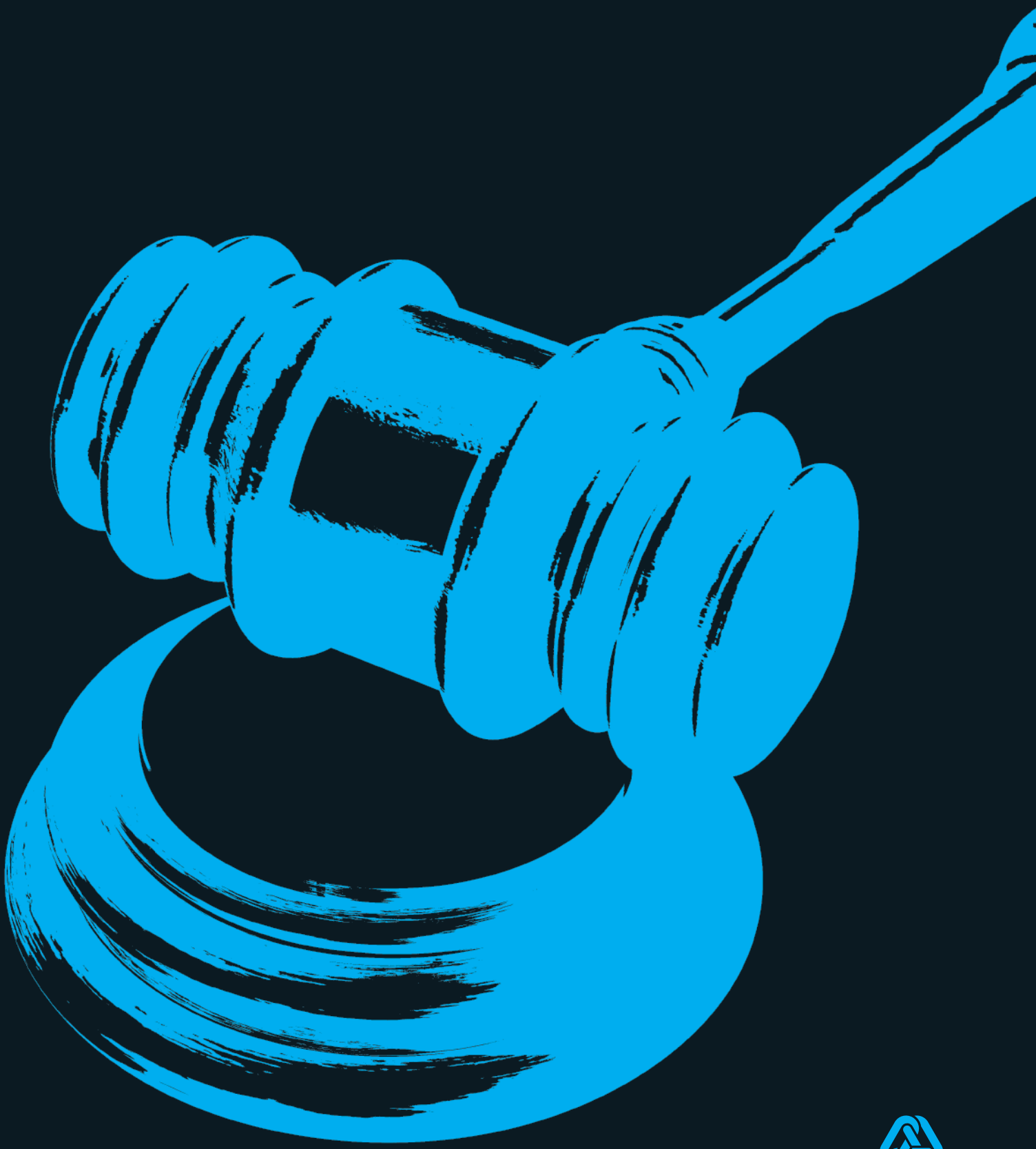
Liability round-up

Issues forum – March 2009



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Contents

There is an ancient Chinese curse which roughly translates into English as "May you live in interesting times". From a legal point of view 2008 has been a very "interesting" year for UK businesses and their insurers, and whilst new challenges have undoubtedly arisen, there were some notable developments.

