Liability round-up

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QBE

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2011: A memorable year

2011 will probably be a year remembered for all the wrong reasons: rioting, the Euro crisis, rising unemployment and little evidence of sustained economic recovery.

Even before the Euro crisis, the UK's economic growth was weak with QBE's sixth national survey of UK businesses revealing a picture of only fragile recovery. The survey of 400 UK businesses of all sizes recorded that 72% of businesses expected a full economic recovery to take two or more years and that 43% would find it difficult to continue trading if current economic conditions continued for another 12 months. Inflationary pressures were also hampering recovery with 57% citing the negative impact of rising commodity prices.

2011 was however also a year when long awaited legal reforms were initiated and these may provide a brighter outlook for UK businesses in 2012.

The Jackson reforms

The stated aim of Lord Justice Jackson's reforms is to reduce costs overall and obtain a better balance on costs between claimants and defendants (in England and Wales). The reforms, amongst other things, propose an end to defendants having to pay Conditional Fee Agreement (CFA) success fees and After the Event (ATE) insurance premiums to successful claimants.

Success fees, often in the form of a 100% mark-up on base costs following a trial win, were intended to help increase access to justice by providing claimants' solicitors with additional funds on successful cases. This was supposed to help offset the risks of not receiving costs on cases taken on a "no win, no fee" basis where the outcome was less certain.

Lord Jackson in his January 2010 report identified that in at least a proportion of cases, success fees were not improving access to justice but simply allowing claimant solicitors to double their fees by cherry-picking cases. This was in turn escalating costs and slanting the civil litigation system in favour of claimants.

ATEs were also identified as adding to the costs burden and distorting the workings of the Civil Procedure Rules. ATE insurance guarantees that claimant solicitors will still receive their costs if they lost and in most cases they will not even be asked to pay the premium for the ATE. This will be paid by the defendants, if the claimant wins and not at all, if they lose.

Success fees and ATEs were cited by Lord Justice Jackson as being the principal causes for costs in England and Wales reaching unprecedented levels. For every pound paid in compensation in England and Wales today, a further eighty-six pence is paid in costs, and state funded bodies like the NHS Litigation Authority in some years, pay more in claimant's costs than on damages.

Progress on Jackson reforms

On 21 June 2011, the Government published the ***Legal Aid, Sentencing and Punishment of Offenders Bill*** (LAPSO). Although there is no mention of civil law costs reform in the Bill's title this is the legislation that, if enacted, will end the recoverability of success fees and After the Event insurance premiums from defendants.

As a major compensator itself, the UK government has a huge incentive to see the reforms implemented.

The Bill passed through the Commons on time and without serious amendment but is now being debated by the Lords, and is having a much less easy passage. Peers have criticised the combination of changes to the CFA regime with additional cuts in legal aid funding (some of which Jackson had not allowed for) that the Bill also introduces. To date, 197 amendments have been tabled which if adopted would see success fees (and in some case ATEs) continuing for most claims.

The strong opposition to the reforms is perhaps unsurprising given strong lobbying by claimants' solicitors, trade unions and consumer groups who see the LAPSO Bill as likely to have a dramatic impact on access to justice.

Peter Smith, Civil Justice Committee member and managing Director of First Assist Legal Expenses Insurance, has predicted that claims against the NHS will fall by 50% due to the combination of legal aid cuts and reforms of litigation funding. His comments published in the ***Law Gazette*** also predict that Lord Justice Jackson's reforms will make it materially harder for claimants in all areas of the market to pursue their claims.

The planned implementation of the reforms by October of 2012 is now in some doubt.

Professor Lofstedt's review

In March of 2011, the Work and Pensions Minister Chris Grayling announced that following on from Lord Young's report ***Common Sense, Common Safety*** a review of all UK work place health and safety law was to be carried out. The review group was chaired by Professor Lofstedt of Kings College London, a specialist in Risk Management who published his report on 28 November 2011.

The Minister also announced plans to reduce the number of Health and Safety Executive (HSE) inspections by about a third and to charge employers found guilty of health and safety offences for the cost of HSE investigations.

The stated aim of the review was to prepare for a reduction in the unnecessary burden (sic) of current health and safety regulation on business and thus stimulate economic growth.

Professor Lofstedt's recommends major changes to current regulation.

