QBE European Operations

Technical claims brief

Monthly update | March 2014

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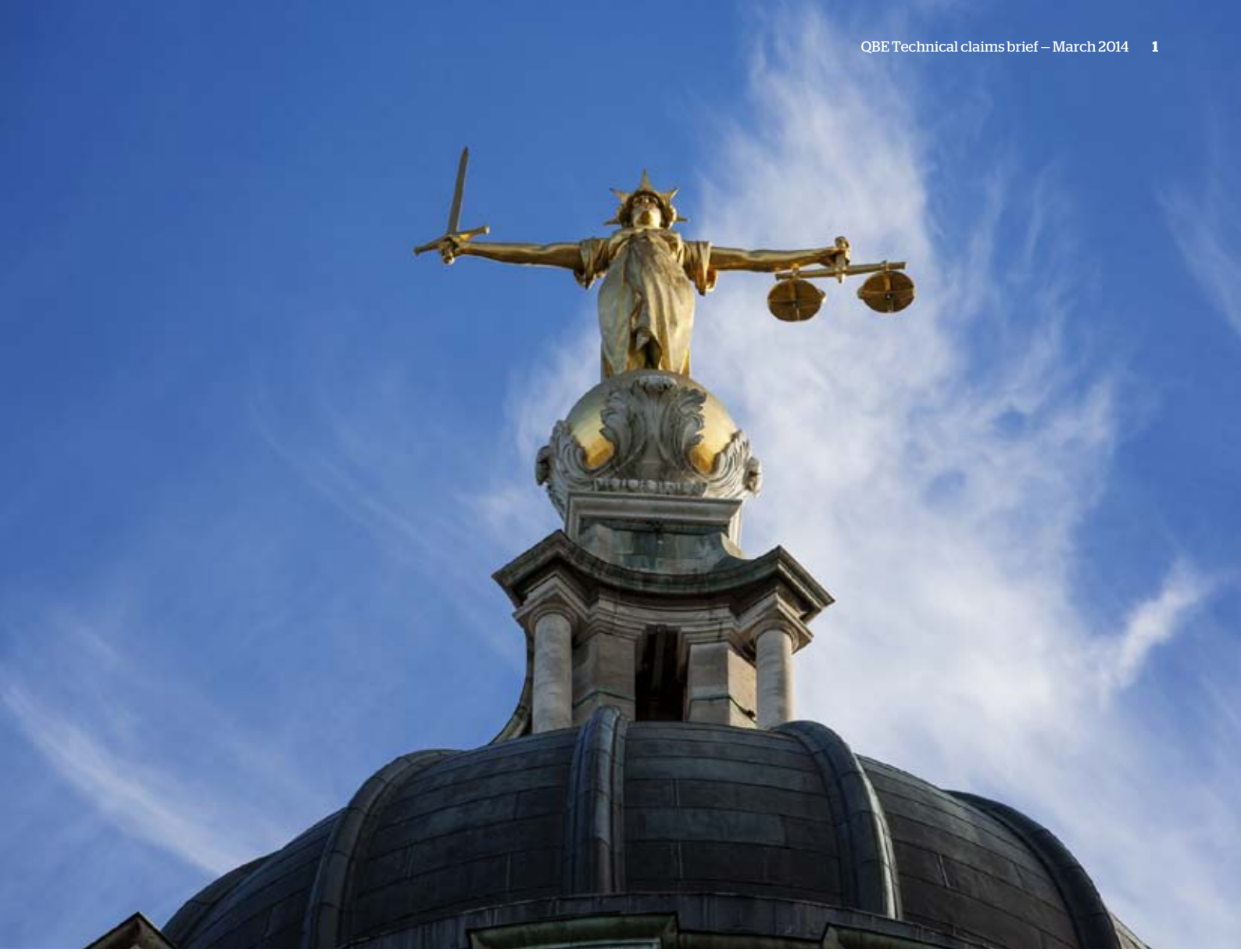


Legislation

Mesothelioma Act 2014

The Act received Royal Assent on 30 January 2014 and the Diffuse Mesothelioma Payment Scheme is now expected to start in July 2014. Draft government Regulations have now been published, which provide more details regarding the administration of the Scheme, how claims will be made, the mechanism and level of payments, as well as the appeals process.

The key points were listed in last months Technical Claims Brief, but the next steps are:

- The government will confirm the successful bidder for delivery of the Scheme
- It is anticipated that applications will start to enter the Scheme in April 2014
- The first levy (circa 3% of gross written premiums) will be collected from insurers in April 2014
- The first claim payments are likely to be made in July 2014.

When the Scheme starts there will be a two-year backlog from the 2012 eligibility cut-off, with some 600 claims to be processed and paid. It is believed that claim numbers will peak in 2016 and then slowly decline thereafter. The amount payments under the Scheme will be based on the age of the claimant and will range from £203,778 (40 and under) to £65,734 (90 and over). The claimant's legal costs are expected to be fixed at approximately £7,000.

