QBE European Operations

Technical claims brief

Monthly update | February 2015

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The 12 February 2015 was a significant day for the insurance industry as three important legislative Bills received Royal Assent – The Insurance Act; The Social Action, Responsibility and Heroism Act (SARAH Act); and The Criminal Justice and Courts Act. The Court Reform (Scotland) Act also received Royal Assent at the end of 2014.

There will be wide-ranging and varied impact for insureds, brokers and insurers. The full extent and impact of the reforms will undoubtedly take a number of years to manifest themselves, but the following is intended to provide an overview and some critical evaluation.

This month we also take a look at the government's proposals to increase court fees, the Supreme Court's rejection of the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill and the revision to the Mesothelioma Payment Scheme.

It has been an exceptionally busy start to 2015 and there remain a number of key judgments expected in the next 6-9 months, including *IEGL v Zurich Insurance* (whether an insured is entitled to an indemnity from an insurer for the entirety of its outlay), *Coventry v Lawrence* (recoverability of ATE premium and level of success fee), *Mohamud v WM Morrison Supermarkets Plc* (vicarious liability arising from a severe assault on a petrol forecourt), *Cox v Ministry of Justice* (another vicarious liability claim by a prison guard) and *The Mayor's Office for Policing and Crime v Mitsui Sumitomo Insurance Co* (liability arising from the 2011 riots).

The Insurance Act

This long-awaited Act began life as a Law Commission project in January 2006. Progress has been slow at times and implementation will come 110 years after the Marine Insurance Act, which has been the statutory foundation of insurance law in the UK. The Insurance Act will come into force in August 2016 and will introduce significant amendments to both business and consumer insurance. The Act will apply equally to reinsurance and key parts will affect an insureds duty of disclosure; the use of warranties in insurance contracts; and an insurer's remedy for fraud.

1. **Duty of fair presentation in business insurance.** The duty will be to make a fair presentation of the risk and for an insured to disclose every material circumstance which they know or ought to know about. The disclosure of sufficient information is to put a prudent insurer on notice that it needs to make further enquiries for the purposes of revealing those material circumstances. The principle of good faith remains.
2. **Proportionate remedies.** If the insured fails to make a fair presentation of the risk, but non-disclosure is neither fraudulent nor reckless, the burden will be on the insurer to show what it would have done if a fair presentation had been made. The remedy will be either; return of premium and avoid the policy (where the insurer would not have entered the contract) or charge a higher premium (based on the altered risk). The purpose is to be more flexible and commercial, whilst retaining the remedy of avoidance in proportionate circumstances.
3. **Warranties.** The remedy for breach of warranty will be softened and will now serve to merely suspend an insurer's liability (rather than discharging the insurer from the point of breach) until such time as the breach is remedied. In certain instances a breach of warranty will only prevent a claim if the breach had a causative effect on the loss.
4. **Remedies for fraudulent claims.** When an insured commits a fraudulent claim the insurer is not liable to pay the claim, it may recover any sums paid and can give notice to terminate the insurance from the time of the fraudulent act (this does not apply to third party fraud).

The Act will also bring into force the Third Party (Rights Against Insurers) Act 2010, from 12 April 2015. The purpose of the Act is to make it easier for claimants to pursue their claim when the defendant becomes bankrupt or insolvent and allows a claim against the insurer without first having to establish liability against the defendant.

> The Act will take some time to bed in, and the shift from the statutory foundation of the Marine Insurance Act 1906 (along with 110 years of common law precedent), to this new chapter of insurance law may lead to some uncertainty and with that, a number of test cases. Clear communication with all stakeholders will be key and QBE is committed to working with insureds and brokers to ensure a smooth transition and transparency.

> Comparisons have been drawn with the Compensation Act 2006. The purpose of that Act was to encourage schools and other institutions to organise 'desirable' activities without undue fear of litigation. Reference to the Act within court reports is extremely limited, so it is difficult to assess its success. The SARAH Act has received some criticism (not necessarily with regard to the sentiment), of having the potential effect of 'muddying the waters' for judges who already have to grapple with the often complex legal tests of duty of care, liability and causation. That said, the Act is welcomed by QBE and will form part of our liability assessment for accidents and be utilised where appropriate.

The Social Action, Responsibility and Heroism Act (SARAH Act)

The Act applies when a court, in considering a claim that a person was negligent or in breach of statutory duty, is determining the steps that the person was required to take to meet a standard of care. This means that the judge will have to take into account whether an individual was acting for 'the benefit of society' (e.g. doing a good deed such as volunteering) if something goes wrong. The Act applies to England and Wales only.

The sections of the Act say the court must have regard to:

Social Action: Whether the alleged negligence or breach of statutory duty occurred when the person was acting for the benefit of society or any of its members.

Responsibility: Whether the person, in carrying out the activity in the course of which the alleged negligence or breach of statutory duty occurred, demonstrated a predominantly responsible approach towards protecting the safety or other interests of others.

