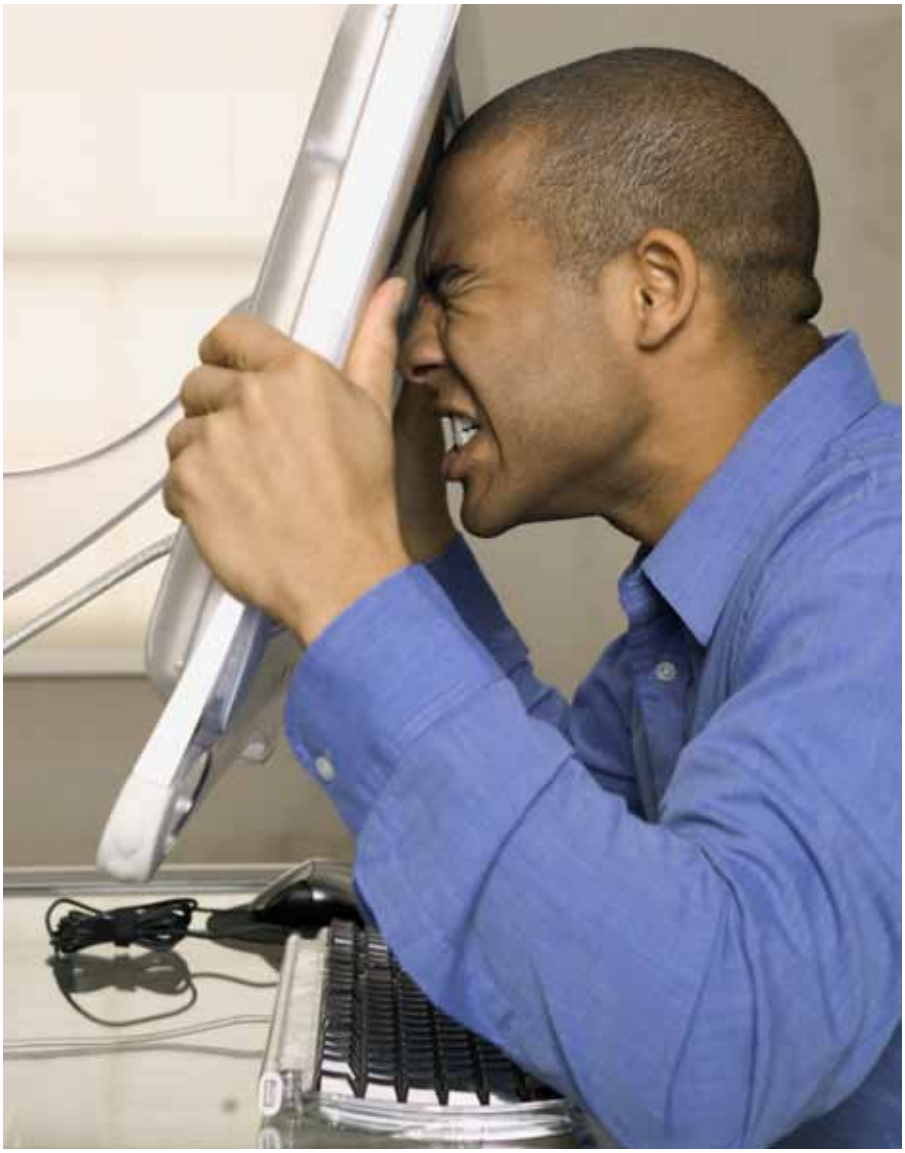
The ***Law Society Gazette*** has reported that the Society will refuse to support the proposed extension of the Ministry of Justice (MOJ) Protocol (in England and Wales) for low value motor personal injury claims, unless there are major structural changes to the system.

The UK Government has proposed extending the Protocol, which currently only deals with Road Traffic Accident (RTA) personal injury claims from £1,000 to £10,000 in value, to include injury claims arising from Employer's Liability (EL) and Public Liability (PL) up to a value of £25,000.

The claims are reported to insurers and processed via an electronic portal. The Law Society says that the portal is only just coping with the current RTA claims load and is likely be overloaded by additional claims.

The Law Society's comments appear in its response to the MOJ's recent consultation on personal injury claims. The MOJ says it will publish a response to the consultation in the summer.

