QBE European Operations

Technical claims brief

Monthly update | July 2014

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Legislation

A solution looking for a problem? The Social Action, Responsibility and Heroism Bill

The Bill, which was announced in the recent Queen's Speech, has the intention of limiting liability for negligence if the act was done in an attempt to assist another person and thus reassuring people that they will not be sued when acting for the benefit of society or for their acts of heroism. The court would have to consider the context of a defendant's actions in cases of negligence before deciding whether they have any liability.

The government is yet to table a draft Bill, but the broad principles are:

- To allow the court to take into account whether a defendant was acting for the benefit of society and took a responsible approach towards protecting the safety or interests of others.
- To allow the court to take into account the context of a defendant's actions if they are sued after they have intervened in an emergency and taken heroic action to assist the claimant without regard to their own safety.

The government says it is taking action to support the millions of people who volunteer and carry-out good deeds every year. The presumption is that some people are put off from participating by concerns about risk and being held liable if something goes wrong. The Bill seeks to counteract the growing perception that individuals risk being sued if they do something for the common good – like leading a school trip, organising a village fete, clearing snow from a path in front of their home or helping in an emergency situation.

From an employers' perspective, the government are looking to highlight measures that will clarify the law and support employers who do the right thing to protect their employees, if something does go wrong through no fault of their own. The aim is to provide greater protection to small business owners who face challenges from irresponsible employees, even if they have taken a responsible approach to safety training and procedures.

Once drafted, the Bill will have to pass through the Houses of Parliament and is expected to be enacted sometime next year.

> *The underling principle of the Bill is similar to that of the recently enacted Enterprise Act (in particular section 69 which removes liability for breach of statutory duty) – a common sense approach to responsibility and negligence, whilst removing a perceived unfair and strict application of breach of duty. It remains to be seen how the Bill would be applied by judges and how they would assess an individual's act of heroism or an act for the benefit of society. The result may be that the negligent act of an individual, or employer, will result in compensation and that the intention of said individual/employer may not provide a full defence.*

Procedure

Limitation still up for grabs.

Collins v Secretary of State for Business Innovation and Skills and another [2014]

Between 1947 and 1967 Mr Collins worked as a dock worker and during that time he assisted with the unloading of cargoes of asbestos that were held in hessian sacks. In early 2002 he became unwell and was diagnosed as suffering from inoperable lung cancer. Following palliative radiotherapy, the cancer abated and Mr Collins made a good recovery and was discharged in 2008.

In July 2009 Mr Collins contacted his solicitor in response to an advertisement offering free advice to those who had worked at the dockyard during the aforementioned period and who had suffered various health problems including lung cancer. In November 2009, a Letter of Claim was sent to the Secretary of State (who had taken over the liabilities of the dockyard) and in November 2010, a further Letter of Claim was sent to the second defendant (a stevedoring company he had worked for). In May 2012, proceedings for personal injury damages were commenced against both defendants, alleging negligent and breach of statutory duty exposure to asbestos.

The defendants argued that the claim was barred under the Limitation Act 1980, as it was brought more than 3 years after the claimant's date of knowledge. The Court heard the limitation arguments as a preliminary issue and upheld the limitation defences, dismissing the claim. Whilst Mr Collins had commenced proceedings within three years from the date of actual knowledge of the possible link between his cancer and his exposure to asbestos (the date when he had seen the advertisement), the claimant had constructive knowledge of the possible link by mid-2003 because a reasonable man should have asked his doctor about the possible causes of his cancer. Had he done so, it was inconceivable that the doctor would not have mentioned asbestos exposure as a possible cause and therefore the limitation period expired in mid-2006. Thus, Mr Collins had commenced his action six years late and it did not appear equitable to disapply the limitation period.

The claimant appealed and argued that the judge should not have found that he had had constructive knowledge in mid-2003, but if he did, the Court should exercise its power to disapply the Limitation Act. The appeal was dismissed. The purpose of the Act is to strike a balance between the interests of a claimant seeking compensation late in the day, against those of the wrongdoer who ultimately needs closure. Parliament had struck that balance by means of an objective test of the date of knowledge.