- Self-employed workers whose activities pose no potential risk of harm to others should be exempt from Health and Safety law
- The Health and Safety Executive (HSE) should review all of its Approved Codes of Practice (initial phase to be completed by June 2012)
- The Government should work more closely with the European Commission and others to ensure that both new and existing EU health and safety legislation is risk and evidence based (particularly during the planned review of EU health and safety legislation in 2013)
- The HSE should undertake a programme of sector-specific consolidation of regulation (like that currently in hand for explosives) to be completed by April 2015

- To ensure consistency of approach, legislation should be enacted to end the sharing of enforcement powers by the HSE and Local Authorities and to give the HSE authority to direct all local authority health and safety inspection and enforcement activity
- The original intention of the pre-action protocol standard disclosure list should be clarified and restated
- Regulatory provisions which impose strict liability should be reviewed by June 2013 and either qualified with "reasonably practicable" where strict liability is not absolutely necessary or amended to prevent civil liability from attaching to a breach of these provisions.

The full review can be seen at: http://www.dwp.gov.uk/policy/health-and-safety/

The UK Government's response to the review (published the same day) was enthusiastic. An immediate consultation on the abolition of large numbers of health and safety regulations was promised with the first regulations to be abolished within a few months. It has also promised to set up a new challenge panel from 1 January 2012 to allow incorrect decisions made by Health and Safety Inspectors to be overturned quickly.

Reaction to the review has been mixed. Whilst some have applauded an anticipated reduction in bureaucracy, others have voiced concerns over potential reductions in work place safety.

The removal of strict liability would undoubtedly be welcomed by most businesses and their insurers but this could be at odds with EU law in some cases. Many of Professor Lofstedt's recommendations call for further reviews and consultations and changes to primary legislation will need to be approved by the UK Parliament and may face opposition from the Scottish Parliament and Northern Ireland Assembly. It is likely to be some years before the final impact of Professor Lofstedt's report can be properly assessed.

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Ministry of Justice claims process - ready for extension?

Another reform backed by both Lord Justice Jackson and Lord Young, was the introduction of the Ministry of Justice's (MOJ) streamlined claims process for low value Road Traffic Accident (RTA) personal injury claims (in England and Wales).

Early in the 2011, the Forum of Insurers Lawyers (FOIL) reported on the relative success of the new process. Despite some early problems with some claimant solicitors and some insurers being unable to access the electronic portal (through which claims are notified and the parties exchange information) some 75% of personal injury claims were now captured by the scheme.

The FOIL report, whilst conceding that the statistical data released by the RTA Portal Company had yet to be tested, said that the consensus was "so far so good" with the portal providing quick and efficient exchange of information between the parties and with a cheaper fixed costs regime in place.

The Government have proposed extending the scheme to all classes of personal injury claims between £1,000 and £10,000 in value and extending the upper threshold for RTA claims to £25,000 by Autumn of 2012. The FOIL report quotes words of warning about such an extension from Tim Wallis the Chair of the RTA Portal Company. Tim warns against further expansion of the scheme to other classes of claims such as Employers' and Public Liability without "further considered time and thought". He believes that any new software system will need careful planning to ensure cost effective implementation and it has been suggested that a separate portal will be needed to cope with the additional claims.

The experience of insurers is that whilst the new scheme offers reduced costs it has also led to the need to deploy more

resources in order to meet the tight scheme deadlines for admissions of liability and acceptance of offers. The insurers reported to have made the biggest apparent savings from the process are those who value claims on the injury description given in the claim notification without waiting for supporting medical evidence. This has given rise to concerns about making fraud easier.

There have also been many complaints about abuses of the system such as the multiple reporting of the same claim (which the portal is currently unable to exclude) with multiple requests for Stage 1 cost payments.

Overall, there are certainly a number of issues to address before a successful roll out to other classes of business can be achieved and it seems unlikely that the scheme will be extended by Autumn of 2012.

Discount rate

To avoid over compensation, lump sum settlements for future losses paid to claimants are reduced to take into account investment return on the settlement money. Recent years have seen record low rates of return in the UK prompting claimant lawyers to call for a reduction in the current 2.5% discount rate used. The discount rate for England and Wales is set by the Lord Chancellor. The Scottish Parliament and Northern Ireland Assembly have devolved powers to set their own rates.