Heroism: Whether the alleged negligence or breach of statutory duty occurred when the person was acting heroically by intervening in an emergency to assist an individual in danger.

Parliamentary debate centred on the term 'predominantly responsible' and what that actually meant in practice. Interpretation will be key for claims defensibility and the ability to evidence properly considered health and safety practice will undoubtedly form part of any successful defence. The crux of the defence will be whether a 'predominantly responsible' approach was applicable to the activity being undertaken at the time, as opposed to mere reliance on an unblemished health and safety record.

The Criminal Justice and Courts Act

The Act contains the much awaited provision that places an obligation on judges to strikeout a claimant's personal injury claim where there is a finding of fundamental dishonesty. That obligation is tempered by the caveat that the entire claim will not be struck-out if it can be argued that the claimant would suffer substantial injustice (akin to the previous position whereby damages would be recovered for any non-fraudulent injury/losses). The Act also extends the concept of fundamental dishonesty beyond the exception to qualified one way costs shifting (QOCS) introduced as part of the civil justice reforms in 2013.

It is not yet clear how the courts will define 'substantial injustice' and 'fundamentally dishonest' in the context of this Act, which will result in a number of claims being tested in the courts over the next couple of years. The case of Gosling v Screwfix Direct Ltd (2014) was only decided in the county court, but was the first finding of fundamental dishonesty for the purposes of QOCS and gives some assistance. Cases of this nature are highly fact sensitive and the compelling nature of the evidence will have to be carefully considered before trying to persuade a judge. The use of term 'substantial injustice' is said to have been inserted so that it gives the court some flexibility to ensure that the provision is applied fairly and proportionately.

While the Act has been passed, a commencement date has yet to be determined.

> The Act will be welcomed by insurers and those who do not support the making of dishonest/fraudulent claims. The fight against fraud continues 'on all fronts' and legislation to supplement and support the available weapons is another step in the right direction. The Act also underlines this government's general desire to tackle some longstanding problems with our civil justice system and QBE will continue to fully support this trend.

Court Reform (Scotland) Act

We have followed closely the progress of this Act and it is pleasing to report the near completion of its journey to the Statute Book. Following receipt of Royal Assent, the Lord President (Lord Gill) has recently announced the implementation of the key features of the Act, which is scheduled to start in September 2015.

They include:

1. A new Personal Injury Sheriff Court will be established in Edinburgh (with Scotland wide jurisdiction)
2. Actions with a value up to £100,000 will have to be raised in the Sheriff Court, rather than in the Court of Session
3. A new Sheriff Court appeal court will deal with criminal cases (From January 2016 the new Sheriff Appeal Court will also deal with jurisdiction in civil cases)

The aim of these changes is to increase access to justice while also lowering costs and it is hoped that parties to litigation will see a reduction in spend on legal costs for the more straightforward claims, post-September 2015. In particular, lower value road traffic accidents may be substantially cheaper to litigate as it is most unlikely that sanction for counsel would be granted by a Sheriff for such cases. It remains to be seen whether Sheriffs will be persuaded to look more favourably upon requests for sanction for counsel in employers' and public liability cases.

Further reform in Scotland may also be on the horizon as Members of Scottish Parliament (MSPs) have launched consultations on two draft Bills. The proposed Damages Claims (EU Directive on Safety and Health at Work) (Scotland) Bill looks to repeal section 69 of the Enterprise and Regulatory Reform Act (which removes civil liability for breach of statutory duty). The consultation closes on 31 March 2015. Secondly, the proposed Recovery of Medical Costs for Asbestos Diseases (Scotland) Bill seeks to enable NHS Scotland to recover the costs of care and treatment of mesothelioma suffers from any compensator. This consultation closes on 30 March. We will keep you updated on these proposals, which clearly could have a significant impact on claims in Scotland and further distinguish them from those in England & Wales.

> “In the short-term there is likely to be an increase in litigation as claimant firms who have traditionally preferred to issue proceedings in the Court of Session, look to beat the September deadline. This may result in increased legal fees and additional strain on the overworked Court of Session. As with all of this reform, the Act is likely to take at least 18-24 months (from September) before any properly considered analysis can be undertaken and significant trends identified. But again, reform looks set to move progress in the right direction and bring into focus the benefits of an efficient and fit-for-purpose civil justice system.

Ministry of Justice propose increased County Court issue fees

The Ministry of Justice has recently announced their intention to substantially increase the issue fee for court proceedings. The level of increases will see a number of intended and unintended consequences, some of which will only become clear with the passage of time. Identified below are a number that seem more certain and will need to be considered carefully by parties to litigation.

The proposals would implement a significant change from the current system, where the issue fee is based solely on a claim value bracket, to one which is predominantly calculated as a percentage of the value of the claim (see below). Under the current fee structure there is a maximum court fee of £1,920, based on a claim value of over £300,000. The current fees have been in place since April 2014.

The new plans are to increase issue fees for all claims valued over £10,000, so that the court fee is 5% of the value of the claim, subject to a maximum fee of £10,000, which would be reached on a claim with a value of £200,000. The Ministry of Justice makes the point that 90% of all claims (those valued below £10,000) will not be affected.

