QBE European Operations

Technical claims brief

Monthly update | April 2015

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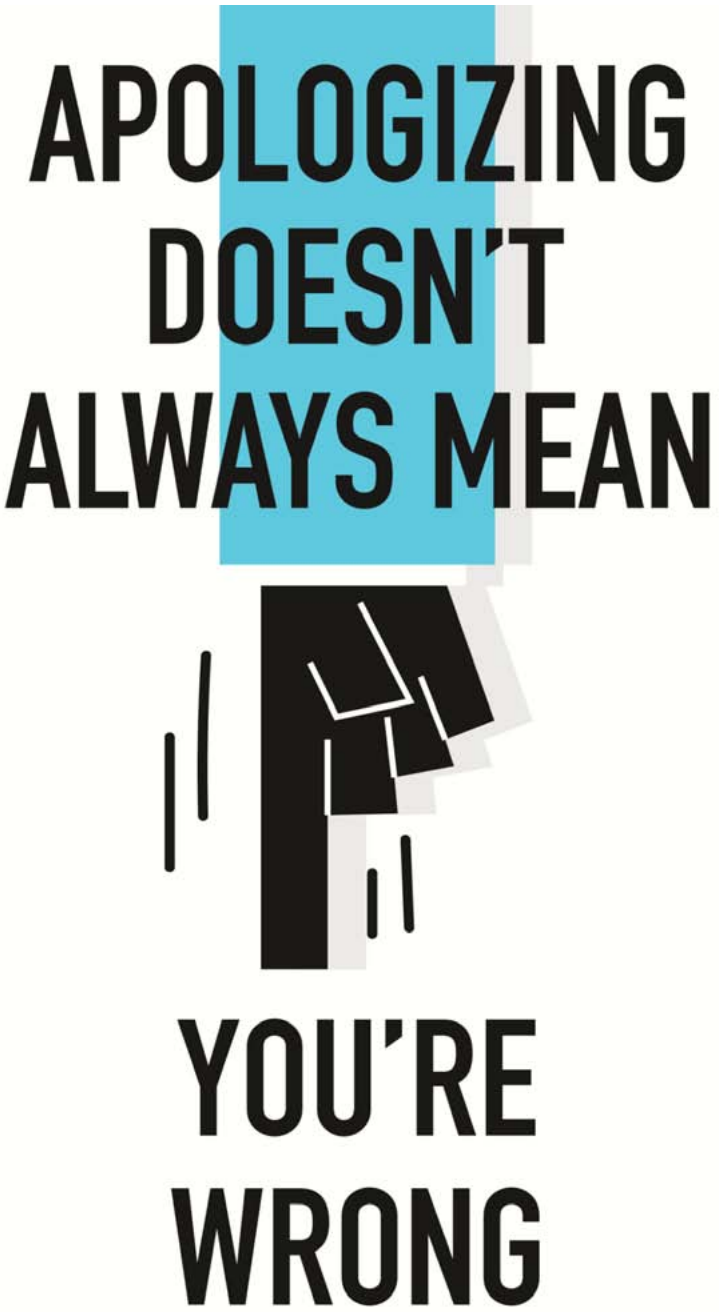
Apologies (Scotland) Bill

The Apologies (Scotland) Bill was formally introduced to the Scottish Parliament on 4 March 2015 and is intended to give legal protection to an expression of apology, in certain circumstances. It provides that an apology is inadmissible in certain civil proceedings as evidence of anything relevant to the determination of liability, and cannot otherwise be used to the prejudice of the person making the apology. The Bill is said to have the broader purpose of encouraging a cultural and social change in attitudes towards apologising.

The logic behind the Bill is to address circumstances that 'are not about the money', but where the wronged is merely seeking an apology from the wrongdoer. In reality, the Bill isn't a significant change to the law – it is long-established that an apology does not amount to an admission of liability – but does hope to provide certainty to parties who want to apologise. It follows that the Bill does not change the position that a claimant would still need to prove his case as to breach of duty, causation and loss suffered.

A secondary hope is that, where appropriate, an apology might 'set the right tone' from the outset, so as to help facilitate early settlement and reduce adversarial, and expensive, litigation. It will be recognised that the success of any purposed attitudinal change will need to be mesureded over a number of years, and not months.