The effect of lowering the discount rate would be to greatly increase the cost of lump settlements and as governments are also compensators (through NHS litigation and as employers); there has been little enthusiasm for a reduction. The Lord Chancellor announced that he would review the rate in November 2010 after the Association of Personal Injury Lawyers (APIL) threatened to apply for a judicial review but then took no further action. In April of 2011, APIL became inpatient and issued an application for a review. This prompted the Lord Chancellor to announce via the Justice Minister that he would issue a public a consultation document in September or October of 2011.

Once this was announced, the High Court felt unable to grant the application but did say that if the review was not forthcoming in the time frame indicated then a fresh application might succeed. At the time of writing, the consultation has still not been launched but is expected to take place early in 2012, failing which the Lord Chancellor is likely to face a further application.

The outcome in England and Wales is likely to effect the deliberations of the Scottish Parliament and the Northern Irish assembly who have yet to announce their own decisions and who might conduct consultations of their own.

The following is an illustration based on figures from the seventh edition of the Ogden tables of the effects of decreasing the discount rate for a care claim of £100,000 a year for a twenty-year old woman with normal life expectancy.

Discount Rate	Multiplier Life	Lump Sum Value
2.5%	32.97	£3,297,000
2.0%	37.56	£3,756,000
1.5%	43.25	£4,325,000
1.0%	50.38	£5,038,000
0.5%	59.41	£5,941,000
0%	70.96	£7,096,000
-0.5%	85.89	£8,589,000
-1.0%	105.42	£10,542,000

Corporate manslaughter

The trial of the first Corporate Manslaughter Act case finally concluded, almost two years after charges were first made, in February of 2011. Cotswold Geotechnical was fined £385,000 but given ten years in which to pay due to their poor financial state. The outcome of the case is unlikely to have given much encouragement to supporters of the Act. It has taken a very long time to reach a conclusion and it has not provided any real test of its scope.

The Act was introduced after incidents like the Zeebrugge ferry disaster and the Hatfield rail crash where despite multiple deaths it had not proved possible to obtain a single manslaughter conviction. The Act was intended to provide a means of punishing large companies where there was a culture of poor health and safety but where it was impossible to secure a manslaughter conviction under existing legislation due to the inability to identify a "controlling mind".

In a small company such as Cotswold Geotechnical with one director, effectively running the business existing legislation could have been used to prosecute without any recourse to the new Act. It was also impossible to impose the level of fines set out in the sentencing guidelines without immediately putting the company into bankruptcy.

A second Corporate Manslaughter prosecution was announced by the Crown Prosecution service in July 2011. This may be a far better test of the effectiveness of the Act. The company being prosecuted, Lion Steel Equipment Ltd is a much bigger one than Cotswold with a much higher turnover. Only when a large company has been successfully prosecuted for an overall poor safety culture, maintained by senior management not directly linked to the activities leading to a fatality, is the Act likely to be regarded as a success.

