Welcome

Welcome to this month’s edition of BC Disease News, our monthly disease update in which you will find news, legislative updates, case law developments and extensive features on everything from the world of insurance/disease and defendant occupational disease litigation.

This month, Slater & Gordon published its full annual results which contained a record $1bn loss over the 2015/16 financial year. Elsewhere, it was ordered that a claim worth £13m should be costs-managed, despite its value exceeding the £10m threshold for compulsory costs management. It has also been reported this month that the NHS Litigation Authority (NHSLA), has set up its own in-house litigation team in an attempt to reduce its £120.1m external legal costs. In other news, a claimant was refused the protection of QOCS after his solicitors wrongly informed the defendants that a CFA was in place three years earlier. This month, we also look at the Industrial Injuries Advisory Council’s (IIAC) independent report on noise induced hearing loss (NIHL) and work with nailing and stapling guns. We also discuss how the High Court held that s.1A of the Fatal Accidents Act 1976 does not breach Article 8 of the European Convention of Human Rights 1998. Finally, we will be discussing the Lord Chancellor’s consultation paper dedicated to civil justice reform of which the extension of fixed fees to as many civil cases as possible was proposed.

Finally this month, we present the 4 following features: assignments of CFA’s between solicitor firms; the second in a series of features looking at the judgment in Wignall v Secretary of State for Transport; a review of the condition ‘osteoarthritis’ and the occupations which are most at risk, and; whether noise exposure can cause latent damage, following the judgment in Ross v Lyjon Company Limited (23rd September 2016, Liverpool County Court).

We would like to take this opportunity to wish our warmest regards to all members of IRLA and invite you to contact the directors here at BC Legal, Boris Cetnik or Charlotte Owen with any comments, feedback or questions that you may have.
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Slater & Gordon Record Annual Loss

Following Slater & Gordon’s (S&G) disastrous first half results, released earlier this year showing a loss of A$958.3m, its full annual results have been published and contain a record $1bn loss over the 2015/16 financial year.

The FY16 results, filed with the Australian Stock Exchange (ASX) earlier this week, states the second half reported net loss after tax to be $59.3m, which, whilst less than the reported first half loss of $958.3m, results in an overall full year net loss after tax of $1,017.6m. The announcement states, ‘the primary driver to this was the first half goodwill impairment charge of $814.2m’.

This write off of goodwill was associated with the firm’s acquisition of Quindell’s professional service arm as we discussed in editions 131 [here] and 137 [here] of BC Disease News.

The announcement also indicates that the significant restructuring carried out by S&G operations in the UK over the last six months, which included a reduction in both operating sites and total headcount, has resulted in improvements in financial performance in the second half of the year with 72% of fee and services revenue now coming from the UK. The announcement suggests that this restructuring plan is due to be finalised by early 2017 and could cost as much as £19m, including consultancy fees, property transactions and redundancy payments.

The announcement also outlines the effect that Brexit has had on the firm’s financial position, stating that ‘net debt at 30 June 2016 is expected to be $682.3m, noting there has been a material favourable foreign exchange translation impact with the post Brexit weakening of the GBP’. In short, now that the AUD’s purchasing power is greater against the weakened GBP their overall debt has reduced.

Whilst S&G shares are no longer at their all-time low of $0.22 with an increase to $0.42, they are nowhere near their highs of $7.85 in 2015.

Elsewhere, Shine Corporate, another Australia-listed personal injury law firm has reported that it has no intention of expanding into the UK whilst reforms in the personal injury market remain a possibility.1

It has been thought since 2000 that Shine Corporate had designs on UK expansion, however, last November, following the announcements in the Autumn Statement of the former Lord Chancellor, George Osborne, it assured the ASX that it had ‘no exposure’ to the UK market.

This is another indication that the personal injury market is waiting with bated breath over the potential reforms announced last year which are yet to be implemented.

Rise in Mergers Due to PI Reforms

A leading accountancy firm, Armstrong Watson has reported that they are seeing more mergers and acquisitions amongst personal injury law firms than ever before.2 It is thought that this is due to a raft of personal injury reforms which have made it harder for law firms to operate at a profit.

A legal sector partner at the accountancy firm said:

‘A lot of the activity is driven by challenges in personal injury. There are a lot of pressures being put on PI firms because of recent changes including banning referral fees and the ability to recover success fees from losing parties. There are firms where the average income per case is lower than their acquisitions’.

It has been predicted that this level of mergers in the personal injury market will continue for some time.

Prison Sentence for Insurance Fraudster

A man who brought a fraudulent personal injury claim for a road traffic accident he was never involved in, has received a prison sentence of eight months for contempt of court.

Mr Kevin Hooper claimed that he was involved in the accident in March 2014 which concerned a collision between a VW Transporter and a local council vehicle. There was no issue as to liability and the insurance claims were subsequently settled. Mr Hooper, alongside four other men (one of which was his partner’s nephew), then brought personal injury claims claiming to all have been passengers in the VW at the time of the accident. The insurer, Zurich, received the claims and after considering the statement provided by the driver of the council’s vehicle, decided that there was no possibility that the four men had been involved in the incident.

Mr Hooper continued to bring proceedings but subsequently discontinued after having evidence put to him by Zurich. The insurer’s solicitors then proceeded to apply for permission to commence committal proceedings. Mr Hooper initially claimed that his solicitor had submitted the claim without his knowledge or consent. However, his solicitor was able to produce a witness statement, signed by Mr Hooper and a telephone recording of Mr Hooper in which he was talking about the claim and his injuries. Following this development, Mr Hooper claimed it was not his voice on the phone call and that he had believed he was signing a statement in relation to another accident which had taken place on the same day in the same location as he was illiterate.

Mr Hooper’s medical records showed no evidence of illiteracy and he could not provide any evidence, either from the driver of the vehicle or any of the other co-claimants alleging to be in the car, that he too was a passenger of the VW.

As a result, Elias LJ found that Mr Hooper was lying and as a result sentenced him to an eight month custodial sentence. In her remarks she said:

‘In the circumstances, you have not helped yourself. I have regard to the fact of the aggravating feature that you have failed to admit anything and have sought to blame your previous legal representatives… You have failed to face your dishonesty and instead have been dodging and weaving. You have sought to embroider your account as the evidence has strengthened. Fraudulent claims are very widespread. They are very damaging to the insurance industry. They are very difficult to detect. They affect the insurance premiums of honest motorists. The court has to accordingly take a strong line’.

NHSLA Attempt to Reduce Defence Costs

It has been reported that the NHS Litigation Authority (NHSLA), has set up its own in-house litigation team in an attempt to reduce its £120.1m external legal costs.3 Notwithstanding, defence costs comprising only 8% of the total costs run up by the NHSLA in 2015/16, this was a 17% increase compared to the 2014/15 period.
The new team has not long been established and will have to pass a 12-month pilot with an analysis of the costs saving effect of the service before a longer term commitment can be made. The NHSLA have said:

‘The litigation team has been established to enable some of the NHS Litigation Authority’s legally qualified staff to act in cases where court proceedings are served. Currently, these cases need to be outsourced to our legal panel’.

This outsourced legal panel consists of 11 law firms and this will not be reduced during the pilot period.

These cost saving measures come at a time when the Government’s proposals on fixed costs in clinical negligence claims are still awaited and claims received by the NHSLA decreased by 5% compared to the period in 2014/15.

IIAC Report on NIHL and Nailing and Stapling Guns

This week, the Industrial Injuries Advisory Council (IIAC) has published an independent report on noise induced hearing loss (NIHL) and work with nailing and stapling guns.

The IIAC is an independent statutory body that advises the Secretary of State for Work and Pensions in Great Britain and the Department for Social Development in Northern Ireland on matters relating to the Industrial Injuries Scheme. The Scheme, Industrial Injuries Disablement Benefit (IIDB), provides compensation that can be used for matters relating to the Industrial Injuries Scheme. The IIAC is an independent statutory body that work with nailing and stapling guns.

The Council relied predominantly on one piece of research from the Health and Safety Executive (HSE). The HSE conducted an investigation into the noise emission levels, which were measured on a sample of 11 new, non-electrically powered tools: six nailers, three staplers, one bradder and one corrugated fastener. Current noise emission tests were applied; measurements were taken under standard laboratory conditions, though field conditions were also simulated.

Findings were related to the levels specified in the Noise at Work Regulations in relation to hearing protection. Correspondence with HSE’s specialist inspector has established that exposures from some of the tested tools might reach >98 dB (A) averaged over 8 hours working day.

Earlier this year, the Council received an MP’s query regarding whether work entailing use of nailing and stapling guns should be added to the list of ‘prescribed’ exposures within NIHL. This triggered a review of the research literature into fastener driving tools i.e. nailing and stapling guns.

The Council stated:

- Ought to be treated, having regard to its causes and incidence and any other relevant considerations, as a risk of the occupation and not as a risk common to all persons; and
- Is such that, in the absence of special circumstances, the attribution of particular cases to the nature of the employment can be established or presumed with reasonable certainty. So, a disease may only be prescribed if there is a recognised risk to workers in an occupation, and the link between disease and occupation can be established or reasonably presumed in individual cases. Is epicondylitis a prescribed disease?

NIHL is a prescribed disease for the purpose of the IIDB scheme and currently includes exposures from band saw, circular saws, cutting discs to cut metal, pneumatic percussive tools to drill rock in a quarry, amongst others).

To make additions to the list of exposures IIAC generally seeks evidence that workers have been exposed to noise levels over 98 dB(A) averaged over an 8 hour working day.

The HSE report notes that a number of uncertainties were identified as a result of the investigation. In particular:

1. There is little or no information on how representative the tested tools were of non-electrically powered fastener driving tools in use nationally. Beyond the 11 non-electrically powered tools tested, no other data were found from published sources or evidence known to the HSE.

2. No data was provided for electrically powered fastener driving tools, and no further information was found on this.

3. No data was identified on noise levels arising from earlier generations of fastener driving tools.

4. Noise levels vary considerably in the field – e.g. between tools, between operations (e.g. patterns of firing and actuation), and according to the materials into which staples and nails are sunk. Risk of NIHL is thought to relate to the average sound intensity on a logarithmic scale where 3dB of difference represents a doubling of intensity. In the HSE report differences between tools and tasks in simulated field conditions amounted to about 15 dB, corresponding to a 32-fold variation in sound intensity.

5. In practice, there is likely also to be considerable variation in the number of times workers fire nailing and stapling guns. The Council has found no empirical data on typical usage patterns and frequencies (e.g. how likely users would be to fire 6,300 to 25,000 shots/day over extended and sustained periods).

The HSE’s report gives an indication that extensive and sustained use of nailing and stapling guns might sometimes lead to noise levels comparable to those for other tools already prescribed (the prescription threshold), but it remains unclear how often and in what circumstances this might happen. In addition to this the IIAC noted that the current prescribed exposures for NIHL have unspecified durations. For nailing and stapling guns it would appear necessary to specify a pattern of use which is not currently possible.