Health and Safety: A toughening legal framework

Corporate manslaughter

Perhaps the most widely anticipated new legislation of 2008 was the *Corporate Manslaughter and Homicide Act 2007* which came into force on 6 April 2008. The legislation was greeted with a good deal of alarm in some quarters in the mistaken belief that it could lead to harsh custodial sentences for company directors and managers. However the Act does not, and was never intended to cover the prosecution of individuals.

There is no requirement on employers to comply with any new regulation but an organisation which causes a death in the work place through a gross breach of a duty of care is now far more likely to be prosecuted. Prior to the new Act, prosecuting authorities were faced with the difficulty of identifying the individual or individuals who were responsible for the breaches which led to a fatality. In a large organisation with a complex management structure this could be almost impossible to do and successful prosecutions for manslaughter, gross negligence and culpable homicide were largely confined to small companies. The Act removed the need to identify responsible individuals and enables prosecutions for wide spread organisational failures. It also largely did away with Crown immunity to the common law corporate manslaughter offence.

An organisation found guilty of the new offence will be liable to pay an unlimited fine. It may also face a publicity order compelling it to publish details of the conviction and fine, and a remedial order requiring it to rectify the failures that led to a fatality.

Although welcomed by the HSE as an important advance, trade unions and other organisations with an interest in work place safety were critical of the new Act's lack of provision for any prosecution of individuals. This situation was remedied however when the *Health and Safety (Offences) Act 2008* gained Royal Assent on 16 October 2008.

"The *Corporate Manslaughter and Corporate Homicide Act 2007* is a landmark in law. For the first time, companies and organisations can be found guilty of corporate manslaughter as a result of serious management failures resulting in a gross breach of a duty of care."

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Tougher sentencing

Effective from 16 January 2009 the *Health and Safety (Offences) Act 2008* is very much aimed at individuals. It applies to all persons with a responsibility for health and safety in the work place. Potentially all employees and the self-employed are affected. Historically prosecutions for health and safety offences have tended to focus on directors, managers and partners.

Like the Corporate Manslaughter Act, no new regulation is introduced but sentences for breaches of regulation are made much harsher. The maximum fine which can be imposed by Magistrates Courts is increased from £5,000 to £20,000. Crown Courts retain their power to impose unlimited fines but for many offences the new maximum penalty is no longer a fine but a two year custodial sentence.

Serious breaches of the *Health and Safety at Work Act 1974* or of supporting regulation, obstruction of inspectors or breach of prohibition or other notices may all now be punished by custodial sentences of up to two years.

The Government and the HSE have been at some pains to point out that both of the new acts are aimed at the worst employers and that good ones have nothing to fear. It is hard to deny however that the legal consequences of breaching health and safety regulation have become much more serious.

To see the full *Health and Safety (Offences) Act* go to **www.opsi.gov.uk/acts/acts2008/ukpga_20080020_en_1**

For further information on the *Corporate Manslaughter Act* go to **www.hse.gov.uk/corpmanslaughter** or for copies of our Issues Forums, go to **www.QBEeurope.com/RM**

The burden of proof

The new tougher penalties for breaches of Health and Safety regulation have focussed attention on the reversal of the burden of proof which an accused often faces.

In the case of *R v Porter* the defendant was the owner of an independent school. He was prosecuted under the *Health and Safety at Work Act 1974* following the tragic death of a 3 year old pupil. The child had been playing on some steps, which were out of bounds, when he fell and injured his head. He died in hospital 5 weeks later having contracted MRSA.

At first instance, the defendant was convicted under S 3(1) of the act for failing to ensure the health and safety of persons not in his employment. In line with previous case law, the HSE had only to demonstrate that there was a risk or a "possibility of danger" in order to reverse the burden of proof back to the employer. The defendant was then faced with having to prove that he had done all that was reasonably practicable to avoid exposure to the particular risk.

The defendant appealed to the Court of Appeal who quashed the conviction ruling that there was no obligation upon an employer to guard against risks which were "merely fanciful".