The Society is not alone in expressing concerns about the portal. Portal Co, which oversees the technical infrastructure of the Protocol, is reported to have warned the MOJ that it would take 11 months to amend the portal to deal with additional RTA claims up to £25,000 in value and two years and seven months to build and test a new portal for EL and PL claims. This work can only take place after the Civil Procedure Rule Committee has amended the procedural rules to enable the change in procedure.



Despite this, the MOJ say that they remain committed to the expansion of the portal scheme in April 2013.

Comment: The introduction of the original scheme in April 2010 was beset with technical problems with many insurers reporting that they were initially unable to access the portal at all. Although these problems were eventually rectified, portal users are anxious to avoid a repetition.

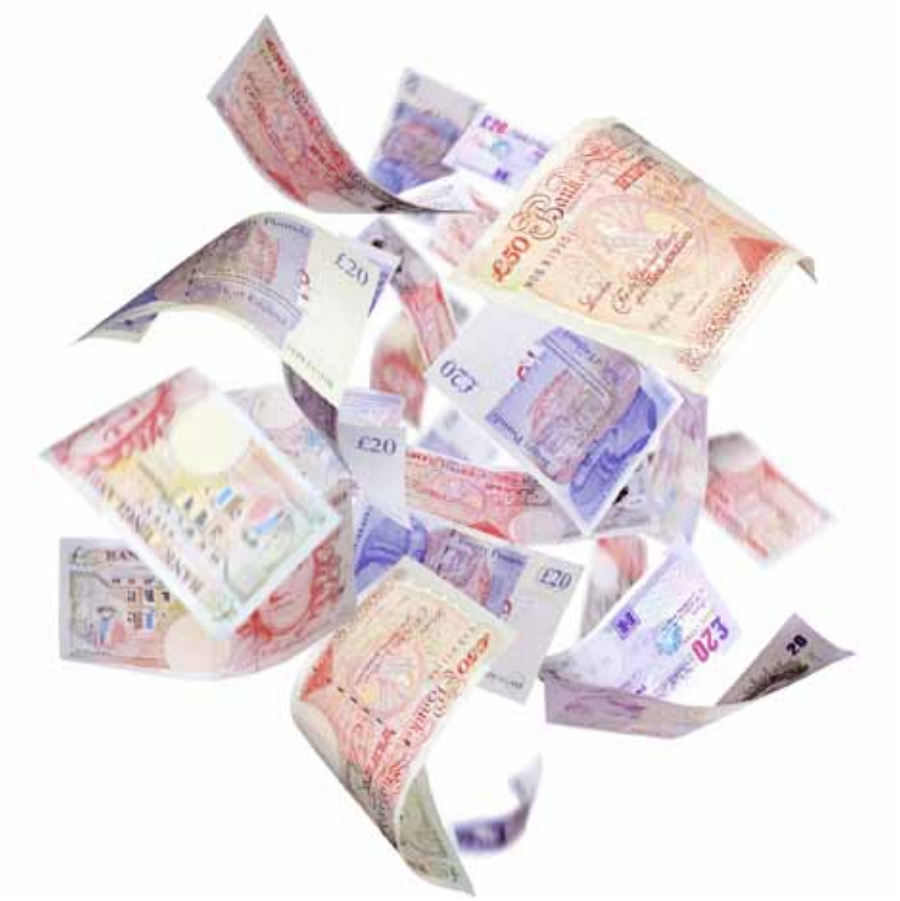
After the Event insurance not unreasonable in portal cases

District Judge Smedley (sitting as a Regional Costs Judge) has handed down judgment in seven conjoined test cases known as the "Liverpool ATE Test Cases".

The cases dealt with After the Event insurance policies (ATEs) taken out by claimants in cases which were being handled through the Ministry of Justice (MOJ) Protocol for low value Road Traffic Accident (RTA) personal injury claims. Defendants argued that taking out insurance against the risk of losing and not recovering legal costs was unreasonable where there was effectively no risk and that they should not therefore be obliged to pay the cost of the premiums involved to claimants. ATEs should only be taken out at stage three of the protocol (where the parties had failed to agree on the amount of damages and there would be a hearing) or when liability was denied by the defendants and the case dropped out of the Protocol.

District Judge Smedley ruled that claimants were not being unreasonable in taking out ATEs at the outset of a Protocol claim because the Protocol was still at an early stage of development with "teething problems" and there was uncertainty whether any individual case would remain in it or not. A claimant and his solicitor were entitled to choose either a single premium policy or a staged one.

