Technical claims brief

Monthly update – March 2011

QBE

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News

First Corporate Manslaughter conviction secured

Cotswold Geotechnical Holdings has become the first company to be convicted of the offence of Corporate Manslaughter and have been fined £385,000. The company were prosecuted following the death of a 27 year old geologist who was killed in September of 2008 when a trench he was inspecting collapsed on him.

Other charges brought against the managing director of the company Peter Eaton, as an individual, including gross negligence manslaughter, did not proceed due to his ill health. Cotswolds' solicitors had previously raised concerns about a fair trial for the Corporate Manslaughter offence given Mr Eaton's poor health and difficulties with giving evidence. An appeal is pending.

Comment: Cotswold's lawyers have questioned the public benefit of prosecuting such a small company which at the time of the accident had only eight employees and an annual turnover of just £350,000. They argued that the Corporate Manslaughter Act was intended to punish health and safety breaches made by large corporations where the prosecution of individuals has historically been frustrated by the inability to identify a "controlling mind".

Supporters of the Act had hoped that a speedy resolution of this case might have encouraged the police and Crown Prosecution Service to bring more cases to trial. This remains the only prosecution to date however and the effectiveness of the Act in a case involving a large corporation has yet to be tested.

Battle lines drawn as Ministry of Justice consultation on Jackson Reforms draws to a close

The Ministry of Justice (MOJ) consultation on Lord Jackson's report on civil litigation funding in England and Wales closed on 14 February. Insurers and defendant solicitors have strongly supported Lord Jackson's proposed reforms as a means of reducing the disproportionate costs of civil litigation and creating a more equitable balance between claimants and defendants.

Claimant solicitors and others voicing concerns about claimants' access to justice have opposed the reforms just as strongly. The Access to Justice Action Group (AJAG) co-ordinated by former MP Andrew Dismore says that 77% of claimants would be "scared off" from litigation if the reforms are implemented. AJAG says that it has lobbied more than 426 MPs in an effort to ensure that any reforms maintain claimants' access to justice.

Lord Jackson himself has countered that 60% of claimants would be better off if his proposals are introduced and that the current system of funding based around Conditional Fee Agreements is disproportionately expensive for both defendants and tax payers.

The Government still appears to be keen to implement reform with under Secretary of State for Justice, Jonathan Djanogly, saying that they wished to see the consultation quickly concluded so that legislation could proceed.

A second consultation is now planned on the extension of the MOJ's process for handling low value motor injury claims to other classes of injury claim, timelines and response protocols. The consultation was due to start in March but according to an

MOJ spokesman the start date will be put back until an unspecified date in the spring of 2011. The consultation is planned to run for three months.

Comment: whilst the Government currently appears enthusiastic about implementing Lord Jackson's proposed reforms opponents have been lobbying hard against them and may yet win major concessions.

The president of the Association of Personal Injury Lawyers (APIL) has said that the new claims process for low value personal injury claims has effectively already addressed many of the issues raised by Lord Jackson and has called on the government to give the new process a chance to fully develop before implementing any major funding reform.

First QBE case heard under New Claims process

The reformed process for dealing with low value personal injury road traffic accident claims was launched by the Ministry of Justice (MOJ) on 30 April 2010. To date there have been relatively few claims reaching a hearing at stage 3 arguably a sign of the new scheme's success.

In the first QBE case ***McGrotty v Northwest Ambulance*** the claimant was awarded £2,735 in damages. This was less than QBE's stage 2 offer. The claimant was awarded £1,011 in respect of disbursements and interest and ordered to pay the defendant's stage 3 costs of £600.

Comment: the costs involved in the new process are lower than those typically seen in cases outside of the process, especially where a hearing has taken place. Judges also appear to be awarding damages at the lower end of the damages brackets.

The Government have proposed extending the scheme to all other types of injury claim of £1,000 to £10,000 in value by April 2012 but the MOJ has expressed concerns about the practicality of such an early implementation date.

55th update to Civil Procedure Rules amends disease protocol

The 55th update of the Civil Procedure Rules (CPR) comes into effect on 6 April 2011. Amongst other things the amendments make important changes to the pre-action protocol for disease and illness claims. The Ministry of Justice says that the changes are intended to speed the flow of information and documentation between the parties to enable earlier decisions to be made on liability and speed up pre-action compensation payments especially in asbestos related disease cases.

Under the amended protocol claimants are required to provide full details of any After the Event (ATE) insurance to defendants, "relevant records" which is now defined to include GP and hospital notes, a work history from Her Majesty's Revenue and Customs and details of any searches for other employers made using the Employers Liability Tracing Service.

