QBE European Operations

Technical claims brief

Monthly update | December 2013

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Contents

News 1

HSE Annual Statistics Report for Great Britain, 2012/13 1

Scotland – Courts Reform (Scotland) Bill – Analysis of Consultation responses (September 2013) 2

Costs 3

Cost budgets and relief from sanctions, Andrew Mitchell MP v News Group Newspapers Ltd [2013] 3

Procedure 4

Fraud – Homes for Haringey v Fari and another [2013] 4

Liability 5

The importance of local standards and expert evidence, Japp v Virgin Holidays Ltd [2013] 5

Non-delegable duty of care (Education) Woodland v Essex County Council [2013] 6

Disclaimer 7

News

HSE Annual Statistics Report for Great Britain, 2012/13

The Health and Safety Executive has now published its annual report, which can be found at **http://www.hse.gov.uk/statistics/overall/hssh1213.pdf**. The report provides various statistics on workplace injury, work-related ill health and HSE enforcement.

The key facts include:

- The number of fatal injuries to workers is down from 171 (2011/12) to 148 (2012/13) with construction still having the highest rate and accounting for 39 (this may help to explain the HSE's recent Construction blitz, resulting in thousands of site attendances and enforcement notices)
- An 11% drop in major injuries to 19,707 compared to 2011/12
- Despite a fall in the number of mesothelioma deaths from 2360 in 2010, down to 2291 in 2011, the projected number of deaths is expected to increase in future years, given the previous year-on-year increases and latency period
- 1.1 million people who worked during the last year were suffering from an illness they believed was caused or made worse by their current or past work. Half million of these were new conditions which had started during that year. Around 50% of new work-related conditions were stress, depression or anxiety and 30% being musculoskeletal disorders
- Workplace injuries and ill health (excluding cancer) cost society an estimated £13.8 billion in 2010-11.

The projected increase in the number of mesothelioma deaths, also applies to lung cancer deaths caused by asbestos. The number of mesothelioma deaths was 500 per annum in the early 1980s and projections suggest numbers should peak at around 2500-2600 by 2020.

> *The figures suggest a continuing improvement in health and safety performance at work, with fatalities and major injuries on the decline. On the ground, the HSE continue their work through increasing numbers of prosecutions and enforcement, but say they are committed to assisting employers to understand and manage risk, sensibly and proportionately. Improving statistics may have some correlation to numbers and size of employers' liability claims, which underlines the importance of a collaborative approach to improve workplace health and safety.*

Scotland – Courts Reform (Scotland) Bill – Analysis of Consultation responses (September 2013)

Responses to Lord Gill's consultation paper, 'Making Justice Work: Courts Reform (Scotland) Bill', are detailed in this recent independent analysis report. In his review, Lord Gill had been unequivocal with his recommendations to overhaul and update Scotland's justice system, hoping to reduce delays and costs for court users. The main recommendations were:

- Move civil business from the Court of Session to the sheriff courts by raising the privative limit (which the Scottish Government propose to call 'exclusive competence') of the sheriff court to £150,000
- Create a new judicial tier within the sheriff court ('summary sheriffs'), with jurisdiction in certain civil cases and in summary criminal cases
- Create a new Sheriff Appeal Court with an all-Scotland jurisdiction to hear civil appeals from the sheriff courts and summary criminal appeals
- Create a specialist personal injury court with an all-Scotland jurisdiction
- Improve procedures for judicial review within the Court of Session
- Facilitate the modernisation of procedures in the Court of Session and sheriff courts
- Alternative dispute resolution (promotion of ADR through court rules).

There was a clear majority support for almost all the recommendations, albeit there is some concern that changes to the sheriff court threshold could result in 90% of personal injury cases being litigated. This will be compounded if the court does not have the capacity for such a large increase in litigation.

The Bill will be debated in parliament, with the aim of it being formally tabled in January 2014. If it receives parliamentary approval, the subsequent Act of Parliament should be expected circa December 2014.

> *Significant reform in Scotland seems certain and the civil claim landscape is likely to alter quite considerably over the next 12-24 months. The appetite for reform is encouraging and it is noteworthy that one eye is firmly on the issues and 'teething' problems felt south of the border. The hope will be for a smooth road to reform, but there are competing interests and a desire to strike the right balance.*

Costs

Cost budgets and relief from sanctions, *Andrew Mitchell MP v News Group Newspapers Ltd* [2013]

The Court of Appeal judgment in the high profile defamation claim by MP Andrew Mitchell has been handed down. His claim followed the Sun Newspaper reporting of the then Chief Whip's confrontation with police officers at Downing Street.

