QBE European Operations

Technical claims brief

Monthly update | April 2013

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News

The Jackson reforms take effect 1 April 2013

After years of preparation and a great deal of debate, Lord Justice Jackson's reforms of litigation funding in England and Wales finally took effect from 1 April 2013.

It is no exaggeration to say that these are the most significant reforms of the civil justice system since Lord Woolf's reforms of the Civil Procedure Rules over a decade ago. Regular readers of this publication will have seen a great deal of information and commentary on the reforms over the last three years but we set out below the main provisions once again for ease of reference:

- Success fees (a percentage mark up on base costs) and After the Event (ATE) insurance premiums will no longer be recoverable by claimants from defendants for Conditional Fee Agreements (CFAs) and ATEs entered into after 1 April 2013 (Mesothelioma claims are excluded from this reform at least for the present)
- Claimants still wishing to enter into a CFA after 1 April 2013 can pay the success fee from their damages
- Qualified One Way Costs Shifting (QOCS) where a successful claimant can recover their costs but a successful defendant cannot (unless having made a successful Part 36 offer and then limited to the value of the damages award) will come into effect from 1 April 2013 provided no CFA or ATE in force prior to that date
- Claimants who are found to be dishonest will lose QOCs protection
- New Part 36 sanctions will apply where defendants do not accept a claimant's Part 36 offer and the claimant succeeds in obtaining as much or more than the offer at a hearing. For claims worth up to £500,000, claimants will receive an additional 10% on damages plus an additional 5% on any damages between £500,000 and £1,000,000. The new sanction will apply where the claimant makes an offer after 1 April 2013
- Awards for general damages will increase by 10% for Judgments given after 1 April 2013 provided no CFA is in place before then. The Statutory Bereavement award will also be increased by 10% from £11,800 to £12,980
- Referral fees are banned from 1 April
- Costs Budgeting (early setting of costs budgets by the court) will be extended from the pilot scheme to all multi-track cases where proceedings are issued after 1 April 2013
- Damages Based Agreements (where costs are determined as a percentage of damages for past loss) may be entered into from 1 April 2013
- The Small Claims Track Limit for non-injury cases will increase to £10,000 (from £5,000) for cases issued after 1 April 2013 (the Ministry of Justice is considering an increase the Small Limit for injury cases).

> *Many commentators, probably including Lord Woolf himself, will say that Jackson has in essence tried to finish the work that Woolf was not given time to complete.*
>
> *The reforms will hopefully, produce a more reasonable and balanced costs regime. Some aspects of the reforms have been bitterly opposed by claimant lobbies but a situation where, as Jackson found , defendants in some instances did not run potentially good defences for fear of the costs consequences, had to be addressed.*
>
> *Whether the reforms succeed in their stated aim to reduce overall costs and to achieve a fairer balance of costs between claimants and defendants but without reducing access to justice, will only become clear as cases are settled over the coming months and years. Insurers are, for the main part, cautiously optimistic but with major complex reforms like these the law of unintended consequences may all too easily operate.*

Ministry of Justice Claims Portal Extension is due to go live at end of July 2013

In addition to Lord Justice Jackson reforms the Ministry of Justice is extending its Claims Portal and introducing a new system of Predictive Costs for Employer's Liability (EL) and Public Liability (PL) claims which fall out of the Portal scheme (except single employer EL disease cases which will revert to an hourly rate).

The Portal extension was planned for 1 April 2013 to coincide with the Jackson reforms. The implementation was postponed however when the Association of Personal Injury Lawyers (APIL) and the Motor Accidents Solicitors Society (MASS) brought a judicial review arguing that the Ministry of Justice had failed to consult properly.

Long delays in implementation were feared but the review was heard and rejected on the 1 March and no appeal was made, leaving the way clear for implementation of the extension.

