QBE European Operations

Technical claims brief

Monthly update | October 2014

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Reform

Court Reform (Scotland) Bill Passed Stage 3

The Courts Reform (Scotland) Bill has now passed stage 3 (final stage) in the Scottish Parliament. The Bill proposes important reform to the civil justice system, which should deliver significant improvements for personal injury claims and access to justice. The purpose of the reform is to address the current system, which has been labelled "slow, inefficient and expensive."

As we reported in June, the Scottish Parliament's Justice Committee had questioned and challenged a number of proposals, which have now been successfully resolved. The following proposed amendments to the Bill were unsuccessful:

1. An amendment to provide automatic 'sanction for counsel' where personal injury damages claimed are above £20,000, as opposed to a test of appropriateness and proportionality, having regard to the 'difficulty or complexity' of proceedings.
2. A set of amendments designed to remove personal injury claims arising from exposure to asbestos away from simple procedure and the privative jurisdiction of the Sheriff Court (so that they would be heard in the higher Court of Session). The proposed exception would have resulted in disproportionately high litigation costs, unnecessary delay, and prolonged settlement timeframes.
3. Amendments to change the appeal structure from a dedicated Personal Injury Court, so that an appeal against a sheriff would proceed directly to the Court of Session, and not the Sheriff Appeal Court. The establishment of a specialist court to deal solely with personal injury claims will improve access to justice and help to deliver quicker judgments.

The privative jurisdiction of the Sheriff Court will be increased from £5,000 to £100,000 and ensure that the majority of personal injury claims will be heard in this court. The indications are that the Bill is likely to receive Royal Assent before the end of 2014, with implementation by mid-2015.

> *The fact that the Bill made it through the legislative process largely unscathed gives it a fighting chance of achieving the aims and objectives set out by Lord Gill following his review of the civil court system. All interested parties should welcome the introduction of the Bill, which will bring Scottish litigation into the 21st century. This will be a challenge for the Sheriff Court infrastructure, but with assurances given that appropriate resources will be available, there is good reason to be optimistic about the outlook for personal injury claims in Scotland.*

Liability

QBE UK Casualty Claims enjoys success at the Court of Appeal. *Dr Rubina Mian v Coventry University* [2014]

The claimant, Dr Mian, was a senior lecturer at the defendant's university and provided a reference for one of her colleagues, a Dr Javed, who obtained employment at the University of Greenwich. Some seven months later, the University of Greenwich raised a number of concerns about the reference provided, as there appeared to be a large disconnect between Dr Javed's performance and some of the assertions in the reference letter. The reference was provided on Coventry University headed notepaper and purported to be written, and signed by Dr Mian. The reference was over three pages long and very detailed.

There was no dispute that the reference had a number of important inaccuracies and materially overstated Dr Javed's qualities and qualifications. Concerned about the reference provided, Coventry University instigated an internal investigation, which showed the presence of three different references for Dr Javed on Dr Mian's computer. Dr Mian was invited to attend a preliminary meeting to explain the inconsistencies, which led to an independent party's decision to instigate disciplinary proceedings. The central allegation was one of complicity between Dr Mian with Dr Javed in the preparation of false and misleading employment references.

When the disciplinary hearing took place, it was Dr Mian's case that she was "guilty of stupidity and naivety, but not complicity." The professor hearing the proceedings said that he found the case "not easy", but decided to dismiss the allegations against Dr Mian. Thereafter, Dr Mian issued personal injury proceedings against the university and claimed they were liable for commencing disciplinary proceedings without undertaking further enquiries and as a consequence of which she suffered psychiatric injury.

The parties agreed that the correct test of whether the decision to instigate the disciplinary proceedings had been "unreasonable" was that it had to have been outside the range of reasonable decisions open to an employer in the circumstances. At trial, the judge decided that if further enquiries had been undertaken, there would have been no proper basis for a charge of gross misconduct and the disciplinary proceedings would not have been instigated. The defendant argued that the judgment represented a failure to apply the agreed test correctly and so appealed the decision.

To apply the test correctly, the court was required to carry out an objective assessment and one not to be made with the benefit of hindsight. The circumstances included both the evidence available to the university at the time and any further evidence that would have become available as a result of a non-negligently conducted investigation. The trial judge accepted that reasonable people could reach different judgements on the same question. Moreover, that it was possible for the defendant to have been wrong both about the method by which the investigation should proceed and the claimant's culpability as to being, without the defendant having been negligent.

