Technical claims brief

Monthly update – July 2010

QBE

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News

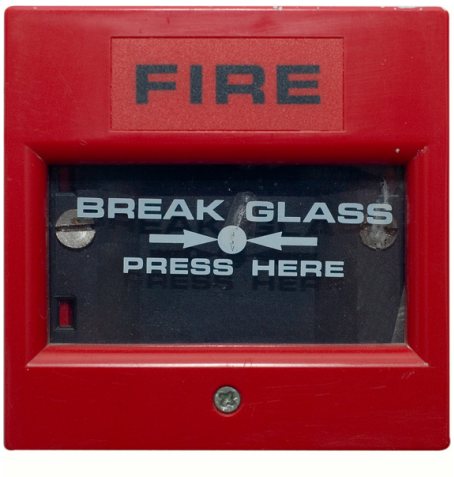
£400,000 Fine for retailer breaching fire regulations

Clothing retailers New Look were prosecuted for multiple offences under the *Regulatory Reform (Fire Safety) Order 2005* following a serious fire in 2009 at their Oxford Street premises. The building had to be cleared and there was disruption to the surrounding area but fortunately no one was injured.

The defendants had failed to deal with a number of deficiencies identified in the store's pre-Order fire Certificate issued in 2000, there was no suitable assessment of the fire risks and they had failed to ensure that employees had adequate safety training.

The judge at first instance having considered the seriousness of the breaches and the large turnover of the defendants found that a fine of £600,000 would be appropriate discounted to £400,000 to reflect the early admission of guilt.

The defendants appealed arguing that the judge had failed to give sufficient weight to the fact that the breaches of the regulations had not caused the fire and had not led to any death or injury. The Court of Appeal however had little sympathy for these arguments. The fine was a reflection of the very serious risk to members of the public and employees of the store caused by the breaches and the defendants should not benefit from a purely fortuitous absence of casualties.



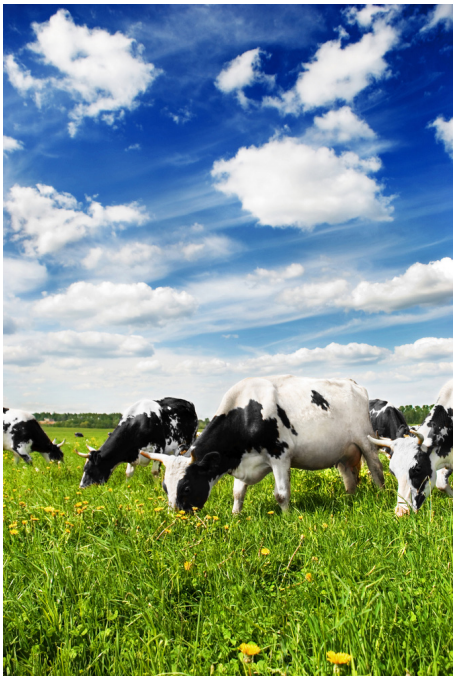
> *"...the court does not have to wait until death or serious injury has occurred to express its displeasure at wholesale breaches of the defendant's responsibilities....."*
>
> ***Lord Justice Pitchford***

Comment: The courts have in recent times shown an increasing willingness to impose severe fines for breaches of health and safety regulation. The Court of Appeal has made it plain that a defendant cannot escape simply because no injuries or damage have actually resulted from their breaches.