Full details of the 55th update can be seen at www.justice.gov.uk/civil/procrules_fin/

Permission to appeal granted on whether Injury Damages should be part of Divorce Settlement

The ***Daily Mail*** has reported on the case of an amputee with spinal damage who is appealing a divorce settlement where he was ordered to pay £285,000 (equivalent to more than half the damages he was awarded) to his ex-wife. Kevin Mansfield was awarded £500,000 after he was struck by a car in 1992. He is not in employment and lives off his damages but the judge dealing with his divorce ruled that the money remaining was an asset of the marriage. Mr Mansfield says that he would be obliged to sell his specially adapted home if the award stands.

The Court of Appeal has granted permission for an appeal but has warned the couple that they will face very large legal costs if the case proceeds to a hearing and would be better off settling their differences by mediation.

Comment: this is an unusual case raising an important point of principle as to how damages are to be regarded in divorce proceedings. If the Court of Appeal does rule on this issue and finds that damages are an asset of a marriage claimants may seek to protect their position by putting damages in trust and/or by seeking additional compensation.

Costs

Interest not payable on costs where claimant has funding: Gray v Toner – Liverpool County Court (2011)

The defendants challenged a first instance decision where they were ordered to pay interest at 8% from the date of judgment. They argued that the claimant who was funding the action by way of a Conditional Fee Agreement (CFA) had not paid any costs or incurred any funding charges and was not therefore out of pocket.

The costs judge agreed with the defendants holding that the primary purpose of interest on costs was to compensate a party for being "kept out of their money" and this was not the case here. Interest should only run from the date of assessment of costs.

Comment: interest on costs in high value cases can quickly reach significant levels between judgment and assessment and so this is a welcome decision for defendants. An appeal is planned but HHJ Stewart is a highly respected senior costs judge who has never previously been overturned by the Court of Appeal.

The decision will not however prevent claimants from applying for interim costs payments or from claiming interest where an interim payment is specified in an order.

Solicitors should not add VAT to the cost of Medical Reports and Records: Barratt Goff and Tomlinson v Her Majesty's Revenue and Customs - First-tier Tax Chamber (2011)

The tax court has ruled that there is no obligation on the part of solicitors to add VAT to their disbursements for medical reports fee and medical records. They cannot therefore reasonably include it in their costs unless it is added at source by a VAT registered expert.

Comment: the decision is good news for defendants who will not now be faced with the burden of additional VAT on claimants' costs. Where VAT has been added by a solicitor but does not appear on the original invoice then this case should be cited to challenge it.

Credit hire

Failure to investigate market rates is failure to mitigate loss: Bent v Highways and Utilities Construction plc and Allianz - Cambridge County Court (2011)

Professional footballer Darren Bent hired an Aston Martin DB9 after his own car was damaged by the first defendant's vehicle. Bent was well able to afford hire charges but took the option to use credit hire at a rate of £573.28 plus VAT per day which he then sought to recover through the court.

At first instance the judge held that the full credit hire rate should be allowed on the basis that the evidence produced by the defendants on market rates for hiring a similar car was inadequate. The defendants successfully appealed to the Court of Appeal (see April 2010 Brief) who held that a claimant with funds enough not to have to rely on credit hire was only entitled to recover a reasonable market rate (referred to as "spot hire" rates) and that evidence of these rates did not have to be for exactly the same model of car or obtained for exactly the same time as the hire period.

Having ruled on these issues, the Court of Appeal remitted the case back to Cambridge County Court for re-trial where the judge duly made a reduced award based on spot hire rates equivalent to 69% of the rate claimed, roughly £20,000 less.

Comment: the judgment confirms the principle that a claimant who has sufficient funds to be able to pay car hire charges should shop around for a reasonable rate. Opting for credit hire without any enquiry amounts to a failure to mitigate and the courts will award only a reasonable market rate rather than the full rate charged.

Thanks go to Berryman Lace Mawer solicitors who acted for the defendants for their helpful note on this case.

Fraud

Fraudsters referred to Director of Public Prosecutions: Ayub v Reynolds Transport - Birmingham County Court (2011)

The defendant's van (insured by QBE) crashed into the rear of the claimant's minibus. The defendant's driver admitted to driving too close to the rear of the claimant's vehicle but maintained that the claimant had deliberately braked much more quickly than was necessary (possibly acting in concert with another driver) and had caused the accident.

The claimant alleged that his wife and daughter were in his minibus and suffered injury. They made claims for injury but did not pursue these to trial when their presence in the vehicle was challenged.

