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, following up on previous months’ reporting, the Ministry of Justice has finally released information following the soft tissue injury (‘whiplash’) claims consultation, which closed in January, 2017, confirming a new small claims limit of £5,000 for RTA related claims and £2,000 for all other personal injury claims. Meanwhile, at the meeting of the Corporate and External Issues Scrutiny Committee, more questioning was aimed at the Local Authority Councillor for the £300,000 grant made to Asons, especially after AXA’s demands for exaggerated costs exacerbated their current financial predicament.

Additionally, there has been some useful guidance handed down by the Court Of Appeal in the case of Pimlico Plumbers Ltd v Smith [2017] EWCA Civ 51, in which it found that a plumber, carrying out plumbing and maintenance work on behalf of a plumbing company, was a ‘worker’ within the meaning of the Employment Rights Act 1996 s.230(3)(b), not a self-employed contractor. This was despite the fact that there were two contracts (the 2005 agreement and the 2009 agreement) of employment and a working practice manual that operated so that both Mr Smith and Pimlico Plumbers believed Mr Smith was a self-employed contractor.

Finally, this month, we present the 3 following features: Mesothelioma Feature: Part 2: Common Law Negligence; Mesothelioma Claims Part 3: Common Law Negligence: Conflicting Appellate Guidance?; and Mesothelioma Claims Part 4: Common Law Negligence: Pre-1970 Exposure, in which we continue our series of features on mesothelioma claims. We begin by considering the common law regime only, questioning why exposure to any level of asbestos does not automatically amount to a breach of duty of care, before moving on to shine a light on recent case law dealing with pre-1970s exposure to see how such apparently inconsistent Court of Appeal guidance has, or can be reconciled.

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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Features

Mesothelioma Feature: Part 2: Common Law Negligence
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Fixed Fees for Clinical Negligence Claims Capped

The Department of Health has published its consultation on fixed recoverable costs in clinical negligence claims, outlining its plans to limit them to cases worth up to £25,000 rather than the higher figure of £250,000 originally proposed. The Department released an announcement stating:

‘The government intends to impose a new, fixed cap on all clinical negligence cases up to £25,000 to prevent rising litigation costs within the NHS. There are numerous examples of lawyers who profit from the NHS by charging more than 80 times the amount awarded to the victims in minor claims.’

The government has anticipated that the new cap will help the NHS save up to £45 million a year. The total bill for the NHS in the financial year 2015 to 2016 was £1.15 billion. Health Secretary Jeremy Hunt stated:

‘It’s important that when significant mistakes happen in the NHS, patients are able to have an open dialogue with a trust about what went wrong, receive reassurance of what is being learnt, and can discuss what form of recompense or redress may be appropriate. Legal action should only be one part of this process. Unfortunately, what we often see in lower cost claims is a deeply unfair system where unscrupulous law firms cream off excessive legal costs that dwarf the actual damages recovered. We believe this creates an adversarial culture of litigation, which is inflating insurance premiums and drawing away resource from the NHS at a crucial time’.

The consultation, which closes on 1 May 2017, has received criticism, although the new lower cap has been met with some relief. In particular The Association of Personal Injury Lawyers stated:

‘The fact that the government has decided to tone down its original plans will come as a relief to injured patients. A fixed-fee regime for more straightforward cases could be workable but the priority has to be the development of a quick and efficient system.

‘It should then be possible to fix legal costs to reflect the speed and efficiency of the new process’.

It went on to say:

‘Above all, we need an end to the “deny, defend and delay” approach by medical professionals when something has gone wrong, which is all too common’.

However, elsewhere, The Law Society president Robert Bourns, remained sceptical of the proposals, stating:

‘We remain concerned that the draft plans could see harmed patients denied the correct level of compensation unless the proposed scheme excludes complex cases and includes exemptions for unusual circumstances. It is also critical that fixed costs are set at a level which is sustainable for expert solicitors to continue to operate in this area…There is a serious risk that those most affected by these proposals would be the vulnerable in society, such as the elderly and people who are disabled, whose cases can be complex and challenging but not necessarily the highest in value’.

The Department of Health has not put forward any proposed figures for the fixed fee, but is seeking views on the methodology that will sit behind them. There are four options, three based on an estimation of legal time required under a streamlined process, and the other based on current market costs.

Discount Rate Review Delay

The Lord Chancellor, Liz Truss, announced to the London Stock Exchange (LSE) last week that the result of her review of the discount rate for personal injury claims would not be announced, as planned, on 31 January 2017. Instead, it was said that the review had taken ‘longer than anticipated’ and so would not be released until February. No specific date in February has been given.

The full announcement can be found here.

Meanwhile, we reported in edition 170 of BC Disease News that the Association of British Insurers’ (ABI) had failed in its attempt to bring judicial review proceedings in relation to the Lord Chancellor’s decision to change the discount rate. The ABI’s grounds for bringing the judicial review were that the government had not completed the necessary foundation work needed to reach a conclusion on the rate. It pointed out that, despite several consultation exercises and an expert panel being convened, no results have ever been published. The High Court rejected the association’s application.

The ABI has now confirmed that it has been refused permission to appeal last week’s decision of the High Court, as well as an interim injunction to stop the announcement.

We will continue to update readers on the progress of the review of the discount rate accordingly.

Cold Calling Ban for CMCs Unlikely
It has been suggested that a ban on cold calling for claims management companies, would be an effective alternative to the Ministry of Justice’s personal injury reforms. However, this week the government has discredited this proposition with accusations that such a ban would have little effect as those responsible are unregulated anyway.\(^4\)

Justice Minister Sir Oliver Heald, faced questions from shadow justice minister Christina Rees in which she asked whether he would consider the merits of banning claims management companies from making PI cold calls. However, he rebutted the proposition and stated:

‘Claims management companies (CMCs) are already banned from introducing claims, or details of potential claims to solicitors if these have been obtained by an unsolicited approach by telephone or in person. The majority of unsolicited calls for personal injury claims are made by illegal unregulated businesses. Regulators are working together to tackle illegal activity where identified’.

The Claims Management Regulator has released data this week which shows that 29 CMCs engaged with direct marketing were audited and issued with written advice between October and December 2016 issued advice is provided to a CMC regarding compliance issues, if this is ignored the next course of action is an official warning. Additionally, new investigations were started into five companies and 12 formal investigations were progressing in relation to possible breaches of rules around nuisance calls, texts and emails.

### E-Cigarette Update

In edition 123 of BC Disease News, we reported on Public Health England’s review of the use of electronic cigarettes, or e-cigs, as an alternative to traditional cigarettes. It was concluded by PHE that e-cigs are 95% less harmful than conventional cigarettes.

E-cigs are battery operated devices that allow users to inhale an aerosolized ‘e-liquid’ in lieu of the usual tobacco smoke. E-liquid typically contains varying compositions of propylene glycol, vegetable glycerine, flavourings, and/or nicotine. Since their introduction to the U.S. market in 2007, e-cigarettes have experienced an exponential surge in popularity. It is thought that almost 3 million adults use them in Great Britain today.\(^5\)

This week, a new study published in the Annals of Internal Medicine, carried out by Dr Lion Shabab, Senior Lecturer at the Institute of Epidemiology & Health, University of London and funded by Cancer Research UK, concluded that people who swapped smoking regular cigarettes for e-cigarettes, or nicotine replacement therapy, for at least six months, had much lower levels of toxic and cancer causing substances in their body than people who continued to use conventional cigarettes.\(^6\)

The study included a group of e-cigarette users, who had been using them for an average of 17 months, measuring the levels of nicotine and 26 potentially harmful chemicals in their body, by looking at samples of their urine and saliva. The results were then compared to traditional cigarette smokers and people who smoked both conventionally and electronic cigarettes. They also compared the results of these groups with those that use nicotine replacement therapy, as it is well established that this is a safe alternative, providing a baseline for comparison.\(^7\)

The comparison showed that nicotine levels found in the samples from e-cigarette users were very similar to those who used nicotine replacement therapy and smokers. This shows that e-cigarettes are an effective alternative for satisfying nicotine cravings.

In relation to the levels of toxic chemicals in their bodies, the results showed a significant trend, differentiating the groups. One chemical in particular, NNAL, which is known to cause lung cancer, was 97% lower in e-cig smokers than in traditional smokers. Additionally, e-cig smokers had similar levels of this chemical as those using nicotine replacement therapy. Dr Shabab claims that this is strong evidence to support the assumption that e-cigs are relatively safe. He stated:

‘We have 3 decades of research into the safety of nicotine replacement therapy, and we’ve not picked up any significant long-term health issues’.\(^8\)

However, Cancer Research UK, still urges consumers to act with caution. They claim there are still issues that need to be addressed. For example, they highlight that those who use e-cigs while continuing to smoke cigarettes failed to reduce the levels of toxic chemical exposure. Furthering this, although the study found significantly lower levels of toxic chemicals in e-cig users’ blood, the chemicals were still present. This is exacerbated by the fact that the study did not compare the levels of chemicals in people who don’t smoke or use e-cigs, so we are unaware as to whether their presence is a natural occurrence, or not.

Finally, Dr Shahab points out that different users often use different devices and liquids, of which some may be more harmful than others and so further work needs to be done into each of these.

Cancer Research UK has set up the UK E-Cigarette Research Forum, which is made up of the country's top tobacco and e-cigarette researchers, in order to find answers to these outstanding questions.

This study adds to the existing evidence that e-cigarettes are safer than smoking.
However, as we pointed out in edition 123, the harmful effects of e-cigarettes cannot be absolutely known at this time. We will continue to report on the issue as the science develops and new regulations are implemented.

New Budgeting Rules Come Into Force

We reported in edition 169 of BC Disease News, that the Civil Procedure Rule Committee (CPRC) had accepted recommendations to reverse the impact of the Court of Appeal’s decision in SARPD Oil International Limited v Addax Energy SA and another [2016] EWCA Civ. 120.

As a reminder, the Court of Appeal in SARPD held, that the costs budgeting hearing should be the time for a full scale argument about reasonableness and proportionality of incurred costs (which are not budgeted). This has been criticised as it fetters the powers and discretion of the costs judge at detailed assessment.

Rules 3.15 and 3.18 of the CPR have now been changed to specifically express that the court can make comments about incurred costs and these can be recorded on the face of any case management order, which can be taken into account in any subsequent assessment proceedings. Also, instead of recording agreements about ‘budgets’, the court will record agreements about ‘budgeted costs’, which does not include incurred costs. However, the court can record the extent of any agreement on incurred costs.

This reverses the position originally taken in SARPD.

The new rules have also codified the Court of Appeal’s decision in Qader & Ors v Esure Services Ltd & Ors [2016] EWCA Civ 1109, so that fixed costs cease to apply when an action is in the multi-track.

These new rules are due to come into force on the 6th April 2017. The amendments are brought into force by The Civil Procedure (Amendment) Rules 2017, which can be accessed here.

MoJ PI Reforms Limited to RTA Claims?

One of the main proposals within the Ministry of Justice’s (MoJ) Consultation paper on reforms to the personal injury sector, was to raise the small claims limit from £1,000 to £5,000 across the board.

We have discussed these proposals extensively within BC Disease News.

An issue of interpretation has arisen in recent months, given a lack of clarity when considering which ‘type(s)’ of claim will be impacted by changes to the claims process, should they go ahead as anticipated. Road traffic accident claims for soft tissue injuries such as whiplash, or neck pain, are a clear target of suggested systemic reform, but could this be extended to include injuries within an employment or public liability context? The consultation itself refers only to soft-tissue injuries.

This week, the claimant community has received a welcome boost to its efforts in limiting the effects of these reforms from ABI director, James Dalton. Dalton expressed his opinion that road traffic accident claims should see the effects of the reforms in isolation.9

Appearing in front of a panel of MP’s, he divulged: “What you want to see and what consumers need is safeguards and information so consumers understand how to file a claim in this new environment. At the moment consumers do not have the information they need to file in the small claims court. We need as a parliament, as an industry and as a sector to provide claimants with the information they need to go through that process”.

However, the Director of General Insurance, was certain that most road traffic accident claimants would be capable of supplying the information needed to submit a claim, i.e. the person at fault and details of any injury suffered, before acknowledging the financially cumbersome nature of the £180 medical report fee.

When questioned about the savings the insurance industry would see, Dalton conceded that, ‘hundreds of millions of pounds’, had already been saved by insurers since the reduction in fixed fees in 2013. This, appears to contradict the motive behind the most recent consultation and renders the government’s condemnation of the claims environment, perhaps, premature.

AXA Demands £113,000 from Asons Following Exaggerated Costs

We have written in recent editions of BC Disease News about claimant personal injury firm, Asons, and a contentiously-awarded £300,000 grant, courtesy of Bolton County Council.10

The Chief Executive, Cliff Morris, of the Local Authority has since admitted that the emergency powers procedure, which certified the grant, should ‘probably not’ have been made, especially as it had not passed official county process.

This week, a new development has seen Asons in the spotlight again, with AXA now set to receive £113,000 (set to cover £70,000 and £40,000 for interest and legal costs respectively) in recompense for ‘falsely and systematically’ exaggerating
costs on 65 settled claims between 2013 and 2014. It is said that Asons overstated the legal experience and qualifications of its staff. In acknowledgement of the seriousness of allegations, the SRA, who are currently involving themselves in the matter, ‘are aware of the situation and are gathering all relevant information before deciding on appropriate action’.

Asons has subsequently released an official statement:

‘We take matters like this very seriously. Following a complaint by AXA, an internal investigation was immediately undertaken. We reported the matter to our regulator and any overpayments were returned. New procedures were instigated and we are satisfied that there has been no recurrence of the historical issues raised by AXA’.

Slater & Gordon Shares Plummet Further

Following an announcement to the Australian Stock Exchange earlier this week, Slater & Gordon (S&G) has seen its biggest drop in share price value since March 2016, when it reported a loss of £37m. The share price now stands at $0.18.

In its announcement to the exchange, S&G, referring to its UK operations, stated that the business had shown signs of improvement, but recovery was slower than expected. This is based on lower than expected billed revenue performance in segments of the business. Which segments it is referring to is unclear.

However, the company forecasts stronger billings in the second half of 2017 as it continues its UK performance ‘transformation programme’ which appears to mean continued cuts in staff numbers and office closures.

As for its Australian operations, the statement claims:

‘Slater and Gordon’s Australian business has more recently started to show signs of being impacted by negative sentiment about the business and increased competition in key segments’.

