QBE European Operations

Technical claims brief

Monthly update | August 2015

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Liability

Occupiers' liability of a homeowner – *Pollock v Cahill [2015]*

In July 2010, the claimant suffered a tragic accident whilst he was staying at the defendants' home. He had been blind since 1998, but the judgment records that he had remained extremely active and had not let his disability hold him back. On the day of the accident, the claimant fell from an open second floor bedroom window and suffered spinal and brain injuries, and was paralysed from the waist down.

The claimant's case was that he fell through the window due to the defendants' breach of duty as occupier. The defendants put the claimant to strict proof as to how and why he fell from the window, they denied breach of duty and argued that, if there was a foreseeable risk of injury, the claimant had willingly accepted the risk and/or that the claimant had caused or contributed to his injuries by his own negligence (defence of volenti).

The liability issues for determination were:

- Who had opened the window and to what extent
- How the claimant had come to fall from the window
- Whether there had been a breach of duty on the part of the defendants
- The defence of volenti and contributory negligence.

Having heard all the evidence, the court decided that the bedroom window had been opened by the defendants. The evidence regarding the space through which the claimant had fallen was inconclusive, but on the balance of probabilities, he had fallen through the open window as he had been trying to make his way to the bathroom having just woken. He had lost his internal compass and when he reached the window, he had believed that he had been at the door and his forward momentum took him through the window.

The court decided that the open window had been a real risk to the claimant and it was the defendants who created the risk. The defendants ought to have appreciated the risk and taken steps to prevent it by keeping the window closed or by warning the claimant about it. This was particularly relevant given the second floor location. As a result, the court concluded the defendants had failed to discharge their common law duty of care they owed as occupier.

Regarding the defence of volenti, the defendants faced an uphill struggle and had to prove that the claimant had willingly accepted the risk of falling out of the window. The force of such a legal argument was lacking, as it was unclear how the claimant could accept a risk which he had not known about. The defendant could put it no higher than to say it was the risk that the window *might* have been open. The court was unimpressed, and as a matter of fact, the claimant had not accepted the risk and had not failed to take reasonable care of his own safety. As a result, the claim was successful, without reduction for contributory negligence.

> Whilst occupiers' liability claims against householders are relatively rare, this case is a good example of the duty of care owed to a visitor, and with particular reference to their individual characteristics. The application of the law cannot be criticised, but this tragic accident was probably caused by an honest oversight or moment of absent mindedness – the simple failure to close a window. However, that was not sufficient to defeat the claim and the simple step of checking and closing the window would have prevented the accident.

> It is still too early to say whether the 'quid-pro-quo' is fair to both sides and what ultimate impact it will have on claimants and defendants appetite to take claims to trial. Whilst we are yet to see any QOCS binding authority from an appeal court, there have been a small number of reported county court judgments deciding the issue of a claimant's 'fundamental dishonesty'. As with most civil justice reform, it is only a matter of time before the Court of Appeal are tasked with analysing the QOCS rules and providing guidance, and in particular, what constitutes 'fundamental dishonesty', the appropriate standard of proof which is to be applied and the evidence that is required in support of such an allegation.

Costs

Qualified One Way Costs Shifting (QOCS) – *Casseldine v The Diocese of Llandaff Board for Social Responsibility [2015]*

This county court decision is noteworthy as it is one of the few occasions when the court has been asked to determine the application of QOCS. The introduction of QOCS was not without criticism, but as its application was not retrospective, set against the limited number of claims that reach trial, it has meant that QOCS has largely avoided the headlines, adverse or otherwise.

The chronology of the case of Casseldine v The Diocese of Llandaff Board of Social Responsibility is important to set out:

- March 2012, the claimant entered into a conditional fee agreement (CFA) with Thompsons solicitors and instructed them to bring a claim against her employer for damages for personal injuries following an accident at work.
- 30 January 2013, Thompsons terminated the retainer and its CFA came to an end.
- 1 April 2013, the changes to the Civil Procedure Rules 1998 came into force to implement the changes recommended by Lord Justice Jackson, including QOCS.
- 6 August 2013, the claimant entered into another CFA with a different firm of solicitors (SRB). As this was a post-April 2013 claim SRB could not claim additional liabilities by way of success fee or after the event (ATE) insurance if they were successful.
- December 2013, the claimant issued proceedings.
- 1 December 2014, the claim was dismissed by the court.

The issue of any costs liability was referred to a regional costs judge and he had to decide whether the claimant should pay the defendant's costs because the Thompsons' CFA predated the April 2013 changes; or whether QOCS should apply and the defendant should not recover its costs from the claimant.

The costs judge decided the existence of the Thompsons' CFA was irrelevant as it had been terminated. The only CFA that was relevant was the SRB one and as it had been taken out after the April 2013 changes, SRB could not recover a success fees or ATE. The 'quid-pro-quo' for the April 2013 changes was the application of QOCS, so they would be engaged on this occasion and the successful defendant could not recover its costs from the unsuccessful claimant.

News

HSE releases annual workplace fatality details

Provisional annual data for work-related fatal accidents in Great Britain's workplaces shows marginal change from previous years, sustaining a long term trend that has seen the rate of fatalities more than halve over the last 20 years.

