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liabilityMatters

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Welcome to our first edition of *liabilityMatters*, the successor publication to 'On the Case' where we looked at case law and offered commentary on how this affects you, our clients.

liabilityMatters will also contain the case law and commentary you told us you valued, but will go further by discussing the trends we're seeing in the claims we're handling, and in the wider liability claims marketplace.

We hope you enjoy the first of what will be monthly *liabilityMatters* publications. If there are subjects that you'd like to see covered, or if you have any comments regarding the content, we'd be delighted to hear from you.

Euro Pools Plc *v* Royal & Sun Alliance Insurance Plc

Claim notifications

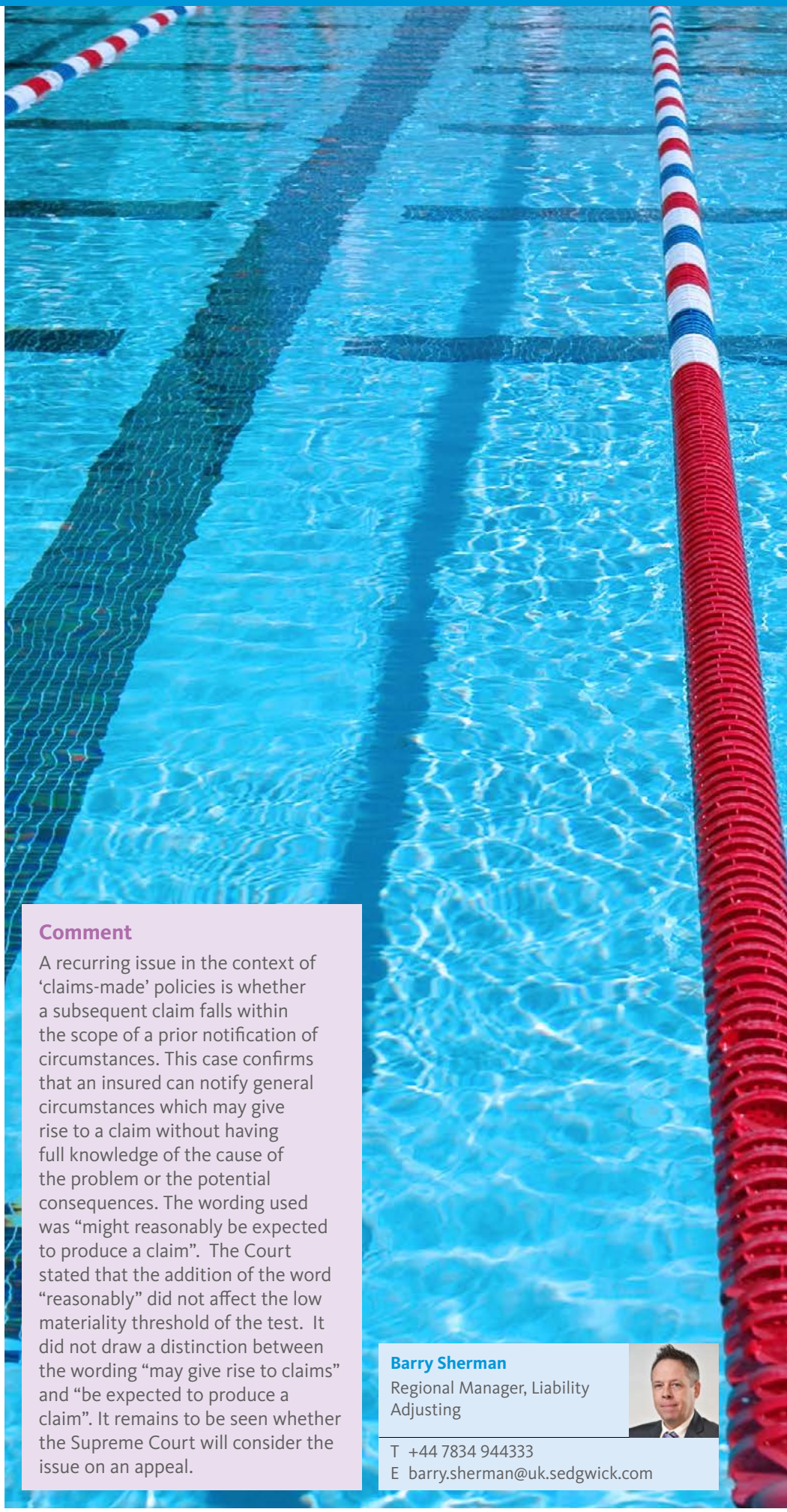
The facts

Euro Pools sought an indemnity for costs incurred in remedying faults occurring in swimming pools it had installed for third parties. In particular, Euro Pools sought indemnity in respect of expenses incurred in installing a hydraulic system to power moveable 'booms' at several pools, to mitigate potential claims by third parties. The key issue that arose on appeal was whether the claim attached to a first or second of two successive professional indemnity policies. Each policy was held with the same insurer (RSA). The Court of Appeal in this case provided clear guidance on the scope of notification of a circumstance.

The Defendant (RSA) contended that the expenses arose from circumstances notified by Euro Pools under the first (2006-07) policy. Euro Pools contended that the potential claims in respect of which the expenses were incurred arose from circumstances notified under the second policy (2007-08), meaning that the indemnity payable would be subject to the separate limit under that policy. The total loss in this case exceeded the policy limit of £5m for both years and the insurer sought to argue that all the losses fell within the 2006-07 policy year. RSA also asserted that communications about remedial works during the period of the second policy were not fresh notifications of circumstances but communications about an existing claim which attached to the first policy.

Judgment

The Court of Appeal allowed RSA's appeal, holding that the remedial works carried out by Euro Pools attached to the first policy year when the original notification of a circumstance was made, meaning that the claim was subject to the first policy year's limit of indemnity.



Comment