The university contended that a reasonable employer could have concluded that there was a disciplinary case for Dr Mian to answer on a charge of gross misconduct and the Court of Appeal agreed – the recommendation for a serious disciplinary charge "was entirely reasonable, indeed almost inevitable" and the trial judge was "plainly wrong" to conclude otherwise. The fact that there was evidence that the trial judge took to support Dr Mian's account did not mean it was unreasonable or negligent of the university to instigate proceedings against her.

> *The case underlines the importance of employers documenting, and enforcing, proper policies and procedures with regard to investigations and disciplinary proceedings. The Court of Appeal made the point that the procedures do not need to be overly technical and legalistic, but they should be transparent, straightforward and simple to apply.*
>
> *The outcome is a welcome reminder of an employer's right to conduct a disciplinary investigation, where it is reasonable to do so, without fear of paying out compensation to an aggrieved claimant because the investigation only leads to a minor sanction or no sanction at all. If the onus on the investigating manager is too high then there is a risk that he/she effectively becomes the disciplinary manager.*

More appeal success for QBE UK Casualty Claims in the High Court - *John Burrows v Northumbrian Water Ltd* [2014]

Mr Burrows was an employee of Northumbrian Water and his duties included him attending emergency call-outs at unmanned reservoirs. For this purpose, he was provided with a four-wheel drive vehicle, with all terrain tyres, and spiked footwear. Mr Burrows was responding to a call-out when his vehicle became stuck in snow on an access road belonging to Northumbrian Water and whilst trying to get the vehicle moving, he slipped on a patch of black ice and suffered injury. At the time of the accident, he was not wearing the spiked boots and it was accepted that there had been previous visits to the site (including on the previous day).

Mr Burrows' case was that his employer had failed to protect him from the black ice by failing to provide suitable tyres on his vehicle. The County Court dismissed the claim, so Mr Burrows appealed. He appealed on the basis that the judge failed to properly consider the Workplace Regulations and in particular Regulation 5 (failure to keep the workplace in an efficient state and in efficient working order and good repair) and Regulation 13 (permitting a defence of "reasonable practicability" when it was not expressly pleaded).

The High Court dismissed the appeal. The parties had accepted that the access route was a traffic route for the purposes of the Workplace Regulations and that Northumbrian Water was under a duty to keep the access road free from ice. The premises were an unmanned reservoir with a light amount of traffic, which could require accessing at any time in the event of an emergency and that the only way to ensure the access route was kept clear of ice would be to require daily visits and gritting. To require Northumbrian Water to do this would put more operatives at risk beyond those on emergency call out and such a requirement would be nonsensical, as it would increase the exposure to ice, not decrease it.

As such, it was not reasonably practicable for Northumbrian Water to have done more in the circumstances and therefore the defence was made out and no prejudice was suffered by Mr Burrows in allowing it. With regard to Regulation 5, the mere presence of ice and snow did not support a lack of maintenance, in the context of a remote, unmanned location.

> *The importance of this decision to employers who require their employees to work in inclement weather cannot be underestimated. The application of common sense is vitally important to a health & safety conscious employer, and it is only correct that they should be afforded a full defence where they can reasonably do no more to protect their employees. Employers must consider the circumstances, and potential risks, they might expose their employees to and act accordingly when assessing that risk, as against any reasonable steps they can take to reduce the risk.*

Mental Capacity. *Jubair Ali v David Caton & Motor Insurers' Bureau* [2014]