Comment: A large number of cases have been stayed (put on hold) pending the outcome of these test cases. Insurers will now be obliged to pay the ATE premiums in these cases. Recoverability of ATE premiums from defendants is due to be brought to an end in October 2013 by the Legal Aid Sentencing and Punishment of Offenders Act.



Costs

Part 36 Offer must specify minimum 21 day acceptance period: PHI Group Ltd v Robert West Consulting Ltd – Court of Appeal (2012)

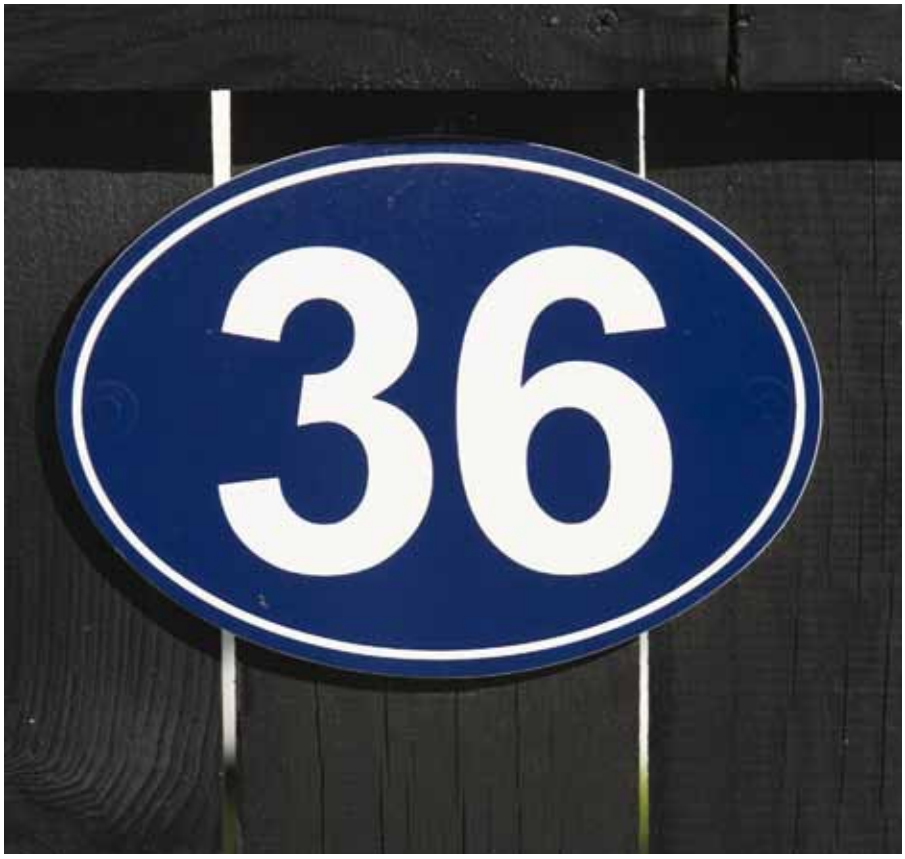
PHI Group were specialist sub-contractors and Robert West Consulting Ltd (RWC) were the consulting engineers for a construction project. The main contractors sued PHI and then RWC in separate actions for negligence. PHI brought contribution proceedings against RWC and vice versa.

PHI Group appealed against a ruling that it should pay 30% of the costs of contribution proceedings brought by RWC against it with the parties to bear their own costs in respect of PHI's contribution proceedings against RWC.

At the trial of the contribution claims, the judge apportioned liability 60% to PHI and 40% to RWC. Prior to the hearing PHI had made an offer to RWC to share liability on a 70/30 basis in RWC's favour. PHI had intended that offer to be on a Part 36 basis and since RWC had not beaten it, PHI argued that it should recover its own costs throughout (although it did not seek indemnity costs or enhanced interest).

The trial judge held that the offer was not a Part 36 offer because although the offer letter referred to Part 36 it did not specify a period of not less than 21 days within which the defendant would be liable for the claimant's costs if the offer was accepted but merely asked for a response within 7 days.