The Court of Appeal agreed that the judge had been correct to find that Mr Collins had constructive knowledge by mid-2003. When applying the objective test, the judge had been correct to conclude that a reasonable person in Mr Collins' position would have asked about the possible causes of his lung cancer by mid-2003. As to the response he would have received from his doctor, as to the possible causes of his lung cancer, the judge's conclusion was also correct. Importantly, Mr Collins' medical records from 2002 contained several references to his employment history and exposure to asbestos. The doctor would have known that exposure to asbestos was a possible cause of lung cancer and if asked by Mr Collins he would have mentioned asbestos exposure as a possibility.

In determining whether the limitation period should be disapplied the Court must have regard to the period of time elapsed between the breach of duty and the commencement of the limitation period. Additionally, the Court would have regard to the time elapsed before the claimant's date of knowledge, although the court would accord less weight to that factor. Ultimately, it was for the Court to evaluate all the circumstances of the case and to decide whether to allow the claim to proceed.

In carrying out his evaluation exercise, the judge had treated the Limitation Act criteria as the factors of primary importance, but had also had regard to the passage of time between the defendants' alleged breaches and Mr Collins' date of constructive knowledge. He had treated the lengthy period of historic delay as a factor that made it less equitable to extend the limitation period and had been entitled to take that period into account in the manner that he had. The judge had carefully evaluated all the relevant factors and had come to a conclusion under the Act which was plainly correct.

> *Limitation rightly remains a full defence to a claim brought out of time and whilst the Court will evaluate all the circumstances in each individual case, this is a useful example of the correct application of the Limitation Act. It is worth remembering that the court will not exercise their discretion to disapply the Act without carefully evaluating the prejudice to both parties and what steps could and should have been taken to bring the claim within the applicable limitation period. Quite correctly, the certainty of limitation should not be watered-down without good reason.*

Motor

Mirror, Signal, Manoeuvre. *Dhiman Gupta v Mainline Coaches Ltd [2014]*

We are pleased to report this recent, and significant, QBE success at trial, with the defence expertly prepared by our lawyers at Berrymans Lace Mawer. Pedestrians and other vulnerable road users receive a certain amount of sympathy from the court, which has been reflected in a number of appeal court decisions in recent years. This case is a useful reminder that the court will analyse all of the evidence and that liability does not follow simply because the claimant is a pedestrian.

In January 2010, Dhiman Gupta had tried to hail a coach which was going to the International Civil Aviation Training Centre, near Cardiff. The coach was operated by Mainline Coaches Ltd and had stopped to pick-up some other students, but Mr Gupta had missed it and was trying to attract the driver's attention.

Mr Gupta's case was that he was hammering on the coach door when, without warning, the driver turned left, knocking him to the ground. He suffered severe injuries when the coach ran over his feet, leaving him with a shattered right shin and multiple fractures to his left leg. He has been left with permanently restricted mobility and claimed over £500,000 in damages. Liability was denied.

At the High Court, Mr Gupta's contention that he had not run into the road, but that he had made eye contact with the driver in the seconds before the accident, were rejected. The judge was satisfied that there was no negligence on the part of the driver, who had taken care to look carefully before making his move to ensure it was safe. The accident probably occurred as Mr Gupta stepped back but then tripped over one of the coach's wheels.

The judge ruled that Mr Gupta's conduct was 'inherently dangerous' and concluded that he must have seen the coach driving away, but decided to run across the road in front of the coach. The coach driver was unaware of Mr Gupta's presence and was driving at less than 5 mph, with the indicator on. There was nothing more that the driver could have done to avoid the accident and therefore he could not have been negligent. The claim was dismissed.

> *Unsurprisingly, the judge had some sympathy for Mr Gupta, given the extent of his injuries and ongoing disability, but was not quite so impressed with his evidence. As is often the case, the outcome at trial turns on the evidence of the claimant and the plausibility of his account. On this occasion, the judge was clearly sceptical that the accident had happened how the claimant described and reached the only sensible conclusion. This was an accident of the claimant's own making and whilst his claim was significant, that alone does not mean he is entitled to compensation.*

Damages

Scotland. Loss of Society Awards in Fatal Mesothelioma Actions.

In the case of *Margaret Gallagher & Others -v- S C Cheadle Hulme Ltd & Others* [2014] the Scottish Court of Session has considered the appropriate awards for various classes of family members, following the death of a Mr Gallagher from mesothelioma.

There have been a number of cases over the last three years that have considered the level of awards for loss of society, both in relation to accident and disease cases. This latest decision considered all of them, before reaching an opinion which will be welcomed by pursuers and could well be followed by other judges in similar fatal actions.

