Technical claims brief

Monthly update – May 2012

QBE

Contents

QBE

News

Implementation of Jackson reforms back on target

The ***Legal Aid Sentencing and Punishment of Offenders Bill*** (LASPO), which will introduce those parts of the Lord Justice Jackson reforms of litigation funding that require primary legislation, has cleared the parliamentary process and at the time of writing awaits the formality of Royal Assent.

The Government was obliged to make one important concession. The Lord Chancellor Kenneth Clarke tabled an amendment delaying the ending of the recoverability of success fees and After the Event (ATE) insurance premiums in respect of diffuse mesothelioma claims only until the government has carried out a review of the likely impact on these claims and published a report.

The Government has also promised to do more to help claimants trace their former employers and to respond to the consultation on the establishment of an Employer's Liability Insurers Bureau (a fund of last resort for claimants) by July 2012.

The commencement date provisions are still awaited but April 2013 still appears to be the target date for implementation.

Comment: The LASPO Bill has survived a bumpy ride through parliament largely unscathed. The plight of mesothelioma victims and their families has clearly aroused a lot of sympathy but it is ironic that the only type of claim where success fees and ATEs will remain recoverable (at least for the time being) is one where the risk of a claimant not succeeding is arguably the lowest.

Government to ban claims referral fees in April 2013

The Department for Transport (DFT) has issued a response to the Transport Select Committee's report on the cost of UK motor insurance.

In response to concerns raised over claims referral fees the DFT said that they would implement a referral fee ban at the same time as the ***Legal Aid Punishment and Sentencing of Offenders Bill*** is due to come into force in April 2013.

The DFT said that other areas of concern raised by the Select Committee such as the number and cost of whiplash claims were under review.

Comment: A referral fee ban should help reduce claim numbers. The DFT is expected to announce further action points addressing other issues raised by the Select Committee in the near future.

One Million UK workers dangerously sleep-deprived

The corporate health consultant company Vielife has published the results of a study examining fatigue in 39,000 British employees. The study, based on assessments carried out over a two-year period, reveals that one in three UK workers frequently come to work in a sleep-deprived state referred to as "sleep-drunk" i.e. so tired that the effects are similar to alcoholic intoxication. The study showed that at any one time an estimated one million UK workers are "sleep-drunk".

The study also shows irregular working hours, stress and obesity to be linked to poor sleep. The results for UK sleep deprivation are much worse than those for the USA and compare unfavourably to many other countries.

Comment: Fatigue has long been recognised as a major cause of accidents both in the work place and on the roads and the results of the Vielife study must be a cause for concern for anyone involved in accident prevention.

Third Party (Rights against Insurers) Act delayed

The UK Ministry of Justice has announced that the implementation of the ***Third Party Rights Against Insurers Act 2010*** has been delayed by work on "other priorities" and is now unlikely to come into force until 2013.

The Act will replace the 1930 Act and is intended to make it easier and cheaper for claimants to pursue the insurers of insolvent defendants. They will no longer have to restore an insolvent company to the Companies Register nor issue more than one set of proceedings, as the new Act will permit them to proceed directly against the insurer without first establishing the liability of the insolvent party.

Comment: The new Act is likely to be something of a mixed blessing for insurers, possibly generating more claims but reducing the costs involved.

Liability

Cyclist's age not grounds for adjusting contributory negligence: Phethean-Hubble v Coles – Court of Appeal (2012)

The claimant was a cyclist who had cycled along a pavement and then turned off onto the road and into the path of the defendant's car.

The car driver initially admitted to police that he had been driving at a speed of 35 mph in a 30mph limit zone but later retracted this. The judge at first instance found that the defendant had been travelling at 35 mph and that in all the circumstances he should have been travelling at only 26/27 mph. At a lower speed the accident could have been avoided completely or at the least, the claimant's injuries would have been less severe.

The judge found the defendant to be primarily liable but with 50% contributory negligence on the part of the claimant for cycling off the pavement into the path of traffic. He then reduced the contributory negligence to only one third to take into account the fact that the claimant was only 16 years of age at the time of the accident.

The defendant appealed against the judge's findings on primary liability and the claimant cross-appealed against his findings on contributory negligence.

The Court of Appeal held that on all the evidence, the judge had been entitled to reach a finding of 50% contributory negligence but it was not just and equitable to reduce contributory negligence to only one third. There was no reason to treat the 16 year old cyclist as anything other than an adult. A finding of 50% contributory negligence was made.

Comment: There can be no contributory negligence found on the part of very young children but contributory negligence may be found on the part of older children. This Court of appeal decision could be cited in arguing that older teenagers should be regarded as adults when it comes to traffic awareness.

Paddock is not a road or other public place: Clarke v Clarke and Motor Insurers Bureau - High Court 2012

Following a fight involving several members of the same family, the first defendant ran over the claimant (her brother in-law) who was on foot. The claimant was seriously injured and permanently paralysed as a result.

The altercation had begun on a gravelled farm entrance but the claimant had been injured in an adjacent paddock. He brought a claim against the first defendant and joined the Motor Insurers Bureau (MIB) to the action because the first defendant was uninsured.

