

Motor news

Quarterly update – Spring 2011



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News

Government issues response on Jackson consultation

The Ministry of Justice (MOJ) consultation on Lord Jackson's report on civil litigation funding in England and Wales closed on 14 February. The Lord Chancellor, Kenneth Clark MP, announced to Parliament on 29 March that the government will be implementing the key proposals made.

Legislative changes will be made "as soon as Parliamentary time allows" and there is speculation that these could be in force by April 2012.

- The recoverability of success fees and After the Event (ATE) insurance premiums from defendants will end (except for ATEs covering expert investigations in medical negligence cases)
- Claimants who wish to enter into Conditional Fee Agreements (CFAs) with their solicitors may still do so but will have to pay the success fee themselves and the amount of the fee will be capped at 25% of the damages
- There is to be a 10% increase in general damages
- The costs rules will be amended so that unsuccessful claimants will not usually have to pay a winning defendant's costs.

In addition there are to be further consultations on raising the threshold for cases to be heard by the High Court to £100,000, increasing the small track limit to £15,000 (excluding injury cases), and increasing the fast track limit to £25,000.



The full response can be viewed at:

www.justice.gov.uk/consultations/docs/jackson-report-government-response.pdf

There is also to be a consultation (closing 30 June 2011) on the best means of extending the Ministry of Justice's scheme for low value personal injury motor claims to all other classes of injury claim.

Comment: this is a complex series of measures of which the full effects, if implemented, are difficult to predict. The insurance industry, however, has supported the implementation of the Jackson reforms as potentially offering substantial cost reductions, especially in high value claims.

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 that fall outside, especially where a hearing has taken place. Judges also appear to be awarding damages at the lower end of the applicable range.

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

Transport Select Committee calls for insurers to act on Motor Fraud

The UK Government's Transport Select Committee has completed an investigation into the high cost of motor insurance premiums. The Committee says that the main reason for the increasing cost of premiums is widespread fraud which the insurance industry has not done enough to tackle and calls on them to fund a specialist anti-fraud police unit.

In response, the Insurance Fraud Bureau (IFB), which has been funded by UK insurers since 2006, has been quick to point out the number of joint anti-fraud operations it is currently carrying out and has carried out in the past with UK police forces. The IFB also highlighted the insurance industry's efforts to prevent fraud through data sharing initiatives and the pursuit of fraudsters through both the civil and criminal courts.

The Association of British Insurers (ABI) has said that in reality the main cause of increased premiums are the escalating levels of damages and associated legal costs in personal injury claims.

Comment: there appears to be reluctance on the part of judges to refer cases for criminal prosecution even when fraud is proved in the civil court. Where insurers have succeeded with private prosecutions, custodial sentences have been the exception and many in the insurance industry believe that the courts are failing to provide any serious deterrent to fraudsters.

New Scottish legislation threatens higher awards in fatal accident cases

The Damages (Scotland) Act was passed by the Scottish Parliament on 3 March 2011 and received Royal Assent on 7 April 2011. Implementation of the legislation is expected to occur sometime before the end of the year. The Act sets out that the default position in calculating the loss of financial support by a widow or widower from their deceased spouse is to be based on 75% of the deceased's net income, with the income of the surviving spouse not considered unless it produces "a manifestly and materially unfair result."

The current system deducts the surviving spouse's income from the pre-accident joint earnings (as well as the deceased's personal living expenses) and meant that in many cases where the deceased was not the main "breadwinner" there was no claim for financial support. The Act does not define "manifestly and materially unfair" and it is likely that the surviving spouse's income will now be disregarded in many cases leading to significantly increased awards.

Comment: "Loss of Society" awards in Scotland also continue to increase with several recent cases seeing sums in excess of £100,000 for an individual relative and combined awards exceeding £200,000. Fatal accident damages are already much higher in Scotland than in other parts of the UK and this is fuelling the trend for claimants to find ways to have their cases heard north of the border.