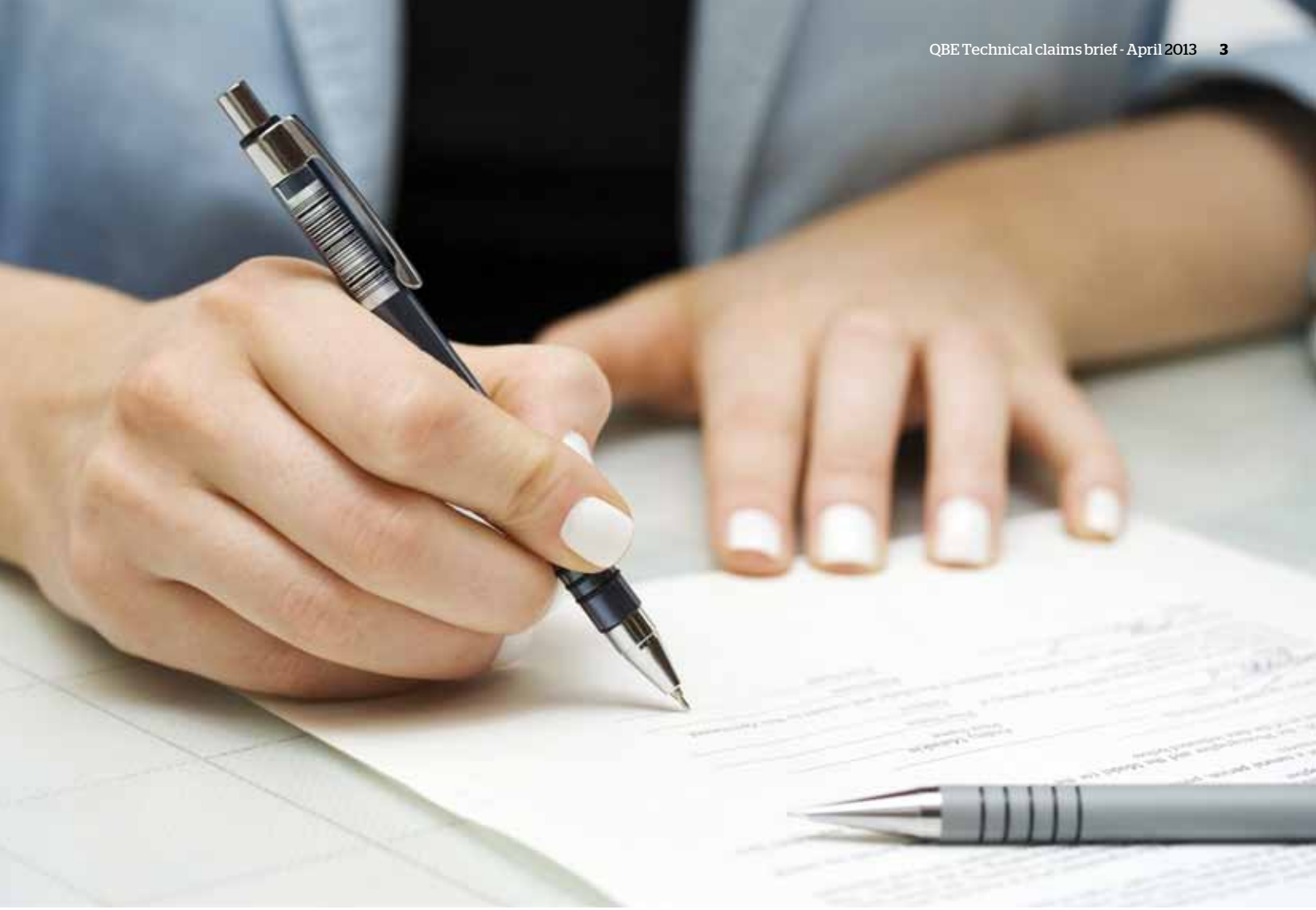
The MOJ opted for a later implementation date, saying that it wished to give all new users of the Portal more time to become familiar with the processes.

The key elements and timing of the changes are set out below:

- Existing motor claims portal extended from upper limit of £10,000 to £25,000 for accidents on/after 31 July 2013
- Extension of portal to EL and PL claims worth up to £25,000 (excluding Mesothelioma, all PL disease and multiple employer EL disease claims) for accidents on or after 31 July 2013 (where notified on/after 31 July for single employer disease cases)
- Admission of liability for EL claims required within 30 'business days' (i.e. working days), 40 for PL or case will drop out of portal into new predictive costs regime
- Fixed costs for the EL and PL protocol are £300 stage 1, £600 up to £10,000 claims value and £1,300 for £10,000 to £25,000 for stage 2.

