QBE European Operations

Technical claims brief

Monthly update | May 2015

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Reform

General Election – Considering the impact of Conservative majority

The result of the General Election was quickly followed by the news that Chris Grayling would step aside as Secretary of State for Justice and would be replaced by ex-Secretary of State for Education, Michael Gove.

Mr Gove is still to set-out his own plans for the new parliament, but his appetite for reform, and steadfastness in the face of widespread criticism, might provide a good indication of what we can expect and whether he will continue the Ministry of Justice reform-piece started by Mr Grayling.

Mr Gove will have to tackle the manifesto promise to review and replace the (Labour) Human Rights Act (HRA) with a British Bill of Rights. The desire is to give our Supreme Court ultimate judicial supremacy, and to break the formal link with the European Court of Human Rights (ECHR). The Bill will face a number of hurdles, perhaps insurmountable, and concerted opposition from the various interested parties. The Bill will have to be carefully drafted, having regard to human right protections, European law and the constitutional problem of leaving the ECHR. A significant divergence from the HRA is unlikely and Mr Gove has recently talked of enhancing human rights '... by modernising and reforming the framework of rights in this country.'

With regard to any civil justice reform, this will likely follow the current £375m modernisation of the court system and might not be a key priority for Mr Gove. Potential reform might include an increase to the personal injury small claims track limit (from £1000), an increase to the fixed cost regime (perhaps up to £75k) or a more wide-ranging and radical review of the whole process. A detailed analysis of the impact of the 2013 Jackson and Ministry of Justice reforms – good and bad - will be necessary and vital to the success of further reform.

> The last government pushed through some long-awaited reform and gained some useful momentum. We can probably expect that to continue, and a Conservative majority might ensure a smoother passage through parliament. Properly considered, consulted, and managed, reform will be welcomed. So, whilst the civil justice system may not be at the top of Mr Gove's agenda for change, history tells us that he is probably already preparing himself for a fight with the claimant lobbyists.

Liability

Zurich v IEGL [2015] – Landmark Supreme Court judgment

This long running dispute has culminated in Zurich's successful appeal in the Supreme Court and should provide clarity to; the key question of apportionment of damages in mesothelioma claims, provide a new right of action enabling insurers to recover contributions from their insureds and/or successive insurers and put an end to the argument an insurer is liable for all damages in a divisible disease claim, as opposed to the proportion of damage done during their period of insurance.

The case concerned a claim from Mr Carre who had been negligently exposed to asbestos for the duration of his employment with IEGL from 1961 – 1988. Zurich provided EL cover between 1982 – 1988 and argued that they were liable for that proportion (22.08%) of the £250,000 damages, plus costs. The Supreme Court accepted that argument and recognised the injustice of an insurer having to carry the entirety of the EL cover, when it was only on cover for a small proportion of the employee's exposure.

As a result, the Supreme Court created a new equitable right of recoupment, which preserved a victims right to recover 100% of their compensation, but also represents a fair balance for insureds and insurers. Whilst an insurer must indemnify the liability of the employer in full, they can recover contributions on a pro-rata basis from successive insurers and a solvent employer where necessary.

The Supreme Court also clarified that the interpretation of the 'All sums' provision in an insuring clause does not mean an insurer is liable for all injury or disease caused during any period of insurance, but only those that fall within the chronological limits of the risk which the insurer has assumed (time-on-risk).

> The judgment is a very helpful endorsement of the practical approach which has been adopted by insurers, but may not have been accepted by a solvent insured. Insurers now have certainty on the key issues which will help with claims strategy and recoupment in appropriate cases.

Vaughan v Ministry of Defence [2015] – duty of care, breach and obvious danger

The claimant was aged 27 and a member of the Royal Marines. After completion of his basic training he was awarded his green beret and posted to 45 Commando in Arbroath. In 2010, he and five other Royal Marines from his company flew to Gran Canaria to take part in a weeklong adventure training exercise. The exercise proceeded without incident until the last day of the trip when the marines were told that they were free to do whatever they wanted.