Mr Mitchell's solicitor failed to file a budget seven days in advance of the court hearing, as specified by the court rules. At the initial hearing, the Master made an order that Mr Mitchell could only recover court fees, but granted permission to apply for relief from the sanctions. At the subsequent hearing, relief was refused and so Mr Mitchell applied to the Court of Appeal.

The two issues to be addressed by the Court of Appeal were:

- Because the appellant had failed to file his costs budget in time, he was to be treated as having filed a costs budget comprising only the applicable court fees (The costs budget actually filed by his solicitors was in the sum of £506,425)
- The refusal to grant relief under CPR 3.9.

This was the first time the Court of Appeal has been called upon to decide on the correct approach to the revised version of CPR 3.9, which gives effect to Sir Rupert Jackson's reforms. In the judgment, the Master of the Rolls, Lord Justice Richards, and Lord Justice Elias, helpfully set-out the relevant provisions of the CPR and their intended application, designed to be tougher and less forgiving for breach and non-compliance. There is also some useful commentary and guidance as to how the new approach should be applied in practice.

On the first question, the Master was entitled to make the order she had made, having done so in the knowledge that the claimant would have the opportunity to apply for relief at the adjourned hearing. She would then be able to decide what response the court should give to the claimant's default so as to give effect to the overriding objective.

On the second question, her main finding was that the claimant's solicitors had been in breach of two provisions of the CPR, and that, in light of the new approach mandated by the Jackson reforms, the case for granting relief from the CPR 3.14 sanction was not established.

The appeal was dismissed. There was no misdirection and the order made was within court discretion. The Court of Appeal acknowledges this was a robust decision, but the focus on the essential elements of the post-Jackson regime were correct. Where a breach of non-compliance is not minor or trivial, and there is no good excuse, a defaulting party can expect a similar outcome.

> *The decision may seem a little harsh to some, but the Court of Appeal had little option if they were to uphold the intended change in culture prescribed in Jackson's reforms. The opportunity to send out a clear message was taken and with the hope that compliance will improve. It is noteworthy that the judgment specifically refers to, and seeks to discourage, expensive satellite litigation of this kind.*

The full judgment can be found at **http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/andrew-mitchell-mp-news-group-newspapers-ltd-27112013.pdf**

Procedure

Fraud – *Homes for Haringey v Fari and another* [2013]

Mrs Barbara Fari made a claim for personal injury after she tripped over an uneven paving slab in May 2008 injuring her right knee. She claimed to be severely disabled and sought over £750,000 in compensation – the majority of which related to care and assistance allegedly provided by her husband. Whilst Homes for Haringey admitted liability, quantum of the claim was disputed.

Undercover surveillance showed Mrs Fari had grossly exaggerated the effect of her injuries. In light of this evidence the medical experts altered their initial opinions, agreeing they had been misled. They agreed the injury would have resulted in a minor aggravation of pre-existing degenerative changes in her knee with symptoms lasting no more than 2-3 months.

Homes for Haringey successfully applied to strikeout the entire claim as an abuse of the court process. The judge found that Mrs Fari had suffered a very minor injury worth no more than £1,500 (less than 0.5% of the pleaded value of the case) and accepted there had been an attempt to deceive the court by significantly overstating the suffering caused.

Permission was given to pursue contempt proceedings against Mr and Mrs Fari, for giving false witness statements and representations to the court and medical experts. Mr Justice Spencer concluded that Mrs Fari was well aware of the content and purpose of her witness evidence and schedule of loss, and furthermore she had driven the claim with 'vigour'. There had been 'a serious and deliberate attempt to mislead'. Although Mr Fari's role had been lesser than his wife, he was also guilty of contempt.

Sentencing has now taken place. In mitigation, Mrs Fari said she had two children living at home and two adult children with disabilities who relied on her, and whose rights under Article 8 European Convention on Human Rights 1950 would be adversely affected if she were sent

to prison. The judge said that those who made false claims had to expect to go to prison. She had chosen to contest every allegation at trial and was not entitled to credit for a guilty plea. Having regard to the seriousness of her conduct, any interference with her children's Article 8 rights was proportionate and necessary. She was given the minimum sentence of three months imprisonment, which took into account that no damages had been paid out as a result of her fraud and that she had been in the media spotlight.

Mr Fari had foolishly allowed himself to be involved in the deceit and had played his part in the pretence to help inflate her claim. The part he had played was sufficiently serious to justify a period of imprisonment. He was sentenced to two months' imprisonment, which was suspended for 12 months to enable him to look after the family while Mrs Fari was in prison.

