QBE European Operations

Liability round-up of 2014

QBE

Liability round-up of 2014

Contents

Introduction – Another busy 12 months

Whilst Lord Justice Jackson's and the Ministry of Justice reforms to the civil justice system continue to bed-in, 2014 also saw a number of key developments which are likely to have a significant impact on casualty claims and the insurance industry as a whole. It is no small task to keep up-to-date, so this round-up provides you with a snapshot, as well as the opportunity to look back, take stock and prepare for the challenges that 2015 will undoubtedly bring.

The first half of 2014 saw the legal profession grappling with the consequences and fall-out from ***Andrew Mitchell MP v News Group Newspapers [2013]***, which sought to introduce tougher and less forgiving sanctions for non-compliance with court rules. Whilst the aim and intention was admirable, it soon became clear that further clarification was needed, which led to the Court of Appeal revisiting the issue in ***Denton v T H White Ltd [2014]***. Much to the relief of the legal profession, the requirement for strict compliance was relaxed and guidance was provided in the form of a three-stage test. The test seems to have reduced the amount of satellite litigation and will hopefully allow the courts, and the parties, to deal with litigation in a more efficient and timely fashion.

2014 didn't see the Supreme Court dealing with a liability case of the potential importance of ***Woodland v Essex County Council [2013]***, when they decided the local authority was liable for the negligence of an independent contractor, without fault on its part. That said, the imposition of a non-delegable duty of care in that case has led to claimant lawyers looking to broaden the scope of such duties. Further, the Court of Appeal has decided a number of cases concerning the scope of vicarious liability and this undoubtedly remains an evolving area of law.

In terms of reform, Scotland has 'picked-up the baton' and will be introducing significant legislation in 2015, in the hope of improving their civil justice system and claimants' access to justice. South of the border, the Insurance Bill and the Social Action, Responsibility and Heroism Bill look like they will finally make it onto the statute book in 2015, and with that will bring a number of challenges for insurers, brokers and insureds.

Fraud remains a 'hot-topic' and 2014 saw a number of important cases, which have provided useful guidance for insurers in their fight against fraud. Positively, that trend looks set to continue with the introduction of the Criminal Justice and Courts Bill in 2015 and a continued governmental appetite to reduce insurance fraud, as well as the cost to the industry from whiplash claims.

Liability – The Continuing Evolution of Vicarious Liability

The Court of Appeal were tasked with looking at two very different cases in 2014, both considering an allegation of vicarious liability for the negligence of an 'employee'. This area of law has been the subject of significant developments in recent years following the historic abuse cases of ***JGE v The Portsmouth Roman Catholic Diocesan Trust [2012]*** and Various Claimants case [2012], where the claimants were successful in expanding the scope of vicarious liability. The contrasting outcomes of the 2014 cases serve to highlight the importance of applying the two-stage test for determining an 'employer's' vicarious liability:

1. A sufficiently close relationship – akin to employment – between the 'employee' and employer
2. A strong connection between what the employer is asking the person to do and the wrongful act, so that the employer significantly increased the risk of harm

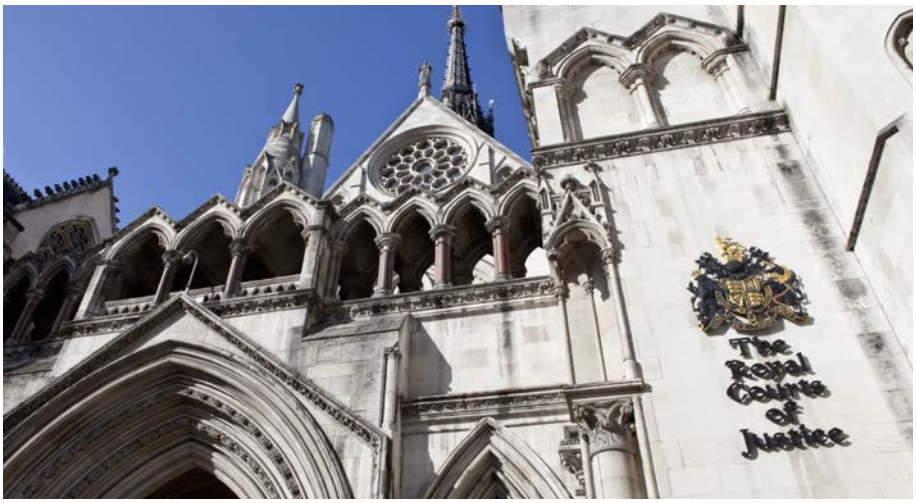
The first case was ***Ahmed Mohamud v WM Morrison Supermarkets Plc [2014]***. On 15 March 2008, Mr Mohamud visited the defendant's petrol station premises in Small Heath, Birmingham. He entered the kiosk and asked the defendant's employee, a Mr Khan, if it was possible to print off some documents which were stored on a USB stick. Mr Khan responded in an abusive fashion, including racist language.

