# Technical claims brief

Monthly update – April 2010



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## News

### First Corporate Manslaughter Act trial adjourned

The trial of Cotswold Geotechnical Holdings Ltd and its Managing Director Mr Peter Eaton for offences under the *Corporate Manslaughter and Corporate Homicide Act 2007* and the *Health and Safety at Work Act 1974* has been adjourned until at least October 2010.

The judge ordered an adjournment after hearing submissions in private about "urgent medical treatment" needed by Mr Eaton.

*Comment: this is the first trial for Corporate Manslaughter and if a conviction is successfully obtained the Crown Prosecution Service may be encouraged to bring further prosecutions under the Act. Charges were first brought back in April 2009 but further delay in the resolution of this case will now be inevitable.*

### U.K. government will not overturn Lords' decision on pleural plaques

The Ministry of Justice has announced that following its consultation on the issue it will not "at this time" overturn the Lords' decision that pleural plaques are not actionable.

The government will make one-off payments of £5,000 each to those claimants who had brought but not yet settled claims at the time of the Lords' ruling in October 2007.

The full announcement and further measures to assist those exposed to asbestos can be viewed at: www.justice.gov.uk/about/pleural-plaques.htm


*Comment: this is an encouraging development for insurers and other compensators and is certainly better than the situation in Scotland where an Act to reverse the Lords ruling recently survived a judicial review initiated by insurers (see February 2010 Brief). Whether this is the end of this issue however remains to be seen.*

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## DWP launches consultation on assisting employees to trace Employer's Liability Insurance policies

The DWP has launched a consultation document *"Accessing Compensation- Supporting people who need to trace Employer's Liability Insurance"* setting out the government's proposals to improve support for people who need to trace Employer's Liability Insurance policies in order to obtain compensation for accidents or industrial diseases arising from their employment.

The consultation has been prompted largely by the difficulties faced by employees suffering from diseases such as Mesothelioma where symptoms may not manifest themselves for decades after exposure to asbestos. These employees can face considerable difficulty in tracking down the insurers of former employers who may no longer be trading.

The consultation contains two main proposals:

- The creation of an Employer's Liability Tracing Office (ELTO) to manage an electronic database of EL policies and to manage the existing tracing service
- The creation of an Employer's Liability Insurance Bureau (ELIB) as a fund of last resort to compensate individuals who are unable to trace EL insurance policies for their former employers.

The consultation sets out a number of specific questions concerning the scope, funding and likely impact of the new bodies and seeks the views of insurers, employees and other interested parties.

Responses are invited by 5 May 2010.

Further information can be obtained at: Dwp.gov.uk/consultations/2010/accessing-compensation-elci.shtml

*Comment: A private members bill aimed at creating an ELIB failed to secure parliamentary time for a second reading and was dropped last year (see December 2009 Brief) but continuing campaigning by Trade Unions and some MPs has kept up pressure for a fund of last resort for Employer's Liability claims. Whether such a fund will successfully be established and if so how it will operate remain to be seen.*

*QBE is preparing a detailed response to this important consultation.*

## DWP to replace GP Sick Notes with "Statement of Fitness for Work"

- Effective from 6th April 2010 (subject to parliamentary approval) , the DWP is replacing the "Sick Note" currently issued by GPs in the UK (excluding Northern Ireland) with a "Statement of Fitness for Work " or "Fit Note"
- The new "Fit Note" gives GPs the option of classifying a patient as either *not fit for work* or *may be fit for work taking account of* ....advice
- Under the second category the GP may advise a phased return to work, amended duties, altered hours or workplace adaptations
- If an employer is unable to provide the support recommended then a "may be fit for work" statement can be treated as "not fit for work" statement
- There is no obligation on an employer to implement recommendations outlined in a "fit note"
- The maximum duration of a "fit note" will be three months as opposed to the previous six months under the old regime
- Guidance for doctors, employers and employees can be viewed at www.dwp.gov.uk/fit/note/

*Comment: the new initiative is intended to open a dialogue between employer and employee about returning to work which will hopefully lead to an earlier return to work in some cases. The contents of these "fit notes" will no doubt be of interest to claims handlers where the patient involved is pursuing a claim for injury.*

