QBE European Operations

Technical claims brief

Monthly update | January/February 2014

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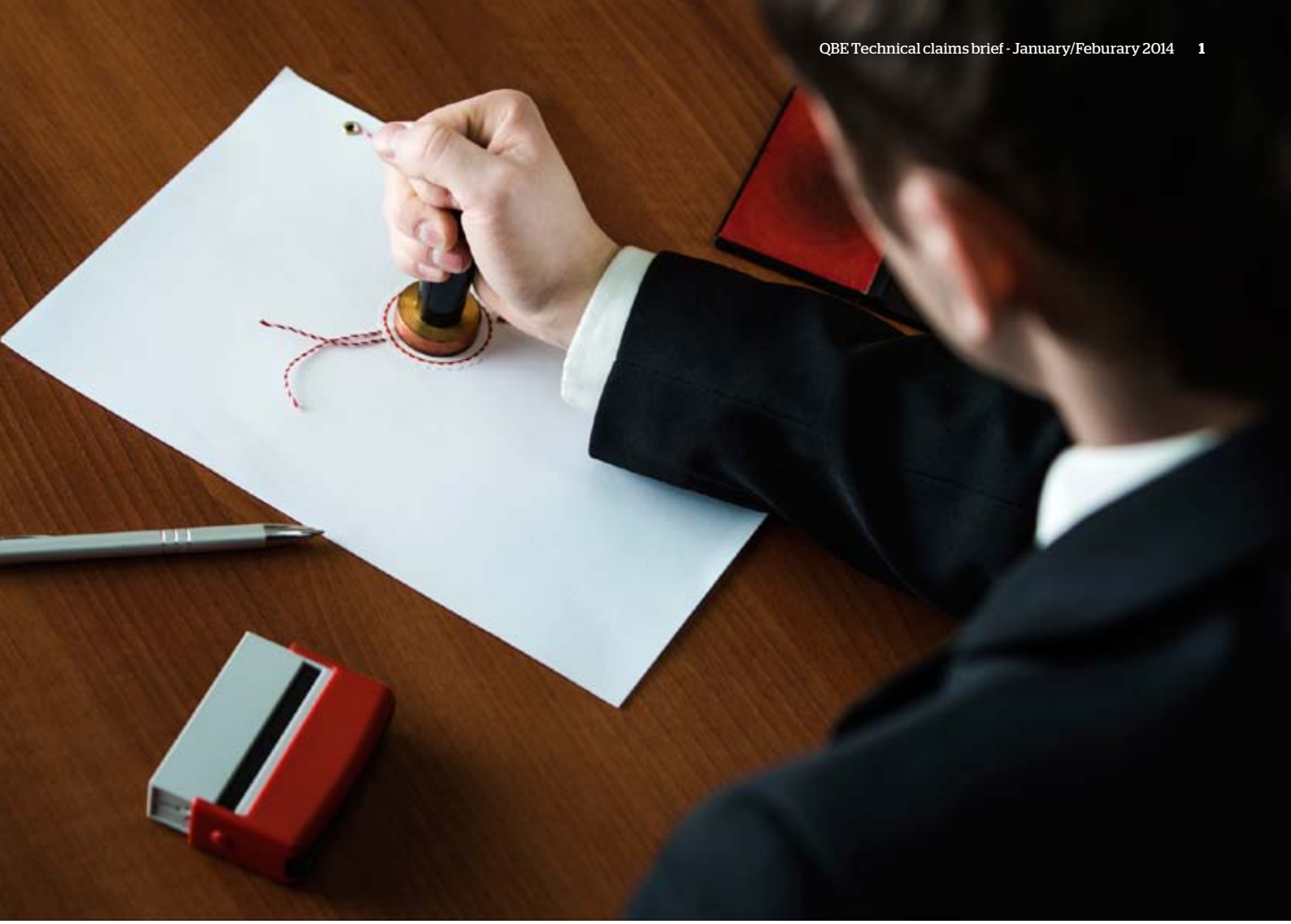


Legislation

Mesothelioma Bill passes at report stage and third reading in House of Commons

This government bill establishes a Diffuse Mesothelioma Payments Scheme to compensate victims who cannot trace their insurers. The scheme will be funded by an industry-wide levy.

The Bill has now passed through the House of Commons unamended and is expected to gain Royal Assent by April. Victims are expected to start accessing the scheme of last resort by summer 2014.

The key points are:

- Claimants must be diagnosed with the disease on or after 25 July 2012
- They must be unable to trace the relevant insurer or employer
- They will recover 75% of the average civil compensation claim
- Payouts will be funded by insurers paying a 3% levy of gross written premiums
- Establish guidance of insurance disputes over the asbestos-related disease.