The Act's Regulations explain how to make an application to the Scheme, the information and evidence that will be needed to support an application, how the application will be administered and how applicants can ask for a review and, eventually, an appeal if they disagree with the decision.

The full draft Regulations can be found at:

http://www.legislation.gov.uk/ukdsi/2014/9780111109106/contents

> The debate over the percentage level of compensation continues for now, despite being set at 75% for the next four years. The injury claims landscape is likely to look quite different in four years time and it remains to be seen whether there is any merit in arguing an increase, if the claim numbers reduce. Two factors may have an influence: the first being the political party in power – Labour have made it clear they will push for 100%; and secondly, whether a similar scheme is extended to other types of diseases such as lung cancer (another Labour proposal).

Scotland, Court Reform (Scotland) Bill update

The Scottish government formally tabled the Bill with the Scottish Parliament on 6 February 2014. The Bill is designed to implement many of Lord Gill's recommendations, which principally deal with reform to Scotland's civil justice system. The Bill has been dubbed 'legislation to bring about the biggest modernisation of Scotland's courts in a generation'. The hope is to reduce delays and cost for court users.

Details of Lord Gill's review were first reported in the December issue of this Brief, but the main proposals are:

- To increase the Sheriff court claims limit from £5,000 to £150,000
- Claims below £5,000 to be settled by a 'simple procedure' with more relaxed rules of evidence (akin to the small claims track in England & Wales)
- To introduce specialised Sheriff courts, for example in personal injury claims
- To introduce a Sheriff Appeal court with all-Scotland jurisdiction
- Appeals from the Sheriff court to be heard by the Court of Session on important points of principle, practice or public policy
- To extend civil jury trials to the Sheriff court – jury awards tend to be higher than those of a judge.

Views on the significant, and far-reaching, reforms are now being sought by the Scottish Parliament's Justice Committee in a call for evidence. Whilst no timetable to enactment has been detailed, the Justice Committee intend to report on the Bill's general principles towards the end of May.

Given the magnitude of the proposals, the whole process of enactment will be time consuming, require significant resources and detailed consideration. The reforms have already drawn criticism from claimant lawyers and the trade unions, so realistically it is unlikely the Bill will be passed before the end of 2014.

> *There is an appetite for change in Scotland and the reforms should be welcomed by all court users. Whilst the costs associated with Scottish claims are generally regarded to be lower than similar cases in England & Wales, litigated claims in the Court of Session are disproportionately expensive and extremely slow to come to trial. By making the judicial system more efficient and effective – particularly implementing the correct use of a judge to hear cases in the area of law in which they specialise (something we're sadly without in England & Wales) – the reforms could actually fulfil what they set-out to achieve.*

Insurance Contract Law Draft Bill: Limited Consultation on Draft Clauses

As part of the Law Commission's overall review of insurance contract law, it is now conducting its fourth consultation, prior to drafting a Bill which will cover disclosure in business insurance, warranties, damages for late payment and an insurer's remedies for fraudulent claims.

The draft clauses relate to:

- ***Fair presentation of the risk (disclosure and representations) in business insurance contracts.*** The insured will retain the duty of disclosure, which includes every material circumstance that is known or ought to be known, how that information is to be presented and a requirement of truth for all material representations. In the event of a breach, the intention is to place the parties in the position they would have been in if a full and accurate presentation of the risk had been provided
- ***Damages for late payment of claims.*** It should be an implied term of an insurance contract that insurers will pay sums due within a reasonable time and a resultant loss due to breach should lead to recovery of damages from the insurer
- ***Insurers' remedies for fraudulent claims.*** This predominantly relates to an insured's fraud and the impact on previous and subsequent genuine losses. The draft clauses provide that a fraudulent claim made by an insured party will lead to forfeiture of the whole claim to which the fraud relates. The insurer may, by notice to the insured, treat the policy as having been terminated with effect from the time of the fraudulent act with no obligation to return premium. The result of such termination being forfeiture of any claim made after the date of the fraud, and the retention of any legitimate claims made before the fraud occurred
- ***Good faith.*** The intention is to keep the general principle, but to remove the remedy of avoidance for breach. The courts will then develop the law to meet new challenges in the insurance context.

They are still working on draft clauses relating to:

- Warranties
- Contracting out. The proposal is for a mandatory regime for consumer insurance, but only default provisions for business insurance. The thinking is that commercial parties should be free to contract out of the reforms and substitute their own agreed regimes.

The Law Commission admit the whole process is taking longer than initially estimated, but hope to publish a final report and draft Bill by summer 2014.

