Technical claims brief

Monthly update – December 2010

QBE

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News

Lord Chancellor to review discount rate

Following the threat of a judicial review the Association of Personal Injury Lawyers (APIL) has secured the agreement of the new Lord Chancellor Kenneth Clarke QC to review the discount rate (i.e. the rate of reduction applied to multipliers in lump sum settlements to reflect investment return on damages and ensure that claimants are not over compensated).

The current rate of 2.5% was set in 2001 and was based on the yields of index-linked government stock (ILGS). The rate of return has significantly dropped since then increasing the likelihood that claimants awarded lump sum settlements may be under compensated.

The recent case of ***Helmot v Simon*** (see October 2010 brief) saw the Guernsey Court of Appeal set a rate of -1.5% for earnings related losses and 0.5% for non-earnings related losses based on their assessment of a realistic rate of investment return for Guernsey. This decision has encouraged the campaign by some claimant solicitors for a reduced rate on the mainland.

At the time of writing there has been no announcement of the time frame for the review.

Comment: any reduction in the discount rate will greatly increase the level of lump sum awards for claims involving future losses calculated on a multiplier/ multiplicand basis. In the case of Helmot v Simon the Guernsey Court of Appeal's decision to reduce the rate from 1% at first instance to a split rate of -1.5% and 0.5% increased damages from £9.3m to £13.75m.

The Lord Chancellor appears to be unenthusiastic about a review as according to APIL he did not respond to the request until a judicial review was threatened.

A reduction in the rate and a corresponding rise in the value and frequency of lump sum settlements could create serious cash flow issues for bodies such as the NHS Litigation Authority and the Motor Insurers Bureau and would have a significant financial impact on insurers and other compensators.

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Ireland closer to periodical payment legislation?

The ***Irish Times*** has reported that the Irish High Court's working party on periodical payments has completed its report and presented its finding to the Irish Minister for Justice. The report criticises lump sum awards as "inadequate and inappropriate" for plaintiffs with long term care needs and recommends the enactment of new legislation (similar to that in the UK) giving Irish courts the power to impose Periodical Payment Orders where it is in the plaintiff's best interest.

The report also stressed the need to make payments secure in the long term and to be income tax exempt. The Minister for Justice is reported as saying that he is personally in favour of the recommendations but stressed that any impact on Irish tax payers must be carefully considered.

Comment: Justice John Quirke who headed the working party had hoped to see a Periodical Payments regime in force by October of this year (see May's Brief) and although the first Irish Periodical Payment award was approved earlier this year, legislation would appear to still be some way off. Given the seriousness of the current Irish financial situation any additional expense to the state or to business could prove an effective barrier to implementation.

Scottish Government Endorses Civil Courts Review

In September 2009 Lord Gill's working party published a wide-ranging report on the Scottish civil legal system. The report was commissioned by the Scottish parliament but up to now there had been little sign of any moves to implement its findings.

The Scottish government has now issued a formal response to the report which endorses the main proposals of a specialist personal injury court hearing cases up to £150,000 in value, simplification of procedure including support for self-representation, increased use of Alternative Dispute Resolution and a review of the legal costs system taking into account Lord Jackson's review of the civil justice system in England and Wales.

Many of the measures will require primary legislation and there is now insufficient parliamentary time to implement this prior to the next election in May 2011. The Scottish government is likely to begin a consultation process on the reforms by the end of this year.

Comment: Feedback from Scottish ministers suggests that the proposed reforms are high on their list of priorities. Whether the Scottish National Party will still be in power after next May's election however, remains to be seen.

Fraud

Exemplary damages awarded against fraudsters: Hussain and others v Yaqoob and Ensign Insurance and Ensign v Hussain and Others – Derby County Court (2010)

Three claimants sought damages for personal injury and vehicle damage arising from two alleged accidents. Both defendant drivers were insured by Ensign (part of QBE). The claims' handlers dealing with the claims became suspicious when one of them recognised a storage account on one claim file that was similar to another he had seen on the other claim.

Subsequent investigation and engineering evidence revealed that the claimants and defendant drivers were well known to each other, that the damage to the vehicles involved could not have been caused as alleged and that there were numerous inconsistencies in the claimants' and defendant drivers' versions of events.

"...I was quite unable to rely upon evidence given in an attempt, as it seemed to me, to brazen out the exposure of a dishonest scheme pursuant to which the accidents which I was asked to consider had been faked, or staged, or exaggerated."