New NHS charges effective from 1 April 2011

Recoverable NHS charges increased with effect from 1 April 2011 in accordance with the attached table. Increases are based on NHS inflation rather than the Retail Price Index.



(From) Accident Date	Out-patient Charge	In-patient daily charge	Charge per Ambulance Journey	Cap
01.04 2011	£600	£737	£181	£44,056
01.04.2010	£585	£719	£177	£42,999
01.04.2009	£566	£695	£171	£41,545

Gender no longer permitted as Rating Factor

In a widely publicised decision (Association Belge des Consommateurs Test-Achats ASBL) the European Court of Justice has ruled that the use of gender in calculating insurance premiums breaches the principle of equality between men and women enshrined in the European Charter of Fundamental Rights.

Previously an exemption to this rule had been allowed for insurance premiums where this was supported by reliable statistical data, subject to a regular five year review.

The exemption was next due for review on 21 December 2012 and will now cease on that date.

Comment: the decision is likely to lead to significant changes to motor and annuity premiums/payments. It could even form the basis of legal challenges to other areas where gender is used to differentiate an outcome.

Association of Personal Injury Lawyers initiates judicial review of discount rate

In November 2010 the Association of Personal Injury Lawyers (APIL) threatened the government with judicial review proceedings if the Lord Chancellor did not review the current discount rate. APIL issued judicial review proceedings on the 30 March 2011 citing inaction by the Lord Chancellor.

The current rate of 2.5% is seen as inappropriate by APIL given yields on Index Linked Government Stocks (ILGS) have declined. APIL claim that average gross annual yields have been less than 1% over the last 3 years. ILGS has previously been deemed as an accurate reflection of the real rate of interest available to claimants seeking a prudent investment of awards given that the income and capital is fully protected against inflation and provides a risk-free investment as opposed to investing a lump sum in a mixed bag of equities and gilts.

On the 11 May 2011 Government announced that the Lord Chancellor is in the process of reviewing the discount rate and has sought views from HM Treasury and the Government Actuary as required by the Damages Act 1996. Government further announced its intention to conduct a wider consultation on the methodology to be used in setting the discount rate in early course.

Consultation will allow the Association of British Insurers (ABI) and insurers themselves to present a case against a reduction in the discount rate.

The Scottish Government and Northern Ireland Assembly have devolved powers to set their own rates in their respective jurisdictions and are reportedly conducting their own reviews.

Comment: any reduction in the discount rate will have the effect of increasing damages for future loss in claims settled on a lump sum basis. Impact can only be assessed once the level of any reduction in the discount rate is known. A reduction to 1%, for example, would have a significant inflationary impact on personal injury claims.

Liability

Breach of Highway Code not necessarily evidence of negligence: Goad v Butcher and Butcher and Sons – Court of Appeal (2011)

The claimant lost control of his motorcycle and crashed after braking heavily to try and avoid a tractor and trailer that was turning right across his path into a country lane. The motorcyclist was travelling at 55-65 mph and the judge held that he would have been able to control his motorcycle and pass safely to the rear of the tractor (and trailer) had he been travelling at a reasonable speed.

The tractor driver when turning into the lane had cut the corner in breach of the Highway Code but the judge at first instance considered this to be irrelevant. The important question was whether the tractor driver had been negligent in making his turn when he did. He had had a clear view of 110 metres in the direction that the claimant was approaching from and had not acted unreasonably in commencing his turn when the claimant was still out of sight. The sole cause of the accident was the claimant's excessive speed and the judge dismissed his claim.

The claimant appealed arguing that the judge had erred in holding the breach of the Highway Code to be irrelevant. Had the tractor driver not cut the corner he would have had a slightly longer view of oncoming traffic (about 20m). He was negligent in starting his turn too early and not reaching the point where his visibility would have been best.

