

Technical claims brief

Monthly update – May 2010



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News

New process for Road Traffic Accident claims gets off to a shaky start

The Ministry of Justice's new process for dealing with personal injury claims between £1,000 and £10,000 in value arising from road traffic accidents started on 30 April as scheduled.

The new process relies on an electronic portal through which all new claims under the scheme will be notified and processed (for the first two stages) but at the time of writing many insurers say that they have still not been given passwords with which to access it.

The process is likely to face at least one early judicial review. Representatives of the Accident Compensation Solicitors Group say that they have consulted counsel with a view to mounting a legal challenge. The group claims that the fixed costs allowed under the process are unrealistically low and have not been based on proper research.

In related news, the shadow justice secretary Henry Bellingham has told the Law Society Gazette that a Conservative government if elected would be "unlikely" to scrap the new scheme but would review solicitors' fees in April 2011.

Comment: Compliance with the new scheme's deadlines for claims handling is seen by some insurers as highly challenging and any erosion of potential costs savings may reduce participation by them. At the time of writing however many insurers cannot participate because they have no means of accessing the portal.



New Third Party Rights against insurers legislation enacted

The new *Third Party Rights against Insurers Act* received royal ascent on 25 March 2010. The new act replaces the original 1930 act and simplifies the process for claimants seeking recovery from an insolvent defendant's insurers (see *January 2010 brief*). Claimants will no longer have to restore the insolvent company to the companies register nor issue more than one set of proceedings.



Solicitors guideline hourly rates increased

The Master of the Rolls has approved an increase of 1.7% in solicitors' guide line hourly rates. The new rates (effective from 1 April 2010) are shown below:

- Grade A - solicitors with over eight years' post qualification experience including at least eight years' litigation experience
- Grade B - Solicitors and legal executives with over four years' post qualification experience including at least four years' litigation experience
- Grade C - Other solicitors and legal executives and fee earners of equivalent experience
- Grade D - Trainee solicitors, paralegals and other fee earners.

	Grade A	Grade B	Grade C	Grade D
London1	£409	£296	£226	£138
London 2	£317	£242	£196	£126
London 3	£229-£267	£172-£229	£165	£121
National 1	£217	£192	£161	£118
National 2	£201	£177	£146	£111

Irish periodical payments scheme anticipated by October

Irish High Court Judge, Mr Justice John Quirke has approved a 1.6m Euro interim payment to a claimant suffering from cerebral palsy and adjourned his case until October 2011 saying that he hoped a system of "phased payments" would be in place by then. This is the second time in recent weeks that Justice Quirke has commented that the introduction of an Irish periodical payment scheme may be imminent (see April 2010 brief).

Comment: The President of the Irish High Court has now established a working group to look at the issue and many in the Irish insurance market see the introduction of some form of periodical payments in the short to medium term as inevitable.

Causation

Asymptomatic Asbestosis: Derek Smith v Deanpast Ltd and Others - High Court (2010)

The claimant had a 15% respiratory disability and sought damages on the basis that this had been caused by his exposure to asbestos. Scans confirmed the presence of asbestosis, folded lung and visceral pleural thickening but the claimant's lung function tests were normal.

The defendants argued that the claimant's disability was in reality due to his being obese. The asbestosis affected only 1% of one lung and did not have a material effect on his breathing. The pleural thickening was not "diffuse" it covered only a small area and was not causing any disability.

HHJ Walton held that the claimant had not suffered a material injury and the claim was dismissed.

Comment: HHJ Walton last ruled on minimally symptomatic asbestosis in four test cases: Beddoes and Others v Vinters Defence Systems and Others (reported in the October 2009 edition of the brief). In those cases only the two claimants who had suffered a material impact on their breathing were compensated. The same principle that the presence of lung disease alone is insufficient for an award of damages has been followed here.

Our thanks go to Berryman Lace Mawer for telling us about this unreported case.



Costs

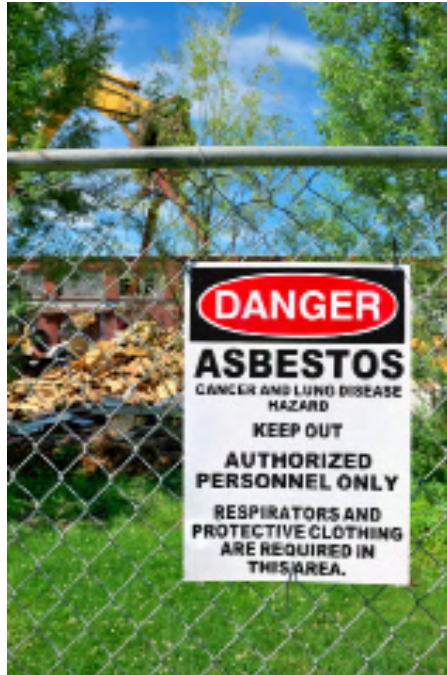
Claimant not expected to have researched Solicitors' Charges: William Albert Higgins v Ministry of Defence – High Court 2010

The claimant who was 82 sought medical advice after experiencing breathlessness. He was referred to a respiratory consultant who diagnosed asbestosis and probable cancer. The claimant was warned that his condition was advanced and untreatable.