For a more detailed guide to the reforms go to http://www.qbeeurope.com/risk-management/technicalclaims.asp

> *The extension of the Portal process has been even more controversial than the Jackson reforms with APIL, MASS and other claimant lobbies voicing bitter opposition. According to the 'Campaign to Save the Legal Industry', up to 100,000 jobs in the legal profession will be lost as a combined result of the Jackson and Portal reforms.*
>
> *Defendants will also face difficulties in adapting to the changes but for them they also hold out the prospect of significant costs savings. As with the Jackson reforms, the Portal changes are viewed by most insurers with cautious optimism.*



Consumer Insurance Act comes into force 6 April 2013

The ***Consumer Insurance (Disclosure and Representations) Act 2012*** comes into force in the jurisdictions of England and Wales, Scotland and Northern Ireland on 6 April 2013.

The Act will abolish the consumer's obligation to volunteer material facts and will require them instead only to take reasonable care to answer insurers' questions fully and truthfully. If they do volunteer any information, they must again take reasonable care that it is not misleading.

An insurer's remedy under the new Act will depend on the conduct of the consumer:

- If the misrepresentation was honest and reasonable, coming about because of a failure to understand a badly worded question for example, the insurer must pay the claim
- If the misrepresentation was careless, then the insurer will have a proportionate remedy: applying exclusions that would have been stipulated had the true position been known, paying only a proportion of the claim if a higher premium would have been charged or avoiding the policy, returning premiums and rejecting all claims if the contract would not otherwise have been entered into
- If the misrepresentation was deliberate or reckless then the insurer may treat the policy as if it was never incepted and decline all claims but retaining the premium unless the consumer can provide reason why this would be unreasonable
- The remedies will also apply where an intermediary acting on the policyholder's behalf makes misrepresentation. The Act establishes a statutory code for determining for whom the intermediary is acting.

The Act also abolishes 'basis of contracts' clauses i.e. preventing a policyholder's responses being treated as warranties and cover not commencing if false information is given.

The Act prohibits insurers from including terms in insurance contracts which impose more onerous duties of disclosure than set out in the Act itself.

> *The Law Commission website reports that the Act is intended to strengthen consumer protection and confidence in the UK insurance market and in many areas simply brings the law into line with recognised best practice. The Act should at least bring some clarity to this complex area of law.*

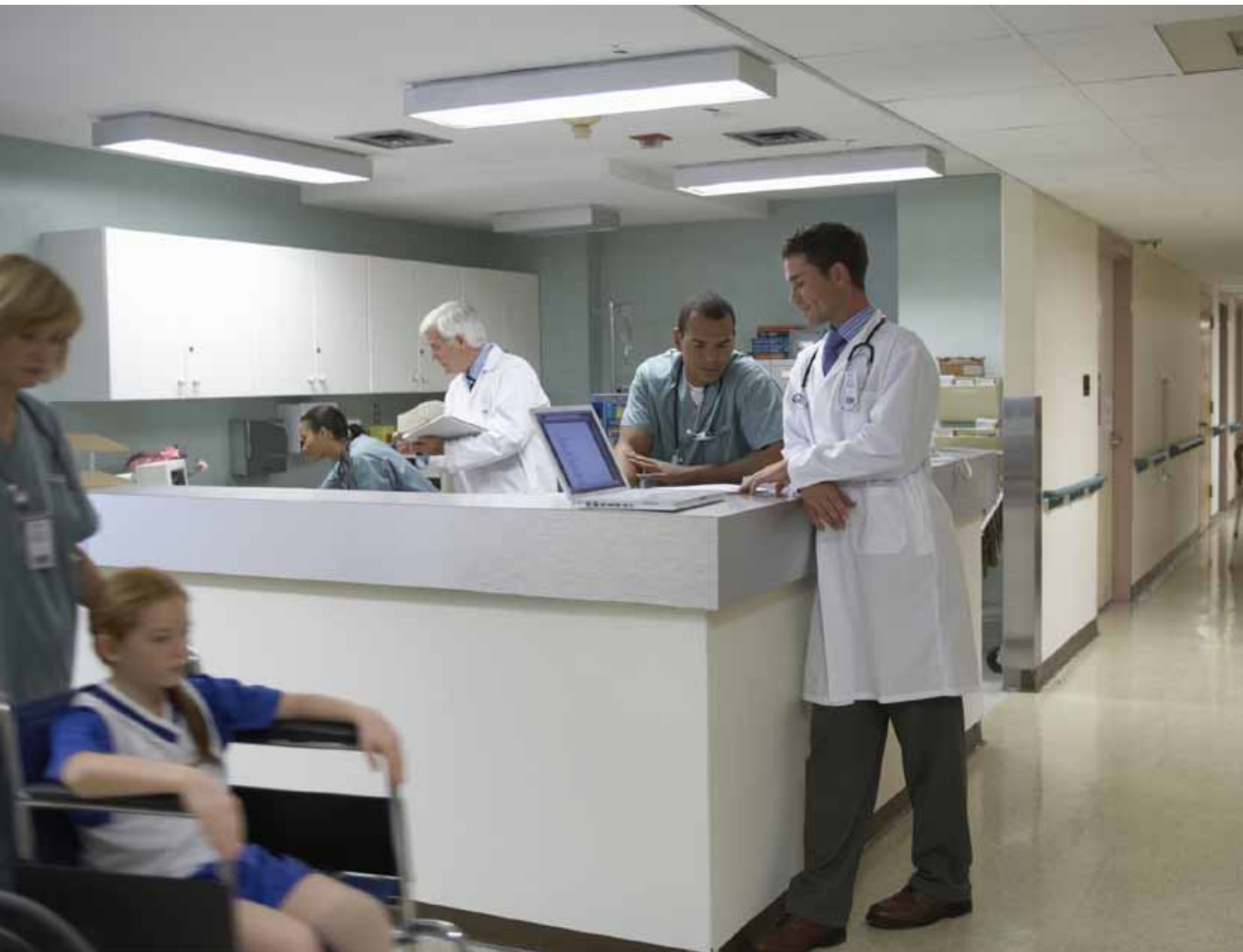
Recoverable NHS charges increase from 1 April 2013