After leaving the kiosk and getting into his vehicle, Mr Mohamud was subjected to a very serious and violent attack by Mr Khan, and was left with a severe head injury, psychological trauma and other soft tissue injuries. The question for the Court of Appeal was whether the relationship between employer and employee was capable of giving rise to vicarious liability – whether there was a sufficiently strong connection between the assault and the employment.

The claimant's case was that the assault arose directly from the interaction between him and Mr Khan, and that was clearly committed within the parameters of Mr Khan's work duties and thus satisfied the second limb of the test. It was argued that it would be fair, just and reasonable for there to be a remedy against the employer.

The defendant countered that Mr Khan's duties involved no element of keeping public order or exercising authority over a customer. Mr Khan was being encouraged to go back inside the kiosk by his supervisor and thus his actions were purely for his own reasons, so there was no connection between his work and the attack.

The Court of Appeal agreed with the defendant and found that the distinguishing feature was the absence of any instruction or requirement for Mr Khan to engage in any form of confrontation with a customer – mere interaction was not sufficient. The claimant was unable to satisfy stage two of the test and thus the defendant could not be vicariously liable for the attack of Mr Khan.



The second case was ***Cox v Ministry of Justice [2014]***. Ms Cox was a prison catering manager and had been supervising six prisoners who were carrying out paid kitchen work in the prison. As they carried a delivery to the first floor kitchen, one of the prisoners inadvertently hit his head on a wall, lost his balance and dropped two heavy bags of rice from his shoulder, one of which fell onto Ms Cox's back.

It was accepted that the accident was caused by the negligence of the prisoner, so the Court of Appeal were left to decide whether the Ministry of Justice's (MoJ) relationship with the prisoner was sufficiently close to be akin to that of employment, thus satisfying stage one of the test. The Court of Appeal dissected the question and found for Ms Cox for the following reasons:

1. Control. The relationship between the MoJ and the prison kitchen staff was actually closer than that of the usual employee/employer relationship. The prisoner was undoubtedly under the control of the MoJ at all times during his incarceration
2. Creation of risk. The MoJ had assigned the prisoner to the activity of kitchen work and in doing so, created the risk of the tort being committed
3. Employment relationship. The kitchen work carried out by the prisoners was essential to the functioning of the prison and benefitted the MoJ. The kitchen provided all meals for the prisoners, who numbered about 400, which meant no outside caterers were needed. The prisoner was paid £11.55 per week for the kitchen work, which would obviously compare favourably to the market rates for outside caterers.

Whilst finding for the claimant, the Court of Appeal tried to limit the scope and temper their judgment by confirming that the MoJ would not be vicariously liable for all negligent acts committed by a prisoner, but went on to acknowledge that the scope and application of vicarious liability is evolving and is likely to continue to develop year-on-year.

Interestingly, it is understood that Mr Mohamud has decided against an appeal, whilst the MoJ have been given permission to appeal to the Supreme Court. Whilst it remains to be seen whether the appeal proceeds, it is quite difficult to identify the deficiency in the Court of Appeal's judgment and any perceived opportunity to draw 'a line in the sand' might be misconceived.

Non-delegable duty of care – Where next?