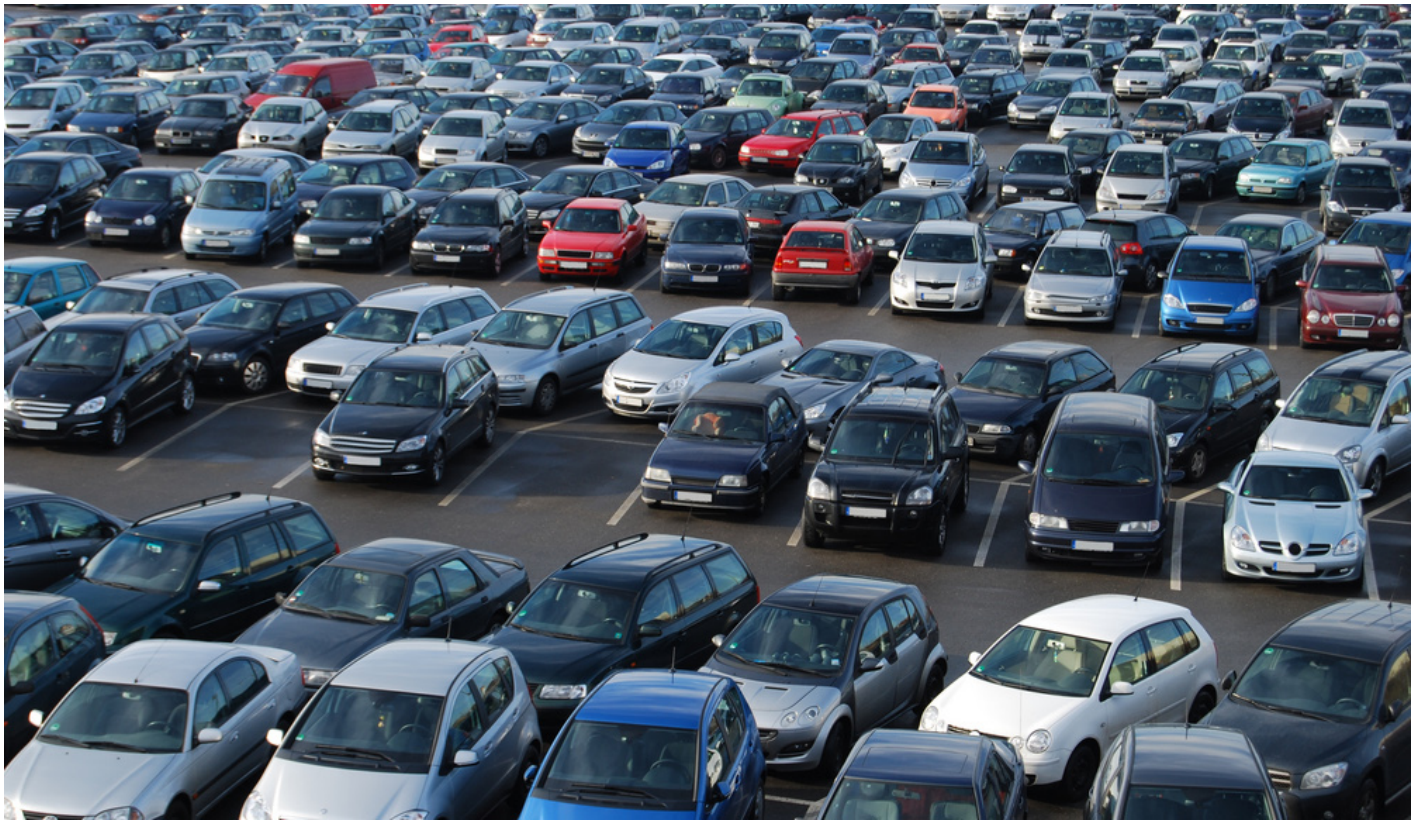
Irish insurer faces high cost of rural hazard

The Irish Independent has reported a one million Euro out of court settlement paid by Irish Insurer FBD to an unnamed motorcyclist who suffered permanent disability when his motorcycle skidded on cow dung left on the road. The dung had originated from FBD's policyholder's cattle and had allegedly caused or contributed to the accident.

FBD has urged farmers to make and maintain clear contractual arrangements with contractors as to who is responsible for clearing the highway of farm waste, mud or other hazards and to bear in mind their legal responsibilities not to endanger users of the highway.



Comment: This case highlights the danger to motorists of material left on the highway and the potential cost to those responsible for depositing it. This applies equally well in UK jurisdictions and to building contractors and others who may leave a road surface in an unsafe condition.



Credit hire

Commercial enterprises, need for hire: Beechwood Birmingham Ltd v Hoyer Group Ltd – Court of Appeal 2010

The claimant, a large Audi dealership, sought to recover credit hire charges of £33,345 for a replacement vehicle hired in following an accident. At first instance the court held that the claimant had failed to mitigate their loss by hiring in a vehicle when they could have used a car from their own stock of vehicles. He awarded them £12,000 general damages based on spot hire rates for a comparable vehicle. The defendant appealed arguing that the correct measure of general damages was the cost of maintenance and operation of the replacement vehicle.

In allowing the appeal the court recognised the very different positions of private motorists and commercial enterprises. The correct valuation of general damages should be based on interest on the capital value of the type of vehicle damaged and a minimal award for depreciation in value for the duration of the repairs. The parties were instructed to agree a suitable sum for general damages calculated on the above basis. This was duly agreed at £3,000.