After reviewing all evidence available on this subject, and the various uncertainties, the IIAC decided not to make any recommendations for changes to the list of prescribed exposures for NIHL.

To read the full IIAC report, click here.

Solicitors Facilitating Fraud

Earlier this week on BBC Radio 4’s Today programme, Director of the Association of British Insurers (ABI), James Dalton, suggested that the rise in fraudulent claims were being driven by solicitors. He was being interviewed following the publication of data by the ABI that said in 2015, insurers detected more than 130,000 fraudulent claims, equivalent to 2,500 a week, up 6% from 2014. The full publication can be accessed here.

He stated during the interview that: ‘as the industry has got better at cracking down on fraudulent whiplash claims and motor claims, claimants and their lawyers have moved their attention to liability claims’.

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As a result, there has been a 36% increase in fraudulent slip and trip claims last year, he said.

Catherine Dixon, chief of the Law Society has said that she does not accept this proposition and stated:

‘Quite the contrary, solicitors are helping to support people who have been harmed through no fault of their own to secure access to justice and receive the compensation they are entitled to in law to help them recover and rebuild their lives. If there is a concern that a claim is not genuine then such a claim should be defended and no compensation paid. We would encourage the ABI to work more closely with solicitors to identify and eradicate fraud while ensuring that those who are entitled to compensation are paid fairly and properly’.

Meanwhile the Government’s consultation regarding the next round of PI reforms are still awaited and it has been suggested that if the rise in the small claims limit for PI to £5,000 and removing the right to claim general damages for ‘minor’ soft tissue injuries were implemented insurance premiums would reduce by an average of £43.3

There has been an increasing focus on insurer fraud in the past month and it is thought that any further rise in premiums may see this increase.

**Lawyers Condemn SRA Plans to Lift Cold-Calling Ban**

This week, personal injury lawyers have warned that the Solicitors Regulation Authority’s (SRA) plans to lift a ban on cold-calling may encourage the more underhand elements of the profession.6

An SRA regulation is currently in place, which prevents personal injury lawyers from making unsolicited approaches in person, or via telephone, towards members of the public. If the ban were to be lifted, the Association of Personal Injury Lawyers (APIL) has said that some solicitors would be able to contact people without their permission.

The SRA’s plans are in line with their plans to slim down the handbook, which they claim will widen access to justice. The Law Society has said the proposals have serious implications for client protection, legal professional privilege, professional supervision, competition and the standing of the solicitor profession.

APIL has previously campaigned for a complete ban on cold-calling, across the claims sector. President of APIL, Neil Sugarman, has commented that most solicitors ‘would not dream’ of cold calling, but we must legislate for those who would. He further added:

‘We are currently in the middle of an epidemic of cold calling for personal injury claims which exploits vulnerable people. We at APIL have consistently called for claims management companies to be banned from cold calling for personal injury, in order to raise the bar to reflect what – quite rightly - is expected of solicitors. We need to do more – not less – to get rid of the scourge of cold calling for personal injury.’

Simon Trott, a founding member of the ethical marketing charter, has commented, saying:

‘This [change to the handbook] opens consumers up to receiving thousands of unsolicited calls from law firms – undermining the considerable progress that has been made by government and regulators in this area and putting the reputation of the legal sector at risk.’

In edition 141 of BC Disease News (here), we reported how a CMC was fined £250,000 by the Information Commissioner’s Office for making 17.5 million automated calls. Unlike solicitors, CMC’s are not forbidden by any regulatory body from making cold calls, however, the way they do so is regulated.

In May, it was reported that APIL was set to launch a campaign to persuade the government to ban claims management companies (CMC’s) from cold-calling consumers over potential claims. This ban would have brought CMC’s in line with solicitors.

Lifting the ban on cold-calling would undoubtedly have adverse effects on the reputation of lawyers and, more specifically, personal injury solicitors.

The SRA are welcoming feedback on the handbook proposals and have urged all those with responses and comments to submit their views by 21st September 2016.

**Expansion of Fixed Costs in Civil Litigation**

In last week’s edition of BCDN, we reported on the Ministry of Justice consultation paper which has been described as a ‘vision statement’ for the future of the justice system.7

It was confirmed in this report that the Government is planning to invest more than £700 million to modernise courts and tribunals with their ultimate goal being cited as ‘a courts and tribunal system that is just, and proportionate and accessible to everyone – a system that will continue to lead and inspire the world’.

There was an entire chapter of the report dedicated to the civil courts in which the main proposal outlined was the intention to extend fixed fees ‘to as many civil cases as possible’.

The report states:

‘More needs to be done to control the costs of civil cases so they are proportionate to the case, and legal costs are more certain from the start. Building on earlier reforms, we will look at options to extend fixed recoverable costs much more widely, so the costs of going to court will be clearer and more appropriate. Our aim is that losing parties should not be hit with disproportionately high legal costs, and people will be able to make more informed decisions on whether to take or defend legal action’.

These proposals follow calls from the senior judiciary, such as Lord Jackson, to impose fixed fees across the fast-track and ‘lower reaches’ of the multi-track. Lord Jackson in particular recommended earlier this year that fixed costs should apply to all claims valued up to £250,000. Further details on these proposals can be found in edition 126 of BC Disease News here.

Since this report, the Law Society has hit out at the Government stating that these plans are ‘totally inappropriate’ as limiting recoverable costs on more complex cases would threaten access to justice.8 In particular, Law Society president Robert Bourns stated that ‘…fixed costs for higher value claims can be prejudicial and disproportionately disadvantage those on lower incomes and the vulnerable’.

However, he did agree that fixed costs for low-value claims could be appropriate if set at the right level as they can provide certainty for both sides in litigation and avoid protracted disputes
about the level of costs.

Alongside these proposals for fixed costs were plans to digitise the courts. The report states:

‘We will speed up resolution as we replace paper and post with digital working: currently, a “fast track” claim with a value between £10,000 and £25,000 takes 11 months to be resolved. Under our new digital model, cases will be handled faster and in a more convenient way, improving the experience for everyone making and defending claims in the civil courts.’

Both the Law Society and the Bar Council have indicated their discontent with these plans and have said they should be treated with caution. It has been suggested that plans to bring courts online would create a two tier justice system that may result in a system providing a different type of justice to claimants and defendants, depending on the size of the claims.

It was said within the report that there would be further consultation on these proposals. We will continue to stay abreast of any developments.

The full report can be accessed here.

Slater and Gordon to Sue Quindell

We outlined in edition 131 of BC Disease News how the acquisition of Quindell’s professional services division by Slater and Gordon (S&G) in early 2015, significantly contributed to its reported £777m loss and a nosedive in its shares from a high of $7.85AUD per share to its current $0.38AUD. Not long after this acquisition, Quindell was placed under investigation by the UK’s Serious Fraud Office over its past accounting practices. S&G was also hit in November 2015 when the UK government announced plans to limit volumes of personal injury claims.

It has now been reported that S&G intend to sue Quindell, now known as Watchstone Group.9 In an announcement made to the Australian Stock Exchange earlier this week, S&G advised that it intends to bring claims against Watchstone Group Plc, arising from the purchase of Quindell’s Professional Services Division. The share purchase agreement requires S&G to notify Watchstone as soon as reasonably practicable after it has formed the view that it may have a claim, according to the announcement.

In response, Watchstone Plc made an announcement to the London Stock Exchange stating that, ‘[i]t does not believe that there are grounds for a claim to be brought and will defend it robustly’.

Watchstone also said it ‘conducted a professional and transparent disposal process’ and allowed S&G the chance to complete an ‘extensive and detailed due diligence process’ on the acquisition.

Elsewhere, S&G is being sued in Australia by investors hit by the fall in the share price, while Your Legal Friend, also known as Camps Solicitors, is putting together a similar group action on behalf of investors in Quindell in the UK.

SRA Confirms PI Cold Calling Ban Will Stay

In last week’s edition of BC Disease News (edition 156 here), we reported on personal injury lawyers warnings that the Solicitors Regulation Authority’s (SRA) plans to lift a ban on cold-calling may encourage the seedier sides of the profession and have adverse effects on the reputation of personal injury solicitors. These fears have now been dispelled by the SRA, which confirmed the ban will remain intact.10

The Association of Personal Injury Lawyers (APIL) spoke out last week, after the latest draft of the SRA Handbook was published, and it was noted that the current rule banning solicitors from cold-calling was omitted.

A spokesperson from the SRA has recently commented:

‘We have no intention of lifting the ban for solicitors working in personal injury and will make that clear in the final codes’.

Asbestos Fibres Can Move in Soil, Says New Study

Last week, a new study by the Scripps Institution of Oceanography at the University of California, San Diego, showed how asbestos fibres can move through sand and soil.11

The first phase of the study tested the long-held belief that asbestos waste piles are locked in place when topped with soil. The study discovered that when organic acids from plants, fungi and bacteria coat asbestos fibres, they can travel and move through sand and soil.

This obviously raises issues around the safety of asbestos waste piles within soil. Further research continues.

National Accident Helpline Anticipates Expanded Role in PI Claims

This week, the National Accident Helpline Group Plc (NAHL) has told how it expects to play a more pro-active role in the conduct and financing of personal injury cases.

Following the next round of government reforms, which we reported on in edition 153 of BC Disease News (click here to read), NAHL told the stock exchange of its plans to expand its role in the handling of PI cases on 21st September 2016.

Steve Halbert, chairman of NAHL, has told the stock exchange that NAHL has ‘purposefully reduced case volumes’ whilst the current uncertainty in the market (caused by the much anticipated outcome of the Ministry of Justice’s consultation paper) is causing law firms to more carefully consider how much they invest in new personal injury cases.

Mr Halbert has said that, in anticipation of the next round of reforms, NAHL is building closer relationships with its panel law firms, which it expects will give them the opportunity to play a more ‘pro-active’ role in the entire conduct and financing of PI cases.

Crackdown on Counterfeit Cigarettes Containing Asbestos

Essex County Council and Trading Standards are in the process of leading a ‘crackdown’ on traders selling counterfeit cigarettes.

The crackdown comes at a time where councils across the country are warning against the dangers of counterfeit cigarettes, which have been found to contain asbestos, remains of dead flies, mould and even excrement. The Local Government Association has said that fake cigarettes pose a fire risk, as well as several risks to health.
Mark Flewitt, Executive Councillor for Housing, Planning and Public Protection Services in Southend-on-Sea said:

“Some people view selling under-the-counter cigarettes as a victimless crime but Trading Standards teams have previously found counterfeit cigarettes containing asbestos and human excrement in the past, posing a massive risk to anyone smoking them.”
Case Law

Further Judgment On CFA Assignment: Azim v Tradewise Insurance Services Ltd [2016] EWHC B20 (Costs)

We have reported on a string of judgments in relation to the assignment of CFA’s in editions, 109, 110, 111, 130, 132, 137 and most recently, 140 of BC Disease News.12

This week, Master Leonard ruled in Azim v Tradewise Insurance Services Ltd that following the much discussed decision of HHJ Wood in Jones v Spire Healthcare, there was no requirement for there to be a relationship of personal trust and confidence between a particular solicitor and client to allow an assignment of a CFA.