Mr Recorder King

At a conjoined hearing the judge was convinced by the weight of evidence that both alleged accidents were fraudulent. As a result the judge ordered the claimants and defendant drivers to pay damages to Ensign in respect of the tort of deceit plus exemplary damages equivalent to the monies they would have obtained had their fraud been successful. They were also ordered to pay Ensign's costs on an indemnity basis.

Comment: The successful exposure of this attempted fraud led to the conspirators being heavily financially penalised although the judge stopped short of a referral to the Director of Public Prosecutions.

Congratulations to James Leslie and Jon Radford, the claims handlers who spotted this fraud.

Liability

Personal Protective Equipment (P.P.E): Steven Threlfall v Hull City Council – Court of Appeal (2010)

The claimant suffered a serious cut to one finger from some unidentified sharp object whilst clearing rubbish from the gardens of vacant council houses. He had been supplied with gloves which had been designed by the manufacturer for "minimal risks only". The claimant argued that the gloves were not suitable and breached regulation 4 of the ***Personal Protective Equipment Regulations 1992*** and that the council's risk assessment was inadequate in breach of regulation 6.

At first instance and first appeal the claimant was unsuccessful. It was held that the council was not obliged to provide highly protective gloves because their risk assessment and experience indicated that the risk of cuts from clearing garden rubbish was very low. There was no absolute duty to prevent injury (although there is an absolute duty to provide suitable PPE if a risk cannot be controlled).

The claimant persevered and was successful at the Court of Appeal which found that had the risk assessment been properly carried out the specific risk of concealed sharp objects would have been recognised. For equipment to be suitable under regulation 4 it must be effective against the risk posed regardless of frequency or seriousness unless it was ***de minimis*** (too trivial for the law to be concerned with it). The adequate control of a risk meant "prevention of serious injury" and the gloves provided had failed to do this.

The Court of Appeal also ruled that when considering the suitability of PPE, judges should not look at regulation 4 alone but should always consider regulation 6 even if a breach of it was not specifically pleaded.

Comment: Lady Justice Smith criticised the defendant local authority for providing the claimant with ordinary gardening gloves which were obviously incapable of protecting the wearer from a sharp object if any pressure was applied. On that basis judgment for the claimant was unsurprising but the Court of Appeal's findings here will no doubt be cited in support of future claims arising from less likely risks.

No contributory negligence on part of rescuer: David Tolley v Claire Carr, Helen Johnson and Damian O'Callaghan- High Court (2010)

The claimant went to the assistance of the first defendant whose car had spun out of control on a motorway and who was sitting in her vehicle which was broadside on to the carriageway with the rear of the car protruding into the fast lane.

The claimant persuaded the first defendant to leave her car and to move onto the central reservation. He then went back to the car to try and move it fully onto the central reservation fearing that otherwise it would cause a serious accident.

Unfortunately a car and then a van struck the first defendant's car whilst the claimant was trying to get into it with the result that he suffered serious spinal injuries permanently losing the use of both legs. The claimant issued proceedings against the driver he had assisted and the drivers of the two vehicles which had struck her car.

"...it is my clear and firm judgment that Mr Tolley's actions on the 23 November 2006 fall within the category of the brave and commendable, not the foolhardy and unreasonable. He acted with proper regard for his own safety in all of the circumstances, but, meritoriously, with greater regard for the lives and well- being of others."

J Hinkinbottom

The defendants accepted primary liability but argued that the claimant's decision to go back and attempt to move the car had been "wholly foolhardy". They questioned whether the car was a hazard to other motorists and suggested that the claimant should have waited for the arrival of the emergency services. They maintained that in the circumstances there was contributory negligence on his part of between 25% and 33%.

The court found no contributory negligence on the part of the claimant. Case law held that the court should be slow to find contributory negligence on the part of rescuers who imperilled themselves to try to save others especially where the hazard was not of the rescuer's making. Witness evidence made it clear that the first defendant's car was a hazard to other motorists. The court found that the claimant had checked to see if other cars were approaching before attempting to get into the crashed car and he could not be blamed for failing to see approaching traffic in the heat of the moment.

Comment: The judgment is a reminder of the courts' reluctance to make any finding of contributory negligence on the part of a rescuer.

