Technical claims brief

Monthly update – January 2013

QBE

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News

UK Government consultation on Whiplash claims begins

A Government consultation aimed at finding ways of bringing down the number and cost of whiplash claims in England and Wales was launched on 11 December 2012 and will run until 8 March 2013.

The consultation proposes the creation of new independent medical panels specially trained to recognise exaggerated or entirely fraudulent claims and an extension of the Small Claims Track to allow more claims to be dealt with in a forum where it would be economically viable to challenge fraud.

Comment: Any reform in this area is likely to be controversial. The Shadow Justice Minister has already criticised the proposals as ignoring root causes of the problems such as the behaviour of claims management companies.

It seems unlikely that any change will be implemented in April 2013, when the Ministry of Justice Claims Portal is extended and Lord Justice Jackson's costs reforms come into effect, as the closing date for the consultation is too close.

Full details of the consultation may be viewed at:

https://consult.justice.gov.uk/digital-communications/reducing-number-cost-whiplash

Fraud

QBE foils half million pound fraud: Roberts v Airbus – High Court (2012)

The claimant Roberts sought more than £500,000 in damages from his employers Airbus, insured by QBE. Roberts alleged that a slipping accident at work had left him severely disabled. He claimed that not only was he unable to work but that he was now dependent on his wife to help dress and care for him.

Surveillance evidence of the claimant painted a somewhat different picture. The court was shown video footage of Roberts working hard and cheerfully, renovating a house. At one point, he was seen lifting a bath and later throwing a roll of carpet into a skip. Despite telling the court that he suffered severe pain on any physical activity, the claimant was filmed laughing, whistling and even skipping whilst working.

Lord Justice Moore-Bick was not amused and sentenced Mr Roberts to a six-month custodial sentence for contempt of court.

Comment: Insurance fraud is not a victimless crime. Fraud drives up the cost of insurance which adds to business overheads and has a chilling effect on the economy. The High Court has sent a clear message that blatant fraudsters can expect to go to jail.

Procedure

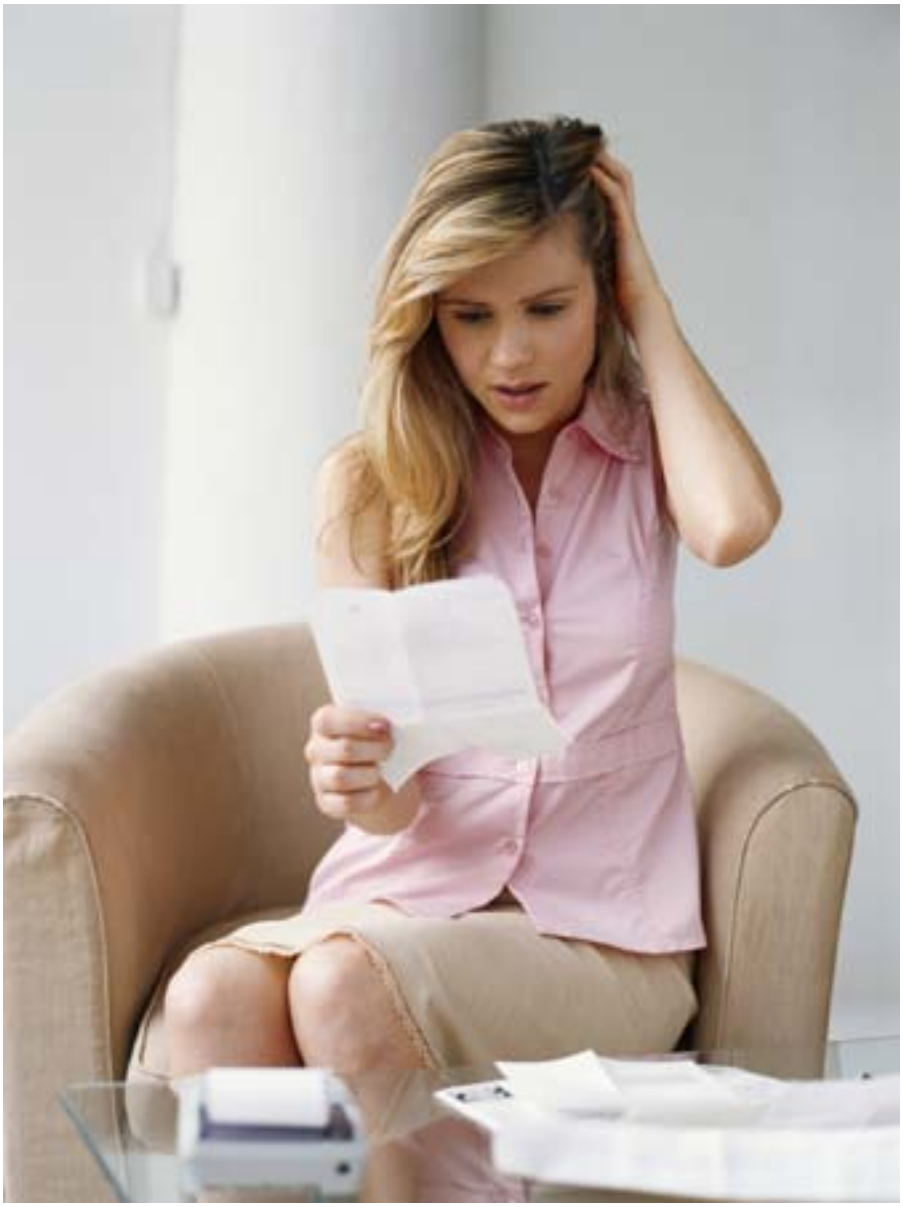
Agreed settlement invalid for protected party: Dunhill (By her litigation friend ...) v Burgin – Court of Appeal (2012)

