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, we discuss the Civil Justice Council’s response to the 12 week Department of Health (DoH) consultation on fixed costs in clinical negligence cases up to the value of £25,000 fixed costs. Moreover, we consider the future of the Personal Injury discount rate, considering the effects of a general election on further reform, as well as industrial insight provided in responses to Liz Truss’ consultation paper, perhaps suggesting de-politicisation. In the world of science, we analyse the latest in pioneering immunotherapy cancer therapy techniques, which are currently being used to treat patients in a Southampton University-led study.

Additionally, we review the case of Godfrey Morgan Solicitors v Armes [2017] EWCA Civ 323, which conveys the difficulties that claimants may face when there is uncertainty as to the legal identity of the party being pursued and limitation restricts the scope for amendment of the Claim Form. The judge, in this instance, deemed that the claimant could not ‘substitute in the alternative’. What is more, in Findcharm Ltd v Churchill Group Ltd [2017] EWHC 1109 (TCC), on the topic of costs budgeting, Coulson J emphasised the duty of parties to civil litigation that ‘...the Precedent R process is carefully and properly adhered to...’ Recording unjustifiably low figures, in the hope that the court also provides a low valued assessment, will therefore amount to an ‘abuse of the costs budgeting process’.

Finally, this month, we complete our Mesothelioma Series, concluding with a Part 11, a practical, worked example of a mesothelioma claim. Continuing this asbestos-based theme, we review 2 of BC Legal’s latest trial successes in mesothelioma and pleural thickening claims, while also releasing our Mesothelioma Breach of Duty (here) and PSLA (here) Guides.

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.
Contents

News

Fixed Fees in Clinical Negligence Cases?
MedCo Imposes Sanctions on 134 Users
Pesticides, Biocides and Thyroid Cancer
Nanoparticles Increase Risk of Cardiovascular Disease
CJC Weigh in on Clinical Negligence Fixed Fees Debate
Slater and Gordon: Update on Debt and Quindell
Johnson & Johnson Ordered to Pay $110 Million in Talc and Cancer Claim
Potential Drug Treatment for Hearing Loss
New Mechanism for ‘Hidden Hearing Loss’ Suggested
Update Following Latest Discount Rate Consultation Paper
Serious Fraud Office Step Up Probe of Quindell
Fibromyalgia Research Links Disorder with Hearing Loss
How Does the Menopause Affect Hearing Acuity?
Launch of Mesothelioma Breach of Duty Guide
Beware of Agreeing Costs Budgets by Default
De-politicisation of the Discount Rate?
Will the Prison and Courts Bill Resurface?
Jackson LJ Sceptical Over Fixed Costs in Clinical Negligence Claims
‘Hot-Tubbing’ Should Not be the Default Position?
Immunotherapy Use in Early-Stage Lung Cancer
Updated Mesothelioma PSLA Guide

Case Law

Court of Appeal Find Obsolete Miners’ Law Firm Negligent: Perry v Rateys Solicitors [2017] EWCA Civ 314
Ongoing Symptoms and Video Evidence: Karapetianas v Kent and Sussex Loft Conversions Ltd [2017] EWHC 859 (QB)
Amending the Claim Form: ‘Substitution in the Alternative’: Godfrey Morgan Solicitors v Armes [2017] EWCA Civ 323
Liability in Mesothelioma Claims: Bussey v Anglia Heating Ltd [2017]
Cost Budgeting is Not a Game: Findcharm Ltd v Churchill Group Ltd[2017] EWHC 1109 (TCC)
Guidance on Striking Out Particulars of Claim: Kaplan v Super PCS LLP [2017] EWHC 1165 (Ch)

Features

Mesothelioma Series: Part 11: Practical Handling of Mesothelioma Claims
Breach of Duty in Pleural Thickening Claim: McGowan (deceased) v AMEC Buildings Limited
Fixed Fees in Clinical Negligence Cases?

In January of this year, the Government published its plans to introduce fixed recoverable costs in clinical negligence cases worth up to £25,000, as opposed to the previous recommendation of £250,000. BC Disease News discussed this in edition 171 (here).

Calculations convey that, within the bracket of claims valued between £1,000 and £25,000 (representing 60% of the total number of NHS settled claims), costs recovered by claimant solicitors were 220% higher than the compensatory payment awarded to victims. This DoH proposal, therefore, was made in reaction to £45 million, per year, in potential savings, which would be generated by alleviating excessive fiscal disproportionality and time taken to settle.¹

This was irrespective of lobbying by the Law Society, the Association of Personal Injury Lawyers (APIL), the Society of Clinical Injury Lawyers and Action against Medical Accidents. On 2 May 2017, the 12 week Department of Health (DoH) consultation on the introduction of fixed fees, ended.²

APIL has now responded to the consultation and has questioned the benefits of fixed costs in a process that they believe to be inherently ‘dysfunctional’. Further, they argue that its implementation will do nothing to speed up the ‘ludicrously long waiting times for the recovery of medical records, or arduous expert reports’ – factors which have, in its opinion, contributed to the hike in litigation fees.

Depending upon the legitimacy of claimant solicitor fees accrued, it is feared that the most vulnerable claimants, who often pursue complex, low value claims, may not receive adequate access to justice if the proposal goes ahead as planned. To protect victims of ‘fatalities, claimants with a short life expectancy, potential breaches of the Human Rights Act and cases with multiple claimants or defendants’, as well as ‘people with disabilities and mental health issues, the over 65s and prisoners’ it has been requested that they are excluded from any new fixed costs regime.

Indeed, fixed costs are a hot topic of conversation in the current legal sphere, as LJ Jackson continues to collate his final ‘progress report’ on fixed recoverable costs outside of the fast track, pending release in July. In the interim period, a voluntary cost capping pilot has been announced for mercantile courts (limited to claims up to £250,000) and is anticipated to provide vital feedback.

However, in recent months, the appetite for a new regime of fixed recoverable costs has weakened, as confidence in costs budgeting has grown. Reflecting this view, Agata Usewicz, head of medical negligence at Hodge Jones & Allen has stated:

‘As a consequence of the Jackson reforms, lawyers’ fees are already tightly controlled, budgeted, capped and limited … Costs already have to be ‘reasonable and proportionate’ before they are paid by the insurer or NHS and the courts rightly already hold the power to reduce any bill found to be excessive … To seek to introduce further and somewhat draconian changes without waiting to see whether the introduction of costs budgeting will lead to the necessary improvement must, from any angle, be considered to be somewhat misguided and misconceived.’³

Alleged misconceptions referred to, include suggestions that ‘expert evidence in cases worth up to £25,000 can be obtained for under £1,200 and that particulars of claim in complex cases can be drafted by junior fee earners’.⁴

Nevertheless, APIL were not adverse to the idea of narrowly adopted fixed fees, where defendants admit to liability in their letter of response. In this instance, an abbreviated expert report could be compiled in advance to arrange an early settlement.

Evidently, costs continue to be an area of conflict and legal uncertainty, so we will continue to report on any further procedural progress in due course.

MedCo Imposes Sanctions on 134 Users

MedCo, the scheme created to assist claimant solicitors with obtaining legitimate whiplash diagnoses, have reported on their annual progress since 31 March 2016.

Published last week, they disclosed that 337 warnings had been issued to its members (Medical Reporting Organisations, Direct Medical Experts and ‘Authorised Users’). As a result, this saw the suspension of 235 operating parties, of which only 84 were reinstated. Hence, 134 user agreements have been terminated.⁴

Reasons given for these sanctions were as follows:

- Members were circumventing the search selection process.
- Members were influencing medical expert opinions on diagnosis and/or prognosis.
- Members were undertaking medical examinations in inappropriate circumstances.
- Members were increasing the market share of instructions, breaching Government policy.
- Members were failing to upload case data.

Due to industrial reforms, such as the change in small claims limit for RTA claims (from £1,000 to £5,000), the sector is likely to see a large influx of litigants in person, given the non-profitable nature of litigation outside of any recoverable costs regime, save for exceptional cases. We discussed an example of such an exception in last week’s edition of BC Disease News (here), where the Court of Appeal in Dammermann v Lanyon Bowdler LLP⁵ imposed an order for recoverable costs on ‘a party who has behaved unreasonably’, in accordance with the powers contained within CPR 27.14(2) subsections.
However, the MedCo scheme, in its current format, is not fit for the purpose of individual litigants approaching MedCo directly for expert medical advice, especially in light of recent sanctions. As a result, a spokesperson for the organisation has proclaimed:

'Significant changes to MedCo processes will be necessary'.

Therefore, a review of MedCo is foreseeable, so to accommodate and secure the needs of market forecasts. We may see an increase in the monitoring of member behaviours; better identification of trends that increase prognosis periods and artificially inflate damages; and a review of the portal’s corporate constitution, with a view to providing representatives from claims management companies and litigants in person.

Pesticides, Biocides and Thyroid Cancer

A newly published study, carried out by Zeng et al. at the Yale School of Medicine, has aimed to investigate the associations between occupational exposure to biocides and pesticides and risk of thyroid cancer. Pesticides are a diverse group of chemicals used in agricultural, commercial and home settings to control insects, fungi and weeds. Biocides are chemicals used to disinfect, deodorise, sterilise and sanitise. Prior to this study, only a small number of studies have investigated exposure to pesticides in relation to thyroid cancer and have reached suggestive but inconsistent results, and no study has investigated exposure specifically to biocides and thyroid cancer.

According to the International Agency for Research on Cancer (IARC), carcinogenic agents for thyroid cancer, with sufficient evidence in humans, are sources of ionising radiation (such as X-rays). More generic healthcare occupations, such as laboratory workers that may or may not be exposed to radiation, were often, but not consistently, associated with thyroid cancer risk. Anomalies of the thyroid gland, other than laboratory workers that may or may not be exposed to radiation, were often, but not consistently, associated with thyroid cancer risk. Exposures to biocides and pesticides and thyroid cancer are unclear, though some animal studies have found that biocides can alter thyroid hormones (though the relationship between thyroid hormones and thyroid cancer is also uncertain).

No significant association was observed for ever being exposed to pesticides. Because the number of pesticide-exposed cases was small, further detailed analysis by probability and intensity of exposure was not explored. There was an increased risk among low-exposed women, but it was not statistically significant. Though this result may have occurred by chance, or by misclassification of exposure, it is also possible that there is an unknown carcinogen specific to the low-exposure occupations.

This study had some limitations. Cases were significantly younger than controls, and cases were more likely to have benign thyroid disease than controls. There are limitations to the job exposure matrix, and it was not possible to investigate individual pesticides or biocides. Future evaluations of the relationships between exposure to biocides and pesticides and thyroid cancer were warranted, to increase the knowledge of whether or not those working with cleaning products and/or pesticides are likely to be at increased risk.

Nanoparticles Increase Risk of Cardiovascular Disease

Herein lies the main issue with current legislation, since the EU’s legal limit on exposure to biocides, such as construction carpenters/joiners, workers in the canning and preserving industry and healthcare professionals such as dentists, pharmacists, physicians and nurses. The findings of the present study suggest an increased risk in occupations exposed to biocides, which offers some evidence that the earlier findings may be related to biocide exposure. The researchers note that the underlying biological mechanisms linking biocides and risk of thyroid cancer are unclear, though some animal studies have found that biocides can alter thyroid hormones (though the relationship between thyroid hormones and thyroid cancer is also uncertain).
airborne particles smaller than 2.5 micrometres is measured in ‘mass per m³’ and not the total number of particles. When dealing with ultratine particles, which are on the rise, it could be argued that the emphasis should be on frequency rather than mass.