The case of Azim concerned a detailed assessment following the claimant’s acceptance of a £3,500 part 36 offer for a road traffic claim. The claim was transferred from TLW Solicitors to Russell Worth Ltd on 23 July 2014 as part of an agreement reached between the two firms. The claimant was informed of this transfer by way of letter on the same day.

It was down to the court to determine whether the retainer with TLW had been terminated, whether the CFA could be assigned in this way and whether, if so, it was effective. In considering these issues, Master Leonard pointed out that this case was distinguishable from previous judgments such as Budana v Leeds Teaching Hospitals NHS Trust (where the CFAs had not been validly assigned, see edition 129 here), as in that case the assignment occurred before the claimant was informed about it (as the letter informing the client was sent on the same day as the assignment was made). As such Master Leonard stated that there was:

‘no real basis for concluding that the TLW CFA had been, or was, terminated at the point that TLW entered into its 23 July 2014 transfer arrangement with Russell Worth Limited’.

In relation to the requirement of a relationship of personal trust and confidence, the case of Jenkins v Young Brothers Transport Ltd [2006] EWHC 51, was referred to whereby Mrs Justice Rafferty found that a CFA could be the subject of a valid assignment and she stopped short of finding that a relationship of personal trust and confidence between solicitor and client was needed.

As a result Master Leonard concluded that the CFA was validly assigned and the claimant was permitted to recover the costs payable to both TLW and Russell Worth Limited.

Costs Management Threshold Set Aside For £13m Claim

In the last fortnight, it has been reported that Chief Chancery Master Marsh has ordered the case of Signia Wealth Ltd v Marlborough Trust Company Ltd & Anor [2016] EWHC 2141 (Ch) to be costs-managed despite its value exceeding the £10m threshold for compulsory costs management, after its £13m value was not disclosed in the claim form.13

The case concerned the second defendant’s departure from her role as CEO at Signia Wealth Ltd. The first defendant was the trustee of a trust which held shares in the claimant beneficially for the second defendant and for other family members.

The master was initially asked, as a preliminary matter, whether the case should be costs managed.

At the time of the hearing, the claimant had incurred costs of £967,000 and forecast expenditure up to the end of the trial of £1,374,000. The defendants had incurred costs of £776,000 with forecast costs being slightly in excess of £1m. At paragraph 12 of his judgment, Master Marsh stated that:

‘Taking those two budgets at face value, the total costs of this claim are expected to be approximately £4.14 million. Its value is put at £13 million. To my mind it is plain that issues of proportionality are engaged. That is not to say necessarily that the figure I have indicated for the total costs expenditure is disproportionate but proportionality is engaged in the sense that it is an issue which will need to be considered.’

Despite initial uncertainty, Master Marsh stated in his judgment that he had no doubt, at the time of the hearing that this claim is within the costs management regime. His reasons for saying so were that neither the claim form, nor the additional claim, mentioned the value of £13m (which is said to be the value of the shares which were held by the first defendant). Had this figure been mentioned in the additional claim form, then the costs management regime would not have applied.

Following the test set out at CPR 13.15(2) (that the court must be satisfied that if the case were to be taken outside the costs regime, that the claim would be conducted justly and at appropriate cost in accordance with the overriding objective. If not, the claim must stay within the regime), Master Marsh considered five factors to determine whether the case satisfied the test:

1. The nature of the claim: in this instance, Master Marsh considered that the claim was characterised by a ‘considerable depth of ill-feeling on both sides.’ He also considered the serious allegations made against the second defendant and the manner in which the litigation was being conducted.

2. The size of the costs: Master Marsh states at paragraph 16 of his judgement that:

‘a claim which may be conducted through to a trial lasting ten days with a total cost of £4.14 million is an expensive piece of litigation, albeit, as I have remarked earlier today, this claim is broadly in the middle range of size and complexity for this Division in London.’

3. Comparing the costs already incurred against future costs.

4. Inequality of arms between the parties.

5. Having regard to the differences between the budgets.

Master Marsh went on to decide at paragraph 20 that he was unsatisfied that this litigation could be conducted justly and at appropriate cost, without costs management.

Costs Sanctions and CFAs

In the recent judgment of Price v Egbert H Taylor & Company Limited (Birmingham County Court 6 July 2016), the County Court refused to apply the costs protection of QOCS to a claimant after his solicitors wrongly informed the defendants that a CFA was in place three years earlier.14

The letter sent by the claimant to the defendant stated:
The claimant, bringing an action against his employer, lost, and contended that QOCS should apply as the reference to the CFA was made in error in a letter to the defendants. However, the defendants submitted that the claimant should not be allowed to walk away unscathed from this mistake with costs protection as this was a ‘clear and unequivocal representation’ which the defendants had relied upon.

In doing so the defendant outlined the definition of estoppel by representation at Halsbury’s Laws at 47[307] which states:

‘Where a person has by words or conduct made a clear and unequivocal representation of fact to another, either knowing of its falsehood or with the intention that it should be acted upon, or having conducted himself so that another would, as a reasonable person, understand that a certain representation of fact was intended to be acted upon, and the other person has acted upon such representation and thereby altered his position, an estoppel arises against the party who made the representation, and he is not allowed to state that the fact is otherwise than he represented it to be’.

It was submitted that this is precisely what had happened in this case. The claimant asserted that there was a pre-commencement funding arrangement in place and the defendant, as a reasonable person, understood that to be a representation to be acted upon and, inevitably, altered its position based on the representation. As such, the defendant contended that the claimant should not be allowed to subsequently assert that QOCS applied.

His Honour Judge Lopez accepted this argument and found that:

‘I accept the submissions made by Mr White in respect of the issue of estoppel. It is, I find, clear that by the letter of the 30th October 2012 the Claimant’s solicitor made a clear and unequivocal representation to the Defendant and its solicitors that the Claimant had the benefit of a conditional fee agreement, even giving the additional detail in the letter that the agreement provided for a success fee. Further, it is clear that the Defendant and his solicitors relied upon that representation. Therefore, I find that the Claimant is now estopped from asserting that Qualified One-Way Costs Shifting does not apply’.

The claimant was ordered to pay £5,533 costs of the first hearing and the £8,806 costs of the appeal.

The full judgment can be accessed here.

**Claimants Entitled To Default Judgment Where Defence Is Filed Late**

In the recent decision of Billington v Davies [2016] EWHC 1919 (Ch), Deputy Master Pickering illustrated two important principles in relation to the late filing of defences.

Firstly, where a claimant has applied for default judgment in default of the defence they are still entitled to default judgment even if the defence is filed between the date of the application and the date of the hearing. Secondly, an application for an extension of time for filing a defence is dealt with on the basis of CPR 3.9 and Denton principles.

The facts of Billington, were that the First Defendant filed an acknowledgment of service. The defence was due on the 4th January 2016. No defence was served and, on the 11th April 2016, the claimant issued an application for judgment in default of filing a defence. The defendant then served a defence the day before the hearing was due to be heard and at the same time made an application for an extension of time to file the defence.

The defendant submitted that the claimant was not entitled to default judgment once the defence had been filed by virtue of the wording of CPR 12.3(2) which states that:

*Judgment in default of defence may be obtained only –

(a) where an acknowledgement of service has been filed but a defence has not been filed;*

(b) *in a counterclaim made under rule 20.4 where a defence has not been filed, and, in either case, the relevant time limit for doing so has expired.*

The Deputy Master rejected this argument on the grounds that to accept it would be unfair to the claimant’s claim.

‘…the reference to ‘a defence’ in CPR 12.3(2)(a) must be a reference to a defence which has either been served within the time permitted by the Rules or in respect of which an extension of time has been granted. Where a defence is served late, unless and until an extension has been granted, a document purporting to be a defence is not in fact a defence for the purposes of CPR 12.3(2)(a). To this extent, the note at 15.4.2 of the 2016 edition of the White Book is, in my judgment, wrong’.

The note at para 15.4.2 of the White Book states:

‘Filing a defence late will prevent the claimant obtaining a default judgment (see r.12.3). However, the claimant may instead apply for an order striking out the defence under r.3.4(2)(c).’

The Deputy Master also rejected the defendant’s application for an extension of time.

**Expert Shopping and Specific Disclosure**

In the judgment of Allen Tod Architecture Ltd v Capita Property & Infrastructure Ltd [2016] EWHC 2171 (TCC), the court ordered a claimant to disclose its original expert’s notes, preliminary report and other documents setting out his opinion on the issues, as a condition for granting permission to the claimant to rely on a new expert.

The parties had been given permission to call an expert structural engineer. The claimant instructed an expert but lost confidence in him after delays in the production of his report. The claimant instructed a new expert. The defendant sought disclosure of the claimant’s letters of instruction to the original expert and to the new expert, and any report, document and/or correspondence setting out the substance of the original expert’s opinion, whether in draft or final form. The claimant had disclosed the letters of instruction and the original expert’s report, which was supportive of the claimant’s claim.

The claimant submitted that the documents sought by the defendant were privileged and should therefore not be the subject of an order for disclosure. It also argued that it had already disclosed sufficient material, and it had not been guilty of ‘expert shopping’.
In considering this argument His Honour Judge David Grant outlined the following principles he felt were relevant:

(a) the court had a wide and general power to exercise its discretion whether to impose terms when granting permission to a party to adduce expert opinion evidence;
(b) the court could give permission for a party to rely on a replacement expert, but such discretion was usually exercised on condition that the report of the original expert was disclosed. The party seeking permission would therefore have to waive privilege in the first expert’s report;
(c) once the parties had engaged in a relevant pre-action protocol process, and an expert had prepared a report in the context of such process, that expert owed a duty to the court irrespective of his instruction by one of the parties. Accordingly, there was no justification for not disclosing such a report;
(d) the court’s power to impose a condition for the disclosure of the first expert’s report arose irrespective of the occurrence of any “expert shopping”. It was a power to be exercised reasonably on a case-by-case basis, having regard to all the circumstances; (e) the court would require strong evidence of expert shopping before imposing a term that a party disclose documents other than the report of the first expert (such as attendance notes and memoranda made by a party’s solicitor of discussions with the expert) as a condition of giving permission to rely on a second expert.

He did however state that whilst this was only a mild case of ‘expert shopping’ the court could still direct disclosure of material produced by the original expert, in which he expressed his opinion, as a condition of permitting the party to rely on a new expert. Accordingly, the court’s power was reasonably exercised by ordering disclosure of those documents, along with any document in which the expert provided his opinion on the case prior to April 2016, as a condition for the claimant calling the second expert as its witness. To the extent that other material was contained within such documents, it was to be redacted.