The claimant suffered a severe brain injury when she was knocked down by the defendant's motorcycle. The claim settled at the door of the court for only £12,500. The settlement was not approved by the court.

The claimant was psychologically vulnerable and the brain injury had caused her to develop cognitive, emotional and psychiatric symptoms. No one at the time had thought to check whether the claimant had the mental capacity to deal with the litigation and agree the settlement.

The claimant's advisors subsequently applied to have the settlement set aside on the basis that she had been incapable of managing her affairs at the time. They argued that her claim was properly worth in excess of £2 million, the defendant conceded that it was worth at least £800,000. As a preliminary issue the court held that the test for whether the settlement should be set aside was one of whether the claimant had capacity to deal with the decisions that had arisen, not to look at what decisions might have been required of her had the case been handled differently.

The claimant's advisors successfully appealed to the Court of Appeal (CA). The CA held that the test was a broad one of whether the claimant had capacity to manage the litigation as a whole. She should have been provided with a litigation friend and if that had been done, the case would have had a very different outcome.



The claimant did not have the capacity to understand what she was giving up by agreeing to the settlement.

Comment: As a matter of public policy, the courts are committed to protecting the vulnerable. Where a defendant suspects that, a claimant lacks litigation capacity they should be aware that any compromise settlement might later be declared invalid unless it is approved by the court.

Comment: It is not often that we are able to report on a successful limitation defence. The Court of Appeal have confirmed that the test set out by the House of Lords in Bracknell Forest Council v Adams remains and for reasons of public policy is a demanding one.

Limitation defence successful: Johnson v Ministry of Defence and Hobourn Eaton Ltd – Court of Appeal (2012)

The claimant had been exposed to very high noise levels whilst working for both defendants during the 1960s and 1970s. He became aware of hearing loss in 2001 but did not consult his GP until 2006 when he asked his doctor to check for excess earwax. His GP told him that his ears were clear of wax and was probably suffering age-related hearing loss (he was 66).

In 2007, the claimant was approached by representatives of an accident management company who were canvassing shoppers in the car park of a local supermarket. He was told he might have a claim against his former employers and was referred to an Ear Nose and Throat surgeon who in 2009 diagnosed severe deafness, partly caused by excessive noise. The claimant brought proceedings in 2010.

At first instance, the judge found that the claim was statute barred. The claimant knew that he had worked in very noisy work places, which could cause hearing loss and by 2001 was experiencing this. The claimant therefore had actual knowledge of his injury more than three years before he commenced proceedings.

