Technical claims brief

Monthly update – June 2010

QBE

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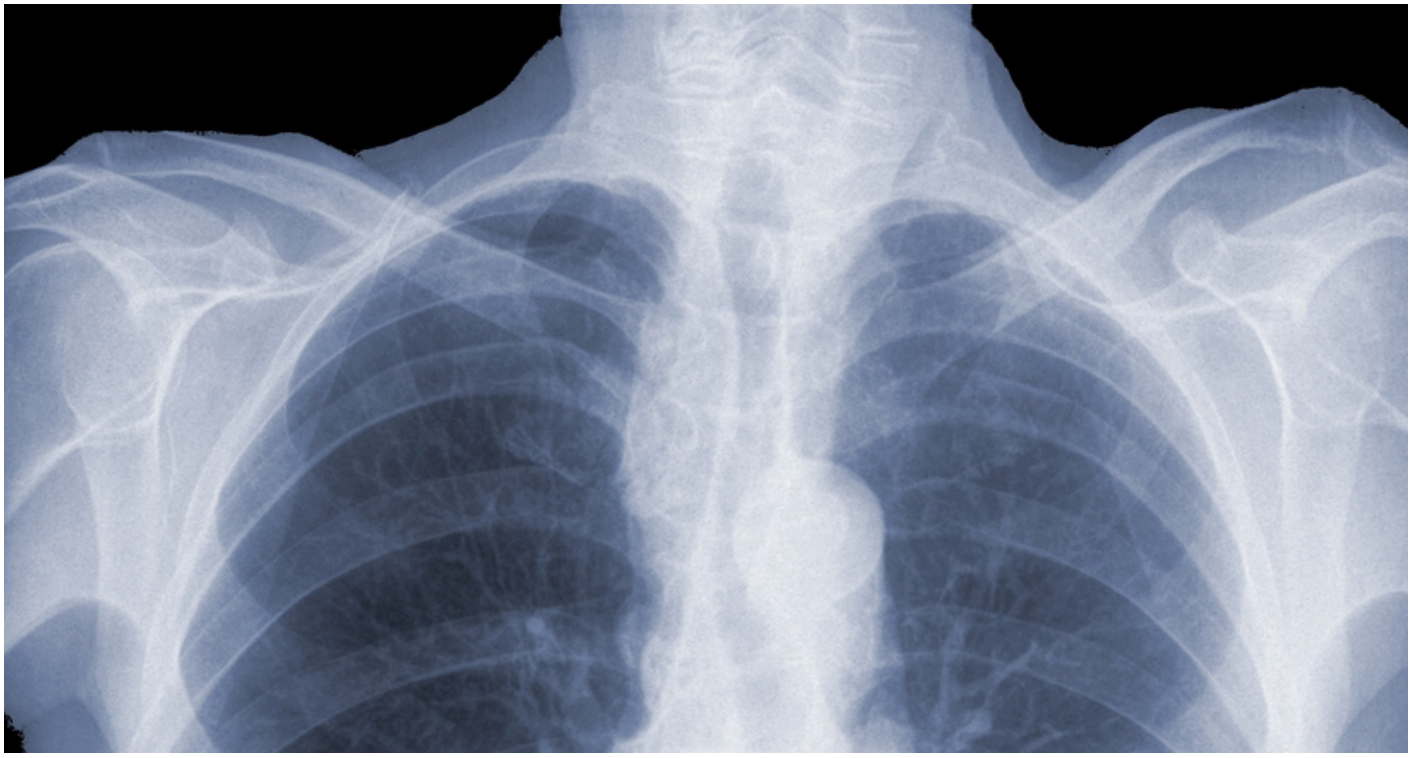

News

QBE issues response to Department of Work and Pensions (DWP) Consultation on Employer's Liability Tracing Office and Bureau

The deadline for responses to the (DWP) consultation document *"Assessing Compensation – Supporting people who need to trace Employer's Liability Insurance"* (see April 2010 Brief) has now passed. QBE has submitted a detailed response backing the creation of an Employers Liability Tracing Office (ELTO) to assist employees who have suffered injury in the workplace to track down the insurers of employers who may no longer be trading.