Withdrawal of Primary Care Trust (PCT) support not lawful: R (Alyson Booker) v Oldham Primary Care Trust and Direct Line Insurance Plc – Administrative Court (2010)

The claimant suffered catastrophic spinal injuries in a road traffic accident. The negligent motorist's insurers admitted liability in full and settlement was agreed with periodical payments covering the cost of the claimant's future care. The periodical payments were however deferred for two years to allow the establishment of a team of Primary Care Trust carers who would then act as a template for a privately funded team. The insurers provided an indemnity in the event that PCT funding was withdrawn in the mean time.

Almost a year after the settlement agreement was made the PCT decided to withdraw its support for the claimant prompting the claimant and the compensating insurers to seek a judicial review.

The PCT argued that because the claimant was being compensated by an insurer she did not have a reasonable requirement for PCT funding. The principle that the tortfeasor should pay applied. The PCT's duty under the ***National Health Service Act 2006*** was a "target duty" allowing it to take into account the costs of providing services and other demands upon it and the court should not interfere with any decision made unless it was unlawful or irrational as per the Court of Appeal's 2006 decision in ***Rogers v Swindon NHS PCT***.

The Court disagreed. The decision not to fund care had been based on the claimant's ability to pay contrary both to Section 1 of the ***NHS Act 2006*** and to the NHS constitution which undertook to provide

treatment free of charge at the point of delivery based solely on clinical need. There was no authority to support the use of the principle that the tortfeasor should pay by the NHS to decline services to a person who would otherwise qualify. The situation here was different to that in ***Rogers*** where the PCT declined to provide a specific form of treatment to a class of patient because it was a low priority. This decision was made from a desire to avoid funding a particular patient to save funds and that was unlawful.

Comment: In arguing that the principle that the tortfeasor should pay effectively provided an opt-out for them, Oldham PCT did not distinguish between cases where compensators were paying in full or in part. Had they been successful with this argument, in cases where liability was split the injured claimant could be left with only partial compensation towards the cost of their care needs with nothing from the NHS to make up the difference. This would make settling claims for catastrophic injury more complicated as claimants would be unwilling to settle without first involving the local PCT in negotiations.

The reaffirmation of the principle that NHS services should be provided free at the point of delivery leaves the way open for claimants to obtain double recovery from both private compensator and the NHS unless settlement agreements specifically preclude this.

Our thanks go to DWF solicitors who acted for the insurers for their helpful note on this case.

Procedure

Late service of proceedings: Aktas v Adepta and Dixie v British Polythene Industries Plc – Court of Appeal (2010)

In these two conjoined personal injury cases proceedings had been issued just prior to the expiry of the three year limitation period but were not served on the defendants in time. As a result both claims were struck out.

The claimants in both cases then issued new proceedings outside of the limitation period relying on the court's wide discretion under section 33 of the ***Limitation Act 1980*** to permit proceedings issued after the expiry of the limitation period if the circumstances of the case justified it. At first instance both the new proceedings were struck out as an abuse of process. The claimants appealed to the Court of Appeal against the striking out of their claims.

Allowing the appeals the Court of Appeal held that negligently serving a claim from out of time was not an abuse of process. Abuse required inexcusable delay, intentional default or a thoroughgoing disregard of the rules. In ***Horton v Sadler 2006*** the House of Lords had confirmed the courts' wide and unfettered discretion in cases where proceedings were issued outside of the three year limitation period. The fact that there were adverse costs implications and no guarantee that the trial court would allow the cases to proceed out of time meant that the claimants would not escape sanction for late service if the cases were remitted back to a trial court.

Comment: the Court of Appeal's judgment means that a defendant cannot hope to have proceedings struck out simply on grounds of late issue unless there are other factors to support an argument for abuse of process.

Legal professional privilege applies only to lawyers: R (on the Application of Prudential Plc and Another) v Special Commissioner of Income Tax and Others – Court of Appeal (2010)

The appellants tried to have notices issued by HM Revenue and Customs for disclosure of documents including legal advice from accountants, quashed or reduced in scope. They were unsuccessful at first instance and appealed to the Court of Appeal. They argued that the status of the person giving the advice was not material and that professional legal privilege should apply to advice given for legal purposes by a professional person whether or not they were a lawyer.

The Court of Appeal whilst keen to uphold the principle of legal professional privilege was also at pains to point out that there needed to be certainty as to where it applied. Parliament had expressly addressed the point as to whether legal professional privilege should be extended to accountants advising on tax matters and had not considered it appropriate to do so. The ***Taxes Management Act 1970 section 20*** specifically set out which documents a tax advisor could be required to produce.