Further, it predicts that for the financial year 2017, fee and services revenue in Australia is expected to be lower than the previous year with declines specifically being seen in personal injury law and general law businesses.

We reported in edition 169 of BC Disease News that the Australian financial regulator, ASIC, had served S&G with two notices to produce documents relating to previous investigations into the accuracy of financial records and accounts of the company. The notices came as a surprise to most as S&G claimed earlier last year that ASIC had dropped its inquiries in relation to the company’s financial records. There has been no update on this investigation to date.

The most recent announcement from S&G can be accessed here.

MoJ Confirm PI Reforms

Yesterday, the Ministry of Justice published the much awaited response to the ‘Reforming the soft tissue injury (‘whiplash’) claims process’ consultation which closed on 6 January 2017.

Two of the measures in the consultation, namely removing compensation for pain, suffering and loss of amenity (PSLA) for minor whiplash claims and raising the small claims limit for personal injury claims to £5,000, were first announced in November 2015 as part of the then Chancellor’s Autumn Statement. In addition to these reforms, the Government consulted on:

- an alternative option to the measure to remove compensation for PSLA for minor whiplash claims, by providing a fixed sum of compensation for such claims;
- the introduction of a tariff of compensation payments for PSLA for those claimants with more significant whiplash injuries; and
- a prohibition on settling whiplash claims without medical evidence from an accredited medical expert.

In the final response, a number of policy decisions have been made, including:

1. the introduction of a tariff of fixed compensation for pain, suffering and loss of amenity for RTA related soft tissue injury claims with an injury duration of between 0 and 24 months;

The government has decided to introduce a single tariff that will cover both whiplash claims and minor psychological claims. The government confirmed that a formal definition for these types of claims will be developed to reduce the scope for affected claims to be displaced into other categories of claim. It was accepted that the definition should not cover more serious psychological illnesses, for example, depression and post-traumatic stress disorder, which are diagnosable using international standards. As such, this measure is likely to be limited to minor psychological injuries such as ‘travel anxiety’ and ‘shock’.

It was suggested in the consultation document that the lowest bracket should be 0–6 months, but this has now been broken down further into two bands, namely 0–3 months and 4–6 months. The government has decided
that the levels of compensation available under the new tariff will be as follows:

<table>
<thead>
<tr>
<th>Injury Duration</th>
<th>2015 average payment for PSLA – uplifted to take account of JCG uplift (industry data)</th>
<th>Judicial College Guideline (JCG) amounts (13th edition) Published September 2015</th>
<th>New tariff amounts</th>
</tr>
</thead>
<tbody>
<tr>
<td>0–3 months</td>
<td>£1,750</td>
<td>A few hundred pounds to £2,050</td>
<td>£225</td>
</tr>
<tr>
<td>4–6 months</td>
<td>£2,150</td>
<td>£2,050 to £3,630</td>
<td>£450</td>
</tr>
<tr>
<td>7–9 months</td>
<td>£2,600</td>
<td>£2,050 to £3,630</td>
<td>£765</td>
</tr>
<tr>
<td>10–12 months</td>
<td>£3,100</td>
<td>£2,050 to £3,630</td>
<td>£1,190</td>
</tr>
<tr>
<td>13–15 months</td>
<td>£3,500</td>
<td>£3,630 to £6,600</td>
<td>£1,820</td>
</tr>
<tr>
<td>16–18 months</td>
<td>£3,950</td>
<td>£3,630 to £6,600</td>
<td>£2,660</td>
</tr>
<tr>
<td>19–24 months</td>
<td>£4,500</td>
<td>£3,630 to £6,600</td>
<td>£3,725</td>
</tr>
</tbody>
</table>

2. providing the judiciary with the facility to both decrease the amount awarded under the tariff in cases where there may be contributory negligence or to increase the award (with increases capped at no more than 20%) in exceptional circumstances;

The following examples of what could be considered exceptional circumstances were given:

- where fraud, fundamental dishonesty or low velocity impact is alleged;
- where liability is disputed;
- where the individual’s loss of amenity is higher than usual (avid sports players, for example); and
- where the victim is elderly, has a disability and their ability to live independently is hampered.

However, the government indicated that there would be no definition of ‘exceptional circumstances’ in any primary legislation, instead it has left it to the discretion of the courts to decide when a claim is exceptional.

3. introducing a ban on both the offering and requesting of offers to settle claims without medical evidence in RTA related whiplash claims only;

The ban will include the making, soliciting, accepting and receiving of such an offer. According to the report, there will be no exemptions to the ban and it will be a regulatory ban enforced through the relevant regulators as identified in the primary legislation.

4. increasing the small claims limit for RTA related personal injury claims to £5,000; and

5. increasing the small claims limit for all other types of personal injury claim to £2,000.

The government intend to keep this limit under review and have said they will consider whether a further increase to £5,000 for all PI claims is required in the future.

The government have said that this reform package will benefit motorists by reducing the number and cost of minor, exaggerated and fraudulent claims. It has been said that a large proportion of these costs are passed on to motorists through increased motor insurance premiums. The impact assessment which accompanied the consultation document estimated that the reforms, on implementation, would lead to savings of around £1bn (or on average £40 per policy). However, as we report later in this edition of BC Disease News, the insurance industry have indicated that these savings may be counteracted by the expected lowering of the discount rate.

Many members of the legal profession, particularly the claimant community, have responded to these reforms with dismay, arguing that people with genuine injuries will be undercompensated. Further, claims of savings in the insurance industry have been challenged with claimant lawyers pointing out that since 2013, the annual cost of motor-related personal injury claims has fallen by £563m yet insurance premiums have continued to rise.11

Measures 1-3 above will be introduced through provisions in the Prisons and Courts Reform Bill which has been laid before Parliament this week. The remaining measures regarding the rise in the small claims limit will be introduced through secondary legislative procedures, and could be in force as soon as October 2018.

Part 1 of the government’s response to the consultation can be found here.

Research Suggests ‘Rehab’ Being Pushed On Claimants

IRN Research, a market research consultancy firm, has released its first edition of the UK Medico-Legal and Insurance Market Briefing which provides an overview of the market for medico-legal and insurance services.12

The report shows that the total market for medical experts, report-writing, and rehabilitation was probably worth over £600m in 2016, having grown from over...
Insurers’ Predictions on Discount Rate

The insurance industry has predicted the impact a likely reduction in the discount rate will have on consumers, ahead of the government’s announcement on the outcome of the discount rate review, expected this month.

The discount rate, which currently stands at 2.5% is applied to lump sums awarded to claimants in personal injury claims for future losses to reflect the interest that the claimant could earn should he invest the damages he receives. This is in order to prevent over compensation. The Association of Personal Injury Lawyers (APIL) have called for a revised discount rate of 0.5%, however, predictions of what the discount rate will be lowered to, vary across the insurance industry, with estimates ranging from 1.5-1%.

Insurance consultant Willis Towers Watson warned early this week that should the government acquiesce to APIL and reduce the discount rate to 0.5% then the motor insurance industry, in particular the reinsurers of this market, would likely experience a material one-off reserve charge of approximately £4.9 billion. They claim there would also be a roughly £700 million per annum increase in the costs of providing motor insurance in the future.

This loss would be reduced to a one-off impact of £1.7 billion and an ongoing annual costs of £200 million if the discount rate is set at 1% (the mid-point between the current rate and that argued for by APIL).

This, they claim, will trickle down to consumers and may counteract any savings from the wider PI reforms, which aim to clamp down on the so called ‘compensation culture’ with annual premiums seeing a likely increase of between £5 and £20 per policy per year.

The full announcement from Willis Towers Watson can be accessed here.

We have outlined in edition 168 of BC Disease News the impact that a likely change in the discount rate will have on asbestos related mesothelioma claims and this can be accessed here.

We will continue to keep readers abreast of any developments regarding the discount rate review.

Bolton Council Quizzed Again Over Asons Grant

The leader of Bolton County Council has been pressed again over the £300,000 grant made to Asons Solicitors under the council’s emergency powers procedure. The grant was purportedly intended to be used for Asons to refurbish its new offices. However, there has been controversy surrounding the firm’s latest annual accounts which revealed that HMRC are seeking a £300,000 payment for unpaid PAYE/NI tax. This has recently been exacerbated by news of a £70,000 payment to AXA for exaggerated costs.

At the meeting of the Corporate and External Issues Scrutiny Committee this month, Councillor Hayes, leader of the Liberal Democrat Group, submitted the following questions:

1. Did Asons Solicitors complete a formal application for grant under The Bolton Town Centre Strategy?

Councillor Cliff Morris insisted that ‘no formal application was required under the scheme for this grant’.

2. It has been established that Asons Estates purchased the former Bolton News Offices on Churchgate at the end of March 2016 for £902,000. It has also been established that the grant of £300,000 was made to
Asons Solicitors, a separate legal entity. The maximum grant allowable under State Aid Rules was 20% of expenditure. Therefore the Council should have verified expenditure by Asons Solicitors amounting to at least £1.5 million. Has the Council seen evidence of at least that amount of expenditure by Asons Solicitors?

To this, Councillor Morris simply replied that Council officers had considered schedules of qualifying expenditure in support of the grant. However, some have doubted that Asons have in fact spent £1.5m on the refurbishment of their new offices (which is what the grant was originally sought for).

3. The grant is recoverable if Asons Solicitors fails to meet certain performance criteria, mainly related to maintaining employment. To monitor whether Asons Solicitors is meeting these criteria it is necessary to use a baseline figure of employees. What was the baseline figure used?

It was revealed that the baseline figure was 150 employees. As such, if Asons fall below this level of employees then Bolton Council can demand the £300,000 be returned.

4. Should Asons go out of business, is the Council confident that the grant could be recovered, given that all assets may be owned by Asons Estates, a separate legal entity and that some may be mortgages to banks?

Councillor Morris made the following statement in response to this question:

‘The Council is confident that it provided support to an employer in the town centre at a time when its business model was changing and that this investment will be returned through its rates and the wider economic benefit of retaining employment in the town centre.’

Following the answers to these questions, members of the Council were dissatisfied been answered properly. Calls were made for evidence of the £1.5million expenditure by Asons. It was previously stated that invoices of approximately £500,000 had been received by the council, yet at this month’s meeting it was implied that invoices of the full amount of £1.5m were now in the council’s possession, however, the members of the council still have not seen these.

Since this meeting, it has been reported that Asons Solicitors has offered Ivan Lewis, Labour MP, space in its offices for him to run his campaign for his candidacy for the Labour Party nomination to be Greater Manchester Mayor. This has raised concerns about links between Asons and the Labour Party. In edition 165 of BC Disease News we noted the apparently close relationship that Asons CEO, Dr Imran Akram, has with many prominent Labour politicians, including, the Bolton Labour Leader Cliff Morris himself. The following picture was featured:

The next meeting of the Council Committee is scheduled for April 2017 and it is likely that further questions will be put to Councillor Morris regarding the grant to Asons and the external audit.

We will continue to report on any developments.
Case Law

Post-Portal PAD Applications: Sharp v Leeds City Council [2017] EWCA Civ 33

The Court of Appeal, handing down judgment this week, has determined that the fixed costs regime applicable to the Pre-action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims applied to the costs of an application for pre-action disclosure by a claimant—when the claim had started off under the protocol but was no longer continuing under it when the application was made.

The claimant tripped and fell in February 2014 as a result of allegedly defective paving maintained by the respondent local authority. The claim was started under the EL/PL Protocol but in October 2014, the claim proceeded under the Personal Injury Protocol. The local authority failed to give pre-action disclosure pursuant to the protocol, and the claimant made an application in February 2015 for pre-action disclosure. By the time of the application hearing the defendant had given the necessary disclosure. The district judge summarily assessed costs in the claimant's favour at £1,250. The defendant appealed and a judge reduced the costs to £300 on the basis that they were governed by the fixed costs regime applicable to the EL/PL protocol. Notwithstanding the modest amount in dispute, the court allowed a further appeal as the issue as to whether the fixed costs regime applied had important practical consequences in terms of the cost/benefit of making applications for pre-action disclosure.

The Court of Appeal held that the fixed costs regime applied to the costs of an application for pre-action disclosure, and from the moment of entry into the portal, recovery of costs for pursuing or defending the claim was intended to be limited to fixed rates so as to ensure proportionality in the conduct of small or relatively modest claims. The fixed costs regime was subject only to a very small category of clearly stated exceptions. To recognise other, implied, exceptions would be destructive of the regime's clear purpose. The court noted that the clear wording of CPR r.45.29A(1) and r.45.29D supported that conclusion, the latter providing that fixed The appeal was dismissed and the claimant was entitled to recover the fixed fee of £300 for their pre-action disclosure application.

The full judgment can be accessed here.

Special Damages:
Discount For Gratuitous Care:
Mehmetemin v Farrell (2017)

In the decision of Mehmetemin v Farrell [2017] EWHC 103 (QB), the High Court provided useful guidance on some common issues which arise in claims of special damages for personal care. The case concerned a claim for damages for a complex injury caused by a road traffic accident.

In quite a lengthy judgment, a number of disputed heads of loss were considered but the following 3 may arise in disease claims. Firstly, what recovery should be allowed where a relative gives up work to provide care? Secondly, are damages recoverable for voluntary dog walking? Thirdly, are the costs of feeding a carer who previously received free food as a ‘perk’ at work, recoverable? We will take each of these in turn and consider the court's findings.

25% Deduction for Gratuitous Care

Care was provided to the claimant by her husband. The issue in dispute was whether the usual practice of deducting 25-30% from gratuitous care, to take account for the fact that tax or national insurance payable to a commercial carer does not arise, should still apply where the claimant’s husband had given up work to care for the claimant.

Previously, in Housecroft v Burnett [1986] 1 ALL ER 332, O’Connor LJ established two pillars for these types of claims. Firstly, the award must provide ‘reasonable recompense’ to the carer and secondly, that the commercial care rates set a ceiling on the award. He stated:

‘Once it is understood that this is an element in the award to the plaintiff to provide for the reasonable and proper care of the plaintiff and that a capital sum is to be available for that purpose, the court should look at it as a whole and consider whether, on the facts of the case, it is sufficient to enable the plaintiff, among other things, to make reasonable recompense to the relative. So, in cases where the relative has given up gainful employment to look after the plaintiff, I would regard it as natural that the plaintiff would not wish the relative to be the loser and the court would award sufficient to enable the plaintiff to achieve that result. The ceiling would be the commercial rate’.

In relation to the carer losing earnings, previous authorities have held that the court will consider the lost income in valuing the gratuitous care, but will not usually award a sum which is more than a figure achieved by applying the commercial care rate (less a discount to reflect that those rates attract taxes in the hand of a paid worker).