QBE does not support the creation of an Employers Liability Insurance Bureau (ELIB) to act as a fund of last resort for uncompensated (or undercompensated) victims of workplace injury funded by a levy on insurance premiums. In QBE's view imposing additional insurance costs on current employers would provide a disincentive to employment. It would also penalise many employers who had no involvement in exposing employees to asbestos or similar long term health risks.

As an alternative QBE recommends a review of the benefits paid under the Pneumoconiosis etc *(Workers' Compensation) Act 1979* with a view to improving the tariff sums payable as a fairer, simpler and more cost effective means of providing compensation.

Comment: The less controversial ELTO proposal may well progress independently of the ELIB concept but implementation of either appears unlikely prior to April 2011.

Costs

Interest on damages, proceedings issued to secure interest not abuse of process: Derek Pelling v Don Valley Engineering Co Ltd – Doncaster County Court (2010)

The defendant applied to strike out the claimant's proceedings on the basis that they had been brought solely so that the claimant would be entitled to interest on general damages and that this was an abuse of process.

The claimant had invited the defendant to agree to pay him interest prior to issuing but the defendant had refused.

> "....the question of interest is an integral part of this case as it is in any other claim for damages for personal injury and that it does not lie with the defendant to say ....that it does not matter or it is not significant or it is cost disproportionate because we do not yet know ....that it will be disproportionate because we do not yet know the quantum of damages."
>
> ***DDJ Thorn***

The judge dismissed the application to strike out the claim holding that the claimant had acted "entirely reasonably". Interest was a legitimate part of the claim and thus issuing proceedings to secure it was not an abuse of process

Comment: A claimant is only entitled to interest on general damages from the date of service of proceedings. In the past the 2% rate of interest might not have seemed worth worrying about but in the current economic climate it may be considered, as the claimant's counsel pointed out, like quite a good return.

On the basis of this judgment claimants are free to secure entitlement to interest on general damages by issuing proceedings but they will need to weigh up the benefit of doing this with the possible disadvantages of their case then being subject to the court's timetable.

Credit hire

Appropriate spot hire rate: Sharon Preece v Chaucer Insurance Services Ltd and Henry McLeod - Walsall County Court (2010)

The claimant incurred credit hire charges of £41,880.20 for a 97 day hire from Accident Exchange Ltd (AEL) after her own prestige car had been damaged in a road traffic accident.

The defendants challenged the claim for credit hire charges and the court was asked to consider amongst other things whether the rates charged were excessive and only spot hire rates should be allowed.

The judge held that the claimant had hired a car on credit hire without even considering the cheaper option of hiring one at spot hire rates and that she was only entitled to spot hire rates i.e. a reasonable market rate for non-credit hire. Both parties conducted extensive research on hire rates and produced their findings to the court in evidence. The research was conducted during 2009 whereas the hire had taken place in 2005.

The claimant contended that the judge should not discount the 2009 figures to allow for inflation on the basis that credit hire prices had been falling. The judge rejected this commenting that just because AEL was now charging less for credit hire than some companies were for spot hire that was not grounds for concluding that there had been a general reduction in car hire rates.

There was "no reason to suppose that inflation applied to the car hire trade any less than to other trades". He accordingly applied a 27.7% discount to the figures that the claimant produced for 2009 hire rates. This equated to a daily rate of £158.12. The judge also allowed a £400 administration charge bringing the total award to £15,337.64 against £41,880.20 claimed which was less than the defendants' interim payment.

Comment: As in the Court of Appeal case of Bent v Highway Utilities (see April 2010 brief) the court here looked at a broad comparison of evidence on hire rates and greatly reduced the award for hire.