The claimant appealed arguing that he could not have had actual knowledge of his noise induced hearing loss prior to any expert diagnosis.

The Court of Appeal agreed that the claimant did not have actual knowledge in 2001 but the correct test was one of ***constructive*** knowledge. A reasonable man in the 21st Century would have been curious about the early onset of deafness in 2001. Had he asked his GP about the cause of deafness as an open question in 2001, his GP would have enquired about his work history and diagnosed noise induced hearing loss by 2002. On that basis, the claim was statute barred by limitation.

Police protection against liability in negligence upheld: Michael and Others v The Chief Constable of South Wales Police and the Chief Constable of Gwent – Court of Appeal (2012)

The estate of Ms Joanne Michael brought an action against two police forces for negligence at common law and breach of European human rights legislation, after Ms Michael was stabbed to death by a former partner.

Ms Michael had dialled '999' after being assaulted and seeing her friend abducted by her former partner who had a history of violently abusing her. Ms Michael's call was initially picked up by the Gwent police who passed the details onto the South Wales police control room. Ms Michael had told the Gwent police operator that her former partner had threatened to return and kill her. Unfortunately, due to some sort of misunderstanding, this information was not passed on and the priority of Ms Michael's call was downgraded from 'immediate response' (i.e. within five minutes) to a lower priority. This allowed Ms Michael's former partner time to return and murder her before police arrived.

The two Chief Constables admitted to serious failings in their handling of the 999 call but applied to have the claim struck out on the basis of no reasonable cause of action in law. They failed at first instance and appealed.

The Court of Appeal followed the authority in ***Hill v Chief Constable of West Yorkshire*** and struck out the negligence claim. No negligence action can be brought against the police in respect of

any failure relating to the investigation or suppression of crime.

The claim under the breach of Article 2 of the ***European Convention on Human Rights*** (ECHR) the right to life, could not however be struck out on the grounds that it was not actionable. A critical feature was what a judge would rule on how the 999 call was handled. There was an arguable case for a breach and this should be determined at a trial.

Comment: The courts have refrained from imposing any duty of care on the police with regards the investigation and suppression of crime. There is never any guarantee of success in this and the police could be inundated with proceedings if they were not protected from negligence actions. The position with regards to breach of Article 2 of the ECHR remains unclear and will do so until such time the UK Supreme Court gives some guidance on the issue.

Quantum

High Court rejects discount rate challenge: Harries (A Child ...) v Stevenson – High Court (2012)

As previously reported in the ***Brief*** the issue of the appropriate level of the discount rate (used to discount the value of lump sum settlements for future loss claims to allow for investment return) has not gone away. One Government consultation on the methodology of setting the rate has concluded and another on the legal framework is overdue ***(see September 2012 Brief)***. In the meantime, claimants who believe they would be left seriously out of pocket by the application of the current rate continue to apply to the courts to vary it.

In this case, the claimant was a very seriously injured minor with an uncertain life expectancy who wanted a Periodical Payment Order (PPO). Unfortunately, the defendant's insurers the Medical Defence Union were unable to provide the necessary level of security of payment.

The claimant's legal team contended that a lump sum settlement calculated using the current 2.5% discount rate would leave the claimant some £2 million out of pocket and asked that the court as a preliminary issue consider applying a different rate.

The court held that the claimant did not have an arguable case. Section 1(2) of the ***Damages Act 1996*** permitted a departure from the prescribed rate but the claimant must first establish that the claim was one which was either in a category not considered by the Lord Chancellor or had special features which were material to the rate and which the Lord Chancellor had not taken into account.

The fact of the claimant being unable to obtain a PPO because of the status of the defendant or their insurers did not make this a category of case that the Lord Chancellor would not have considered when he set the rate.

Comment: The Government appears to be in no hurry to commence a review of the discount rate. Any reduction in the rate would lead to greatly increased lump sum settlement awards and as a major compensator itself, the Government would face considerable extra cost. In the meantime, the courts appear to be equally unenthusiastic about varying the rate in individual cases.

Completed 21 December 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).

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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

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