Future planned research will seek to delve deeper into the path of nanoparticles into the brain, in order to discover potential links with asthma, dementia, Alzheimer’s and Parkinson’s.¹¹

We have previously discussed the effects of nanoparticles and potential occupational exposure in edition 121 of BC Disease News in which we pointed out that the use of nanotechnology is increasing rapidly across a wide range of industries, including medicine, agriculture and engineering. Though nanotechnology may provide novel and new solutions to problems, it may bring new types of risk to the workforce. This most recent study suggests that nanoparticles may travel through the body in previously unknown ways.

In April, ACS Nano, a scientific journal, published the findings of a joint study, carried out by the University of Edinburgh and the Netherlands National Institute for Public Health and the Environment.¹² Funded by The British Heart Foundation, the study sought to establish how nanoparticles in diesel fuel are linked to cardiovascular disease.

The experimental subjects, who took part in the study published last month, included 14 healthy volunteers, 12 surgical patients and several mouse models. Each of them commenced 2 hours of exercise, while breathing in gold nanoparticles, which are safely used in medical imaging and drug delivery. Post-exposure, researchers detected gold traces in urine and blood, for most participants, within 15 minutes. For some, particles remained in their bodies for 3 months.¹³

Ultimately, this proves that, upon inhalation, nanoparticles pass through the lungs and enter the bloodstream. Subsequently, they travel to other organs and accumulate, often at inflamed vascular sites, e.g. where carotid plaques exist, which increases a person’s susceptibility to contract cardiovascular disease.

Dr Mark Miller, the Senior Research Scientist who led the study, has since stated:

‘Only a very small proportion of inhaled particles will do this, however ... even this small number of particles might have serious consequences.’¹⁴

CJC Weigh in on Clinical Negligence Fixed Fees Debate

A week ago, we reported on the closing of the 12 week Department of Health (DoH) consultation on fixed costs in clinical negligence cases. This has been met with lobbying by industrial bodies, like the Association of Personal Injury Lawyers (APIL), who are opposed to the changes proposed, predominantly on the basis that, if enacted, the most vulnerable patients would face restricted ‘access to justice’.

The Civil Justice Council (CJC) are the latest organisation to voice their critique of the Government’s plans to implement fixed costs up to the value of £25,000.¹⁵ They adopt the same stance as APIL, foreseeing that the position ‘will prevent many cases being brought’. Officially, the CJC have stated that the paper:

‘... whilst recognising the need to ensure that claimant lawyers are not deterred from taking on low-value cases, fails to adequately recognise the need to ensure that experts, critical in this type of litigation, are not deterred.’

Paying respect to Jackson Li’s ongoing ‘progress report’ on fixed recoverable costs outside of the fast track, the CJC has suggested that the DoH ‘pool and ‘analyse’ both consultations ‘before bringing forward finalised reform proposals’, which would seem to be a plea for consistency and transparency.

Moreover, in last week’s edition, we discussed the obstacles to justice that may surface as a result of the change in small claims limit for RTA claims to £5,000, plunging many into a situation where costs are not recoverable and forcing individuals stand as litigants in person. Schemes, such as MedCo, are not designed for this. Conversely, with fixed fees, the CJC suggests that MedCo experts might ‘refuse to take [often necessary] instructions in these cases’ and shift their focus onto higher-value claims for ‘adequate remuneration’. The impact of this could be even greater in ‘acute areas of specialisation’ or where ‘more than one expert’ is to be instructed. Further, the CJC are also against the ‘imposition of a flat cap for all expert witnesses’.

Considerations given to consultations on both clinical negligence fixed fees and the RTA small claims limit have, therefore, recognised certain important factors beneficial to those instructed by claimants, but will still to protect them against deterrents which will hinder the functionality of future schemes and allegedly ‘disadvantage’ those seeking justice.

The CJC have requested a ‘re-think’ on pre-action protocol and urged the regime to be ‘structured and financed properly’, before they can pledge support for the principle of fixed costs in clinical negligence cases.

Slater and Gordon: Update on Debt and Quindell

It has been several weeks since we last reviewed the financial predicament of Slater and Gordon, the Australian Stock Exchange listed Law Firm.

In our previous update [here], we disclosed that 94% of S&G bank debts, totalling £458 million (AUS$738 million), had been sold to ‘secondary debt buyers’ by their original lenders, such as National Australia Bank, Westpac, RBS and Barclays. Last month, it
was announced that the new lenders acquired stock for around £0.13 (AU$0.22) per share in a ‘debt-for-equity’ swap.

More recently, just last week, investors were notified by the Firm that a capital injection of £22.7 million, which equates to AU$40 million, will be borrowed from the new lenders and used to fund the business over the course of the next 3 years, in order to provide assistance during the period of ‘solvent restructure’. This figure is close to net losses, published in their latest interim results. According to officials, ‘a further update will be provided in the coming weeks’, which BC Disease News will report on in due course.

Then, on Wednesday 11th May, Watchstone Group PLC, formerly known as Quindell, notified the London Stock Exchange that S&G plan to issue proceedings against them for £600 million by the end of May. Accordingly, their letter of intention stated that:

‘... but for fraudulent misrepresentation it would not have entered into the transaction at all’.

S&G’s acquisition of Quindell’s professional services group in 2015, for an estimated £637 million, has been persistently featured in many BC Disease News editions, as the large-scale deal failed to broker the success anticipated, to the point where their shares are now ‘almost worthless’.

Watchstone has urged S&G to disclose ‘continuously declined’ evidence, in their possession, that is relevant to the merits and quantum of its misrepresentation accusation, as they believe the claim to be ‘groundless’ and would oppose it ‘robustly’. Nevertheless, S&G remain confident that at least £53 million in purchase price warranties, held in an escrow account, are recoverable, due to unfulfilled conditions.

6 month overview of Slater and Gordon equities (Financial Times):

The current S&G share price currently sits at just £0.06 (AU$0.105), which is a slight improvement since the lowest ever value recorded at the beginning of March.

Johnson & Johnson Ordered to Pay $110 Million in Talc and Cancer Claim

A US court has ordered Johnson & Johnson to pay more than $110 million (£85 million) to a woman who claims she developed ovarian cancer after using its talcum powder. The 62-year-old from Missouri had used the product for 40 years and developed ovarian cancer, which has spread to her liver. Prosecutors argued that the company did not adequately warn about the cancer risks associated with the product. Johnson & Johnson says it will appeal.

There have been around 2,400 claims against Johnson & Johnson over its talc-based products, and this verdict is the largest so far. The amount awarded included $4.5 million in compensatory damages and $105 million in punitive damages. This follows a case from last February in which $72 million was paid, a jury verdict last May in which a woman was awarded more than $55 million, and a third in October for $67.5 million. In March this year, Johnson & Johnson won a case by a Tennessee woman who was diagnosed with ovarian cancer in 2013, after using baby powder for 36 years. A New Jersey state court judge last year threw out two talc cases set for trial, finding inadequate scientific support for the claims.

In a statement on last week’s verdict, Johnson & Johnson said:

‘We deeply sympathise with the women and families impacted by ovarian cancer. We will begin the appeals process following today’s verdict and believe a jury decision in our favor in St. Louis in March and the dismissal of two cases in New Jersey in September 2016 by a state court judge who ruled that plaintiffs’ scientific experts could not adequately support their theories that talcum powder causes ovarian cancer, further highlight the lack of credible scientific evidence behind plaintiffs’ allegations. We are preparing for additional trials this year and we will continue to defend the safety of Johnson’s Baby Powder’.

So what does the current evidence indicate regarding a link between talc products and ovarian cancer? Talc is a mineral that occurs naturally in the earth, and is mined for use in a range of products. In its natural form, it can be mixed with asbestos, however, asbestos-free talc has been used in baby powder and cosmetics since the 1970s. Studies on asbestos-free talc and cancer have produced contradictory results.
In 2006, the International Agency for Research on Cancer (IARC) classified asbestos-free talc used on the genitals as ‘possibly carcinogenic to humans’, and found that there was limited evidence in humans for the carcinogenicity of use of talc-based body powder on the genitals.\textsuperscript{24} There was also inadequate evidence in humans for the carcinogenicity of inhaled talc, and the group found little or inconsistent evidence of an increased risk of cancer in the studies of workers occupationally exposed to talc.

A 2015 study received media coverage following the Johnson & Johnson case in February last year.\textsuperscript{25} This case-control study compared 2,041 cases of ovarian cancer with 2,100 controls.\textsuperscript{26} Cases were asked, after their diagnosis, to estimate their use of talc, which may have introduced recall bias, whereby cases are inclined to overestimate their exposure. The use of talc on the genitals was associated with a 33 \% increased risk of ovarian cancer. Some subtypes of ovarian cancer were more likely to be associated with talc. There were also increased risks with use of talc and hormone therapy. Other studies published since the IARC classification have found possible links between talc and ovarian cancer,\textsuperscript{27} though a large cohort study from the Women’s Health Initiative found no association.\textsuperscript{28} A 2008 meta-analysis, in which results from 20 studies were pooled, found an increased risk of 35 \% among talc users.\textsuperscript{29} Another meta-analysis, published in January this year, found a weak but statistically significant association between genital use of talc and ovarian cancer, from analysis of 24 case-control and 3 cohort studies.\textsuperscript{30} The overall increase in risk was 22 \%. An association was detected for only one subtype of ovarian cancer, known as serous carcinoma. There was no trend in risk with either duration or frequency of talc use. The differences in results in studies with different designs and the lack of a trend for duration or frequency of use mean that these findings cannot be interpreted as a causal association.

The charity Ovacome, which provides advice and support to women with ovarian cancer, says that there is no definitive evidence of a link with talc, and that the worst-case scenario is that using talc increases the risk of cancer by a third.\textsuperscript{31} It adds that, ‘Ovarian cancer is a rare disease, and increasing a small risk by a third still gives a small risk’, and, ‘even if talc does increase the risk slightly, very few women who use talc will ever get ovarian cancer. Also, if someone has ovarian cancer and used talc, it seems unlikely that using talc was the reason they developed the cancer’.

Baby powder is a cosmetic, which means that it does not need to be approved by the Food and Drug Administration. Johnson & Johnson baby powder carries a warning, cautioning against inhalation and noting that the powder is for external use only. In the case won by Johnson & Johnson in March, the majority of jurors were not convinced by the evidence linking genital usage of talcum powder products to an increased risk of ovarian cancer, and believed that the evidence was insufficient to require strengthening of the product’s warnings.\textsuperscript{32} A lawyer for the claimant suggested that the jury was not convinced of a link to his client’s specific form of ovarian cancer. In the latest case, one of the jurors has been quoted as saying that the figure of $105 million for punitive damages was derived from a formula starting with the number of years since the IARC classified talc as a possible carcinogen (in 2006).\textsuperscript{33} The claimant testified that she would not have used the products had they carried any warning about cancer risks.\textsuperscript{34} In the case from last February, in which Johnson and Johnson were ordered to pay $72 million to the family of a woman who died from ovarian cancer, the trial reportedly saw an internal memo from a medical consultant employed by Johnson & Johnson that suggested that ‘anybody who denies [the] risks between “hygienic” talc use and ovarian cancer would be publicly perceived in the same light as those who denied a link between smoking cigarettes and cancer.’\textsuperscript{35} More cases against Johnson & Johnson will go to trial this year, and it is likely that new studies on this topic will continue to be published, as the existing data are inconsistent. Johnson and Johnson are also appealing the cases they have lost. The association between talc and ovarian cancer and the rulings in the new cases and appeals will continue to be in the news in the near future.