*A comprehensive review of this reform will appear in an Issues Brief prepared by the QBE Rehabilitation Team on 6th April and can be viewed at www.qbeeurope.com/casualty/risk-management/qbe-issues.htm*

## Irish High Court call for introduction of legal framework for periodical payments

The influential Irish High Court Judge Mr Justice John Quirke has fuelled new speculation about the introduction of Periodical Payments in Ireland. After awarding a catastrophically injured claimant Ms Claire Noone a lump sum of 4.25m Euros he again criticized the current Irish law which does not permit annual payments and which leaves seriously injured claimants, with uncertain life expectancy, "in a lottery situation".

He made these comments after hearing Ms Noone's family express concerns that the damages would be insufficient to meet Claire's care needs if she lived beyond the age of 63.

Mr Justice Quirke also expressed the hope that the law would be changed within the next 12 months.

*Comment: the Irish Parliament has had working parties examining the issue of Periodical Payments at various times as far back as 1996. Whether Mr Justice Quirke's comments are based on any concrete plans for new legislation is unknown. The introduction of Periodical Payments in Ireland would protect the position of claimant's with uncertain longevity but if introduced on the same basis as in England and Wales would also increase the cost of catastrophic claim settlements.*

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## Causation

### Death in custody, claimant unable to recover damages in respect of event partially caused by her: Diana Smith v Youth Justice Board for England and Wales and Another – Court of Appeal (2010)

A former training assistant sought damages for severe post traumatic stress disorder following the death of a 15 year old inmate whom she had restrained whilst working in a secure training centre.

The claimant had restrained the youth using the Seated Double Embrace (SDE) technique together with two male colleagues. The technique approved by her employers causes the restrained person to experience difficulty in breathing. The deceased died after choking on his own vomit. The claimant sought damages on the basis that the defendants had failed to keep the procedure under review and had they done so they would have banned SDE as a means of restraint and thus the death would have been prevented.

At first instance the judge dismissed the claim on grounds of causation finding that the Ministry of Justice had breached their duty care to the claimant in not reviewing the SDE restraint technique but that a review would not in all probability have led to it being abandoned.

The claimant appealed. The Court of Appeal held that the judge at first instance was wrong in finding that a professional review of SDE would not have led to it being abandoned prior to the date of the incident and the whole tragic sequence of events being avoided.

The Court of Appeal then went on to consider the question of fairness. The claimant had applied a restraint technique in breach of the rules governing its use and had maintained it for seven minutes despite the clear signs of the youth's distress. The claimant herself together with her two colleagues was responsible for the death of the restrained youth and it would be unjust for her to recover damages for its subsequent effect on her.

*Comment: the "fairness" test in this judgement is of immediate relevance to claims involving employees trained in restraint techniques but could be argued in a wider context where claimants have suffered psychological injury due to events partly caused by their own negligence.*

***"Although.....no credit goes to the Home Office for having kept in being the system of restraint which enabled the tragedy to occur, its actual occurrence was the responsibility of the appellant herself, albeit with others. It would be rightly regarded as unjust if she were to recover damages for its effect on her."***

***Lord Justice Sedley***

### Excessive speed not causative of collision at junction, circumstantial evidence considered: Murphy v Smith News Trading and Another – High Court (2010)

The claimant was driving home after a party in the early hours of the morning when her car was struck in the side by the defendant's lorry at a traffic light controlled junction. Two passengers in the car were killed and the claimant and two other passengers suffered serious injuries.

The claimant sought damages against the lorry driver alleging that he had driven through a red light and that he had been travelling faster than the legal speed limit. The lorry driver maintained that it was the claimant who had driven through a red light. The passengers sought damages against both drivers and all the claims were consolidated into one hearing.

At trial the judge held that on the balance of probabilities it was the car driver who had driven through the red light. She was young and a relatively inexperienced driver who had probably been confused by road works on the approach to the junction. The lorry driver was a far more experienced driver and had resolutely maintained that the lights were green in his favour from the outset.