This is how the fee changes would look:

- A claim valued at £25k - currently £610 increasing to £1,250, *an increase of 205%*
- A claim valued at £50k - currently £610 increasing to £2,500, *an increase of 410%*
- A claim valued at £100k - currently £910 increasing to £5,000, *an increase of 550%*
- A claim valued at £200k - currently £1,315 increasing to £10,000, *an increase of 760%*
- A claim valued at £300k - currently £1,720 increasing to £10,000, *an increase of 580%*
- A claim valued at £350k – currently £1,920 increasing to £10,000, *an increase of 520%*

It has been suggested that the level of increase takes the issue fee beyond the current position where the fee should effectively fund the court system, to a point where the payment will supplement the financial resources of the Ministry of Justice generally. The government expect the fees to produce additional income of £120m annually, most of which will be funded by insurers.

The following could be some of the intended and unintended consequences:

1. Claimants might be reluctant to incur an increased issue fee where the prospects of success are marginal;
2. Defendants (and their insurers) will have to consider the increased fee as part of their litigation strategy;
3. Arguments that Claimants have issued prematurely may be improved where a significantly increased issue fee could have been avoided;
4. ADR may become more popular, as parties look to settle claims (or at least narrow the issues) without recourse to increasingly expensive multi track litigation;
5. The increased fees should dramatically improve the court system for users, as increased resources could be allocated to the whole process.
6. Claimants may seek interim payments which would allow them to fund the issue fee.
7. Claimant solicitors will likely try and issue proceedings before the increased fees are brought in, with a resultant short-term spike in litigation.

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> It remains to be seen whether the proposals are implemented untouched, or whether stakeholder pressure results in a review of the 5% calculation. Funding cuts for the court system have understandably resulted in a less efficient and user-friendly court service and few would argue that court users shouldn't pay a fair fee to fund the system. Setting the fee at the right level is vital and not something which the government should rush into. Appropriate submissions will be made to the Ministry of Justice and with a general election fast approaching, it remains to be seen whether the proposals are pushed through and approved by the current parliament.

Supreme Court rejects the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill

The Supreme Court has decided that the National Assembly for Wales did not have the legislative competence to enact the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill.

Under section 2 of the Bill, those who were liable to compensate victims of asbestos-related diseases would be required to pay for the cost of NHS services provided to the victims and under section 14, the compensators' liability insurance policies would be required to cover those sums. The Supreme Court has concluded that the Bill fell outside the National Assembly's legislative competence with regard to the organisation and funding of the NHS and was also incompatible with the rights of compensators and insurers under the European Convention on Human Rights 1950.

An attempt to bring insurers within the ambit of the Bill was said to be important as many compensators who exposed their employees to asbestos are now insolvent and unable to meet any judgment against them. The ABI successfully intervened and argued that the Welsh Assembly's power is limited to regulating services and not raising funds. The Supreme Court agreed and decided it would be wrong to retrospectively override insurance policies, written decades ago, and impose an obligation on insurers to pay the costs of the NHS, where this liability had not previously existed.

> The judgment brings to a conclusion a long-running dispute and concerted effort to take this area of law in a different direction to that taken by other parts of the UK. Had the decision been different, claimant lawyers dealing with asbestos litigation, and where a claimant had received medical care in Wales, would have been obliged to include details of the NHS costs. It was estimated that the Bill would have recouped approximately £1m for the NHS in Wales. As mentioned above, the Scottish Parliament is now consulting on bringing in similar powers of recovery from insurers.

Revision to Diffuse Mesothelioma Payment Scheme

On 10 February 2015, the Minister for Work and Pensions, Lord Freud announced the government's decision to increase the Diffuse Mesothelioma Payment Scheme tariff from 80% to 100% of the average civil claim (for those diagnosed on or after 10 February). The increase could mean an additional £54,000 for a claimant.

The government say the Diffuse Mesothelioma Payment Scheme has already paid out over £19 million in its first 10 months, compensating hundreds of claimants across the country who are unable to claim compensation as their employer or employer's liability insurer is untraceable.er, Lord Freud said:

"It is already clear that the insurance industry, through its Employer Liability Tracing Office, is doing an increasingly good job at tracing insurance policies which means sufferers can more easily pursue compensators for a remedy. I am determined that this success is maintained, reinforced by regulation from the Financial Conduct Authority.

Following discussion with the insurance industry, I have agreed to introduce some additional administrative safeguards to ensure that we can all be confident that the scheme continues to act as we intended and remains a scheme of last resort. I am pleased to be able to agree to their requests."

The increase is said to be partly due to the success of the insurance industry in tracing liable insurers and partly due to the number of claimants being lower than anticipated. The cost of the scheme is met by a levy on the insurance industry and there is presently no suggestion that the cost of the increased compensation will be passed on to insureds. The hope remains, for all concerned, that the number of sufferers start to reduce in the near future.

Completed 26 February 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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