# Technical claims brief

Monthly update – November 2010



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## News

### "Common Sense" or "Back to Basics"?: Lord Young delivers his report

Lord Young was commissioned by David Cameron before the last general election to report on the perceived "compensation culture" and Health and Safety Law. He delivered his report on the 15 October this year.

The report's stated aim is to free businesses from unnecessary bureaucracy and fear of litigation. Amongst other things the report recommends that:

- Lord Jackson's recommendations should be implemented (see February 2010 Brief)
- Abandonment of Conditional Fee Success Fees and After The Event Insurance recovery
- Extension of the current personal injury claims process for low value motor claims to all personal injury claims valued at under £10,000 and to increase the motor claims limit to £25,000
- Restrict referral agencies and personal injury lawyers advertising
- Prevent insurers requiring low hazard businesses to employ health and safety consultants *(QBE does not do this and provides free risk management advice)*
- Insurers should not prevent "worthwhile activities" by refusing to quote to cover them
- Simplify risk assessment procedures for school trips and activities, voluntary organisations and low risk work places
- Extend RIDDOR *(Report of Injuries, Diseases and Dangerous Occurrences Regulations 1995)* reporting threshold from 3 to 7 days absence
- Current Health and Safety regulations should be consolidated into a single set.

*Comment: The report holds out the prospect of financial savings for both businesses and their insurers on legal costs and administration but to what extent these proposals will be successfully implemented remains to be seen. Implementation is unlikely to be straightforward and some reforms will face considerable opposition.*

Lord Young's full report "Common Sense Common Safety" can be viewed on the Government website: www.number10.gov.uk

***"The aim is to free businesses from unnecessary bureaucratic burdens and the fear of having to pay out unjustified damages claims and legal fees. Above all it means applying common sense not just to compensation but to everyday decisions once again."***

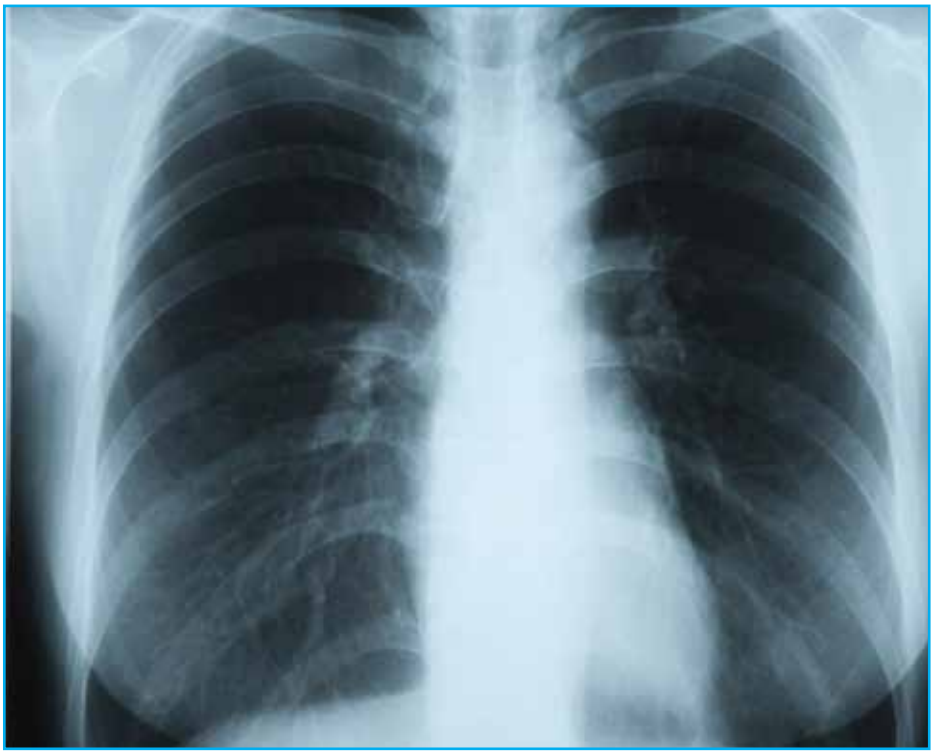
***Lord Young of Graffham***

## Court of Appeal delivers judgment in Employer's Liability policy "Trigger" test cases

The Court of Appeal has delivered its judgment in *Durham v BAI (Run Off) Ltd and others*. These important test cases deal with the issue of when Employers Liability (EL) policy cover is triggered in mesothelioma cases.