A recurring issue in the context of 'claims-made' policies is whether a subsequent claim falls within the scope of a prior notification of circumstances. This case confirms that an insured can notify general circumstances which may give rise to a claim without having full knowledge of the cause of the problem or the potential consequences. The wording used was "might reasonably be expected to produce a claim". The Court stated that the addition of the word "reasonably" did not affect the low materiality threshold of the test. It did not draw a distinction between the wording "may give rise to claims" and "be expected to produce a claim". It remains to be seen whether the Supreme Court will consider the issue on an appeal.

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Discount Rate

An unwelcome surprise from the Lord Chancellor?

When victims of life-changing injuries accept lump sum compensation payments, the discount rate influences the final figure they are awarded. But striking the balance between compensator's pockets and claimants rights was never going to be easy.

Has the new rate got it right?

The Civil Liability Bill

The Bill received Royal Assent on 20 December 2018 to become the Civil Liability Act 2018.

A key target of the Act was to include setting out a new mechanism to calculate the discount rate. This change was to reflect the interest a claimant can expect to earn by investing lump sum payments, as well as the effects of tax, expenses and inflation on these returns – not a simple job when considering the potential fluctuations over a lifetime.

Discount Rate

In March 2017, the Lord Chancellor changed the discount rate to minus 0.75%, from the previous rate of plus 2.5%. This sparked much debate and the need for large increases in financial provisions for compensators. Under the new rate, a seriously injured 15-year-old girl requiring lifetime care of £250,000 per year would receive £26 million to pay for it, compared to the £8.5 million under the previous discount rate of 2.5%.

Whilst a positive result for claimants, the same couldn't be said for policyholders as compensators would inevitably have to pass the costs on in increased premiums. For the NHS, as one of the largest compensators, this money had to come from tax payer's pockets or cuts – neither of which were welcome propositions.

Under the Damages Act 1996 (as amended by the Civil Liability Act 2018), the Lord Chancellor was tasked with confirming any new discount rate on or before 6 August 2019. What happened next took us all by surprise as the discount rate was changed, but only to minus 0.25%. Under the revised rate the same injured 15-year-old girl will now receive £21 million.