Our thanks go to Browne Jacobson LLP who acted for the defendants for telling us about this unreported case.

Indemnity

Claimant unable to prove insurer provided Employer's Liability (EL) Cover: Ian Hall v Newhall Heating Ltd and AGF Insurance Ltd – High Court (2010)

The claimant developed mesothelioma as the alleged result of exposure to asbestos whilst employed by the first defendant between 1967 and 1974. He obtained a default judgment against his former employers who were no longer trading. His solicitors sought to identify the first defendant's employer's liability insurers for the period of exposure with a view to obtaining damages from them under the *Third Party (Rights against Insurers) Act 1930.*

The claimant with the assistance of his former employer's insurance broker identified National Employers' Mutual (N.E.M.) as the employer's liability insurer. The liabilities of N.E.M. had been taken over by AGF Insurance who were joined to the proceedings as second defendants. AGF accepted that if it was proved that N.E.M were employer's liability insurers for any part of the exposure period then they in turn would be liable to satisfy the judgment obtained by the claimant.

> "Mr Hall was entitled to assume that his employers would be insured against employer's liability risks and that ..... he would be properly compensated by their insurance company. But, in light of my decision, he will not be. This is a situation in which countless other employees have found themselves over the years.
>
> ***Ronald Walker QC***

The insurers could trace no record of any employer's or public liability policy issued by them to the first defendants. The judge held that it would have been remarkable had a policy been issued, for all records of it to have disappeared especially when these would have been incorporated into the insurer's computer data base set up in 1980. It was far more likely that the broker's recollection of matters some 40 years ago was simply in error.

The judge whilst expressing sympathy for the claimant's plight found that on the balance of probabilities N.E.M. had not issued a liability policy during the period of exposure and the second defendants had no obligation to settle the claimant's judgment.

Comment: This case illustrates the difficulties that many mesothelioma victims face in tracing a former employer's insurer and the motivation for the Department of Work and Pensions consultation on setting up an Employer's Liability Tracing Office (ELTO) and an Employers Liability Insurance Bureau (ELIB). An ELTO if established may in future allow claimants like Mr Hall to track down their employer's insurers and avoid litigation being launched against the wrong company.

RTA conflict with EU second motor directive: Churchill Insurance Company v Wilkinson and Evans v Equity – Court of Appeal (2010)

In these conjoined cases the claimants had both suffered severe injuries after permitting uninsured drivers to drive their vehicles. In both cases the insurers of the vehicle owners argued that whilst they were obliged to indemnify the drivers by virtue of Section 151 (5) of the *Road Traffic Act 1988* they were also entitled to seek recovery of the damages from them under section 151 (8) as they had permitted the uninsured drivers to use their vehicles. This amounted to "circuity of action" and the claims should be struck out.

The claimants argued that this interpretation of the Road Traffic Act (RTA) conflicted with long-standing European Union policy aimed at ensuring that victims of road traffic accidents were compensated irrespective of whether the drivers responsible were insured. In the Wilkinson case (see July 2009 Brief) the court at first instance found in favour of the claimant but in the Evans case the court found for the defendant!

Both cases were referred to the Court of Appeal to decide whether section 151 (8) of the RTA complied with EU law or if some amendment or re-interpretation might make it compliant.

The Court of Appeal has now decided to refer this complex issue to the European Court.

Comment: At the time of writing there is no indication as to when the European Court's judgment will be made. The scenario of a young motorist permitting an uninsured friend to drive their car is not all that unusual and there are a number of outstanding cases with various insurers awaiting the outcome.

Liability

Failure to protect vulnerable Mental patient, Human Rights Act Article 2: Savage v South Essex Partnership NHS Foundation Trust - High Court (2010)

The claimant's mother was a patient detained under the *Mental Health Act 1983.* She escaped from a psychiatric ward and committed suicide by jumping in front of a train. Her adult daughter brought proceedings against the NHS trust responsible for her care.