The Court of Appeal dismissed the appeal holding that the judge had applied the correct test and that whilst a breach of the Highway Code might be evidence



of negligence it would depend on the circumstances of the accident. In this case the tractor driver was not negligent in relying on his 110m view and could not have reasonably foreseen that the claimant would have been travelling at a speed so far in excess of the speed limit.

Comment: this case is another illustration that the Courts recognise that excessive speed can be the primary or sole cause of a motor accident.

Procedure

Court of Appeal acts against “Expert Shopping”: Edwards-Tubb v JD Wetherspoon PLC – Court of Appeal 2011

The claimant was injured in a fall at work and obtained an orthopaedic report on his injuries. He complied with the pre-action protocol by supplying the names of three experts whom he might instruct and, having received no objection from the defendant, proceeded to obtain a report from one of them. That report was not disclosed or relied upon and when proceedings were issued, a report from a different orthopaedic expert was served.

At first instance the defendants successfully sought an order for disclosure of the first report, but that order was overturned on appeal and a further appeal was made to the Court of Appeal.

The claimant argued that whilst they might require the court’s permission to change experts after the issue of proceedings, this was not the case pre-issue and that the court was not permitted to override the claimant’s privilege in the report. The defendants argued that the court had control under Civil Procedure Rule (CPR) 35.4 both pre and post issue on whether or not an expert could be called and that it should use that power to discourage “expert shopping” and promote openness.

The Court Of Appeal allowed the appeal and restored the order to disclose the first report. The court held that once a party had embarked on the pre-action protocol procedure, which involved cooperation in the selection of experts, there was no justification for not disclosing a report from an expert who had been put forward, accepted, and written a report. There was



no difference in principle in the position pre or post issue.

Comment: the Court of Appeal has shown its disapproval of “expert shopping” and parties (usually claimants) who seek to replace an initial unhelpful report are now likely to have to disclose it if they wish to make use of a second report in the same discipline.

Defendant entitled to wait for Signed Witness Statement before disclosing surveillance: Douglas (A Litigation Friend ...) v O’Neill - High Court (2011)

The claimant was seriously injured when he was run over by the defendant’s car. Liability was agreed in the claimant’s favour with a 12.5% deduction for

contributory negligence. Many of the claimant’s disabilities and symptoms were accepted, but the extent of his long-term brain damage and reduced mobility were disputed.

The defendant obtained surveillance evidence of the claimant driving and refuelling a manual car, dealing with a bank employee, using a cash machine and shopping unaided all of which were at odds with the symptoms the claimant presented on medical examination. The defendant had completed the surveillance in October 2010 but did not serve it until January of 2011, some two months before trial.

The claimant argued that the late service of the evidence so close to trial amounted to an ambush, was in breach of the Civil Procedure Rules, and that the evidence could not be relied upon without first obtaining the court's permission.

The defendant duly applied to produce the evidence arguing that the delay serving it had been caused by the claimant's own delay in serving his signed witness statement. The claimant had missed various court deadlines during the course of the case and had not served his witness statement until 21 December 2010, some fifteen months after the exchange of witness evidence was first scheduled. The defendant had waited for the claimant's witness statement so that he could know the extent of the pleaded claim and had served the surveillance evidence as soon as he could after the court's Christmas break.

The court held that in the interests of justice the defendant should be permitted to rely on the surveillance footage. The evidence was not witness evidence, but a "document" and was privileged. It was only disclosable when and if the defendant chose to waive privilege. The defendant was entitled to wait until the claimant had completed his evidence before deciding whether to disclose covert surveillance footage as otherwise a potentially fraudulent claimant would be alerted to it and the defendant would be deprived of the opportunity of gathering evidence.

Comment: this judgment makes it plain that a defendant is entitled to wait until the extent of the claimant's claim is made clear (usually by serving a signed witness statement) before disclosing surveillance evidence. Provided this evidence is served at the first reasonable opportunity after the claimant has finished pleading their case,

then it should be permitted. Otherwise, a dishonest claimant would have an opportunity to tailor their case to the defendant's evidence.