Potential Drug Treatment for Hearing Loss

A team of researchers from the Massachusetts Institute of Technology (MIT), Brigham and Women’s Hospital, Massachusetts Eye and Ear Infirmary and Harvard Stem Cell Institute, have developed an approach to replace damaged hair cells in the cochlea of the inner ear.\textsuperscript{36} This may be a step towards a treatment that can restore hearing that has been lost.

The cochlea contains about 15,000 hair cells, which receive and translate sounds into signals that are sent to the brain. Hair cells can be lost due to ageing, noise and other causes, resulting in hearing loss characterised by elevated audiometric thresholds. In other words, the listener with loss of hair cells cannot hear quieter sounds. Once damaged, hair cells cannot regrow.

The researchers have discovered a combination of drugs that expand the population of another type of cell found in the cochlea, known as supporting cells, and induces them to become hair cells. They exposed cells from a mouse cochlea, grown in a lab dish, to molecules that stimulate a cellular pathway that causes the cells to multiply rapidly. The cells were, at the same time, exposed to molecules that activate another pathway, to prevent them from turning into hair cells too soon. Once they had a large pool of immature cells, another set of molecules were added that provoked the cells to become mature hair cells. This procedure generated around 60 times more mature hair cells that previous techniques.
This approach also worked in an intact mouse cochlea removed from the body. In the intact cochlea experiment, the researchers did not need to add the second set of molecules, because when the immature cells formed, they were naturally exposed to signals that stimulated them to become mature hair cells. One of the researchers, Jeffrey Karp, an associate professor of medicine at Brigham and Women’s Hospital and Harvard Medical School, said of the intact cochlea experiment: ‘We only need to promote proliferation of these supporting cells, and then the natural signalling cascade that exists in the body will drive a portion of those cells to become hair cells’. 37

A test on a sample of human inner ear tissue has also led to the production of hair cells. As such, the researchers believe that this treatment could be easy to administer to human patients, because it involves a simple exposure to drugs. The drugs could be injected into the middle ear, from which they would travel into the inner ear. Some of the researchers have started a company called Frequency Therapeutics, 38 which has licensed the technology and plans to begin testing in human patients within 18 months. The concept of using small molecules to promote cell regeneration may also be applicable to other tissue and organ systems.

New Mechanism for ‘Hidden Hearing Loss’ Suggested

A recent study has offered further insight into the phenomenon of ‘hidden hearing loss’. The term ‘hidden hearing loss’ (HHL) describes the phenomenon in which a listener’s audiogram is normal, but they report difficulty with distinguishing speech in noise. 39 Hidden hearing loss is also known as obscure auditory dysfunction (OAD) and King-Kopetzky syndrome. We have covered hidden hearing loss in a feature located in issue 113 of BC Disease News and it was mentioned in issue 157 (here).

It has previously been proposed that HHL may result from noise exposure, though there is little direct evidence for this effect in humans. 40 Unlike hearing loss resulting in increased thresholds, where the hair cells are lost, it has been suggested that HHL is caused by damage, or loss, of the synapses that connect the hair cells to the auditory nerve fibres.

In a quiet audiology testing room, only a few synapses are required to detect sounds, but in a noisy environment, specific synapses are required. Thus, loss of the synapses can cause the listener to have normal audiometric thresholds, but difficulty hearing speech in noise.

Animal studies have shown that certain nerve fibres, which encode information at medium to high sound levels, and in background noise, may be damaged, even though the animals can still hear quiet sounds. 41 42

The new study proposes an additional cellular mechanism for HHL. Nerve fibres, or axons, are surrounded by a sheath, made of myelin, produced by cells known as Schwann cells. The function of Schwann cells is to support, maintain and insulate the nerve fibres. The results from this study suggest that loss of Schwann cells, which can regenerate and rebuild the myelin sheath, results in permanent damage to structures in the auditory nerve, known as heminodes.

The researchers used genetic tools to induce the loss of myelin in the auditory nerve of mice. Although the myelin regenerated within a few weeks, the mice developed a permanent hearing loss, which was observed by testing of the function of the auditory nerve. Even after the myelin regenerated, damage to the heminodes remained.

This newly proposed cause of hidden hearing loss could occur in individuals who also have HHL caused by noise-induced synapse loss, and the two types of hearing loss could be additive. To test whether the two forms of HHL interact, mice that had undergone demyelination (loss of the myelin sheath) and their control counterparts were subjected to noise exposure at the levels that have caused synapse loss in other studies. Remarkably, noise exposure induced further decrease in auditory nerve function beyond the decrease produced by demyelination, and the magnitude of the decrease in function was the same in mice that had no demyelination.

These findings indicate that exposure to noise sufficient to cause synapse damage leads to additional auditory loss, even in mice that already have HHL due to Schwann cell loss.

The article makes no mention of Schwann cell loss being caused by noise. The causes of Schwann cell loss are generally diseases; Charcot-Marie-Tooth disease and Guillain-Barre syndrome (GBS) are neuropathies involving Schwann cells. Thus, the findings from this study might offer an insight into the causes of auditory deficits in patients that have recovered from such diseases. These findings may also be of use in the development of new treatments for hearing loss.

These findings offer further evidence for the existence of HHL, and evidence that there are two distinct mechanisms, which are additive. One of these mechanisms, synapse damage, is shown in mice to be caused by noise. The medical history of a claimant with HHL should be obtained, so that the likelihood of HHL being caused by noise (synapse loss), or by disease (Schwann cell loss), can be considered. However, there is still little evidence of HHL, caused by noise, in humans.

Update Following Latest Discount Rate Consultation Paper

On 11 May, the government consultation: ‘The Personal Injury Discount Rate. How it...”
should be set in future’, closed.43 We announced its launch in edition 179 of BCDN (here). Over the past week, various bodies have responded to the consultation by stating their opinions on the present rate, which assesses the value of lump sum damages awards for future financial loss in Personal Injury cases. From March of 2017, the new rate was introduced by Lord Chancellor, Elizabeth Truss, representing a 3.25% decrease to (-)0.75%.

As soon as the current rate was announced, the government faced lobbying from the insurance industry to reconsider the severity of the reduction, but claimant Law firms have urged ministers not to ‘pander’ to their demands.

Nevertheless, shock over the magnitude of change has seen insurance profits suffer, with the UK arms of Ageas and Allianz recently recording figures of £0.8 million (96% less than £21 million recorded in Q1 of 2016) and £37.5 million (21% less than £47.4 million recorded in Q1 of 2016) in profit, during the first business quarter, respectively.44 45 This is demonstrative of the fact that the insurance and reinsurance market is having to bolster its reserves to cope with the financial implications of new legislation. Further, the British Insurance Brokers’ Association (BIBA) have expressed fears of ‘upward pressure on customers’ premiums’ and concerns over ‘reduced capacity in the motor insurance market’.

What is more, the Medical Defence Union (MDU) suggests that the new rate will have ‘profound economic repercussions’ on the cost of clinical negligence claims, NHS services and GP indemnity fees.46 According to the Union’s CEO, Dr Christine Tomkins, figures suggest that the Treasury will have to source an additional £5.9 billion during the first 3 years to cover NHS costs in isolation, on account of the fact that ‘a claim that would have settled for £8.4m on the previous discount rate would now settle for £17.5m’. As a result, the MDU has stressed that amendments made to the Damages Act 1996 are ‘not fit for purpose’.47

The same position has been echoed by Professor Helen Stokes-Lampard, chair of the Royal College of General Practitioners (RCGP), who emphasised that:

‘Every GP has the right to provide care to their patients, safe in the knowledge that they are protected by their insurance. Indemnity cover is already a significant financial burden on GPs so this potential hike in costs will come as a serious blow and cause great anxiety.’48

The overriding motive behind change was to account for the UK’s low interest rate. Presently, the discount rate, otherwise known as the Ogden rate, is a reflection of the yield that can be obtained by way of investment in Government Linked Investment Bonds (gilts). Thus, when a negative yield was calculated, a negative discount rate was adopted in order to assure victims of serious injuries that they would not be undercompensated.

Critics of the new rate have claimed that assumptions made about the nature of claimant investments are incorrect and fail to recognise low-risk, mixed portfolio assets as an alternative venture, which would yield far higher than gilts.

However, the Association of Personal Injury Lawyers (APIL) has praised the current discount rate formula, given that it removes any onus placed on severely injured individuals to make high risk investments and still allows them to benefit fully from the compensation awarded to them. Warning the Government against the influence of protest, APIL has said that ‘the insurance industry must not be allowed to shirk its responsibilities’.49

Nevertheless, BIBA, in their consultation response, contends that ‘it is very unlikely that a prudent investor with appropriate advice would receive a negative return on investment’.

A common idea shared by institutions staunchly opposed to the new rate, is the creation of an ‘independent panel of experts’, including ‘insurers, claimant lawyer representatives, independent advisers and actuarial firms’, with a view to considering any future proposals to alter the discount rate, before the Secretary of State can intervene by casting their decision.50

The Association of British Insurers (ABI) has pledged to provide 100% compensation, but has requested a break from gilts as the asset which impacts upon the discount rate and, in turn, the size of the initial lump sum. Director of General Insurance Policy, James Dalton, has stated:

‘Retaining the status quo is not an option – it is essential that the new government changes the framework to ensure we have a system that is fit for purpose for claimants, insurance paying customers and compensators…’

Moreover, the ABI has endorsed an example approach taken in Ontario, Canada, where a stepped dual rate applies. They believe that, if this system was emulated in the UK, it would provide a more accurate representation of differing investment periods. Subsequently, lower returns would be collected by claimants with short-term needs and higher returns would be deposited by long-term investing claimants. Specifically, in this Canadian province, for the first 15 years, a short-term rate applies, which varies annually depending upon return on yields, after which a fixed rate of 2.5% is imposed.51 Alternatively, as a way of minimising claimant investment risk, periodical payment orders could be recommended in place of lump sum orders, where the risk shifts to the compensator.52

Elsewhere, the International Underwriting Association (IUA) has called for ‘regular review of the rate at intervals between 1 and 3 years by a ‘politically accountable minister’, instead of requiring governmental discretion, in hope of easing market volatility.53

These responses to the consultation are currently being analysed by the Government. Of course, the dissolution of parliament during the General Election period has stalled the progress therefore, the discount rate will remain unchanged for now. However, we will continue to report on any progress.
Serious Fraud Office Step Up Probe of Quindell

We previously reported in edition 106 of BC Disease News (here), that the Serious Fraud Office (SFO) had launched a criminal investigation over the accounting and business practices of Quindell after it overstated annual profits by £312 million.

It has been announced this week that the SFO have now requested that Slater and Gordon (S&G) produce files opened by Slater and Gordon Solutions Legal Limited (the UK subsidiary set up following the acquisition of the professional services division of Quindell in 2015).54

Reporting to the Australian Stock Exchange, S&G confirmed that the SFO notice specified Watchstone Group Plc (formerly Quindell Plc) as the ‘person’ under investigation.