Whilst on the face of it this is an improvement, in reality, negotiations during the 868 days between the two discount rate announcements were resulting in settlements using a rate between 0% and 1%, with many settling around plus 0.5%.

What's next?

A new Scottish discount rate is currently being reviewed, with a report expected in late September and implementation due soon after that. Speculation is rife as to how this will differ from the English rate.

There is still a market feeling that the revised rate only goes so far and over compensates claimants, whilst not truly reflecting the investment strategy for damages awarded against future loss.

Comment

While the rate may not have been what was expected by the industry, it at least provides some certainty for reserving, actuaries and premium strategy. The Lord Chancellor will review the rate again in another five years, in the meantime we've seen those compensators who predicted a better rate than minus 0.25% have to post increased reserves, and those who reserved at minus 0.75% allow welcome releases.

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Shelbourne *v* Cancer Research UK (2019) EWHC 842 (QB)

Vicarious liability for social events

The facts

Shelbourne is the latest case on the scope of an employer's vicarious liability where the claimant unsuccessfully attempted to extend the boundaries beyond Bellman *v* Northampton Recruitment Limited.

Cancer Research UK (CR) held a Christmas party. They compiled a risk assessment, the main concern being to prevent people returning to the laboratories during or after the party. The assessment also led to the presence of security staff at the party.

Mr Beilik, a visiting scientist (not employed by CR) attended the party along with the Claimant, Ms Shelbourne, an employee of CR. Ms Shelbourne was on the dance floor when Mr Beilik, who had been drinking, lifted her up and then dropped her when he lost his balance. She sustained serious back injuries and sued her employer. The County Court held that CR was not liable in negligence for her injury; neither was it vicariously liable for Mr Beilik's actions. The Claimant appealed.

Court of Appeal

The first instance decision found that the position of Mr Beilik was sufficient to satisfy the test from Mohamud and Cox – in that that there was a relationship between him and CR. This was not challenged by the Defendant as part of a cross-appeal but the appeal considered the tests laid down in Mohamud, namely:

What functions or 'field of activities' had been entrusted by CR to Mr Beilik and was there a sufficient connection between the position in which he was employed and his wrongful conduct, to make it right for CR to be held liable?

The Claimant's case was that the relevant 'field of activities' of Mr Beilik included interacting "with fellow partygoers in alcohol-infused revelry, leading to the setting aside of the ordinary boundaries of social interaction; all of which was authorised by the Defendant for its own benefit, since it stood to gain from the enhancement of its employees' morale". That argument was rejected by Mr Justice Lane, who held that CR was only "responding to the expectation of its members of staff that this is what an employer does for them at Christmas."

This was not a case where the Claimant was at work when Mr Beilik committed the tort or where his 'field of activities' was sufficiently connected to what happened at the party, so as to give rise to vicarious liability. The Court held that these circumstances were different to Bellman *v* Northampton Recruitment where the company was held vicariously liable for an assault committed by its managing director on an employee, following their Christmas party. Mr Justice Lane stated that in that case, "it was the managing director's control of proceedings, at all material times, and his reaction to what he perceived to be a challenge to his authority as MD, which made the company vicariously liable".

Mr Justice Lane concluded that the first instance decision was correct and that Mr Bellik's field of activities "was not sufficiently concerned with what happened at the party to give rise to vicarious liability." The appeal was therefore dismissed.

Comment

Vicarious liability attracts much attention in the legal world and the curse of the Christmas party struck again in Shelbourne. The decision in the case was however distinguished from Bellman due to the fact that the MD (who assaulted him) had control over the event and acted as such because he considered the Claimant was challenging his authority. Following Shelbourne, employers who arrange similar events will partly breathe a sigh of relief, alongside their insurers.

