QBE European Operations

Technical claims brief

Monthly update | November 2013

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Update: Enterprise and Regulatory Reform Act 2013

Section 69 of the Act (see July edition), which amends section 47 of the Health & Safety at Work Act 1974 to effectively remove civil liability for breach of health and safety regulations came into effect on 1 October. It is not retrospective and only applies in respect of incidents occurring on or after that date. The regulations affected include the 'Six Pack' concerned with the Provision and Use of Work Equipment, Personal Protective Equipment, Manual Handling, Workplace Health and Safety, Display Screen Equipment and the Management of Health and Safety at Work.

The impact of the legislation on employers' liability claims defensibility remains uncertain. Whilst the removal of strict liability is to be welcomed, the number of claims that are likely to fail under this amendment will probably be minimal.

The concern is that section 69 will merely lead to satellite litigation and increased defence costs – the burden of proof remains with the defendant to show they have discharged their common law duty of care. The overarching message is; where a claim was likely to succeed pre 1 October, it is likely to remain so thereafter. The collation of evidence is vitally important to the defence of any claim and that remains the case under section 69. That in turn brings with it a cost consequence, which will be particularly felt by defendants following the introduction of Qualified One-way Costs Shifting.

Procedure

Jackson's reforms bite... Biffa Waste Services Ltd v Dinler and Ors (2013)

This High Court decision provides further evidence of the need to comply with the court's case management directions and the pressure on the judiciary to give effect to Jackson's reforms.

The claimant had brought a personal injury claim against the defendant following a road traffic accident. Standard fast track directions included: dates for exchange of witness statements; that oral evidence would not be permitted at trial from witnesses who had not served a statement or whose statement was served late; and that the claimant should serve an agreed bundle at least seven days before trial.

The claimant failed to file a pre-trial checklist in time, as well as failing to pay the listing and hearing fees. The matter was referred to a deputy district judge who gave the claimant more time and ordered that unless the claimant complied with the directions the claim would be struck out.

The claimant served the witness evidence on the defendant's solicitor some 27 days after the original due date and within 2 hours of the extended deadline — the statements were not filed at court until the day before trial. The claimant also failed to attempt to agree the contents of the trial bundle with the defendant and simply filed and served a copy the day before trial.

On the first day of trial, the claimant indicated his intention to apply for relief from the automatic strikeout for the late payment of court fees. He gave no explanation for the failure. The defendant cross applied to strike out the claim on the basis of the claimant's failure to comply with the court orders and specifically stated that it had been unable to amend its pleadings to plead fraud due to the late service of the claimant's witness statements.

The judge at first instance declined to strikeout the claim, instead deciding that a wasted costs order against the claimant would suffice. The trial was adjourned.

On the defendant's appeal, the High Court judge held that Jackson's reforms involved a significant change in the court's attitude to non-compliance with court orders. Under CPR 3.9 the court was required to consider the wider issue of court time and resources.

There had been a flagrant disregard of the court orders by the claimant. The delays and failings were significant and unsatisfactory, which directly caused the trial to be adjourned. Mrs Justice Swift held that neither proportionality nor the overriding objective had been properly considered at first instance and there was no compelling argument to grant relief from sanctions. The claim was struck-out.