S.63(1) Factories Act 1961: Further Case Law

In edition 139 of BC Disease News we provided an overview of the judicial interpretation of s.63 of the Factories Act 1961 following the decision in Smith v Portswood House [2016] EWHC 939.

As a reminder, s.63 requires employers to remove dust or fumes by all practicable measures where the dust was ‘likely to be injurious’ or of a ‘substantial quantity’.

The section states:

“In every factory in which, in connection with any process carried on, there is given off any dust or fume or other impurity of such a character and to such extent as to be likely to be injurious or offensive to the persons employed, or any substantial quantity of dust of any kind, all practicable measures shall be taken to protect the persons employed against inhalation of the dust or fume or other impurity and to prevent its accumulating in any workroom...”

We pointed out that there were two distinct limbs of this test. Firstly, is the character of the dust that the claimant alleges to be exposed to likely to be ‘injurious’ and secondly is the dust of ‘substantial quantity’. We then considered what was meant by ‘substantial’ and whether the visibility of the dust the claimant was allegedly exposed to is sufficient to satisfy the second limb or whether there had to be some method of quantification.

In Smith the claimant alleged that dust would ‘fly up into the air’ and submitted that in the absence of reliable methods of measurement the presence of visible clouds of dust from work processes seemed to be the only method available to make any assessment of the quantities of dust and that as the claimant had described in detail the visibility of the dust, even though it had extraction equipment fitted to it, then if this evidence was accepted, it must also be concluded that there must have been substantial quantities of dust.

HHJ Curran, in Smith, did not accept this conclusion as he felt it came close to reversing the burden of proof. He also felt that there was no evidence of how dense any dust cloud would have to appear to be to satisfy the test of ‘substantial quality’.

As such the approach in the leading decision of McDonald (Deceased) (Represented by Mrs Edna McDonald) v The National Grid Electricity Transmission Plc [2014] UKSC 53, was followed, in that simply stating that there was a presence of dust will not be sufficient. Instead, the judge in Smith adopted the approach of Lady Hale in McDonald and said that one should take the opinions of both experts as to the amount of dust likely to have been given off by the various activities shown to have been carried out in order to establish whether the amount of dust given off was substantial, therefore endorsing the need for a quantitative approach to the term ‘substantial’.

This decision has recently been followed by Prater v British Motor Holding [2016] WL 03947474, in which the claimant had been exposed to asbestos while working as a panel beater between 1958 and 1975. The judge in this case also adopted the two limb approach to s.63. The evidence was that 30-35% of the employee’s work involved exposure to asbestos which was described as being all over his clothing. His clothes were not washed more than once a week and there were no shower facilities. The dust given off was in such quantities ‘as to be visible in the air, including as a haze or smog’ and no steps were taken to reduce the inhalation or accumulation of asbestos dust.

The judge found that on this evidence the only quantitative assessment that could be made, based on a common sense view, was that the quantity of dust exposure during the claimant’s employment was ‘substantial’. It has been suggested that this decision again relies on the frequency of exposure i.e. in this case it was said to have been 30-35% of the employee’s work which shows a frequent and regularly high level of dust in the defendant’s workplace. If this is the case then this would again be consistent with a rejection of the visibility requirement and the adoption of the quantitative approach in McDonald.

Most recently has been the decision of Warne v Vinters-Armstrong Limited [2016] EWHC 1971 (QB), in which the claimant was exposed to asbestos dust during the course of his employment over 50 years ago. He was diagnosed with interstitial lung fibrosis which in the majority of cases is idiopathic but can also be caused by exposure to asbestos and is then known as ‘asbestosis’. The issue in this case was the amount of asbestos the claimant had been exposed to. The judge accepted that 25 f/ml years cumulative exposure would be sufficient to establish that the employer had breached its common law duties to the claimant and as such s.63 was not directly relevant, although some useful insights can still be gleaned from the decision.
The evidence was that exposure took place at the Defendant’s factory for 3 years, as a result of using dustbins full of asbestos to douse fires that were ignited during the production of magnesium. Further exposure to asbestos dust would occur in the 30 minutes during which the resultant mess was cleared. Around 9 fires would occur per year per machine. The claimant operated one machine, and his colleagues the others.

The claimant’s expert who had no practical experience of measuring asbestos exposure outside the context of asbestos litigation found that the act of tipping out the dustbin would result in a peak of 10,000 f/ml. The defendant’s expert on the other hand had been a member of the Committee for Fibre Measurement and so was better able to assist the court with quantifying the asbestos exposure. He found that there would have been a peak concentration of 2,000 f/ml. As a result the judge favoured the defendant’s expert evidence and found that the threshold of 25 f/ml years was not met. The figure was more likely to be below 10 f/ml years, despite the claimant’s evidence of a large amount of visible dust.

Again this is an indication that the court are keen to take a more quantitative and scientific approach to these types of claims. However, it would have been interesting to know whether an argument under the second limb of s.63 would have succeeded in this case as there would have necessarily been a judgment of whether exposure which occurred 9 times per year would have been sufficient to satisfy the quantitative approach to the ‘substantial’ limb of this test (despite the evidence of visibility of dust given by the claimant).

It would appear then that there is currently a focus on the regularity and frequency of any exposure as opposed to the visibility of dust levels.

**Fatal Accidents Act 1976**

**Is Compatible With Human Rights Act 1998**

Last week, the High Court handed down judgment in the case of *Smith v (1) Lancashire Teaching Hospitals NHSFT, (2) Lancashire Care NHSFT, (3) Secretary of State for Justice* [2016] EWHC 2208 (QB). The claim was a challenge to the compatibility of s.1A of the Fatal Accidents Act 1976 with the Human Rights Act 1988.

The Claimant was the surviving opposite-sex unmarried partner of a man who died as a result of clinical negligence. She sued the first two defendants in tort for negligence. The claim included a claim for dependency damages under s.1 of the 1976 Act, to which she was entitled as a surviving unmarried partner who had lived with her former partner for more than two years; but it did not include a claim for bereavement damages.

The FAA requires a tortfeasor who is liable for causing a death to pay dependency damages under s.1 to a person within certain categories of relationship with the deceased to compensate such a person for the financial losses caused by the death. By s.1A it also requires the tortfeasor to pay bereavement damages to the spouse or civil partner of the deceased or, where the deceased was a child who had not reached the age of 18, to the parents of that child.

Dependency damages may be claimed by a person who had lived with the deceased as spouse or civil partner for at least two years at the date of death ("2 year + cohabitee") but not for bereavement damages. The claimant contends in this action that the denial of bereavement damages to her, as a 2 year + cohabitee, after the death of her partner of many years violates her right to respect for her family or private life, or discriminates against her unlawfully on the ground of her status as an unmarried person.

Edis J dismissed the claim. He found that it involved an attempt to impose a positive obligation under Article 8. Article 8 was not engaged. Accordingly, the claim fell at the first hurdle. However, despite this conclusion, Edis J did voice some concerns with the law as it currently stands in this area.

He stated:

‘If 2 years + of cohabitation is a “bright line” rule adequate for s.1, why not for s.1A? If it is important to any degree to ensure that 2 year + cohabitees do not recover bereavement damages from tortfeasors, why does the Secretary of State preside over the 2012 Criminal Injuries Compensation Scheme whereby damages of the same kind are paid out of public funds after a death caused by a crime?’

He also referred to the 1999 Law Commission Report ‘Claims For Wrongful Death’ (Law Com No. 263) which reviewed this area of law and recommended the extension of classes of claimant entitled to bereavement awards and he concurred that this was in need of reform.

He concluded by saying:

‘It is to be hoped that the outcome of this litigation may provoke some further discussion in Parliament for further legislation which might improve the current state of the law. The necessary provision would be short, probably uncontroversial, and would involve very limited additional expenditure’.

Whilst it has been put forward that these comments may suggest further political scrutiny of this area in the future, it should be noted that, The Negligence and Damages Bill, part 2 and 3 of which would have repealed the Fatal Accident Act 1976, has been confirmed as making no more progress in Parliament which suggests a lack of political appetite for reform in this area.

The full copy of the judgment can be found here.

**Court Applies Costs Management to Litigant in Person**

This week, it has been reported that courts have the power to apply costs management to litigants in person (LiP).17

The decision of Chief Master Marsh in *Campbell v Campbell* [2016] EWHC 2237 (Ch), which was handed down last week, deals with some important issues in relation to the costs incurred by a LiP and the nature of costs budgeting in general.

The case involved a commercial dispute between two brothers relating to jointly owned companies.

The claimant in *Campbell* was instructing solicitors when the costs management hearing was ordered, but by the time the hearing took place on 21st July 2016, he had become a LiP. His counsel continued to represent him on a direct access basis. He also had assistance from a firm of solicitors and intended to obtain assistance from junior counsel.

The claimant’s costs budget of 5th August 2016 provided for future expenditure up to the end of trial of slightly in excess of £315,000, having already incurred costs of £547,621. Both sides asked the court to make a costs management order in respect of the claimant’s costs.

In paragraph 1 of his judgment, Chief Master Marsh addressed two issues. Firstly, the extent to which the costs management regime under CPR 3.12 – 3.18 applies to the costs of a LiP, and,
secondly, the scope of LiP costs recoverable under CPR 46.5 where a LiP obtains legal assistance from a solicitor and a member of the bar.

Master Marsh initially stated that the court’s jurisdiction to costs manage a LiP was unclear. After examining several provisions of the CPR, he concluded, however, that he had the power to do so.

Marsh used CPR 3.12(2) as a starting point. CPR 3.12(2) explains the purpose of costs management as:

“The purpose of costs management is that the court should manage both the steps to be taken and the costs to be incurred by the parties to any proceedings so as to further the overriding objective.”

He noted that the objective is expressed in general terms and in no way indicates that a claim involving LiP’s may not benefit from costs management.

Whilst CPR 3.13 expressly exempts LiP’s from the requirement to file and serve a budget, the editors of the White Book 2016 suggest that in spite of this exemption it is open to a LiP to file and exchange a budget if they wish.

CPR 3.15(2) provides that “…the court may manage the costs to be incurred by any party in any proceedings” which, again, gives no indication that different provisions should apply to LiP’s.

The claimant also sought a declaration from the court that the cost of solicitors from whom he intended to seek advice, but not instruct to have conduct of the case, would be recoverable, along with the fees of junior counsel the solicitors would instruct. It was not disputed that the direct access QC’s fees would be recoverable.

Marsh said there was no reason to construe CPR 46.5(3) narrowly so as to prevent a LiP recovering the cost of assistance in the course of their conducting the claim. In paragraph 32 of his judgment, he says:

“The direct access scheme, whether it is used for advocacy or other assistance, provides a litigant in person with expertise which may be essential to be able to progress a claim in an orderly manner and is likely to be of assistance to the court for that reason.