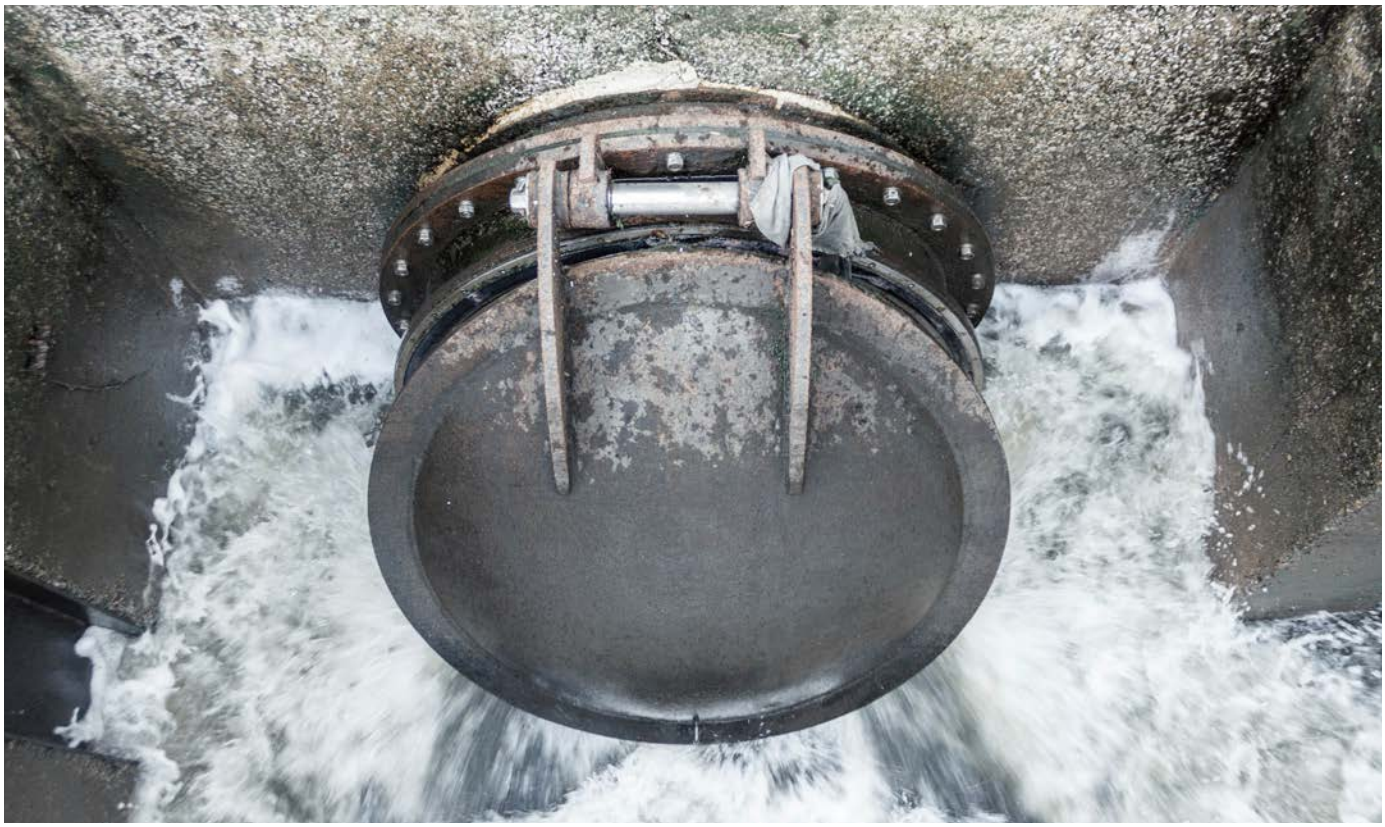
Many commentators were quick to highlight the potential significance of ***Woodland v Essex County Council [2013]*** and to speculate on other areas where a defendant might be fixed with a non-delegable duty of care to a claimant. The tragic circumstances of Annie Woodland's accident, and the prospect of her being left without compensation, underlined the public policy issues at play. The Supreme Court took that opportunity to set out clear guidelines (the five step Woodland criteria, below) for determining whether a non-delegable duty of care is owed, but added the additional requirement that it must be fair, just and reasonable to impose such a duty. As a result, 2014 saw two conflicting County Court decisions, where claimants have sought to argue that a local authority owes them a non-delegable duty of care for the provision of foster care.

The first case was ***BB & BJ v Leicestershire County Council (2014)*** and whilst the judge's comments on a non-delegable duty of care were merely obiter (not determinative of the case outcome as it was struck-out due to limitation), it appeared to give claimants a route to claim against the local authority. The claimants alleged sexual, physical and emotional abuse by foster carers and following the decision in ***Woodland*** the basis of the claim was changed from a professional negligence claim against the social workers, to an allegation that the local authority breached its non-delegable duty of care and/or was vicarious liability for the actions of the foster carers.

Whilst a local authority could not be vicariously liable to the claimants, as their relationship with the foster carers was not sufficiently akin to employment, the County Court judge decided a non-delegable duty of care was owed. The judge applied the *Woodland* criteria:

1. The claimant was a child or vulnerable person who was reliant on the protection of the defendant against the risk of injury
2. There was an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission (i) which places the claimant in the custody, charge or care of the defendant, and (ii) there is a positive duty to protect the claimant from harm
3. The claimant has no control over how the defendant chooses to perform those obligations
4. The defendant has delegated to a third party a function which is an integral part of the positive duty which he has assumed towards the claimant
5. The third party has been negligent in the performance of the very function assumed by the defendant and delegated to the third party.

Finally, the judge had to consider whether it would be fair, just and reasonable to impose a non-delegable duty on the local authority and did consider the difficulties that may be faced in the future with regard to obtaining insurance and the imposition of a duty on a local authority, where no such duty is imposed on a parent. That had to be balanced against the redress available for children placed in a local authority's children's home and abused by a local authority employee, but where no such redress would be available against a foster carer. Ultimately, the judge felt it more compelling that victims of abuse should have a claim against the local authority which had taken the positive step of taking control of the child to protect it, and the claims would have succeeded had they not been struck-out due to limitation.



