Technical claims brief

Monthly update – February 2011

QBE

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News

Applicable VAT rates for legal costs

The standard VAT rate rose to 20% on 4 January 2011. Under the normal VAT rules the new rate will apply to goods or services where a "tax point" has been created by the issuing of a VAT invoice or receipt of payment after 4 January. The ***Change of Rate Rules*** however, permit the suppliers of goods and services to apply the former VAT rates for goods or services provided prior to the change date, even if an invoice has been issued after it.

A solicitor who has worked for a client over a number of years without interim billing can now elect to charge either the various VAT rates applicable at the time the work was done or the current 20% rate throughout. If they choose to apply the higher rate throughout however this should be capable of successful challenge at assessment (with the exception of disbursements and predictive costs).

Date	Standard VAT rate
Pre 30 November 2008	17.5%
1 December 2008 to 31 December 2009	15%
1 January 2010 to 3 January 2011	17.5%
Post 4 January 2011	20%

Further guidance on VAT regulations can be obtained from the Her Majesty's Revenue and Customs' website on: http://www.hmrc.gov.uk/vat/index.htm

Comment: where costs bills have applied the new higher rate for work done over a number of years, it should be possible to successfully challenge them.

Civil law reform bill dropped

The Ministry of Justice (MOJ) has announced that the government will not proceed with the draft ***Civil Justice Bill*** as it "will not contribute to the delivery of the government's priorities". The MOJ carried out a consultation on the draft bill between December 2009 and February 2010 which proposed a wide range of changes including reform of fatal accident damages and the basis on which claims for gratuitous care are dealt with.

Comment: following the demise of this bill any change to the range of persons entitled to bring claims in respect of fatal accidents in England and Wales is unlikely to take place in the foreseeable future.

The Damages (Scotland) Bill is still being considered by the Scottish Government's Justice Committee but will not be enacted prior to the next election scheduled for 5 May 2011. The Bill if enacted would exclude the earnings of a surviving spouse from dependency claim calculations and would significantly increase the number and value of these claims.

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Conditional Fee Agreements success fees found to breach Human Rights convention

On 18 January 2011 in the case of ***Mirror Group Newspapers v The United Kingdom*** the European Court of Human Rights ruled that the success fees payable by Mirror Group Newspapers (MGN) were a breach of Article 10 of the ***European Convention on Human Rights***.

The success fees arose from Conditional Fee Agreements (CFAs) entered into by model Naomi Campbell to fund a long running legal dispute with MGN over newspaper articles in the ***Mirror*** concerning Ms Campbell's attendance at "Narcotics Anonymous". Ms Campbell claimed that the articles were a breach of confidentially and privacy. She was eventually successful in the action following two appeals to the House of Lords but was only awarded £3,500 in damages but incurred £1,086,295 in costs (the two appeals to the Lords alone cost £850,000 of which £367,077 was success fees).

MGN applied to the European Court of Rights for a ruling that its rights to free expression under Article 10 had been breached in two respects. Firstly in the Lords' finding that it had breached confidentiality and secondly that it had been required to pay Ms Campbell's success fees. On the second point it argued that CFAs with success fees had imposed an excessive costs burden on defendants in defamation and privacy cases discouraging the press to report on some cases even where there were legitimate matters of public concern.

The court held by majority vote that the Lords' breach of confidentiality decision was not a violation of Article 10 but unanimously agreed that the success fees payable by MGN did violate it.

In its judgment the court referred to many of the criticisms of the current CFA regime made by Lord Justice Jackson in his report on the cost of civil litigation. It cited his findings that the CFA regime was unfocused and used by those well able to fund their own actions, removed the incentive for claimants to control their costs spending, sometimes forced the abandonment of even good defences and allowed claimant solicitors to "cherry pick" winning cases and benefit from success fees with little real risk.

The UK Government now has three months from the date of the judgment, to make written submissions before it becomes final.

Comment: the decision will have no immediate effect on UK costs. It is not yet final and whilst binding on the UK Government it has no direct effect on UK law. It does however provide another powerful incentive for a reform of the current CFA regime and should be welcomed by those campaigning for change.

Irish Government drafts Corporate Manslaughter Legislation

The Irish Times has reported that the Irish Government has approved the drafting of corporate manslaughter legislation. The draft legislation will take into account the findings of the Irish Law Reform Commission's 2005 report on corporate killing, commissioned in response to a number of high profile cases where organisational failure led to multiple fatalities.