In the present case the court upheld this position and found at para 33:

‘[...] it would be artificial to inflate the amount recoverable by reference to a sum which could never be paid to a relative, i.e. tax and national insurance’.
As such, the 25% discount still applied and was deducted from all gratuitous care awarded in this case.

**Cost of Dog-Walking**

The claimant sought to recover the cost of her husband performing the task of dog-walking for 3.5 hours per week. However, the defendant resisted this, on the basis that dog-walking is an amenity for a family member, rather than a service, so compensation is not required when putting the claimant back into the position she would have been in, had she not been injured. Furthermore, the defendant claimed that dog-walking by a family member is different from a commercially provided service, especially as the dogs were shared among family members and there was no suggestion that the claimant’s husband had found walking the dogs to be a burden.

The Judge held at para 59:

‘There is, in my judgment, no reason in principle why such a service should not be provided by a relative in the same way as DIY is provided by a relative, and claimable. If there is a need to get someone else to provide a service which the injured person can no longer perform, and which has to be and is performed, the cost is recoverable whether it be commercial or gratuitous. That Mr Mehmetemin may enjoy walking the dogs (in the same way as a relative might enjoy gardening when forced to garden because of an injury to his wife) so that it might therefore be regarded as an amenity, does not prevent recovery, if he is carrying out this service for and instead of his wife when he would not otherwise have been doing so. In such circumstances it is a service he is performing, the need for which has been brought about by the accident.’

However, he did feel it was appropriate to reduce the amount of hours claimed from 3.5 to 2, to take account of shared dog-walking with his wife, as he said it would not be appropriate for there to be a recovery of notional costs for a shared pleasure. He pointed out that it could potentially also lead to double recovery, i.e. the cost of gratuitous care would already cover the cost of the husband accompanying his wife on trips outdoors. The 25% reduction to a commercial dog walking hourly rate was also made.

This statement of principle regarding damages for voluntary dog-walking may be relied upon in the future by claimant solicitors. It should be noted that the appropriate multiplier is the life-expectancy of the particular dog and not the ‘active’ life-expectancy of the claimant.13

**Extra Food Cost**

The claimant also claimed an estimated £300 per month for the additional cost of feeding her husband whilst he was caring for her, since before the injury, he had been working as a chef, receiving free meals 5 days a week.

The judge dismissed this claim on the grounds that the claimant had not supplied the court with competent evidence proving that her husband did in fact receive these free meals. Also, save for a general estimate of £300 a month, the claimant could not conclusively evaluate the cost of food at home. Overall, this was considered too remote:

‘Even if the cost of extra food for Mr Mehmetemin at home is incurred as a result of his enforced retirement to look after his wife, the loss remains his loss rather than his wife’s loss. If it were to be argued that the cost of his food is increased household expenditure and therefore affects the Claimant as well as him, the claim would still relate to the loss of his perk. He is not a private carer and not entitled to a subsistence allowance’.

**Impact of Currency Fluctuation on Costs Awards**

In edition 152 we reported on the decision of **Novus Aviation Ltd v Alubaf Arab International Bank BSC(c) (2017)**

In another decision before the High Court, where this issue was raised again, the Court did not adopt the same approach.

In **MacInnes v Gross** [2017] EWHC 127 (Q8), the defendant sought extra costs to reflect changes in the exchange rate between Pound sterling and the Euro since the EU referendum. The defendant relied on the decision in **Elkamet Kunststofftechnik GmbH v Saint-Gobain Glass France S.A.** [2016] EWHC 3421 (Pat) where the claimant was awarded an extra £20,000 in costs to compensate for the impact of the falling value of Pound, which, upon conversion, drastically affected the transaction covering their solicitor’s fees.

However, Mr Justice Coulson found that the circumstances of the present case were substantially different from the former case. Firstly, the judge in **Elkamet** was dealing with a summary assessment where he would have had specific figures to consider, along with evidence detailing how those figures had arisen.

Refusing the defendant’s claim, he highlighted the important distinction between an order for costs and an order...
Living Mesothelioma Claims: Andreou v S Booth Horrocks & Sons Ltd (2017)

In a quantum only trial before the High Court, HHJ Walden-Smith assessed various heads of damage claimed by a 76-year-old man who was terminally ill with mesothelioma and adjourned, until after his death, the assessment of the value of the services he would have provided to his wife but for the disease.

The claimant was diagnosed with mesothelioma in 2016. He then brought proceedings against the defendant, his former employer, in respect of exposure to asbestos in the early 1960s when he was a heating and plumbing engineer. The defendant admitted liability. The claimant’s health had sharply declined and he was unable to attend trial. It was estimated he would live for a few more months with his symptoms becoming increasingly debilitating. His ‘but for’ life expectancy in the absence of mesothelioma, was estimated to age 82 reduced from normal due to a history of heavy smoking.

The claimant and his wife, owned a 39-room hotel, three rental properties and their home which included 10 acres of land in which they grew fruit and vegetables used at the hotel or sold. The court held that it was not sufficient for the claimant’s health to have sharply declined, he had to rely on paid gardeners, and also his granddaughter. Some receipts / invoices were attached to his statement of evidence of work being carried out by others. The defendant offered, for the purposes of settlement, £4,500.

HHJ Walden-Smith also pointed out that the land provided an income and as such had a partial business purpose. As such she held that the land was ‘part business and part expensive hobby, not simply a garden which requires maintenance’.

For these reasons, the court reduced the amount awarded to £4,500.

Equipment

The court then considered the cost of the equipment that the claimant had already purchased, for example, he had a lift installed in his house to help him get between the three floors, which cost £84,000. The defendant contended that chair lifts would have sufficed. The claimant had also bought a reclining chair for £2,700, however, a nursing expert said that a £1,000 chair would...

for damages as compensation. He said at para 20:

‘I am also uncomfortable with the idea that an award of costs should be treated as an order for compensation, as if it were a claim for damages. I consider that there are inherent differences between the two regimes, and that orders for costs have never been regarded as compensating the payee for the actual costs that he has paid out. On the contrary, unless the payee has an order in his favour for indemnity costs, he will never recover the actual costs that he has incurred’.

Finally he said that he did not see the close analogy between ordering interest on costs, which he said was commonplace, and ordering exchange rate losses due to the particular time that the costs were paid, which was not. In relation to this matter he said:

“The paying party can work out in advance the additional risk created by the potential liability to pay interest on costs, but any potential liability to pay currency fluctuations is uncertain and wholly outside his control. Furthermore, it might be argued that the generous rate of interest on costs at 4% over base is designed to provide at least some protection to the payee against such events”.

For these reasons, combined with the fact that there is no other authority on the topic, Coulson J refused the defendant’s application to recover any further sums by way of currency fluctuations on costs.

The full judgment can be accessed here.
have sufficed. In addition to this, he had purchased two air purifiers, which he claimed he needed to help prevent infection.

The court concluded that there was a balance to be struck – the claimant was obliged to act reasonably in his claim, but there was no requirement to take the cheapest option. However the court was also entitled to consider whether the cost of something was wholly disproportionate to any perceived benefit. In determining the reasonableness of incurring of a cost the court can consider the cost benefit.

The Judge did not find this head of loss an easy issue to resolve. It was not a viable defence to the defendant to say that just because the chairlift was a viable and cheaper option then the cost of installing the lift should be disallowed. The issue was whether the claimant had acted reasonably and the standard of reasonableness is not a high one. However in this case there was no real additional benefit derived from the lift compared to a chairlift. It was a cost wholly disproportionate to any perceived benefit. As such the claimant was awarded the cost of a chair lift, £6,000, but not the lift installation. Similarly, the court found that £1,000 was the appropriate award in relation to the reclining chair. However, it was found that the air purifiers were a reasonable purchase and the claimant was awarded £1,708 in respect of them.

For future aids and equipment, the claimant claimed for items including a bath lift, a mobility scooter and an adjustable bed. The defendant argued that the fact that the claimant had not yet purchased such items, yet could afford to, indicated that he did not need them. However, the court held that the claimant would become progressively and significantly weaker and so would need the equipment, with the exception of the bed which they said he would have bought if he had needed it. As such, he was awarded £1,800.

Lost Years Income Claim

The court then came to consider the lost years claim on income for which the claimant sought £203,000 and which the defendant assessed was at no more than £100,000 as there was nothing in the evidence before the court, save for the state pensions, that established the level of the income from the hotel and the three properties or with respect to the private pensions.

The court found this approach to be too harsh. The judge stated at para 77:

‘It has to be accepted that the very nature of these claims are expedited because of the ferocious nature of the disease itself, and it seems to me that the evidence that the claimant has provided with respect to his income is sufficient to give a clear indication of the annual net income of the claimant even though it is a fluctuating income’.

The court averaged the accounts over the last four years and came to a sum of £75,924 as the average annual figure for the claimant’s income but this figure reducing in later years. The judge set out the appropriate split multipliers for the lost years claim and applied a conventional reduction of 50% to the losses.

Lost Years on Services

It appears the claimant also sought recovery for loss of services during the ‘lost years’-although the amount claimed is not apparent from the judgement. Such head of loss is not recoverable-see Phipps v Brooks Dry Cleaning Services Ltd.14 The defendant argued that the claimant had elected to bring a living claim now and therefore should be dealt with now and as it was not something recoverable in law it should be dismissed.

HHJ Walden-Smith held:

‘This is a proper claim that will be made in due course. In the circumstances, while it is clear from the authorities that this is not something that this court can order, given that it has not been agreed between the parties, I will adjourn this part of the claim in order that it can be dealt with post mortem. It would not be right in my judgment for the claimant or the claimant’s estate or his widow in due course not to be able to make a claim for something to which he is entitled simply by reason of it having been brought into these proceedings. This discrete matter will therefore be adjourned’.

Dependency claims on services are of course recoverable in fatal claims. This approach to claims for lost years may have wider implications for the handling of living mesothelioma claims. Firstly, it may mean that insurers will need to revalue and reserve such claims on a ‘fatal basis’ to include a dependency claim on services. Similarly, it may also mean that insurers are having to factor in a sum for a future dependency claim in any offers to settle. This will also raise issues regarding interim payments to claimants – are these to be assessed based on only the living element of the claim or can interim damages be paid based on an anticipated dependency claim as well?

Court of Appeal Guidance on Employee Status

The Court of Appeal in the case of Pimlico Plumbers Ltd v Smith [2017] EWCA Civ 51, has found that a plumber, carrying out plumbing and maintenance work on behalf of a plumbing company, was a ‘worker’ within the meaning of the Employment Rights Act 1996 s.230(3)(b), not a self-employed contractor. This was despite the fact that there were two contracts (the 2005 agreement and the 2009 agreement) of employment and a
working practice manual that operated so that both Mr Smith and Pimlico Plumbers believed Mr Smith was a self-employed contractor.

Mr Smith had suffered a heart attack in 2011, after which he requested to reduce his days from five to three days a week. This request was denied and Mr Smith was subsequently dismissed. Mr Smith then issued proceedings in which he complained of unfair dismissal, wrongful dismissal, entitlement to pay during medical suspension, holiday pay and arrears of pay, direct disability discrimination, discrimination arising from disability and failure to make reasonable adjustments.

The case was initially heard before the Employment Tribunal which had to determine whether Mr Smith was an employee of Pimlico Plumbers, whether he was a worker or whether he was alternatively, genuinely self-employed. Usefully, the court outlined the distinction between these categories as follows:

a) **Employee**: Persons Employed under a contract of service

b) **Self-Employed**: Persons who are self-employed, carrying on a profession or a business undertaking on their own account, and who enter into contracts with clients or customers to provide work or services for them.

c) **Worker**: Persons who are self-employed and provide their services as part of a profession or business undertaking carried on by someone else. (as per s. 230 of the Employment Rights Act 1996)

The Employment Tribunal found that Mr Smith fell within category c) and was therefore a ‘worker’ and that his working situation met the definition of ‘employment’ in the Equality Act 2010. The reasons for this were as follows:

The agreement, and its main purpose, was for Mr Smith personally to provide work for Pimlico Plumbers;

- The working manual practice obliged Mr Smith to work a normal week of 40 hours on the days agreed with Pimlico Plumbers;
- Although there was some flexibility, Pimlico Plumbers expected engineers to discuss their working hours with, and to agree them with Pimlico Plumbers. Mr Smith had sufficient obligation to provide his work personally to be a worker;
- There was not an unfettered right to substitute at will. There was no such right given to MR Smith by the contractual documents and no evidential basis for such a practice. Even though in practice engineers with Pimlico Plumbers swapped jobs around between each other, and also used each other to provide additional help where more than one person was required for a job or to do a job more quickly, and there was evidence that external contractors were sometimes required to assist a job due to the need for further assistance or to conduct specialist work, the fact was that Mr Smith was under an obligation to provide work personally for a minimum number of hours per week or on the days agreed with Pimlico Plumbers;
- Although Mr Smith had autonomy in relation to the estimates and work done, Pimlico Plumbers exercised very tight control in most other respects. That included a high degree of restriction on Mr Smith’s ability to work in a competitive situation, which suggested that he was not in business on his own account and was certainly inconsistent with Pimlico Plumbers being a customer or client if any such business;
- Pimlico Plumbers could not be considered to be a client or customer of Mr Smith’s business but is better regarded as a principal. Mr Smith was an integral part of Pimlico Plumbers operations and subordinate to Pimlico Plumbers. He was not in business on his own account.

As Mr Smith was not considered to be an ‘employee’ for the purposes of the Employment Rights Act 1996, the Tribunal did not have jurisdiction to consider Mr Smith’s claims for unfair dismissal, wrongful dismissal, entitlement to pay during the period of a medical suspension and failure to provide particulars of employment. However, as he was considered to be a ‘worker’ for the purposes of the 1996 Act and this fell within the definition of ‘employment’ in the Equality Act 2010, it did have jurisdiction to consider his complaints of direct disability discrimination, discrimination by reason of failure to make reasonable adjustments, and in respect of holiday pay, as well as in respect of unauthorised deductions from wages.

Pimlico Plumbers appealed this decision but it was upheld by the Employment Appeal Tribunal who also found that Mr Smith was not an employee but was a ‘worker’ i.e. a person who is self-employed but provides their services as part of a business undertaking carried on by someone else.

The Court of Appeal agreed with the decisions of the lower tribunals and dismissed the appeal, focusing on the fact that Mr Smith was obliged to perform the contracts personally; to work 40 hours per week; to hire a van with a Pimlico Plumbers’ logo and to use a mobile phone (deducted from his salary).