An amendment to extend the compensation cap to 80% was narrowly defeated by 266 votes to 226. Other proposed amendments included backdating the scheme to the start of the consultation in 2010, which would have cost an extra £80 million.

> *The absence of any amendments to the Bill is to be welcomed, and whilst opinions remain divided, the scheme broadly represents a fair outcome. Claimants will receive an amount of compensation that reflects the terrible nature of the disease, whilst ensuring that the cost for insurers paying into the scheme is sustainable in the long term.*

Mesothelioma protocol abandoned

In early 2013, a government consultation proposed the creation of a Mesothelioma Pre-Action Protocol (MPAP), in the hope that a specifically-tailored protocol would streamline the claims process and result in less litigation. The disease often leads to death within months of diagnosis, and there is broad agreement that valid claims should be settled quickly and where possible, whilst the sufferer is still alive.

Disappointingly, a number of respondents raised objections and the government has now confirmed that the proposal has been abandoned. Unsurprisingly, claimant lobbyists also objected to standardised solicitors' fees (as has been brought in for fast track employers & public liability claims) and this has also been abandoned.

Efforts will now be concentrated on improving the existing process and under consideration is an electronic case management system for mesothelioma claims. Further details from the government review are expected.

More positively, the government did take the opportunity to confirm the removal of 'no-win no-fee' CFA and ATE premium recovery from July 2014. This should have the effect of reducing inflated solicitors' costs and bringing them into line with other personal injury claims.

> *2013 witnessed wide-ranging and significant reform to the civil claims environment in England & Wales, and whilst the same is not expected of 2014, there would appear to be some ongoing government focus on improving matters. Unsurprisingly, we can expect a fair amount of 'horse trading', but this 'new dawn' may help bring to an end the days of claimant firms 'making hay while the sun shines'.*

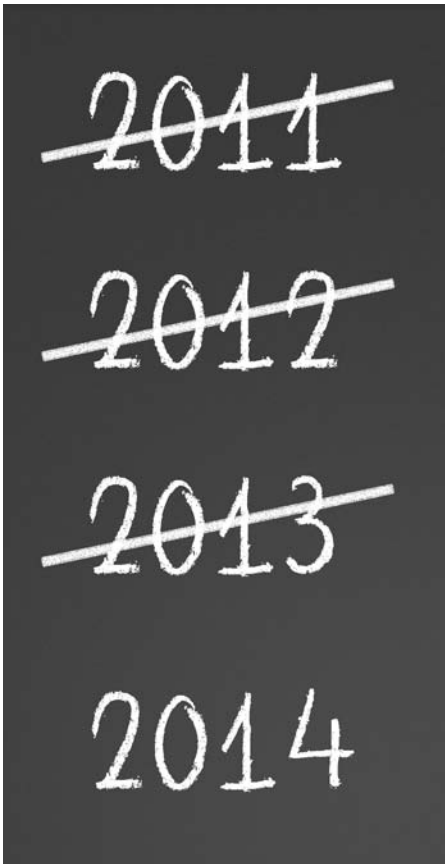
Reform: Limitation and Periodical Payment Orders in Scotland – The Damages Bill

The momentum for reform in Scotland gathers pace with the announcement of the Damages Bill. On the back of a recent consultation on personal injury claims and the civil law of damages, the Scottish government has now responded, outlining the key actions they intend to take as a direct result.

The Damages Bill has been announced as one of the legislative priorities for 2014 and the intention is:

1. Amend the Prescription and Limitation (Scotland) Act 1973 (the 1973 Act) to increase the limitation period for raising an action for damages for personal injury from three years to five years
2. Update the reference in the 1973 Act to 'unsoundness of mind' in relation to the circumstances in which the limitation period does not run
3. Provide a list of factors to assist the courts with the exercise of their existing discretion under the 1973 Act to allow an action to proceed when raised after the expiry of the limitation period
4. Replace the current assessment under the 1973 Act of 'reasonably practicable' in relation to the date of knowledge test for determining the start of the limitation period, with a more subjective awareness assessment
5. Clarify that it should not be possible for a bereaved relative to secure damages for psychiatric injury under the Damages (Scotland) Act 2011
6. Provide that courts should have the power to impose periodical payments in relation to awards of damages for personal injury.

Whilst the intention is to address some of the practical difficulties inherent in pursuing claims for personal injury, the extension of the limitation period and introduction of periodical payment orders (PPOs) is likely to have a significant impact on the claims landscape in Scotland.