The lorry had a tachograph fitted to it which recorded its speed as it approached the junction as 37-38mph. The speed limit was 30mph but on the facts of the case this speed was not held to be causative of the accident. Even if the lorry driver had been travelling at 30mph he would still have been unable to avoid the claimant when she crossed the junction in front of him. There was no liability on his part.

*Comment: the judgment is a reminder that for excessive speed to give rise to liability in respect of an accident it must be shown to be causative. It is also a reminder that the courts may rely on circumstantial evidence to resolve liability where there is no independent witness evidence to hand.*

***"...the available circumstantial evidence supports the proposition that on the balance of probabilities Ms Josie Murphy crossed the traffic lights against a red light.***

***There is evidence that she was a young and relatively inexperienced driver who had passed her test 12 months before....I find that the position of the road works at the junction and accompanying signage caused her confusion."***

***Mr Recorder Pittaway QC***

## Credit Hire

### Spot hire rates, standard of evidence: Darren Bent v Highways and Utilities Construction Ltd and Allianz Insurance – Court of Appeal (2010)

Following a road traffic accident, professional footballer Darren Bent hired a car on a credit hire basis from Accident Exchange. He incurred over £63,000 in charges recovery of which was then sought from the insurers of the driver of the vehicle which had collided with him (Allianz).

Following a long running dispute over the claim for hire charges the Court of Appeal heard an appeal on the issue of production of evidence of spot hire rates in credit hire cases.

The Court of Appeal held:

- Where a claimant had funds to hire a car and was not thus dependent on credit hire then damages should normally be assessed at spot hire rates i.e. the market rate for a similar car
- Evidence of spot hire rates should not be disregarded because it covered a later date than the date of hire, the court could make appropriate adjustments
- It was unnecessary to produce evidence of the spot rate for an exactly comparable car; a judge who looked at rates for better and worse cars than the claimants and calculated an average would not be in error.

The case will now be remitted for a re-trial on whether the claimant actually needed to hire an alternative car and the rates charged.

*Comment: this is a helpful decision for defendants making it easier for them to produce evidence on spot rates and providing useful guidance for the lower courts which should ensure far greater consistency in their rulings.*

*We are grateful to Berryman Lace Mawer who acted for the insurers for their note on this case.*

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## Fraud

### Court deliberately misled, no fresh action for fraud required: Mark Noble v Martin Owens – Court of Appeal (2010)

The claimant was knocked form his motorbike by the defendant's car suffering serious orthopaedic injuries. Liability was admitted and damages were assessed in the High Court at £3,397,766 inclusive of interest. The court had been told that the claimant's condition was little better than that of a paraplegic: he was largely confined to a wheel chair and had substantial permanent care needs.

Nine months after the High Court hearing the Insurance Fraud Bureau received a tip off from a member of the public telling them that the claimant had greatly exaggerated his symptoms. The IFB informed the defendant's insurers who obtained a good deal of surveillance evidence. Film of the claimant showed him walking without aids, operating heavy machinery and lifting and bending with ease. The defendant's medical experts when shown the footage could hardly believe it was the same man they had examined.

The defendant's insurers obtained an injunction freezing a substantial portion of the claimant's damages and applied for the award to be set aside and a re-trial held. The claimant argued that the authorities on this issue did not permit a re-trial and that the defendants should commence a fresh action for fraud.

The Court of Appeal held that the evidence of fraud was not incontrovertible and did not justify setting aside the award of damages; this could only be done once fraud was proved. They did however hold that it was unnecessary "in this day and age" (i.e. since the advent of modern surveillance equipment) for the defendants to have to commence a fresh action for fraud. This was a costly and circuitous road and in order to do justice to the parties the most appropriate course was to remit the case back to the High Court for the original trial judge to deal with the fraud issue.

*Comment: the merits of post settlement surveillance are frequently discussed by insurers and other compensators. If the defendant's insurers in this case are eventually successful in recovering a substantial part of their outlay then this tactic is likely to be more widely used.*

*Whatever the eventual outcome in this case, the Court of Appeal has set a useful precedent for defendants who wish to avoid the expense and difficulty of commencing fresh proceedings where they have good evidence of fraud.*

## Liability

### Occupiers liability, foreseeability of trespass: Paul Mann v Northern Electric Distribution Ltd – Court of Appeal (2010)

The claimant at the age of 15 had climbed into an electricity substation and came into contact with a bus bar carrying 66,000 volts. He suffered devastating burns and subsequently lost one leg below the knee.