In edition 146 and 147 of BC Disease News, we highlighted the importance of
distinguishing between, workers, employees and self-employed persons for the purposes of EL/Disease claims. We noted that agency and temporary workers, independent contractors and self-employed persons are becoming an increasingly important part of the UK labour workforce due to increasing employer desire for workforce flexibility and an increasing migrant population.

This most recent decision adds to the extensive case law, discussed in those previous editions, and makes it clear that the courts will not simply rely on contractual agreements between parties but instead will look closely at the working relationship in order to determine an individual’s employment status. Where a contractor works exclusively for one company, it seems that the line between independent contractor and employee can become blurred.

The full judgment can be accessed here.

Apportionment in Asbestos Related Pleural Thickening: Time Based or Dose Based?

In the recent decision of David Kearns v Delta Steeplejacks Limited [2017] EWHC 149 (QB), the High Court considered the differing approaches to apportionment where two employers had exposed the claimant to asbestos in breached of duty.

The claimant worked for the defendant from 1981/82 to 1990/91, during which time he alleged he was exposed to asbestos by virtue of working as a steeplejack and as a result had developed diffuse pleural thickening of the lung. The claimant also brought proceedings against a second defendant which was discontinued before trial.

Breach of Duty

The claimant gave evidence at trial of the circumstances of his exposure to asbestos in each situation. Whilst working on chimneys he was exposed to asbestos blankets used between courses of brickwork and asbestos rope used in the maintenance of chimney caps. Whilst working on cooling towers he cleaned and replaced asbestos eliminator slats and asbestos distribution pipes. Whilst working on power station windows he worked on the removal and replacement of windows which involved removing and replacing asbestos caulking. Whilst working on flare stacks he removed asbestos gaskets at the top of the stacks. He had cleaned an asbestos roof with a jet spray.

The primary duty in this case was under the Control of Asbestos Regulations 1969 and the Control of Asbestos at Work Regulations 1987, to prevent exposure (Reg 8 (1) (a)). If prevention was not reasonably practicable, the employer was required to reduce exposure to the lowest level reasonably practicable (Reg 8 (1) (b)) and in any event below prevailing standards. Where it was not possible to reduce exposure below prevailing standards, the employer was required to provide respiratory protective equipment (Reg 8 (2)). It was also agreed that in accordance with the relevant HSE Guidance Note EH10 Mr Kearns’s exposure should not have exceeded the relevant control limits for occupational exposure to asbestos unless he was wearing appropriate respiratory protection.

The defendant conceded exposure and that they were in breach of its duty to prevent Mr Kearns’s exposure to asbestos dust as far as reasonably practicable or to reduce such exposure to the lowest level reasonably practicable. It was also accepted that there was insufficient evidence of effective precautions being taken. The defendant however argued that the claimant had exaggerated the extent of his exposure.

If the Claimant’s evidence was accepted as to his work with asbestos blankets then his exposure to asbestos was very high. The Claimant’s expert, Mr Glendenning, concluded that if the Claimant’s evidence was accepted, the exposure amounted to 30 fibre ml/years with the Defendant’s expert, Mr Stear, concluding that the exposure amounted to 5.2 fibre ml/years, both in breach of the EH10 guidance.

The judge found that, allowing for some limited inaccuracy of recollection over years, the claimant’s exposure was at 25 fibre ml/year or more.

Exposure-time or dose?

It was accepted that as pleural thickening is a dose related and divisible disease, apportionment would need to be carried out despite the fact the claim against the second employer had been discontinued.

The claimant argued for a time based apportionment whereas the defendant argued a dose based assessment. On a time-exposure basis, the defendant was responsible for 39% of overall exposure. On a dose basis the exposure fell to somewhere between 14-17% based on both experts’ evidence.

The claimant submitted that time exposure is a broad-brush approach often used in disease claims involving divisible injury where exposure with different employers is likely to have been broadly similar and/or the evidence of exposure is such that precise calculations of dose and apportionment are impossible. The defendant submitted that whilst it may be sensible to utilise a time exposed basis when there is insufficient evidence to do otherwise, the dose relationship is the most appropriate way of addressing apportionment, where it is available.

David Pittaway QC, sitting as judge, concluded that he was unable to make findings as to the claimant’s exposure.
whilst he was working with his other employer. Whilst evidence on this issue was given by the claimant at trial, he was not cross-examined on the issue and no evidence was heard from his other employer. As such the judge found that the time exposure approach advocated for by the claimant was the most appropriate approach and as such the defendant was liable for 39% of the overall exposure.

Causation

The Claimant began smoking in around 1970 (aged 16/17) and continued on and off until 2012. He started getting shortness of breath in 2007 and was diagnosed with cigarette induced COPD. In 2008 he was admitted to hospital for an exacerbation of the COPD. He developed bilateral asbestos related pleural plaques. It was agreed he had a respiratory disability of 60%, 40% of which was a consequence of COPD and 20% of diffuse pleural thickening.

His life expectancy was reduced by 9 years by his COPD. The medical experts disagreed about the cause of the diffuse pleural thickening in the right lung. It might be caused by asbestos or by a significant fall / trauma in 1999. The medical experts also disagreed about the sufficiency of the evidence of diffuse asbestos related pleural thickening in the left lung.

Given that it was accepted that the claimant was exposed to high levels of asbestos during his employment with the defendant, the court accepted that the diffuse pleural thickening in the right lung was a result of asbestos exposure as opposed to the 1999 trauma. However, in considering all the evidence submitted by both medical experts, the court concluded that there was insufficient evidence of diffuse pleural thickening in the left lung and so the changes to the left lung did not amount to an actionable injury.

Damages

The court was asked to assess PSLA based upon the claimant’s respiratory disability attributable to the diffuse pleural thickening of his right lung caused by his exposure to asbestos. Based on a 20% respiratory disability, PSLA was awarded at £40,000. Special damages were assessed at £300. The judge then applied the apportionment reduction which rendered the defendant liable to pay a total award of £15,717.

The damages were awarded on a provisional basis with the claimant’s estate being entitled, for the duration of the claimant’s life and/or within 3 years after the date of his death, to apply for further damages in the event of:

- Mesothelioma developing;
- Progression of diffuse pleural thickening due to asbestos causing a significant increase in respiratory disability;
- Asbestosis;
- Lung cancer caused by asbestos.

The full judgment can be accessed here.

Proportionality

Judgment: Rezek-Clarke v Moorfields Eye Hospital NHS Foundation Trust (2017)

The High Court has found that a £72,000 bill for a claim valued at £3,250 was ‘disproportionate’.

The case was one of clinical negligence and concerned a delayed diagnosis of a pituitary tumour. The defendant admitted breach of duty but denied causation. A settlement was accepted in July 2015 of £3,250, two years after the claimant solicitors were instructed, after both sides had failed with Part 36 offers.

The defendant was ordered to pay the claimant’s costs of the claim on the standard basis and the claimant’s solicitors served their Bill of Costs in the sum of £72,320.85. The defendants requested a provisional assessment and in the summer of 2016, Master Simons, Costs Judge, reduced the claimant solicitor’s bill to £26,604.40, on the grounds that it was disproportionate to the value of the claim. The claimant then requested an oral hearing in accordance with CPR r.47.15(17) in respect of the following elements of the decision:

i. Finding that the bill was disproportionate;
ii. Reduction of the After the Event Insurance (AEI) insurance premium from £31,976.49 to £12,000;
iii. Reduction of the expense rates claimed;
iv. Reduction of Counsel’s fees;
v. Reduction of four of the fees for medical reports totalling £18,036 (including VAT) to £7,500, plus VAT;
vi. Reduction of some of the attendances on the Claimant;
vii. Reduction of the document time claimed from 52.5 hours to 33 hours, 24 minutes.

At the oral hearing, points (iii)-(vii) were addressed with no changes made. The judge dealt in detail with the issues of proportionality and the ATE premium.

Proportionality

The defendant argued that the costs claimed were disproportionate and that and the costs bore no relationship to the factors listed in CPR 44.3(5) which are:

(5) Costs incurred are proportionate if they bear a reasonable relationship to

(a) the sums in issue in the proceedings;
(b) the value of any non-monetary relief in issue in the proceedings;
(c) the complexity of the litigation;
(d) any additional work generated by the conduct of the paying party; and
(e) any wider factors involved in the proceedings, such as reputation or public importance’.

It was also submitted that the claimant solicitors were aware of the low value of the claim and that they should have taken steps to deal with the claim in a proportionate manner.

The claimants submitted that the costs claimed were reasonable and proportionate, especially as the defendant had disputed the issue of causation therefore making it necessary to issue proceedings. Additionally, they pointed out that the claim was a clinical negligence claim which was by its nature complex and as such, the matter required a high degree of skill and specialised knowledge in order to prove the allegations of breach of duty and causation.

Master Simmons relied on the case of Jefferson v National Freight Carriers Plc [2011] EWCA Civ 2082, in which the Court of Appeal stated:

‘In modern litigation, with the emphasis on proportionality, it is necessary for parties to make an assessment at the outset of the likely value of the claim and its importance and complexity, and then to plan in advance the necessary work, the appropriate level of person to carry out the work, the overall time which will be necessary and appropriate to spend on the various stages in bringing the action to trial, and the likely overall costs. While it is not unusual for costs to exceed the amount in issue, it is, in the context of modern litigation such as the present case, one reason for seeking to curb the amount of work done, and the costs by reference to the need for proportionality’.

This he said, is even more relevant today as the rules regarding proportionality are now much more onerous. However, he stated at para 21:

‘I looked through the solicitor’s file, both at the provisional assessment and prior to the hearing today, and I could see no evidence of any planning in the manner described by HH Judge Alton. The claim was always going to be low value and indeed there is an entry in the documents schedule annexed to the bill dated 31 July 2013 “Conducting a preliminary valuation in the light of the information obtained to date”.

Despite this, they proceeded to instruct expensive medical experts to prepare reports the costs of which totalled almost £20,000.

As such it was concluded:

‘Costs of £72,320.85 for a low value medical negligence claim are disproportionate. They do not bear any reasonable relationship to the sums in issue in the proceedings. The litigation was not particularly complex, no additional work was generated by the conduct of the Paying Party and there were no wider factors involved in the proceedings such as reputation or public importance’.

ATE Premium

With regards to the ATE premium, which stood at £31,976.4, the defendants argued that the claimant’s solicitors should have explored alternative insurance providers. In doing so the defendant pointed to premiums charged in other cases where the premiums were between £595 and £3,500 plus Insurance Premium Tax (IPT) and the policies had provided an indemnity of £100,000. As such the defendant maintained that the premium should be disallowed on the grounds that it was disproportionate or alternatively should be restricted to no more than £500.

The Claimant rejected the Defendants’ evidence which challenged the premium and submitted that the burden was on the Paying Party to advance material in support of the contention that the premium was unreasonable. No expert evidence had been produced. The examples that had been produced were not expert evidence.

Master Simons concluded that, the premium was disproportionate and distinguished this case from pre-LASPO cases, stating that since 1 April 2013, costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred.

He found that the claimant had not investigated any alternative insurance policy, the calculation of the premium was based on the costs of the medical reports which were considered unreasonable and disproportionate and the cost of the premium bears no reasonable relationship to the claim.

As such, he maintained the position that the premium should be reduced to £2,120 inclusive of IPT as it was reasonable for the claimant to have taken out an appropriate ATE policy so it should not be disallowed in its entirety.

The full judgment can be accessed here.
Mesothelioma Feature: Part 2: Common Law Negligence

INTRODUCTION

We have seen in part 1 of this series of features that the relaxed test of causation in asbestos related mesothelioma claims does not extend into the other remaining essential elements of establishing liability.

So the claimant must prove (i) exposure on a balance of probabilities, (ii) the exposure was in breach of duty, (iii) the exposure in breach of duty materially contributed to the risk of injury and was more than de minimis and (iv) loss and damage suffered as a result of injury and which is within the usual ‘remoteness rules’.

Breach of duty may be established in common law and/or statutory duty. In some mesothelioma claims only common law negligence will apply with issues of reasonable foreseeability to be determined. In others there may be co-existing statutory duties. Sometimes these statutory duties relate to generic workplace risks such as harmful ‘dust’ and ‘fumes’ and sometimes specific asbestos legislation will apply. Sometimes the statutory duties will import notions of foreseeability and simply ‘mirror’ the common law duty of care. Sometimes the statutory duties will involve a more onerous duty of care which does not involve any consideration of foreseeability.

In this and next week’s features we consider the common law regime only and show why exposure to any level of asbestos does not automatically amount to a breach of duty of care.

WHERE THERE IS DEVELOPING KNOWLEDGE

In common law an employer must take reasonable care for the reasonable safety of its employees from a foreseeable risk of injury. The test is the conduct of the reasonable and prudent employer taking positive thought for the safety of its workers in light of what it knows-or ought to know (actual or constructive knowledge) - see Stokes v Guest Keen and Nettlefold (1968)15 and Thompson v Smiths Shiprepairers (1984).16 That is the test unless it can be proven that a particular employer had a heightened or better appreciation than the objectively reasonable employer.

Our knowledge of the risks associated with respirable exposure to asbestos has developed over the last century or so.

In the mesothelioma claim of Asmussen v Filtrona (UK) Ltd (2011)17 guidance given by the Supreme Court in Baker v Quantum Clothing Group Ltd (2011)18 was applied:

‘...In an area of developing knowledge, an employer was entitled to rely on recognised and established practice at the time. Foreseeability of injury should not be judged with the benefit of hindsight and likewise depends on standards of the time’.

The issue of breach at common law depends upon the knowledge of risks, advice and standards prevailing at the time. As was said by Simon J in Asmussen:

‘...foreseeability of injury is to be tested against the standard of the well-informed employer who keeps abreast of the developing knowledge and applies his understanding without delay, and not by the standard of omniscient hindsight. An employer can rely upon a recognised and established practice to exonerate itself from liability in negligence for failing to take precautionary measures unless (a) the practice is clearly bad practice, or (b) ...the particular employer acquired greater than average knowledge of the risks.’