The ABI has drafted a response to the financial implications of the Bill and rightly criticises the proposed definition of 'apology', with regard to the inclusion of an 'undertaking to review'. The fear is that such a definition will raise issues of applicability and uncertainty as to admissibility, which will have the result of undermining the intention, purpose and hope of the Bill.



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The Bill has obvious applicability to any organisation in Scotland that has employers' and/or public liability insurance. There is potential for the Bill to bring an insured into conflict with their insurance policy. Most policies will expressly state that an insured should not make any admissions following an accident or act in anyway that would prejudice the insurer's position. The Bill might support that position (as an apology would be inadmissible), but it would need to be drafted carefully, to ensure the content is caught by the Act. It remains to be seen exactly what the Bill will look like after it completes its passage through Parliament and we will track its progress.

Introducing the Statutory Duty of Candour

From 1 April 2015, a Duty of Candour will apply to all care providers who are regulated by the Care Quality Commission (CQC). This is subject to final approval from Parliament and follows the same legislation which came into effect for NHS healthcare providers in November 2014. The Duty of Candour is likely to have a number of serious implications for healthcare and care providers.

Although for many years doctors have had an ethical obligation to be open and honest with their patients, the introduction of the statutory duty means that they will now have a legal duty to tell patients if something goes wrong and causes specific, defined types of harm

The Duty of Candour is intended to ensure openness and transparency when a notifiable safety incident has occurred. The relevant healthcare or care provider will have to follow a procedure which involves an apology, but is not meant to be an admission of liability. A notifiable incident is defined as any unintended or unexpected incident which occurs when a service user is being treated (or cared for) and that has resulted in the death, severe harm, moderate harm or prolonged psychological harm.

The process will require an oral notification within 10 working days and must:

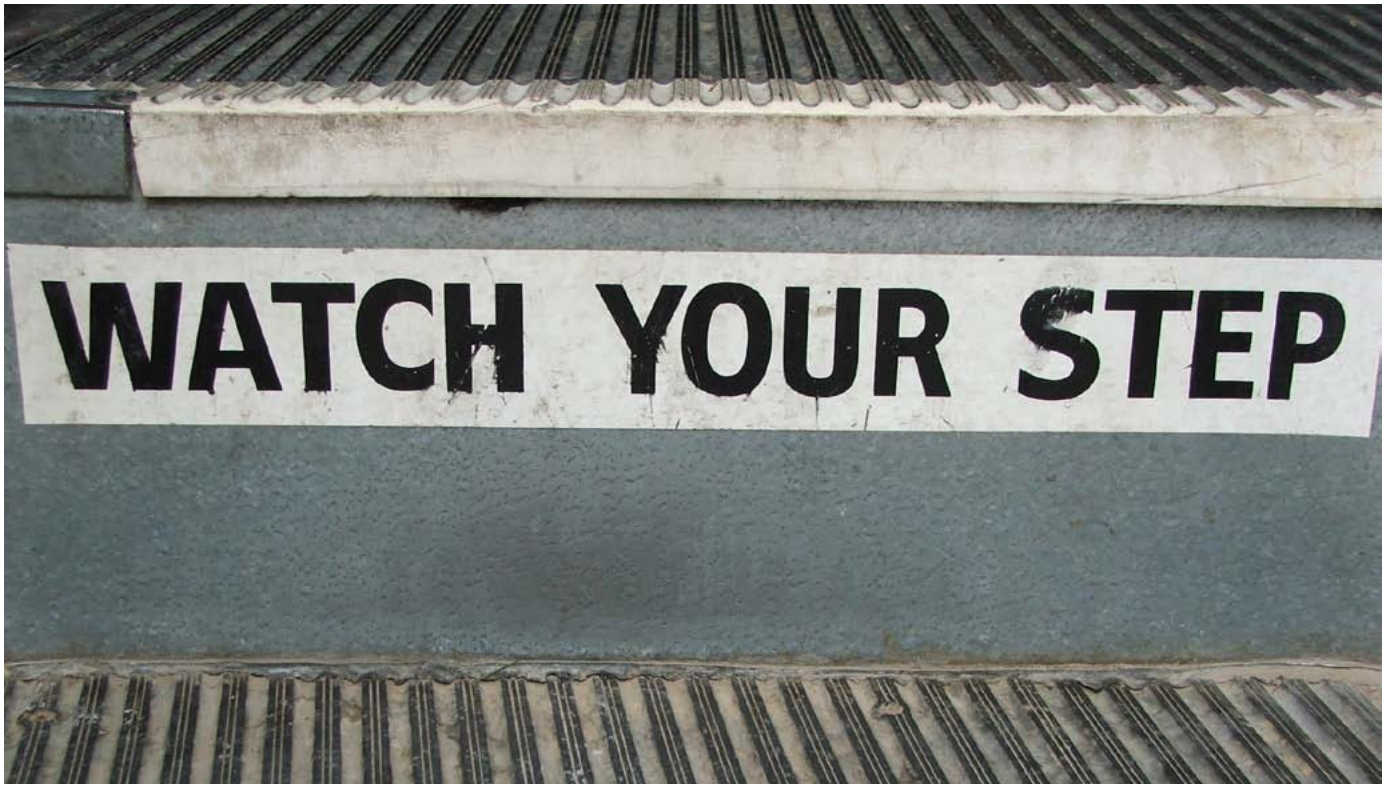
- Ensure that the service user or their representative understands what has gone wrong
- Give an account that is true to the best of the organisation's knowledge
- Clearly state what further enquiries into the incident will take place
- Apologise, expressing sorrow or regret, without admitting fault or liability
- Keep a written record of this conversation

