Technical claims brief

Monthly update – October 2012

QBE

Contents

News 1

Court of Appeal to review decision on damages increase 1

Police officially recognise "Mandate Fraud" as new crime 2

US "Popcorn Lung" sufferer wins $7.2 million 3

More claimants suing their solicitors 3

Costs 4

Court of Appeal departs from normal Part 36 Rules: SG v Hewett – Court of Appeal 4

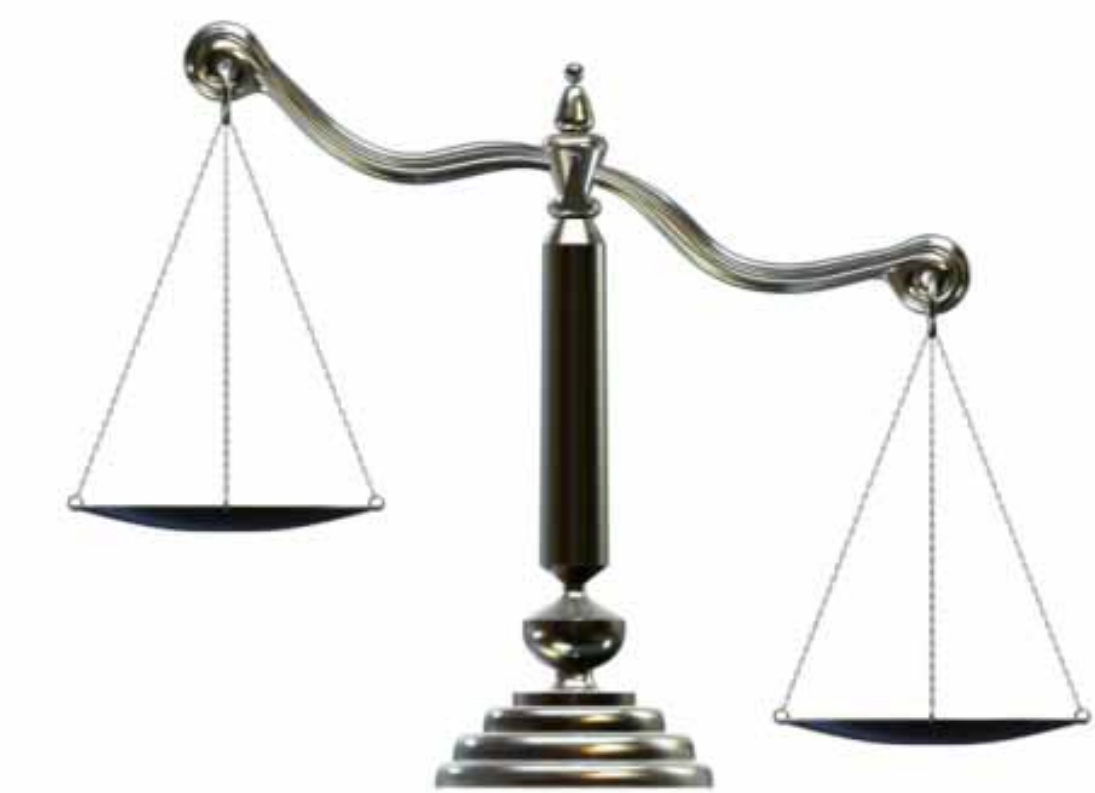
Liability 5

Motor insurers must compensate injured passengers who have permitted uninsured driving: Churchill Insurance Co Ltd v Wilkinson and Evans v Equity Claims Ltd – Court of Appeal 2012 5

Outdoor pursuits company not liable for "Welly-Wanging" Accident: Glenroy Blair-Ford v CRS Adventures Ltd – High Court (2012)2 6

Disclaimer 7

QBE



News

Court of Appeal to review decision on damages increase

In the August 2012 edition of the Brief we reported on the Court of Appeal announcement in the case of ***Simmons v Castle*** that a ten percent increase in general damages will apply to all cases heard in England and Wales where judgment is given on or after 1 April 2013.

Following intervention from the Association of British Insurers (ABI), the Court of Appeal agreed to re-open the case and on 25 September 2012 heard an application from the ABI, that the ruling should be amended to exclude cases where Conditional Fee Agreements have been entered into prior to 1 April.

This would prevent claimants from benefiting from both success fees under the pre-Jackson regime and the damages increase intended to recompense claimants for the loss of these same fees. Judgment is expected imminently.

Comment: Defendants fear that unless the judgment is amended claimants will either press for enhanced damages now or simply delay settlement.