Asbestos

Supreme Court rejects insurers' appeal on Scottish Pleural Plaques

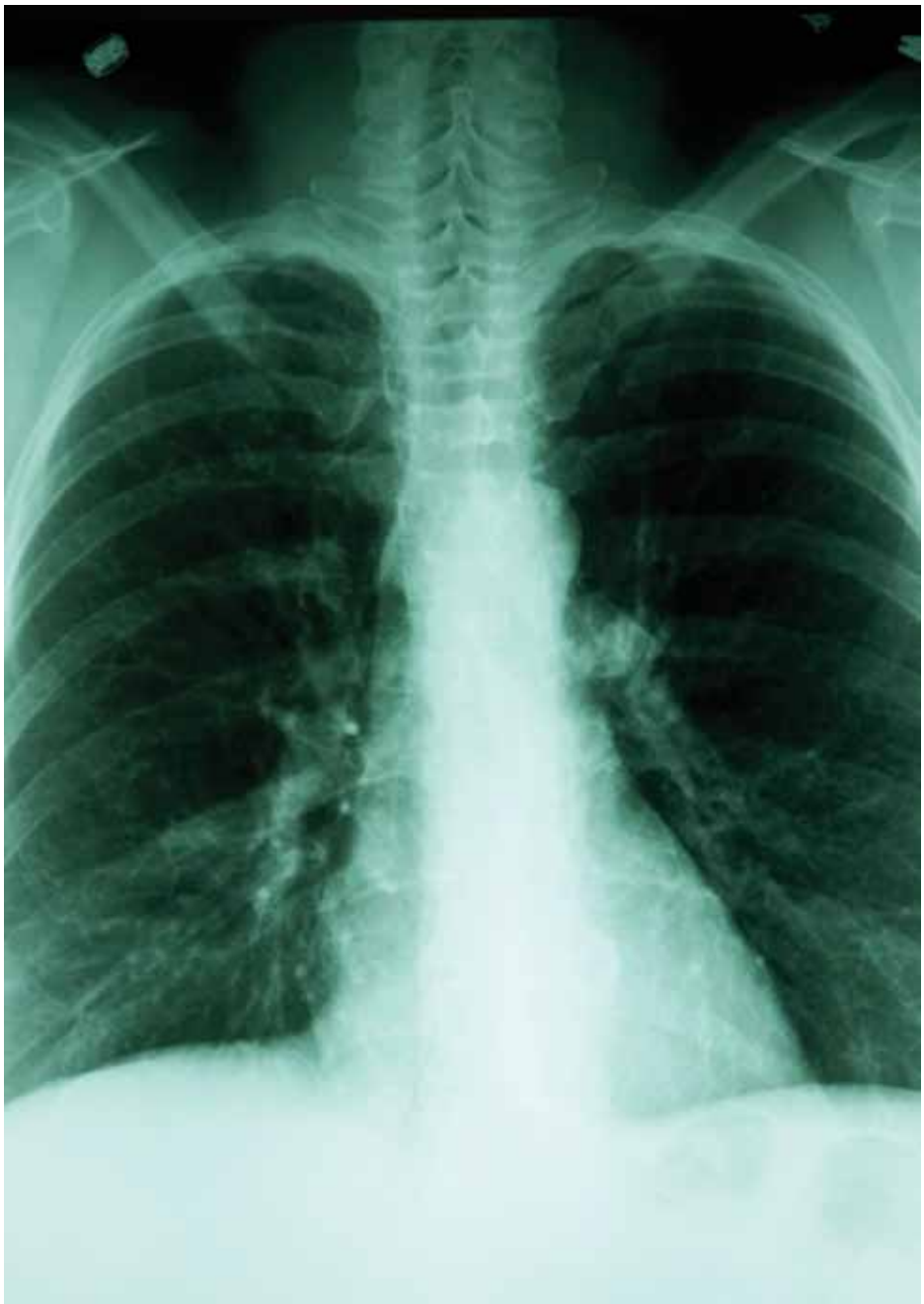
The Supreme Court has rejected the appeal brought by four insurers seeking to have the ***Damages (Asbestos Related Conditions) (Scotland) Act 2009*** declared unlawful.

The appeal against the decision of the Inner House of the Court of Session was based on the arguments that the Act was a breach of the ***European Convention on Human Rights*** (depriving insurers of their rights to enjoy their property) and was so irrational as to be invalid at common law.

The Supreme Court found against the insures holding that the Scottish Government were not acting unreasonably in trying to address what they saw as a social injustice. The Act reverses the House of Lords decision in ***Rothwell v Chemical Insulating Co*** for the Scottish jurisdiction and means that individuals with pleural plaques and other asymptomatic conditions will once again be able to obtain compensation. Prior to the decision in ***Rothwell*** pleural plaques had been actionable for many years and the Act to a large degree simply restored the pre-***Rothwell*** position.

There are reported to be around 800 litigated plaque cases in Scotland, which were awaiting the Supreme Court's decision and, barring a further appeal to the European Court of Human Rights, these can now proceed to settlement. Similar legislation introduced by the Northern Ireland Assembly can also now progress to enactment.

Pleural plaques and other asymptomatic conditions remain unactionable in England and Wales and claimants exposed to asbestos there are now likely to try to find



grounds on which to bring their plaque claims in one of the a jurisdictions where they can obtain compensation.