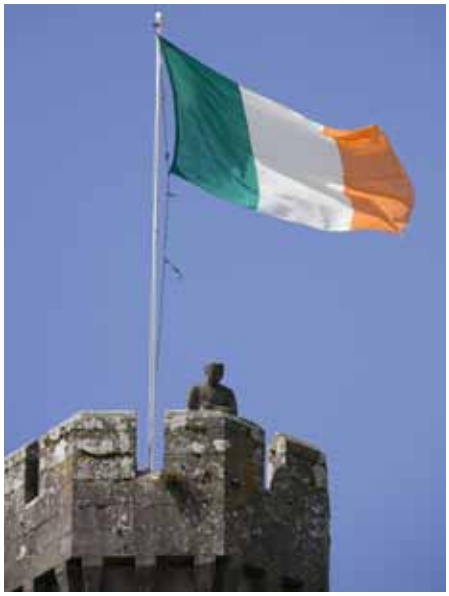
NHS charges will increase from 1 April 2013 in line with 'NHS inflation'.

- The charge for out-patient treatment will rise from £615 to £627
- The daily rate for in-patient treatment will rise from £755 to £770 with the overall in-patient charge cap increasing from £45,153 to £46,046.
- Ambulance charges will increase from £185 to £189

The table on the right sets out the rates since 2009.

NHS Treatment Charge	Accidents 01/4/09 – 31/3/10	Accidents 01/04/10 - 31/03/11	Accidents 01/04/11 - 31/03/12	Accidents 01/04/12 - 31/03/13	Accidents On or after 01/04/13
Non-admission	£566	£585	£600	£615	£627
Daily in-patient rate	£695	£719	£737	£755	£770
In-patient charge cap	£41,545	£42,999	£44,056	£45,153	£46,046
Ambulance charges	£171	£177	£181	£185	£189





Irish Courts Bill raises financial jurisdictions

The Irish Department of Justice and Equality has published details of a new Bill, which will raise the financial jurisdictions of the Irish District and Circuit Courts for the first time since 1991.

The ***Courts Bill 2013*** will increase the financial jurisdiction of the Circuit Court from €38,092 to €60,000 for personal injury cases and to €75,000 for other actions. The District Court's jurisdiction will rise from €6,384 to €15,000.

In a press release, the Ministry explained that the lower existing limits had rendered the District and Circuit Court 'redundant' for some classes of litigation forcing more cases into the High Court and into a more expensive costs regime.

The increased limits of jurisdiction would help to contain costs and avoid inflationary pressure on insurance premiums.