The ***European Convention on Human Rights 1950 Article 8*** guaranteed protection from disclosure for correspondence with a lawyer but there was nothing within the Article which suggested that this should be extended to any other person giving legal advice. The Court of Appeal rejected the appeal holding that legal professional privilege applied only to lawyers.

Comment: This case derives from a revenue investigation into a tax avoidance product but is still a reminder that legal advice from professionals other than lawyers (unless prepared in contemplation of litigation) may be disclosable.

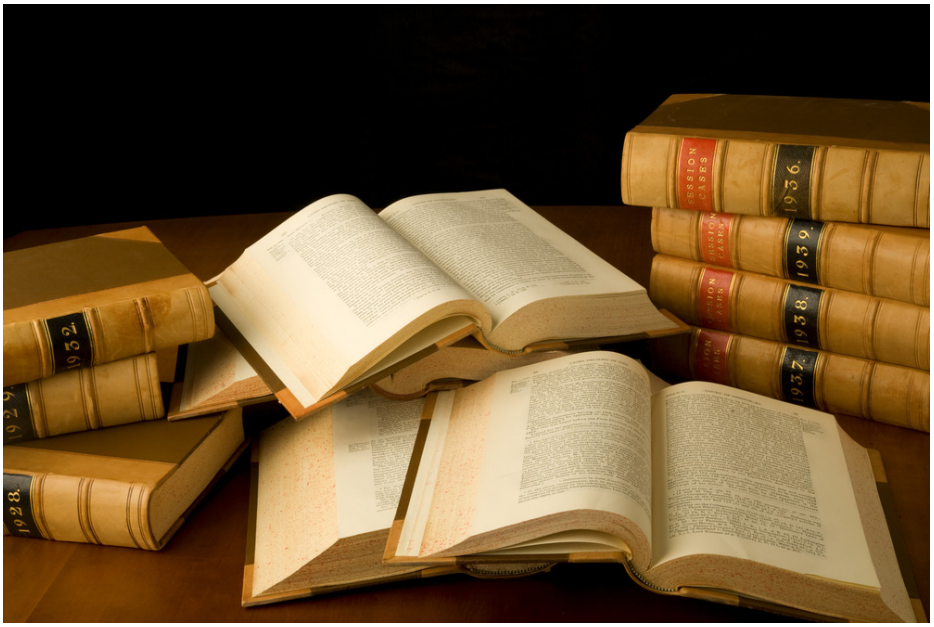
Part 36 offer cannot be time limited: C v D and D2 – High Court (Chancery Division) (2010)

In this claim for breach of contract the claimants made an offer to settle the claim which was stated to be a Part 36 offer and that the offer would be open for 21 days from the receipt of the offer letter. Eleven months later the defendants said that they wished to accept the offer which had never formally been withdrawn.

The claimants argued that the offer was no longer available for acceptance but the defendants countered that the Civil Procedure Rules (CPR) clearly stated that a Part 36 offer could only be withdrawn or changed by serving written notice on the party receiving the offer.

The court found that the offer was not in fact a Part 36 offer but a time limited offer where the time given for acceptance had expired. The defendants could not therefore accept it.

A Part 36 offer was an offer which was capable of being withdrawn but it could not be self limiting. Under the current rules (i.e. post April 2007) an offer must specify a period of at least 21 days or more within which the defendant will be liable for the claimant's costs if the offer is accepted but the rules say that the offer will thereafter remain open for acceptance until it is withdrawn by service of written notice by the party making the offer on the party receiving the offer.



"If the words used cannot fit within Part 36 then the result is simply that Part 36 does not apply whatever may have been intended."

Mr Justice Warren

Comment: The claimants in this case had made a Part 36 offer using an out of date wording which meant that their offer did not in fact fall within Part 36. Although this worked in their favour in this instance, if parties to litigation wish to make use of the specific provisions of Part 36 they must be careful to use the correct wording.