Similarly, it is clearly contemplated that a litigant in person may pay for and recover the cost of ‘legal services’ relating to the conduct of the proceedings. In a complex claim, the litigant in person may wish, for example, to obtain assistance with disclosure or the drafting of witness statements. This is part of the unbundling of legal services contemplated by Lord Woolf.”

This judgment has affirmed that in appropriate cases, courts have the power to costs budget the costs of LiP’s. This is most likely to apply where the case is complex/the costs are large and the LiP was previously using legal assistance. Courts can make a costs management order in relation to LiP’s costs, and LiPs can recover costs where they obtain assistance from lawyers short of them having conduct of the case.
Assignment of Conditional Fee Agreements: A Review

Introduction

A significant issue for the consolidating claimant PI & Disease market is whether a Conditional Fee Agreements (CFA’s) can effectively be assigned between solicitors firms. This issue might arise, in the context of a firm selling its work, becoming insolvent, and the work being sold off by a liquidator to another firm, or a solicitor simply moving firms and taking the client with them.

We have discussed the assignment of CFA’s extensively within BC Disease News but particularly in editions, 129, 140 and 144.

In this week’s feature we provide some background to the assignment of CFA’s, a recap on the flurry of recent judgments in this area and also some practical guidance for the most common scenarios in which assignment of CFAs can cause controversy.

Why Does It Matter?

Whether or not a CFA has been validly assigned to a new firm is an important issue because to be able to transfer a pre-1st April 2013 claim with a conditional fee agreement, and retain the recoverable success fee within that agreement, potentially makes the claim far more profitable than having to make a new conditional fee agreement with a new firm of solicitors. This is because from 1 April 2013 alongside the implementation of The Legal Aid Sentencing and Punishment of Offenders Act (LASPO) 2012, where claimants fund their litigation via CFAs and/or after-the-event (ATE) insurance, and where a pre-existing funding agreement has not been entered into, the CFA success fee and ATE premium are no longer recoverable from the losing defendant if the case is successful.

Additionally, it is important to be aware of invalid assignments of CFAs between claimant solicitors, because where a CFA is held to be invalid, costs will almost invariably be disallowed in full according to the ‘indemnity principle’. This is because an invalid CFA is essentially an unenforceable agreement between practitioner and the claimant and, as such, the claimant is not liable to remunerate the instructed practitioner for work undertaken. Intrinsically, if the claimant is successful and is therefore entitled to recover his costs from his opponent, the indemnity principle says this is limited to the extent of his liability to his instructed practitioner for those costs which in the case of an invalidly assigned CFA would be nil. Thus the losing opponent may only be liable for certain disbursements incurred and paid by the claimant.18

Due to the trend in claimant solicitors’ firms taking on large amounts of CFAs pre-LASPO in order to secure the benefit of the success fee and subsequently not being able to competently handle them, we have recently seen large books of such work being sold between firms. In this instance, defendants have been disputing whether pre-April 2013 CFAs can be assigned to new solicitors to maintain the recoverability of the additional liabilities and this has caused a raft of often conflicting judicial commentary. These decisions are important as tens of thousands of pre-LASPO CFAs have been bought up by larger practices on the basis that the recoverable success fees and ATE premiums would be preserved.

Background

It is important to consider the law that governs the assignment of CFAs which are essentially a contract between a solicitor’s firm and its client. It has been said that CFAs should be regarded as personal contracts, as it is a contract for the solicitor’s firm to provide a service personally to the claimant and as such is not the same as a contract to purchase goods.19

There are a number of decisions which confirm that a personal contract is not capable of assignment, however, even if it is deemed to be, there remain a number of potential issues. For example, all contracts have what are termed benefits and burdens. CFAs are no exception to this and in a solicitor-client retainer the benefit of the contract from the solicitor’s point of view is the right to payment from the client and the burden on the solicitor is the obligation to work for the client.

The general rule (subject to very few exceptions) is that the benefit can be assigned but the burden cannot.20 Where both parties to an existing contract and a new party agree that the new party should take over the benefits and burdens of a contract that is not an assignment but is instead known as a novation i.e. the old contract has been rescinded. If the old contract is to be replaced with a new one this must be compliant with post- April 2013 CFA’s and as such will not allow the recoverability of success fees or ATE premiums from the losing opponent. If there is no alternative contract then on the face of it there is no valid retainer and so no recovery of any costs save for certain disbursements.

Case Law Recap

The first case which started the controversy over CFA assignments was Jenkins v Young Brothers Transport Ltd [2006], in which it was said that a CFA could be validly assigned despite the fact that it was a contract for personal services. The case concerned a pre-LASPO CFA where the solicitor had moved from Firm A to Firm B and then again to Firm C and the CFA was assigned with each move.

The defendant argued that as a matter of contract law, a contract for personal services such as a CFA could not be assigned because it was only possible to assign the benefit and not the burden of the contract. As a CFA comprised the benefit of being paid and the burden of doing the work it was submitted that the CFA could not have been assigned and that there should therefore be no costs for them to pay.

The High Court in this instance disagreed and in doing so it relied upon the ‘conditional benefit principle’ which is an exception to the general rule that the burden under a contract for personal service cannot be assigned. The Court held that as the claimant had followed the individual solicitor from firm to firm, that this indicated that he was motivated by ‘personal trust and confidence’ vested in that particular solicitor and so this was sufficient to justify the burden being assigned.

As such the burden was assigned and Firm C had achieved a win for the purposes of the CFA, the claimant was liable for the success fee and therefore entitled to recover this from the losing defendant.

Whilst Jenkins would appear to establish an exception to the assignment of CFAs it was said within the judgment that it should not be interpreted beyond the scope of its own facts and subsequent case law has indicated that the courts take a robust stance in refusing to extend this principle beyond Jenkins.

In Budina v Leeds Teaching Hospitals NHS Trust [2016], the court did not consider...
directly whether or not a CFA can be validly assigned but it did provide some important points of principle in relation to assignment.

The facts of this case were that Firm A ceased carrying out personal injury work and implemented a process of unilateral file transfer to Firm B. All the files being transferred were subject to pre-LASPO CFAs and all claimants were told of the transfer via a letter which did not require their consent. Firm B contended that these CFAs had been assigned to it from Firm A.

The court held that the transfer without the consent of the claimants amounted to the termination of the retainer by Firm A. As such, it was not possible to assign a terminated agreement and thus neither firm were entitled to be paid under the pre-LASPO CFA. However, in this case Firm B had entered into a ‘fall-back’ post-LASPO CFA and so could recover all costs from the paying party save for a success fee. Firm A, having breached the CFA, was entitled to recover nothing.

Jones v Spire Health Care [2016] concerned a similar bulk transfer of files but Firm A had obtained the claimant’s consent. The claimant went on to succeed in her action with Firm B and costs were sought accordingly.

The losing defendant submitted that a novation of the CFA had taken place on the premise that Jenkins did not apply as there was no relationship of ‘personal trust and confidence’. Firm B however, contended that Jenkins was authority for the proposition that CFAs could be assigned and used this to support its argument that their CFA was so assigned.

The court at first instance agreed with the defendant and distinguished Jenkins, on the basis that the client’s movement from Firm A to Firm B was in no way motivated by personal trust or confidence – rather convenience as Firm A had entered administration. Thus the CFA was not assigned from Firm A to Firm B. However, this decision was appealed and HHJ Wood QC, sitting in Liverpool County Court, held that the assignment was valid. The judge held that Jenkins established a general principle that both the benefit and the burden of a CFA can be validly assigned from one firm to another; and that this principle is not restricted to the situation where the client’s agreement to the transfer is motivated by a relationship of personal trust and confidence with the fee earner who is moving from the first to the second firm.

This judgment was followed shortly by Webb v London Borough of Bromley [2016], which also concerned a pre-LASPO CFA between Firm A and a claimant. Firm A ceased trading in January 2014 and the claimant was contacted by Firm B. The claimant consented to an assignment of the CFA between herself and Firm A to Firm B (who did not have a ‘fall-back’ CFA). The claimant was successful in her action and as such sought Firm B’s success fee from the losing defendant.

The Court found that because the claimant had consented to the assignment there had been a novation, as opposed to an assignment of the CFA. The judge stated that:

‘If it had been an assignment there would have been a letter or telephone call to say that the CFA was now with Firm B and that hopefully the claimant would be happy with this but if she was not she would have to go elsewhere’.

The post-LASPO novated CFA was created on terms identical to those in the original CFA and as the success fee was not compliant with the stipulated cap the same was held to be unenforceable.

In the absence of a ‘fall-back’ CFA, Firm B was unable to recover its costs.

The Court refused to accept that Jenkins applied. Master Rowley specifically stated that:

‘In case I am wrong that a novation has occurred, I should deal with the question of whether a valid assignment had taken place. For the reasons I have just given, I do not accept that the claimant reposed her trust and confidence in Mr Davies in a manner akin to that of Mr Jenkins and his solicitor’.

This was followed by the decision last week in Azim v Tradewise Insurance Services Ltd [2016] EWHC B20 (Costs). The file in this case was transferred from Firm A to Firm B on 23 July 2014 as part of an agreement reached between the two firms. The claimant was informed of this transfer by way of letter on the same day. That letter explained that, due to staff reductions, Firm A were transferring the claimant’s case to Firm B on the same terms as the existing CFA and they enclosed a Form of Consent which the client subsequently signed.

The court distinguished the facts in Budana and found that the letter had not terminated the CFA as the CFA was transferred before the claimant knew about it. Additionally, the court found that there was no requirement for notice of assignment to be given in advance of the assignment. The defendant’s argument that Jenkins established a need for a relationship of ‘particular trust and confidence’ between solicitor and claimant in order for the burden of a personal contract to be assigned, was rejected. The Master followed the approach in Jones and saw no obstacle to a genuine arm’s length assignment of a CFA.

It would appear then that Jenkins has caused some confusion over whether there is a need for a relationship of ‘personal trust and confidence’ between a solicitor and a claimant in order to establish that the burden of a CFA has been assigned. Whilst it is now known that Jones will not be proceeding to the Court of Appeal, it is thought that the case of Budana will be. In any event, this is clearly an area of law that requires clarification.

Until then, we have provided the following summary of the case law so far:

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**Conclusion**

It is maintained that whilst the court in *Jenkins* did not out rightly address the issue of whether CFAs could be validly assigned where there was no relationship of ‘personal trust and confidence’, this should not be allowed to be interpreted and used by claimant solicitors as support for a blanket acceptance of the assignment of CFAs. The use of *Jenkins* in this way is a manipulation of that decision and defendant practitioners, on behalf of insurers, should continue to challenge the assignment of CFAs where this is the case. The issue will continue to be a prominent one as the claimant PI & Disease market continues its consolidation.
Revisiting *Wignall v Secretary of State for Transport: Issues of Causation*

**Introduction**

In edition 153 of BC Disease News we considered the recent NIHL judgment of *Wignall* and discussed the implications this had for common law dates of knowledge and implementation periods in NIHL claims. This week we look again at the judgment in relation to the court’s findings on causation.