As this decision was in the County Court and was only obiter it does not have to be followed nor is it binding on other cases and it was no surprise the court were asked the same question shortly afterwards. The recent decision in ***NA v Nottinghamshire County Council (2014)*** did just that and to the relief of local authorities, and their insurers, it was decided that it would not be fair, just and reasonable to impose a non-delegable duty of care for the provision of foster care.

The claimant was subjected to physical, emotional and sexual abuse and claimed that the defendant had negligently failed to remove her from her family home; that they should be vicariously liable for abuse by the foster carers; and that they owed her a non-delegable duty of care whilst she was in foster care. Each limb of the claim failed, but most importantly the judge declined to find a non-delegable duty of care because it would place an unreasonable burden on a local authority providing critical public services and where it had taken all reasonable steps to ensure that the child was safe in the placement. Such a duty would lead to risk averse foster parenting and there should be a fundamental distinction between placement in a children's home and placement with foster carers. The latter provides experience of family life and the local authority does not have the same control over the children's day-to-day lives. That may bring risks but provided that all necessary reasonable care has been taken to ensure that foster parents and the placement are suitable "those are risks which will generally be worth running in order to obtain for a child the benefits of family life."

Ultimately, the judge was satisfied that the public interest in promoting family life for children in foster care trumped the inevitable difference of legal treatment between children abused by foster carers and those abused in a children's home. We can expect to see an appeal and the Court of Appeal judgment will provide the next chapter in this ever-evolving area of law.

Reform – Court Reform (Scotland) Bill, Insurance Bill and Mesothelioma Act

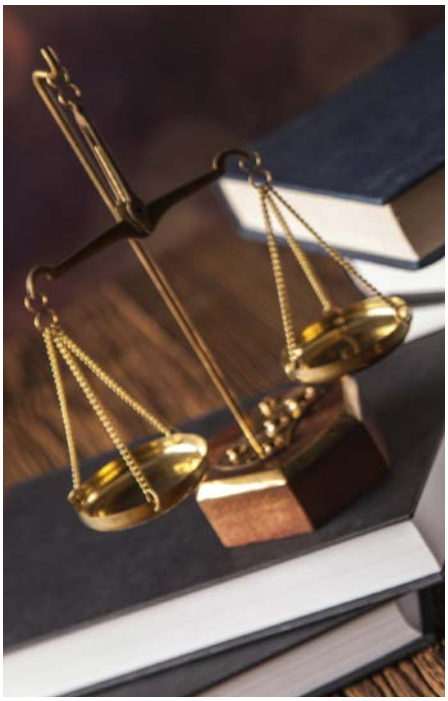
Court Reform (Scotland) Bill

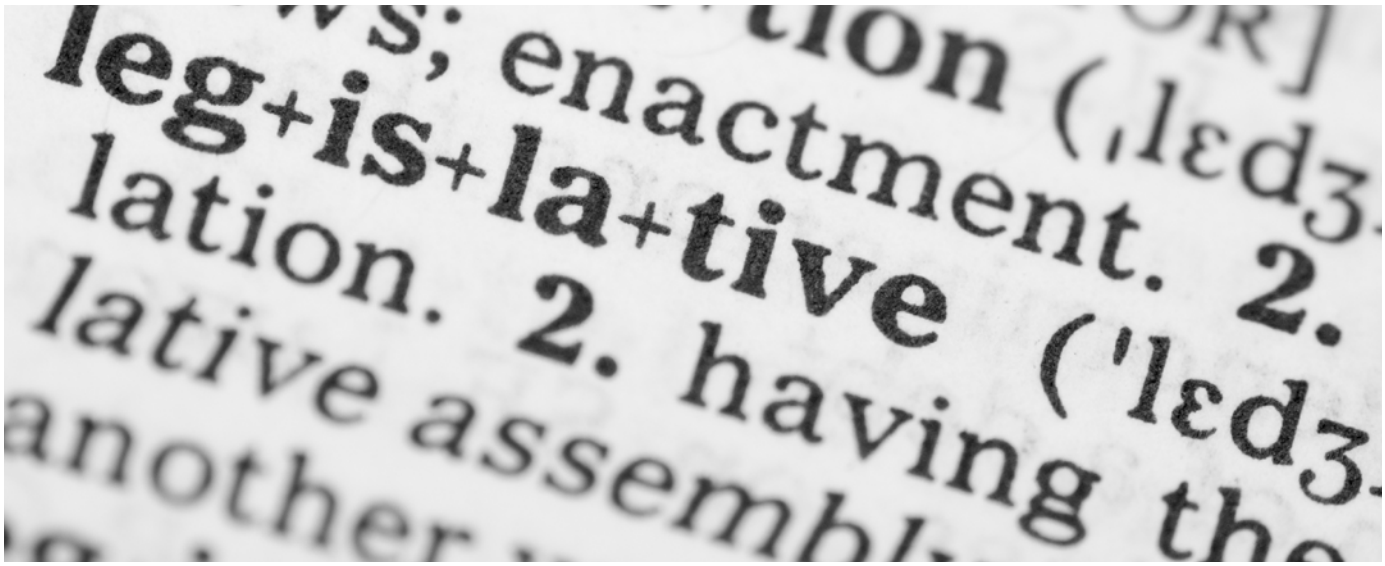
This major piece of legislation is long overdue and will be warmly welcomed by the majority of interested parties who use the Scottish civil justice system, which has been labelled 'slow, inefficient and expensive'. The Bill (drafted following Lord Gill's review of the civil court system) proposes major changes and has recently passed stage 3 (final stage) in the Scottish Parliament.