The MIB pleaded that the claimant was armed with a number of weapons, had taken cocaine and had threatened the first defendant and her children with a machete. They submitted that the first defendant was acting in self-defence and that the doctrine of ***ex turpi causa*** should be applied (i.e. the claimant should not succeed in obtaining damages as a result of his illegal actions). They also argued that they had no liability under the Uninsured Drivers Agreement because this related to liability under the Road Traffic Act 1988 (RTA). The RTA applied only on a road or other public place and the claimant had been injured in the paddock, which was private property.

The MIB were unsuccessful on the first two points. The claimant had struck the first defendant's car with the machete and broken a window but there was no evidence given to support self-defence (the first defendant did not appear at the hearing). The ***ex turpi causa*** defence also failed because the claimant's injuries arose from being struck by the car not the earlier fracas.

The farm entrance was a public place but the paddock was private. Since the injuries occurred in a private place, the MIB escaped liability under the Uninsured Drivers Agreement and judgment was entered against the first defendant only.

Comment: It is not often that liability under the Road Traffic Act is defended on the basis that the accident did not occur on a road or other public place. This case is a timely reminder that this remains a valid defence useful to both the MIB and to Article 75 insurers.

Schools do not have a non-delegable duty to pupils under the care of a third party: Woodland v Essex County Council - Court of Appeal (2012)

The unfortunate claimant was a schoolgirl who suffered severe brain damage after she came close to drowning during a swimming lesson. The claimant attended a school run by Essex County Council (CC). The school had arranged the swimming lesson at a swimming pool run by another local authority and this was supervised by a lifeguard and a swimming teacher employed by a private company.

The claimant argued that Essex CC owed her a non-delegable duty of care in the capacity of loco-parentis (in the place of her parents) to ensure that reasonable care was taken to ensure her safety. The judge at first instance held that the claim against Essex CC was bound to fail and struck it out.

The claimant appealed to the Court of Appeal (CA) but the CA supported the original decision. It was not appropriate to extend the local authority's duty of care to include activities outside of the school premises and which were outside of the control of the school or its teachers. A development of the law along these lines was a matter for the Supreme Court and there was no material basis to conclude that such a change would be fair, just and reasonable.

Comment: The Court of Appeal commented that to extend the law, as the claimant argued would discourage education authorities from providing "valuable educational experiences" such as external swimming lessons for their pupils. The decision means that the status quo is maintained and that local authorities and other bodies entrusted with the safety of vulnerable individuals such as children can discharge their duty of care by taking care to engage suitable and competent service providers.

Quantum

Largest ever Irish personal injury settlement: Cullen Kennedy v Margaret Kennedy and the Motor Insurers Bureau of Ireland - Irish High Court (2012)

The Irish High Court has approved the highest ever award of damages to an injured claimant. Cullen Kennedy (now 10 years of age) will receive €11.5 million from the Motor Insurers Bureau of Ireland after being left quadriplegic and dependant on a ventilator following a road traffic accident in 2008.

Comment: This tragic case is an example of the very high financial cost of catastrophic injury. This is an Irish case but in the jurisdiction of England and Wales, some young quadriplegics are receiving even larger awards, worth in excess of £10 million (€12 million, at current rate of exchange).

Completed 25 April 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).

Disclaimer

This publication has been produced by QBE Insurance (Europe) Ltd ("QIEL"). QIEL is a company member of the QBE Insurance Group.

Readership of this publication does not create an insurer-client, or other business or legal relationship.

This publication provides information about the law to help you to understand and manage risk within your organisation. Legal information is not the same as legal advice. This publication does not purport to provide a definitive statement of the law and is not intended to replace, nor may it be relied upon as a substitute for, specific legal or other professional advice.

QIEL has acted in good faith to provide an accurate publication. However, QIEL and the QBE Group do not make any warranties or representations of any kind about the contents of this publication, the accuracy or timeliness of its contents, or the information or explanations given.

QIEL and the QBE Group do not have any duty to you, whether in contract, tort, under statute or otherwise with respect to or in connection with this publication or the information contained within it.

QIEL and the QBE Group have no obligation to update this report or any information contained within it.

To the fullest extent permitted by law, QIEL and the QBE Group disclaim any responsibility or liability for any loss or damage suffered or cost incurred by you or by any other person arising out of or in connection with you or any other person's reliance on this publication or on the information contained within it and for any omissions or inaccuracies.

QBE Insurance (Europe) Limited and QBE Underwriting Limited are authorised and regulated by the Financial Services Authority. QBE Management Services (UK) Limited and QBE Underwriting Services (UK) Limited are both Appointed Representatives of QBE Insurance (Europe) Limited and QBE Underwriting Limited.

QBE European Operations

Plantation Place
30 Fenchurch Street
London
EC3M 3BD

tel +44 (0)20 7105 4000
fax +44 (0)20 7105 4019

enquiries@uk.qbe.com
www.QBEeurope.com

3710/TECHNICALCLAIMSBRIEF/MAY2012