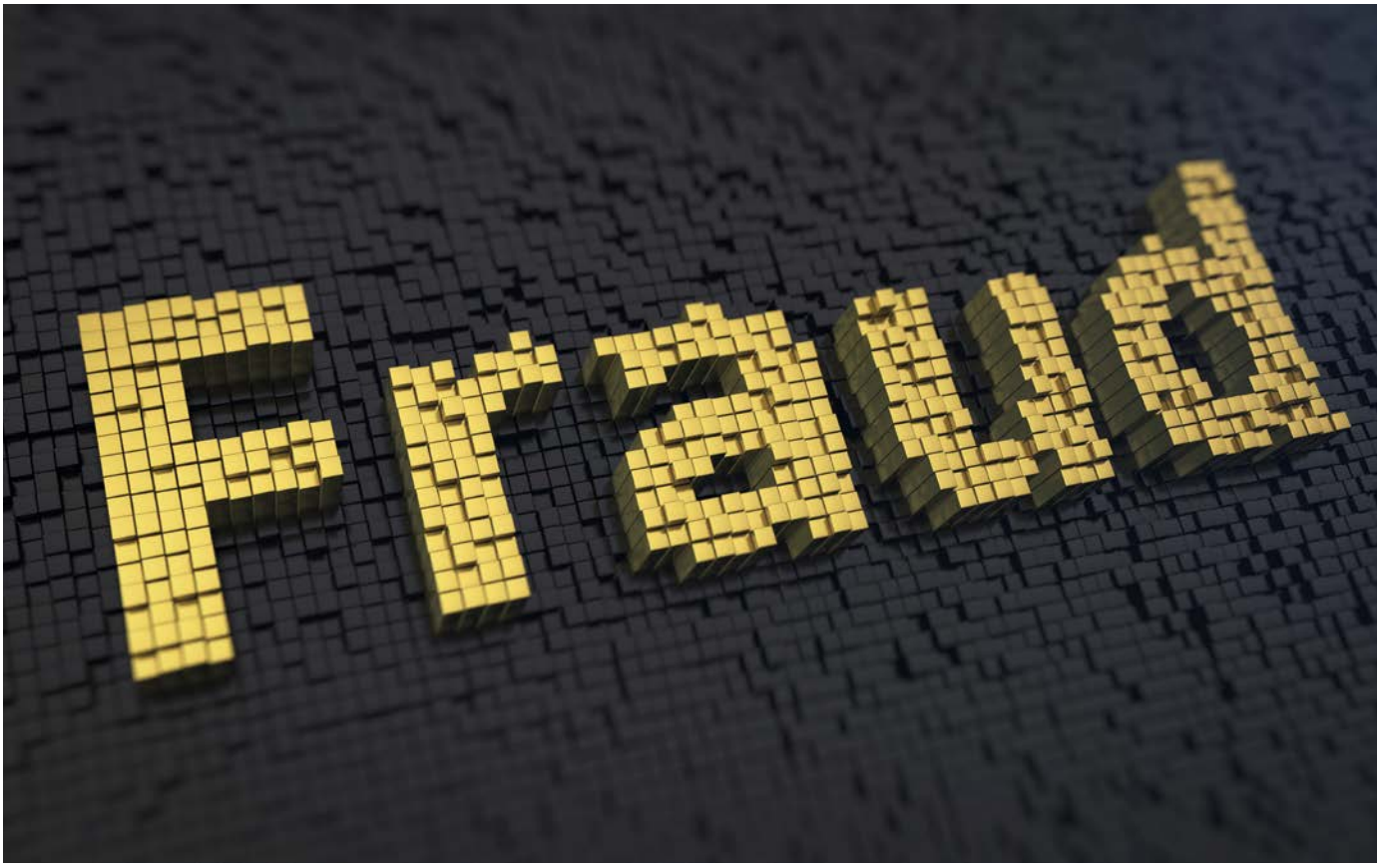
Mr Ali claimed significant damages after suffering a severe head injury following a road traffic accident on 30 January 2006. The issue between the parties was whether the claimant had mental capacity and the outcome would have a significant impact on the level of past and future losses. The crux of the case was whether the fact that Mr Ali had taken the UK citizenship test (the UKCT), and passed it, was sufficient evidence to support the statutory presumption of mental capacity.

The medical experts for both parties agreed that it was surprising that Mr Ali had managed to pass the test (whether fairly or by cheating) and said the result appeared to be inconsistent with the level of cognitive disability which he had displayed to them in various examinations over the many years since the accident. The Motor Insurers' Bureau (MIB) argued that, having found that Mr Ali had passed the UKCT without outside assistance; the judge had failed properly to consider the consequences of that finding and had instead placed too much weight on other evidence, which was no longer reliable. In doing so, the judge was wrong to conclude that Mr Ali continued to suffer with significant cognitive deficits, requiring care and case management, lacking mental capacity and with no residual earning capacity.

The Court of Appeal decided that the trial judge who heard the case had been entitled to make the finding that he had, having heard all the evidence (a 12 day trial) as to whether the claimant had passed the UKCT unaided. While the experts had all expressed surprise at the result, none had said that the result had been impossible and the trial judge had been bound to take into account all the features of the evidence in the context of his finding that Mr Ali had somehow passed the UKCT. It was not the correct approach to focus upon the UKCT, to the exclusion of anything else. There could be no doubt that Mr Ali had suffered a very severe brain injury and once the factor of the UKCT pass was put into context with all the other evidence, the MIB's argument over-emphasised the importance of the UKCT success in the context of the evidence as a whole.

With respect to mental capacity, the trial judge had also been entitled to conclude that Mr Ali had lacked capacity, notwithstanding the statutory presumption, having regard to the totality of the evidence. In assessing the care and case management requirement, the trial judge had achieved a sensible balance of all the evidence as part of the significant award and the same could be said with respect to the absence of any residual earning capacity.

