Technical claims brief

Monthly update – February 2010

QBE

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News

Lord Justice Jackson's Final Report calls for major costs reforms

In November 2008 the Master of the Rolls appointed L J Jackson to carry out a major review of the rules and principles governing the costs of civil litigation and to make recommendations as to how to promote access to justice at proportionate cost.

Having consulted widely on this issue with solicitors, insurers, the judiciary and other interested parties L J Jackson has now published his final report which makes major recommendations for reform. Some of the key recommendations are summarised below:

- Conditional fee agreements (CFAs) have been a major contributor to disproportionate costs since success fees became recoverable. Success fees should no longer be recoverable from defendants

- Claimants should still be permitted to enter into CFAs with solicitors but any success fee should be borne by them, not the defendant

- To preserve adequate compensation (following the loss of the ability to recover success fees from the defendant) awards of general damages for pain, suffering and loss of amenity should be increased by 10%

- The maximum amount that solicitors may deduct for success fees should be capped at 25% of the damages (excluding future losses). In the majority of cases this should leave claimants no worse off than they are under the current regime

- Some solicitors pay referral fees to management companies to 'buy' cases. Referral fees add to the cost of litigation, without adding any real value to the litigation process. Solicitors should not be permitted to pay referral fees in respect of personal injury cases

- After the event (ATE) insurance premiums add considerably to the cost of litigation. They should cease to be recoverable from the losing party in litigation

"***The measures the report proposes will ensure that legal costs are reduced and that civil justice will be more efficient and fairer.***

The time for discussion and debate is over it is now time for action. I hope that the Ministry of Justice will give these proposals the same enthusiastic and practical support which the Judges will give them".

Lord Neuberger, Master of the Rolls

- The need for ATE insurance could be removed by introducing qualified one way costs shifting. “One way” would mean that a successful defendant would be unable to recover their costs from the unsuccessful claimant but a successful claimant would be able to recover their costs from an unsuccessful defendant. This arrangement would be “qualified” by the courts retaining the power to impose a different costs order where a party’s conduct is unreasonable (or their relative resources justify it)

- Costs should be fixed in all fast track cases (i.e. claims up to a value of £25,000 with a one day trial estimate). This would give the parties certainty as to their costs recovery if successful and costs exposure if unsuccessful. It should also remove potentially expensive costs disputes

- The availability of before the event (BTE) insurance should be publicised and used more widely

- Contingency fees (where a solicitor is paid as a percentage of damages awarded) should become lawful in personal injury cases. Making alternative methods of funding available to claimants should increase access to justice

- The early settlement of personal injury claims for “acceptable amounts” could be encouraged by the production of a transparent and “neutral” calibration of existing software systems used by insurers to calculate damages. A working group comprising claimant and defendant representatives, the judiciary and other interested parties should be set up to take this matter forward

- The current provisions of CPR Part 36 do not go far enough in terms of incentivising claimants to make settlement offers or defendants to accept them. Where a defendant fails to beat a claimant’s offer the claimant’s damages should be enhanced by 10%.

The Master of the Rolls has welcomed the report and has called on the Ministry of Justice to give the report’s proposals “enthusiastic and practical support”.

The full report can be viewed on the judicial web site: www.judiciary.gov.uk/about_judiciary/cost-review/reports.htm

A more detailed assessment of the report will be published by QBE later this month.

Comment: Lord Jackson’s report and proposed reforms address long standing concerns over the disproportionately high cost of litigation. The more significant changes (such as to the CFA/ATE rules) will require parliament to enact new legislation. Significant reform is not therefore expected before the end of 2011.

If the core proposals are implemented they could lead to a substantial reduction in the costs of civil litigation with only a moderate increase in the cost of damages payable. The proposals will however face considerable opposition from some claimant solicitors, ATE companies and others. Enabling legislation may be substantially amended in its passage through parliament and any measures implemented are also likely to be tested in satellite litigation.

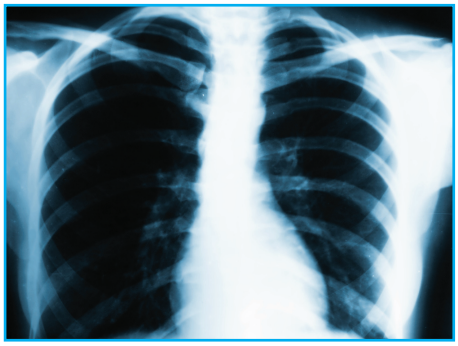
Scottish Court of Session rejects insurer's challenge to Pleural Plaques Act

In October 2007 the House of Lords ruled that damages could not be claimed for symptomless pleural plaques. Almost immediately a bill was drafted by the Scottish Nationalist Party to prevent the Lords' decision from affecting Scottish cases. Due to the disproportionately high incidence of Pleural Plaques in Scotland the bill received cross party support in the Scottish Parliament and the *Damages (Asbestos – Related Conditions) (Scotland) Act 2009* became law in June 2009.