Despite some opposition from claimant lobbyists, there was limited amendment to the Bill as it passed through parliament and the key points of the Bill are:

1. An increase in the privative jurisdiction of the Sheriff Court from £5,000 to £100,000, which will mean the vast majority of personal injury claims will be heard in that court
2. Asbestos related claims will not be excluded from the Sheriff Court
3. There will be no presumption that the instruction of counsel will be sanctioned and it will be for the claimant to satisfy the court that a particular case warrants the instruction of counsel
4. The establishment of a national specialist court to deal with personal injury claims, with both proofs (trial) and civil jury trials adjudicated by specialist sheriffs
5. Establishing a Sheriff Appeal Court

The fundamental hope is that the reform will improve access to justice, reduce costs and help to deliver quicker judgments for court users. There are some concerns about the extent to which the Sheriff Court infrastructure is currently equipped to deal with the increased volumes of work, but assurances have been given that the appropriate resource will be there. The indications are that the Bill will be implemented by mid-2015.





Insurance Bill

South of the border, reform to insurance contract law edges closer and the Insurance Bill is due for its final reading in the House of Lords on 15 January 2015. The Bill will then make its way through the House of Commons and could be enacted before the end of the current parliamentary session (30 March 2015) and would come into force 18 months thereafter.

The key clauses of the Bill will address:

1. Duty of disclosure in business insurance. The insured will have to make "a fair presentation of the risk" which means they must disclose every material circumstance that is known or ought to be known to them. Failing that, disclosure which gives sufficient information to put a prudent insurer on notice that it needs to make further enquiries. Every material representation as to a matter of fact must be substantially correct and every material representation as to a matter of expectation or belief must be made in good faith.
2. Remedies for breach of duty of disclosure. The draconian remedy of avoiding the policy is being replaced with a more proportionate range of remedies, which include an additional premium where an insurer can show that it would have written the risk but at a high premium.
3. Warranties and Basis of Contract clauses. The Bill effectively abolishes Basis of Contract clauses and the insurer would not be able to contract-out. A breach of warranty currently discharges the insurer from its obligations, but the Bill provides for cover reinstatement where the insured remedies the breach.

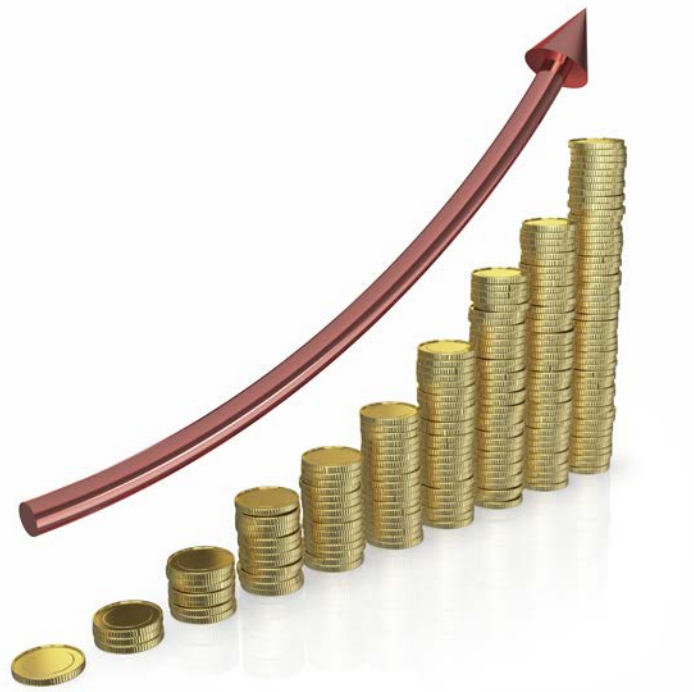
When the Bill is implemented much of the case law and precedent, which has been accumulated, interpreted and adapted over more than 100 years, will cease to apply. This will inevitably impact upon the certainty of outcome and will likely lead to some satellite litigation as stakeholders and their lawyers become familiar with the new law. That said, QBE Insurance welcomes this significant piece of legislation and looks forward to working with brokers and insureds to ensure a smooth transition.