Insignificant risks, arising from routine activities can be ignored. In future the prosecution will have to prove that a "real risk" existed before the burden of proof can be reversed.

"...the new Act sends out an important message to those who flout the law. However, good employers and good managers have nothing to fear."

Judith Hackitt, HSE Chair, on the Health and Safety (Offences) Act

Work place equipment: “swings and roundabouts”

The question of what is and what is not “work place equipment” and thus how far strict liability for defective equipment applies, continued to come before the courts on a regular basis.

In the Court of Appeal case of *Smith v Northamptonshire County Council*, the claimant was employed by the defendants as a driver/carer and was injured whilst pushing a wheelchair down a ramp which collapsed. At first instance the Judge ruled that the ramp was work equipment and that the defendants were strictly liable under the *Provision and Use of Work Equipment Regulations 1998* (PUWER).

The defendants appealed, arguing that the ramp was not work equipment and that there was no intention in the regulations to impose strict liability for lack of maintenance of something outside of an employer’s control.

The Court of Appeal agreed that the ramp, installed by the NHS, was not work equipment. It did not become so simply by virtue of the claimant pushing a wheelchair down it. Nor was the fact of it being a movable object material. The defendants had no power to maintain the ramp save by obtaining the consent of the NHS or the home owner who used it.

The regulations in defining “work equipment” implied “*an underlying relationship from which it would be natural to contemplate some responsibility for construction or maintenance*” which was clearly not the case here. The employers were not strictly liable.

The Lords’ ruling in *Spencer-Franks v Kellogg Brown and Root Ltd and Ors* was less helpful to employers.

In this case the claimant was repairing a closing mechanism fitted to a door on an oil rig. A screw came out and the linking arm swung out striking him in the face and causing injury. The claimant sued his employers and the operators of the oil rig for breach of statutory duty under PUWER.

This claim brought under Scottish Jurisdiction, was initially dismissed by the Inner House of the Court of Session which ruled that the door closer was not work equipment, and even if it was, the claimant had not been “using” it as defined by the regulations.

The claimant successfully appealed to the House of Lords who ruled that as the door and its closing mechanism were for use at work, they were work equipment. Any implied exclusion in the regulations, of apparatus forming part of the work place premises, could not be applied to an offshore platform. To say that the claimant was not “using” the door because he was repairing it was too narrow an interpretation.

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Public Liability: more pragmatism from the Court of Appeal

Ever since the Lords' ruling in *Tomlinson v Congleton BC (2004)*, where the danger that litigation could put an end to many beneficial recreational activities was recognised, there has been a trend away from the automatic compensation for the unwary and the unlucky.

The "bouncy castle"

In the high profile case of *Harris v Perry, Perry and Harris*, the unfortunate child claimant suffered brain damage when he was struck on the forehead by the heel of an older boy whilst both were playing on a "bouncy castle".

The Perrys, who had hired the castle for their triplets' birthday party, had allowed children of different ages and sizes to use the castle against recommended safe practice. They had also hired in a second piece of play equipment and could not provide uninterrupted supervision for both. The older boy had been doing somersaults when the accident occurred and told the court that he would have stopped doing this if asked by a supervising adult.

At first instance the Perrys were found liable. The decision received wide spread publicity and there was an almost immediate down turn in the hire of "bouncy castles" and other play equipment. An appeal was quickly heard however and the original decision overturned.

The Court of Appeal, whilst holding that children should be safeguarded from foreseeable risks, were unconvinced that the defendants should have been automatically expected to prevent children of different sizes from playing on the castle or from doing somersaults. Short of advice to the contrary, these were not obviously dangerous.

Organisers of children's activities were greatly relieved!

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Obvious risk

In *Trustees of the Portsmouth Youth Activities Committee (a charity) v Poppleton* the claimant was rendered tetraplegic when he fell from the top of a climbing wall at the defendants' activity centre. He had been attempting to jump from one climbing wall to a buttress on another, an activity expressly forbidden by the rules of the centre. The defendants were found 25% liable at first instance for breach of a common law duty of care i.e. failing to warn the claimant that the safety matting at the centre could not be relied upon to prevent injury in the event of a fall.