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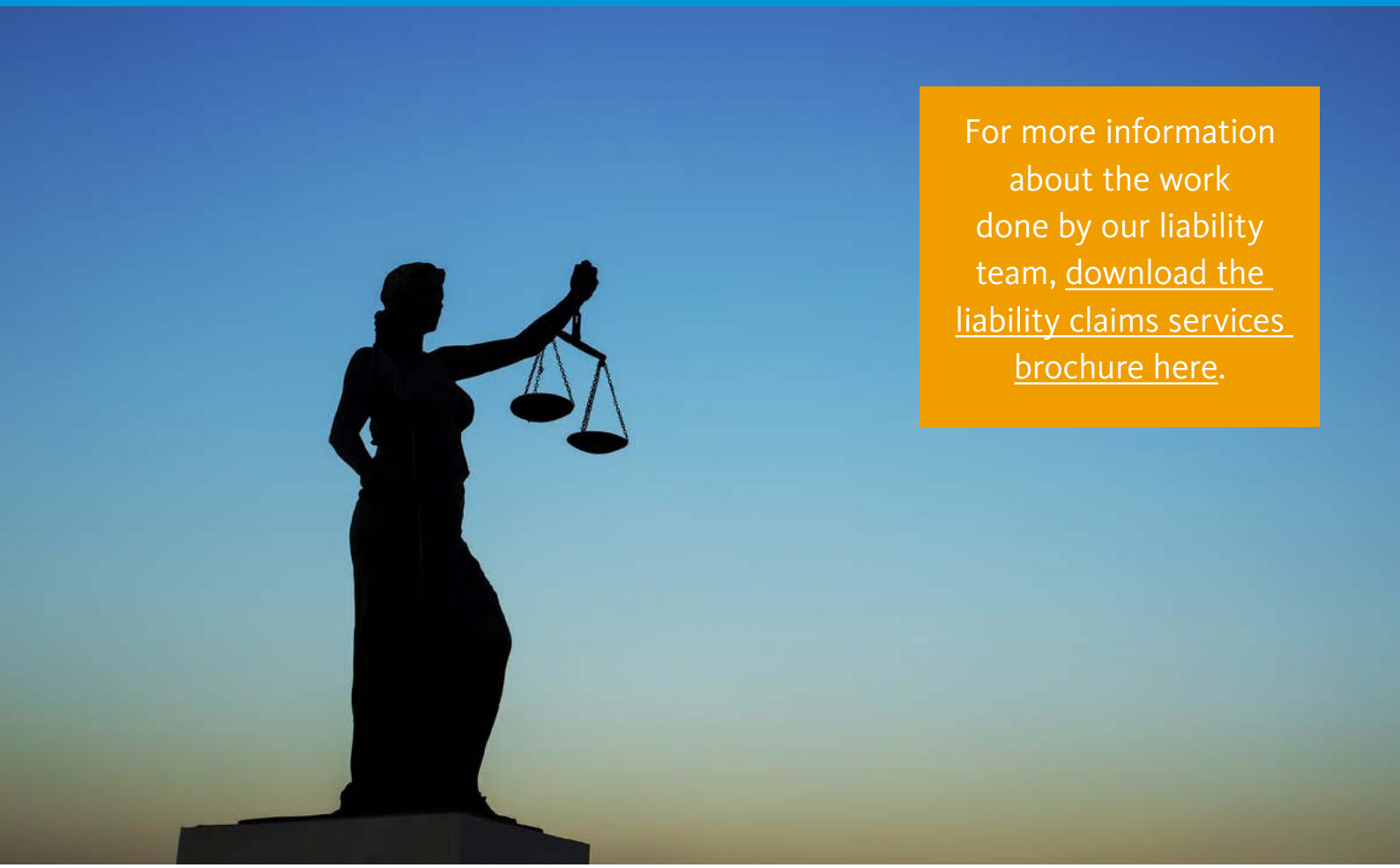

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We apply market leading technology to improve the customer experience, settle claims faster and identify fraud. Our digital thinking never stops, we're always developing new technology to make claims more transparent and easier for everyone.

You'll find Sedgwick at the following upcoming industry events:

- **19 September** – CILA conference
- **3 October** – Fraud Awards
- **11 October** – CILA lunch
- **6-7 November** – speaking at the BDMA conference
- **14 November** – sponsoring the I Love Claims Home Claims Conference
- **26 November** – AIRMIC dinner

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