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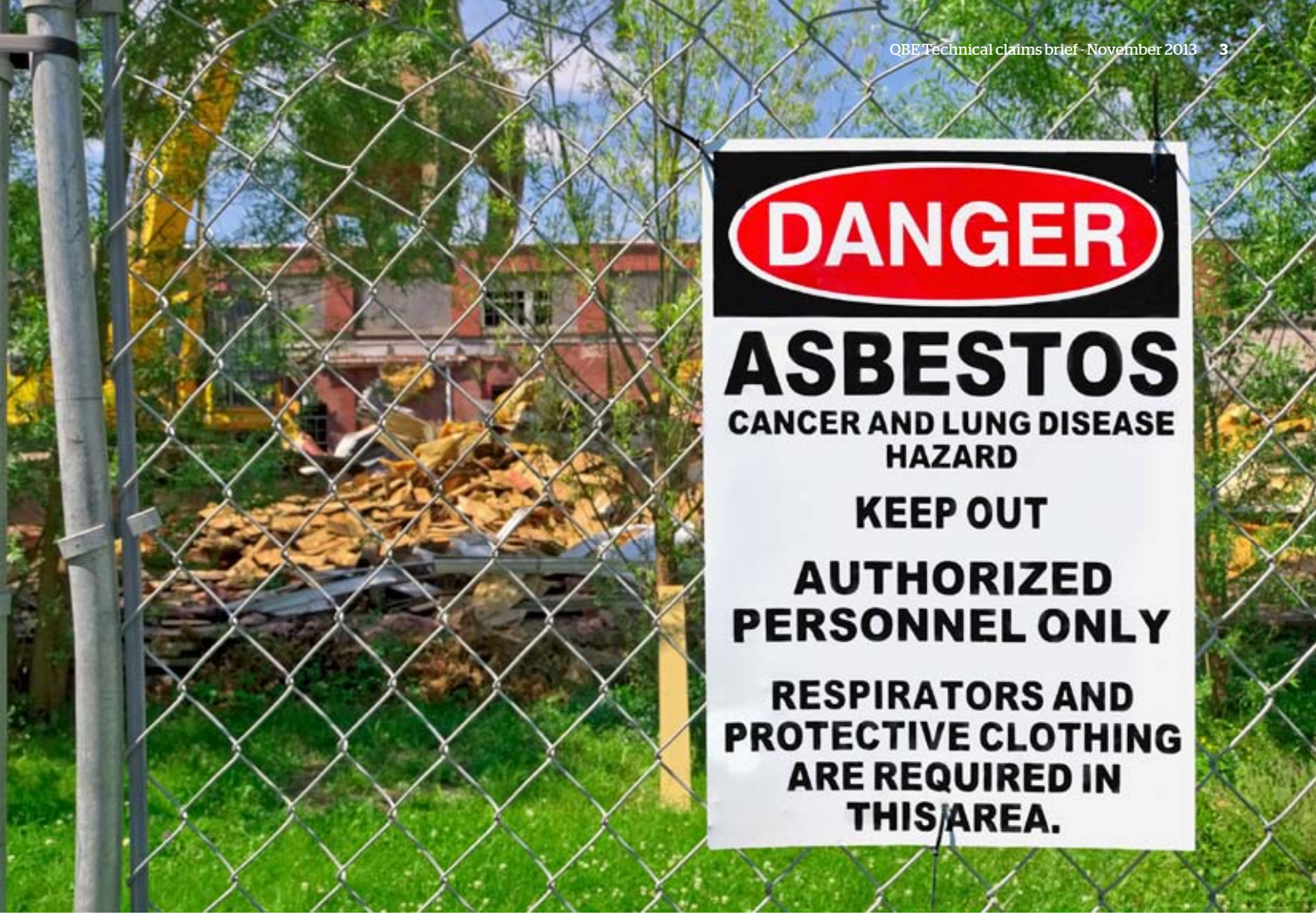
> *Non-compliance with court orders is not a one-way street and all parties to litigation should comply or apply for an extension or relief at the very earliest opportunity. That is not a huge sea-change from the pre-Jackson position, but most defendants, and their insurers, will welcome the court's intolerance of claimants having scant regard for directions and then going 'cap in hand' before the judge at the 11th hour. It is hoped that the result is that claims are better prepared for trial and defendants better placed to decide which claims to fight to trial.*



Limitation. Infringement complaint to the European Commission – Nicholas v Ministry of Defence [2013]

A claim was issued under the Law Reform (Miscellaneous Provisions) Act 1934 by the deceased victim's daughter, Ms Nicholas, against the MoD as a result of her mother's war time exposure to asbestos. The MoD admitted that the exposure had been culpable but pleaded that the claim was statute barred under section 11 of the Limitation Act 1980: the three year limitation period having expired over a year before her death in November 2008.

The MoD argued that for over four years prior to her death the victim had the requisite knowledge under section 14 of the Act, following a meeting with her doctor where these matters were explained:

1. That her asbestosis was an occupational illness
2. That it was significant
3. That it was attributable to some culpable act or omission during her war time work and
4. The identity of the defendant. The deceased had done nothing about it and an additional three and a half years elapsed after her death before proceedings were issued.

The MoD argued that it would be inequitable for the court to apply its discretion and disapply the statutory time limit (section 33 of the Act) where a conscious decision had been made by the deceased not to pursue a claim and on account of the extensive delay.

The court considered the criteria set out in section 33 and decided to exercise its discretion in the claimant's favour, citing:

1. The absence of any prejudice caused by the loss of the statutory limitation period defence or to the cogency of the evidence
2. The victim had not been well enough to contemplate taking legal advice or issuing proceedings due to the effects of the asbestosis for which the MoD were responsible
3. Following her death, the MoD were informed relatively promptly of the prospective claim; a moratorium had been agreed between the solicitors within a year and this was in place up to the date proceedings were issued, and
4. No prejudice occurred by reason of this additional delay.

> *The outcome is not surprising given the criteria set out in section 33 and the recent trend of judgments – whilst a limitation defence may still be available, it is increasingly difficult to defeat an application to the court for discretion. The Limitation Act was intended to give potential parties to litigation the certainty of a prescribed period during which a claim must be commenced – however, uncertainty remains while Judges continue to exercise their wide discretionary powers, especially in emotive cases involving fatalities and asbestos related conditions.*

Liability

Plastics factory owners fail to recover contribution towards damages paid following explosion – ICL Tech Ltd & Ors v Johnston Oils Ltd [2013]

The owners of a plastics factory which exploded in Glasgow killing nine people, and seriously injuring 45 others, have failed in a test case to hold a supplier liable for compensation. The total value of the claims being determined by the test case amounted to approximately £12m.