> *The impact of the final piece of legislation is likely to be felt by all insurers. Procedures for dealing with an insured's claims within a 'reasonable time' will need to be closely monitored – something particularly topical at the moment with the sheer volume of claims for storm and flood damage. Ultimately, there appears to be a real prospect of the courts being kept busy due to the interpretative nature of certain clauses.*

Research, risk and horizon scanning

Mistimed sleep disrupts circadian regulation of the human transcriptome. Proceedings of the National Academy of Sciences.

New research has been published which found that the daily rhythms of our genes are disrupted when sleep times shift. This raises questions over the impact of shiftwork and the long term effect on health. The research may increase the pressure on the Health and Safety Executive (HSE) to update its guidance on shiftwork.

Writing in the Proceedings of the National Academy of Sciences, a team lead by Surrey University sleep geneticist Simon Archer observed the effects on 22 men and women aged 22-29 who stayed at the Sleep Research Centre where the lighting was controlled to transform a normal 24-hour day into a 28-hour day.

Disruption of the timing of the sleep–wake cycle, such as can occur during jet lag and shiftwork, led to disordered physiological rhythms. The research shows that delaying sleep by 4 hours for 3 consecutive days could have implications for understanding the negative health outcomes of disruption of the sleep–wake cycle.

Simon Archer said: "Sleeping at the wrong time is bad for you..... Over 97% of rhythmic genes become out of sync with mistimed sleep and this really explains why we feel so bad during jet lag, or if we have to work irregular shifts."

Unsurprisingly, the TUC have come-out and said the report reinforced concerns about a link between shiftwork and conditions ranging from breast cancer to diabetes, heart attacks and obesity, establishing it as a 'major occupational health issue.'

This research study does not seek to, and nor does it, draw a conclusive causative link between shift work and ill health. Such a small and limited study, can only have limited quantitative and qualitative value. That said, concerns about the effect of shiftwork have been voiced before and where 'major occupational health issue(s)' are under consideration, you can expect some close interest from claimant lawyers. To that extent, it would be welcomed if the HSE were to provide some updated guidance for employers.

Costs

Rehill v Rider Holdings Ltd [2014]

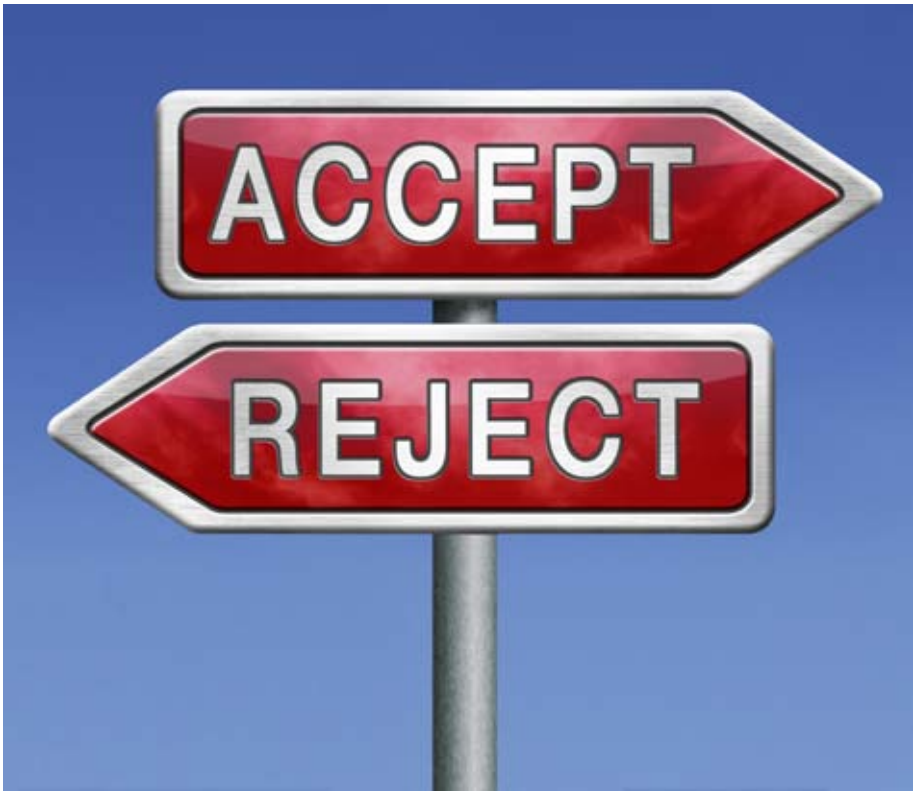
In December 2005, while crossing at a controlled pedestrian crossing with the red light against him, the claimant was hit by a bus owned by the defendant. The defendant's driver had failed to apply the brakes quickly enough and liability was ultimately apportioned equally between the parties.