At trial, the judge concluded that the claimant had deliberately caused the accident by unnecessarily applying his brakes and that the claimant's wife and daughter were not in the minibus and had only claimed to be in it so that they could make fraudulent claims.

The claim was struck out. The claimant was ordered to return an interim payment and pay £5,000 for the defendant's costs. In addition the case was referred to the Director of Public Prosecutions in light of the findings of fraud.

> *"....I am satisfied that he (the claimant) used the opportunity on the road whilst driving slowly to put on his brakes unnecessarily knowing that Mr Preece (defendant's driver) had got to a position where he was too close to be able to stop his vehicle should he (the claimant) apply his brakes too fast and in my judgment that is precisely what he did. He caused this accident;"*
>
> *His Honour Judge Simon Brown QC*

Comment: Congratulations to the QBE claims handler Zoe Leete who instructed solicitors to defend the claim. What is particularly pleasing in this case is that not only did the judge penalise the claimant in costs but also referred the case for criminal prosecution, something that many judges are unwilling to do.

Plaintiff awarded Aggravated Damages when defendants failed to prove fraud: Lizanowicz v Hollingsworth Cycles Ltd – Irish High Court

The plaintiff alleged that he had been injured after faulty repairs carried out by the defendants caused him to be thrown from his mountain bike. The defendants alleged that the incident was fabricated.

The judge found for the plaintiff awarding damages of €41,000 in respect of the injuries sustained and a further €7,000 by way of aggravated damages for the serious allegations made by the defendants which they had failed to prove.

Comment: whilst an award of aggravated or exemplary damages in UK jurisdictions would be highly unusual, stiff costs penalties are often imposed if fraud is alleged but not proven. If it is possible to challenge the circumstances of an alleged accident without an express fraud allegation this is often a better option.

Liability

Does Risk outweigh Social Value? Uren v Corporate Leisure and Ministry of Defence - Court of Appeal (2011)

The claimant was participating in an "it's a knockout" style race which was one of the activities in a health and fun day arranged by his employers the RAF. Unfortunately he broke his neck after diving head first into a shallow inflatable pool and striking his head. He was rendered tetraplegic. The claimant sought damages from the company that supplied the equipment and supervised the activities and from the Ministry of Defence (MOD) as his employers.

The claimant argued that the defendants had failed to carry out suitable and sufficient risk assessments and that had they done so they would have been alerted to the danger and either banned diving form the start or when they observed competitors doing it during the race.

At first instance ***(see March 2010 Brief)*** the Judge held that whilst the risk assessments were inadequate and that the employer's duty to undertake them was non-delegable, the risks involved in the game were low and outweighed by the social benefits it provided. Neither defendant was held to be in breach of duty.

The claimant appealed arguing that the games organised by Corporate Leisure (CL) were unsafe and would pose a danger to other participants if the appeal was not allowed. The MOD cross appealed against the finding that its risk assessment was inadequate and that it could not rely on the risk assessment carried out by CL.

The Court of Appeal agreed with the Judge at first instance that the MOD's duty to undertake a risk-assessment was non-delegable. A thorough risk assessment

carried out by a contractor might be suitable and sufficient but this would be a question of fact in each individual case. The assessment carried out by CL was on the facts neither suitable nor sufficient and the MOD could not rely on it. In this case the two defendants had failed to even confer on assessments.

> *"I wish to make it plain that, if I had been satisfied that the judge's conclusion as to the low level of risk entailed, I would not have interfered with the way in which he balanced that risk against the social benefits of the activity.*
>
> *.....I accept that he did not make any error of approach. However, if the judge's conclusion on the degree of risk is unsound, the balancing exercise is affected and the final conclusion must be set aside."*
> *Lady Justice Smith*

With regard to whether the social benefits of the activity outweighed the risk involved, the judge at first instance had not erred in his approach in balancing risk against benefit. The Court of Appeal however was unable to support the judge's finding that the risks of the game were low. There had been insufficient analysis of the expert evidence, eye witness evidence had been disregarded and it was unclear how statistics quoted by CL's expert had been taken into account. In the circumstances the court of Appeal could not say whether the judge's decision was sound or not.

The appeal was allowed and the case remitted back to the High Court for retrial on the issue of whether the degree of risk was justified by the social value of the game.

Comment: this is the second Court of Appeal judgment in recent weeks dealing with physical recreation activities in which judgment in favour of the defendants has been overturned. In Scout Association v Barnes the Court of Appeal (see February Brief) whilst expressing approval for scouting activities generally found that on the facts of the case the risk outweighed the benefits and gave judgment in favour of the claimant. Whether this is the start of a trend in favour of claimants on this issue will only become clear as further judgments are handed down.

Completed 25 February – 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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