> *This case is a useful reminder that the Court of Appeal will not be quick to disturb a trial judge's decision, who has had the significant benefit of hearing all the evidence. The appeal system is designed to protect the first instance decisions of county court trial judges, who have heard from the parties and deliberated over the evidence. The case also highlights the significant weight the courts generally place on the expert evidence before them and judges will often be guided by their views and opinion.*



Fraud and Contempt of Court.
***Royal & Sun Alliance (RSA) v Fahad* [2014]**
Mr Fahad submitted a personal injury claim following a fabricated road traffic accident. The RSA's investigations uncovered a number of links between the accident parties and at trial, the witness statements made by Mr Fahad about his involvement in an accident were proven to be false. The RSA applied for permission to commit Mr Fahad for contempt of court.

The RSA argued that there was ample evidence to support the application and it was in the public interest to bring committal proceedings once there was a finding of a fabricated accident or claim. There was a subtle distinction between exaggerated claims and fabricated accidents, but only to the extent that cases of fraud where there was no accident were the most serious kind and there was clearly strong evidence to support the application (albeit no such finding is required at the application hearing).

In allowing the application to commit for contempt, the High Court were satisfied that the false statements were significant, that Mr Fahad understood the effect of making such statements and that committal proceedings were appropriate. The RSA would still have to prove contempt of court to a criminal standard within the committal proceedings.

> *The High Court acknowledged the importance of committal proceedings, and accompanying custodial sentences, to the ongoing fight against insurance fraud. The fight continues to be fought on-all-fronts and the support of the government and judiciary is vital. The task for insurers (and their policyholders) is to remain vigilant, continue to improve fraud-detection and to seek the appropriate penalty once a fraudster is identified.*

An Occupiers Duty and Asbestos - *McDonald (Deceased) v The National Grid Electricity Transmission Plc* [2014]

A claim for damages was brought against the successors of the occupier and operator of Battersea Power Station. Mr McDonald was diagnosed with mesothelioma, and in July 2012, died shortly before the hearing in the Supreme Court in February 2014.

It was Mr McDonald's case that the mesothelioma was caused by exposure to asbestos dust when he occasionally visited the power station between 1955 and 1959. The National Grid was sued as the successor to the occupier and operator of the power station and it was agreed that the work he undertook did not involve any exposure to asbestos dust. His case was that he was exposed to asbestos dust when he would go into the power station's boiler house and witnessed lagging work being done there. It was common ground that no part of Mr McDonald's employment required him to go into the boiler house and his explanation was curiosity and friendliness with the power station workers. It was these circumstances of inhalation of asbestos dust that were said to have caused his illness.

Mr McDonald's primary factual case at trial was that he was frequently exposed to substantial quantities of asbestos dust in the circumstances described above. The trial judge rejected that case, finding instead that "any exposure was at a modest level on a limited number of occasions over a relatively short period of time". The trial judge described Mr McDonald's claim of constantly standing in clouds of asbestos dust as "an unreal scenario". Mr McDonald challenged these findings of fact before the Court of Appeal, but the challenge was dismissed.

The claim against the employer in negligence failed at trial, and before the Court of Appeal, because it was not established that any asbestos exposure that Mr McDonald might have experienced was of such a nature and extent to require the reasonable employer to take precautions given the knowledge and standards of the time (late 1950s).

The claim against the occupier/operator succeeded in the Supreme Court by a narrow majority (3:2), who found that the Asbestos Industry Regulations 1931 applied not just to those factories engaged in the production of asbestos products, but instead applied to all factories at which the activities set out in the preamble to the regulations took place. It was decided that the reference in the preamble to the regulations applying to "all factories and workshops or parts thereof in which the following processes or any of them are carried on" supported this broad interpretation and it was also decided that the exemption to the regulations for infrequent use would have no application if the regulations applied only to asbestos factories, where the activities would never be "occasional". Finally, the court decided that the term "mixing" was to be given a wide interpretation to incorporate the formation of lagging paste for application in a power station. As such, Mr McDonald was able to establish breach of statutory.