Comment: The Court of Appeal has provided very useful guidance on what a commercial enterprise with replacement vehicles available is entitled to claim. This judgment should limit claims from car dealerships or similar businesses where their own vehicles could have been used as replacements.

Fraud

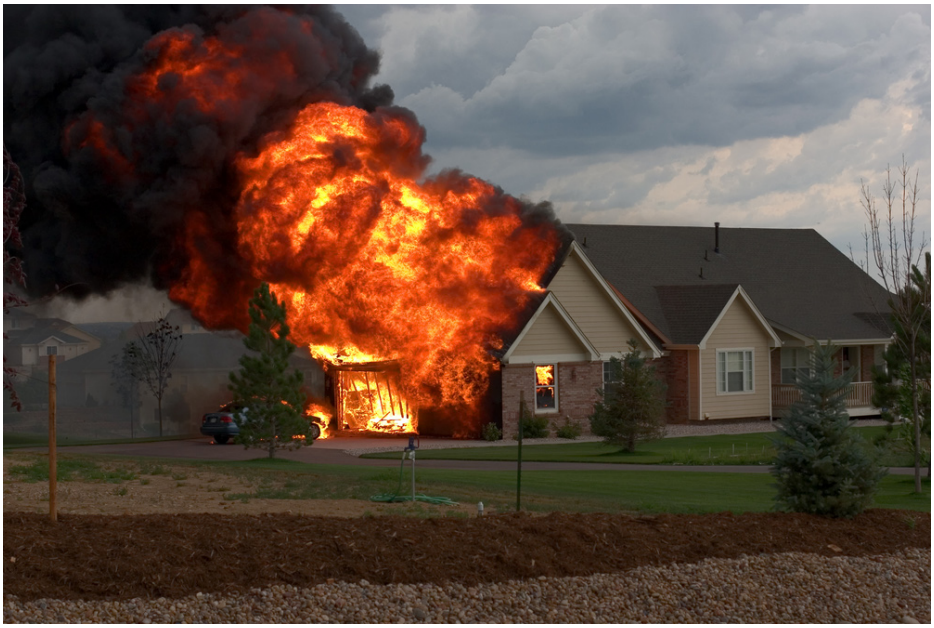
Overstatement of claim, entire claim forfeit: Farid Yeganeh v Zurich Plc – High Court

The claimant had a building and contents policy with the defendant. Following a fire the claimant submitted a claim to his insurers but after investigating the claim the insurers rejected it on the basis that the fire had been deliberately started by the claimant or someone acting on his behalf and the contents claim in respect of damaged clothing was overstated.

The judge held that given the very serious nature of the arson allegation and having regard to the case law on this point it was for the defendant insurers to show that the claimant had caused the fire and to do so clearly. In the absence of any direct evidence the judge was unable to reach a finding of arson by the claimant particularly where there was no obvious motive for it.

The claimant had however been shown to be dishonest and on the evidence the defendant insurers had established that the claimant had made a claim in respect of the contents which was partly fraudulent and/or false. It was a condition of the policy that the defendant would make no payment at all if any part of the claim was found to be fraudulent or false and the entire claim therefore fell.

Comment: A reminder that under the terms of many policies it is only necessary for an insurer to demonstrate that part of a (first party) claim is false in order to succeed in rejecting the claim in its entirety. The claimant's dishonesty in a number of matters including Council Tax evasion whilst not being proof of insurance fraud undoubtedly damaged his credibility as a witness.



"His approach to the contents claim was at best careless. Until July 2008 he had included pine bedroom furniture until this was found in a shed. ... Mr Yenageh lied to the Council in order to evade Council Tax. ....Mr Yeganeh has not hesitated to be untruthful when he has seen it in his financial interest to do so."