Police officially recognise “Mandate Fraud” as new crime

A simple but very effective new type of fraud is reported by Channel 4 News to be earning UK criminals more than £150 million a year. Fraudsters contact public bodies and private companies pretending to be from one of their suppliers and tell them that their bank details have changed. Funds are then paid into the fraudsters’ bank accounts and by the time that the fraud is discovered the money has often disappeared into various untraceable accounts. This new type of fraud has been christened “mandate fraud” by police.

Public bodies such as NHS trusts and local authorities, which are required by Government transparency rules to publish details of their spending on-line, are said to have been particularly vulnerable but are now introducing stricter security measures such as identification codes.

Comment: Another worrying example of the importance of fraud awareness.

US “Popcorn Lung” sufferer wins $7.2 million

Reuters and the BBC have reported the case of Wayne Watson who was awarded $7.2 million (£4.4 million) after successfully suing a Popcorn manufacturer and a supermarket. The defendants had failed to put labels on bags of popcorn warning that fumes from the bags were potentially dangerous to inhale.

Mr Watson suffers from a form of irreversible obstructive lung disease known as “popcorn lung” which he claimed resulted from years of eating popcorn and inadvertently inhaling diacetyl contained in the flavouring. The defendants argued that Mr Watson’s condition was caused by working with carpet-cleaning chemicals but a Colorado jury rejected this argument, finding the defendant manufacturers and supermarket 80% and 20% liable respectively.

Comment: There are several hundred reported claims in the USA from plaintiffs who inhaled diacetyl whilst working in popcorn manufacture but this appears to be the first reported claim from a consumer.

The first reported UK claim for diacetyl exposure is from a Mr Martin Muir who has started proceedings against his former employer, Firmenich. Mr Muir alleges that exposure to the chemical whilst using a mix of food flavourings known as “base veg” has significantly reduced his lung capacity.

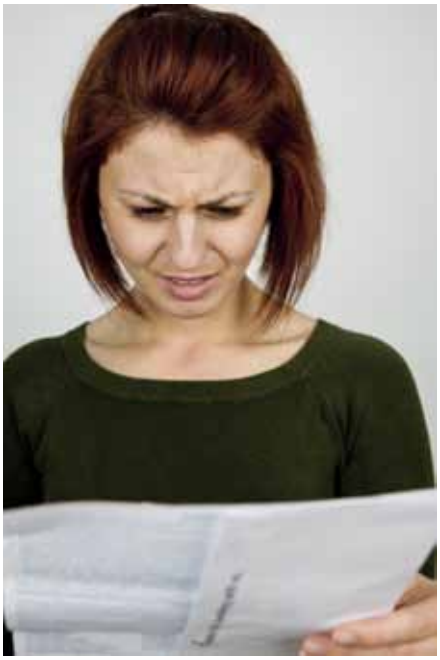
More claimants suing their solicitors

The Law Society Gazette has reported that an increasing number of personal injury solicitors are being sued for negligence by their clients. The article cites a number of examples of claimants having been advised to settle their original claims for a fraction of their true value.

Professional negligence lawyers are reported as saying that a reliance on under-qualified staff, a lack of face-to face contact with clients and failure to understand medical reports are all factors in this trend.

Other commentators have blamed the “breathtaking pace” at which some personal injury claims were handled was leading to lawyers missing pertinent data.

Comment: A much more common problem for insurers is tackling exaggerated claims and the over compensation of claimants. Over compensated claimants are of course unlikely to want to sue their lawyers!