This follows the update, included in last week’s edition of BC Disease News (here), that S&G are to issue proceedings against Watchstone Group Plc for £600 million by the end of May for ‘fraudulent misrepresentation’.

The full announcement delivered to the Australian Stock Exchange by S&G this week can be accessed here.

Fibromyalgia Research Links Disorder with Hearing Loss

In November 2016, results of a research study were published in Biomed Central Musculoskeletal Disorders, which display a correlation between musculoskeletal pain and subjective hearing impairment.55 Until now, the relationship between fibromyalgia and subjective hearing acuity had produced contradictory findings and, thus, were inconclusive.

Fibromyalgia is a widespread musculoskeletal pain disorder that sensitises, or dysregulates general functioning of the nervous system, resulting in heightened perception of pain, while often causing sleep, memory, concentration and mood problems, chronic fatigue syndrome, irritable bowel syndrome interstitial cystitis and temporomandibular disorder, among many other comorbidities (co-occurring diseases or disorders). Diagnoses of fibromyalgia around the world have shown a range of prevalence, but is usually expressed in 2-11% of populations and is more commonly found in women than in men, increasing with age.

At the Norwegian University of Science and Technology in Trondheim, Nord-Trøndelag County, a study, led by Magne Stranden, sought to conduct a comprehensive experiment and obtain clarity surrounding fibromyalgia’s effect on sensory stimuli. Fibromyalgia is believed to affect central neural processing, rather than organ-specific pathology and could therefore be described under the umbrella term: ‘centralized sensitization syndrome’.

44,494 individuals took part in the health study, having undergone audiometry testing and completed a detailed questionnaire which mapped symptoms of fibromyalgia. Test subjects were split into groups: those with fibromyalgia; those suffering from localised and widespread musculoskeletal pain; and a control group without fibromyalgia. When recording their results, researchers made adjustments for the participants’ ages, education, anxiety, depression and hearing thresholds, in order to calibrate external variables which could impinge upon the validity of the data acquired.

The author of the paper stated as follows:

‘Our study showed increased probability for subjective hearing loss, both in persons with fibromyalgia and other musculoskeletal pain, especially widespread pain, after adjustment of audiometric measured hearing loss and sociodemographic and psychological variables. The finding supports the increasing recognition that medically unexplained pain conditions may pertain to a larger spectrum of symptoms, and that a common denominator for the different symptoms might be a more general dysregulation in perception of sensory stimuli’.56

Compared to the control group, those who suffered with fibromyalgia were 4.5 times more likely to suffer from hearing loss, while those with other musculoskeletal condition were 1.8 times more likely. This infers that with rising levels of musculoskeletal pain comes an increased risk of hearing impairment.

Looking to the future, the author of the study has said that:

‘...it would be interesting to address auditory perception among patients with fibromyalgia and other chronic pain in a prospective and nuanced manner, encompassing both experiences of explicit hearing problems and hypersensitivity to sound’.57

How Does the Menopause Affect Hearing Acuity?

On 10 May 2017, Menopause, the Journal of the North American Menopause Society, made available to the public, details pertaining to a 22 yearlong study, carried out by the Brigham and Women’s Hospital in Boston, Massachusetts, investigating a potential trend between hearing loss and female hormonal balance during the menopause.58

Hypothesising over historic research, which implied that a natural reduction in oestrogen levels during the menopause increases the risk of hearing loss, the researchers in this study anticipated that post-menopausal hormone therapy (HRT) would slow the decline in acuity by replenishing any oestrogen deficit.59

Between 1991 and 2013, 80,972 women at a baseline age between 27 and 44, took part in the Nurses’ Health Study II, all of
whom had menopausal status and some of whom were undergoing a course of oral HRT. Over a follow-up period of 1,210,928 years, representing the cumulative ageing of all participants, 18,558 cases of hearing loss were identified through self-reporting, which was equivalent to 23% of the experimental subject class.60

Within the pool of 18,558 hearing loss sufferers, no significant overall association could be deduced between menopausal status and the risk to hearing loss, although association was established in individuals who began the process of natural menopause at an older age (50+); an increased chance of 10%.61 The latter was conducive to the findings in past studies referred to above.

However, to the surprise of many, the results of the study conveyed, albeit unexpectedly, that the likelihood of developing hearing loss escalated by 15% as a result of HRT use over a period of 5 to 10 years and symptoms continued to worsen by a further 6% if taken for more than 10 years.62

Sharon Curhan, lead author and researcher at the Channing Division of Network Medicine noted that:

‘Many factors contribute to acquired hearing loss, including age, genetics, noise, medical conditions, diet, and lifestyle factors ... Our research focuses on identifying preventable contributors to hearing loss ... the role of sex hormones in hearing is complex and incompletely understood ... These findings suggest that hearing health may be a consideration for women when evaluating the risks and benefits of hormone therapy’.63

Dr. JoAnn Pinkerton, Executive Director of the North American Menopause Society, when addressing the unanticipated nature of the relationship discovered, commented that this:

‘... should lead to more testing in a randomized, clinical trial. Information about the potential effect on hearing is important to include in a discussion regarding the risks and benefits of hormone therapy for symptomatic menopausal women’.64

Meanwhile, Dr Heather Currie, Chairman of the British Menopause Society, stated, in defence of HRT, that:

‘This type of trial relies on women’s self-reported hearing loss and does not prove that HRT causes this – only that there may be an association. This should not terrify women and, as we have always said, the decision about HRT should be an individual choice based on the balance of benefits and risks’.65

More research in this clinical area is to be expected over time, especially as this latest discovery has poured greater confusion on the link between hormones and their impact on hearing loss.

Launch of Mesothelioma Breach of Duty Guide

Liability is becoming an increasingly live issue in mesothelioma claims. In this Guide we consider how the courts deal with these liability issues and what practical handling guidelines can be gained. In part 1 of this Guide we consider the essential requirement of the claimant proving exposure on balance of probabilities. We then go on in part 2 to consider the common law regime for proving exposure and show why exposure to any level of asbestos does not automatically amount to a breach of duty of care. Finally in Part 3, we compare the approach at common law with the statutory regime for asbestos and ask ourselves if the latter imposes more onerous duties on employers or if it simply mirrors those obligations at common law.

The Guide can be accessed here.

Beware of Agreeing Costs Budgets by Default

An important point to surface from the Association of Personal Injury Lawyers (APIL) conference last week relates to court directions and costs budgets.66 It has been reported that some courts, when sending out directions for the CCMC, include the following phrase:

‘The parties shall seek to agree the costs budgets. If any party wishes to challenge the budgeted costs of an opponent, they must file and serve not less than 3 days before the hearing a written statement setting out which stages (if any) of the budget is contested, why, and what is said to be the appropriate figure. In default any budget or stage thereof not so challenged shall be deemed to be agreed’.

In instances where parties are non-compliant and still wish to dispute the budget, relief from sanctions will be required.

This practice is not widespread and, as such, practitioners will need to be particularly careful when checking directions.

De-politicisation of the Discount Rate?

Last week, we discussed the reactions of various organisations to the Ministry of Justice’s 6 week discount rate consultation: ‘Personal injury discount rate: how it should be set in future’.67 Since then, the Law Society has submitted its response stating that the power to set the rate should be protected from ministerial influence:68

‘Fundamentally, any changes should not undermine the 100% compensation principle. We agree that the current methodology could be changed to better reflect the potential yield claimants could...’
receive from investing a lump sum as long as it does not undermine the 100% compensation rule. Decisions on awards made by the courts should not be subject to political influence. In order for the civil justice system to retain the trust and confidence of claimants and defendants, the process should be fully independent from government.69

This would remove the Lord Chancellor, currently Elizabeth Truss MP, from the method by which an adequate discount rate is calculated. Replacing political figures would be a panel of independent experts with financial investment qualifications and/or experience would be best suited to debate change, chaired by a government actuary. Entrenched in Law, a review would occur every 5 years, so to distance the rate setter from inducing the timing of any alterations made. Meanwhile, the judiciary would retain fettering powers to apply a different rate from the one specified, if they believed it was necessary.70

Will the Prison and Courts Bill Resurface?

Last week, the Conservative Party published its election manifesto.71 Previously, the wash up period preceding the recess of Parliament had halted the passing of the Prison and Courts Bill, which led to speculation over whether the Bill will resurface when the new Government takes office.

Provisions encased within the Bill included the raising of the small claims limit for RTA cases from £2,000 to £5,000, with the aim of preventing fraudulent soft tissue whiplash actions, while many commentators and leading industrial figures perceive the Bill as an opportunity to revise the controversial (±)0.75% discount rate on lump sum damages.

In chapter 3, titled: ‘The World’s Great Meritocracy’, the party heralds that they: ‘... will reduce insurance costs for ordinary motorists by cracking down on exaggerated and fraudulent whiplash claims’.72

It seems then, that if the Conservative Party is re-elected in June, its Justice reform strategy will continue the progress made thus far.73 Further, given that the Labour Party has, until this point, left proposals unopposed,74 if they were to form a Government, as a majority or in coalition, it is foreseeable that a similar policy could be adopted.

Jackson LJ Sceptical Over Fixed Costs in Clinical Negligence Claims

In edition 176 of BC Disease News (here), we reported on the work of Jackson LJ, and his ‘progress report’ on the introduction of fixed recoverable costs in the lower regions of the multi-track, which is awaiting official release in July. Following this, the Department of Health has commenced a review of fixed fees in high value clinical negligence claims worth up to £250,000.

In a recent speech, given at the Association of Personal Injury Lawyers’ annual conference, Jackson LJ expressed his dissatisfaction with such a proposal, unless it was limited to cases where causation and liability were admitted. The reasoning behind this is that the civil justice system would, according to his expertise, face ‘considerable difficulties’ if such a regime were to be implemented.75 Despite having championed a blanket threshold of £250,000 across all civil claims in the past, at the conference, he confessed that:

‘These reforms have now been in place for just over four years [since the Legal Aid, Sentencing and Punishment of Offenders Act]. There were teething problems which have been dealt with, costs management is now working much better, so after four years the time has come to look again’.

A fortnight ago, we discussed (here) the Civil Justice Council’s proposal to ‘pool’ and ‘analyse’ both consultations ‘before bringing forward finalised reform proposals’. It is possible that Jackson LJ may consider this suggestion, after having weighed in on the clinical negligence fixed costs debate last week.

‘Hot-Tubbing’ Should Not be the Default Position?

We have written before, as recently as edition 180 of BC Disease News (here), about expert ‘hot-tubbing’ and how it ‘should gradually become a ‘default position’ in the Mercantile Court and Technology and Construction Court (TCC).’76 Now, a sub-committee of the Civil Procedure Rule Committee (CPRC), chaired by Mr Justice Kerr, has warned against forcing this procedure on ‘unwilling parties’ during a committee meeting.77 The sub-committee was initially set up following a Civil Justice Council (CJC) report in August 2016.