> *The judiciary's stance, in this case and a number of other similar cases, should act as a deterrent for those contemplating fraud. Insurers, and their lawyers, are focusing their efforts on identifying and stamping-out insurance fraud. A collaborative approach has reaped benefits and will make it increasingly difficult for fraudsters. Whilst the economic slump may be a driver for fraudulent behaviour, it is satisfying to note that these cases are receiving publicity, both within insurance/legal forums, as well as wider public audiences.*

Liability

The importance of local standards and expert evidence, *Japp v Virgin Holidays Ltd* [2013]

Mrs Japp was staying at a hotel in Barbados as part of a package holiday which she purchased from Virgin Holidays. She had been reading a book on her balcony and had closed the patio door behind her. The telephone rang but, when Mrs Japp went to answer it, she walked through the closed glass door, which shattered on impact and caused her serious lacerations. The glass in the door was not toughened or safety glass.

The parties agreed that the Tour Operator was required to provide accommodation of a reasonable standard that was reasonably safe, which should comply with applicable local safety standards and regulations.

Each party disclosed expert evidence on the question of the relevant local standard. They agreed that the Barbados National Building Code (published in 1993, prior to the installation of the door in 1994) provided that this type of door should be fitted with safety glass and that this was an 'essential minimum provision in the public interest'. The Defendant's expert, a specialist attorney, argued that the Code was not law and thus the hotel was not legally obliged to comply with it, suggesting that type of glass door in question was in common use in Barbados and represented local custom and practice. Mrs Japp's expert, a chartered surveyor based in Barbados, argued that it was custom and practice to follow the Code.

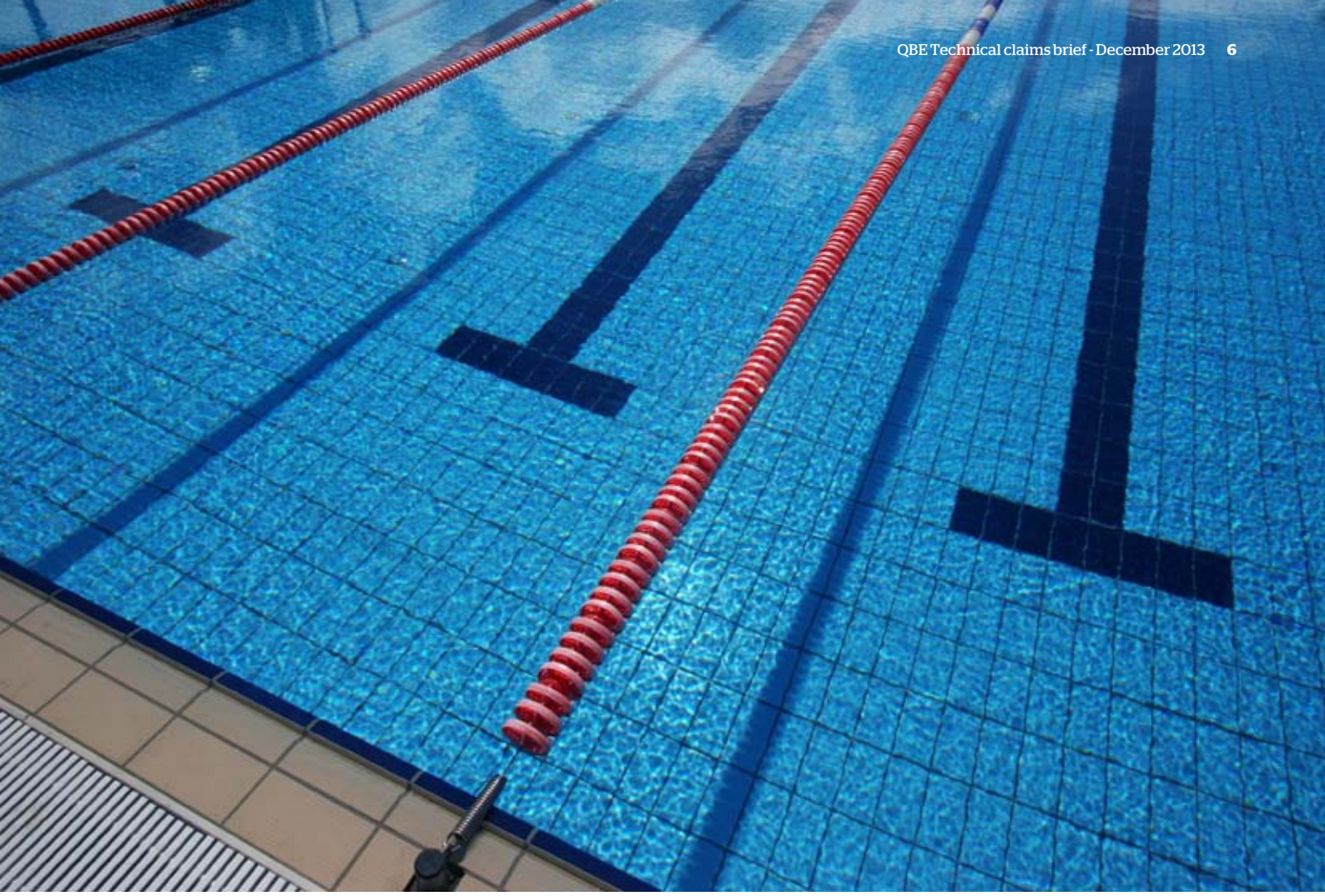
At first instance, the Judge preferred the claimant's expert and held that the standard of the hotel had to be considered against the custom and practice in the building industry at the date of the accident (2008) some 14 years after the hotel was constructed. He found that the local standard at the time of the accident required safety glass in the door, and that there was a duty to update the premises to install safety glass to comply with current custom and practice. The judge concluded that there was a breach of duty at the time the hotel was constructed.