**Background**

NIHL has a characteristic audiometric pattern consisting of bilateral ‘notches’ or ‘bulges’ in hearing thresholds at 4 kHz – or 3 or 6 kHz\(^2\) (or any combination of these frequencies). If the noise exposure continues the notches/bulges deepen and spreads to affect the adjoining frequencies.\(^2\) It is generally accepted that NIHL usually begins around 4 kHz. At first it may be asymptomatic but if it spreads into the lower frequencies of 3 and 2 kHz, individuals begin to complain of hearing disability.\(^2\) In Scott-Brown’s Otolaranyngology,\(^2\) Dr Alberti states that the loss at 4 kHz usually begins to progress at a steady rate for about 10 years and then slows greatly. However, the loss eventually spreads into other frequencies and it may take up to 30 years to involve frequencies of 1 kHz and below to any great extent. This will lead to a notched sensorineural hearing loss centred about 4 kHz, gradually becoming a steeply sloping loss starting at about 0.5 kHz. This is illustrated in the following audiogram:

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The 2012 Guidance Statement on the principle characteristics of occupational NIHL authored by the American College of Occupational and Environmental Medicine provides a useful outline of what NIHL typically looks like: \(^2\) In relation to the frequencies affected, it states:

- It is always sensorineural, primarily affecting the cochlear hair cells in the inner ear;
- Its first sign is a ‘notching’ of the audiogram at the high frequencies of 3, 4 or 6 kHz with recovery at 8 kHz;
- In early NIHL, the average hearing thresholds at the lower frequencies of 0.5 kHz, 1 and 2 kHz are better than the average thresholds at 3, 4 and 6 kHz, and the hearing level at 8 kHz is usually better than the deepest part of the notch.

This condition is relatively rare and is thought to have a genetic cause rather than indicative of NIHL. It is very rare for cookie bite hearing loss to be caused by damage to hearing. Those suffering from this condition will experience difficulty hearing the mid frequencies but not the low and high frequencies.

As such, it is established medical convention that where hearing loss has been caused by exposure to excessive noise there will be maximal damage at the frequencies of 3, 4 and...
6 kHz. Where an audiogram is showing maximal loss at 1 or 2 kHz, this kind of loss is very rarely caused by damage and is more likely a genetic condition idiopathic to the individual.27

However, in the recent decision of Wignall, the contrary was found.

Wignall v Secretary of State for Transport

We outlined, in detail, the facts of the case in Wignall in edition 153 of BC Disease News and as such for the sake of brevity we will not repeat those in any great detail, except to remind readers that the parties in this case were in dispute as to limitation, breach of duty, causation, quantum and apportionment of damages. The exposure in this case was said to be between 1957-1968.

The court posed two questions, firstly was the deceased’s hearing loss, revealed in 2 audiograms taken in October 2012 and February 2014, noise induced? Secondly, if it was, was the loss attributable to the defendant’s breach of duty?

The claimant relied upon the medical opinion of Mr Zeitoun, Consultant Otolaryngologist, Head & Neck Surgeon and the defendant relied upon that of Mr Jones, Consultant Surgeon formerly of the Department of Otolaryngology, Head & Neck Surgery. For the purposes of Mr Zeitoun’s medical report a pure tone audiogram was obtained on 18th October 2012 and for the purposes of Mr Jones’ report a further pure tone audiogram was obtained on 18th October 2012 and for the purposes of Mr Jones’ report a further pure tone audiogram was obtained on 18th February 2014. The appearance of these audiograms were similar and both demonstrated a hearing loss at the 2 kHz frequency which was greater than that at the 3 kHz and 4 kHz frequencies-particularly in the right ear.

Both experts agreed that this was an unusual appearance for NIHL however, Mr Zeitoun claimed that he would expect to see and had seen such a presentation in 5 to 15% of NIHL cases. In order to show that NIHL can affect the 2 kHz frequency Mr Zeitoun relied on the text book, Scott-Brown’s Otolaryngology, as mentioned above, which states:

‘Noise-induced permanent threshold shift usually commences between 3 and 6 kHz, often around 4 kHz, and gradually worsens at that frequency and spreads into neighbouring frequencies. At first it may be asymptomatic but if it spreads into the lower frequencies of 3 and 2 kHz complaints begin’.

He also pointed out that the CLB Guidelines also refer to involvement at 2 kHz in some cases.

Mr Jones disagreed and expressed the opinion that the audiograms did not show evidence of NIHL at all because, as a point of principle, hearing losses most marked at 2 kHz are not evidence of NIHL. In doing so, he relied upon the position paper, also mentioned above, of the American College of Occupational Medicine, which summarises the typical features of NIHL and emphasised the sentence ‘there is always far more loss at 3, 4 and 6 kHz than at 0.5, 1 and 2 kHz’ and ‘the greatest loss usually occurs at 4 kHz’.

Mr Jones also relied upon the publication called ‘Advances in Noise Research ’ (1998), written by Dr Luxon, which he claimed endorsed the American criteria to the same general effect. However, HHJ Butler pointed out that Dr Luxon also accepts that NIHL ‘can begin in frequencies other than the 3-6 kHz region’ albeit ‘this is rare’.

Additionally, Mr Jones claimed that if one was to use the CLB Guidelines on such an atypical loss that it would result in a ‘false diagnosis’.

Mr Zeitoun did not agree with Mr Jones and insisted that whilst the audiogram was atypical it was still within the methodology of the Guidelines. However, he did accept that if the atypicality had included the 1 kHz frequency he would then not have diagnosed NIHL.

His Honour Judge Butler did recognise that the Guidelines indicated that the normal or typical presentation is of a measurement of hearing threshold level at 3, 4 or 6 kHz which is at least 10 decibels greater than that at 1 or 2 kHz. However, he emphasised at para 64 that:

‘It is in my judgment important to bear in mind that guidelines are just that. They are guidelines not a straightjacket. The express purpose of the guidelines is said (page 281) to be:

“...to assist in the diagnosis of noise-induced hearing loss (NIHL) in medico-legal settings. The task is to distinguish between possibility and probability, the legal criterion being more probable than not. It is argued that the amount of NIHL needed to qualify for that diagnosis is that which is reliably measurable and identifiable on the audiogram. The three main requirements for the diagnosis of NIHL are defined: R1, high frequency hearing impairment; R2, potentially hazardous amount of noise exposure; R3 identifiable high frequency audiometric notch or bulge”’.

HHJ Butler also acknowledged that the guidelines mainly referred to ‘uncomplicated cases of NIHL’, or ‘typical’ NIHL alongside ‘normal’ age-associated hearing loss (AAHL). However, he concluded that:

‘In my judgment, this plainly does not mean that the guidelines cannot be applied to complicated cases where the NIHL is atypical or the AAHL is abnormal, guidelines should recognise the atypicality or abnormality’. merely that the expert using the guidelines should recognise the atypicality or abnormality’.

He went on to say:

‘No doubt in some cases the atypicality and the degree of abnormality would be such as to prevent an expert using the guidelines but I am satisfied on the balance of probabilities that Mr Zeitoun did not find himself in that position. In my judgment he has interpreted the guidelines as a guide not a rigid rule’.

In conclusion, HHJ Butler pointed out that Mr Jones’ position that NIHL could never be diagnosed where there was maximal loss at 2 kHz in any circumstances, did not accord with the publications. He noted that in the CLB Guidelines, Dr Luxon’s publication and Scott-Brown’s Otolaryngology text book, it had been said that maximal loss at 2 kHz in NIHL claims was rare.

Additionally he stated that if the CLB Guidelines were to be accepted as the definitive approach in the medico-legal context of NIHL claims then it had to be accepted that whilst atypical, maximal loss at 2 kHz can sometimes, in a small proportion of cases, lead to a finding of NIHL.

As such, HHJ Butler found that Mr Zeitoun’s evidence was preferred stating at para 70 that:

‘For all the foregoing reasons, I found the opinion of Mr Zeitoun to be logically consistent and his use of the guidelines and his approach to the audiogram results to accord with the orthodox medico-legal approach. Each case depends on its own facts and the quality of the evidence adduced. In the context of this present case, on the evidence presented to me, I reject Mr Jones’ opinion that where the greatest loss is at 2 kHz, NIHL cannot ever properly be diagnosed. I accept the opinion of Mr...’
Zeitoun held although the deceased was atypical and his NIHL in his case could properly be diagnosed, albeit as a rare or minority cases, subject to proof of hazardous noise exposure has been proved. The position is that, on the facts of this case, such exposure has been found proved.’

HHJ Butler, also rejected Mr Jones’ alternative argument that the cause of the hearing loss in both audiograms was idiopathic or had a genetic cause which was currently beyond scientific explanation. As such it was found that on the balance of probabilities the deceased’s employment was causative or materially contributory of part of his NIHL.

Conclusion and Comment

Most, if not all, of the medical and scientific literature on NIHL concurs that where typical occupational noise exposure gives rise to NIHL, then such losses are maximal at 4 or 3 or 6 kHz. However some of the literature also acknowledges a possibility, in exceptional circumstances, of maximal loss at 2 kHz. Although generally for the hearing at 2kHz to be affected by NIHL it would take over twenty year’s exposure, high noise levels and a sensitive ear for this to happen. As this was not the case in Wignall, it would seem more logical that the loss at 2 kHz was therefore not due to noise exposure but instead idiopathic i.e. of unknown origin.

As was recognised in Wignall, such a dispute as this is often determined on the evidence before the court. As such it is important that when faced with such a dispute, there is a focus on providing evidence to show that the individual does not fall into the ‘rare’ category and a specific alternative causative explanation for the hearing loss is put forward.

Osteoarthritis and Lower Limb Disorders: A Review of Occupational Risks

Introduction

Lower Limb Disorders (LLD) is an umbrella term for a range of musculoskeletal disorders affecting the hips, knees and legs one of which is osteoarthritis (OA). Earlier this year, the Industrial Injuries Advisory Council (IIAC) published an information note on OA of the knee, and work in the construction industry.

This review is one of four published by the IIAC on OA since 2003 as its evidence of causal association with various occupations has developed. In this feature we will review OA the occupation risk factors and the occupations associated with developing this condition.

What is Osteoarthritis?

OA is a degenerative condition that affects the joints of the body but principally at the neck, lower back, fingers, hips, knees and toes. OA is sometimes also known as arthrosis or osteoarthrosis. It is the most common musculoskeletal condition in older people. It is characterised by cartilage in a joint roughening and becoming thinner, and thickening of the bone beneath the cartilage. Tissues in the joint become more active, to try to repair the damage. These changes cause pain to be felt in adjacent structures, accompanied by stiffness and difficulty with movement.

The severity of symptoms can vary greatly between people, and between different affected joints in the same person. Symptoms are often felt in only one or a few joints at any time.