In April 2007 the defendant made its first offer to settle the claim for £75,000, expressed to expire in June 2007 (the first offer); the offer was not accepted by the claimant. In November 2007, the defendant made a Part 36 offer to settle for £100,000 (the second offer). That too was not accepted and was subsequently withdrawn by the defendant in January 2008. In June 2009 the defendant made a further Part 36 offer for £40,000. Again, the offer was not accepted and was then withdrawn.

Just before the court's assessment of damages hearing in April 2013, the claimant accepted an offer of £17,500. The issue to be determined was what order should be made regarding costs, based on the claimant's failure to accept, and beat, multiple offers from the defendant, albeit the offers had been withdrawn.

In the County Court, the judge decided that, whilst the claimant had dishonestly inflated his claim and should have accepted the earliest offers, he had been prudent and reasonable to await expert medical evidence. As such, the claimant should only be penalised for failing to accept the June 2009 offer and ordered that the defendant pay the claimant's costs to that date, and the claimant pay the defendant's thereafter.

The defendant appealed on the effect of the first and second offers being rejected and whether the claimant's costs should be reduced due to his dishonesty. The appeal was successful: the court was required to consider any admissible offers to settle. Further, if a claimant should have accepted an offer within 21 days, the consequence should be that he is entitled to his costs up to the date of acceptance. If the offer should have been accepted, then the defendant should be entitled to his costs thereafter.



In this case, the question was whether the claimant had acted reasonably in not accepting the first and second offers. The judge had been wrong and made obvious errors when evaluating the evidence and when exercising his discretion. The Court of Appeal decided it had been unreasonable for the claimant not to have accepted the second offer in November 2007 and he was ordered to pay the defendant's costs from 21 days after the offer.

On whether to penalise the claimant for dishonesty, it was entirely appropriate to order him to pay the costs of any part of the claim process which had been caused by his fraud or dishonesty. The Court of Appeal took the opportunity to provide a clear message that claimants should be penalised when they choose to dishonestly inflate, exaggerate and fraudulently pursue a claim.

> *This case provides a good example of the benefits which can be derived from an early Part 36 offer. Whilst the November 2007 offer of £100,000 would clearly have over-compensated the claimant, both parties would have avoided significant legal bills had the offer been accepted. Whether on the advice of his solicitor or not, the claimant decided not to accept the offer and went on to dishonestly inflate his claim. Whilst some cynics have long-questioned whether the courts provide justice for all, on this occasion the claimant got what he deserved and justice was served.*

Liability

Ahmed Mohamud v WM Morrison Supermarkets Plc [2014]

On 15 March 2008 Mr Mohamud visited the defendant's supermarket and petrol station premises in Small Heath, Birmingham. After checking the tyre pressures on his car, he entered the petrol station kiosk and asked the defendant's employee if it was possible to print off some documents which were stored on a USB stick. The supermarket's employee, Mr Khan, responded in an abusive fashion, including racist language and two other employees appeared to have joined in the abuse.

Mr Mohamud left the kiosk and walked to his vehicle. He was immediately followed by Khan, who opened the front passenger door and partly entered the vehicle. He shouted further abuse and told him to get out of his car. At this point Mr Mohamud was punched to the head by Khan and after exiting his vehicle, he was then subjected to a serious attack involving punches and kicks whilst he was curled up on the petrol station forecourt. The attack left Mr Mohamud with a head injury, psychological trauma and other soft tissue injuries.

In the County Court, the judge decided that Mr Mohamud was in no way at fault for the 'brutal and unprovoked' attack. Mr Khan was being encouraged to go back inside the kiosk by his supervisor, who had earlier told him not to follow Mr Mohamud out of the premises. Mr Khan had made a positive decision to leave his kiosk and to follow him. It was concluded that his actions appear to have taken place purely for reasons of his own and the defendant was not vicariously liable. Mr Mohamud appealed.

The question for the Court of Appeal was whether the relationship between employer and employee was capable of giving rise to vicarious liability – the test of close connection between the assault and the employment.

The claimant's case was that the assault arose directly from the interaction between Mr Mohaumd and Mr Khan, and that was clearly committed within the parameters of Mr Khan's work duties. It would be fair and just for there to be a remedy against the employer.

The defendant's case was that Mr Khan's duties involved no element of keeping public order or exercising authority over a customer.

The judgment contains a detailed, and interesting, review of the case law in the area of vicarious liability involving assault and violent confrontation. The distinguishing feature in this case was the absence of any instruction or requirement for Mr Khan to engage in any form of confrontation with a customer – mere interaction is not sufficient and the appeal was unsuccessful.

> *Whilst the court were obviously sympathetic to Mr Mohaumd's plight, they took the opportunity to confirm the law is not yet at a stage where the mere fact of contact between an employee and a customer is sufficient to fix the employer with (strict) vicarious liability – Lord Justice Christopher Clarke confirmed that would be a step too far.*

Completed 20 February 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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4823/TechnicalClaimsBrief/March2014

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