This was subsequently endorsed by Lord Justice Aikens in the Court of Appeal decision of Williams v University of Birmingham (2011)19, in which the deceased, a student at the defendant university, died of malignant mesothelioma, allegedly as a result of being exposed to asbestos whilst carrying out scientific experiments in a tunnel under the university buildings which contained pipes lagged with asbestos lagging. The university appealed against a decision that it was liable to the estate and dependents of the deceased on the grounds that it could not reasonably have foreseen that allowing him to carry out the experiments would expose him to the risk of an asbestos-related injury. In determining the correct test for breach of duty, the court stated:
‘In the context of the present case, I would formulate the test for whether the University was negligent and in breach of duty in the following manner. Ought the University reasonably to have foreseen the risk of contracting mesothelioma arising from Mr Williams’ exposure to asbestos fibres by undertaking the speed of light experiments in the tunnel in the manner contemplated - and done in fact - to the extent that the University should (acting reasonably) have refused to allow the tests to be done there, or taken further precautions or at the least sought advice. That brings me to the second important point. The understanding of asbestos-related diseases and the extent to which exposure to even very small quantities of asbestos fibres can have dire consequences has grown over the years. The question of what the University ought reasonably to have foreseen about the consequences of any exposure to asbestos fibres in the course of experiments in the tunnel and the reasonable conduct that the University ought to have adopted must be judged by reference to the state of knowledge and practice as at 1974.’

Williams has been followed in subsequent first instance mesothelioma decisions in which the claims were dismissed. For example, in McGregor v Genco (2014)20, in which the court was required to determine whether the defendant employer was liable in negligence for the mesothelioma of the claimant who was employed as a sales assistant in a department store and exposed to asbestos from the removal of old escalators which were being removed in 1976. Patterson J referred to Williams and concluded that she was unable to accept ‘that the defendant should have appreciated that the claimant was at risk of an asbestos related injury and that their failure to appreciate and take what would now be regarded as appropriate precautions or make enquiries about the nature of the dust was negligent’.

Similarly, in McCarthy v Marks & Spencer (2014)21, the court found that the defendant company had not breached its common law duty of care in respect of a worker who had developed mesothelioma following exposure to asbestos while working at its premises between 1967 and 1990. The judge referred to Williams and said at paragraph 90 that:

‘I do not consider that, assessed by the standards of the time, that it was reasonably foreseeable that the defendant should have appreciated that the presence of asbestos dust was likely to be injurious to the health of other contractors on site, who came into contact with asbestos dust, certainly not in the quantities which the experts agreed were involved’.

The importance of the ‘standards of the time’ can be illustrated here by considering the decision in a secondary exposure mesothelioma case, Maguire v Haarland & Wolf (2005)22, in which the deceased was exposed to asbestos fibres between 1961-1965 from washing contaminated work clothes of her husband who was employed by the defendant and was himself significantly exposed whilst working in boiler and engine rooms of ships. At para 21, Lord Justice Judge, identified the dangers of hindsight when criticising historic omissions of employers. He stated:

‘When considering criticisms of actions and omissions forty years ago we have, always, to warn ourselves against the wisdom of hindsight, and recognise the potential unfairness of using knowledge accumulated during the last forty years which, by definition, was not available to the defendants. It has taken a very long time indeed for the true extent of the dreadful risks posed by exposure to asbestos dust to become known. As we shall see, the learning process has been gradual, beginning with those most obviously at risk, employees whose work directly involved such exposure’.

He then went on to conclude, after a thorough analysis of the documentation available at the time of the deceased’s exposure, that there was nothing in the specialist safety, medical or factory inspectorate literature to alert the defendant to the risk of secondary exposure. The risk was only identified in literature in 1965. As such the Court of Appeal held that scientifically developing this field the risk was not foreseeable.

More recently, in Woodward v Secretary of State for Energy & Climate Change (2015)23, also a secondary exposure mesothelioma claim where the deceased developed mesothelioma from the clothes of other workers, the court applied the test in Williams and concluded that in determining whether the employee could have reasonably foreseen a risk of injury to the deceased from their exposure, that consideration must be had to the standards of the time. The standards of the time in this case were set out in Technical Data Note 13 first issued in 1970 and accompanying the Asbestos Regulations 1969. However, the claimant sought to distinguish Williams on the grounds that in the current case the employer had specific guidance from the Asbestos Research Council, of which it knew, or ought to have known, and that guidance was that contaminated clothing should not be taken into clean areas, or into canteens. As such, it was submitted, that the exposure limit in Technical Data Note 13 was irrelevant and that because of the accepted risk of mesothelioma which was recognised the claimant should succeed.

The judge made an important distinction between a risk of injury and foreseeability of injury. He stated:
‘Not all risk of injury is sufficient to make injury foreseeable. As I said, the risk of mesothelioma was well known in the 1970s. It was, or should have been, known to the University of Birmingham and Williams; it was, or should have been, known to the National Coal Board in this case. However, the question is not whether there was that risk but whether the harm was foreseeable’.

As such the question was, did the defendant have reason to believe that there was sufficient risk of the deceased developing mesothelioma if she was exposed to asbestos from the clothing of other workers, and what is regarded as a sufficient risk has to be judged by the standards of the time, and those standards were set out in this case in Technical Data Note13.

This principle of distinguishing between foresight of risk and foresight of injury is perhaps best illustrated in the House of Lords decision of Bolton v Stone [1951] AC 850, where a cricket ball hit out of the cricket ground hit a passer-by. In that case it was said by Lord Porter that:

‘...it is not enough that the event should be such as can reasonably be foreseen; the further result that injury is likely to follow must be also such as a reasonable man would contemplate, before he can be convicted of actionable negligence. Nor is the remote possibility of injury occurring enough; there must be sufficient probability to lead a reasonable man to anticipate it’.

It is justifiable not to take steps to eliminate a real risk if it is small and if the circumstances are such that a reasonable man, careful of the safety of his neighbour, would think it right to neglect it-The Wagon Mound (No.2) [1967] 1 AC617 as per Lord Reid at 642-3.

This principle that not all foreseeable risk will equate to foreseeable harm was very recently underlined by the Court of Appeal in Dean & Chapter of Rochester Cathedral v Leonard Debell (2016)24. This case concerned a tripping accident at Rochester Cathedral. The court found that the cathedral was not liable in negligence as the nature of the risk did not pose a real danger to pedestrians. Lord Justice Elias stated:

‘It is important to emphasise, therefore, that although the test is put by Steyn LJ in terms of reasonable foreseeability of harm, this does not mean that any foreseeable risk is sufficient. The state of affairs may pose a risk which is more than fanciful and yet does not attract liability if the danger is not eliminated. The observations of Lloyd LJ in James v Preseli Pembrokeshire District Council [1993] P.I.Q.R. P114, a case which applied the test in Mills, are pertinent:

“In one sense, it is reasonably foreseeable that any defect in the highway, however slight, may cause an injury. But that is not the test of what is meant by ‘dangerous’ in this context. It must be the sort of danger which an authority may reasonably be expected to guard against.”’.

FORSEEING A PARTICULAR INJURY?

The employer does not need to foresee a particular type or form of disease - just personal injury. So, for example, mesothelioma only came to be known to medical science in 1960. Before that it was an unrecognised condition. So if an employer ought to have foreseen a risk of asbestosis from negligent exposure in the 1950s-at a time when mesothelioma was unknown-but the employee goes on to develop mesothelioma in the future, then there is no foreseeability defence in those circumstances - see Page v Smith [1996] AC 177 at para 170.

As was said by Russell LJ at para 361 in Margereson v Roberts [1996] PIQR P365, a public liability case concerning alleged exposure from a factory operated by the defendant in a suburb in Leeds in which the claimant lived from 1925 to 1957:

‘….liability only attaches to these defendants if the evidence demonstrated that they should reasonably have foreseen a risk of some pulmonary injury, not necessarily mesothelioma’.

In Jeromson v Shell Tankers UK Ltd [2001] I.C.R. 1223, the defendant appealed against a finding that it was liable in negligence for the deaths of two former employees who had developed mesothelioma following prolonged exposure to asbestos in the 1950s when the existence of mesothelioma was unknown. The Court provided some guidance on how to determine whether an employer ought to reasonably have foreseen risk of pulmonary injury:

‘The issue in this case is not one of balancing the effectiveness, expense and inconvenience of the precautions required against the extent of the risk: the issue is whether the risk should have been identified. With the benefit of hindsight, it is now quite clear
that the exposure in these cases was sufficient to cause mesothelioma, the disease from which Mr. Dawson and Mr. Jeromson eventually died. But the link between asbestos and mesothelioma was not established until 1960. Until then the known risk was of lung disease, in particular asbestosis, and, in the 1950s, lung cancer associated with asbestosis. The issue was whether the degree of exposure in this case was such that reasonable employer should have identified a risk'.

HOW KNOWLEDGE DEVELOPED

So how has knowledge of the risks associated with asbestos developed? What information was available to the reasonable and prudent employer over time?

The 1930 publication by the Home Office of the ‘Report on the effects of asbestos dust on the lungs and dust suppression in the Asbestos Industry’ (Merewether and Price) really marked the start of the public understanding of the dangers associated with inhalation of asbestos dust and established a clear link between long-standing and heavy exposure and the risk of asbestosis. Although the report was directed towards the manufacturing industry it also referred to workers exposed in other industries. It provided no information about what might be a ‘safe’ level of exposure.

A detailed chronology of industry guidance and developing knowledge of the risks and harm associated with asbestos is provided in our mesothelioma guide published at the end of this series of features, but in very simple terms the development can be summarised in the table below:

<table>
<thead>
<tr>
<th>DATE / PERIOD</th>
<th>RISK IDENTIFIED</th>
</tr>
</thead>
<tbody>
<tr>
<td>1930</td>
<td>Asbestosis from heavy and prolonged exposure. Research confined to textile workers but identified workers in other industries exposed to asbestos dust as also at risk. Risks from lower exposures unknown.</td>
</tr>
<tr>
<td>1940s</td>
<td>Asbestosis concern raised for ship building and ship repair industries.</td>
</tr>
<tr>
<td>1950s</td>
<td>Lung cancer associated with asbestosis</td>
</tr>
<tr>
<td>1960</td>
<td>Mesothelioma-its existence was first recognised within medical literature.</td>
</tr>
<tr>
<td>1962-1964</td>
<td>Mesothelioma-association made with slight exposures to asbestos</td>
</tr>
<tr>
<td>1965</td>
<td>Mesothelioma from secondary exposures, such as family members exposed to work clothes of primary exposed person contaminated with asbestos or living within half a mile of asbestos factory.</td>
</tr>
<tr>
<td>October 1965</td>
<td>Mesothelioma-Public awareness raised through the October Sunday Times ‘Killer Dust’ article.</td>
</tr>
</tbody>
</table>

EXPOSURE LIMITS

How was an employer to determine whether there was a foreseeable risk of injury from respirable exposure to asbestos?

Recommended UK workplace exposure limits to hazardous substances have existed since 1960 and have been variously called ‘Threshold Limit Values’, ‘Hygiene Standards’, ‘Control Limits’ and have been based on continuous 8 hour or 4 hour or 10 minute exposure periods.

It was not until 1960 and publication of a booklet, ‘Toxic Substances in Factory Atmospheres’ by the Ministry of Labour, that any industry guidance on asbestos exposure limits was provided. Based on a ‘normal working day’ the maximum permissible concentration for asbestos was 177 particles per cubic centimetre of air (ppcc)-referred to as Threshold Limit Value. Updated editions of the booklet were published in 1966 and 1968 which were now called ‘Dust and Fumes in Factory Atmospheres’. The Threshold Limit Value was now expressed as an 8 hour time weighted average of 5 million particles per cubic foot (mppcf) –
essentially the same as the previous limit of 177 ppcc. Note that the Threshold Limit Value in these 3 publications was the same for all types of asbestos fibres-no distinction was made between the different fibre types reflecting the lack of knowledge then as to their differing carcinogenic potencies.

Then in March 1970 Technical Data Note 13: Standards for Asbestos Dust Concentration for Use with the Asbestos Regulations 1969, was published which accompanied the 1969 Asbestos Regulations. Now for the first time distinction was made between the different fibre types. Chrysotile (white) and amosite (brown) asbestos shared the same 4 hour time weighted exposure limit of 2 fibres /ml (and a higher limit of 12 fibres / ml averaged over a shorter 10 minute sampling period) which was not to be exceeded. Crocidolite (blue) asbestos had a limit set at a 10th of this at 0.2 fibres / ml reflecting knowledge of its greater carcinogenic potency.

It is important to note that the threshold limit values pre 1970 were expressed in units of particles per cubic centimetre (ppcc) and from 1970 in units of fibres per millilitre-'fibres/ml'. It is not entirely clear how these units relate to each other and how to accurately convert units of ppcc to fibres /ml. This uncertainty means that the pre 1970 TLV expressed as a fibres/ml equivalent is thought to be anywhere between 5-30 fibres/ml.

This uncertainty was expressed in Maguire where Lord Justice Judge, sitting in the Court of Appeal made the following comments regarding the conversion of threshold limit values:

‘Under the heading “Mineral Dusts”, the figure relating to asbestos reads “177” and appears beneath the letters PPCC, particles per cubic centimetre of air. This method of calculation derives from the United States of America. In the United Kingdom the equivalent figure would be expressed in fibres per millilitre. We understand that the method of converting one of these calculations into the other is not straightforward, in the sense that there is “no universally accepted factor”. The end result is that this “hygiene standard” for asbestos should be regarded as equivalent to an asbestos fibre concentration somewhere in the broad range of 5/30 fibres/ml’.

In December 1976 Technical Data Note13 was replaced by the HSE Guidance Note EH10, which gave revised criteria which the HSE was to adopt in determining whether the requirements of the 1969 Asbestos Regulations were being observed. However for the first time there was the recommendation that ‘exposure to all forms of asbestos dust should be reduced to the minimum that is reasonably practicable’.

EH10 was updated in 1983 which gave more positive guidance on what could be done to reduce exposure to ‘the minimum that is reasonably practicable’ Now for the first time positive guidance was given as to the use of respirators.