A group of insurance companies challenged the Act by way of a judicial review action in the Court of Session arguing that it violated the right to a fair trial and to the "peaceful enjoyment of property" guaranteed by the *European Convention on Human Rights* and that it had no rational basis under common law. This was opposed by the Scottish government who also challenged the right of insurers to seek a review in the first place.

Lord Emslie who heard the case released his Judgment on 8 January 2010. Whilst expressing some sympathy for the insurers' position and accepting their right to bring the case he thoroughly rejected their arguments.

The right to a fair trial applied to the parties in the various actions not their insurers nor were the insurers' property rights, as defined by the Convention, affected. The common law "irrationality" argument was also rejected. For the Act to be invalidated there would have to have been bad faith, an improper motive or manifest absurdity.



There are a large number of pleural plaque actions in Scotland which were "sisted" (stayed) pending the outcome of the review and many others not yet litigated. The pursuers (claimants) are now free to proceed with their actions.

Comment: The decision is bad news for insurers who, unless they successfully appeal the decision, will have to pay damages on a large number of Pleural Plaque cases. The very detailed rejection of the insurers' arguments contained in Lord Emslie's lengthy judgment could make it difficult for any appeal to succeed.

Implementation of EU Railway passenger rights regulation for international journey

European Union regulation 1371/2007 implemented on 3 December 2009 introduced a range of new rights for rail passengers.

As well as increasing the amounts that passengers can claim for lost luggage and delay (including the introduction of cash payments) the regulations introduced:

- an assumption of liability on the part of train operators in respect of accidents involving death or injury to passengers (subject to contributory negligence and the right to recovery from third parties)
- a requirement to meet injured passengers "immediate needs" within 15 days
- 21,000 Euro minimum immediate needs payments in fatal injury cases.

The new regulations will only apply to international journeys for the time being as the UK government (amongst others) has delayed implementation for domestic services. The Department of Transport have said that they are still considering responses to their consultation on the regulations (carried out last year) but expect to make a decision on implementation early in 2010.

Comment: The impact of the regulations will be limited until such time as they are introduced for domestic journeys. Domestic opt-outs of between 5 and 15 years are permitted for the various elements of the regulations.

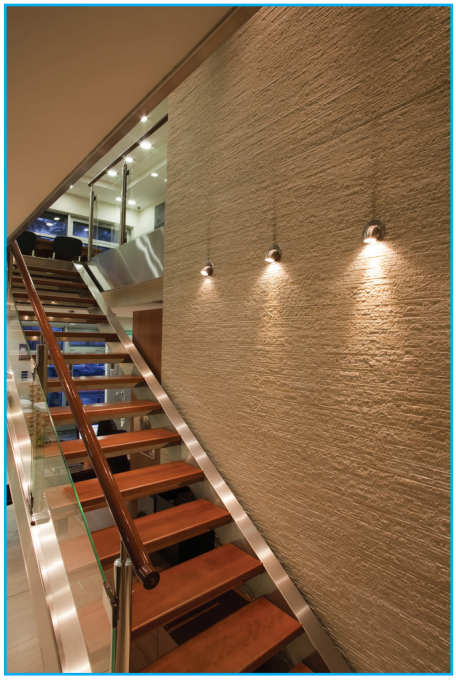
Costs

Exaggerated claim, costs consequences: Martine Widlake v BAA Ltd – Court of Appeal (2009)

The claimant injured her back after falling down some stairs at an airport operated by her employers. Her fall was caused by a loose rider on the stairs and liability was admitted.

The extent of the claimant's injuries was hotly contested with the defendant arguing that she had suffered only a 12 month exacerbation of a pre-existing condition. They valued general damages at £3,250 against the claimant's valuation of £11,000. On special damages the defendant valued the claim at only £2,022 against the claimant's £23,906. The defendant made a Part 36 offer of £4,500.

At first instance the judge was unimpressed with the claimant's evidence and noted that covert surveillance film obtained by the defendant showed the claimant having no apparent sign of pain or disability. He awarded the claimant a total of £5,522. This was a greater sum than the defendant's Part 36 offer but he found that the claimant had grossly exaggerated her claim and had failed to make any counter proposal or otherwise negotiate and in light of this conduct ordered her to pay the defendant's costs.



The claimant appealed the costs order. The Court of Appeal whilst supporting the judge at first instance, in penalising the claimant's conduct with a punitive costs' order, held that her conduct warranted her forfeiting her own costs only and that there should be no order on costs.

Comment: The Court of Appeal has once again confirmed that claimants who exaggerate their claims may be penalised in costs but the extent of the penalty will vary depending on the extent of the dishonesty.