Like the UK ***Corporate Manslaughter and Corporate Homicide Act 2007*** the draft legislation would enable criminal liability to be found against a corporate entity and a large fine imposed. It would also introduce the offence of "grossly negligent management causing death" for which an individual senior manager could be prosecuted with the possibility of a custodial sentence.

Comment: whilst the prosecution of individuals for manslaughter through gross negligence and other health and safety offences resulting in death is well established in the UK there have to date been no successful prosecutions of corporate entities under the Corporate Manslaughter Act. Whether an Irish version will prove more successful remains to be seen. There is speculation that the new legislation is at least partly intended to focus minds on health and safety issues following the reduction in the number of health and safety personnel during the current recession.

New injury claims process: So far so good?

The Forum of Insurers Lawyers (FOIL) has reported on the relative success of the Ministry of Justice's reform of the claims process for low value Road Traffic Accident (RTA) personal injury claims. It reports that despite some early problems with some claimant solicitors and some insurers being unable to access the electronic portal (through which claims are notified and the parties mainly exchange information) some 75% of personal injury claims are now captured by the scheme.

The FOIL report whilst conceding that the statistical data recently released by the RTA Portal Company has yet to be tested says that the general consensus of opinion is "so far so good" with the portal providing quick and efficient exchange of information between the parties and a cheaper fixed costs regime in place.

The report also quotes Tim Wallis the chairman of the RTA Portal Company as warning against the further expansion of the scheme to other classes of claims such as Employers' and Public Liability (proposed by the Government to take place in April 2012) without "further considered time and

thought". He believes that any new software system will need careful planning to ensure cost effective implementation.

Comment: the new scheme whilst offering reduced costs has led to insurers having to deploy more resources in order to meet the tight scheme deadlines. Some insurers have already set up direct links between the Portal and their own IT systems and whilst this approach saves time, the initial set up costs are significant.

There have been complaints about "bad behaviours" such as the multiple reporting of the same claim with multiple requests for stage one cost payments which the Portal is currently unable to address. Overall there are certainly a number of issues to address before a successful roll out to other classes of business can be achieved.

New offence created to tackle uninsured motorists

The Road Safety Minister has announced that a new offence is to be introduced making the registered keepers of uninsured vehicles liable to pay a £100 fine and to have their vehicles seized if these remain uninsured. At present an offence only occurs when an uninsured vehicle is driven on the highway.

The Department of Transport has already issued a Commencement Order and new regulations will shortly be introduced. The new offence is expected to be in force by the spring of this year.

Vehicles with a valid Statutory off Road Notice (SORN) will not be affected.

Comment: Uninsured and untraced drivers are responsible for around 160 deaths and 23,000 injuries every year. The new offence will mean that it will no longer be necessary for police to catch uninsured motorists driving before they can take action and this will hopefully reduce the number of uninsured vehicles on the roads.

Northern Ireland Assembly considers pleural plaque legislation

In October 2007 the House of Lords ruled in ***Johnston v NEI International Combustion Ltd and Others*** that pleural plaques were not an injury, disease or impairment and that in short there was no entitlement to damages arising from them. The Scottish Parliament acted quickly to bring in legislation to nullify this ruling in Scottish jurisdiction but the ***Damages (Asbestos-Related Conditions) (Scotland) Act 2009*** is still undergoing legal challenge.

The Northern Ireland Assembly is now considering similar legislation. The ***Damages (Asbestos-related Conditions) Bill (Northern Ireland)*** if enacted would back date the entitlement to claim damages for pleural plaques to the date of the Lords ruling and would also make pleural thickening and asymptomatic asbestosis actionable.

Comment: the UK Ministry of Justice announced in February last year that they would not "at this time" take any action to overturn the Lords ruling and so pleural plaques are unlikely to become actionable in England and Wales for the foreseeable future. The validity of the Scottish Act is undergoing appeal and whatever the outcome is likely to be further appealed to the UK Supreme Court. If the Supreme Court rules against the Scottish Act similar legislation in Northern Ireland seems unlikely to be enacted. If on the other hand it rules in favour damages for pleural plaques could be reintroduced one jurisdiction at a time.

UK fraud reaches highest ever level

International auditing firm KPMG LLP has reported that its “fraud barometer” has recorded the highest ever levels of UK fraud in the twenty three years it has been monitoring Crown Court prosecutions for frauds over £100,000 in value.

The total value of fraud recorded in 2010 was £1.374 billion up 16% on 2009. Of the total fraud 42% was directed at government agencies. A KPMG spokesman attributed the rise to a combination of austerity measures, rising unemployment and structural changes in the economy.