> *The levels of insurance premiums, especially for motor risks, have been a major concern for Irish governments for some years.*

Record fine for breach of Health and Safety Legislation

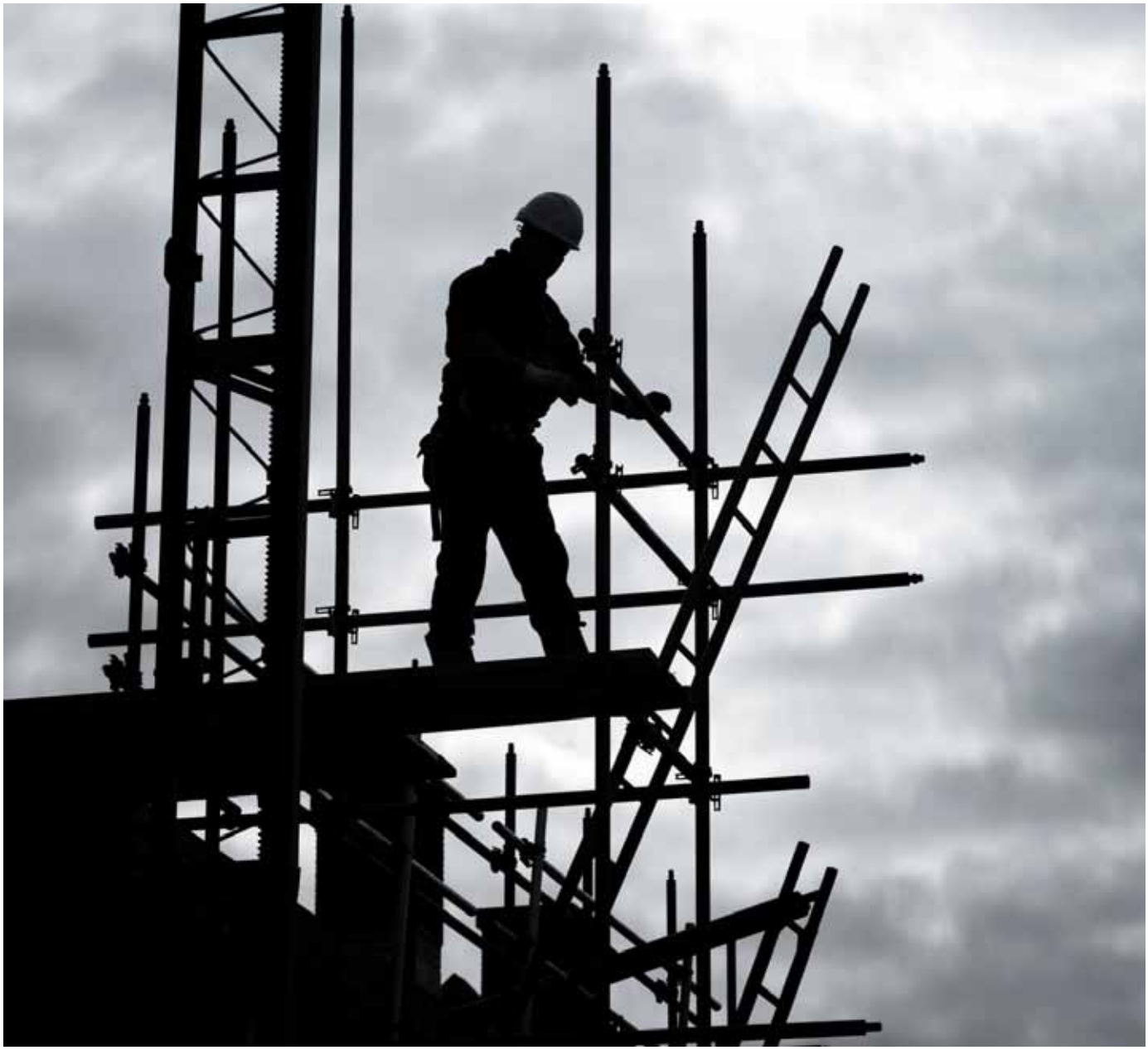
An Irish haulage company Nolan Transport has been fined a record €1 million and ordered to pay prosecution costs of €70,000 following the deaths of two women struck by metal coils, which had been inadequately secured to a lorry.

The coils, which weighted five tonnes, had each been secured using only three of six available straps and came off the lorry whilst it was negotiating a bend. The women were driving two separate cars at the time and in addition to the two deaths, two passengers were seriously injured.