The application of the Bill will be wide-ranging, felt by insurers in the jurisdiction and ensures the civil law of damages in Scotland retains a significant difference to the law south of the border. The other recently proposed Scottish reforms, in relation to funding and costs, had similarities to the Jackson/Ministry of Justice reforms, but the Damages Bill will ensure a degree of individualism.

> *What does it all mean? Claimants, or Pursuers, will have more time to bring a claim and the court will have greater discretion in relation to disapplying the limitation period. The decision to grant courts the power to make PPOs is no surprise, and is likely to be followed in Ireland. Such orders should be reserved for the highest value claims.*

Limitation

Occupiers' Liability & Assumed Responsibility: Risk v Rose Bruford College [2013]

In June 2009, the claimant, who was then aged 21, attended a day of events at the defendant drama school of which he was an attendee. The entertainment available included an inflatable pool. In the course of the day, the claimant ran at the pool and leaped into it chest and face down, landing in a manner so that his head impacted the side of the pool, and striking the ground with force. He fractured his C5 vertebral body and was rendered tetraplegic. He brought a claim under the Occupiers' Liability Act 1957 and at common law against the defendant.

The claimant's case was that:

- The defendant owed a duty of care to take appropriate steps to prevent him from injuring himself, including the making of risk assessments and ensuring proper supervision
- The duty arose on the facts and in the circumstances of the case as a deemed incident of the college/student relationship
- The defendant had assumed responsibility for the claimant's safety in all the circumstances, having knowledge of the risks acquired from the experience of the previous year.

The defendant denied the existence of such a duty and asserted that the risk of injury had been obvious to the claimant, and that he had chosen to run that risk.

The Court decided the correct starting-point was not to consider whether the defendant had owed the claimant a duty of care, but whether the defendant had owed a particular duty of care to protect the claimant from the risk that he took. By acting as he had done, the claimant had created an obvious and serious risk that otherwise would not have existed. Whether or not the claimant would have responded to warnings or advice from the defendant, and regardless of whether there had been adequate supervision, the claimant had exercised a genuine and informed choice at the critical moment: he had been entirely free to enter the pool, and to decide on how he was going to do so.

Assumption of responsibility did not require an examination of what the defendant ought to have done, but what it had actually done. The claimant's argument fell a long way short of establishing an assumption of responsibility. What would be required was evidence of the very matters of which the claimant denied the existence; namely, affirmative steps taken by the defendant to ensure that proper risk assessments were taken and all relevant control measures enforced.

The defendant did not owe the claimant more than a general duty of care under section 2 of the Occupiers' Liability Act 1957 and the claim failed.

> *This was a tragic accident, but the decision reinforces the established position that claimants of full age and mental capacity must take responsibility for their own actions. Where a claimant chooses to create an obvious and serious risk to his own safety, the courts will not impose a duty of care on a defendant occupier.*

Procedure

The fall-out from *Mitchell* continues: *Bianca Durrant v Chief Constable of Avon & Somerset* [2013]

The claimant appealed against a decision allowing the defendant relief from sanctions following the failure to serve witness statements in compliance with a court order.

The defendant failed to comply with the original date and applied for an extension until 12 March 2013. The defendant then served two statements one day after the extended deadline, a further four statements two months later in May 2013 and finally two more statements in early June 2013. The trial was to be heard on 10 June 2013.

The defendant's argument was that it would be unable to refute and respond to the claimant's allegations if it was unable to rely upon the additional witness statements. The judge at first instance agreed and adjourned the trial. The claimant appealed.

Prior to *Mitchell,* the Court of Appeal would not normally interfere with a judge's case management decision, but as anticipated, the opportunity to emphasise a continued robust approach was taken.

The reason for the defendant's breach was incompetence and an inexcusable underestimate of the work involved in preparing witness statements. Furthermore, the applications for relief from sanctions had not been made promptly.

The Court of Appeal decided the defendant's applications afresh and permission to rely on all seven witness statements was refused.

> *The outcome should be no surprise to anyone dealing with litigated civil claims – there have been a number of similar decisions widely reported post-Mitchell. Much of the criticism of Mitchell has come from claimant lawyers, but compliance with court orders applies equally to defendants and whilst human error will account for some breaches, unsurprisingly, solicitor incompetence will not suffice for the courts! One can only presume that some lawyers with a combination of hundreds of cases, with multiple court deadlines, will be keeping their professional indemnity insurers busy in the coming months.*

COMING SOON...

Watch-out for QBE's Issues Forum Liability Round-Up of 2013.

If you do not already subscribe, please go to http://www.qbeeurope.com/risk-solutions/subscribe.asp and update your details.

Completed 20 January 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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