‘Hot-tubbing’ is best described when experts concurrently adduce evidence. The concept was introduced as a Jackson reform, which came into force on 1 April 2013 and hoped to reduce the ‘wasteful duplication of effort and cost’ associated with obtaining expert evidence. The Expert Witness Institute’s recent figures highlighted that only 15% of experts when questioned, admitted to hot-tubbing participation,78 despite Civil Justice Council (CJC) research confirming 83% of judicial respondents considered the quality of expert evidence to be an improvement over the formerly accepted procedure.79

Consequently, concern has grown over why a positive response to ‘hot-tubbing’ has not caused a shift in ‘uptake’ statistics. On the contrary, in the CPRC sub-committee’s February report, they revealed that ‘hot-tubbing’ has not even been taken up voluntarily, suggesting that unless it is actively promoted in specific cases, the
A new study has discovered that a type of cancer treatment, which has benefitted patients enduring the latter stages of lung cancer, may also yield promising results with newly diagnosed patients. Some might assume that these findings are also of relevance to mesothelioma patients, but this was not conclusively proven during the course of the study.

Immunotherapy is an emerging treatment for some cancers, whereby the body’s own immune system is ‘switched on’, allowing it to attack cancer cells. In issues 167 (here) and 176 (here) of BC Disease News, we have previously covered a specific type of immunotherapy treatment, known as pembrolizumab (brand name – Keytruda), which is a checkpoint inhibitor drug. Checkpoint inhibitors work by interrupting an interaction between a protein located on cancer cells (known as PD-L1) and a protein located on immune cells (known as PD-1), which would otherwise instruct the immune cells not to attack the cancer cells. Therefore, disruption of this interaction allows the immune cells to recognise and destroy cancerous cells.

There is evidence in support of clinical benefits for patients with melanoma and lung cancer, although evidence surrounding the treatment of mesothelioma is still yet to be fully determined. Data is available for mesothelioma patients who have already been treated with routine therapies, but the dataset is small, due to low patient numbers. However, we are now seeing private treatment costs of Keytruda in an increasing number of living mesothelioma claimants, following remarkable lung cancer patient outcomes, which are typically valued at around £70,000 or more. Further, in most trials involving both lung cancer and mesothelioma patients, Keytruda has been prescribed post-chemotherapy or post-standard treatment.

In the new study, researchers at the Tisch Centre Institute at Mount Sinai have discovered that some of the same immune cells that allow immunotherapy to reverse the malignance of late-stage lung cancer are also present as the disease begins to take hold. Samples of patients’ lung tumours, healthy lung tissue and blood were analysed and investigated immediately after lesion removal surgery, in order to ascertain their immune properties. Interestingly, the researchers established that stage I lung cancer lesions already harbour immune system components that likely compromise the anti-tumour 1 cells’ ability to fend off cancer. This is indicative of the fact that checkpoint inhibitors, particularly those that target PD-1 and PD-L1 interaction, may be effective in treating early-onset cancers.

Results from the first clinical trial of a PD-L1 inhibitor in early-stage lung cancer patients were announced in October. The small study found that immunotherapy with the drug nivolumab (brand name – Opdivo) is safe and feasible at that stage.

Currently, 304 relapsed (stage III) mesothelioma patients, across 20 UK-wide industrial sites, are undergoing nivolumab therapy at the University of Southampton’s Centre for Cancer Immunology, which has been the product of research jointly conducted by the University of Leicester and the University of Southampton. Stage III trials are the most expensive and time-consuming to conduct, as they use larger test groups to further assess drug efficacy. Within the group of test subjects, two thirds of the participants will receive the treatment drug, while the remaining third act as the control, receiving a placebo. This will continue for up to a year, unless the side effects pose a threat to their health or the mesothelioma returns.

Cancer Research UK have provided the necessary funding and are hoping that the trial will determine whether the drug, which has been used to successfully treat
advanced melanoma and kidney cancer, is successful at boosting late-stage mesothelioma survival in patients whose CT scans show a worsening of their mesothelioma, despite having already been treated with at least 2 different courses of chemotherapy. The main aims of the trial are to evaluate:

- how successful nivolumab is at treating late-stage mesothelioma (Overall survival? Progression free survival? Overall response rate?);
- whether nivolumab is safe for human consumption (toxicity); and
- how nivolumab affects a patient's quality of life (patient questionnaire).

Professor Fennell, clinical lead Professor at the University of Leicester, has stated that:

"Preliminary studies targeting PD-1 in mesothelioma have shown promising activity. CONFIRM aims to definitively assess the true benefit of nivolumab for patients with relapsed mesothelioma in a setting where there is an unmet need. Critically, we aim to understand why patients respond (or not) to this drug, and identify biomarkers to ensure that we can personalise therapy to maximize the benefit for patients."

Recruitment for the 'Checkpoint Blockade For Inhibition of Relapsed Mesothelioma' (CONFIRM) investigation has just begun and is expected to continue until March 2021. The final data collection is likely to take place in summer of 2021 and final results will be published subsequently. Sometimes, preliminary data from small groups of participants are reported at conferences while the trial is still ongoing, so we will continue to update readers on the clinical trial's progress as and when worthwhile information becomes available.

If further studies offer more evidence that checkpoint inhibitors can be effective in early-stage lung cancer, interest in their use in early-stage mesothelioma is likely to follow. Early-stage mesothelioma diagnosis is rare, because there are either no symptoms, or symptoms do not allow differentiation from other, more common, chest disorders. However, some early cases are discovered accidentally. The use and success of checkpoint inhibitors in late-stage lung cancer and some small studies of mesothelioma patients have led to claims for their use in late-stage mesothelioma, and so it follows that, if there is evidence for their success in early-stage lung cancer, trials and claims for these drugs for early-stage mesothelioma may eventually appear.

Updated Mesothelioma PSLA Guide

Two years since our last edition, this week we release the 4th edition of our mesothelioma PSLA guide.

This contains information on actual awards for mesothelioma, dependent on age and the period between onset of the disease and death, or anticipated date of death. These are provided in the form of ‘ready reckoner’ tables, organised by award size, claimant age and duration of symptoms.

In addition to this, our mesothelioma PSLA calculator can be accessed here - and provides estimated common law awards according to age and duration of symptoms, based on these ready reckoner tables.

The guide can be accessed here.
Case Law


The Court of Appeal has ruled, in the case of Perry v Raleys Solicitors [2017] EWCA Civ 314 that the now defunct miners’ law firm, Raleys Solicitors, must pay £15,000 for negligent advice it gave to a client, a former miner.

As is well known, the Department for Trade and Industry, which had assumed responsibility for the liabilities of the National Coal Board/British Coal Corporation liability, set up a compensation scheme in 1999 to provide tariff-based compensation to miners who had been exposed to vibration and in consequence suffered from vibration white finger or VWF (there was a similar scheme set up to compensate those suffering from COPD).

We discussed the Coal Health Compensation Schemes in greater detail in edition 128 of BC Disease News, where we highlighted that many of the top personal injury claimant firms had profited from the fixed tariff compensation scheme. Raleys Solicitors was among these firms and allegedly earned tens of millions of pounds in fees. In 2009, six partners of Raleys were either suspended or fined by the Solicitors Disciplinary Tribunal for misconduct in the way the firm handled the claims. Raleys went into administration last year.

This is not the first time that Raleys has been in the spotlight for professional negligence claims related to former miners. In editions 28 and 94 we considered the similar case of Proctor v Raleys Solicitors Ltd where they were also found to be negligent in advice given to a claimant leading to under compensation.

The claimant in this case became a miner in 1966, as an employee first of the National Coal Board, and then of its successor, the British Coal Corporation. As a result of using vibratory tools he developed VWF. He continued to work in the industry until he took redundancy in 1994 when he ceased work completely. In 1996 he instructed Raleys, to pursue on his behalf a claim for damages as a result of developing this condition.

The claimant eventually settled his claim for VWF for £11,660 on the advice of Raleys but which did not include any element of services claim. On the basis that the claimant could not carry out six everyday tasks without assistance because of his injury, he was entitled to make a claim for services under the ‘Services Agreement’ which supplemented the main Scheme. This had not been pursued by Raleys.

The claimant, several years later, sued Raleys, alleging that its negligent advice had caused him to settle his claim at an undervalue. He claimed damages in respect of the loss of opportunity to claim a services award in respect of heads of damage available under the ‘Services Agreement’, namely gardening, window cleaning, DIY, decorating, car washing and car maintenance in the sum of £17,300.17 (plus interest).

Raleys initially defended the claim robustly, putting forward a range of defences. However, two days before the trial, they admitted that they had negligently failed to advise the claimant about the potential for a services claim.

At first instance, the judge, HHJ Saffman found that the claimant had not proved that Raleys’ negligence had been the cause of his settling his claim at an undervalue and he did not accept that the claimant could not perform those tasks mentioned, unaided. As such Raleys succeeded in their defence.

The claimant appealed to the Court of Appeal on the following grounds:

1. The judge had misapplied the test of causation in considering whether the claimant had lost a real chance of succeeding on a services claim. Instead, the question should have been, if he had been properly advised would he have made such a claim and if he had made the claim would it have had a real and substantial rather than a merely negligible prospect of success?

2. The judge had failed to attach sufficient weight to the high grading of the claimant’s VWF by the experts when he concluded that the evidence given by the claimant and his family, regarding his ability to carry out everyday tasks, was false.

3. There had been a failure to apply the principle that a claimant did not have to be entirely disabled in order to be entitled to a services award.

Giving the unanimous ruling of the Court of Appeal, LJ Gloster concluded that this was ‘one of those very rare cases where an appellate court should interfere with the factual conclusions of the trial judge’.

She went on to say at para 28:

‘In my judgment, the judge was wholly wrong, both as a matter of principle and in the particular circumstances of this case, to have engaged in the kind of factual determination which he did as to whether, on the balance of probabilities, Mr Perry could have brought an “honest” services claim. In reality the judge carried out a determination on the balance of probabilities as to whether Mr Perry would have succeeded in his services claim against the [government].’

Her rationale for this was that there was, ‘no way in which rationally the judge could have regarded this as a case where it could have been said that it was “overwhelmingly clear on the material before the court” (certainly not before the trial began and even after all the evidence had been heard) that the claimant had only a negligible prospect of success’.

LJ Gloster also agreed with the claimant’s submission that the trial judge had failed to
apply a principle which was fundamental to the compensation scheme, namely that a claimant did not have to be disabled entirely from carrying out a task in order to be entitled to a services award.

As such, the claimant was awarded damages of £14,556, plus interest at 8%, on the basis of an 80% prospect of success in the services claim. In handing down her judgment, Gloster LJ said there were ‘sound public policy reasons’ behind her decision. She stated at para 36:

‘It is far too easy for negligent solicitors, or, perhaps more pertinent, their insurers, to raise huge obstacles to claimants such as Mr Perry from pursuing their claims, if the latter are required, effectively, to prove in the litigation against solicitors that they would have succeeded in making such a claim against the third party. Raleys’ defence in the present case is an unfortunate exemplar of insurers putting the claimant to proof of every issue in the underlying claim. Such an approach is intellectually unsound; it requires the court, inevitably many years later, to investigate whether a claimant, who as here, may be unsophisticated and not have kept records, to prove what he would have done many years earlier. In cases of admitted or proven negligence, on the part of solicitors or other professionals, that should not be the correct approach. Nor, in my view, do the authorities support it.’

The full judgment can be accessed here.

It is thought that there may be more of these types of negligence claims against solicitors firms in the future. This is especially so as the claimant solicitors in this case have launched a campaign specifically designed to alert coal miners who have previously made a successful claim through the WVF compensation scheme.