Finding the company guilty of a breach of section 12 of the ***Safety Health and Welfare at Work Act 2005*** (which sets out duties to non-employees), the Judge in the Wexford Circuit Court criticised Nolan Transport for a 'flagrant disregard' for safety.

The Health and Safety Review has reported the €1 million fine as the largest ever imposed on a company of this size.

> *Like their counterparts in the UK, the Irish courts will impose heavy fines for breaches of Health and Safety regulations leading to fatalities.*



Liability

60% contributory negligence found for employee who fell from scaffolding: Sharp (By his brother...) v Top Flight Scaffolding Ltd – High Court (2013)

The claimant was employed to erect and dismantle scaffolding by the defendant. On the day of the accident, the claimant was required to erect scaffolding at the rear of a terraced property with no external rear access.

The claimant had erected the scaffolding up to the roof of the house but with no ladders between the different levels. It had not been possible to get a big enough single ladder through the house to reach the top of the scaffolding so with no other means of getting off the scaffolding, the claimant was obliged to climb down it. Whilst attempting this he fell to the ground landing in the garden of the adjoining house.

The claimant's case was that had his employers carried out a proper risk assessment and heeded industry guidance they would have instructed him to use internal ladders when constructing the scaffolding and the accident would have been avoided. The defendants countered that despite the claimant having little formal training he was sufficiently experienced to be able to assess the work himself. The accident had been caused by his decision not to use internal ladders and to climb down the outside of the scaffolding, which he knew to be dangerous.

The court found that the defendants had failed in their common law duty to provide adequate training and to ensure that the claimant remained competent. At best, the claimant had no formal training since the 1990s and at worst, none at all. The reliance of the defendants on the claimant's ability to assess the job himself without a risk assessment or method statement was unacceptable. There was a causative breach of duty and primary liability was established.

With regard to contributory negligence however, the court found that the claimant had attempted to climb down the outside of the scaffolding. He must have realised that this exposed him to danger, as did his decision not to incorporate internal ladders into the scaffolding. He could easily have taken these simple precautions. The claimant was therefore 60% responsible for the accident.

> *The high proportion of contributory negligence found in this case is a reminder that the courts may penalise claimants for not taking obvious precautions for their own safety even where their employer's conduct has been poor.*

Pedestrian suffers catastrophic injury after pothole trip: Bullock v Homes for Haringey – Out of Court settlement approved by High Court (2013)