Judge Mackie QC

Surveillance evidence exposes gross exaggeration of symptoms: Singh v O'Shea - High Court 2010

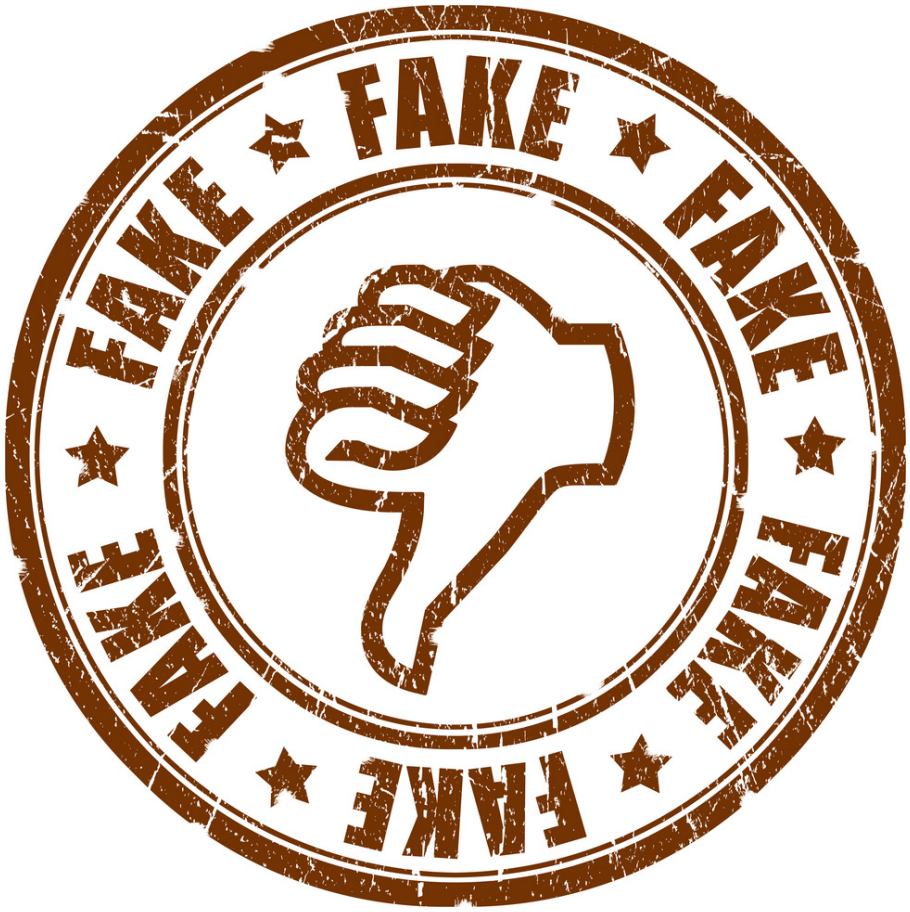
The claimant alleged that following an accident at work he was left with continuing disabling pain and was unable to return to his pre-accident occupation. He sought £500,000 in damages from his employers who were insured with QBE.

The claimant had genuinely suffered two serious fractures to his ankle but following an investigation by enquiry agents he was shown to be grossly exaggerating his symptoms.

The claimant was covertly filmed sprinting back and forth between two road cones in a local park with apparent ease at a time when he was applying for incapacity benefit and claiming that he could walk no more than ten yards without severe pain.

Despite the surveillance and other evidence the claimant pursued his claim to a hearing where the judge found that he had given false evidence and had grossly exaggerated his pain and disability and had made false statements of truth. The claimant failed to meet a long standing Part 36 offer and suffered severe costs penalties as a result. The court however did not apply any other sanction.

Comment: Whilst it is always pleasing to expose false claims the decision of the court not to impose penalties, despite the judge finding that the claimant had made false statements to the court and false declarations on state benefit applications, is disappointing.



QBE considered bringing an action for Contempt of Court but we were advised that the costs of this would be very high and any fine on the claimant was unlikely (based on recent cases) to be of a significant level.

In the writer's view, the absence of court imposed penalties in a case like this must call into question whether the civil courts have any serious interest in supporting the fight against insurance fraud.

Indemnity

Broker's duty to satisfy itself that clients understand duty of disclosure, loss of chance: Jones v Environcom Ltd, Environcom England Ltd and MS PLC (T/A Miles Smith Insurance Brokers) (Third Party) – High Court 2010

The premises of Environcom were destroyed by fire. Environcom submitted a claim for the loss to their insurers but the insurers refused to pay on grounds of material non-disclosures. The insurers brought proceedings seeking a declaration of non-liability and their policyholders counterclaimed for an indemnity under the policy.

Later Environcom issued Third Party proceedings against their brokers alleging that they had been negligent in not explaining which material facts they should have disclosed to their insurers.

The dispute between Environcom and its insurers was resolved by negotiation with the insurers paying them £950,000 inclusive of costs but this left a very large shortfall of £6 million. Environcom continued their Third Party action to try and recover this sum from their brokers.