ICL Plastics Ltd raised an action against Johnston Oils (QBE insured) to recover a contribution towards the damages of almost £191,500 and expenses of over £23,000 which the pursuers paid to Archibald Lindsay, who was seriously injured by the explosion at the Stockline Factory in Maryhill in May 2004. However, Lord Hodge in the Court of Session Outer House ruled that it would not be 'fair, just and reasonable' to impose delictual (akin to common law tort of negligence) liability on the defender.

In 2007, ICL Plastics and another firm, ICL Tech, were fined a total of £400,000 for breaching health and safety laws over the blast. A public inquiry chaired by Lord Gill in 2008 concluded it was an 'avoidable disaster' which happened after liquid petroleum gas (LPG) escaped from a badly maintained pipe and ignited.

The injured parties, who included relatives of the deceased, sued and recovered damages from ICL. The pursuers raised the present action to claim a contribution from the defender under section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 on the basis that Johnston Oils would have been found liable in damages to the injured parties if they had sued it. Johnston Oils supplied the LPG that was ignited to cause the explosion but the pipework from which it leaked had been installed by a third party many years before Johnston Oils' supply contract began.

The 'central issue' was the scope of Johnston Oils' duty of care to the injured parties, as there was 'no real issue on foreseeability'. Lord Hodge concluded *"If the pursuers did not carry out their duties and allowed their pipework to corrode and to leak, Johnston Oils could reasonably foresee that persons, such as the injured parties, might suffer fatal or very serious injury. The area of dispute is essentially the overlapping concepts of proximity and whether it is fair, just and reasonable for the law to impose liability on the supplier."*

The pursuers encouraged the court to take the 'small step' from acknowledging Johnston Oil's 'obvious duty in the face of patent danger' to recognise its 'duty to make straightforward inquiries' when it was unaware of the age, route or condition of the pipe.

However, delivering his opinion, Lord Hodge said: *"I do not consider that to be a small step in law because of the absence of proximity for the reasons which I have given. I therefore conclude that Johnston Oils did not owe the duties of care to the injured parties on which the pursuers have built their case."*

Lord Hodge also held that even if the pursuers had succeeded in establishing a breach of a duty of care, their claim would have failed on causation.

The court were clearly reluctant to extend the scope of the duty of care owed and correctly applied the longstanding test established by Caparo Industries plc v Dickman [1990]. Thanks go to Simpson & Marwick for their considerable assistance in defending this protracted and publically sensitive claim.

Psychiatric injury and secondary victims – Taylor v A Novo (UK) Ltd [2013]
The claimant's mother injured her head and foot at work on 27 February 2008 after a colleague caused a stack of racking boards to fall on top of her. The defendant employer admitted liability. Having started to make a good recovery the mother collapsed and died at home on 19 March 2008 in front of her daughter, who had not been present at the original accident. The death was as a direct result of the original accident.

The daughter suffered significant post-traumatic stress disorder and the issue to be determined by the court was whether she could claim damages as a secondary victim, her mother having been the primary victim. At first instance, the claim succeeded as she had been present at the event which caused the damage to her, that is her mother's sudden death.

On appeal the Court of Appeal said that 'proximity' should be applied in two different ways; firstly to describe the relationship between the parties and secondly the physical closeness of a claimant to the event. Had the claimant seen the original accident and suffered shock and psychiatric illness then she would have qualified as a secondary victim as per the principles in Alcock v Chief Constable of South Yorkshire Police [1992]. However, her mother's death had been separated by three weeks from the accident date and it was not reasonable to make the defendant liable for the claimant's shock and illness upon witnessing this subsequent event. Any extension of the class of secondary victim was a matter for Parliament, not the courts.

> *The question of secondary victims has come before the court a number of times since the tragic events at Hillsborough in 1989 and attempts to extend the class of claimant continue. Public policy considerations remain a key aspect, but this case also underlines the correct application of the law.*

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New Judicial College Guidelines, 12th Edition (formerly the Judicial Studies Board Guidelines)

The 12th edition of the Judicial College Guidelines has now been published. The Guidelines are a useful resource for laymen and claims handlers alike and are used by judges when awarding damages for personal injury at trial.

The Guidelines recognise the recent 10% uplift on general damages – indeed this edition provides two columns to show both pre and post Jackson reform figures. Generally, the figures in the 12th edition have been updated to reflect the modest inflation figure of 2.8% since publication of the 11th edition.

Completed 30 October 2013 – written by QBE EO Claims. Copy judgments and/or source material for the above available from Tim Hayward (contact no: 0113 290 6790, e-mail: tim.hayward@uk.qbe.com).

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