The hygiene guidance limits for asbestos between 1960 and 1990 are shown in the table below and extracts from key guidance is shown in the appendix to this feature.
<table>
<thead>
<tr>
<th>DATE &amp; DOCUMENT</th>
<th>TYPE OF STANDARD</th>
<th>LIMIT VALUES</th>
</tr>
</thead>
<tbody>
<tr>
<td>March 1960 Toxic Substances in Factory Atmospheres, Ministry of Labour</td>
<td>Threshold Limit Value (TLV)*</td>
<td>CHRYOSITILE</td>
</tr>
<tr>
<td>177 ppcc as 8 hour TWA</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1966 Dust and Fumes in Factory Atmospheres, Ministry of Labour</td>
<td>5 mppcf (=177 ppcc) as 8 hour TWA</td>
<td></td>
</tr>
<tr>
<td>1968 Dust and Fumes in Factory Atmospheres, Ministry of Labour</td>
<td>2 mppcf/12 fibres/ml as 8 hour TWA</td>
<td></td>
</tr>
<tr>
<td>March 1970 and January 1971 Technical Data Note 13 (TDN 13), Department of Employment and Productivity</td>
<td>‘Standard for Asbestos Dust for use with Asbestos Regulations 1969’</td>
<td>2 fibres/ml (4 hour TWA) or 12 fibres/ml (10 minute TWA)</td>
</tr>
<tr>
<td>January 1974 TDN 13 Rev</td>
<td>‘Hygiene Standards for Airborne Dust Concentrations for use with Asbestos Regulations 1969’</td>
<td>2 fibres/ml (4 hour TWA) or 12 fibres/ml (10 minute TWA)</td>
</tr>
<tr>
<td>December 1976 HSE Guidance Note EH10</td>
<td>‘Hygiene standard’</td>
<td>As TDN (above) but subject to “exposure to be reduced to the minimum reasonably practicable” requirement. This requirement applies to all subsequent standard setting documents below.</td>
</tr>
<tr>
<td>April 1983 HSE Guidance Note EH10</td>
<td>Control Limit</td>
<td>1 fibres/ml (4 hour TWA)</td>
</tr>
<tr>
<td>July 1984 HSE Guidance Note EH10</td>
<td>0.5 fibres/ml (4 hour TWA)</td>
<td>0.2 fibres/ml (4 hour TWA)</td>
</tr>
<tr>
<td>February 1988 HSE Guidance Note EH10</td>
<td>0.5 fibres/ml (4 hour TWA) or 1.0 fibres/ml (10 min TWA)</td>
<td>0.2 fibres/ml (4 hour TWA) or 0.6 fibres/ml (10 min TWA)</td>
</tr>
<tr>
<td>June 1990 HSE Guidance Note EH10</td>
<td>Exposure Limit</td>
<td>As February 1988</td>
</tr>
</tbody>
</table>

*NOTE: The standards pre 1970 are expressed in units of particles per cubic centimetre. Standards from 1970 are in units of fibres/ml. The conversion between units is unclear. It is generally thought that pre 1970 limits are the equivalent of between 5-30 fibres/ml.
ARE EXPOSURE LIMITS ‘SAFE’ OR ‘PERMISSIBLE’ LEVELS OF EXPOSURE?

How are these exposure limits to be treated by employers? Did they represent ‘safe’ or ‘permissible’ levels of asbestos exposure? Did the reasonable employer comply with its common law duties of care if exposure was below any relevant limit? Or was the duty a more precautionary one to reduce exposure not just below any limit but as far as reasonably practicable?

These are questions which we will be addressing in next week’s feature.

APPENDIX: ASBESTOS HYGIENE STANDARDS 1960-1990

TOXIC SUBSTANCES IN FACTORY ATMOSPHERES 1960

PERMISSIBLE CONCENTRATIONS

While systems of control should be as effective as it is practicable to make them, it is desirable to have some guide to which the efficiency of the control measures can be related. In the List at the end of this booklet there are set out figures of maximum permissible concentrations of certain substances used in industry. For each substance a figure of concentration in atmosphere is given. If this concentration is exceeded, further action is necessary to achieve satisfactory working conditions. The List also serves as a general indication of the relative degrees of toxicity of these substances.

TOXIC SUBSTANCES IN FACTORY ATMOSPHERES

INTRODUCTION

By Section 47(1) of the 1937 Factories Act all practicable measures are to be taken to protect persons employed against inhalation of any dust or fume or other impurity of such a character and to such extent as to be likely to be injurious.

This booklet offers suggestions to occupiers of factories and others concerned. It deals with points relating to all practicable measures to protect against inhalation and it gives information about certain dusts and fumes known to be of such a character as to be likely to be injurious if inhaled. The information given is not exhaustive and expert advice should always be sought in any case of doubt or difficulty.

In some cases the hazards and the proper precautions against them are well known and understood. But with the increasing complexity of industrial processes new substances are coming into use. The first step in all cases is to know what substances are being used and the possible hazard involved. It is of prime importance always to be on the look-out for a possible hazard and to bear in mind the possible need for precautions; for example, by seeing that labels on containers and instructions for use are properly examined, understood and observed.

MINERAL DUSTS

<table>
<thead>
<tr>
<th>SUBSTANCE</th>
<th>PPM</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aluminium oxide</td>
<td>1766</td>
</tr>
<tr>
<td>Asbestos</td>
<td>177</td>
</tr>
<tr>
<td>Dust (measles, no free silica)</td>
<td>1766</td>
</tr>
<tr>
<td>Mica (below 5% free silica)</td>
<td>706</td>
</tr>
<tr>
<td>Portland cement</td>
<td>1766</td>
</tr>
<tr>
<td>Silica (high above 50% free SiO₂)</td>
<td>177</td>
</tr>
<tr>
<td>medium (5 to 50% free SiO₂)</td>
<td>706</td>
</tr>
<tr>
<td>low (below 5% free SiO₂)</td>
<td>1766</td>
</tr>
<tr>
<td>Silicon carbide</td>
<td>1766</td>
</tr>
<tr>
<td>Soapstone (below 5% free SiO₂)</td>
<td>706</td>
</tr>
<tr>
<td>Talc</td>
<td>706</td>
</tr>
</tbody>
</table>
DUST AND FUMES IN FACTORY ATMOSPHERES

INTRODUCTION

It is a requirement of section 62(1) of the Factories Act 1961 that, in every factory where any process is carried on giving off dust, fumes or other impurity of such a character and to such an extent as to be likely to be injurious or offensive to the persons employed, or any substantial quantity of dust of any kind, the occupier shall take all practicable measures to protect the persons employed against inhalation of the dust or fumes. This booklet offers some guidance in methods of meeting this statutory obligation—by enclosing the process, by providing local exhaust ventilation, by using personal protective equipment and by general ‘good housekeeping’. Attempts should, however, always be made in the first place to use as a substitute the least harmful material possible. In all circumstances the aim should be to reduce the concentration of dust or fumes in the atmosphere to the lowest practicable level.

We reproduce in this booklet, by permission, a list, adopted by the American Conference of Governmental Industrial Hygienists at their meeting in May 1965, of ‘threshold limit values’ for a number of substances which may be injurious or offensive if absorbed in the form of dust or fume. A condition of reproduction of this list is that it should be published in entirety and without amendment, and careful attention should be given to the preface which explains the thinking behind it. It must be remembered that it is based on experience, practice and research in the United States. Because of the differences in climate, genetic and industrial conditions in this country, and because certain materials may be obtained from different sources of supply, British experience is not always the same, and
DUST AND FUMES IN FACTORY ATMOSPHERES

INTRODUCTION

It is a requirement of section 63(1) of the Factories Act 1961 that, in every factory where any process is carried on giving off dust, fume or other impurity of such a character and to such an extent as to be likely to be injurious or offensive to the persons employed, or any substantial quantity of dust of any kind, the occupier shall take all practicable measures to protect the persons employed against inhalation of the dust or fume. This booklet offers some guidance in methods of meeting this statutory obligation—by enclosing the process, by providing local exhaust ventilation, by using personal protective equipment and by general 'good housekeeping'. Attempts should, however, always be made in the first place to use as a substitute the least harmful material possible. In all circumstances the aim should be to reduce the concentration of dust or fumes in the atmosphere to the lowest practicable level.

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It is intended to republish the present booklet each year, with the American threshold limit values for that year as an Appendix. The threshold limit values for some of the respirable dusts submitted by the United States are under active consideration at the present time, and so also is the possible use of gravimetric methods for their estimation. These values have been based on impinger sampling techniques whereas in the United Kingdom other methods are commonly used.

The threshold limit value given in this booklet for asbestos is the American value. In the United Kingdom it is proposed to introduce new Asbestos Regulations shortly, and for the purposes of these Regulations the American figure quoted should be regarded as a ceiling value.
MINERAL DUSTS

SILICA

Crystalline

**Quartz, Threshold Limit calculated from the formula ... ... ... ... ... 250 (or \%SiO₂ + 5)

**Cristobalite ...

Amorphous, including natural diatomaceous earth ...

Tremolite ...

SILICATES (less than 1% crystalline silica)

**Asbestos ...

Mica ...

Soapstone ...

Talc ...

Portland Cement ...

GRAPHITE (natural) ...

‘Inert’ or Nuisance Particulates ...

see Appendix D

Conversion factors

mppof x 35.3 = million particles per cubic meter

= particles per c.c.

NOTICE OF INTENDED CHANGES (Continued)

SUBSTANCE

+ Asbestos 12 fibers/ml > 6 μ in length [2], or 2 mppof [3].
Standards for Asbestos dust concentration for use with the Asbestos Regulations 1969

In this note guidance is given on how the H.M. Inspectors of Factories will interpret the dust concentration, consisting of or containing asbestos. If dust is liable to cause danger to the health of employed persons it is important to bear in mind that these standards are provisional and may have to be revised from time to time.

Chrysotile, amosite and fibrous amphibole asbestos

(a) Where the average concentration of asbestos dust over any 10 minute sampling period is less than 2 fibrils/sec or 0.1 mg/m³, H.M. Factory Inspectors will not seek to enforce the substantive provisions of the Regulations, in particular regulation 5 and 6. Where the concentration is 2 fibrils/sec or 0.1 mg/m³ or more the dust will be considered to be dust and the duration of sampling and the number of samples to be determined as follows:

(b) Where the average concentration of asbestos dust over a four hour period exceeds 5 fibrils/sec or 0.5 mg/m³, inspectors will normally seek to confirm or otherwise check the accuracy of the test by means of a further sample before taking action to enforce regulations 7 or 8 whichever is applicable.

Sampling—general considerations

There should be an awareness of the danger of dust sampling before attempting it. This note gives guidance on the interpretation of the concentration and composition of asbestos dust and is not intended to cover all aspects of dust sampling.

(a) There should be an awareness of the danger of dust sampling before attempting it. This note gives guidance on the interpretation of the concentration and composition of asbestos dust and is not intended to cover all aspects of dust sampling.

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(d) There should be an awareness of the danger of dust sampling before attempting it. This note gives guidance on the interpretation of the concentration and composition of asbestos dust and is not intended to cover all aspects of dust sampling.
Introduction

1. This Notice of Guidance replaces Technical Data Note 13 — Hygiene Standards for Airborne Asbestos Dust — Constructions for use with the Asbestos Regulations 1966. It is intended to provide interim guidance and will be revised when the Advisory Committee on Asbestos, which was set up by the Health and Safety Commission to review the risks to health arising from asbestos and products containing asbestos, publishes its findings and recommendations.

2. These Guidance Notes replace the series of Technical Data Notes produced by HSE Factory Inspectorate and the CEBR’s Notes of Guidance produced by the Employment Medical Advisory Service.

3. The Notes are published under five subject headings: Medical, Environmental Hygiene, Chemical Safety, Plant and Machinery, and General. Existing TDA and CEBR’s Notes of Guidance will be progressively brought into the new groupings.

9. Until the Advisory Committee on Asbestos has published its findings and recommendations the Health and Safety Executive will use the following criteria in assessing whether or not there is compliance with the Asbestos Regulations and the Health and Safety at Work Act.

(a) Exposure to all forms of asbestos dust should be reduced to the minimum that is reasonably practicable, and

(b) In any case, occupational exposure to asbestos dust should never exceed:

for crocidolite

0.2 fibres/ml when measured over any 10-minute period.

for other forms of asbestos

2 fibres/ml when measurements are averaged over a 4-hour period. Short term exposure should not exceed 12 fibres/ml when measured over any 10-minute period.

Note: Fibres means particles of length greater than 5 micrometres, a diameter of less than 3 micrometres and having a length to breadth ratio of at least 3:1, observed by transmitted light under phase contrast conditions at a magnification of approximately 500x.

10. The Health and Safety Executive will expect particular care to be taken where workers are engaged in processes involving crocidolite because the concentration of this mineral that is believed to be liable to be dangerous to health is very small indeed. An approved respirator will be required to be worn unless the concentration in the breathing zone of a worker in a crocidolite process can be maintained below 0.2 fibres/ml when measured over any 10-minute sampling period. Advice on the selection and use of respiratory protective equipment can be obtained from local offices of the Health and Safety Executive.
Mesothelioma Claims Part 3: Common Law Negligence: Conflicting Appellate Guidance?

INTRODUCTION

In last week’s feature we considered the various hygiene standards and control limits which have existed for asbestos in the UK since 1960. How were these control limits to be treated by employers? Did they represent ‘safe’ or ‘permissible’ levels of asbestos exposure? Did the reasonable employer comply with its common law duties of care if exposure was below any relevant limit? Or was the duty a more precautionary one to reduce exposure not just below any limit but as far as reasonably practicable?

These questions are not easy to answer but have been addressed by three decisions of the Court of Appeal – Jeromson v Shell Tankers UK Ltd [2001] EWCA Civ 101, Maguire v Harland & Wolff Plc [2005] EWCA Civ 1 and Williams v University of Birmingham [2011] EWCA Civ 1242. Unfortunately there is a definite tension between these authorities resulting in an apparently conflicting way of dealing with cases involving exposures before and after 1970 and publication of Technical Data Note 13: Standards for Asbestos Dust Concentration for Use with the Asbestos Regulations 1969, was published which accompanied the 1969 Asbestos Regulations.

The result is that employers had an apparently more onerous duty to reduce exposures to asbestos as far as reasonably practicable - irrespective of whether exposure was below control limits that existed from 1960, but from 1970 employers could rely on Technical Data Note 13: Standards for Asbestos Dust Concentration for Use with the Asbestos Regulations 1969 and escape any finding of common law breach if the exposure was within limits set out within that document - i.e. there was no duty to reduce as far as practicable.

EXPOSURE LIMITS

Firstly let us remind ourselves of the hygiene standards and control limits that have existed for asbestos since 1960.

1960 - ‘Toxic Substances in Factory Atmospheres’ by the Ministry of Labour, which set a Threshold Limit Value or the maximum permissible concentration for asbestos of 177 particles per cubic centimetre of air (ppcc) over 8 hours. Equivalent to 5-30 fibres / ml.

1966 and 1968 - ‘Dust and Fumes in Factory Atmospheres’. The Threshold Limit Value was now expressed as an 8 hour time weighted average of 5 million particles per cubic foot (mppcf) – essentially the same as the previous limit of 177 ppcc. Equivalent to 5-30 fibres / ml.