Mesothelioma Act 2014

Finally, 2014 saw the introduction of the Mesothelioma Act and the Diffuse Mesothelioma Payment Scheme, which started in July. Under the Scheme, claimants who cannot pursue a claim against an employer, or their insurer, will be able to recover 80% of the average damages settlement. The Scheme is funded by a levy paid by current Employers' Liability insurers. It is believed that claim numbers will peak in 2016 and then slowly decline thereafter, so it remains to be seen whether claimant lobbyists will then be able to persuade the government to increase the recoverable damages to 100%.

A more recent development with mesothelioma claims followed the High Court decision that the LASPO exemption (allowing the recovery of success fees and ATE premiums) should be maintained until the government has undertaken a full review. Whether that review can be done during 2015 remains to be seen and will perhaps depend on the political party in power post-election.

Causation – Pre-existing injury and the eggshell skull rule



The case of ***Christine Reaney v University Hospital of North Staffordshire NHS Trust [2014]*** could be of significant importance to causation arguments in personal injury claims where the claimant has a pre-existing injury. The long-established eggshell skull rule has arguably been extended and this case should be considered when assessing what damages should flow from a subsequent injury. The eggshell skull principle requires that a defendant must take its victim as it finds them and is answerable for the full extent of the injury suffered, even where only slight injury would have been foreseeable in a person of normal fortitude.

In Ms Reaney's case, the hospital admitted the negligent exacerbation of her pre-existing T7 paraplegia, specifically the creation of deep pressure sores with a consequent infection of the bone marrow, abnormal shortening of the muscle tissue of her legs and a hip dislocation. The High Court had to consider the extent to which her condition had been made worse and what damages should be paid. The Court decided the hospital's negligence had made Ms Reaney's position 'materially and significantly' worse than it would have been "but for" their negligence.

The hospital argued that the right approach was that they should only "top-up" the care that the claimant would otherwise have needed prior to that negligence. They argued that because of the paraplegia, Ms Reaney was always going to be someone who had significant care needs but those needs should not rest at the door of the hospital. On that basis, the hospital asked the court to assess her needs as a whole, give credit for the care that was being provided, take account of the care that she needed, but was not being provided, and thereafter compensate Ms Reaney for the additional care that arose because of the pressure sores.

The difficulty for the Court was that there was a significant element of care that Ms Reaney needed prior to the negligence, but that care was not being met. Once the negligence occurred and the care needs increased, the judge had to determine how to "fairly" compensate Ms Reaney to address her needs. While she was paraplegic prior to the hospital's negligence she was only receiving seven hours of care a day from the local authority and on top of that she received gratuitous care from her friends and family. After the negligence, the judge accepted that she now needed 24-hour care, seven days a week, provided by two carers.

The hospital maintained that it would not be fair for them to fund the full care package because they would be compensating Ms Reaney for the underlying paraplegia and not the injury they caused (the pressure sores). The court took the view that the correct test was an objective "but for" test, which would allow an assessment of Ms Reaney's needs, ignoring the negligence. It was necessary to look at the factual position of the care she was actually receiving (seven hours and the family support) and thereafter, having heard the legal arguments, determining the appropriate level of compensation to meet Ms Reaney's needs.

The court decided it was not enough for the hospital to simply "top-up" what might otherwise, or should have been in place as a consequence of the underlying injury. The consequence of the hospital's negligence was that by injuring an already injured party, they were responsible for the costs associated with the care package (and other associated expenses) that was now required and they had to pay full compensation for the (indivisible) worsened condition.

It is important to think about whether the second injury has more serious consequences because of the first injury and to that end, there are similarities to the case of ***Paris v Stepney Borough Council [1951]*** – the loss of an eye is much worse for a one-eyed man, as opposed to a man with full sight. As a result, either by application of the "but for" test or by finding that the hospital had "materially contributed" to Ms Reaney's condition, the result would be the same and the absence of a joint tortfeasor, from which the hospital could seek contribution, was no answer to the full damages claim against it.