The claimant and his five colleagues went to the beach area at Puerto de Mogan and whilst they were there, the claimant went into the sea and executed a shallow dive when he was about waist deep in the water. Tragically, he struck his head on something below the surface and sustained a fracture of his cervical spine which resulted in incomplete tetraplegia. The claimant's case was that his injury was caused by the breach of duty of the Ministry of Defence (MoD), who owed the same duty of care as would be owed to an employee by virtue of section 2 of the Crown Proceedings Act 1947.

The court had to determine:

1. How the claimant sustained his injury
2. The duty owed to the claimant in the particular circumstances of the accident
3. Whether there had been a breach of such duty.

The claimant's case was that the corporal in charge ought to have visited the beach before a marine swam there. The corporal should have looked out to sea and checked whether there were any obvious dangers, such as rocks. The claimant also made the point that the Royal Marines were required to keep fit, which was said to be relevant to the task being undertaken at the time.

The court was satisfied that the claimant had run through the shallow water near to the beach and as the water became deeper, he was unable to run as he was submerged up to his thighs. The presence of other people in the sea might have slowed him down. By the time the claimant executed his dive, he had slowed to walking pace. The court was satisfied that the claimant would have performed a 'dynamic risk assessment' which was the kind of judgement of the conditions that might be expected of a sensible adult such as the claimant when entering the sea from a pleasure beach.

With regard to the duty of care owed, it could arise in a military setting even when the activity was not part of the serviceman's duty or part of the adventure exercise. Unsurprisingly, the court said that the nature and extent of any duty would vary from case to case, and would be fact-sensitive.

The evidence here showed that the claimant and his colleagues had not gone to the beach as part of their requirement as Royal Marines to keep fit. The fact that the MoD had not owed the claimant a duty of care in their capacity as employer with regard to the accident circumstances was not the end of the analysis. The corporal was under a general duty, as the senior member of the crew, to take reasonable care for the safety of those under his command. Whilst he was not required to 'ensure' the safety of the company, he was required to take reasonable care to guard against foreseeable risks of injury.

It is long-established law that a successful defence cannot be founded solely on the basis that the risk was so obvious that an occupier could safely assume that nobody would take that risk. A duty of care to protect against obvious risks or self-inflicted harm does exist in cases when there was no genuine and informed choice, or in the case of employees, or some lack of capacity, such as the inability of children to recognise danger.

After considering the evidence, and upon applying the law, the claim had to fail. There had been no breach of duty on the part of the corporal. The claimant had genuine and informed choice as to how he had entered the sea. He had not been acting in the course of his 'employment' and he did not lack capacity. He had assessed whether it was safe to do what he did before he dived headfirst into the sea. Tragically, he had misjudged the dive with catastrophic results. The court was satisfied that there was no duty on the corporal to warn the claimant of the risks involved in diving from a standing position in shallow water.

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> Whilst the court's decision is the correct one, it is a stark reminder that even the most seriously injured claimant will not recover compensation, in the absence of a duty of care and breach. In this case, most would agree that the law reflects a common sense approach to duty of care. An onerous and demanding duty should be owed by employer to employee, but in circumstances outside of that capacity, the test of reasonableness should ensure a just outcome.

Fraud

Hayward v Zurich Insurance Company Plc [2015] – Fraud and the settlement agreement

The claimant, Mr Hayward, had commenced personal injury proceedings against his employer. The defendant, Zurich, were his employer's insurer and suspected him of exaggerating his injuries and investigated further. A settlement agreement was then reached. Three years later, Zurich received a tip-off that the claimant had been dishonest and commenced proceedings to recover the monies paid. At a preliminary hearing, the Court of Appeal allowed Zurich's claim to continue and decided that they were not prevented from relying on the subsequently discovered fraud (even though fraud had been alleged in the earlier proceedings).