March 1970 - Technical Data Note 13: Standards for Asbestos Dust Concentration for Use with the Asbestos Regulations 1969, was published which accompanied the 1969 Asbestos Regulations. Now, for the first time, distinction was made between the different fibre types. Chrysotile (white) and amosite (brown) asbestos shared the same 4 hour time weighted exposure limit of 2 fibres / ml (and a higher limit of 12 fibres / ml averaged over a shorter 10 minute sampling period) which was not to be exceeded. Crocidolite (blue) asbestos had a limit set at a 10th of this at 0.2 fibres / ml reflecting knowledge of its greater carcinogenic potency.

December 1976 - TDN13 was replaced by the HSE Guidance Note EH10. Same limits as for TDN 13 but subject to “exposure to be reduced to the minimum reasonably practicable” requirement.

April 1983 - EH10 was updated in 1983 which gave more positive guidance on what could be done to reduce exposure to ‘the minimum that is reasonably practicable’. Now for the first time positive guidance was given as to the use of respirators.

ARE EXPOSURE LIMITS ‘SAFE’ OR ‘PERMISSIBLE’ LEVELS OF EXPOSURE?

How are these exposure limits to be treated by employers? Did they represent ‘safe’ or ‘permissible’ levels of asbestos exposure? Did the reasonable employer comply with its common law duties of care if exposure was below any relevant limit? Or was the duty a more precautionary one to reduce exposure not just below any limit but as far as reasonably practicable?
Let us first consider **Williams** as the latest of the line of Court of Appeal authorities. In that case the deceased had been exposed to asbestos in a service tunnel at the defendant university while an undergraduate physics student in 1974. The deceased had been exposed to a level of asbestos fibres exceeding 0.1 fibres/ml, but less than 0.2 fibres/ml, for a period between 52 and 78 hours in total. At first instance, the judge held the defendant liable at common law, holding that the exposure materially increased the risk of the deceased contracting mesothelioma. On appeal however, the court held that the test is whether the degree of actual exposure made it reasonably foreseeable to the employer that as a result of its conduct the employee would be exposed to a risk of contracting an asbestos-related condition. That was to be based on the available knowledge at the relevant time. At the time, Technical Data Note 13 (published by HM Factory Inspectorate, March 1970) set levels of 0.2 fibres/ml for crocidolite and 2 fibres/ml for amosite and chrysotile as maximum safe exposure levels. The deceased’s exposure had not exceeded this so there was no breach of duty; the employer at the time on the available knowledge would not have foreseen – and could not have reasonably been expected to foresee – a risk of contracting an asbestos-related condition.

Lord Justice Aikens held:

‘I agree with Mr Feeny’s submission that there could only be a breach of duty of care by the University if the judge had been able to conclude that it would have been reasonably foreseeable to a body in the position of this University in 1974 that if it exposed Mr Williams to asbestos fibres at a level of just above 0.1 fibres/ml for a period of 52–78 hours, he was exposed to an unacceptable risk of asbestos related injury. In my view the best guide to what, in 1974, was an acceptable and what was an unacceptable level of exposure to asbestos generally is that given in the Factory Inspectorate’s “Technical Data Note 13” of March 1970, in particular the guidance given about crocidolite. The University was entitled to rely on recognised and established guidelines such as those in Note 13. It is telling that none of the medical or occupational hygiene experts concluded that, at the level of exposure to asbestos fibres actually found by the judge, the University ought reasonably to have foreseen that Mr Williams would be exposed to an unacceptable risk of asbestos related injury’.

Let us next consider the Court of Appeal authority of **Jeromson**. This was an appeal by the widows of two men who developed mesothelioma as a result of exposure to asbestos dust during employment as marine engineers in engine rooms by Shell between 1951-57 and 1957-1961. The appeals succeeded at common law against Shell. Claims against the earlier employer, The Cherry Tree, arising from exposure and lagging work in the 1940s succeeded under the Asbestos Industry Regulations 1931 but failed at common law and under s.47 of the FA 1937.

It was Shell’s case that until the link between asbestos and mesothelioma was established in the 1960s, the known risk from asbestos was of asbestosis and that risk was thought to come from prolonged exposure of a completely different order from that experienced by the 2 employees and the risk of injury was simply not foreseeable. Dealing with common law negligence the court considered the literature published before 1961 and what Shell - as a reasonable and prudent and major employer-should have made of it. The key publications and guidance considered were [(i) the Merewether & Price Report 1931, (ii) the 1931 Asbestos Regulations, (iii) s.47 of the Factories Act 1937, (iv) Annual Reports of the Chief Inspector of Factories from 1938, 1943, 1949 and 1956 and (v) advice to the Ship repairing Industry and power stations by the Chief Inspector in 1945 and 1949].

The 1960 guidance ‘Toxic Substances in Factory Atmospheres’ by the Ministry of Labour, which for the first time set a Threshold Limit Value or the maximum permissible concentration for asbestos of 177 particles per cubic centimetre of air (ppcc) over 8 hours, was NOT considered by the court.

It was an undisputed finding of fact that exposure involved ‘significant levels of visible dust’. Lady Justice Hale (as she was then), who gave the lead judgment of the court, identified the issue at common law as being ‘whether the degree of exposure in this case was such that a reasonable employer should have identified a risk’ [para 35].

Essentially at the time of exposure it was scientifically unknown how to measure asbestos exposure levels. There was no knowledge of what might be considered safe or permissible levels of exposure. The literature considered by the court pointed to sufficient uncertainty and ignorance as to the dangers posed by asbestos that a prudent employer, given the nature and extent of exposure of the employees, would have adopted a precautionary approach and taken precautions, or at the very least made inquiries about what precautions, if any, they should take.

Lady Justice Hale stated:
'The point which impressed the judge was the certain knowledge that asbestos dust was dangerous and the absence of any knowledge, and indeed any means of knowledge, about what constituted a safe level of exposure. Mr Mackay’s argument relies heavily on the explosion of knowledge which took place during the 1960s. Only then did it become apparent that mesothelioma could result from very limited exposure. In particular, it was only then that knowledge began to develop of the risks to those outside the workplace, such as the wife washing her shipyard worker husband’s overalls (as in Gunn) or people living near to asbestos works. But just as courts must beware using such later developments to inflate the knowledge which should have been available earlier, they must beware using it to the contrary effect. The fact that other and graver risks emerged later does not detract from the power of what was already known, particularly as it affected employees such as these, working in confined spaces containing a great deal of asbestos which might have to be disturbed at any time. There is no reassurance to be found in the literature that the level of exposure found by the judge in this case was safe and much to suggest that it might well not be so. The judge was entitled to conclude that a prudent employer would have taken precautions or at the very least made inquiries about what precautions, if any, they should take'.

Next we consider the Court of Appeal authority of Maguire, a secondary exposure PL mesothelioma claim. The deceased had been exposed to asbestos fibres between 1961-1965 from washing contaminated work clothes of her husband who was employed by the defendant and himself significantly exposed whilst working in boiler and engine rooms of ships. The exposure created a reasonable foreseeable risk of injury to the husband (which did not materialise) but was it reasonably foreseeable to the defendant that family members of its employees were at risk of mesothelioma from this type of secondary exposure?

This risk was only identified in medical literature in 1965 (the Newhouse and Thompson papers). The court held that in a scientifically developing field the risk of injury in this case was not foreseeable (with LJ Mance as he was then dissenting). Standards could not be imposed on employers that no-one at the time had ever thought of adopting.

The nature of guidance given to employers by the Ministry of Labour in its 1960 document ‘Toxic Substances in Factory Atmospheres’ which, as stated earlier, introduced the first hygiene control limit for asbestos, was closely scrutinised by LJs Mance and Longmore.

In the document introduction its purpose is given as offering suggestions on practical measures which can be adopted to protect persons against inhalation of any dust or fume of such a character and such extent as likely to be injurious - as required by s. 47(1) of the 1937 FA. The document then sets out a hierarchy of practical measures - starting with substitution of the dangerous substance for a harmless one and if that is impossible then ensuring that no toxic material escape into the atmosphere by various means of enclosures and exhaust ventilation and finally the use of PPE. Under the heading ‘Permissible Concentrations’ the document states ‘In the List at the end of this booklet there are set out figures of maximum permissible concentrations of certain substances used in industry…If this concentration is exceeded, further action is necessary to achieve satisfactory working conditions’.

Despite dissenting judgments on the foreseeability issue, LJs Mance and Longmore agreed that the 1960 guidance did not advocate safe or permissible levels of exposure. Due to the uncertain risks of asbestos there was a duty to reduce exposure ‘so far
as reasonably practicable’. LJ Mance stated [par 77] that levels were ‘not a justification for foregoing practicable measures to reduce exposure to dust, but the minimum which should be achievable by taking all practicable measures’. LJ Longmore said [para 90] that ‘it is only when it is impracticable to reduce exposure to dust, that permissible concentrations can have any relevance in relation to employees’.

LJ Judge considered the later 1968 Ministry of Labour publication ‘Dust and Fumes in Factory Atmospheres’. Whilst this set out the same threshold limit values for asbestos as the earlier 1960 document, he found that the document when read as a whole demonstrated a far greater perception of the risks associated with asbestos than the earlier document [para. 40].

As such, it was concluded that, the defendant, despite the presence of threshold limit values, was under a duty to reduce the claimant’s exposure to asbestos to the lowest practicable level.

Let us pause here and consider what is said in the 1966 (not addressed at all in Maguire) and 1968 publications. Within the introduction to both it states ‘In all circumstances the aim should be to reduce the concentration of dust or fume in the atmosphere to the lowest practicable level’ although this is made in the context of dust or fumes considered likely to be injurious or of any substantial quantity (following the wording of s.63(1) of the FA 1961). In both publications the threshold limit values are prefaced with the following explanation:

‘The Threshold limit values refer to air-borne concentrations of substances and represent conditions under which it is believed that nearly all workers may be repeatedly exposed, day after day, without adverse effect. Because of wide variation in individual susceptibility, exposure of an occasional individual at or even below the threshold limit may not prevent discomfort, aggravation of a pre-existing condition, or occupational illness.’

It is difficult to understand why employers should not take that official definition at face value and why they would have reasonable foresight of the risk of harm from exposures within the threshold limit value and further why there would be a requirement to reduce exposure to the lowest practicable level - unless that exposure was above the limit value or ‘of any substantial quantity’. The document states that the threshold limits ‘are based on the best available information from industrial experience, from experimental human and animal studies, and when possible, from a combination of the three’.

The publications also provided a separate list of limits referred to as ‘Tentative Values’ where the evidence of safety was not so well established. So certain substances were assigned to this list ‘for at least 2 years to permit presentation of further scientific evidence to indicate their appropriateness for transfer to the Recommended List’. Asbestos was assigned to the ‘Recommended List’ and this would surely reassure an employer that the value assigned to asbestos was indeed a safe limit based on well-established scientific evidence?

**CONCLUSION**

It is clear then there is a legal tension between the Court of Appeal authorities in Maquire, Jeromson and Williams in respect of the common law standards and duties of care regarding exposures pre and post 1970 and what reliance employers can place upon
control hygiene limits

However, claims involving pre-1970 exposures are diminishing. According to the HSE the average latency period between asbestos exposure and onset of mesothelioma is c. 40 years and we are now 47 years on from the 1970 threshold date. The issue of how we deal with claims arising during exposures in the 1950s /1960s will become more an academic one and of decreasing practical importance into the future.

Next week we consider the case law for post 1970 exposures and the defences available where exposures are below control hygiene standards.
INTRODUCTION

So far in this series of mesothelioma features, we have looked at the various hygiene standards and control limits which have existed for asbestos in the UK since 1960 and considered how these were to be treated by employers.

In last week’s feature, we looked at the tension between the Court of Appeal authorities resulting in an apparently conflicting way of dealing with cases involving exposures before and after 1970 and publication of Technical Data Note 13: Standards for Asbestos Dust Concentration for Use with the Asbestos Regulations 1969, which accompanied the 1969 Asbestos Regulations.

In Jeromson [2001] EWCA Civ 101, and Maguire [2005] EWCA Civ 1, the Court of Appeal found that in respect of exposures arising in the 1950s / 1960s, employers were under a common law duty to reduce exposures ‘as far as reasonably practicable’. It appears employers could place little reliance on so called ‘Maximum Permissible Concentrations’ of exposure as first established in March 1960 by the Ministry of Labour publication ‘Toxic Substances in Factories’ and in revised 1966 and 1968 editions where the exposure levels were now known as ‘Threshold Limit Values’.

In the later decision of Williams [2011] EWCA Civ 1242, the Court of Appeal appeared to depart from the principles set out in Jeromson and Maguire and found that what was reasonable conduct of an employer would be determined against the exposure standards set out within the Department of Employment Publication Technical Data Note 13 first published in March 1970 with such levels effectively being considered as ‘permissible’ or ‘acceptable’ exposure. There was no duty to reduce exposures as far as reasonably practicable below these standards.

So are these authorities conflicting or can they be reconciled in any way? We appear to be in the strange position where employer standards in the 1970s were less onerous than those in the 1950s and 1960s – despite the greater knowledge of risks associated with asbestos. If the exposure standards set out in TDN13 were seen as the best guide for what was regarded as an acceptable level of exposure in 1970, how could such level be seen as unacceptable before that?

This week we consider recent case law dealing with pre 1970s exposure to see how such apparently inconsistent Court of Appeal guidance has or can be reconciled.

CONTRADICTORY CASE LAW FOR PRE-1970 EXPOSURES?

Let us firstly consider Abraham v G. Ireson & Son and other [2009] EWHC 1958 where the claimant was exposed to asbestos during 2 employments as a plumber between 1956 - 1965 with 2 very small general building / plumbing firms.

The judge found his exposure was from ‘…use of asbestos string and / or asbestos scorch pads’ which was described as being ‘very light and occurring intermittently and infrequent’. Despite this the engineering evidence was that exposure could have been reduced further by the use of asbestos free string.

The court was required to determine whether the asbestos exposure was negligent i.e. did it give rise to a foreseeable risk of injury having regard to the state of knowledge at the time?

The claimant submitted that by the mid-1950s, the association between asbestos dust and the risk of pulmonary injury was well-known and employers should have been aware that there was no ‘safe’ level of asbestos exposure, as such all possible steps should have been taken to eliminate or reduce to a minimum their employees’ exposure to asbestos dust. The claimant relied on Jeromson and submitted that the threats posed by asbestos were sufficiently well-known at the time and sufficiently uncertain in their extent and effect that the defendant should have taken appropriate precautions, or should, at the very least, have made enquiries about what precautions, if any, they should take.