> *This complex and technical area of law and causation continue to challenge our higher courts and the interested parties. This latest judgment may open a further avenue to claims against occupiers who could not have foreseen that the claimants were being put at any risk. Some legal experts have described it as a "landmark" ruling and one that protects the compensation rights of sufferers of asbestos-related diseases. It remains to be seen exactly how many claims will be caught by this judgment, but it may bring an occupier into the picture, where a claim against the employer fails.*

Damages for Injury-on-Injury.
***Christine Reaney v University Hospital of North Staffordshire NHS Trust and another* [2014]**

The hospital admitted the negligent exacerbation of Ms Reaney's T7 paraplegia by deep pressure sores with the consequent infection of the bone marrow, abnormal shortening of the muscle tissue of her legs and a hip dislocation. The Court of Appeal had to consider the extent to which her condition had been made worse and what damages should be paid. Applying the principle that a tortfeasor had to take the victim as he found them, and pay full compensation for their worsened condition, the court found the hospital's negligence had made Ms Reaney's position materially and significantly worse than it would have been "but for" the negligence.

In this case, there was an underlying injury (that was non-negligently caused) and the subsequent negligent injury dramatically increased Ms Reaney's needs. It was agreed that she started from a position of already needing and receiving care and assistance, but the court had to determine what level of compensation was appropriate taking into account what she now required.

The hospital argued that the right approach was that they should only "top-up" the care that she would otherwise have needed prior to that negligence. The argument was 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 only compensate Ms Reaney for the additional care that arose because of the pressure sores.

The difficulty for the judge was the significant element of care required by Ms Reaney prior to the negligence was not being met. Once the negligence occurred and the care needs increased, the judge had to determine how to compensate Ms Reaney "fairly" in order to address her needs. While she was paraplegic before the pressure sores developed, she was only able to receive seven hours of care from the local authority. After the negligence, the judge accepted that she now needed 24-hour care, seven days a week, provided by two carers.

The hospital tried to argue that it was not fair from them to have to pay for this full care package because they were being asked to compensate for the underlying paraplegia and not simply for the pressure sores and the problems developing from there. The judge took the view that the correct test was the objective "but for" position and thus to decide what her needs were ignoring the negligence. He then looked at the factual position of what she was actually receiving (seven hours and the family support) and thereafter, having heard the legal arguments, determine the appropriate level of compensation to meet Ms Reaney's needs.

The court found for Ms Reaney and decided it was not enough for the hospital to "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.

> *This case perfectly highlights the age-old principle of putting a claimant back into the position they would have been "but for" the negligence of the defendant. It is important to think about whether the second injury has more serious consequences because of the first injury. The judge used the analogy of a claimant who has already lost the vision of one eye and then suffers an accident that causes them to lose the vision of the other eye. The accident related loss is of vision in one eye, but the consequence is that the claimant is left totally blind.*

Highway Authority Defence. *Walsall Metropolitan Borough Council v Millard* [2014]

Many will recall that the winter of 2009-10 was particularly harsh and with such conditions come a number of significant challenges for our local authorities. Walsall (the highway authority) had received many more complaints about the highways than usual and made the decision to temporarily abandon their periodic system of inspection of highways and instead would be "reactive". The highway authority's case was that the decision was forced upon them due to the severe weather, an increasingly acute problem of resource v maintenance. As a result, the highway authority could only respond to direct complaints as they were being deluged with problems due to the severity of the bad weather.

The claimant tripped on a dangerous defect on 27 February 2010 and the location had been due for its six-monthly inspection by 17 February 2010, but had not been inspected because the periodic inspection had been suspended. In the first instance, the Deputy District Judge decided that the highway authority set the standard of what was reasonably required to keep the highway safe by inspecting every six months (which, incidentally, was what the national Code of Practice recommended). Moreover, they could not justify departure from that based on not having enough manpower/resources to continue such inspections through harsh weather because Wilkinson v York said that insufficient resource was no defence. Section 58 of the Highway Act provides a defence where the highway authority has done that which was "reasonably required to secure that the part of the highway to which the action relates was not dangerous for traffic". That requires an objective judgement based on risk.

> *It remains appropriate and proper for highway authorities to make decisions about routine inspections based on cost vs. benefit and to be able to document the analysis and risk assessment. Where there is a legitimate need to depart from the ordinary routine due to lack of resources, a highway authority should adduce and rely upon such evidence at court.*

The decision was appealed to the Circuit Judge, His Honour Judge Gregory, who overturned the decision. He considered that there is a distinction between cases like Wilkinson in which a highway authority inspected less often than was necessary as a matter of policy, and cases like this in which the highway authority was seeking to deal with unusual circumstances. In this case, a judge should take into account the question of manpower/resources available to a highway authority in determining whether, or not they can prove that they have taken reasonable care.

Completed 29 October 2014 – written by QBE EO Claims. Copy judgments and/or source material for the above available from Tim Hayward (contact no: 0113 290 6790, e-mail: tim.hayward@uk.qbe.com).

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