The Court of Appeal agreed that the offer was not a Part 36 offer because it had not complied with the mandatory requirements of Part 36.2 of the Civil Procedure Rules

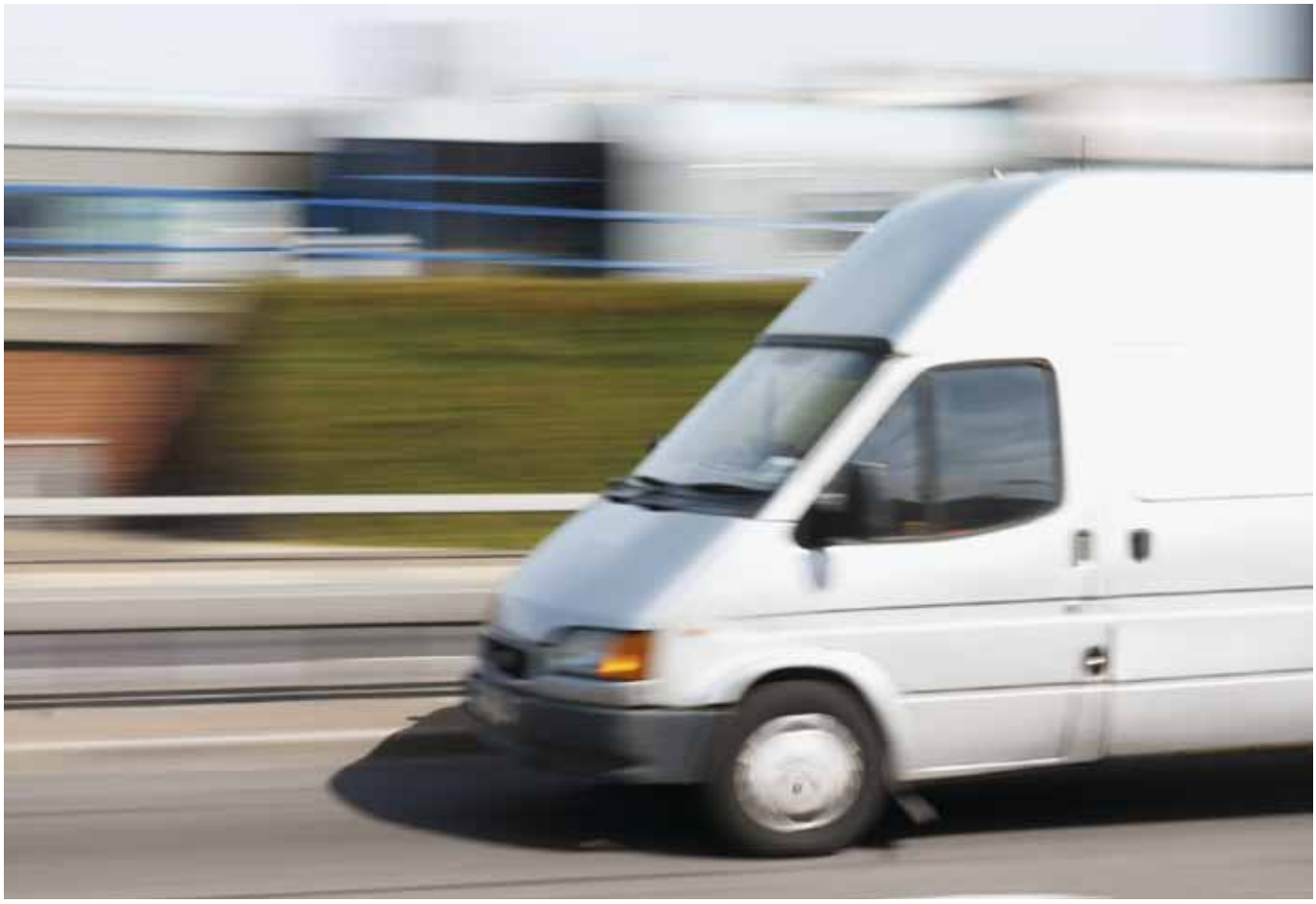


(CPR). To be a valid Part 36 offer an acceptance period of not less than 21 days must be specified.

The Court of Appeal however, disagreed with the trial judge's costs ruling. PHI's offer should be considered under Part 44 of the CPR dealing with the court's general discretion on costs and did not apply solely to PHI's claim against RWC but also to RWC's claim against PHI. The Court of Appeal ordered that RWC pay PHI's costs of the contribution proceedings and bear its own.

Comment: Part 36 of the CPR is an important part of litigation procedure (in England and Wales) providing potentially valuable costs protection and negotiation leverage for the party making the offer.