Proceedings were originally issued against four insurers in run-off who had suspended payment of mesothelioma claims following the Court of Appeal's ruling in *Bolton v MMI and Commercial Union*. The Court of Appeal in Bolton had concluded that Public Liability policies written on an "occurrence" basis engaged when mesothelioma manifested itself as opposed to the date of negligent exposure some years before.

The insurers' policy wordings referred to disease and bodily injury "contracted" or "sustained" during the period of cover. They argued that these had the same meaning as "occurred" and that the decision in *Bolton* applied equally well to EL policies which meant that their policies did not respond until much later.



At first instance the court concluded that the insurers EL policies should respond to mesothelioma claims on a traditional "causation" basis. In other words their policies engaged at the date of negligent exposure. The insurers appealed.

The Court of Appeal has now reached the following conclusions:

- Where the wording used is "sustained", the policy in force when the disease starts to develop (manifests) responds;
- Where the wording used is "contracted", the policy in force at the time of negligent exposure responds;
- Policies incepted after the *Employers Liability Compulsory Insurance Act 1969* came into force (January 1972) respond if disease is caused during the life of the policy regardless of the wording;

The judgment was on a majority basis with the Court of Appeal failing to reach consensus on most of the main issues. No clear guidance has emerged and permission has been granted to the losing parties to appeal to the Supreme Court. In the meantime some victims of mesothelioma and their families may go uncompensated.

*Comment – The Court of Appeal has not brought the clarity to this issue that many commentators hoped for and a further appeal now seems inevitable. If the Supreme Court does not alter the Court of Appeal's findings, insurers who held risks more recently are likely to be faced with additional liabilities that their underwriters could not have allowed for in setting premiums. A smaller number of insurers are likely to be faced with a larger proportion of the claims.*


## Insurance lawyers highlight fraud

In a response to the Law Commission's consultation on the Eleventh Programme of Law Reform the Forum of Insurance Lawyers (FOIL) has raised the very serious issue of the courts' approach to fraudulent claims. In a letter to the Chairman of the Commission Dan Cutts, the president of FOIL, cites the £1.9 billion a year that general insurance fraud is estimated to cost the UK insurance industry and the £350 million a year estimated to come from organised motor fraud alone.

FOIL has suggested that the Civil Procedure Rules be amended to give judges a far greater range of sanctions with the power to strike out at any time and to extend the grounds for strike out to include not just fraudulent claims but any claims tainted by fraud or by conduct in support of other fraudulent claims.

*Comment: many insurers have expressed their frustration at the perceived lack of firmness by the judiciary in tackling the serious and growing problem of insurance fraud. FOIL's comments to the Law Commission are likely to be welcomed by most if not all insurers who will hope that the Commission takes some positive action in response.*

## Costs

## No automatic right to costs Pre-litigation: The National Trust v J.G.Holt t/a City Plant - Trowbridge County Court (2010)

The defendants who were insured by QBE caused substantial damage to a gate and adjoining masonry when their vehicle collided with a building owned by the National Trust. The claimant instructed solicitors who wrote to QBE on their client's behalf to recover the cost of the repairs. Liability was promptly conceded and quantum was later agreed by loss adjusters instructed by QBE. The claimant's solicitors had asked in correspondence for their costs to be paid but this was never agreed.

Once quantum was agreed the loss adjusters wrote to the claimant's solicitors with a discharge form which stated that the repair cost was "accepted in full and final settlement and discharge of all claims". There was no offer or even mention of costs. The claimant's solicitors signed and returned the discharge form and a settlement cheque was then issued and banked by the claimant's solicitors.

When QBE refused to pay the claimant's costs their solicitors attempted to refund the settlement and issued Part 7 proceedings. The defendants relied upon the defence of "tender before action" and also argued that the form of discharge compromised all the issues between the parties. The claimant's solicitors argued that there was an agreement in principle to pay their costs as they had made it plain in correspondence that their offer to settle the claim had been conditional on their costs being paid.