The consultant mentioned the name of a solicitor in central London who dealt with asbestosis claims. The claimant's daughter instructed the solicitor who successfully negotiated a settlement of the claimant's claim prior to his death.

"I see no point of principle. It is not in dispute that a reasonable litigant will normally be expected to investigate the hourly rates of solicitors whom he might instruct and that he will normally be expected to consider a number of other factors, including the time and costs associated with geographical location...."

Justice Tugendha



The defendants contested the amount of costs sought by the claimant's solicitor on the basis that the claimant had lived in Kent and that he could have instructed a local solicitor at less cost.

The Master at first instance held that it was not reasonable to have expected the claimant to have undertaken "a trawl of local" solicitors given his extreme situation and the fact that a competent solicitor had been recommended to him. The defendants

appealed arguing that the Master's ruling was at odds with the relevant authorities particularly the Court of Appeal decision in *Wraith v Sheffield Forgemasters Ltd.*

On appeal the judge held that the list of factors considered by the court in *Wraith* was useful but should not be mechanically applied to other cases. In this case the Master had correctly considered a number of factors such as the claimant's age and the urgency of his particular situation which had not been relevant in *Wraith*. The Master had not been in error and the appeal was dismissed.

Comment: The judge hearing the appeal was at some pains to point out that his decision in this case in no way undermines the expectation that normally a claimant should carefully consider all the factors relating to the cost of his choice of solicitors including their hourly rates and geographical location.

Fraud

Costs Penalties for supporting fraudulent claims: Nadeem Ahmed and Others v Shaoib Chothia – Manchester County Court (2010)

The five claimants were allegedly injured in a road traffic accident. It was accepted by the defendants that the first and third claimants had genuinely suffered injury and their claims were settled when they accepted early Part 36 offers.

At trial it was found that the fifth claimant (a child) was in the vehicle but was uninjured and that the second and fourth claimants were not even in the vehicle.

"It may well be that it would be unusual to make a costs order against a witness, but the court has to act in accordance with the justice of the case and having regard to all the circumstances .

Here there is every reason to reflect the court's disapproval of the First and Third Claimant's behaviour."

HHJ Holman

The first and third claimants had supported the fraudulent claims and the defendant's counsel sought a costs order against them. In light of their conduct the judge ordered that they would be jointly responsible for the defendant's costs from the date that they accepted their Party 36 offers as it was from that date that they "allied themselves to the false claims". The date of acceptance



was the 9 March 2009 and the hearing took place on 23 February 2010 and so the financial sanction against the claimants will be fairly substantial.

Comment: A genuinely injured claimant is still in principle entitled to their damages even if found to be supporting a dishonest claim but it is encouraging to see that a judge of HHJ Holman's seniority is willing to impose significant costs sanctions.

Our thanks go to Horwich Farrelly who acted for the defendant for telling us about this case.

Indemnity

Instructions to Brokers, Policyholder's evidence not credible: *Shaul Yechiel v Kerry London Ltd – High Court (2010)*

The claimant had been robbed of valuable jewellery. The jewels were insured on the basis that they were normally kept in a safe deposit box and were only covered in the owner's possession for a period of up to 14 days. At the time of the theft the jewels had been with the claimant for 23 days and the insurers declined to pay his claim for their loss.

The claimant alleged that prior to the theft he had informed his brokers by means of a letter, which was both faxed and posted, that the jewellery was to be in his possession for an extended period and that they had failed to inform his insurers. He brought an action against them seeking recovery of the value of the jewellery.

The defendant brokers denied ever having received the letter and said that the first time they had been told about it was some 15 months after the theft.

"....I have reviewed Mailfox's/ Kerry's files. They appear to have been efficient brokers and to have maintained good records of oral conversations with Mr Yechiel. There was no reason for Mr Russell (broker) to fail to deal with a letter from Mr Yechiel which was bound to have lead to a demand for substantial additional premium and extra brokerage.