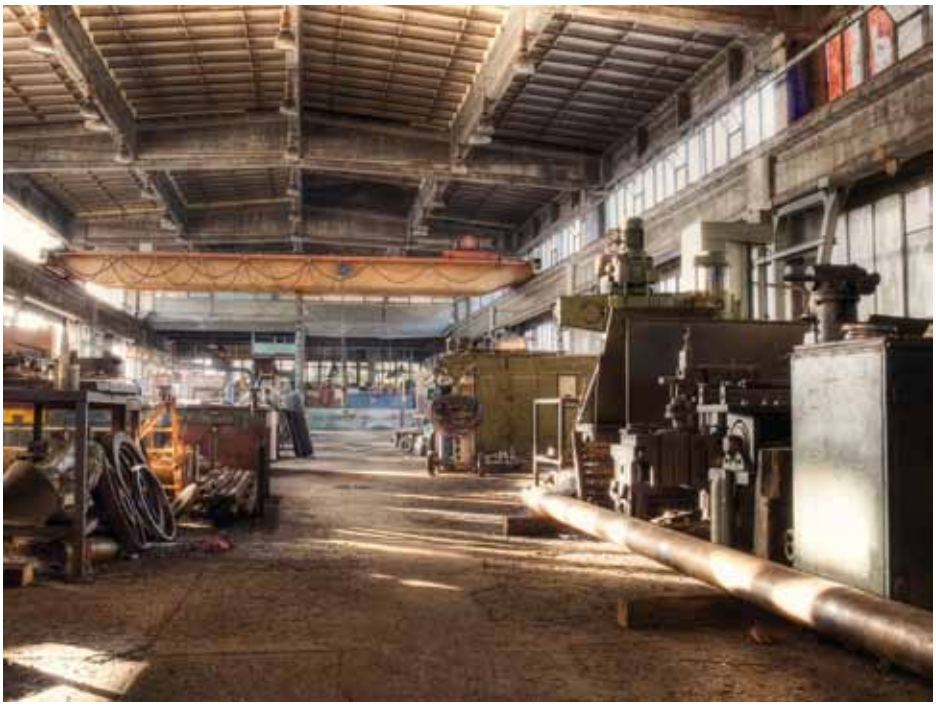
Supreme Court widens pool of potential Asbestos claimants

In the conjoined appeals of ***Sienkiewicz (Administratrix of the Estate of Edith Costello) v Greif and Willmore v Knowsley Metropolitan Borough Council,*** the Supreme Court considered the issue of causation where the deceased victims of mesothelioma had been exposed to low levels of asbestos by single defendants.

In the first case, Edith Costello was a clerical worker who had been exposed to low levels of asbestos when visiting her husband on the factory floor of the manufacturing firm they both worked for. In the second case, Dianne Wilmore had been exposed to asbestos from ceiling tiles whilst she was a school pupil due to the tiles being damaged by other pupils and when occasional maintenance work was carried out. Both claimants had been successful at the Court of Appeal but the defendants appealed to the Supreme Court.

The defendants argued that for the claimants to succeed they must prove that, on the balance of probabilities, it was more likely than not that the negligent exposure to asbestos had caused mesothelioma. To do this they needed to establish that the exposure had doubled the risk when compared to the risk of contracting it from asbestos fibres in the environment.

The House of Lords famously addressed causation in mesothelioma cases in ***Fairchild v Glenhaven Funeral Services*** where there were multiple exposures with different employers over the claimant's working life. It was impossible to say which asbestos fibre and consequently which exposure, had actually led to mesothelioma. Faced with this dilemma the Lords reduced the usual test for causation to one of whether negligent exposure had materially



increased the risk and held that any of the employers who had done so were jointly and severally liable. The defendants argued that the ***Fairchild*** exception should not apply here because these cases involved only single defendants.

The Supreme Court dismissed the appeals holding that the Fairchild exception should apply. They cited section 3 of the ***Compensation Act 2006*** (which imposed joint and several liability) as giving a clear indication that Parliament wished to impose draconian consequences on any employer who had been responsible for even a small proportion of exposure.

They also rejected statistical evidence on mesothelioma cases as inappropriate for a disease where the latency (time between inhalation of fibres and symptoms) was so long.

Although expressing some scepticism about the lower courts' findings on the levels of exposure, the Supreme Court did not interfere with them and more importantly did not define what constituted a ***de minimis*** level of exposure (i.e. one so low that the law was not concerned with it) or what level led to a material increase of risk.

The Supreme Court's ruling has increased the number of potential claimants not just in mesothelioma cases but possibly also for some lung cancer cases. The fact that the Court has failed to define what level of exposure creates a material risk will almost inevitably lead to further litigation on the issue.