The most commonly affected joints are shown in the figure below:

**Figure: Joints most commonly affected by osteoarthritis**

Incidence

Between 1990 and 2010, disability due to OA in the UK increased by 16%. The proportion of the population affected is expected to increase in the future, partly due to expected increases in the number of older people and the number of obese people.

In the UK, 8.75 million people have sought treatment for OA. These patients comprise:

- 33 % of people aged 45 years and above
- 49 % of women and 42 % of men aged 75 years and above.

Women are more likely than men to have sought treatment. It is estimated that 4.11 million people in England have OA of the knee (around 18 % of the population aged 45 and over) and 2.46 million people in England have OA of the hip (around 11 % of the population aged 45 and over).

In England and Wales there are approximately 160,000 total hip and knee replacement procedures performed each year, and approximately the same number of hip and knee joints are replaced. The numbers of hip and knee replacements each year since 2002 are shown in the figure below.
The main risk factors for OA are believed to include:
- Age
- Gender
- Obesity or overweight
- Injury or operation on a joint earlier in life, including using a joint too soon after injury or surgery
- Genetics
- Other previous or existing joint conditions such as rheumatoid arthritis or gout

The Health and Safety Executive (HSE) estimates that 50% of cases of surgically-treated knee OA and 30% of surgically-treated hip OA were related to occupational factors. In 2009/10 an estimated 94,000 people in Britain who had worked in the last 12 months suffered a lower limb disorder caused or worsened by their work. Of these, an estimated 30,000 were new cases, which is about 100 out of every 100,000 workers in Britain.

It is generally acknowledged that some occupations increase the risk of OA. There is appreciable evidence that ‘cumulative overuse’ and ‘cumulative trauma’ from kneeling/squatting, climbing stairs or ladders, heavy lifting and walking/standing are causal factors for LLD in the workplace.

The following occupations are prescribed to the Industrial Injuries Disablement Benefits (IIDB) list of diseases: hip OA in farmers; knee OA in miners; knee OA in carpet fitters and carpet and floor layers. Prescription of knee OA in construction workers was recently considered, but was not recommended for prescription by the IIAC because there is a relative shortage of direct evidence on risks of knee OA by job title.

It is these occupations which we will now look at in more detail.

Occupational Risks

The payment of IIDB is made in two circumstances: either when there has been an occupational accident or when a person has developed a prescribed disease – both from employment as an employed earner.

A disease becomes prescribed when there is a recognised risk to workers in an occupation, and the link between disease and occupation can be established or reasonably presumed in individual cases. This can be demonstrated in two ways:

1. Clinical features – for example, proof that an individual’s dermatitis is caused by his occupation may lie in its improvement when he is on holiday and relapse when he returns to work.
2. Doubling of risk – some diseases are not uniquely occupational and when caused by occupation are indistinguishable from the same disease occurring in someone who has not been exposed to hazard a work. In these circumstances, attribution to occupation on the balance of probabilities depends on epidemiological evidence that work in the prescribed job, or with the prescribed occupational exposure, increases the risk of developing the disease by a factor of two or more.

Farmers

The first call for evidence from the IIAC in relation to OA was made in 1992 regarding OA of the hip. Initially, the evidence of any occupational association was inconclusive, but the IIAC returned to the subject in October 2003 due to further evidence being published.

From this report, it became clear that whilst the disease is common in the population at large, there was one occupational group in particular which saw a raised incidence – farmers.

Initial case-control studies from Finland, Sweden and France suggested that farmers had a two to three-fold higher rate of total hip replacement than other occupational groups. In a large Swedish cohort study, which included 250,000 people who held the same blue-collar occupations in successive censuses, the risk of hospital admission for hip OA among farmers was increased nearly four-fold relative to occupations with low physical workloads. Also in Sweden, where a disability pension is available for hip OA, a particularly high rate of award was found in farmers relative to physically less demanding occupations (increased around fourteen-fold).

A similar study in Britain found a doubled risk of severe hip OA in men who had farmed for more than 10 years when compared with controls. In another survey of British men aged 60-76 moderate to severe hip OA was about eight times more common in men who had farmed for longer than a year than in a control group (mainly office workers), and nine times more common in men who had farmed for at least 10 years.

None of the research was unable to identify the exact reasons for the excess risk of hip OA in farm workers.

The IIAC concluded that a doubling of the risk for this OA had been demonstrated in farm workers and, as such, recommended that OA of the hip should be added to the scheduled list of prescribed diseases for IIDB for farmers who have been employed as such for ten years or longer in aggregate.

Miners

This review was followed by a report published by the IIAC in 2008 on OA of the knee in coal miners.30 This report found that there was a greater than doubled risk of OA of the knee in miners and evidence of an excess risk associated with occupational kneeling and squatting while undertaking heavy manual tasks (such as lifting or shovelling) – activities traditionally undertaken by miners.

The evidence relied upon by the IIAC included two studies by Kellgren and Lawrence,31 and a study by Greinemann.32 Kellgren and Lawrence, consisted of a radiological survey based on random samples of 84 miners, 45 non-mining manual workers and 42 office workers aged 40-50 years from Leigh in Lancashire. Their study extended an earlier cross-sectional survey that had shown an excess of knee pain in miners, relative to age and sex – matched non-miners from this community. In the follow-up, “severe” radiological OA of the knee was found in five (6%) of the miners as compared with one (2%) of the manual workers and none of the office workers. For “slight” radiological OA of the knee, the corresponding figures were 34 (40%), 9 (20%) and 10 (24%).

Greinemann’s study involved a clinical and radiological examination of both knees, carried out in 500 miners aged 50 with at least 25 years of work at the coal face, and a similar number of age-matched referents with no sporting or occupational knee strain. Main joint OA was diagnosed in 65 (13%) of the miners as compared with five (1%) of the controls.

Studies were also looked at in relation to particular activities commonly found among miners. Coggan et al33 compared 518 patients listed for surgical treatment of knee OA, with controls from the same communities, matched for sex and age. Histories of occupational activities and knee injury were ascertained at interview and risks were more than doubled in subjects who reported kneeling or squatting at work for more than one hour per day over at least one year, and raised 1.7-fold in those lifting weights of 25 or more kilograms more.
than 10 times per week for at least a year. There was also an association with occupational climbing of ladders and stairs in men, but not in women. Even greater risks were reported from work that entailed both kneeling/squatting and heavy lifting.

The IIAC considered the changing activities of miners throughout the years and concluded that kneeling and squatting under load would have been a significant feature of work for most underground miners until the mid-1980’s; after this time, the majority of miners would not have spent prolonged parts of their working day kneeling and squatting. However, they did note that such exposure would have likely persisted for faceworkers and face salvage workers in certain non-mechanised mines until a much later period and other categories of miner, such as development workers and conveyor belt cleaners, would have incurred such exposures through activities such as installing track, pipework and conveyor belts, carrying heavy arched supports, and cleaning coal spillages by shovel in circumstances of restricted access. As such, their final recommendation was that OA of the knee should be prescribed in relation to work as an underground miner for ten years or more in aggregate, but that, to be reckonable, any service from 1986 onwards must be in one or more of the following categories: as (a) a faceworker working non-mechanised coal faces (i.e. no power loader machine); or as (b) a development worker or conveyor belt cleaner or attendant.

Carpenters and Floor Layers

Following the conclusion emanating from the coal miners report that there was evidence of a greater than doubled risk of OA of the knee in those undertaking substantial kneeling and squatting under heavy load, the IIAC questioned whether the same risk would also be found in those working in the construction industry or those working as carpet fitters and floor layers, and published a report on this in November 2010.34

The Council’s literature review identified 13 potentially relevant research investigations on disease and symptom risk, including (with overlap) eight reports in floor layers, six in builders, labourers, and construction workers, four in painters, four in carpenters and isolated reports in other trades.

It was concluded that collectively, the evidence was sufficient to prescribe OA of the knee in carpet fitters and carpet or floor layers who have worked full time under exposure circumstances for a period of 20 years or more in aggregate. However, there was insufficient evidence to support prescription of OA of the knee in other groups of construction workers.

The Council identified the following work activities which must be present in order for carpet fitters and layers to qualify:

- Installing linoleum, carpet or vinyl floorings;
- Removal of old flooring;
- Installing of underlay;
- Installing of skirting board; and
- The associated preparatory work.

Construction Industry

Earlier this year, the IIAC decided to conduct a review of the position in relation to construction workers generally. In 2010, it was determined that there was limited evidence on risks by more closely defined job titles within the industry. The results were published in their Information Note and concluded that, as in 2008 and 2010, there was a shortage of direct evidence on risks of knee OA by job title. Such evidence tended to point potentially to a qualifying level of risk among ‘construction’ workers when defined very broadly, but gives only limited evidence on risks by more closely defined job titles within the industry. New reports have not changed this position.

A further present limitation was found to be that representative levels of exposure to knee-straining activity are still not at all well described in British construction workers. Despite a literature review, calls for evidence and consultation with experts, the Council managed only to identify some subjective and not wholly consistent estimates of exposure for workers from Denmark and there are difficulties in extrapolating from work practices in Denmark to those in the UK.

As a result, the IIAC concluded that they were still unable to recommend extending the prescription for knee OA to encompass additional trades within the construction industry. Although, they indicated in the note that they are committed to reviewing this position periodically.

Conclusion

The IIIC has prescribed OA of the hip to farmers and OA of the knee to miners and carpet or floor layers. It should be noted however, that there are significant conditions on these prescriptions. For example, farmers must have been employed as such for ten or more years in aggregate.
Can Noise Exposure Cause Latent Damage?

Introduction

A judgment handed down today in the case of Ross v Lyjon Company Limited (23rd September 2016, Liverpool County Court) raised important causation issues in relation to NIHL and reaffirmed the basic tenant of tort law, that it is for the claimant to prove damage.

The case, run by Roberts Jackson solicitors, saw evidence from Professor Moore and Mr Zeitoun for the claimant and Professor Lutman for the defendant on the subject of latency in NIHL and the advancement on behalf of the claimant of a phenomenon which has previously been described as 'hidden hearing loss', that is, damage which cannot be seen on standard audiometric testing.

Background

The claimant alleged exposure to excessive noise during employment with the defendant as an electrician between 1979 and 1992 at various large scale industrial sites including chemical plants and oil refineries in the North West. The claimant alleged that he would regularly work 12 hours a day in constant noise. He alleged exposure to noise from the operation of turbines, drill towers, presses, compressors and general heavy industry.

The claimant had alleged similar exposure which 2 other employers between 1974 and 1992 and 1993 and 1998. The claims against these employers were compromised at an earlier stage of litigation.

The remaining defendant admitted breach of duty. An audiogram in 2011, obtained as part of Mr Zeitoun’s medical report, showed NIHL. The primary issue in dispute was causation which centred upon the discovery of an audiogram dated 28.10.1993, undertaken as part of a BUPA health screening, soon after the claimant’s employment with the defendant had ended. The 1993 test showed no audiometric evidence of NIHL.