The defendants argued that any dust exposure which the claimant might have had was well below the levels which were
considered foreseeably hazardous before 1965. The defendant pointed out that the levels of exposure to which the claimants in Jeromson were found to have been subjected were far higher than that described by the claimant.

Having considered the literature on knowledge of risk, Mrs Justice Swift, sitting in the High Court, posed the following question [at paragraph 79]:

‘Given that it is accepted that the defendants should have been aware of the relevant literature, what should they have concluded from it? It is true that the message to be drawn, in particular from the 1930 Report and from the extracts from the 1938 and 1949 Annual Reports of the Chief Inspector of Factories which I have quoted, was that asbestos dust was highly dangerous and that its inhalation was to be prevented as far as possible. However, that message was delivered in the context of the known risk of asbestosis and of occupational exposure to significant quantities of asbestos dust. The question is whether it should have alerted an employer whose employee’s only exposure to asbestos exposure was light and intermittent (as I have found the claimant’s exposure to have been) to the possibility that he might be at risk of contracting an asbestos-related injury’.

The judge then went on to say that the approach of Jeromson would suggest that the answer to this is ‘yes’, given the uncertainty as to what levels of exposure were safe and what were not. However, she stated that Jeromson must be viewed in the context of the findings of significant exposure made by the judge in that cases, exposure which was far in excess of that of the claimant in the present case.

In order to support this rationale, Swift J turned to the finding of the judge at first instance in Jeromson, which was not disturbed by the Court of Appeal, where it was found that:

‘... marine employers employed by Shell were liable and likely to encounter intense concentrations of asbestos dust, on a regular basis. In the most part, these exposures would be for minutes rather than hours, but on occasion, both at sea and in dry dock, the exposures would be for hours and at an even higher intensity’.

The judge at first instance in Jeromson went on to say:

‘If the exposure had indeed been “limited, intermittent or occasional”... then a different conclusion might have been justified. [Emphasis added]. However, on my findings, the exposures, or potential exposures, in these cases, albeit relatively brief, were substantial and regular. Although it might have been anticipated that, with these levels of exposure, the development of asbestosis would take years to develop (if at all), I accept the submissions of Mr Allan that a reasonable employer, being necessarily ignorant of any future potential asbestos exposure, cannot safely assume that there would never be sufficient cumulative exposure.’

This clearly demonstrates that the judge considered that the degree of exposure was relevant to the question of foreseeability of risk. Indeed, Lady Hale confirmed this in her judgment in Jeromson when she said at paragraph 35:

‘The issue was whether the degree of exposure in this case was such that a reasonable employer should have identified a risk’.

As such, Swift J concluded that the defendants in this case, given the low level of exposure, could not have known that he might have been exposing the claimant to risk of an asbestos-related injury. Indeed, she found that they may have in fact taken comfort from the 1960 Ministry of Labour publication ‘Toxic Substances in Factory Atmospheres’. This was because, she said, that whilst the booklet stressed the importance of keeping contamination of the workplace to a minimum and did not profess to set a ‘safe’ level of asbestos exposure, the level at which the maximum average permissible concentration of asbestos dust over a working day was set was so much in excess of the levels to which the claimant was likely to be exposed that it may well have encouraged the defendants to believe that the levels of asbestos dust to which the claimant was being exposed gave rise to no risk of injury.

It should be noted here the claimant’s exposure pre-dated 1965 and publication of the Newhouse and Thompson papers27 and October 1965 Sunday Time article ‘Scientists Track Down Killer Dust Disease’28 which both highlighted potential risk of mesothelioma from both minimal and secondary exposures.

It is noted in a number of mesothelioma judgements that October 1965 marked a change in the state of knowledge which was or should have been available to employers.
So would there be a different approach to the foreseeability issue in respect of exposures between 1965/66-1969 following these publications? Would any exposure however minimal, give rise to a foreseeable risk of injury such that the duty would be to reduce exposure so far as reasonably practicable?

Such an exposure was considered in the mesothelioma case of *Asmussen v Filtrona (UK) Ltd* [2011] EWHC 1734 (QB) where the claimant alleged she had been exposed to asbestos during 2 periods between 1955-60 and 1962-72 at a factory manufacturing cigarette filters. It was accepted that exposure arose from the claimant watching a repair of an asbestos lagged pipe, from occasional mechanical damage and repair of lagged pipes and sweeping of fibres released to the floor. The claimant’s exposure was described by the judge as ‘very slight’ and ‘low background contamination’.

Swift J accepted that the test for liability in asbestos related claims was as set out by Hale LJ in *Jeromson*, namely ‘whether the risk of personal injury…ought reasonably to have been foreseen by a careful employer’.

Swift J followed further guidance given by the then recent Supreme Court decision in *Baker v Quantum Clothing Group Ltd* [2011] UKSC 17:

‘…in an area of developing knowledge, an employer was entitled to rely on recognised and established practice at the time. Foreseeability of injury should not be judged with the benefit of hindsight and likewise depends on standards of the time’.

The issue of breach at common law depends upon the knowledge of risks, advice and standards prevailing at the time:

‘…foreseeability of injury is to be tested against the standard of the well-informed employer who keeps abreast of the developing knowledge and applies his understanding without delay, and not by the standard of omniscient hindsight. An employer can rely upon a recognised and established practice to exonerate itself from liability in negligence for failing to take precautionary measures unless (a) the practice is clearly bad practice, or (b) …the particular employer acquired greater than average knowledge of the risks.’

Swift J did not accept ‘that the defendant should have recognised at the relevant time that the proximity of asbestos lagging in the work place and the disturbance and replacement of it might injure those working there’.

Having reviewed much of the relevant industry guidance and literature she found that even ‘by the end of the second period of the Claimant’s employment the dire consequences of exposure to small quantities of asbestos was not generally recognised’. It is not clear how this conclusion was reached but it may be she was influenced by the 1970 guidance given in respect of TDN13 which covered the very end period of exposure and retrospectively applied this to the 1965-1969 period of exposure.

Pre 1970 exposure was also considered in the more recent mesothelioma case of *Hill v John Barnsley & Sons Limited* [2013] EWHC 520 (QB), in which the deceased, who had been employed by the defendant in 1968/9 and 1969/70 had worked at a power station, testing the strength of girders. It was alleged that the deceased, as part of the testing, would throw a chain up, feed it over the girder and catch it on the other side and then drag the chain across the dusty girder, covering himself in asbestos dust which had settled there from asbestos lagged pipes...

Mr Justice Bean, quoted heavily from the case of *Williams* and stated that he could see ‘nothing controversial’ about the decision. However, the claimant submitted that Aikens J had erred in his consideration of TDN13 in *Williams*.

The claimant argued that if the levels set out in TDN13 were considered a ‘safe’ level of exposure, this would be inconsistent with *Maguire*. In response to this Bean J stated:

‘I do not consider that Aikens LJ in paragraph 61 of Williams was intending to depart from basic principles of the law of tort as set out, for example, by Longmore LJ in *Maguire*. I put it to Ms Adams [counsel for the defendant] that the effect of that part of Williams is as follows: if an employer or occupier in 1970-74 had no reason to think that the TDN13 levels of exposure would be exceeded, then injury from asbestos fibres was not reasonably foreseeable. She agreed. Mr Phillips [counsel for the claimant] also agreed that this is the effect of paragraph 61[…].’

However, the claimant argued that TDN13 was not published until March 1970 and could not therefore have influenced the thinking
of a reasonable employer in 1968/69 and as such there could not have been any ‘safe’ level of exposure.

The judge rejected this submission and held that:

‘…if, using Aikens LJ’s words, it is the best guide to what was regarded as an acceptable level of exposure in 1970, it is hard to see that such a level would have been regarded as unacceptable in 1968 or 1969’.

These findings however did not assist the defendant as it was concluded by Bean J that:

‘Assuming as I do that Williams was correctly decided and is binding on me, it does not assist the defendants on the facts of the present case. They had every reason to think that the level of exposure would substantially exceed 2 f/ml for short periods, and that workers on the premises would be exposed to a foreseeable risk of injury’.

This does not answer the questions left by the Maguire, namely, whether or not the 1960, 1966 and 1968 Ministry of Labour publications did in fact advocate safe or permissible levels of exposure. Bean J avoided addressing this area of contention and instead retrospectively applied TDN13 to 1968/69 exposure.

We are not necessarily convinced of the correctness of retrospective application of guidance limits to a period where knowledge of risks were not sufficiently well developed and known to establish acceptable or permissible limits of safety. However, it does seem that insufficient weight has been attached to the Threshold Limit Values set out in the 1966 and 1968 editions of Toxic Substances in Factories.

Finally, we turn to McDonald v National Grid Electricity Transmission Plc [2014] UKSC 53, in which the deceased alleged exposure to asbestos between 1954 and 1959 whilst working at Battersea power station in the course of his employment with the defendant. It was alleged that the deceased went into areas of the plant where asbestos dust was generated by lagging work.

The Court of Appeal in this case, suggested that there was some tolerable levels of exposure in the 1960s. Following expert evidence as to the general state of knowledge of the potential for harm from asbestos exposure at various dates, McCombe LJ stated in relation to the case at common law:

‘Mr Nolan [counsel for the defendant] relied upon the common ground between the experts on this subject, which I have already recorded above, and the effective acceptance by Mr Raper, Mr McDonald’s witness, that nobody would have identified Mr McDonald’s exposure as potentially injurious. He also referred us to the guidance literature on the subject from March 1960 and at the time of issue of the 1969 Regulations, both of which still indicated that some exposure to asbestos dust could be accepted as tolerable, or in the latter case in respect of which enforcement action by the Factories Inspectorate would not be taken. In the former case, the booklet still gave indications of “permissible concentrations of certain substances” including asbestos.’

This finding itself was not challenged by the Supreme Court.

Could this be an indication that Maguire is wrong on the issue of the reliance employers could place upon Threshold Limit Values in the 1960s? In our view the obiter comment made in Maguire that the 1968 edition of Toxic Substances did not advocate safe or permissible levels of exposure is indeed wrong. Both the 1966 and 1968 editions appear to advocate ‘acceptable’ levels of exposure when the Threshold Limit Values are defined as follows:

‘The Threshold limit values refer to air-borne concentrations of substances and represent conditions under which it is believed that nearly all workers may be repeatedly exposed, day after day, without adverse effect. Because of wide variation in individual susceptibility, exposure of an occasional individual at or even below the threshold limit may not prevent discomfort, aggravation of a pre-existing condition, or occupational illness.’
It should also be noted that this guidance was given after the ‘1965 watershed of knowledge’ and it must be assumed that the Ministry of Labour (and the American Conference of Governmental Industrial Hygienists who set the limits) knew of the 1965 Thompson and Newhouse papers when publishing their own guidance and yet, notwithstanding this, they still chose to set exposure limits as they did. The guidance states that the threshold limits ‘are based on the best available information from industrial experience, from experimental human and animal studies, and when possible, from a combination of the three’.

It is difficult to understand why employers would not take that official definition at face value and why they would have reasonable foresight of the risk of harm from exposures below the threshold limit value and further why there would be a requirement to reduce exposure to the lowest practicable level — unless that exposure was above the limit value or ‘of any substantial quantity’.

CONCLUSION

Is there tension or divergence in how the Court of Appeal has considered common law breach of duty in asbestos related claims arising from pre and post 1970 exposures?

On basic principles we would argue not, and the cases can be distinguished on the basis of the findings of fact as to the extent of asbestos exposure involved in each case. Foreseeability issues are very fact specific as to the nature and extent of exposures.

The test of foreseeability consistently applied by the Court of Appeal is whether the risk of personal injury arising from the particular exposure to asbestos ought reasonably to have been foreseen by the careful and prudent employer giving positive thought for the safety of its employees.

In general terms the 1950s and 1960s the risks and uncertainties regarding significant or heavy exposures were such that the duty was to reduce such exposures as far as reasonably practicable. However, in respect of light / low exposures no risk could reasonably be foreseen and no such duty arose.

There is however certainly tension arising from Maguire’s (obiter) dismissal of employer’s reliance on the Threshold Limit Values set out in the 1968 Ministry of Labour guidance and in Williams where the standards of TDN 13 where used as ‘acceptable’ levels of exposure. So we are in an apparently curious position where the standard expected of employers pre 1970 was higher than after 1970. Employers could rely on hygiene standards from the 1970s but could not rely on the earlier hygiene standards.

In our view Maguire’s consideration of the 1968 guidance (the 1966 guidance is not considered) appears incomplete and its treatment is incorrect. It is not at all apparent from a full and proper reading of both the 1966 and 1968 guidance why an employer could not rely on these as setting the benchmark for what were ‘acceptable’ levels of exposure. Maguire’s dismissal is also inconsistent with the with the comments of Mr. S. Luxon, the Deputy Factories Inspector, in a paper entitled “Threshold Limit Values for Environmental Monitoring in Hazard Assessment and Control” 1973 who said with specific reference to asbestos:

“Legislation controlling the hazards of inhalation of toxic substances generally is contained in s.63 of the Factories Act of 1961. This requires that where dusts or fumes, which include vapours and gases by definition, are present in the air of the workroom to such an extent as to be likely to cause injury to health, steps must be taken by exhaust ventilation or other means to protect persons...”
employed. For the purpose of determining what concentrations might cause injury, the TLV is now generally accepted as the yardstick. If, therefore, it can be shown that the TLV has not been exceeded, then the employers’ legal and moral obligation can be said to have been fulfilled.”

Next week we consider post-1970 exposures where cases are largely bound by Williams, namely that TDN13 represents the standard of knowledge at the time and the levels within it indicate the levels regarded as ‘safe’-but for how long could TDN13 be relied upon and did the standards change?
References


Fibres/ml is explained within TDN13 as being ‘particles of length between 5 microns and 100 microns and having a length to breadth ratio of at least 3:1 observed by transmitted light by means of a microscope at a magnification of approximately 500x’.


‘Epidemiology of Mesothelial Tumours in the London area and Mesothelioma of Pleura and Peritoneum following Exposure to Asbestos in the London Area’ in New York and in the British Journal of Industrial Medicine.

Sunday Times, 31st October 1965, article by Dr Alfred Byrne, Sunday Times Medical Correspondent entitled “Scientists track down a killer dust disease”.
Disclaimer

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