Reinterpretation of the Factories Act – a near miss for employers

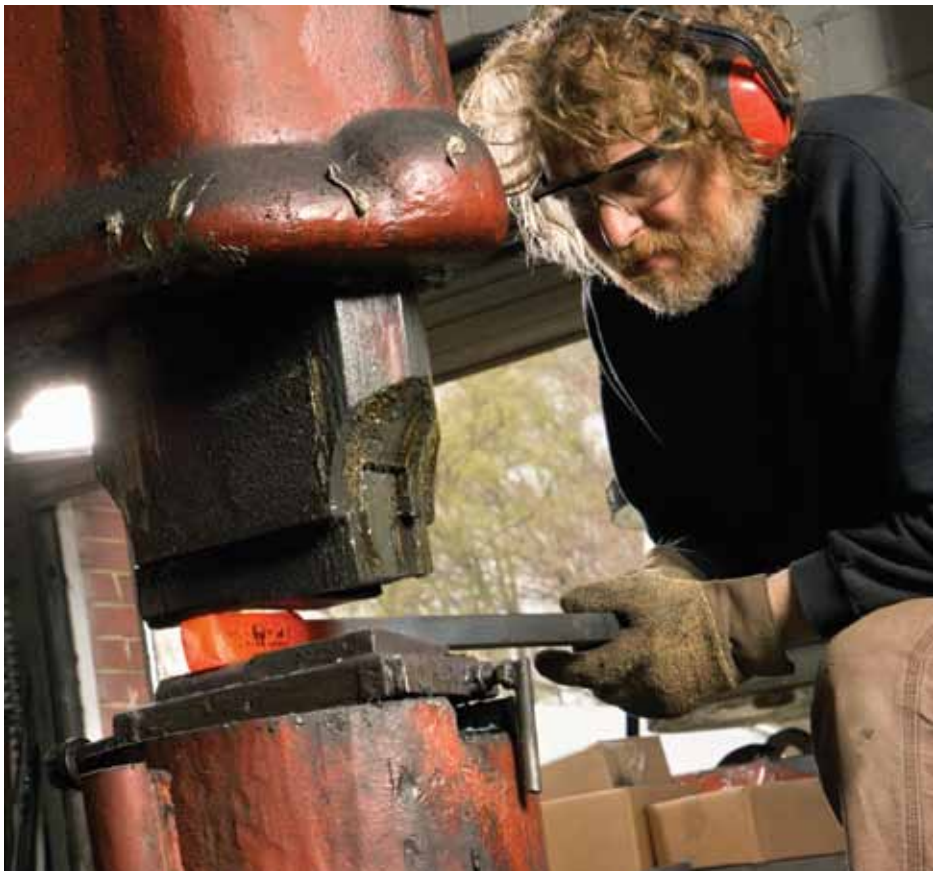
By a 3 to 2 majority the Supreme Court ruled that an employer, without specific knowledge of risk, is not liable for noise induced hearing loss at noise levels of 90dB(A) or below for unprotected exposure occurring prior to January 1990 either at common law or under statutory duty imposed by Section 29 of the ***Factories Act 1961***.

An employer with specific knowledge of the risk (e.g. acquired through previous complaints of hearing loss from staff or from published research it should have known of) will be liable two years from the date of acquiring the knowledge of risk. The date of knowledge would be determined in each individual case and two years allowed to devise and implement a system of hearing protection.

The decision in ***Baker v Quantum Clothing Group and Pretty Polly Ltd and Meridian Ltd*** effectively restores the original trial judge's decision and overturns many of the Court of Appeal's findings.

The Court of Appeal had held that "safe" as defined by the ***Factories Act,*** was absolute and must be judged objectively with no reference to whether the risk of injury was reasonably foreseeable. On that basis, the claimant's employers were liable for any risk that gave rise to injuries whether it was foreseeable or not. The duty to keep the workplace safe was however qualified by the employer only being required to take preventative measures, which were "reasonably practicable". From late 1976 to early 1977, employers could have assessed the risk of Noise Induced Hearing Loss (NIHL) using British Standard B5330. Allowing 6 to 9 months for implementation employers were liable for noise exposure causing injury from 1978.

The Supreme Court held that it was wrong to impose a higher standard of care on



industry than had been applied at the time. The issue of what was "safe" as defined by the ***Factories Act 1961*** should be judged objectively but it was not an absolute concept and foreseeability of injury was relevant.

The "average" employer would only have been aware of the risks posed by noise exposure between 85dB(A) and 90dB(A) from 1988 when consultation on a draft European directive on work place noise levels took place. Allowing two years for implementation of safety measures (rather than the Court of Appeal's 6 to 9 months) employers would be liable for NIHL below 90dB(A) from January 1990 (also the implementation date of the ***Noise at Work Regulations 1989***).