The data released by the Health and Safety Executive (HSE) reveals 142 workers were fatally injured at work between April 2014 and March 2015 (a rate of 0.46 fatalities per 100,000 workers). This compares to last years all-time low of 136 (0.45 fatalities per 100,000 workers).

The statistics support the proposition that Great Britain continues to be one of the safest places to work in Europe, having one of the lowest rates of fatal injuries to workers in leading industrial nations.

The new figures show the rate of fatal injuries in several key industrial sectors:

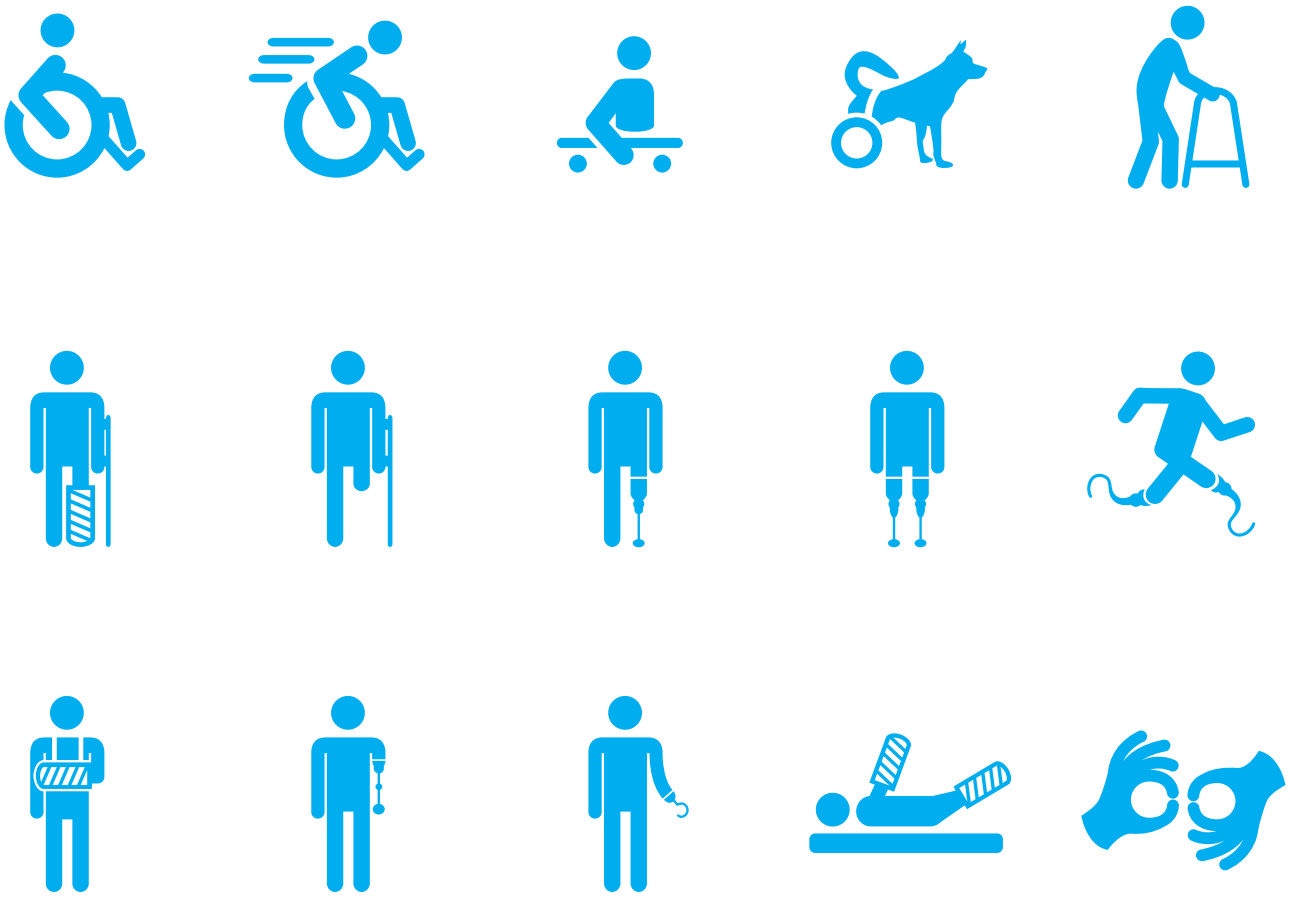
- 35 fatal injuries to construction workers were recorded – a rate of 1.62 deaths per 100,000 workers, compared to an average of 45 deaths in the past five years and a decrease from the 44 deaths recorded in 2013/14.
- 33 fatal injuries to agricultural workers were recorded – a rate 9.12 deaths per 100,000 workers, the same as the average of 33 deaths in the past five years and an increase from the 27 deaths recorded in 2013/14.
- Five fatal injuries to waste and recycling workers were recorded – a rate of 4.31 deaths per 100,000 workers, compared to an average of six deaths in the past five years and an increase from the four deaths recorded in 2013/14.