One encouraging aspect of the figures was a marked reduction in the levels of mortgage fraud apparently due to the success of more stringent checks adopted by financial institutions.

Comment: the KPMG fraud barometer only measures higher value cases which are actually brought to trial. The overall cost of fraud to the UK economy is estimated as being in the region of £2 billion a year with more than half of that sum being obtained by professional criminals.

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Liability

Contributory negligence of pedestrian on pavement: Osei-Antwi v South East London and Kent Bus Company Ltd – Court of Appeal (2010)

The claimant was standing on the pavement waiting to cross the road when the rear of the defendant's bus, which was making a sharp left turn into a bus deport, struck her and crushed her against some railings.

The judge at first instance found one third contributory negligence on the part of the claimant due to her standing too close to the edge of the pavement and not keeping a proper look out for buses which she knew were turning. The claimant appealed.

The Court of Appeal held that on the facts of the case the claimant was not standing in an inherently dangerous place nor could she have foreseen that the rear of the bus would strike her. There was no contributory negligence on her part.

"....I decline Mr Lazarus's invitation to come to any fixed conclusion on whether Chapman provides a principle in law that a pedestrian who is struck when standing on a pavement can never be held to blame."

Lady Justice Hallett

The Court of Appeal however declined to find that the 1982 case of ***Chapman v Post Office*** was an authority for the principle that a pedestrian who is standing on a pavement can never be held to blame despite the claimant's counsel's inviting them to do so.

Comment: the refusal of the Court of Appeal to rule out contributory negligence on the part of a pedestrian struck on a pavement leaves open the tantalising possibility of successfully arguing this point. Presumably however this would only succeed where the claimant was in an obviously dangerous place and/or should have foreseen that a vehicle was likely to encroach onto the pavement.

Nightclub owners duty of care clarified: Everett and Another v Comojo (UK) Ltd (T/a The Metropolitan and Ors) – Court of Appeal (2011)

The two claimants were injured in a knife attack at a nightclub owned and managed by the defendants. The attack had arisen after a member of the club a Mr Bulabaid had seen one of the claimants either tapping or kicking a waitress' bottom. The waitress had not complained but Bulabaid was annoyed on her behalf and told the waitress several times that he would ensure that she received an apology. Some while later Bulabaid persuaded the waitress to arrange to have one of his employees a Mr Croasdaile, whom he described as his driver, admitted to the club.

The waitress was alarmed by the appearance of Croasdaile. He was heavily muscled and had an aggressive manner. The waitress feared that Bulabaid might send him over to the claimants and a confrontation could ensue. She went to warn her manager but in the meantime the claimants had decided to leave. Bulabaid beckoned one of the claimants over to his table and demanded an apology on the waitress' behalf. When this was refused Croasdaile stabbed him in the neck. He then chased the other claimant and stabbed him five times. Both claimants were seriously injured. Croasdaile was later convicted for Grievous Bodily Harm and given a life sentence.

The claimants sought damages for injury from Bulabaid and the owners of the night club Comojo Ltd. Bulabaid absconded leaving the claimants to pursue Comojo, At first instance the judge held that a nightclub may owe a duty of care to protect its patrons from the action of a third party but this would depend on whether the risk was foreseeable. In this case it was not. The waitress could not have foreseen that Croasdaile would stab the claimants. Bulabaid had been a regular customer and neither he nor any of his associates had ever behaved violently before.

Her actions in reporting her concerns to the manager could not be criticised. There was no breach of duty. The claimants appealed arguing that there had been a breach.

The Court of Appeal in considering whether the nightclub had a duty to protect its patrons from assault by a third party applied a threefold test. It considered proximity of the relationship between the nightclub and its patrons, foreseeability of injury and whether it was fair, just and reasonable in the circumstances to impose a duty of care. They held that all three limbs of the test were satisfied and that there was a duty of care but the standard of care and the scope of the duty must also be fair, just and reasonable. The judge at first instance's finding that the waitress had acted reasonably was unassailable. In the circumstances there was no breach of duty on the part of the defendants. The appeal was dismissed.

Comment: Lady Justice Smith giving the lead judgment commented that the common duty of care is an extremely flexible concept. The nightclub in this case was a respectable establishment in Old Park Lane, W1 where violence was virtually unheard of. The duty of management in such an establishment would be no higher than training staff to look out for trouble and inform security staff. A less salubrious establishment where the use of weapons and violence were common might require weapon searches and quick response teams to avoid liability for assaults on customers.