Liability

No contributory negligence in parking within Controlled Area by pelican crossing: Howe v Houlton, Marshall Barry Ltd and Norwich Union Insurance – High Court (2009)

The claimant parked his car (on the nearside of a single carriageway) got out and then leant back in to retrieve some belongings. Whilst he was still standing by the side of his car an articulated lorry struck the car door and the claimant causing him to be thrown underneath it. The claimant suffered severe injuries including the loss of both legs.

The defendants denied negligence on the basis that the claimant got out of his car into the path of the lorry when it was too close to be able to avoid him. They also argued contributory negligence on the basis that

the claimant failed to look out for the lorry and avoid it and that he had parked his car illegally within the zigzag lines adjacent to a pelican crossing.

> ***"The purpose of the zigzag lines on either side of a pelican crossing is to ensure that the pedestrians using the crossing can see and be seen. The presence of a car parked within the controlled area of such a crossing is just as obvious to vehicles approaching from behind as if it were lawfully parked just outside that controlled area. Indeed, it may even be more obvious because of its proximity to the crossing".***
>
> *The Hon. Mrs Justice Swift DB*

On the facts of the case the Judge held that the claimant had got out of his car when the lorry was still some 36 metres away and that the lorry driver could and should have either avoided the claimant by steering away from him or by stopping his vehicle. The judge held that the claimant did look at the approaching lorry but had no reason to

think that it presented a danger to him being someway off at the time and positioned further out towards the middle of the road.

The claimant's decision to park illegally, close to the crossing was in no way causative of the accident and in that position he may even have been easier to see. The defendant driver was liable with no contributory negligence on the part of the claimant.

Comment: Although illegal parking did not give rise to a finding of contributory negligence in this case it does not necessarily mean that illegal or thoughtless parking cannot be used to establish contributory negligence in other circumstances.

Quantum

Damages for miscarriage caused by accident: Claire Hale v Daniel Burridge – Nottingham County Court (2009)

The claimant suffered multiple injuries after as a result of a road traffic accident the most serious being a miscarriage. She was off work for fourteen days. The claimant was only five weeks pregnant (with her second child) but had already told family and friends and had started to choose names for the child with her husband.

She suffered a marked psychological reaction for which she attended counselling and six to eight sessions of Cognitive Behavioural Therapy were additionally recommended. For four and a half months post accident she suffered almost continuous sleep disturbance and even by twenty six months post accident still suffered anxiety attacks and travel anxiety and was over-vigilant about the care of her son born eleven and a half months after the miscarriage.

When assessing damages the judge took into account the fact that despite the pregnancy being at an early stage at the time of the accident the claimant never the less regarded the foetus as a child. He awarded general damages of £9,250.

Comment: When assessing damages for miscarriage the court will consider a number of factors including how advanced the pregnancy was and whether the claimant is subsequently able to have children. As in this case the court is also likely to consider subjective factors such as how the claimant views the pregnancy and the consequent psychological reaction to the loss.

Guernsey court sets 1% discount rate: Manuel Helmot v Dylan Simon – Royal Court of Guernsey (2010)

The claimant suffered brain and other serious injuries when his bicycle was hit head on by the defendant's car leaving him with life-long care needs. Liability was admitted.

There is no equivalent to the Damages Act operating in Guernsey and the court had no power to award periodical payments. Settlement had therefore to be on a lump sum basis. Guernsey is not bound by UK legal decisions or legislation (unless the latter is specifically extended to include it). The claimant's representatives argued that the court should exercise its independent jurisdiction in assessing damages and apply a discount rate of -1.5% to earnings related losses including care and of 0.5% to other future losses.

These rates were advanced on the basis that they reflected the realistic returns available from UK Index Linked Government Securities and were appropriate to the specific economic conditions on Guernsey. The defendant argued for a 2.5% rate across the board as applied on the British mainland.

The court decided that the appropriate approach to adopt in determining a discount rate was to take the 2.5% UK rate as a starting point and adapt it for Guernsey's unique economic conditions. The rate awarded was 1%. This rate would apply to all future losses. There was no basis in Guernsey law for adopting different rates principally because there was no specific index of earnings available on Guernsey on which to base an earnings related rate.

The parties have one month in which to raise an appeal.

Comment: The rate set was arguably specific to this case but claimants on Guernsey are now likely to seek a 1% rate in future cases and proving that this is inappropriate could be a costly exercise for defendants. The reduced discount rate will greatly increase the value of lump sum awards on Guernsey.

This case is not a precedent for the rest of the UK. It may also not be of much assistance to those campaigning for a reduction in the UK discount rate as it is based on Guernsey specific economic conditions and part of its rationale was the unavailability of periodical payments in that jurisdiction.

Completed 1 February 2010 – Case transcripts and source material for the above items can be obtained from John Tutton (contact no: 01245 272756, e-mail: john.tutton@uk.qbe.com).

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