In this case, PHI still obtained their costs through Part 44 but anyone wishing to rely on the full provisions of Part 36 must use a correct offer wording.



Liability

No damages for claimant injured whilst fleeing crime scene: Joyce v O'Brien and Tradex - High Court (2012)

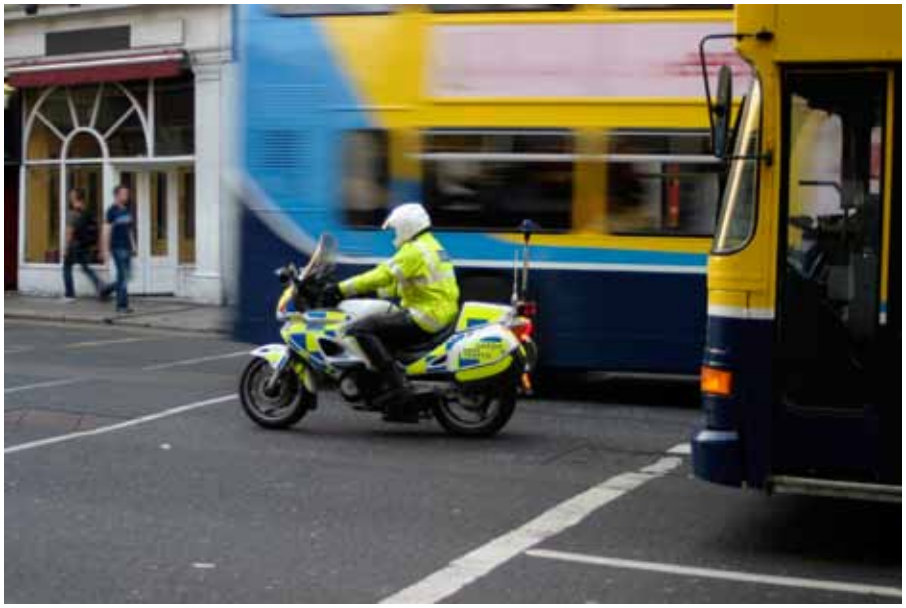
The claimant suffered a severe head injury resulting in permanent disability after he fell from a van driven by the first defendant, his uncle. The claimant had been standing on a rear footplate and hanging onto the back of the van and to a number of ladders protruding from the rear doors.

The ladders had been stolen by the claimant and his uncle who were fleeing the scene when the accident occurred.

The claimant brought a claim against his uncle alleging that he was driving too quickly whilst the claimant was not securely in the van.

In dismissing the claim, the court applied the doctrine of ***ex turpi causa***, which prevents criminals from claiming damages for injuries sustained as a result of criminal conduct. The claimant was injured whilst hanging onto the stolen property to stop it falling out of the van during his getaway. The driver could not owe him a duty of care in such circumstances and in any event, as a matter of public policy the claimant should not be able to recover damages.

Comment: For the ex turpi causa doctrine to apply there must be a direct causal link between the illegal activity and the injuries sustained.



Comment: As Lord Justice Longmore pointed out in the Court of Appeal's judgment, the requirements of the regulations impose a far more onerous duty than common law and likelihood of injury and forseeability are not considered.

Likelihood of injury not considered under Personal Protective Equipment Regulations: Blair v Chief Constable of Sussex – Court of Appeal (2012)

The claimant was a police officer who injured his lower leg during an advanced motorcycle training course involving off road driving. He sued his employers alleging breach of the ***Personal Protective Equipment at Work Regulations 1992*** (PPE). He pleaded that his injuries would have been prevented or minimised had his employers given him motocross boots rather that the standard police issue motorcycle boots supplied.

The judge at first instance dismissed the case. Having regard to the circumstances and foreseeable risks, the boots provided were suitable and appropriate. Motocross boots even if provided would not have prevented the accident or subsequent injury.

The Court of Appeal overturned the judge's decision. He had not applied the structured approach needed when considering the PPE regulations. He should have first considered the risk of injury (the likelihood or foreseeability of that injury did not come into account) and then considered whether the equipment provided (so far as was reasonably practical) was effective in controlling or preventing the risk.

The judge had misinterpreted the medical evidence, which said that stronger boots would have minimised any injury. The boots supplied were clearly ineffective in preventing or controlling the risk. The practicality point had not been sufficiently addressed or pleaded at trial and evidence that motocross boots were difficult to walk in was insufficient to provide any defence

Completed 27 June 2012 – 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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