The claim went to trial and the judge decided that the settlement monies should be repaid in full. Although it is normally a requirement to prove reliance on a fraudulent misrepresentation, the judge held that the position in a third party litigation context is different. In litigation, a party might suspect that the other side is lying, but when settling the claim they can choose to take into account the risk that the other side may be believed (a high burden of proof rests with the party making such an allegation). Hence the requirement is that they were "influenced" by the fraud, rather than that they believed it. The claimant appealed, so the claim went back to the Court of Appeal.

The Court of Appeal examined the rationale for settlement and decided that when a defendant who takes the risk that the claimant's statements are false, but settles nonetheless, he (Zurich) foregoes the opportunity to disprove those statements at trial. Where the statements are fraudulent, rather than merely false, the settlement monies will be recoverable on the summation that it would be unfair to treat him as having taken the risk of the claimant being dishonest. Here, Zurich had made allegations of fraud in the initial proceedings, and before they settled the claim, so should not be availed of the opportunity to recover the settlement monies.

The Court of Appeal did have to reconcile this outcome with their previous decision that Zurich's claim could proceed and they could rely upon the subsequently discovered fraud. The distinction is based on the argument that the mere possibility that statements may be believed by the court does not constitute "reliance" on misrepresentations. To rescind an agreement for misrepresentation, there must be credit given for a statement's truth, and inducement due to the perception that it was true rather than false. In this case, Zurich had not merely disbelieved the claimant's assertions about his injuries, they had positively pleaded that they were fraudulent. As a result, the settlement agreement could not be rescinded.

> "With the current momentum for the fight against fraud, and with the backing of the Criminal Justice and Courts Act, the appetite to resist fraudulent claims is rightly on the increase. The strength of an insurer's evidence will always be key to proving fraud and it is unfortunate that Zurich received the tip-off too late on this occasion. Insurers who suspect fraud will deploy appropriate resources and techniques to investigate a claim, and with the support of statute and the judiciary, Mr Hayward's windfall will not be repeated.