Fraud

The growing governmental support for insurers' fight against fraud has culminated in the introduction of the Criminal Justice and Courts Bill. Figures released by the ABI in May 2014 revealed that the value of fraudulent insurance claims uncovered by insurers in 2013 rose to a record £1.3bn, an increase of 18% from 2012. Insurers detected a total of 118,500 bogus or exaggerated insurance claims, which underlines the sheer scale of the problem and the need for multi-party, judicial and governmental support.

The judiciary set out the current legal position in the Supreme Court decision of ***Summers v Fairclough Homes [2012]*** which gives the court the power to strike-out the entirety of a claim, including any award for genuine injury, where a claimant grossly exaggerates the extent of his injury. However, this power is only to be exercised in very exceptional circumstances and in ***Summers*** the fact that the claimant fabricated the extent of his injury in an attempt to increase the value of his claim from £88,000 to £840,000 was not sufficient to see the claim struck- out, despite the court accepting that the claimant had acted dishonestly.

The new position under section 56(2) of The Criminal Justice and Courts Bill will be that in any personal injury claim where the court finds the claimant is entitled to damages, but is satisfied on the balance of probabilities that the claimant has been "fundamentally dishonest" in relation to the claim as a whole, it must dismiss the entirety of the claim.

On that basis, the Bill goes further, and sets out a more robust approach to fraud and dishonesty, than that found in ***Summers***, whose claim would have been struck-out with the application of section 56. It is to be hoped that the judiciary will embrace the Bill and exercise their power to serve as a deterrent to fraudulent claims.

A number of other measures have recently been announced by the government and include:

1. A register of accredited medical experts. Aimed at ensuring that medical experts considering whiplash claims are independent and sufficiently well trained, a new portal – Medco - will go live from 6 April 2015. The system aims to exclude any experts with a direct financial link to those commissioning them and by the end of 2015 all experts will have to be accredited.
2. Industry-driven data sharing to identify previous claims history. Fraudulent claims will be tackled 'at source' via a system of claimant representatives carrying out CUE PI searches on all potential whiplash claimants. This is intended to serve a dual purpose as it will also assist the medical expert to reach a prognosis.
3. A fraud task force. Lord Chancellor, Chris Grayling, took his opportunity at the recent ABI conference to announce the formation of a 'fraud task force' which will fall under the leadership of Law Commissioner, David Hertzell. The task force will extend the focus on fraud beyond whiplash and motor claims, widening current initiatives to consider other types of insurance claims fraud. It is expected that the task force will produce interim findings by the end of March 2015 and will look in particular at whether there is any further legislation needed, or voluntary measures which could be put in place, to combat fraud.

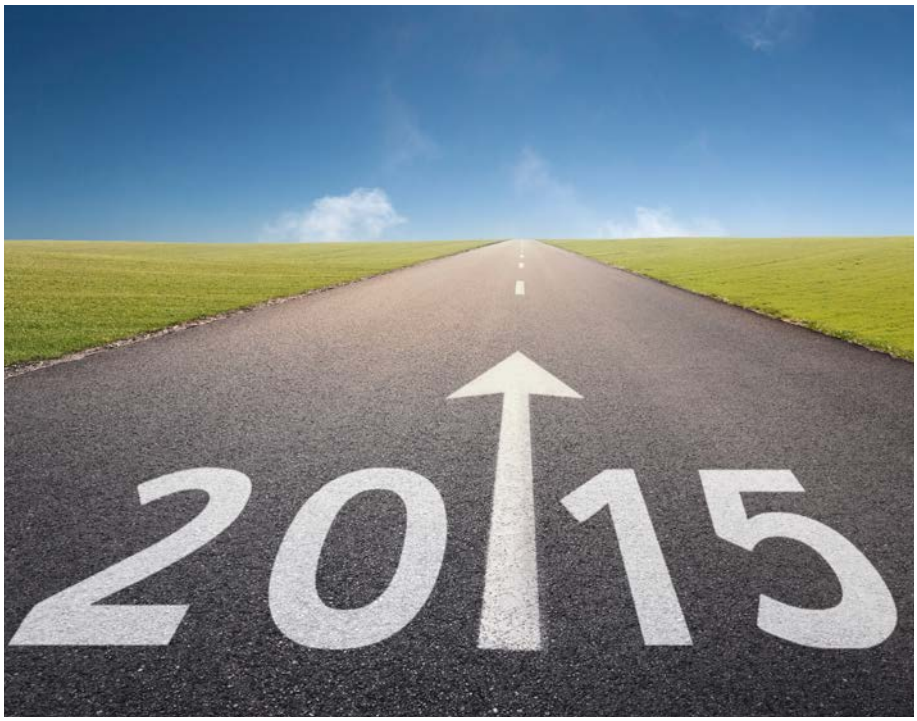
All interested stakeholders will welcome the ongoing appetite to tackle insurance fraud and keep the problem firmly at the top of the agenda. In addition, 2014 saw a number of cases where insurers, and the authorities, have continued to take the fight to fraudsters.