Costs

Court of Appeal departs from normal Part 36 Rules: SG v Hewett – Court of Appeal

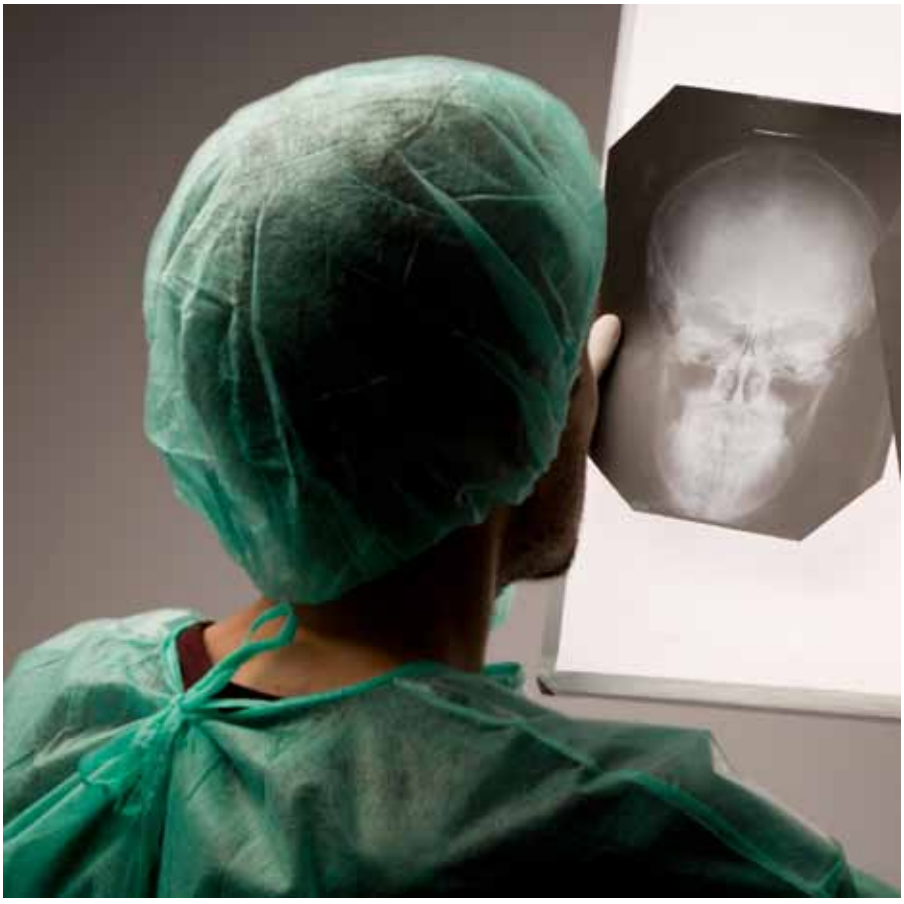
The claimant was a six-year-old child who suffered severe facial scarring and frontal lobe brain damage in a road traffic accident. It was difficult for the medical experts instructed in the case to predict with any certainty how the claimant would develop; frontal lobe problems do not normally become obvious until adolescence.

The defendants made a Part 36 offer six years later. The claimant's solicitors felt unable to advise their client to accept the offer at that time, as they believed that the prognosis was still too unclear. Two years later following further investigation, the offer was accepted.

At first instance ***(see March 2012 Brief),*** the Court ordered that the normal costs consequences of Part 36 should apply. The defendant would pay the claimant's costs up until the 21-day expiry period of the Pat 36 offer and the claimant would pay the defendant's costs thereafter.

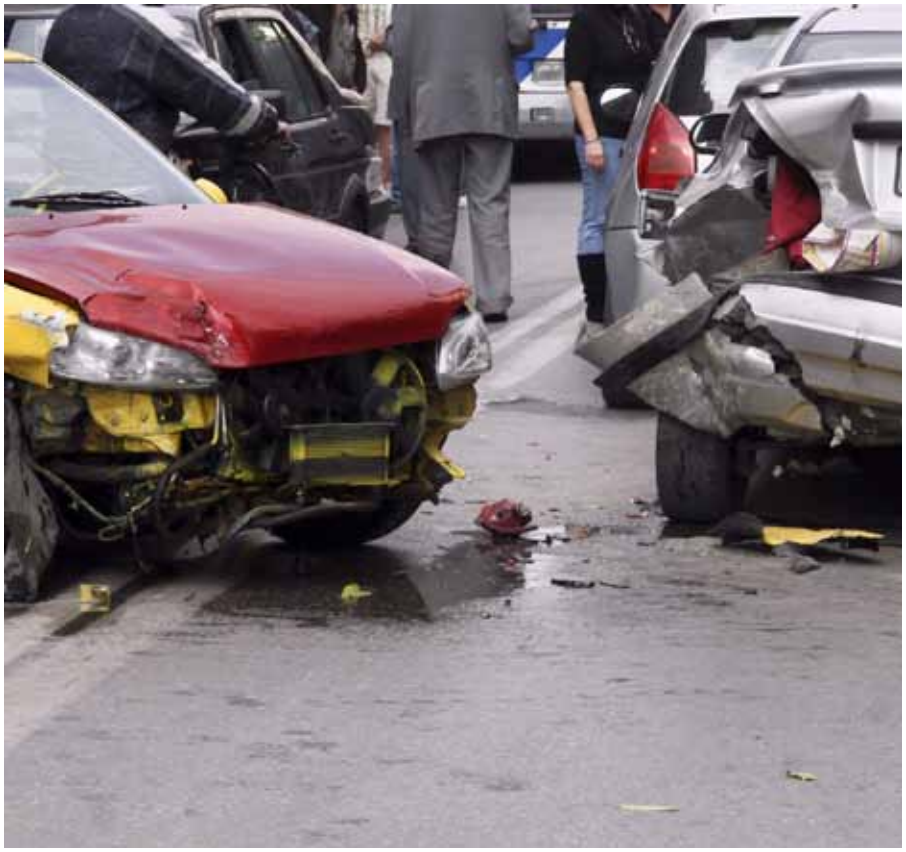
The claimant successfully appealed to the Court of Appeal who ordered that the Defendants should pay all the costs. The Court had the power under the Civil Procedure Rules (CPR) 36.14 to depart from the normal order if they considered it unjust in the particular circumstances of the case.