The Defendant appealed, and contended that the duty of care should be considered against the custom and practice at the date of construction of the hotel, and that there was no duty to update. Further, they argued that there was insufficient evidence before him to enable the Judge to decide that the Code represented the prevailing local standard as at the date of construction.

The Court of Appeal confirmed that the judge at first instance had erred and that the relevant date was not the date of the accident, but the date of construction of the hotel. They further agreed that there was no duty to update the premises to comply with improving standards — unless changing standards provided for updating of structural features. The Court of Appeal noted this 'served to establish an important point of principle'.

Nevertheless, the Court found that the judge at first instance was entitled to find that the Barbados National Building Code should have been followed by the Hotel in 1994 when the building was constructed and the award of damages was upheld overall. This is now the most authoritative decision on local standards for structural features of hotels in holiday claims.

> *The importance of correctly establishing that the relevant date for considering a duty of care in relation to local standards, custom and practice, is the date of construction (and not the date of the accident) should not be underestimated. A finding to the contrary could have had a significant impact for insurers and on claims defensibility more generally. The case also serves as an important reminder of the weight the court will place on expert evidence – getting the right expert is vital, so whilst an appellant court will rectify misapplied points of law, they are far less likely to interfere with a finding of fact.*



Non-delegable duty of care (Education) *Woodland v Essex County Council* [2013]

In 2000, the Claimant (then aged 10) stopped breathing in the course of a swimming lesson and tragically sustained a serious brain injury. Her school had arranged the lessons through an independent contractor which provided a teacher and a lifeguard. Neither was employed by the local authority Defendant. It was accepted that the Defendant owed a common law duty of care to the Claimant, which included taking reasonable steps as would be expected by a reasonable parent to ensure that the teacher and lifeguard were competent to perform the swimming lesson at the material time.

The Supreme Court unanimously held that the Defendant was liable for the negligence of an independent contractor without fault on its part. There was a non-delegable duty of care. Delivering judgment, the court referred to the expansion of vicarious liability which was akin to non-delegable duties in so far as the defendant was not directly responsible for the negligent act. It was acknowledged that non-delegable duties of care were inconsistent with the fault based principles upon which the law of negligence is based and that any erosion to that principle must therefore be in exceptional circumstances.

The Court explained that a school's duty of care to its pupils is personal. It stems first and foremost from its acceptance of the pupil into its care to teach and supervise. Swimming lessons were an integral part of the school's teaching function and their control of the Claimant. The Supreme Court went on to say that the decision does not make schools liable for the negligence of third parties carrying out extra-curricular activities where the school has not assumed responsibility for the activities.

Of some concern, Lady Hale said "The boundaries of what the... school has undertaken to provide may not always be as clear cut as in this case... but will have to be worked out on a case by case basis as they arise."

> *This is a very important new development in extending the law of non-delegable duties and is likely to have far reaching consequences. This is the first time the concept of non-delegable duties owed by local authorities has been extended by common law. It is vitally important to ensure that contractor's insurance policy contains an adequate limit of indemnity, as well as a separate contractual indemnity.*

Completed 27 November 2013 – 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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4683/TechnicalClaimsBrief/December2013

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