Ongoing Symptoms and Video Evidence: Karapetianas v Kent and Sussex Loft Conversions Ltd [2017] EWHC 859 (QB)

The High Court has recently handed down judgment in a case where the claimant’s case as to ongoing symptoms was contradicted by video evidence. Interestingly, Mr Jonathan Swift QC held that the evidence showed that there had been a full recovery, but rejected the argument that the claimant was fraudulent.

The claimant claimed damages for an injury arising out of an accident at work in 2012 where he worked for the defendant as a dry liner. The claimant was working in the loft when the floor collapsed and he fell to the floor below. The floor collapsed because two supporting joists had been removed, of which the claimant was not informed. As a result of the accident, the claimant suffered a pelvic fracture (alongside a head injury and bruising to his thigh which were not the subject of this dispute). He underwent a pelvic reconstruction operation but continued to complain of severe pain in his right leg.

The claimant was examined by a range of medical experts both before March 2014 and after August 2014 where he appeared to be severely disabled. The claimant was also videoed on a number of occasions between the end of March 2014 and mid-August 2014 in which the claimant appears to have a relatively normal level of function.

Taking this evidence into consideration, the judge stated:

‘…I accept that the video evidence shows the claimant’s level of recovery from the 2012 accident, by the mid part of 2014. My conclusion is that by that time, the claimant had recovered to the extent that he had regained something approaching normal functionality’.

The claimant argued that his ability as depicted in the video could be explained on the basis that he was taking large doses of painkillers, masking the pain and enabling him to give the appearance of a relatively normal level of functioning. The judge rejected this as lacking plausibility and as such accepted the video evidence as representative of the claimant’s level of functionality as at 2014.

The question was then posed: ‘Does the available evidence make good a contention that there is a sufficient causal connection between the claimant’s current condition and the 2012 accident?’

This was answered in the negative. The judge concluded that the evidence did not make that connection so that the claimant’s condition was not therefore to be attributed as a consequence of the 2012 accident.

The defendant alleged that in the absence of any other evidence to explain the claimant’s pattern of significant recovery followed by significant decline, that the court should find that since 2014 there was nothing wrong with the claimant, or that at the least the claimant had significantly exaggerated any residual effects for the 2012 accident.

Whilst the judge accepted the logic in this submission he found at para 36:

‘I carefully observed the Claimant when he gave evidence; he was also in court for most of the hearing, and so I saw him in one context or another over a period of time. The Claimant appears deeply distressed by his condition, and as I have already said, entirely worn down, and apparently sincere. It is of course possible that all of this is fake. But I regard that to be very implausible. I mean no disrespect to the Claimant when I say that I do not believe that he is sufficiently sophisticated to be capable of such a deception conducted over so extended a period of time’.
As such, whilst it was concluded that the 2012 accident had not caused the claimant’s alleged symptoms, it was also found that the claimant had not acted dishonestly in the proceedings. As such the judge rejected the defendant’s application that the claim be struck out with no recovery of any damages. Instead, he found that the defendant was liable to compensate the claimant for the injury he suffered in 2012 and for the consequences of that injury thereafter but only to the extent that by the end of May 2014 the claimant had substantially recovered from the effects of the injuries sustained.

The full judgment can be accessed [here](#).

**Amending the Claim Form: ‘Substitution in the Alternative’: Godfrey Morgan Solicitors v Armes [2017] EWCA Civ 323**

‘If one amends to add a claim against D2 in the alternative is one adding a defendant, or substituting one?’

This was the question identified by HHJ Moloney QC at the first appeal of Armes v Godfrey Morgan Solicitors. At the 2nd appeal, heard by Burnett LJ at the Court of Appeal this month, his Lordship overturned the previous decisions in relation to amendments made to the Claim Form after the limitation period had expired, explaining:

‘In my view the claimant added the Firm outside the limitation period in circumstances which are not sanctioned by the 1980 Act and the CPR. The Firm’s application to disallow the amendment should have succeeded.’

The facts of the case were as follows:

The claimant consulted a solicitor in August 2006. In December of 2008, Personal Injury and Employment Law claims were brought for work related stress, suffered during a course of employment at Norfolk County Council, between 2002 and 2006. However, on 15 March 2010, the action was struck out, as a result of a compromise agreement, signed by the claimant solicitor on 9 October 2007. That compromised both the EL and PI limbs of claim. The claimant contended this, arguing that his solicitor was negligent in compromising the PI claim, when it was agreed that he would only compromise the EL claim.

Subsequently, the claimant sought new legal instruction to issue a claim in professional negligence against ‘the Company’ of solicitors, alleging vicarious liability.

‘The Company’, formerly ‘the Firm’, was incorporated in February 2007, but was run as a partnership until September 2007. On 10 October 2007, a day after the alleged incident of professional negligence, they changed their name to the present, ‘Company’ name (Godfrey Morgan Solicitors Limited), but all clients were clients of ‘the Firm’ (Godfrey Morgan Solicitors) until December 2007, transferring thereafter.

The original claim, against ‘the Company’, was issued on 8 October 2013, which was within the applicable 6 year limitation period prescribed by Limitation Act 1980 provisions, immediately before expiration. On 7 February 2014, the Claim Form was amended to add ‘the Firm’ as a 2nd defendant, after the expiration of this aforementioned time limit, but within the 4 month period required for service. Amendments made after proceedings are issued on a party, but before the act of service, is permitted by CPR 17.1, without needing the authorisation of the court. As a consequence of joinder without permission, the newly added defendant applied to disallow the amendment under CPR 17.2.

This application was made on the basis that the amendment was not sanctioned within the confines of s.35 of the Limitation Act 1980 and concurrent CPR 19.5, which regulate new claims in pending actions.

Was ‘the Firm’ added as a new party (non-permissible), or substituted in place of ‘the Company’ (permissible) in accordance with the relevant legislation?

The parties recognised that, in order for this amendment to stand, it had to be characterised as a ‘substitution’ rather than an ‘addition’.

The judge at first instance, HHJ Moloney QC, concluded that it was a ‘substitution in the alternative’. The defendant (‘the Firm’) challenged this conclusion and appealed.

Sitting in the Court of Appeal, Burnett LJ rejected the claimant’s argument that proper analysis of the claimant solicitor amending the Claim Form and thereby joining ‘the Firm’ as the 2nd defendant in addition to ‘the Company’, would suggest that the two parties were substituted for one another, in spite of the fact that one of the two parties was already named on the Claim Form.

In doing so, his Lordship considered the statutory regime, providing a chronological application of CPR Parts 17 and 19, whose content flows from s.35 of the 1980 Act, as follows:

1. A party may amend his statement of case at any time before it has been served on any other party (CPR 17.1).
2. The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim ‘arises out of the same facts or substantially the same facts’ as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings (CPR 17.4).
3. The court may add or substitute a party, but only if the ‘relevant limitation period was current’ when the proceedings were started; and the addition or substitution is ‘necessary’ [CPR 19.5(2)].
4. The addition or substitution of a party is ‘necessary’ only if the court is satisfied that, the new party is to be substituted for a party who was...
named in the claim form in ‘mistake’ for the new party [19.5(3)(a)].

Burnett LJ, when tackling the definition of ‘substitution’, clarified, at paragraph 23, that:

‘...These provisions draw a clear distinction between addition, on the one hand, and substitution on the other. The ordinary meaning of the word substitution connotes the replacement of one person or thing by another. As Pearce LJ observed in Davies v Elsby Brothers [1961] 1 WLR 170, when considering the substitution of a party permitted under the rules in different circumstances, “substitution involves the addition of a party in replacement of the party that is removed”.

In contrast, on the topic of ‘addition’, he stated, at paragraph 26, that:

‘The provisions of section 35 of the 1980 Act and the CPR do not invest a court with power to allow an amendment to proceedings to bring in a new party after the expiry of a limitation period whenever it considers it equitable to do so. That would be to replicate the provisions of section 33 of the 1980 Act (the power to disapply the limitation period in personal injury actions) in much wider circumstances. Parties are entitled to rely upon limitation as providing protection, save in so far as legislation and rules of court otherwise provide’.

Finally, when dissecting the concept of ‘substitution in the alternative’, at paragraph 28, his Lordship concluded that the term’s non-existent legal basis within CPR 19.5(3)(a), further to the unsanctioned addition of ‘the Firm’ to proceedings, outside of the limitation period, means that:

‘The argument that the Company and the Firm have been substituted for the Company whilst an ingenious attempt to circumvent the obvious meaning of “substitute”, does not assist the claimant. It remains an addition’.

Burnett LJ believed that the purpose of the amendment was to allow the claimant solicitors to pursue both defendants, pending confirmation that one defendant was vicariously liable and, thus, the remaining party could be served with a discontinuance.

Ultimately, it was established that ‘the Firm’s’ application for the amendment to be disallowed should have succeeded and, accordingly, the appeal was allowed.

Armes, therefore, demonstrates the difficulties that claimants may face when there is uncertainty as to the legal identity of the party being pursued and limitation restricts the scope for amendment of the Claim Form.


This week, the High Court have held themselves to be bound by the decision in Williams v University of Birmingham [2011] EWCA Civ 1242, and found that a widow’s claim for damages following her husband’s death from mesothelioma failed, as she could not prove, on the balance of probabilities, that the levels of his exposure to asbestos, during the course of his employment, exceeded that set out in TDN 13 of 1970.

Between 1965 and 1968 the deceased was employed as a plumber with the first defendants, at the time known as Anglia Heating Ltd. He then had a period of self-employment, but in 1969/70 he went to work for Pump Maintenance Ltd, the second defendants, until 1980. He then worked for Anglia Television for about 20 years as a plumber.

The deceased developed mesothelioma in 2015 and died in January 2016. His wife, the claimant, commenced proceedings, for negligence or breach of statutory duty, in July 2016, against the first and second defendant, alleging that the deceased had developed mesothelioma as a consequence of being brought into contact with asbestos during his employment with them. The claim against the second defendant was settled shortly before trial.

The judge in this case, HHJ Yelton, was concerned only with issues of liability and quantum was agreed.

The claimant had made three statements before his death which were not greatly detailed with regards to the work he carried out. The claimant was not called to give evidence and neither the defendant, nor the claimant, traced or called those who ran the first defendant or anyone who worked there with the deceased. As such, the only oral evidence was from the defendant’s expert and the claimants.

Having heard the evidence of both experts, HHJ Yelton stated that he was satisfied on the balance of probabilities that:

(1) The defendants were at the material time a substantial firm of domestic plumbers in the Norwich area and indeed the largest such business. That of course is very different from being part of a multi-national company.
(2) During his employment with the defendants the claimant was mostly employed in domestic heating and plumbing work.
(3) The deceased’s exposure to asbestos during this employment came from cutting asbestos cement pipes, usually flue pipes from a boiler or a gas fire, with a hacksaw and also from handling asbestos rope, from which a length was teased out, and then used to caulk joints on the new flue pipes. The pipes had a diameter of 4 to 6 inches and the asbestos used was almost always chrysotile (white asbestos), the most commonly found type and the least toxic. The deceased did not carry out lagging or insulation work in the course of his employment.
(4) The deceased’s own estimate was that this cutting and caulking occurred about once every two to three weeks, and I accept that.
Dust was produced from the cutting. The dust was not all from the asbestos and much of it (Mr. Brady thinks about 85 to 90%) was from the cement used in the pipes. There could be three or four cuts in relation to each flue and each cut would take about five minutes.