Social benefit of activity did not outweigh risk: Scout Association v Mark Adam Barnes – Court of Appeal (2010)

The Scout Association had been found liable for injuries suffered by a then thirteen year old scout who had fallen and injured himself whilst playing "Objects in the Dark". The game involved grabbing objects when the lights were turned off. At first instance the judge had found that turning the lights off had introduced an unacceptable level of risk.

The Scout Association appealed arguing that turning the lights off made no material difference to the level of risk and that the judge at first instance had failed to consider or give sufficient weight to the social value of the game.

The Court of Appeal dismissed the appeal on a two to one majority basis. The risks of playing the game had been increased by turning the lights off and it could not be said that the claimant would have suffered the accident he did if the lights had been on. The judge had considered the social value of the activity but on the facts of the case had concluded that the increased risk outweighed any social benefit.

> *"...the judge did have well in mind the social value of this game which was to add to the excitement and in that way enthuse the youngsters looking for that added "spice". But the spice also added risk and the cost of prevention was simply not to turn the lights out."*
>
> *Lord Justice Ward*

It was accepted that the activities of the scouting movement were valuable to society and that these often carried some degree of unavoidable risk but this did not mean that every scouting activity however risky was acceptable. Each individual case must be judged on its merits and whether the social benefit of an activity was sufficient to justify the risk it entailed was a question of fact, judgment and degree.

Comment: there have been several high profile liability decisions in recent years where the courts have ruled in favour of defendants on the basis that the risks associated with recreational activities were outweighed by the social benefits. Against that background this ruling might be considered disappointing but it is still very much the case that courts will consider social benefit when determining liability.

Procedure

Insurers unable to rely on contribution act: Jubilee Motor Policies v Volvo Truck and Bus – High Court (2010)

Jubilee Motor Policies (JMP) had satisfied a judgment for damages for personal injury suffered by a claimant in a road traffic accident caused by their policyholder's negligence. JMP had declined indemnity but was still obliged to satisfy the judgment under the terms of the ***Road Traffic Act 1988***.

JMP considered that the poor maintenance of their policyholder's vehicle had been a contributory factor to the accident and brought proceedings under the ***Civil Liability (Contribution) Act 1978*** against Volvo Truck and Bus alleging that they had been in breach of contract in respect of the vehicle's maintenance.

Volvo successfully applied to have the proceedings struck out. The Contribution Act requires liability for the "same damage". Volvo argued that JMP as an insurer were not liable for the claimant's injuries but had been required to satisfy a judgment by virtue of statutory duty and were not therefore liable for the "same damage". The judge agreed holding that the definition of "same damage" had to be construed narrowly and that to successfully obtain a contribution from a defendant a claimant such as JMP must show that the genesis of the liability for damages was the same.

Comment: Where an insurer is declining indemnity but has statutory obligations to satisfy court judgments it may find itself dealing with litigation in its own name rather than the policyholder's and on the basis of this judgment it will now be prevented from bringing contribution proceedings against other wrongdoers.

Proceedings brought directly against insurers are increasingly common and not just in motor cases. The question arises as to whether insurers will now be barred from seeking contributions where they are sued directly?

Ian Sinho, Claims Manager at Jubilee, who kindly gave the writer some background on this case, believes the judge's findings to be flawed but will not be appealing due to other (unspecified) issues with this claim.