In this case, the claimant's solicitors had not acted unreasonably. They were in a difficult position. Even had they advised acceptance of the offer within the 21-day acceptance period it was unlikely that a judge would have approved the settlement given the uncertainty over the prognosis.



The extra costs incurred after the 21 day period were all incurred investigating the offer and gathering medical evidence to obtain court approval of the settlement.

Comment: Decisions in costs cases depend on the precise circumstances of the case. This case is a reminder that the Courts have considerable powers under the CPR to depart from the usual Part 36 rule. Part 36 offers however remain a potent negotiating tool and must as in this case, be carefully considered by a claimant's solicitors.



Liability

Motor insurers must compensate injured passengers who have permitted uninsured driving: Churchill Insurance Co Ltd v Wilkinson and Evans v Equity Claims Ltd – Court of Appeal 2012

The insurers of vehicles driven by uninsured motorists in accidents are obliged to meet any unsatisfied judgments obtained by injured passengers under the ***Road Traffic Act (RTA)***. Under section 151(8) of the Act, however they have a right of recovery against their policyholder if they have caused or permitted the use of the vehicle by the uninsured driver.

Where the policyholder who has permitted the uninsured driving is themselves injured as a passenger, insurers have in the past defended claims on the basis of circuitry of action i.e. they should not have to pay damages to someone from whom they are immediately entitled to recover them.

This is however, at odds with a ***European Directive 2009/103*** requiring that insurers must not exclude vehicles from cover because they have drivers unauthorised by the insurers.

In the January 2012 Brief we reported on the above two cases referred by the Court of Appeal to the European Court of Justice (ECJ) for guidance. The ECJ ruled that the European Directive permitted no national rules that prevented an insurer from compensating injured passengers and referred them back to the Court of Appeal.

It was common ground between the parties that the RTA could be interpreted to comply with the Directive with the addition of some additional wording. The Court of Appeal rejected the wording proposed by the claimants, preferring the wording suggested by the insurers.

The new wording added to the section on entitlement to recovery is:

"...save that, where the person injured by the policy may be entitled to the benefit of any judgment to which this section refers, any recovery by the insurer in respect of that judgment must be proportionate and determined on the basis of the circumstances of the case."

Comment: Insurers will no longer be able to use the circuitry of action defence but will still have a right of recovery in all cases where their policyholder permitted unauthorised drivers to use their vehicle. The right of recovery will not however be absolute in cases where the policyholder is also an injured passenger.

How this will work in practice will only become clear as the courts rule on new cases but it seems unlikely that insurers will be permitted to make any substantial recoveries from seriously injured passengers' damages.

Our thanks go to Plexus Law for their helpful note on these cases.

Outdoor pursuits company not liable for "Welly-Wanging" Accident: Glenroy Blair-Ford v CRS Adventures Ltd – High Court (2012)2

The unfortunate claimant was a teacher participating in a wellington boot throwing competition when he fell and damaged his spine. The competition known as "welly-wanging" was part of a "mini-Olympics" organised by the defendants on an outdoor activity trip. Pupils competed against teachers with the latter asked to throw backwards between their legs in an effort to make it a more even contest.

When the claimant threw his boot, he toppled forwards, striking his head on the ground severing his spinal column and suffering permanent tetraplegia. He sought £5 million in damages from the defendants arguing that had they carried out a risk assessment a safer method of throwing would have been advised and that his injuries were a foreseeable consequence of the activity.

The judge rejected this, finding that the absence of a formal risk assessment for the event was not decisive and that the dynamic risk assessment of the "mini Olympics" (i.e. as the events took place) was acceptable given that there was "no foreseeable real risk".

There was good evidence that many previous "welly-wanging" events had passed off without incident and whilst the judge expressed his sympathy for the claimant's terrible injury he could not make a finding of liability on the defendant for what was a freak accident.

Comment: The Courts remain reluctant to find the organisers of events of social value liable for participants injuries especially where as in this case, the defendants enjoyed an excellent safety record with no previous incidents of this nature having occurred.

Completed 28 September 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

4009/TECHNICALCLAIMSBRIEF/OCTOBER2012