The decision was good news for employers and their insurers and not just because it reduced the number of potential NIHL claims. The Court of Appeal's interpretation of the ***Factories Act*** meant that an employer's breach of statutory duty could be judged in the light of knowledge unavailable at the time and without consideration of reasonable foresight of injury and acceptable standards. The ruling had it not been overturned could have been used to support thousands of claims for a variety of work place diseases.

Fraud

Insurers not doing enough?

In March of 2011, the UK Parliamentary Transport Select Committee called on the insurance industry to do more to combat fraud. The committee had been hearing evidence on the high cost of UK motor insurance and had concluded that insurance fraud was the main cause of premium increases.

Although most insurers see the high levels of damages awarded by the courts and the level of legal costs as the true causes of premium inflation, the industry responded by agreeing to provide £9m to fund a new police insurance fraud unit. The unit is based in London but can investigate cases in all parts of the UK with 35 full time staff headed by a Detective Chief Inspector. This new commitment was in addition to existing industry funding for the Insurance Fraud Bureau and to heavy investment in anti-fraud technology and staff training.

The initial state response to the new investment by insurers was unimpressive. The closure of the Metropolitan Police Stolen Vehicle Unit was announced soon afterwards with some officers reported as saying that the closure was due to the prospect of the insurance unit being able to cover part of their work.

Contempt of Court

On a more positive note, the judiciary has been taking a much harder line with fraudsters who have lied to the court. In 2010 in the case of ***Kirk v Walton*** a claimant who lied about the extent of her disabilities in support of a claim for £800,000 was fined only £2,500 for contempt. In 2011, however, in the case of ***Shikell v MIB*** the claimant and his father were both imprisoned for twelve months for contempt after giving false evidence in

support of an alleged brain injury claim. In many subsequent 2011 contempt cases, custodial sentences were also imposed.

In ***Lane v Shah*** the claimant, her husband and daughter all received custodial sentences. They pleaded that in light of their remorse and previous good character the sentences should be suspended but the two Divisional Court judges who heard the case disagreed. The judges' explained the sentence in their published judgment stating that those caught giving false evidence in support of their claims should expect to go to prison and that this was essential to deter exaggerated claims.

Although insurers have been encouraged by the increasing willingness of the courts to jail fraudsters, the process of having them committed for contempt is entirely funded by insurers usually with little prospect of recovering the costs involved.

The recent Court of Appeal decision in ***Tariq Ali v Esure Services Ltd*** should help to speed up this process and reduce costs as the Court has now ruled that a High Court judge has jurisdiction in contempt cases and may impose a custodial sentence without involving the Divisional Court.

This permits a High Court trial judge to hear an application for committal almost immediately and allows the insurers to gauge the judge's views on imprisonment before applying. Prior to this, most contempt committals required three stages including two separate sittings of the Divisional Court, an expensive and lengthy process with no means of gauging the Divisional Courts likely view prior to making the application.

Conclusion

The reform of civil litigation funding in England and Wales is long overdue and the LAPSO Bill, coupled with changes to the Civil Procedure Rules, is at last tackling this. It can only be hoped that with Government support and some concessions on legal aid reductions, the Bill may yet be enacted without substantial amendment, in 2012.

The levels of damages for personal injury claims awarded by UK courts remain well above those in mainland Europe, especially for catastrophic injuries where the cost of care regimes is escalating at a frightening rate. If the Government wishes to reduce the burden on itself and on other compensators, then this too must be addressed.

The full impact of Professor Lofstedt's report is unlikely to be felt for some years but a clearer system of regulation that can be applied more cheaply but without compromising work place safety is a worthwhile goal and one that should receive widespread support.

With all of the planned reforms, 2012 promises to be a year of change.

Completed 5 January 2012 – written by and copy judgments and/or source material for the above available from John Tutton (contact no: 01245 272756, e-mail john.tutton@uk.qbe.com)

Author Biography

John Tutton, Claims Controller, UK Casualty

After working as Claims Manager and Technical Claims Manager for two Lloyds Syndicates, John was recruited to the then Ensign Claims Department in 2004, to provide support on catastrophic injury claims.

He joined the QBE Strategic Claims Team when it was set up in 2006, specializing in acquired brain injury claims. In 2010, John moved to UK Casualty where in addition to catastrophic injury claims he now deals with a wide range of high value claims from commercial liability risks.

John has worked in the insurance industry since 1983.

Disclaimer

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