The defendants appealed arguing that to treat the (adequate) safety matting as a hidden or latent danger was wrong and that it was obvious that a climber who fell awkwardly was at risk of injury. The claimant cross appealed against the finding of 75% negligence on his part.

The Court of Appeal allowed the appeal and dismissed the cross appeal. The claimant had voluntarily undertaken an inherently risky activity. It was obvious that even with safety matting, falling was hazardous.

In the leading judgement in this case, Lord Justice May warned that adults who knowingly risk injury by taking part in dangerous activities should not assume that they will be compensated.

Mesothelioma: the trigger litigation

In 6 consolidated cases, the High Court was asked to resolve the thorny issue of at what point, if at all, employer's liability cover was triggered in mesothelioma claims. Was an EL insurer who was on cover at the time that the victim first breathed in an asbestos fibre liable to deal with the subsequent claim for mesothelioma or should this fall to the insurer who was on cover at the time that a tumour developed or symptoms appeared?

A tumour can take as long as 40 years to develop by which time an employer might no longer be trading, raising the prospect of 8-12% of victims being unable to obtain compensation if the court chose this as the trigger point.

The High Court ruled that the intention of the parties contracting the insurance policies was that the trigger date started from when the fibres were inhaled. Terms in the policy wordings such as "injury sustained" or "disease contracted" mean "caused" which with mesothelioma equates to exposure to asbestos.

Unsurprisingly, given the very significant financial implications of this judgement, an appeal is underway.

Work place stress

The Court of Appeal once more considered the duties of employers to combat work place stress in *Dickins v O2 Plc*.

The defendants appealed against an award of damages to an employee for psychiatric injury caused by occupational stress. In March 2002 the claimant had told her employers that she felt exhausted and "at the end of her tether". A month later she told them that she was suffering from stress and feared that her health would become damaged if she continued working. She requested a six month sabbatical. Her employers suggested that she use their counselling service but she was already undergoing counselling arranged by her GP in relation to stress-related Irritable Bowel Syndrome.

At her appraisal she repeated her concerns and was referred to Occupational Health but nothing came of this and in June 2002 the claimant went on sick leave never to return. The defendants argued that the judge at first instance had failed to recognise that indications of impending illness must be clear before an employer is under a duty to act and had failed to take into account that the employer offered a confidential counselling service. His finding that the defendants should have sent the claimant home was unreasonable as this action would have amounted to a breach of contract.

The Court of Appeal however upheld the judge's finding that psychiatric injury was foreseeable from April 2002. In *Hatton v Sutherland*, the Court of Appeal had set out guidance on occupational stress claims and had indicated that employers who provided confidential counselling were unlikely to be held to be in breach of duty. On the facts of this case however, the provision of a counselling service was insufficient to discharge the employer's duty. The suggestion that the employer could not have sent the claimant home for fear of breach of contract was dismissed.

In the original judgement the claimant's damages were discounted by 50% to allow for the influence of other factors on the claimant's breakdown. This was not an issue raised at appeal but two of the three judges, commented that psychiatric injury in these cases should be seen as indivisible and an employer would be liable for the whole injury if their negligence had made a more than minimal contribution to the injury.

Employers must now be weary of trying to defend occupational stress claims on the sole basis of the availability of a counselling service.

"...the reference to counselling services in Hatton did not make such services a panacea by which employers can discharge their duty of care in all cases."

LJ Smith

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Conclusion

2008 has seen more pressure put on businesses to ensure good health and safety practice. The positive side is that "cowboy" competitors are now more likely to be severely punished and that responsible businesses are less likely to be penalised for freak accidents. There may also be less likelihood of having to compensate those intentionally risking their own safety.

Further information

You can find further information at **www.QBEeurope.com/RM**

Author Biography

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John was recruited to QBE Claims in 2004 to provide support on catastrophic injury claims. He joined the QBE Strategic Claims Team in 2006 where he specialises in handling acquired brain injury claims.

John has worked in the insurance industry for over 25 years.

Completed March 2009 – copies of case judgements and source material for the above items can be obtained from John Tutton (contact no: 01245 272756, e-mail: **john.tutton@uk.qbe.com**).

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