The judge found for the defendants. There was no agreement to pay costs; the defendants had "carefully and assiduously avoided any mention of costs". In addition the "Form of Discharge" compromised all matters between the parties. The claim was dismissed and costs of the action awarded to the defendants.

*Comment: many claimant solicitors in England and Wales seem to genuinely believe that there is an automatic entitlement to costs in almost any situation but this is not the case and the "tender before action" defence should be borne in mind by defendants who settle claims prior to proceedings being issued.*

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## Liability

### Claimant suffers permanent disability due to general practitioner's negligence: Quelcutti v Luckraj – Out of court settlement (2010)

The claimant suffered a disc prolapse and attended his general practitioner complaining of pain and numbness in his lower back. The doctor failed to examine the claimant but did refer him for an urgent MRI scan which was due to take place a few days later. In the meantime the undiagnosed disc prolapse had filled the claimant's spinal canal and was causing compression nerve damage, a condition known as "cauda equina" syndrome. Faced with worsening pain the claimant re-attended his doctor the next day and was prescribed painkillers and anti-inflammatory medication.

The claimant attended his doctor for the third time the following day and was finally sent to a hospital where his condition was correctly diagnosed. He was then referred for an urgent decompression operation. Despite the surgery the claimant was left with sexual dysfunction, loss of bowel and bladder control and severe restriction and discomfort in his back so that he could not stand or sit for long at a time. He sued his GP saying that she was negligent in failing to examine him, failing to admit him to hospital immediately, failing to advise him to come back to her or go to an accident and emergency department if symptoms became worse and causing or contributing to a delay in the correct diagnosis and treatment.

The GP admitted liability and an out of court settlement of £800,000 was agreed.

*Comment: road traffic and work place accidents can lead to disc prolapse and subsequent nerve compression. If this is not quickly diagnosed and treated neural damage and disability may result. This in turn can lead to Motor and Employers Liability insurers facing much more serious claims than would otherwise have arisen from the initial effect of an accident. This case serves as a reminder that it is possible to successfully pursue medical practitioners who worsen a claimant's condition by failing to make a timely diagnosis.*

## Taking responsibility for icy pavements: Susan Durrant v Thames Water Utilities Ltd and Surrey County Council - Guildford County Court (2010)

The claimant suffered a fracture to her elbow when she slipped on an icy pavement. The ice had formed when water leaking from a stopcock had frozen in cold weather. The claimant brought proceedings against Thames Water who had been aware of the leak and who had on one occasion sent out a technician who had temporarily placed a traffic cone by it as a warning and gritted around it.

The claimant argued that Thames Water had a strict liability under the *Water Industry Act 1991* or in the alternative that they were liable at common law having adopted responsibility for the hazard but then abandoned it. The claimant also sued the Local Authority arguing breach of duty under the *Highways Act 1980 s.41 (1A).*

The Judge found that the Local Authority had in place systems for obtaining information on the dangers of ice and procedures for dealing with any problems. Having not had notice of the continuing problem with the freezing water from the leaking stopcock it was not reasonably practical for them to have dealt with it and so the statutory defence under the *Highways Act 1980 s58* applied.

Thames Water also escaped statutory liability as the leaking stopcock was situated on private property. They were however held liable at common law. They had taken responsibility for a hazard identified by their technician and had taken remedial action but then abandoned that responsibility by removing the warning traffic cone, not renewing the grit and failing to tell the property owner of the leak in breach of their own internal policy.

The judge did comment that this scenario was different to that of a householder who by gritting outside of his house on one occasion did not adopt responsibility for continuing to do so.

*Comment: with a severe winter forecast and the Government urging the public to be good citizens by clearing ice and snow from in front of their homes this could be a topical case. The judgment raises the question as to whether a homeowner who grits or clears ice not once but on a regular basis and then stops would be held liable at common law in the event of a claimant injuring themselves slipping on ice.*

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## Quantum

### "Record £17.5 million" periodical payment award: Chrissie Johnson (A protected person....) v Serena Compton-Cooke - High Court 2010

The claimant suffered catastrophic brain injuries when the car she was a passenger in collided with a lorry. She was left with life-long care needs and currently resides in a specialist care home. The parties agreed a settlement of £4 million on a lump sum basis plus periodical payments of £300,000 per annum for life linked to the Annual Survey of Hours and Earnings index 6115.