Claims were made by the widow, four children and seven grandchildren and the range of awards were:

Widow £80,000

Son £35,000

Daughters £35,000

Grandsons £2,500 – £25,000

Granddaughters £12,000 - £25,000

Until the Court had heard live evidence from the family members there was little to suggest that the nature of the family relationship with the deceased was anything other than fairly typical. But having heard the evidence, the Court was of the view that the deceased was a remarkable man and that his death had had a profound effect on his family who adored him. The judge singled out two of the grandchildren as being particularly affected by his death who described him as "irreplaceable" and were each awarded £25,000.

The Court did say that where a pursuer claims that he/she had more than an ordinary relationship with a deceased, which would result in an increased award, then the details of the special features of the relationship should be highlighted in the pleadings. This should prevent such evidence only being provided to the defender at Court and should help with settlement negotiations.

The levels of award for loss of society are significant for all classes of family members. The Court highlighted the disparity with England, both in terms of the classes of pursuer and the level of damages, but commented that if the view in Scotland is that the level of awards are excessive, then this will be for a higher judicial authority to say so.

> *It seems likely that the level of loss of society awards in Scotland will remain high for the foreseeable future and damages in fatal claims will have to be determined according to the evidence of family relationship disclosed. A defender may encounter obvious difficulties challenging that evidence and could be left at the mercy of the court. Whilst we have recently reported an appetite for reform in Scotland (see Court Reform Bill), it seems likely that there will remain quite deliberate jurisdictional differences between in England & Wales and Scotland.*

Fraud

Bogus claims to be thrown out as government steps up insurance fraud crackdown.

The government has reacted to an increasing tide of judicial decisions, by announcing significant reform to crackdown on insurance fraud in personal injury claims. Furthermore, they intend to tighter and better regulate the companies involved.

The straightforward aim of the reform is to allow insurers to pay nothing towards fraudulent claims, with the expectation that those savings will then be passed on to policyholders. This will apply to all injury claims, across all lines of business and could have a significant impact on the claims landscape in the UK.

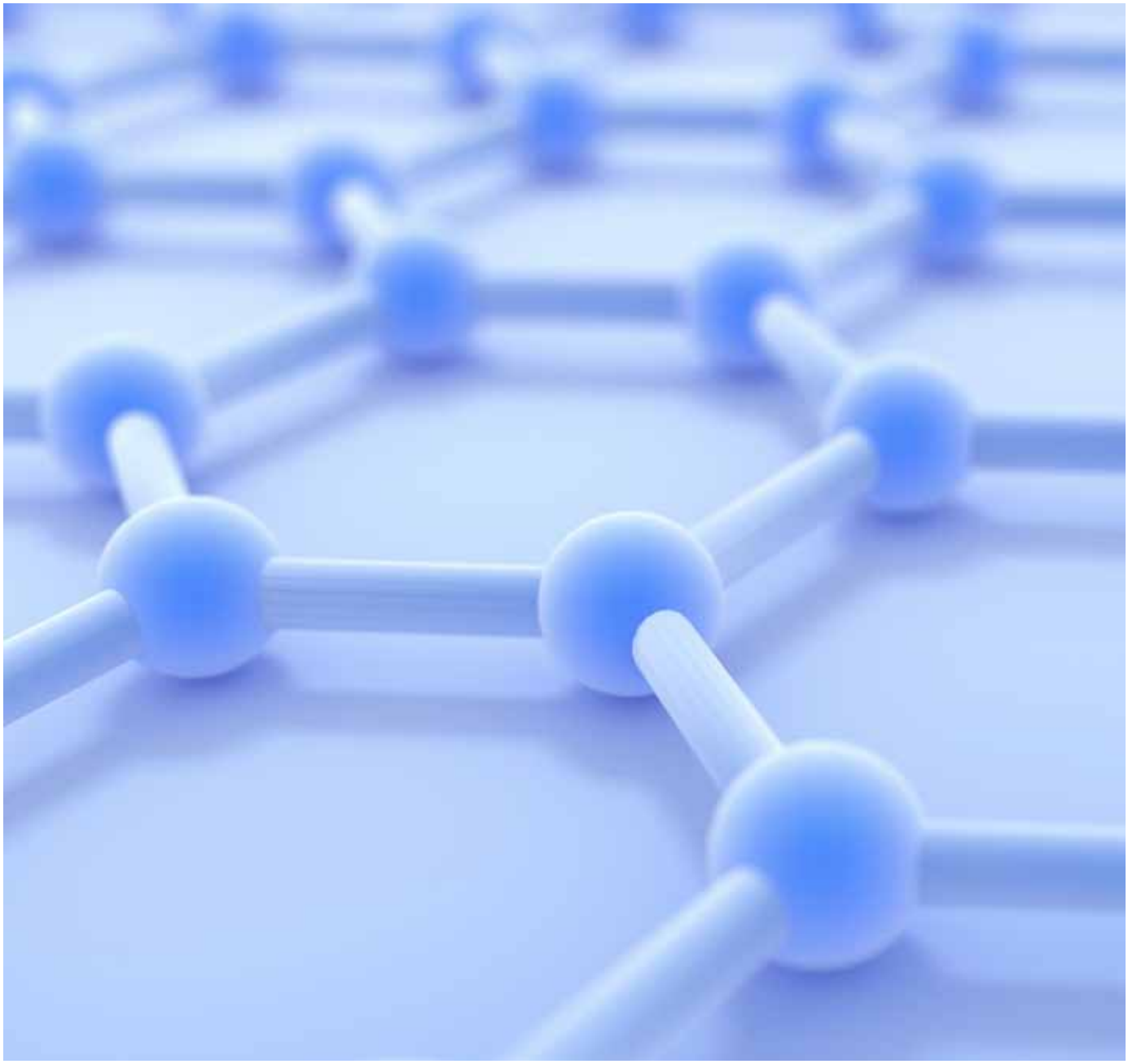
Currently, a claimant is still entitled to recover damages which are not fraudulently claimed, despite trying to recover other damages which are. That position has rightly troubled many insurance and defendant legal practitioners for some time, with a perceived injustice and the absence of a sufficient deterrent to commit fraud.