The claimant sought a declaration that the trust was in breach of its positive obligation under Article 2 of the *European Convention on Human Rights* to protect the life of her mother and for "just satisfaction" on the basis that she was a "victim" as defined by Section 7 (7) of the *Human Rights Act 1998* having suffered the loss of a close relative.

The court heard that the claimant's mother had a history of absconding and had been assessed as a suicide risk following an earlier suicide attempt. The hospital in which she was being treated at the time of her death had not updated her risk assessment and had not reviewed the level of observation as the trust's own policy required.

On the evidence the judge held that had the treating hospital raised the level of observation, which would not have been an unreasonable or onerous step, the claimant's mother would not have been able to abscond as she did. This would have created a real prospect or substantial chance of her survival.

Following a preliminary ruling by the House of Lords in this case on the scope of the trust's duty under Article 2, the court had

to determine whether the trust had the actual or constructive knowledge of a "real and immediate risk to life" and if so had they done all that could reasonably been expected to prevent it. Clearly they should have known of the risk and could have raised the level of observation. The claimant was entitled to a declaration that the defendant had failed to discharge its duty under Article 2.

> "I bear in mind that the claimant has openly stated that she has not brought this action for financial reward. The damages I grant under this head, and I think it is right to grant damages, can never compensate her for the loss of her mother and can only be a token acknowledgement that the defendants ought properly to give her some compensation to reflect her loss."
>
> ***Justice MacKay***

The claimant was also entitled to bring a claim as a victim, having been close to her mother and suffering considerable distress on her death. In deciding an appropriate level of damages the judge recognised that the claimant had not brought the action for reasons of financial gain and that no amount of damages could compensate her for the loss of her mother. He awarded her a token sum of £10,000.

Comment: This judgement whilst dealing with a mental patient is likely to have a wider application to other vulnerable patients and prisoners. It will also be interesting to see how the courts will deal with claims which are brought under both the Human Rights Act and Fatal Accidents Act.

Work place regulation not applicable to "Fun Event": Barber v Fun and Leisure Event Specialists Ltd and Bradford and Bingley – Bolton County Court (2010)

The claimant was taking part in an "It's a knockout" style competition when she fell and suffered injury. The event was part of an activities day organised by the claimant's employers as a "thank you" to their staff. The claimant had climbed through an inflatable mangle into an inflatable washing machine full of soapy water and then lost her footing after exiting the washing machine.

The claimant argued that her employers were in breach of the *Work Place (Health, Safety and Welfare) Regulations, the Provision and Use of Work Equipment Regulations and the Management of Health and Safety at Work Regulations.* She also argued negligence in common law against both defendants.

The judge dismissed the claim. The accident occurred outside of the workplace and the mat that the claimant slipped on was not work place equipment. The regulations cited did not apply.

On the common law point, the judge considered the High Court ruling in *Uren v Corporate Leisure (UK) Ltd and Others* (see March 2010 Brief). In that case an RAF serviceman had suffered catastrophic injuries in a similar type of event. The High Court had recognised that challenging competitive physical activities were a beneficial part of the life of those people fit enough to participate in them and that they could never be entirely risk free. In that case as in this one the defendants had taken reasonable precautions to try to make the games safe. In both cases the risks were obvious to the claimants.

Section 1 of the *Compensation Act 2006* allowed the courts to take into account the benefits to society generally of sporting and other potentially dangerous activities when considering liability issues and the judge held that this also mitigated in favour of the defendants in this case.

Comment: Since the 2003 House of Lords' ruling in Tomlinson v Congleton Borough Council, where the Lords recognised the risk that fear of litigation might put an end to many healthy recreational activities, the courts have made a number of decisions supporting the organisers of these events.

Our thanks go to Kennedys Solicitors who acted for the defendants for telling us about this otherwise unreported case.

Completed 20th May – 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

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