As well as the audiogram from 1993, there was reference in the claimant’s medical records to a further hearing test undertaken by BUPA as part of an earlier screening in 1987. Although no 1987 audiogram was located, the records relating to the 1987 test referred to the claimant having ‘normal hearing’.

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In view of the audiometric evidence from 1987 and 1993, the remaining defendant denied causation.

Expert Evidence

The claimant’s expert, Mr Hisham Zeitoun, Consultant Otolaryngologist Head & Neck Surgeon, had not referred to the BUPA health records or 1993 audiometry in his initial report and had relied solely upon an audiogram undertaken at the time of his examination of the claimant in February 2011 which was compliant with the ‘Coles guidelines’ for diagnosis of NIHL.

When questioned by the defendant on the BUPA records, Mr Zeitoun initially agreed that ‘if the audiogram of 1993 is a true representation of Mr Ross’ hearing at the time, Mr Ross has not suffered noise induced hearing loss prior to that audiogram’.

Subsequently, Mr Zeitoun questioned the accuracy of the 1993 BUPA hearing test and opened the door for the claimant’s ensuing argument that even if the audiogram were accurate, the claimant had nevertheless sustained some damage to his hearing as a result of alleged exposure with the defendant notwithstanding the fact that it was not revealed on the 1993 audiometry.

The claimant was granted permission to reply upon further medical evidence from Professor Brian Moore, Emeritus Professor of Auditory Perception in the Department of Psychology at the University of Cambridge.

Professor Moore’s evidence was summarised by the judge, HHJ Wood QC, as follows:

‘His evidence was that whilst the obvious effect of noise exposure would be damage to the outer hair cells within the cochlea where such damage was usually identifiable by the thresholds revealed on audiometry, it did not necessarily follow that hair cell damage would give rise to a noticeable loss when detecting sound. He relied upon a number of animal studies to demonstrate that mild changes could be caused to the outer hair cells without any measureable change in the thresholds. Because damage to the auditory system built up gradually, reflecting the cumulative energy received by the ears, there will be a time before the damage is evident’.

The defendant relied upon the medical opinion of Professor Mark Lutman, Professor of Audiology at the Institute of Sound and Vibration Research in Southampton. Professor Lutman observed that the 1993 audiogram showed more or less normal hearing which led him to conclude that any NIHL which might have been present on the 2011 audiogram must have occurred after 1993 or alternatively any loss was due to idiopathic (unknown) causes. He saw no reason to doubt the accuracy of the 1993 audiogram. On the question of whether or not there could be latent effects of noise exposure, Professor Lutman referred to the received wisdom from expert and consensus groups that there were no such measurable latent effects.

Put simply, if the loss had not occurred as a result of alleged exposure with the defendant (in light of the 1993 audiogram demonstrating normal thresholds), then the 2011 test could only be explained by subsequent exposure or it was idiopathic, insofar as sensorineural hearing loss of unknown origin was common in the general population and could mimic NIHL.

There was an agreement between Professor Moore and Professor Lutman regarding the theoretical scientific arguments on the hidden effects of noise exposure based on various animal studies but disagreement as to how they could be applied in the claimant’s case particularly as pointed out by Professor Lutman, in view of the physiological differences between species. In the joint statement Professor Moore and Professor Lutman agreed:

‘…there are theoretical arguments and limited data that there might be certain latent effects. It is well established from animal studies that noise exposure may cause quite substantial damage to the hair cells in the inner ear without causing any hearing loss as gauged by the audiogram. It has also been shown in recent animal studies (mice) that exposure to high levels of noise can damage the synapses between inner hair cells and neurons directly; it can lead to degeneration of neurons in the auditory nerve without measurable effects as gauged by the audiogram. Such degeneration of neurons may continue for months or years after noise exposure has ceased’.
In summarising the issues to be determined, HHJ Wood identified that the first question for the Court was whether or not the 1993 audiogram was an accurate representation of the claimant’s hearing loss at that time.

The accuracy of the 1993 audiogram

Mr Zeitoun gave evidence that he was concerned about the efficacy of the 1993 audiogram on the basis that it had been confirmed by BUPA that the test would not have been conducted in a soundproof booth.

Professor Lutman took the view that the 1993 test was entirely plausible and stated that the usual concerns about testing conditions and in particular, ambient noise would serve to make thresholds worse than they actually were. As the claimant’s 1993 audiogram showed some thresholds recorded down to zero, there was no evidence that ambient noise would have been a problem, and no evidence that the audiometry had been obtained other than in an entirely proper fashion.

Mr Zeitoun accepted under cross examination that ambient noise would make thresholds worse and not better but advance a number of factors he considered could make a recorded threshold better than was actually heard. These included:

- Visual signals from the operator who may be within sight of the subject;
- An audible click from the testing machine if it had mechanical components;
- The absence of irregular intervals between the sounds tested.

Such factors, Mr Zeitoun asserted could make the subject predict when a sound was being emitted which in turn would lead to a belief that he had heard the sound when he had not.

HHJ Wood QC found that there was no shifting the burden of proof and that it was not incumbent on the defendant to satisfy the court that the 1993 audiogram was accurate. He stated:

‘The audiogram is included in a compendium of the medical records, the accuracy of which would normally be self-proving, in the absence of any significant contradictory material’.

He went on to say:

‘There is simply no evidence that the audiogram carried out by BUPA...did not properly measure hearing thresholds. By referring to audible clicks from the audiometry mechanism, visual signals, or the lack of variation in the spacing of the sound pulses, the claimant is indulging in speculation without real evidence’.

Additionally, he stated that the fact the claimant did not complain of hearing difficulties in 1993 was a further factor which undermined the claimant’s challenge to the efficacy of the 1993 test. On the subject of Mr Zeitoun’s position he remarked:

‘Insofar as Mr Zeitoun has called the audiogram into question, he has lost objectivity because of his shifting position and has indulged in litigation bias, whereby his position became harder as the issues crystallized’.

Latency of damage

Having found that the 1993 audiogram was accurate, the second question for consideration was whether the claimant had established, on the balance of probabilities, that notwithstanding the absence of any hearing loss in 1993 at the end of his employment with the defendant, he had nevertheless sustained some damage to his hearing which became evident in later years and which was not related to the ordinary ageing process.

HHJ QC declined to be drawn into making a decision which answers a generic question about occupational deafness litigation. He stated:

‘This is especially so because on the face of it the question depends upon the non-expert interpretation of a complex medical/scientific debate which is ongoing based on a plethora of epidemiological studies in both humans and animals, and where there is yet to be any consensus. It is axiomatic that every case is fact specific and a decision has to be made upon the evidence presented, of which scientific research is but a small part’.

In considering the argument advanced on behalf of the claimant by Professor Moore, HHJ Wood QC noted that Professor Moore had accepted that it was unusual that there was no recorded loss on the 1993 audiogram given the claimant’s alleged history of exposure and agreement by Professor Moore than in general, NIHL progresses more rapidly earlier on. Professor Moore had speculated that the claimant may have had an usually large cochlear reserve however the Judge preferred the evidence of Professor Lutman that such was unlikely.

In finding for the defendant, HHJ Wood found that Professor Moore’s conclusions were fundamentally flawed because they were based on the assumption that the claimant was exposed to the same constant noise levels throughout his entire working history. There was no engineering evidence in the case and the argument presented by Professor Moore would flounder if noise levels after 1993 were greater than those prior to this date.

Notwithstanding the absence of compelling engineering evidence, the Judge held that the claimant would still have faced a difficulty because there was no evidence that underlying synaptic damage not revealed on threshold had actually taken place prior to 1993 in the claimant’s case. The Judge found that in the absence of any reported difficulties prior to 1993, the court would be embarking on a highly speculative exercise were it to conclude that synaptic damage had been occurring, which meant that the claimant was more vulnerable to hair cell damage in later years.

HHJ Wood concluded:

‘It seems to me that both Professor Lutman and Professor Moore have been engaged in an honest intellectual interpretation of the research literature and it is unnecessary for this court to determine which of the theories is preferred. I conclude that whilst there was a possibility of latent damage occurring to the nerve structures in the cochlea not detectable on the 1993 audiogram, this falls significantly below being a probability in the light of all the evidence which has been made available to this court. It is unnecessary to make any further determination, or to provide any generic ruling on the scientific question although it does appear unlikely that there will be any sufficient consensus on that question, or means by which such damage could be measured for some time to come’.

New LCB Guidelines on disability considered

In previous editions (124 and 129) of BC Disease News we have considered the new LCB Guidelines on assessment of NIHL & disability in NIHL claims.

The issue of the appropriate method for evaluating hearing disability was briefly considered by HHJ Wood who said:
The issue arises from a determination as to which of the centiles is appropriate to the Claimant. Professor Lutman has adopted a less than generous approach in the sense that he has followed newly published guidelines (to which he is a significant contributor) which are intended to incorporate ‘best fit’ by reference to certain anchor points. I accept his evidence that previous assessment guidelines (again to which he has contributed) provided a rough and ready approach taking an individual Claimant as averagely susceptible at the 50th centile.

It is correct in this respect that if one were to take 1 and 8 kHz the Claimant is far closer to the 25th percentile for ageing, and this would have the effect of reducing the measured thresholds at 1, 2 and 3 kHz. However, it is noteworthy that Mr Zeitoun, and indeed Mr Welsh who provided the initial report [for the defendant] had taken a more traditional line which appears to be founded on the Black Book guidance over 20 years ago, and there is some substance to Mr Zeitoun’s argument that the 2016 guidelines themselves provide scope for some flexible interpretation allowing individual variability. As I remarked in court, the issue as to whether or not the 4 kHz threshold should be taken into account remains a controversial one, because in some respects it has an effect on the disability. It remains to be seen whether or not those involved in medico-legal work adopt the potentially less generous interpretation without applying the exceptions which appear to emanate from the more recent guidelines.

However, this particular case I would have had some sympathy with the approach of Mr Zeitoun if it had been necessary to assess the disability, and to have compensated the Claimant on the basis of an approximate 10 decibel threshold hearing loss over 1, 2 and 3 kHz, which was indeed the preferred approach of Mr Welsh.

Comment and conclusion

The judgment supports the conventional view that NIHL occurs at the time of exposure and underlines the value of contemporaneous audiometry in determining issues of causation in NIHL claims. The burden is on the claimant in every case to prove that he has sustained a compensable injury as a result of alleged exposure, on the balance of probabilities. Where standard audiometric evidence does not support a finding on NIHL and the claimant does not report any contemporaneous hearing difficulties, a claimant is unlikely to discharge the burden on the basis of hypothetical scientific principles.

Some of the important issues raised in this case will be considered in further features of BC Disease News.
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28 Figure from Arthritis Research UK <http://www.arthritisresearchuk.org/arthritis-information/conditions/osteoarthritis/which-joints-are-affected.aspx>


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