Some dust went on to the deceased’s clothes. After carrying out this work he would blow on the cut end of the pipe, and later sweep up, which produced visible dust as it was done.

The asbestos rope (which in his earlier statements the deceased describes as “string”, which is a misleading term) was dusty and some of the dust came off on to his hands. It is on this point that I accept the evidence of Mr. Brady, who had spoken to the deceased about it. Rope of this type often contained amosite (brown asbestos) as well as the more common and less toxic chrysotile.

During his employment with the first defendants, the deceased was not given any advice about reducing exposure to asbestos dust.

It was exposure to asbestos which caused the claimant to develop mesothelioma.

In terms of the level of asbestos the deceased would have been exposed to, the judge favoured the evidence of the defendant’s expert. He agreed with him that the dust from sweeping would produce a similar result in the atmosphere to that from cutting and that the claimant’s proposition that this would be as high as 100 fibres/ml was not sustainable. Further, he agreed that the sweeping took place after a job which involved cutting and was unlikely to have taken more than a few minutes. HHJ Yelton also stated at para 20:

’I also bear in mind that the exposure to asbestos in this case was very limited in time. On the basis that the deceased was involved in the cutting of flue pipes once every two or three weeks, his involvement with the dust was not in my judgment substantial although not de minimis. On the figures set out above (which can only be estimates) the deceased was exposed to asbestos dust for up to an hour once every two to three weeks’.

Further, he rejected the claimant’s reliance on the fact that the deceased had the rope with him in his vehicle and that he carried the pipes into the building where he would be working as he said that the exposure in those circumstances was likely to be minimal and of ‘little or no importance’.

It was concluded that, on the balance of probabilities, the deceased was not exposed to levels of asbestos dust beyond those set out in TDN13, which had not been published at the time of his employment with the first defendant.

In this respect, the defendant relied upon the decision of Williams, which established that the correct legal test for breach of duty where there was more than de minimis exposure, was whether the degree of actual exposure made it reasonably foreseeable to the defendant that, as a result of its conduct, the respondent would be exposed to the risk of contracting mesothelioma and that was to be based on its knowledge at the time of the exposure.

The claimant submitted that the decision of the Court of Appeal in Williams was reached ‘per incuriam’, i.e. a lack of due regard to the law or the facts and should not be followed. It was this formulation of the test of reasonable foreseeability that the claimant disagreed with. Instead, the formulation of the test of reasonable foreseeability as seen in the Court of Appeal decisions of Maguire and Jeronson, which also concerned pre-1970 exposure, was preferred. In these cases, it was held that an employer would be found to be in breach of their common law duty of care if he failed to reduce his employee’s exposure ‘to the greatest extent possible’.

Whilst it was agreed that the exposure of the deceased in this claim could have been reduced, HHJ Yelton, pointed out that Williams had in fact been followed by a number of first instance decisions including, McCarthy v Marks & Spencer Plc [2014] EWHC 3183, Hill v John Barnsley & Sons [2013] EWHC 520 (QB), Woodward v Secretary of State for Energy and Climate Change [2016] EWHC 939 (QB) and Smith v Portswood House Ltd[2016] EWHC 939 (QB).

As a result he found that he could not accept the claimant’s argument re Williams as the doctrine of precedent, recently restated by the Supreme Court in Williams v Joyce [2016] UKSC 44, meant that High Court Judges are bound by decisions of the Court of Appeal and if there are two inconsistent decisions, the later should be followed. As such, despite the apparently conflicting Court of Appeal decisions in Jeronson, Maguire and Williams, as Williams was the most recent, that should be the decision that is followed.

As such, in the present case, in order to succeed, the claimant must be able to show on the balance of probabilities that it was reasonably foreseeable that the deceased could contract mesothelioma, based on knowledge at the time. As we noted above, it was found that the deceased’s exposure did not exceed the limits outlined in TDN13.

In this regard, the judge found, that despite the fact that the exposure to asbestos in the present case preceded TDN13:

’…it would in my judgment be perverse to find that TDN13 increased rather than decreased the levels of exposure which a responsible employer would regard as safe. In other words, if the decision in Williams is correct, then a claimant cannot succeed in a claim of this nature in relation to a period before 1970 by showing that exposure to asbestos was at a lower level than provided by TDN13.

This is the same approach to TDN13 taken in Hill, in which Bean J stated:

’…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’.

He went on at para 44:

‘Having concluded that the claimant has failed to prove that the levels of the
While the Claimants offer very low figures in their Precedent R, in extreme cases, this can lead one side to calculate its own amount, somewhere between the wildly different sets of figures put forward by the parties. Unhappily, this case is, in my view, an example of that approach.

The facts of the case regarded a gas explosion, which took place in the Churchill Hotel at Portman Square. This forced the 4 month closure of a restaurant, operated by Findcharm Limited. Subsequently, Findcharm brought a claim for costs arising from the explosion, valued at £820,000 (plus interest), predominantly for ‘loss of profit’. Findcharm made revisions to their cost budget before the CMC, before submitting a total budget of £244,676.30. Meanwhile, Churchill’s Precedent R totalled £79,371.23. Coulson J described this as a ‘basic’, ‘unrealistic’ budget, with ‘no utility’, that contained ‘bare denials and non-admissions’ which the ‘CPR was meant to sweep away’.

As a result, an order was made against Churchill, which stated that:

‘Unless within 21 days Churchill pleaded a positive defence on the cause of the explosion, they would be taken to admit Findcharm’s pleaded case on that issue’.

On this basis, the assumptions that had been taken into account in Findcharm’s Precedent R were deemed to be ‘reasonable’ and ‘appropriate’, namely that there would be no need to collate expert evidence dealing with the cause of the explosion and that a single joint accountant expert could address the claim for loss of profit.

Held, at paragraph 11, disregarding Churchill’s Precedent R:

‘Having considered Findcharm’s revised cost budget in the round, I conclude that it is both proportionate and reasonable. I therefore allow it in the sum claimed of £244,676.30’.

In his closing statement, Coulson J emphasised the duty of parties to civil litigation that ‘...the Precedent R process is carefully and properly adhered to...’ Therefore, by submitting unjustifiably low figures, as Churchill pleaded, in the hope that the court also provides a low valued assessment, clearly amounts to an ‘abuse of the costs budgeting process’.

Guidance on Striking Out Particulars of Claim:

Kaplan v Super PCS LLP

[2017] EWHC 1165 (Ch)

On 3 May 2017, the High Court heard an application in the case of Kaplan v Super PCS LLP [2017] EWHC 1165 (Ch), where Mrs Justice Rose struck out the particulars of claim, brought by 5 litigants ‘in deceit’, over false representations allegedly made by the Defendants.

Four iterations of claim forms were issued and served against the Defendant since August 2014, but the Defendants, in this trial, sought to strike out the claim form and particulars and/or the claim in its entirety applying CPR 3.4(2), while the Claimants sought to amend their particulars of claim, in order to ‘expand’ and ‘clarify’ the oral evidence that formed the basis of their ‘deceit’ action.

CPR 3.4(2) provides as follows:

‘CPR 3.4

(2) The court may strike out a statement of case if it appears to the court –
(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
(b) that the statement of case is an abuse of the court’s process or is otherwise likely to obstruct the just disposal of the proceedings; or
(c) that there has been a failure to comply with a rule, practice direction or court order.’
Directing the Court, her Ladyship Rose J advised, at paragraph 37, that:

‘... it is the Claimants’ obligation to put the case forward in a manner which does not involve the Defendants having to chase back through multiple cross-references to other paragraphs in the pleading which may then say something different leading to a lack of clarity about what the allegation actually is. I agree with the Defendants that the proposed amended Particulars of Claim are properly described as unnecessarily prolix and embarrassing. They fail fairly to identify the claims being pursued in a way which can be reasonably understood or responded to by the Defendants.’

Expansion of claimant pleadings up to that moment, which sought to ‘surgically’ clarify their position, had been structured in an incoherent way, with ‘incorrect’, ‘inconsistent’ and ‘flatly contradictory’ cross-referencing between paragraphs, making it difficult for the individual Defendants to establish what the alleged wrongdoings were.

Held, at paragraphs 38-39:

‘I have therefore concluded that to accede to the application to amend the Particulars of Claim in anything like their current form would be likely to obstruct the just disposal of the proceedings within the meaning of CPR 3.4(2)(b) ... I therefore will refuse permission to amend the deceit claim and strike out the Particulars of Claim’.

However, given a lack of ‘abusive’ or ‘ulterior’ motive behind the litigants’ claim, she ‘... decided to step back from striking out the claim in its entirety’, before the 6 year limitation period expired, but requested that the Claimants ‘undertake a serious review’ of their allegations, limiting the extent of those allegations ‘to matters which they have a reasonable prospect of establishing at trial’.
INTRODUCTION

In the past week’s features we have looked at the construction of one of the most commonly pleaded statutory duties in asbestos claims, s.63(1) of the Factories Act 1961 (preceded by s.47(1) of the Factories Act 1937). We deconstructed it into 5 distinct parts, as follows:

In every factory in which, (1) in connection with any process carried on, (2) there is given off any dust or fume or other impurity of such a character and to such an extent as to be likely to be injurious or offensive (3) to the persons employed, or (4) any substantial quantity of dust of any kind, (5) all practicable measures shall be taken to protect the persons employed against inhalation of the dust or fume…’.

Each of these elements are required in order to establish liability under the sub-section. Having dealt with the meaning of ‘any process carried on’, ‘persons employed’ and the two limbed test i.e. ‘likely to be injurious’ and ‘substantial quantity’, we now turn to the final element of the section. What is meant by ‘all practicable measures’? Does this import a concept of foreseeability? How otherwise can an employer take practicable measures against unknown risks? How do the answers to these questions impact on the second limb test of ‘substantial quantity’ which, as we concluded last week, does not involve any notions of foreseeability? Finally, we go on to compare the requirement to take ‘practicable’ measures with that of taking all ‘reasonably practicable’ measures, frequently found within other parts of the Factories Acts and other legislation.