It was common ground that Environcom had failed to disclose the use of plasma guns (for disassembling electrical equipment), frequent ignitions of refrigerator insulating material by the guns and a small fire some two months before the fire which destroyed their premises. Environcom alleged that had their brokers explained their obligations to disclose material facts to their insurers they would have done so and would have been able to obtain valid insurance cover. Their claim was for the loss of chance of obtaining this cover.

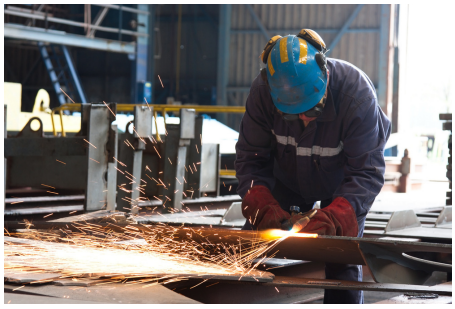
"...I am not persuaded that it is sufficient simply to rely upon written standard form explanations and warnings annexed to proposals or policy documents. I understood the experts to be agreed on this. The broker must satisfy himself that the position is in fact understood by his client and this will usually require a specific oral or written exchange on the topic."

Judge David Steel

The court found that the brokers had done little more than send out proposal forms to their clients and relied upon the standard explanations of disclosure contained in these. This was inadequate to satisfy their duty to explain their clients' obligations on disclosure to them. There needed to have been an oral or written exchange on the topic.

In the absence of a full explanation about the obligations of disclosure there was a higher standard of care on the part of the broker in eliciting material information. The brokers could not have been expected to enquire directly about very specific aspects of their clients operation such as the use of the plasma guns but they should have made it clear that any outbreaks of fire were material facts. Had they enquired about the fires the use of the plasma guns would then have come to light.

For Environcom's claim to succeed however they also needed to establish that had they disclosed the use of the plasma guns, the minor ignitions and the earlier fire they would have had a realistic and substantial prospect of obtaining cover. Their insurers had been reluctant to offer terms in the first place and had they known of the use of the plasma



guns and the associated fire they would have been even more unwilling to quote for cover. In the unlikely event that cover was obtained the use of the plasma guns would have been excluded. Environcom were in fact operating in breach of their waste management licence by recycling pentane (highly inflammable) refrigerators. The risk was essentially uninsurable and their claim for loss of chance must fail.

Comment: This case is a reminder of some of the duties of brokers to their clients and of the serious consequences which can follow if they fail in them. The brokers in this case had failed to advise their clients properly about their duty to disclose materials facts and the likely consequences of not doing so. They had given them no indication as to the sort of information likely to be considered material and had compounded these omissions by making no effort to elicit information which was material but which might not be considered so by their clients. Had the risk in this case not been uninsurable the brokers would have been liable to pay a substantial portion of the £6 million shortfall.

Liability

Asbestos, breach of duty, reasonably practical steps to prevent exposure: Reynolds v Secretary of State for Energy and Climate Change – High Court 2010

The claimant sought damages in respect of the death of her husband from Mesothelioma. She alleged that he had contracted the disease due to being exposed to blue asbestos by his employer's breach of duty whilst working in a National Coal Board warehouse.

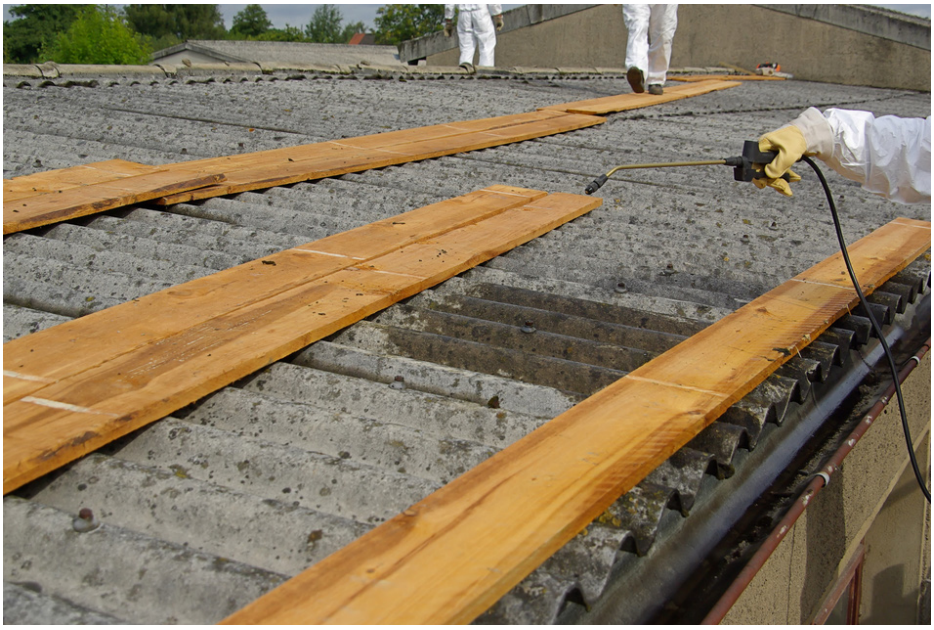
Prior to the claimant's late husband starting his employment at the warehouse the Factories Inspectorate had ordered the ceiling of the warehouse to be sealed to prevent the blue asbestos used to insulate it escaping. This proved to be ineffective and the Inspectorate then ordered the asbestos to be removed. Contractors were hired to remove the asbestos and fit new insulation.