The claimant was only sixteen years old at the time of the accident and twenty at the time the settlement was approved.

The claimant's solicitors have been quick to publicise the size of this settlement and several national newspapers have reported on it. The harsh fact is however that the amount of damages that the unfortunate claimant will actually receive is dependent on how long she lives.

The figure of £17.5 million appears to be based on an estimate of longevity to age 65 which the defendant's insurers' Zenith believe is far too optimistic given the severity of the claimant's injuries. Zenith has reported that the claimant would in their view be fortunate to live to 60 and say that £11.5 million is the most that the settlement is really worth. They also say that the claimant's solicitors themselves have conceded that 60 is a more realistic figure for longevity. The claimant's solicitors have subsequently suggested that the figure quoted in newspapers has been calculated and exaggerated by the press.

*Comment: this tragic case demonstrates that estimating the life expectancy of an injured claimant is one of the prime difficulties in assessing the true cost of periodical payments. It is also a reminder that press reports on the size of claims settlements may not necessarily be accurate.*

## Step-parents once more able to claim fatal accident compensation in Scotland: Roslyn Evelyn Mykoliw and Others v Arthur James Botterill – Court of Session Outer House (2010)

The first pursuer's husband was killed in an accident at work. A total of twelve relatives brought claims in connection with the death including the deceased's step father.

The step-father sought a lump sum award for "non-partimonial loss" following a wrongful death. This is often referred to as a "loss of society" claim and is compensation for the emotional loss suffered by a bereaved relative. Section 35 of the *Family Law (Scotland) Act 2006* sets out the wide range of family members who can claim for "loss of society" including anyone who accepted the deceased as a child of his or her family. The Act also however bars claims from anyone who was related to the deceased by reason of affinity i.e. a relative through marriage including step parents.

The defenders not surprisingly argued that the step-father's claim was excluded. The pursuer argued that he was entitled to claim having accepted the deceased into his family and having formed a close and loving relationship with him.

The Judge held that to accept the defender's argument would be unjust. Had the pursuer been simply cohabiting with the deceased's mother rather than married to her there would have been no impediment to his claim. To discriminate against him purely on the grounds of his matrimonial status was both irrational and in breach of Article 8 of the *European Convention on Human Rights*. It was not the Scottish Parliament's intention to prevent step-parents who accepted a child into their family from claiming for loss of society if they subsequently died.

*Comment: the court's judgment has clarified an apparently contradictory Act and has prevented the need for further legislation. The bad news for defenders is that the already extensive range of relatives who can claim for loss of society now includes step-parents.*

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## Scottish loss of society awards "Out of control": Philipa Young and Marie Paiser v M.O.D. - Court of Session (2010)

The mother and sister of a serviceman killed in Afghanistan when the plane he was travelling in blew up have been awarded £90,000 and £60,000 respectively by an Edinburgh jury. The jury may have been expressing their anger at the M.O.D.'s alleged sacrifice of safety to save expense but these awards were made against a background of rapidly escalating damages in this area. The awards for loss of society guidance and (emotional) support contrast sharply with bereavement awards in England and Wales which are capped by statute at £11,800 and which must be split between qualifying relatives.

Jury awards in Scotland have often been criticised by defenders as too inconsistent and too large but there is House of Lords authority *(Currie v Kilmarnock and Louden District Council)* for the idea that Judges should follow juries in these cases. Some Scottish solicitors now regard loss of society awards as out of control.

*Comment: fatal accidents have long been one of the areas where damages in Scotland far exceed those in England and Wales. In addition to the escalating levels of loss of society awards there is a private members bill lodged by MSP Bill Butler currently under consideration in the Scottish Parliament which if enacted would automatically exclude surviving spouses' earnings from the calculation of dependency awards. This would greatly increase many awards and see awards made where there was in reality no financial loss.*

The writer's thanks go to Simpson and Marwick Solicitors for their notes on the above two cases.

**Completed 25 October 2010 – Written by and copy Judgments and/or source material available from John Tutton (contact no: 01245 272756, e-mail: john.tutton@uk.qbe.com).**

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