Quantum

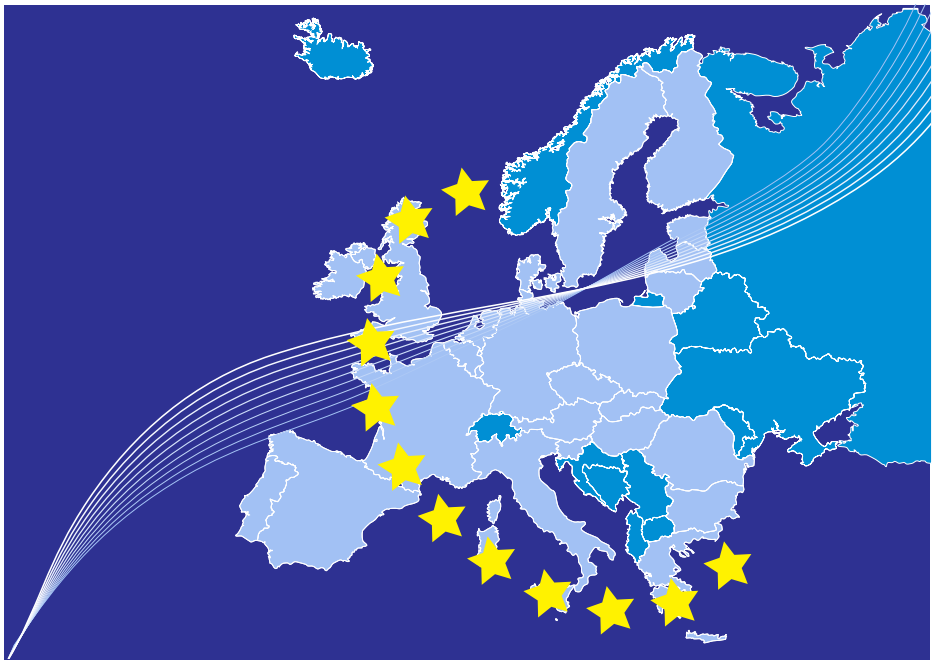
Motor Insurers Bureau damages not determined by "Rome II": Clinton David Jacobs v Motor Insurers Bureau – Court of Appeal (2010)

The claimant who normally resided in England was seriously injured whilst on holiday in Spain. He was run over by a car driven by a German national who was uninsured and was obliged to seek compensation from the UK Motor Insurers Bureau (MIB).

The High Court was asked to rule as a preliminary issue whether the claim for damages should be assessed by reference to English or Spanish law or a combination of the two. Damages assessed under English law would be far higher than under Spanish.

At first instance ***(see March 2010 Brief)*** the High Court held that EU Regulation 864/2007 (known as "Rome II") applied and that damages should be assessed by English law as stipulated by that regulation.

The claimant appealed arguing that regulation 864/2007 should not apply to the assessment of damages because the mechanism whereby the claimant was seeking compensation was regulation 13 (2) (b) of the ***Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003*** and this regulation required the MIB to compensate the claimant as if the accident had occurred in Great Britain.



The Court of Appeal agreed holding that different EU regulations could apply to different areas of law involved in the same claim. Thus whilst "Rome II" determined that Spanish law governed liability, damages should be assessed in accordance with British levels of damages in accordance with regulation 13(2).

Comment: This will be a disappointing decision for the MIB who will be faced once more with paying UK levels of damages to UK residents injured by citizens of other EU countries abroad. The MIB should be able to recover the money from the equivalent body in the country where the uninsured vehicle is usually based but this is not always a straightforward matter.

The decision creates an interesting anomaly whereby a UK citizen injured in another EU country by an untraced or uninsured foreign driver could be financially better off than one injured by an insured driver. This and other anomalies arising from "Rome II" are only likely to be resolved if and when the European Court of Justice rules on them.

Multiple indices used on periodical payment order: E.A. (A child by her Father and Litigation Friend M.A.) v 0 - High Court 2010

Settlement of this claim from a catastrophically injured claimant was agreed between the parties and approved by the court on the following basis:

- A lump sum of £2.189m
- Periodical payments for care and case management of £330,000 per annum linked to the 90th percentile of Annual Survey of Hours and Earnings (ASHE)
- Periodical payments for loss of earnings of £22,000 per annum from age 23 to 65 linked to the aggregate ASHE index for females
- Periodical payments for increased cost of holidays, home running costs, private medical expenses and therapies of £23,750 per annum linked to the Retail Price Index.

Comment: An increasingly common feature of Periodical Payment Orders is the use of multiple indices for different heads of loss. This reduces the risk of over or under compensation but does make the administration of the payments and the calculation of reserves and overall settlement values more complex.

Completed 24 November – written by and copy judgments and/or source material for the above available from John Tutton (contact no: 01245 272756, e-mail: john.tutton@uk.qbe.com).

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