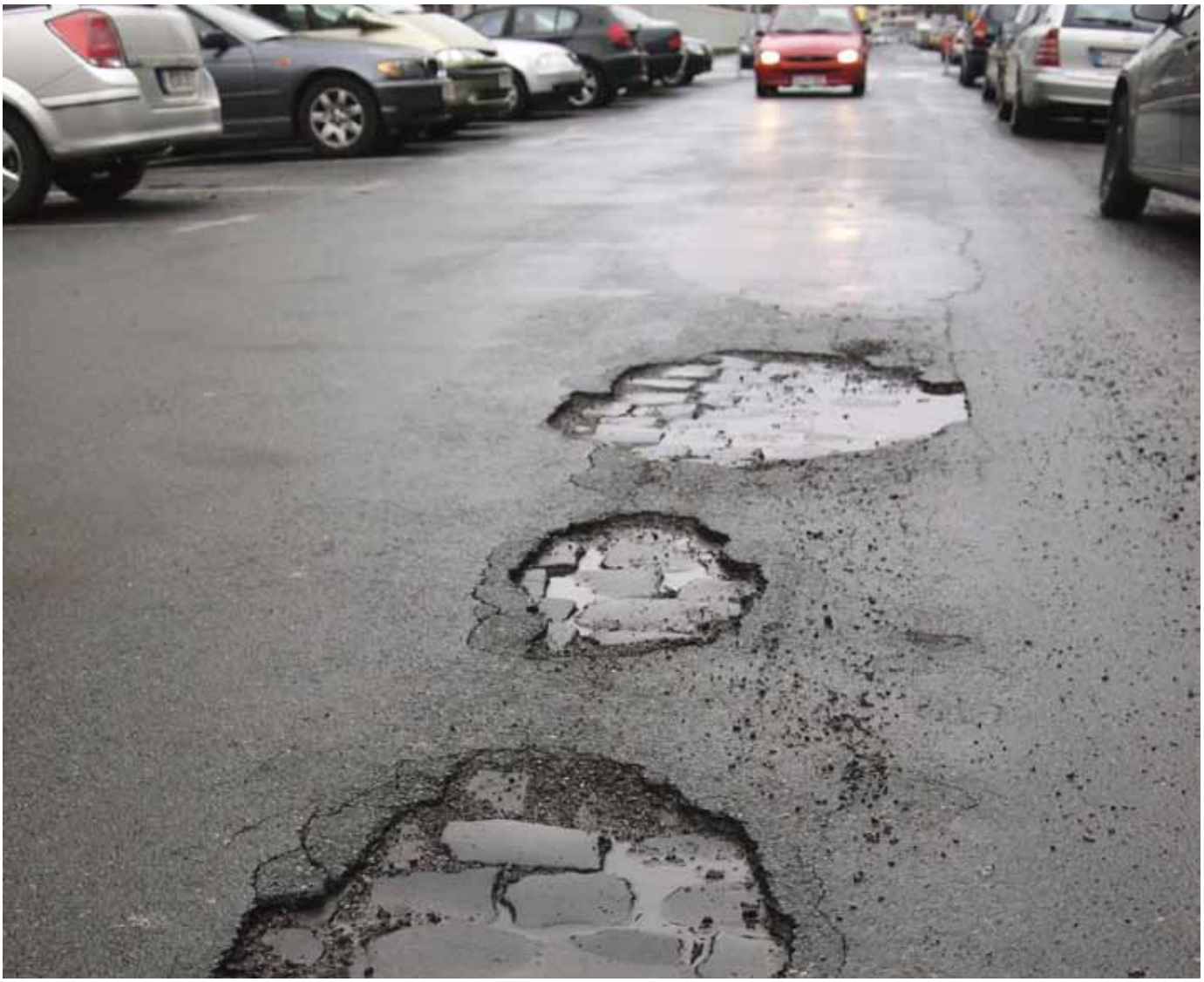
A negotiated settlement for a pedestrian, who suffered catastrophic brain injuries after stumbling in a 3-inch deep pothole and hitting his head, has been approved by the High Court. The claimant, now 38, had brain surgery and extensive specialist rehabilitation following the accident but was unable to return to work and will require daily care for the remainder of his life.

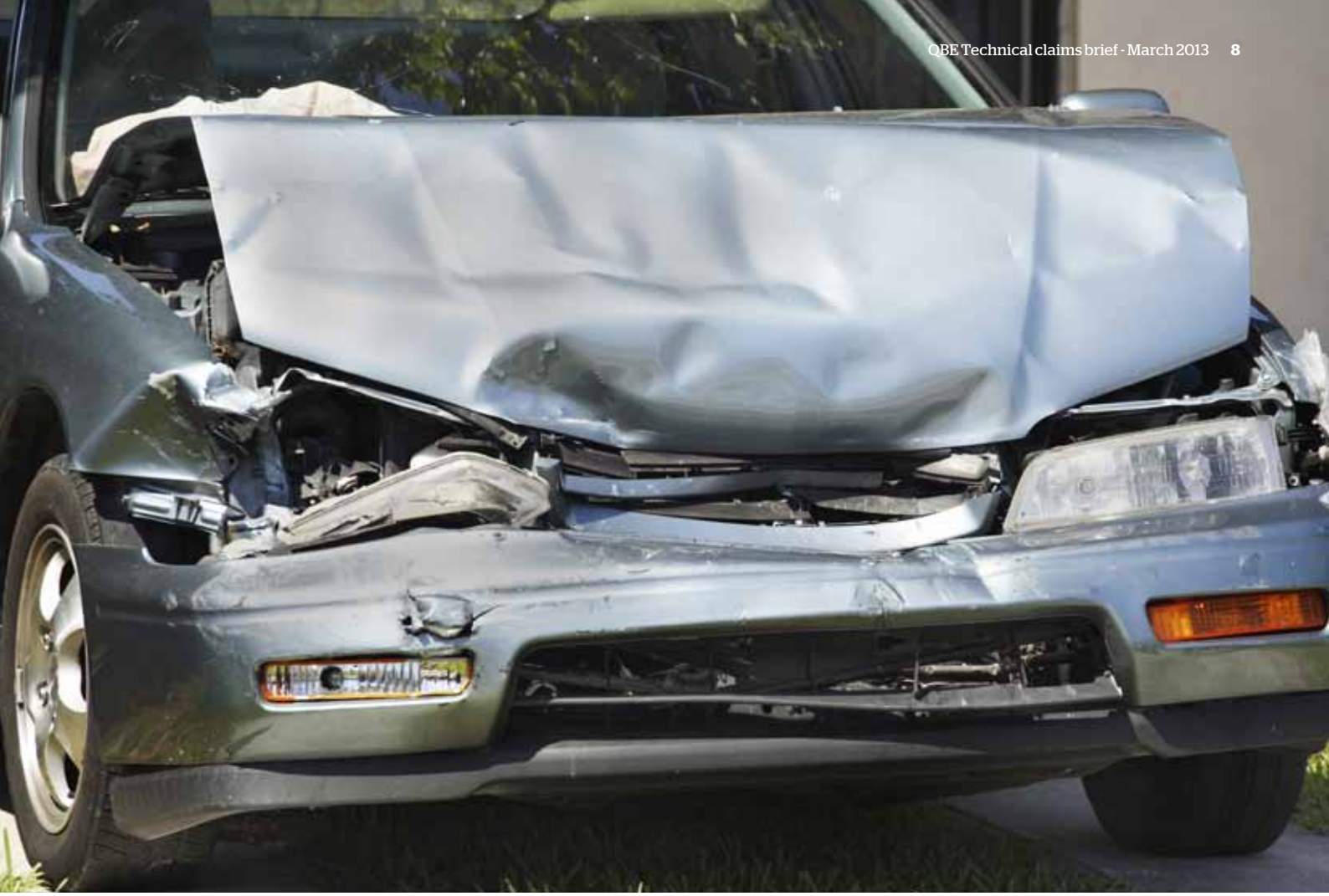
Homes for Haringey admitted that they had not maintained the road to a proper standard. Liability was agreed on a 72.5% to 27.5% split basis in the claimant's favour back in 2008 but agreement on the value of the claim has only just been reached.