Jonathan Hirst QC



The court dismissed the claim holding that on the balance of probabilities no letter had ever been sent. The claimant had historically dealt with his brokers by telephone. He did not raise the allegation of faxed instructions or produce a copy of the fax report for some considerable time and could not produce the "shiny copy" of the fax sent. He claimed not to remember what had become of this obviously important document.

He also had a poor record of dealing with requests for documentation from his insurers promptly and had had to be reminded by his brokers many times before getting his jewellery professionally valued.

The brokers' records were maintained in good order and it was improbable that they would have overlooked a letter of instruction which would have led to a substantial additional premium and extra brokerage.

The claimant, had he genuinely sent a letter, should have queried the absence of a reply before the 14 day period was exceeded.

Comment: The case highlights the importance of maintaining good records and having efficient processes for dealing with incoming faxes and letters. In this case the judge carefully reviewed the brokers' files and heard evidence on their procedures before finding in their favour.

Procedure

Hand Arm Vibration Syndrome, Frequency of Exposure: David Vance-Daniel v Corus UK Ltd – Court of Appeal (2010)

The claimant sought damages from his employer in respect of Hand Arm Vibration Syndrome (HAVS) caused by the use of vibrating tools between 1975 and 1995.

The defendant employers supported by their insurers (QBE) successfully defended the claim at first instance. The Judge found that the claimant had developed HAVS due to his exposure to vibrating tools whilst working for the defendant but that the defendant was not in breach of duty.

The claimant's exposure pre-dated the Control of Vibration at Work Regulations and the judge had considered the common law position. The guides available to the defendant at the time (1987 British Standard Guide BS6842 and the 1975 Guide to the Evaluation of the Human Hand – Arm System to Vibration) both referred to daily use whereas the claimant had used vibrating tools about once a week.

The defendant had no other employees doing the same work as the claimant and there were thus no previous cases of HAVS arising from this work which would have alerted the defendant to the risk to the claimant. In all the circumstances the risk was not reasonably foreseeable.



The claimant appealed on the grounds that the risk of injury should have been foreseeable from 1975 and that exposure once a week to vibration above safe limits was "regular" exposure as described in the guides. The defendant countered that the guides made frequent reference to "daily" exposure" and this must mean more than once a week.

The appeal was dismissed. The Court of Appeal ruled that a reasonable employer could not have been expected to recognise exposure once a week to vibration in excess of the action level as being likely to cause HAVS.

Comment: This is a helpful decision to defendants facing claims for HAVS arising from infrequent use of vibrating tools. It should be borne in mind however that this is a complex area of law and the courts will consider all of the surrounding circumstances especially any previous claims from other employees doing the same work.



Comment: The settlement is a good illustration of the daunting levels that UK catastrophic injury damages have reached.

Under the current legal regime a claim from a young tetraplegic with reasonably good life expectancy, where there are no arguments on liability and settlement is on a periodical payment basis may well exceed £10m.

Quantum

“Record” damages agreed in RTA claim - Wasim Mohammed v Muminal Islam – Out of Court Settlement

The case of Wasim Mohammed, a 22 year old tetraplegic, who obtained an out of court settlement estimated as being worth £11.15m has been widely reported in both legal bulletins and the main stream press. This has been reported as the “highest car crash payment in British history”: it is not but it is possibly the highest publicised award.

The claimant was a front seat passenger in a car which crashed when the driver attempted to overtake another car at a junction. He suffered damage to his spinal cord (at C4 level) and was left with no movement in his legs and very little movement in his arms. He now suffers severe spasms and is completely reliant on others to assist him with normal daily living. He is also at risk of developing symptomatic syringomyelia (the formation of a cavity

in the spinal cord) which could make his condition even worse.

The out of court settlement comprised a lump sum of £4.25m (for past care, accommodation, general damages etc) with periodical payments of £235,000 a year for life to meet the claimant’s care needs index linked to ASHE 6115 (60th percentile).

The settlement agreement also allows the claimant to apply to the court at a later date for a further lump sum and increased periodical payments if symptomatic syringomyelia does develop.

With periodical payments the amount a claimant will actually receive depends on how long they live and on how the ASHE 6115 index performs.

A tetraplegic even with the best possible care will have a reduced life expectancy. In this case the defendant’s expert estimated that he would live to 65 and the claimant’s expert to 75. If the claimant lives to even the lower estimate, his damages will almost certainly exceed the £11.15m estimated value of the settlement.

Completed 26 April 2010 – Copy judgments and/or other source material for the above items may be obtained from John Tutton (contact no: 01245 272756, 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