The reform will allow a court to dismiss the entire claim where it is found to be "fundamentally dishonest" - the same test which is used under the recently introduced Qualified One Way Costs Shifting (QOCS, introduced April 2013). Such a finding of dishonesty deprives a claimant of QOCS protection and leaves them having to pay the defendant's costs. This reform goes a step further and removes any entitlement to recover damages.

The full package of measures to tackle insurance fraudsters includes:

- Requiring courts to throw out compensation applications in full where the claimant has been fundamentally dishonest – to stop people who have had an accident from exploiting the system by making bogus claims or grossly exaggerating the extent of their injuries
- Plans to ban lawyers from encouraging people to make claims by offering them incentives like cash or iPads
- Reducing questionable whiplash claims by improving medical assessments, ensuring they are only conducted by independent accredited professionals, and setting fixed fees for medical reports this year
- Introducing new rules this year to restrict the practice of settling whiplash claims without confirmation of the claimant's injury

> *Data released by the Association of British Insurers on 30 May 2014 found that the value of fraudulent insurance claims uncovered by insurers rose to £1.3 billion in 2013, representing an increase of 18% since 2012. This data underlines the true scale of the problem and the urgent need for reform. Insurers will continue to take robust and proactive steps to fight fraud on all fronts, but the support of the government is to be welcomed and QBE will continue to help lead industry initiatives.*



Horizon scanning

Graphene - Miracle material or another Asbestos?

The Independent recently published an interesting article relating to the use of the nanomaterial Graphene (http://www.independent.co.uk/news/science/miracle-material-graphene-has-dangerous-edge-9312966.html).

Graphene sheets are only one atom thick and are said to be 200 times stronger than steel, thinner than a sheet of paper and more conductive than copper. They are considered to have widespread application in various industries. Whilst it has been described as a revolutionary material, a recent expert study has suggested it might have dangerous side effects as it spreads into the environment.

Researchers have discovered that graphene oxide, which is created when the material is exposed to air, moves easily through bodies of water and are concerned that could lead to it finding its way into human bodies. That is a concern because the effects of graphene in human bodies are not yet known. A recent study at Brown University (USA) found that jagged edges of the material can easily pierce cell membranes in human lung, skin and immune cells, allowing it to enter cells and disrupt their functions.

> *Graphene was only first isolated in a laboratory 10 years ago and is a material that remains in its infancy. There are early opportunities to examine and understand the potential for harm, and how they can be engineered out. The similarities to the widespread historic use of asbestos will not be lost on many.*

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