Expert Witnesses lose historic immunity: Jones v Kaney – Supreme Court (2011)

The claimant (Mr Jones) brought proceedings against the defendant (Dr Kaney) who had been instructed by him as an expert witness in an earlier action. Dr Kaney, a clinical psychologist, prepared an initial report saying that Mr Jones had suffered Post Traumatic Stress Disorder (PTSD) following a road traffic accident. The defendant's expert in that case had reported that Mr Jones had exaggerated his symptoms and the court ordered a joint report.

The joint report was highly damaging to Mr Jones' case saying that he had not sustained PTSD and had been dishonest. When Dr Kaney was asked to explain her apparent change of heart, it emerged that she had signed the Joint Statement without comment or amendment even though it did not reflect her views!

At first instance the Judge expressed sympathy for Mr Jones. If his allegations were true then he had suffered "a striking injustice". The Judge, however, was bound by the Court of Appeal decision in *Stanton v Callaghan* that gave expert witnesses blanket immunity in relation to the evidence they gave in proceedings. He was obliged to strike the claim out.

Mr Jones appealed to the Supreme Court which held by majority decision that the immunity of expert witnesses was no longer justified. The House of Lords had removed advocate's immunity in *Arthur J S Hall and Co v Simons* and there was no

good reason why it should continue for expert witnesses alone. It was, in reality, unlikely that expert witnesses would be discouraged from offering their services or expressing their views freely, especially as they were usually insured against claims for professional negligence.

Comment: it seems likely that at least some claims may now be made against expert witnesses where they have negligently damaged their client's case. An expert who simply changes his or her mind, however, and reports this in line with their duty to the court would, in the view of Supreme Court Judge Lord Justice Kerr, be able to successfully defend a claim against them.

Thanks go to Berryman's Lacey Mawer LLP, who acted for Dr Kaney, for their helpful note on this case.



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 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 Berrymans Lace Mawer LLP, who acted for the defendants, for their helpful note on this case

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.





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.

"....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

At trial, the judge concluded that the claimant had deliberately caused the accident by unnecessarily applying his

brakes, that the claimant's wife and daughter were not in the minibus, and that they 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.

Comment: 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 reluctant to do.

Post-trial surveillance not proof of fraud: Mark Noble v Martin Owens – High Court (2011)

The court awarded the claimant £3.4 million in damages in respect of serious injuries sustained in a road traffic accident. Nine months after the hearing, however, the Insurance Fraud Bureau received a tip off that the defendant's level of disability was much less than he had alleged. The defendant's insurer arranged surveillance of the claimant and after obtaining a substantial amount of visual evidence, successfully obtained an injunction freezing £2.25 million of the award and an order for the case to be remitted back to the High Court for retrial.

The claimant testified that he had not lied about the severity of his symptoms at the original trial. He had been dependant on the use of crutches and a wheelchair, but through a combination of working hard at physiotherapy and the frequent use of pain killers had achieved the level of mobility seen on the surveillance footage. It did not mean that he was without pain or able to work as he had been seen to (driving diggers for example) every day.

The judge held that it was for the defendant to prove that the claimant had dishonestly and knowingly misrepresented his level of disability, but the defendant had failed to do so. The judge accepted expert evidence on behalf of the claimant that there was a credible medical explanation for the level of his recovery and he believed the claimant to be an honest witness. In addition, pre-trial surveillance evidence was consistent with the disabilities alleged.

The claimant had elected not to spend the damages awarded for care and aids/appliances on those aspects, but this was

a decision the judge could understand and it did not mean that the claimant had lied about his disabilities.

"That he has cheated the Revenue and has not used his damages on acquiring the services and facilities for which they were awarded counts against him, but it does not follow from these matters that he is guilty of dishonestly misrepresenting the true extent of his disability. Once compensation is in the hands of an injured claimant, I can see how he might decide ... to forgo some or most of the aids and assistance for which he claimed and spend the money instead on other things which in his mind compensated him for his loss of amenity."