The oral notification must then be followed by a written notification, which must:

- Repeat the information, and apology, given in the oral notification
- Include the results of any further enquiries
- Inform the recipient of the continuing duty to keep the service user or their representative informed, in writing, of any further enquiries and investigations, should they wish to receive it

Non-compliance is a criminal office and punishable with a fine of £2500. The CQC may also refuse or revoke registration where providers cannot demonstrate compliance with the requirements.

> By placing a (statutory) positive duty on an organisation to issue an apology, will once again raise the potential conflict with the requirements of an insurance policy and will have to be carefully considered and managed. Whilst accepting the need for openness and honesty, the making of an apology should not be confused with an admission of legal liability and some will fear the potentially prejudicial content of the aforementioned oral and written apology. It will be interesting to see the impact of the Duty of Candour in this area and whether it could be applied to other areas of industry.



Failure to establish causative link to breach of duty – *West Sussex County Council v Fuller [2015]*

The claimant, Ms Fuller, was an employee of the defendant local authority. On 12 December 2008 she suffered an injury to her wrist following an accident at work. She was delivering post to the different floors of the council building when she tripped-up the stairs and subsequently issued the claim. She alleged that her foot had stuck on a 'sticky patch' on the stairs, which caused her to trip and that she was hindered by having to carry large amounts of heavy and bulky mail.

The claimant's case was that the amount of post meant that she had to use both hands to carry the post so that she could not use either of the handrails and that she could not see where she was walking. As she was going up the stairs, one foot did not lift off as she was anticipating, because of the sticky patch and her momentum carried her forward.

Liability was denied, but damages had been agreed in the sum of £6,000. The claimant's costs were estimated to be in excess of £100,000.

Her claim was framed on breach of Regulation 3 of the Management of Health and Safety at Work Regulations 1999 (MHSWR) – a failure to carry out a suitable and sufficient risk assessment - and Regulation 4 of the Manual Handling Operations Regulations 1992 (MHOR) – a failure to assess and reduce the risk of injury.

At the first instance hearing, the claim was successful despite the judge concluding that the claimant's account of the accident was factually incorrect. The judge found that she was not carrying a large amount of post, she had at least one hand free and there was no hazard in the form of a sticky patch that caused or contributed to the fall. The judge decided that she had simply misjudged her footing, and if the accident were to be analysed in terms of fault, it was entirely the claimant's fault

The judge then erred in law when considering breach of statutory duty and the application of the MHSWR and MHOR. He decided the defendant was in breach due to the absence of a risk assessment of the task of distributing post around the building, and to then take appropriate steps to reduce the risk of injury to the lowest level reasonably practicable. He accepted the claimant's submission that breach of MHOR did not require the breach to be causative of the accident and the claim succeeded. The defendant appealed.