The published statistics also include a breakdown by country and region. These are strongly influenced by variations in the mix of industries and occupations. For example, in Scotland and Wales (compared to England), there are noticeably fewer employees in lower-risk occupational groups, with relatively more in higher-risk ones. In addition, the number of fatalities in some regions is relatively small, hence susceptible to considerable variation.

The HSE has also released the latest available figures on deaths from asbestos-related cancer. Mesothelioma, one of the few work-related diseases where deaths can be counted directly, (contracted through past exposure to asbestos) killed 2,538 people in Great Britain in 2013, compared to 2,548 in 2012.

A more detailed assessment of the data will be provided as part of the annual Health and Safety Statistics release at the end of October. As this will draw on the HSE's full range of sources, including changes in non-fatal injuries and health trends, it will provide a richer picture on trends.

> It is broadly positive that the number of fatal accidents remains largely static, but the HSE will no doubt continue their focus on construction, and other high risk areas of industry. Further significant reductions in fatalities seems unlikely, but it is incumbent on all employers to keep health & safety and risk management at the forefront of their minds. Aside from the tragedy of human loss, employers and the insurers will soon feel the impact of the forthcoming changes to the HSE prosecution sentencing guidelines. The changes will mean that prosecutions are likely to prove more expensive for the defendant (fine level) and their insurer (where there is cover for legal costs). The end result is likely to be repeat offenders being fined at a level which will send them out of business.



Damages

Smith v Manchester awards endorsed by Court of Appeal in *Billett v Ministry of Defence [2015]*

In a welcome judgment from the Court of Appeal, they have reminded claimants and defendants that the strict application of the Ogden tables is not suitable in all personal injury claims that include an alleged impact on a claimant's future working capacity. The case of Smith v Manchester [1974] provides claimants with a lump sum payment based on their likely financial loss, if they were placed on the open labour market, caused by their loss of earning capacity.

In the recent case of Billett v Ministry of Defence, the Court of Appeal decided a *Smith* award could still be relevant in cases involving lower-level disability. The court said it was more appropriate to use the broad-brush approach advocated in *Smith*, when assessing damages for disadvantage on the open labour market, a decision which reduced the award for loss of future earning capacity from £99,000 to £45,000. The claimant was awarded 2 years loss of earnings.

When considering the appropriate award, the Court of Appeal looked at the application of the Ogden Tables and level of award the claimant would have received if he was deemed 'disabled' and there was no adjustment to the multiplier. The claimant would have been entitled to an award of approximately £200,000 for future loss of earning capacity, a result described by Lord Justice Jackson as "hopelessly unrealistic". To reflect the fact that the claimant suffered "virtually no hindrance from his disability" the tables would have to be adjusted significantly, an exercise which would be no more scientific than the broad-brush approach applied via Smith v Manchester.

> "There have been a number of examples when the lower courts have been uncomfortable applying the Ogden tables due to a perception of over-compensation for future losses. The classification of a claimant as 'disabled' is not the end of the story, and careful consideration of the nature, level and impact of the disability is crucial. When dealing with a claim involving minimal ongoing or permanent disability, the level of damages should reflect that. The decision in Billett is welcome support to insurers' argument that awards should have a common-sense approach to provide fair and reasonable compensation.

Horizon Scanning

Long working hours and the risk of coronary heart disease and stroke

People working long hours are more likely to have a stroke, according to analysis of more than half a million people. The data, published in the Lancet medical journal, showed the chance of a stroke increased beyond the traditional 9am to 5pm. The causal link is uncertain, but theories include a stressful job and the damaging impact on lifestyle.

Experts say people working long hours should regularly monitor their blood pressure. The study showed that in comparison to a 35-40 hour week, doing up to 48 hours increased the risk by 10%, up to 54 hours by 27% and over 55 hours by 33%. Dr Mika Kivimaki, from University College London, said that in the 35-40 hour group there were fewer than five strokes per 1,000 employees per decade. That increased to six strokes per 1,000 employees per decade in those working 55 hours or more.

Dr Kivimaki admitted researchers were still at the "early stages" of understanding what was going on. Ideas include the extra stress of working long hours or that sitting down for long periods is bad for an individual's health and may increase the risk of a stroke.

However, the data could just be a marker for poor health with those spending long hours at the office, not having enough time to prepare healthy meals or exercise regularly. The importance of a healthy and balanced lifestyle, including regular exercise and 'downtime', has been widely publicised for a number of years and many employers acknowledge their role, as well as the benefits to their workforce.

> "The suggested correlation between long hours, sedentary occupations, stress and poor diet, is likely to be the focus of more scientific investigation in years to come, particularly so given the increasing problem of obesity. Both employees, and employers, have a role to play to tackle these issues and to promote a healthier workforce. Whilst the research experts admit the link is currently uncertain, it remains to be seen whether any claimant lobbyists or medico-legal experts see this an area for civil litigation.

Completed 30 August 2015 – written by QBE EO Claims. Copy judgments and/or source material is available from Tim Hayward (contact no: 0113 290 6790, e-mail: tim.hayward@uk.qbe.com).

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