The amount of the settlement has not been disclosed but given the details reported, this is probably a multi-million pound claim.

A spokesperson for Homes for Haringey said that following the accident they had introduced a 'comprehensive maintenance programme' on all of their estates with twice-yearly inspections costing £300,000 a year.

> *Councils facing budget cuts may be tempted to reduce maintenance but claims like this illustrate the dangers of doing so.*





Procedure

Judge erred in ignoring documentary evidence: Goodman v Faber Prest Steel – Court of Appeal (2013

The defendant's lorry collided with the claimant's car. The defendant admitted liability subject to contributory negligence but disputed that the claimant had suffered any significant injury.

The claimant alleged that he suffered pain in his neck, knees and lower back especially when driving. The opposing medical experts agreed that had the claimant suffered any genuinely significant injury in the accident he would have experienced painful symptoms in the following days.

The medical records recorded no such complaints until many months after the accident and the claimant had sent an e-mail to his manager confirming that he had not suffered any pain for over a month post accident.

At first instance, the Judge accepted the claimant's verbal evidence that he had suffered painful symptoms immediately after the accident despite the absence of any mention of it in the medical records and his failure to explain his contradictory e-mail under cross-examination.

The defendant company, which was insured with QBE, appealed saying that the judge had erred in accepting the claimant's evidence.

The Court of Appeal acknowledged that a trial judge has an important advantage in hearing a witness' evidence live but also that it was difficult for even an experienced judge to decide only from a witness' demeanour whether they were truthful. Contemporary documents were often a valuable guide to the truth and the trial judge should have tested the claimant's evidence against the medical records and his own e-mail. The trial judge had failed to set out any reason why the claimant's verbal evidence was to be preferred and appeared to have been entirely swayed by it.

The trial judge's ruling was set aside and a fresh hearing ordered before a different judge.

> *A common complaint from insurers is that judges appear to be too willing to accept what claimant's say about their injuries with little apparent scrutiny of the medical evidence. This helpful judgment from the Court of Appeal will hopefully serve as a reminder that judges must carefully weigh all available evidence.*

Completed 25 March 2013 – written by and copy judgments and/or source material for the above available from John Tutton (contact no: 01245 272 756, e-mail: john.tutton@uk.qbe.com).

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4299/TechnicalClaimsBrief/April2013
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