Liverpool Victoria Insurance Company Ltd v Mr Thumber [2014] saw successful committal proceedings against Mr Thumber for contempt of court, following a staged accident. The judge was satisfied that there was 'powerful evidence of fraud' and the dishonest evidence of Mr Thumber was clearly a contempt of court. He was sentenced to 12 months in prison and the judge made it clear that those found guilty of insurance fraud should expect a custodial sentence.

Another successful outcome followed collaboration between QBE Insurance and the Insurance Fraud Enforcement Department (IFED). A QBE policyholder was involved in a staged accident on 5 February 2011. Three friends from Liverpool had deliberately caused the crash (involving a coach and a car) in a bid to fraudulently claim £150,000 for personal injuries. IFED made multiple arrests and the men were successfully prosecuted with conspiracy to defraud and were sentenced for up to 14 months in prison.

The final case followed a serious fire at Mr Hindry's business on 27 June 2012, which destroyed the premises and all stock, as well as damaging neighbouring properties. Fraud investigators discovered Mr Hindry's income from the business did not support his outgoings and lifestyle. The business was struggling with a number of creditors pursuing payment and it was also discovered that he was an active gambler, losing approximately £50,000 at casinos in the last 2 years. Mr Hindry was found guilty of charges relating to arson and fraud by false representation, and was sentenced to 6 years.

Horizon scanning – What's in store for 2015?



The case of ***Coventry v Lawrence*** recently received a good deal of attention, and also created a fair amount of head-scratching, when the Supreme Court said it will hear an argument that the losing party's obligation to pay a success fee and ATE premium infringes their article 6 right to a fair hearing (European Convention on Human Rights, ECHR). If such an infringement were established, the legitimacy and incompatibility with The Courts and Legal Services Act 1990 would then have to be determined. In theory, this could lead to compensation claims against the government where success fees and ATE premiums have been paid pre-LASPO (1 April 2013), but the prospect of hundreds of thousands of claims against the government seems an unlikely one, with the potential of billions of pounds at stake.

The appeal is to be heard by the Supreme Court beginning 9th February and a number of interested parties have been invited to make submissions. The extremely high costs in ***Coventry*** may just be an unfortunate exceptional example #of excessive success fees and ATE premiums rather than compelling evidence of the incompatibility of the costs regime itself and it remains to be seen whether this case has wider application for casualty claims.

Another outstanding question-mark is against the ongoing government review of the discount rate. Given the length of time of the review, and with a general election in May, the sensible money would probably bet against an outcome before the end of the 2015. The discount rate is used to help calculate damages for lump sum future losses and was set by the Lord Chancellor at 2.5% in 2001. Even a 0.5% reduction would lead to significant increase in damages across large loss claims and would impact the government and insurers alike. The government recently appointed a panel of experts to give investment advice and it could be another 6-9 months before a new government is able to properly review, consider, comment and act upon any report. Again, there is an awful lot at stake for the government and it goes without saying that a decision will not be rushed into.

Also 'on the radar' will be the Supreme Court judgments in ***IEGL v Zurich Insurance Plc*** (a mesothelioma case regarding partial cover and recovery), ***Michael v The Chief Constable of South Wales Police*** (whether the police are liable following an alleged delayed response to a 999 call) and Court of Appeal hearing in ***DSD & NVB v The Commissioner of Police for the Metropolis*** (whether the police have a duty to conduct investigations in a timely and efficient manner).

Finally, don't forget to keep up-to-date by reading our monthly Technical Claims Brief, which provides a summary of relevant case law covering liability, quantum, procedural issues and important points of law. You can subscribe at **www.qbeeurope.com/risk-solutions/subscribe.asp**.

Author

Tim Hayward

Tim joined the insurance industry in 1997, working in motor, and then liability claims, for a major UK insurer. He specialised in insurance claims litigation, studying part-time for 4 years, before qualifying as a Solicitor in 2011.

Working within QBE EO Technical Claims, Tim deals with high value and complex UK casualty claims, as well as providing technical advice internally and to key stakeholders. Tim is the author of the monthly QBE publication, Technical Claims Brief.

QBE European Operations Plantation Place 30 Fenchurch Street London EC3M 3BD
tel +44 (0)20 7105 4000 www.QBEeurope.com

5451CC/LiabilityRoundUp2014/January2015
QBE European Operations is a trading name of QBE Insurance (Europe) Limited and QBE Underwriting Limited, both of which are authorised by the Prudential Regulation Authority and regulated by the Financial Conduct Authority and the Prudential Regulation Authority.