Legal

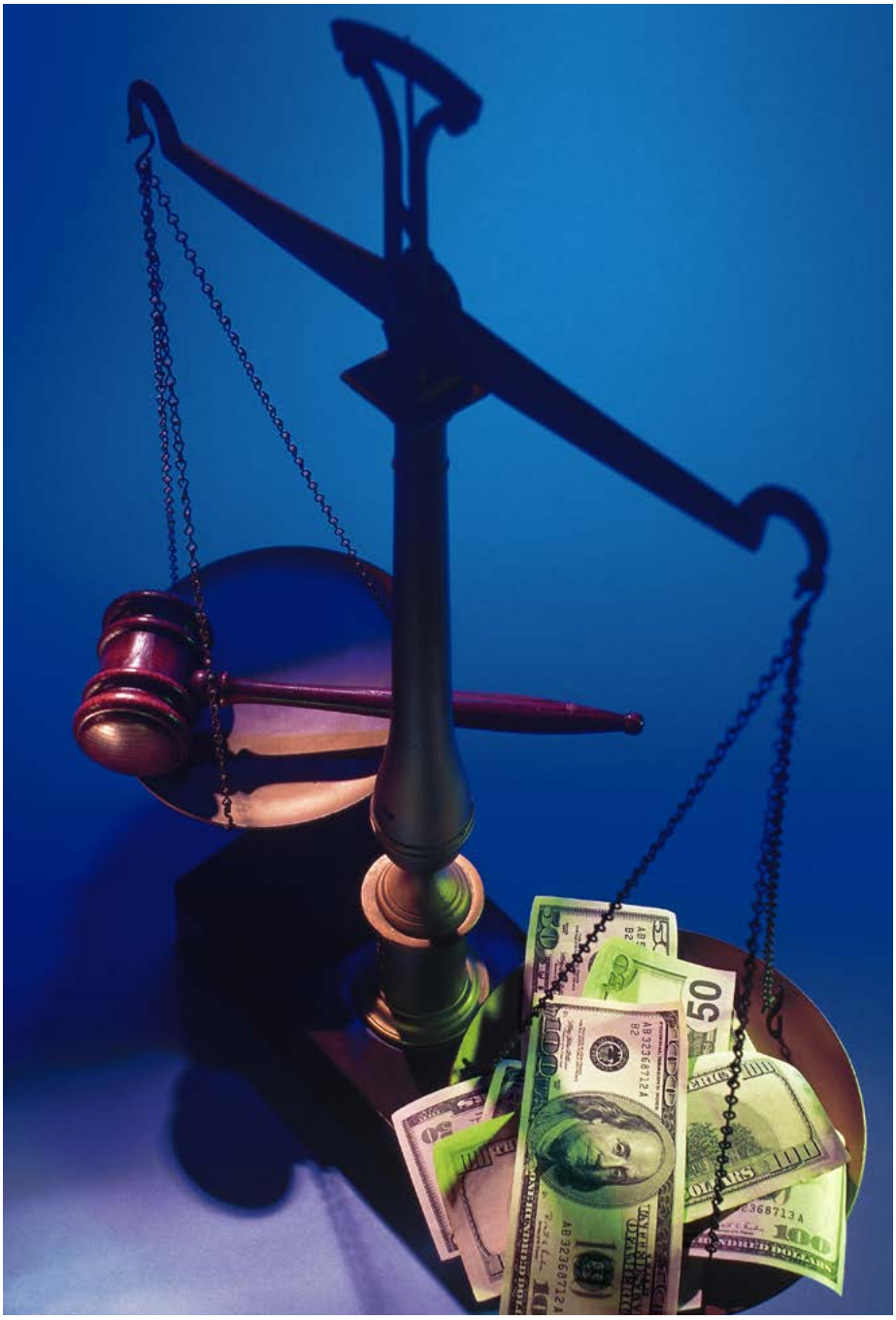
Solicitors' costs guideline hourly rates (GHRs) – Review frozen

In July 2014, the Civil Justice Council Costs Committee submitted its report on the GHRs to Lord Dyson, Master of the Rolls. Having considered the report and having had discussions with the Law Society and the Ministry of Justice, Lord Dyson has now announced an indefinite freeze on the current GHRs for solicitors' costs (they have remained static since 2010) on the basis that there are neither the resources nor the mechanism for determining what the hourly rates should be. GHRs help judges assess solicitors' costs by providing guidelines for the recoverable hourly rate.

Lord Dyson had already declined to accept the proposals of a Civil Justice Council Committee established to review the rates (which would have resulted in an average 5% decrease in the rates) on the basis that he considered the committee's evidential base to be insufficiently safe. He has now expressed "considerable doubt" that even if funds were forthcoming to undertake the necessary research, there would be sufficient numbers of firms willing to participate to produce an "adequate evidence base".

Whilst the GHRs will remain in force for the foreseeable future as the default figures for costs figures, they might be considered as less relevant at detailed assessment and will encourage arguments to justify a departure from the GHRs and to include inflation based increases. Presently, such arguments fail more often than not.

Lord Dyson did take the opportunity to repeat his view that there should be a widening of the application of fixed costs and he will "... continue to press this point to ministers and others in the hope that this important element of the Jackson reforms is implemented."



> Whilst a decrease to the GHRs would have been welcomed, maintaining the status quo will give a degree of certainty for the majority of personal injury claims. Given the proposal to reduce rates by 5%, it is not surprising that there might be a shortage of law firms volunteering to participate in research. If fixed costs limits are increased, the use of GHRs will be reduced further, which should have a benefit for the judiciary and legal costs paying parties.

Completed 29 May 2015 – written by QBE EO Claims. Copy judgments and/or source material for the above available from Tim Hayward (contact no: 0113 290 6790, e-mail: tim.hayward@uk.qbe.com).

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