The Court of Appeal decided the cause of the injury had nothing to do with the risks which might occur when carrying post. The initial finding of fact that the claimant had misjudged her footing meant that the only way to prevent this injury was to stop her from walking up the stairs. The claimant agreed that might be a wise precaution.

Having considered various authorities the Court of Appeal rightly identified that liability under Regulation 4 of MHOR is only established on proof of a causative link between the accident and the breach of duty. Whilst the defendant was arguably in breach of duty for failing to carry out a risk assessment, the accident clearly did not fall within the ambit of the risk which the defendant was required to assess. The claimant simply misjudged her footing, rather than falling because she was carrying post – that was the occasion, rather than the cause. The appeal was allowed.

> "This is a very good example of the necessity for a claimant to establish a causative link between the accident and the alleged (and potentially admitted) breach of duty. On this occasion, few could disagree that the claimant should not be entitled to recover compensation as a result of merely misjudging her footing. The legal position has changed somewhat following the introduction of the Enterprise Act, but an important point is that the result would have been the same. What also remains the same is that an employer is under a duty to take reasonable care for the health and safety of their employees so as not to expose them to an unnecessary risk."

Stress in the workplace — *Easton v B&Q Plc [2015]*

This case neatly reaffirms the position that a successful claimant must establish a breach of duty owed by the employer; usually the duty to take reasonable care to avoid unnecessary risks to the claimant's health. The claimant's claim failed because it was not foreseeable that he would suffer a relapse, despite the employer failing to conduct a risk assessment after his return to work following an earlier breakdown. The failure to risk assess was not sufficient to establish breach of duty.

As to the existence of workplace stress, the relevant question for an employer is whether they have a duty to do something about it, and if so, a duty to do what. The Judge in this case followed the established guidance set out in the Court of Appeal decision in Hatton v Sutherland [2002] and helpfully identified the key points to be considered by those handling these claims.

The starting point is that a reasonable employer must appreciate an indication of impending harm to health, arising from stress at work and to realise that he should do something about it. The employer does not need to apply professional standards of medical diagnosis, but persistent out-of-character behaviour will warrant an enquiry. Sensibly, the more overt the behaviour, the sooner that trigger point arises. Stress indicators are traditionally grouped under the separate categories of emotional, physical and behavioural.

For the claimant to establish breach of duty, he must show that the employer has failed to take the reasonable steps, bearing in mind the extent of the risk of harm, the nature of the harm which may occur, the cost and practicability of preventing it, and any justification for running the risk. This is inevitably a balancing act for an employer, but broadly speaking the more likely the harm to the employee, or the more serious the damage, the less important the employer's justification for running that risk, along with the cost of avoiding it.

An important point for employers is that where they offer a confidential advice service, with referral to appropriate counselling or treatment services, it is unlikely they will be found in breach of duty. The confidential nature of the service will mean that the employer might not learn of the workplace stress, so employees should be encouraged to raise any issue with their line manager.

If the only reasonable and effective step would have been to dismiss or demote the employee, the employer will not be in breach of duty by allowing a willing employee to continue in the job. An employer should be aware that a reduction of hours or duties, even if it is for the employee's own protection, could count as a constructive dismissal.

A sensible and prudent employer should ask questions concerning the cause of the workplace stress, what would make the situation better and whether a practical solution can be found to address it. This exercise goes hand-in-hand with an employer's legal obligation and should promote the optimum outcome for all concerned.

> “Whilst the case does not create any new law, for those dealing with stress claims and advising employers, it is a helpful restatement of the legal criteria and duty of care. The employee v employer relationship correctly demands that the latter has a duty to take reasonable care to avoid unnecessary risks to the former's health. A burden should be placed on employers when an employee is under their duty of care. But it follows that when a reasonable employer could not foresee a mental injury, a claim for compensation cannot be made outto expose them to an unnecessary risk.”

Completed 30 April 2015 – 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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