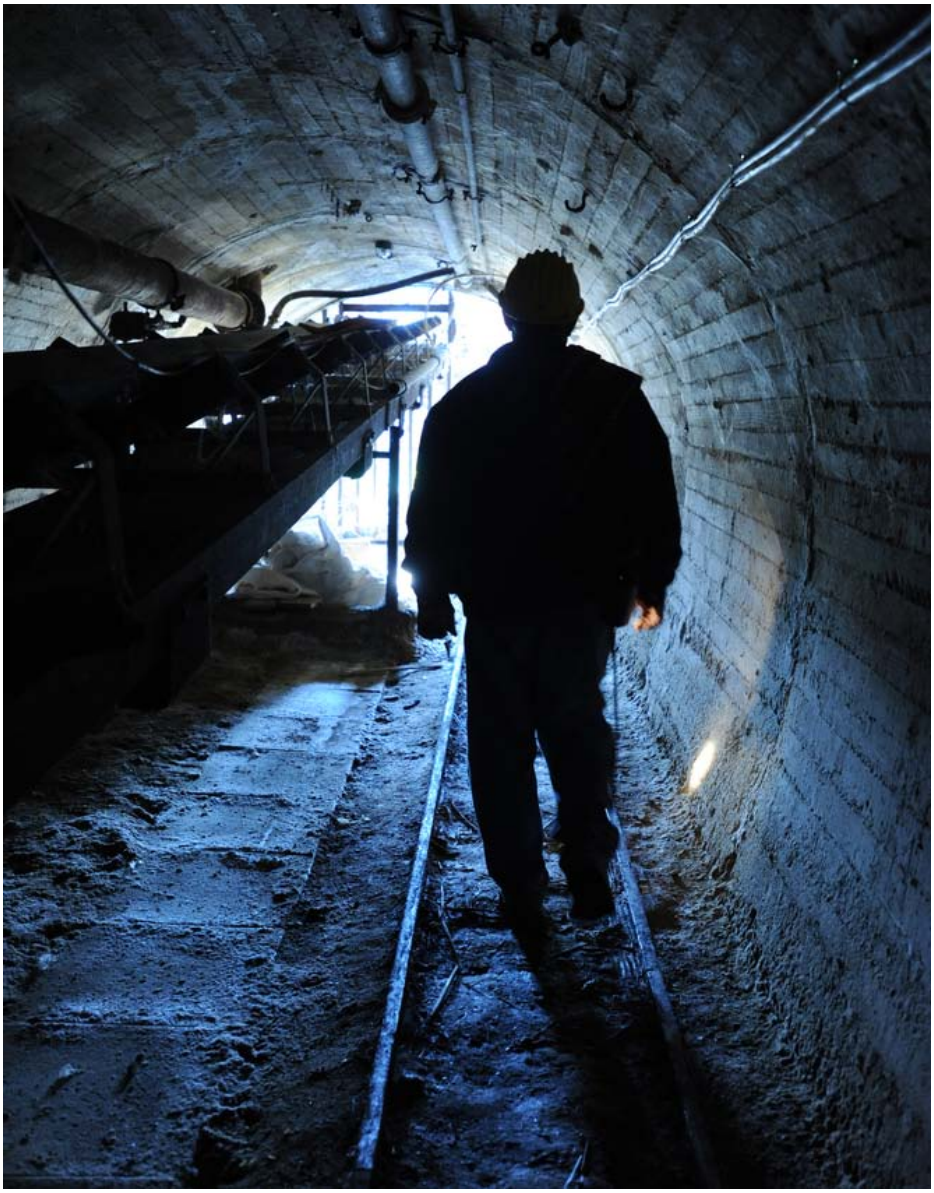
Miners "Beat Knee" test cases fail on limitation point: Davies and Others v The Secretary of State for Energy and Climate Change – High Court (2011)

The claimants were either retired miners or administrators of the estates of deceased miners who had contracted osteoarthritis of the knee as a result of the general rigours of working underground rather than from any specific trauma (a condition known as "beat knee"). The Department of Energy (which had inherited the liabilities of the British Coal Board) had issued a generic defence raising the limitation point.

As preliminary issues the High Court was asked to rule on the dates of knowledge of the lead claimants in the case and if these were outside of the limitation period whether it was justified for the Court to use its powers under Section 33 of the ***Limitation Act 1980*** to disapply limitation and let the various claims proceed.

The Court held that all of the eight lead claimants (and by implication the remainder of the claimants) had sufficient knowledge of their conditions long before they issued proceeding in some case a delay of over twenty years. Having considered the problems with evidence, the length of delay and the broader merits (such as questions of dealing fairly with both the claimants and the defendant) it was not appropriate for the Court to use its discretion under Section 33 and the claims could not proceed.

Comment: the courts have a very wide discretion under Section 33 under which they may allow a claim to proceed after limitation has expired. A long delay in bringing proceedings is not necessarily fatal to a claim if there is still sufficient cogent evidence available to allow a fair trial. The court must also consider the "balance of prejudice" between the parties i.e. in the particular circumstances of the case did the prejudice to the defendant of letting a case proceed out of time outweigh the prejudice to the claimant of not permitting their claim to proceed.



Quantum

Court refuses request for adjournment pending discount rate review: Kevin Day v Randhawa and Motor Insurers Bureau - High Court (2011)

Solicitors acting for the severely brain injured claimant applied to the court to have the issue of an appropriate multiplier adjourned pending the Lord Chancellor's review of the discount rate. As in the case of ***Love v Dewsbury*** reported in last month's Brief the judge refused to grant an adjournment.

Comment: given that there is as yet not even any time frame in place for a review any decision to adjourn cases would likely lead to the build up of a substantial backlog.

Completed 24 January – 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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