Mr Justice Field

Comment: insurers have long debated whether more attempts at post settlement surveillance should be made. This case highlights a serious problem with such surveillance in that unless it is obtained very soon after trial, it is not necessarily proof of the claimant's pre-trial condition.

Perhaps a more frustrating issue for insurers is that as the law stands a claimant can be awarded very large damages for future care (in Mr Noble's case over £2 million) but, provided they have mental capacity to handle their own affairs, are not obliged to actually have the care for which the insurer has paid them.

Custodial sentence for fraudster: Shikell v Motor Insurers Bureau (MIB) – Leeds District Registry 2011

The claimant in this case accepted a Part 36 Offer of only £30,000 after his claim for brain injury, pleaded in excess of £1.3 million, was discredited by surveillance evidence obtained by the Motor Insurers Bureau (MIB).

The MIB was granted permission to bring proceedings for contempt of court against the claimant, his father, and one of the claimant's friends on the basis that they had attempted to pervert the court of justice by lying about the claimant's alleged disabilities.

The test for contempt in cases like these is that the applicant must prove beyond doubt for each statement which is alleged to be false, that:

- The statement is false
- The statement, if maintained as true, would interfere with the course of justice
- The maker of the statement had no belief in the truth of the statement and knew that it was likely to interfere with the course of justice.

Exaggeration of a claim alone is not automatically proof of contempt of court.

The claimant was found guilty on 14 of 16 counts against him and, along with his father, was given a 12 month custodial sentence. The claimant's friend was fined for verifying a document he had not

actually read but escaped a more serious penalty as he did not know that his false statement was likely to affect the damages the claimant would receive.

Comment: where a judge is unwilling to refer a fraudulent claim to the Director of Public Prosecutions a defendant who wishes the claimant to face a criminal penalty can apply for permission to bring proceedings for contempt of court. The legal costs involved can, however, be prohibitive and as shown above the test to prove contempt is not an easy one. Even when found in contempt a claimant may receive only a relatively small fine. In Kirk v Walton the claimant settled for £25,000 after her claim in excess of £750,000 was discredited by surveillance, but was fined only £2,500.

Cases like this one where fraudulent claimants are jailed remain relatively rare. Only when custodial sentences are much more common are they likely to serve as a significant deterrent.

Thanks go to the MIB and their solicitors Weightmans for their helpful note on this case.

Judge gives guidance on use of “social network” evidence: Daniel Locke v James Stuart and Axa Corporate Services Ltd – High Court (2011)

The claimant sought damages for personal injury and other losses following an alleged road traffic accident. The second defendant, who was the first defendant’s insurer, alleged that the accident had been staged and was in fact one of nine related staged accidents involving a number of conspirators. The accidents had all been referred to the same firm of solicitors by the same individuals and had all occurred

in the same area over a six month period. The vehicles involved had been on short-term hire and had multiple passengers resulting in 97 individual claims. The defendants produced evidence from “Facebook” that the claimants knew each other.

The Judge accepted that the defendants had proved their case to the required standard and gave judgment in their favour but raised concerns about the volume of evidence produced to the court. He recommended that in future cases like this the parties prepare a schedule for the court of which facts were accepted or disputed, and that a document explaining how “Facebook” entries were generated and what inferences could be drawn from them be compiled as a guide to the courts. He also warned that the details of individuals obtained from “Facebook” or other social networking sites should not appear in trial bundles with any suggestion that they were involved in fraud unless there was proper supporting evidence.

Comment: social networking sites are increasingly popular and can be a useful source of evidence. They may confirm that conspirators know each other, or that claimants might not be as seriously injured as they allege. Claimants have even been known to boast about their frauds to friends on them! It is encouraging that the courts appear to recognise the evidential value of these sites.

Completed May 2011 – Copy Judgments and/or source material for the above items can be obtained from Chris Gaydon (contact no: 01245 272480, e-mail: chris.gaydon@uk.qbe.com).

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