The deceased started his employment after the removal of the asbestos but before the new insulation was installed.

Despite the remedial work blue asbestos was still seen to be filtering through the ceiling and following complaints from the union, specialist contractors were hired to remove the asbestos dust from the work place and reseal the roof.

Witnesses for the claimant gave evidence of high levels of contamination with asbestos dust floating in the air and being swept up by the workforce. They alleged that vibration from machinery and birds roosting in the roof caused asbestos dust to rain down on them.

This was very much at odds however with the evidence of the jointly instructed Consulting Engineer. The results of atmospheric monitoring (starting from



when work on the ceiling was first carried out) showed very low levels of asbestos throughout and this would in his view have been unlikely to have materially increased the risk of an asbestos related illness. The levels of exposure were not considered hazardous at the time and it was not feasible that birds or cranes could have caused additional dust to fall as was alleged.

The judge rejected the evidence of the claimant's supporting witnesses (one of whom was the claimant's son in law) finding that they had been influenced by an understandable desire to secure compensation for the claimant. The defendant had acted promptly to address the requirements of the Factories Inspectorate and complaints from the union. He found that the claimant had not established that the defendant was in breach of statutory or common law duty and that according to the standards of the time the defendant had reduced the deceased's exposure so far as was reasonably practical.

Comment: It is not often that a reasonable practicality defence succeeds in a Mesothelioma case. The defendants here were assisted by a joint expert witness backing their case, good records of exposure levels and a well documented history of addressing health and safety issues.

If the claimant decides to persevere with her claim she will not only have to challenge the trial judge's findings on the credibility of the various witnesses at appeal (something that the Court of Appeal has historically been extremely reluctant to interfere with) but will also have to tackle causation (not addressed in this hearing) which may not be easy given the low levels of exposure recorded.

Main contractor partially liable for failing to supervise sub-contractor: Andrew Swain v Geoffrey Osborne Ltd and PJ Brown Ltd – High Court 2010

A lorry driver who fell and seriously injured his ankle at a building site brought an action for damages against both the main site contractor and the sub-contractor responsible for ground works. The claimant alleged that he had slipped on mud on a foot way after getting out of his lorry but the defendants claimed that he had injured himself when jumping from the cab of his lorry.

On the evidence the court held that the accident had happened much as the claimant described it. The footway had been slippery due to an unsatisfactorily system for removing mud from it and checking it was clear. A finding of 25% contributory negligence on the part of the claimant was made following his admission that he was aware that the foot way was muddy but was still hurrying along in wet conditions.

The court had been required to rule on whether the contractors had been responsible for the claimant's injuries not apportion liability between them. The judge however did rule that whilst the main contractor had substantially discharged its responsibility by contracting with a reputable sub contractor to undertake safety measures they must still bear some measure of responsibility as they had not ensured that the sub contractors had implemented a satisfactory system. The

sub contractors had the greater share of responsibility due to their day to day running of the safety measures but the main contractors still had an element of responsibility by reason of their continuing supervisory role.

Comment: A main site contractor with a continuing supervisory role is unlikely to escape all responsibility for site safety even where the day to day implementation of safety measures has been taken over by a reputable sub contractor.

Completed 24 June 2010 – Copy judgments and/or other source material for the above items may be obtained from John Tutton (contact no: 01245 272756, e-mail: john.tutton@uk.qbe.com).

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