The claimant sought damages from the defendant in respect of alleged breach of the *Electricity Supply Regulations 1988* requiring substations with live exposed equipment to be surrounded by a fence (or wall) at least 2.4 metres high. The substation was surrounded by a wall of over four metres in height topped with a rotating anti-climb device (RACD). The claimant had overcome these formidable obstacles by climbing onto the top of adjacent railings then scaling a buttress and jumping from the top of this over the RACD. This had required remarkable athleticism and the use of three pieces of wood inserted into the structure to give him purchase. The judge at first instance dismissed the claim holding that it was not foreseeable that a trespasser would climb the wall as the claimant had and that the defendants had done all that was reasonably practical to prevent the entrance of trespassers.

The claimant appealed on the basis that the defendants had not discharged their duty as occupiers simply by building a wall of the required height and that they had failed to fit RACD to all sides of the brick buttress which the claimant had climbed. A subsidiary argument was that the wall erected was not actually of the required height when measured from the top of the railings which the claimant had first scaled.

The Court of Appeal held that the regulation might require the occupiers to take additional security measures, in addition to building a fence or wall of the required height, depending on all of the surrounding features. The Recorder at first instance had been correct in enquiring into the reasonable practicality of the steps that the claimant argued should have been taken.

The means adopted to climb the wall was however found by the Recorder to be unforeseeable and that finding was unassailable. Since the means was unforeseeable it was not reasonably practical for the defendant to take steps to prevent it. The subsidiary argument was also rejected with the court holding that the regulations referred to the wall's height as measured from the ground.

*Comment: the judgment illustrates that the Court of Appeal will carefully examine the measures taken by occupiers to prevent trespassers gaining entry to dangerous areas; security measures will be looked at not in isolation but in all the surroundings in which they are deployed. It also however illustrates that Court accepts that the actions of a determined and inventive trespasser cannot always be foreseen.*

***"No amount of security measures will keep out a sufficiently determined trespasser."***

***Mr Recorder Fairwood***

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## Procedure

### Destruction of evidence, abuse of process: Celia Weaver (Widow....), Anita Gurney (Personal Representative....) v Contract Services Division Ltd – High Court (2009)

The defendants sought to strike out the claim brought by the widow and personal representative of the estate of a former employee who had allegedly died due to asbestosis. The application was made under Civil Procedure Rule r3.4 following the discovery that lung tissue samples taken prior to the deceased's death had been destroyed on the claimants' instructions and despite advice that the defendants were likely to object to this.

The defendants argued that the destruction of the tissue deprived them of obtaining vital evidence on the level of asbestos exposure sustained by the deceased and that a fair trial on causation was no longer possible.

It was held that the decision to destroy the tissue samples in the face of advice that defendant would object to it amounted to an abuse of process making further proceedings unsatisfactory and preventing the court from doing equal justice between the parties. The deceased could not be cross-examined and the defendants had been deprived of the only means of obtaining positive evidence on levels of exposure.

The claim was struck out and the claimant ordered to pay the defendant's costs.


*Comment: the court in reaching this judgment followed the principle set out in the 2000 Court of Appeal case of Arrow Nominees Inc and Anr v Blackledge i.e. that the destruction of evidence amounts to an abuse of process where it creates a substantial risk that a fair trial will no longer be possible. The judge commented that whilst the courts would be sympathetic to the relatives of the deceased who wanted tissue samples destroyed for reasons of privacy or religious belief, they must accept that the destruction of evidence which assisted the defence could prevent their claim from proceeding.*

**Completed 30 March 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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**QBE European Operations**

Plantation Place
30 Fenchurch Street
London
EC3M 3BD

tel +44 (0)20 7105 4000
fax +44 (0)20 7105 4019

enquiries@uk.qbe.com
www.QBEeurope.com


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