On the next page, we provide a table of the regulations/legislation commonly relied upon within asbestos claims in which the terms ‘practicable’ and ‘reasonably practicable’ appear:
<table>
<thead>
<tr>
<th>Statutory Provision</th>
<th>Applicable Between</th>
<th>Industrial Application</th>
<th>Duties Under Legislation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Asbestos Industry Regulations 1931</td>
<td>01/09/1932 - 13/05/1970</td>
<td>Applies to all Factories and Workshops where the preamble activities are carried out</td>
<td>Regulation 2(a) - 'Mixing or blending by hand of asbestos shall not be carried on except with an exhaust draught effected by mechanical means so designed and maintained as to ensure as far as practicable the suppression of dust during the process.'</td>
</tr>
<tr>
<td>Factories Act 1937/1961</td>
<td>01/07/1938 - 01/04/1962</td>
<td>Factories, Factories Occupying Parts of Buildings, Electrical Stations, Institutions Constituting a Factory, Docks, Wharves, Quays, Warehouses, Building and Engineering Construction</td>
<td>Section 4(1) - 'Effective and suitable provision shall be made for securing and maintaining by the circulation of fresh air in each workroom the adequate ventilation of the room, and for rendering harmless, so far as practicable, all fumes, dust and other impurities that may be injurious to health generated in the course of any process or work carried on in the factory.'</td>
</tr>
<tr>
<td>Factories Act 1937/1961</td>
<td>01/04/1962 - 01/01/1993</td>
<td>Factories, Factories Occupying Parts of Buildings, Electrical Stations, Institutions Constituting a Factory, Docks, Wharves, Quays, Warehouses, Building and Engineering Construction</td>
<td>Section 47(1)/63(1) - 'In every factory in which, in connection with any process carried on, there is given off any dust or fume or other impurity of such a character and to such an extent as to be likely to be injurious to health or offensive to the persons employed, or any substantial quantity of dust of any kind, all practicable measures shall be taken to protect the persons employed against inhalation of the dust or fume...'</td>
</tr>
<tr>
<td>The Building (Safety, Health &amp; Welfare) Regulations 1948</td>
<td>02/10/1948 - 02/03/1962</td>
<td>Construction, Structural Alteration, Repair or Maintenance of a Building (including Re-Pointing, Re-Decoration and External Cleaning), Demolition and Preparation, Laying of Foundations of an Intended Building on or Adjacent to a Site of Engineering Construction and Machinery or Plant Used in Such Operations</td>
<td>Regulation 82 - 'Where in connection with any grinding, cleaning, spraying or manipulation of any material, there is given off any dust or fume of such a character and to such an extent as to be likely to be injurious to the health of persons employed all reasonably practicable measures shall be taken either by securing adequate ventilation or by the provision and use of suitable respirators or otherwise to prevent inhalation of such dust or fume.'</td>
</tr>
<tr>
<td>Construction (General Provisions) Regulations 1961</td>
<td>01/03/1962 - 10/10/1999</td>
<td>Building Operations and Works of Engineering Construction</td>
<td>Regulations 20 - 'Where in connection with any grinding, cleaning, spraying or manipulation of any material, there is given off any dust or fume of such a character and to such extent as to be likely to be injurious to the health of persons employed all reasonably practicable measures shall be taken either by securing adequate ventilation or by the provision and use of suitable respirators or otherwise to prevent inhalation of such dust or fume.'</td>
</tr>
<tr>
<td>Factories Act 1937 / 1961</td>
<td>01/04/1962 - 01/01/1993</td>
<td>Factories, Factories Occupying Parts of Buildings, Electrical Stations, Institutions Constituting a Factory, Docks, Wharves, Quays, Warehouses, Building and Engineering Construction</td>
<td>Section 26 (1)/ 29(1) - 'There shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work, and every such place shall, so far as is reasonably practicable, be made and kept safe for any person working there.'</td>
</tr>
</tbody>
</table>
MEANING OF PRACTICABLE MEASURES

‘...all practicable measures shall be taken to protect the persons employed against inhalation of the dust or fume...’

Both limbs of s.47(1)/s.63(1) of the Factories Acts require the occupier to take ‘all practicable measures’ to protect the persons employed against inhalation. Section 4(1) of the Act requires the occupier to take ‘practicable’ measures to maintain ventilation whilst Section 26/29 qualifies the keeping of a workplace safe by the words ‘reasonably practicable’.

What does practicable measures mean? Do the words import any notion of foreseeability? How does an employer adopt measures against unknown risks?

In Adsett v. K. and L. Steelfounders and Engineers Ltd [1953] 1 WLR 773, the Court of Appeal considered the meaning of ‘practicable’ in relation to section 47(1) of the Factories Act 1947 (the antecedent of section 63). In deciding the meaning of ‘practicable’, Singleton LJ stated (at page 779):

‘It seems to me that you must have regard to the position which existed at that time’.

Singleton LJ continued (pages 779-80):

‘... the question is, had they taken all practicable measures; but if no one in science, or no one in the engineering world, or no one who has had charge of a big factory, knows of a system by which one can combine a grid and dust extractor, with the dust extractor under the grid, until these defendants found that way and decided to try it, is it to be said that that which they discovered by their experimenting was practicable long before they found it? There has not been a word of evidence to show that anyone knew of any such system before, though dust extractors by themselves were well known’.

Singleton LJ concluded (page 780):

‘In deciding whether all practicable measures were taken one must have regard to the state of knowledge at the time, and particularly to the knowledge of scientific people. It is easy to be wise after the event, but I find it impossible to say, on my view of this section, that it was shown that the defendants were in breach of the duty imposed on them by the section’.


‘The introduction of the word “practicable” necessarily qualifies in some way the absoluteness of the injunction. I find it difficult to think that an occupier of a factory, who undoubtedly need not take every conceivable measure to combat a danger which is scientifically known, may none the less be under obligation to combat what in his particular industry is scientifically unknown. Practicable measures in this context must mean such measures as a reasonably careful employer, after making an assessment of what is necessary and sufficient according to the circumstances existing at the relevant time, would take to deal either with dust of an injurious quality or dust in substantial quantities’.

In Gregson v Hick Hargreaves & Co Ltd [1955] WLR 1252 when considering what practicable measures could be taken by a factory occupier, Singleton LJ said:

‘No one could successfully contend that if there was given off a considerable quantity of dust at one end of this 100 yards long shop, everyone down to the other end of the shop should be provided with a mask’.

In Wallhead v. Ruston and Hornsby Ltd [1973] 14 KIR 285, Bagnall J considered the meaning of ‘practicable’ and found (page 292):

‘However, on one point the authorities to which I have been referred are unanimous: what is practicable must be determined in the light of current knowledge’.

Bagnall J concluded (page 293):
‘… in determining both the possibility or likelihood of the dust in question being injurious and the practicability of remedial or preventive measures, I must have regard to what the defendants knew or ought to have known at the relevant date on the footing that they ought to have known that which they would have ascertained if they had read the literature and made the enquiries which a reasonably prudent and careful employer of labour in an iron foundry would have read and made’.

On the same page, Bagnall J also observed that the defendants must:

‘… be regarded as employers or ironfounders and not as pathologists or engaged on medical research …’

In *McDonald*, when considering the issue of whether foreseeability was relevant to the 2nd limb of s.47(1), Kerr cited and noted with approval *Richards v Highway Ironfounders (West Bromwich) Ltd* [1955] and what was said by the then Master of the Rolls on the issue of practicable measures. At paragraph 86 Kerr said:

‘The relevant phrase in section 47 is any substantial dust of any kind. I should start my discussion on this part by saying what this does not mean. It does not mean a substantial quantity of injurious dust. The so-called dichotomy in section 47 points clearly away from such an approach. Whether the second limb of the subsection is triggered calls for a purely quantitative assessment. It may well be, as suggested in cases such as Richards and Gregson, that the possibly injurious propensity of the dust has a part to play in deciding what are practicable measures. But that has nothing to say on the question whether, in the first instance, there is any substantial quantity of dust of any kind’.

**PRACTICABLE v REASONABLY PRACTICABLE**

It appears that the term practicable measures does import notions of foreseeability, but if a risk is foreseen then what are the practicable measures to be taken? This has often been discussed in cases addressing the meaning of ‘reasonably practicable’ and any differences with ‘practicable’.

The classic exposition of reasonable practicability is to be found in Asquith LJ’s judgment in *Edwards v National Coal Board* [1949] 1 KB 704, CA at 712:

‘Reasonably practicable is a narrower term than ‘physically possible’ and seems to me to imply that a computation must be made by the owner in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other, and that, if it be shown that there is a gross disproportion between them — the risk being insignificant in relation to the sacrifice — the defendants discharge the onus on them’.

This was followed by *Marshall v Gotham Co Ltd* [1954] A.C. 360, a case concerned with the death of a workman caused by the fall of a roof in a gypsum mine, the fall being the result of an unusual geological condition known as ‘slickenside’ which had not been found in the mine for 20 years and which was not detectable by any known means before the fall, the mine owners were exonerated from liability on the ground that they had proved that it was not reasonably practicable to ensure the mine’s safety from such a danger. Lord Oaksey held:

‘That is to say, what is ‘reasonably practicable’ depends upon a consideration whether the time, trouble and expense of the precautions suggested are disproportionate to the risk involved. It is conceded in the present case that it was not reasonably practicable to make the roof secure by timbering, and to have attempted to make it secure by pneumatic props in some places and by leaving it unmined in others when no slickenside had ever occurred for a period of 20 years was not, in my judgment, reasonably practicable’.

A useful evaluation of the quantum of risk was provided in *Austin Rover Group Ltd v Her Majesty’s Inspector of Factories Appellant* [1989] 3 W.L.R. 520, where it was held at para 627:

‘It follows from the passages which I have quoted that, for the purpose of considering whether the defendant has discharged the onus which rests upon him to establish that it was not reasonably practicable for him, in the circumstances, to eliminate the relevant risk, there has to be taken into account (inter alia) the likelihood of that risk"
eventuating. The degree of likelihood is an important element in the equation. It follows that the effect is to bring into play foreseeability in the sense of likelihood of the incidence of the relevant risk, and that the likelihood of such risk eventuating has to be weighed against the means, including cost, necessary to eliminate it’.

An example of this evaluation can be seen in the recent case of Mann v Northern Electric Distribution Ltd [2010] EWCA Civ 141, in which the claimant trespassed onto a substation owned by the defendant and as a result was electrocuted and suffered serious lifelong injuries. The claimant alleged breach of regulation 20 of the Electricity Supply Regulations 1988 which states:

‘The supplier shall –
(a) enclose any part of a substation in the open air, containing live apparatus which is not practicable, danger or unauthorised access’;

At first instance the recorder found that:

(a) it was foreseeable that, with the help of a climbing aid such as the piece of wood propped up on the ground against the railings, a person might climb on to the cross-bar of the railings (stage one); but

(b)(i) in general it was not foreseeable that even a determined trespasser would climb the distance of six feet eight inches between the cross-bar and the flat top of the buttress (stage two); and

(ii) in particular it was not foreseeable that he would reduce that distance (albeit in this case he remained confronted by the need to climb five feet two inches) by use of a precarious wooden piece ‘makeshift ladder’ which someone had taken considerable trouble to construct behind and on top of the stanchion.

The recorder therefore held that the element of foreseeability inherent in the concept of what was reasonably practicable was absent and that the defendant had established that it had complied with paragraph (2)(a) of the regulation.

The claimant appealed to the Court of Appeal but this was dismissed. Lord Justice Wilson stated at para 18:

‘As the recorder observed, no amount of security measures will keep out a sufficiently determined trespasser. Thus, for example, no wall, however high, is proof against the trespasser who has brought a ladder of equal height: entry by such means may be foreseeable but it may nevertheless, for other reasons, not be reasonably practicable for the supplier to prevent it. By contrast entry by the means adopted in the present case was, according to the unassailable finding of the recorder, not foreseeable and it was, for that reason, not reasonably practicable for the defendant to take further steps in relation to its wall, even when viewed in the context of its surrounding features, in order to prevent it’.

How does this approach differ to that of ‘practicable’?

Lord Parker CJ in Moorcroft v Thomas Powles & Sons Ltd [1962] 1 WLR 1147 (at page 1454) considered what the distinction between ‘practicable’ and ‘reasonably practicable’ might be (in relation to the Building (Safety, Health and Welfare) Regulations, 1948):

‘It seems to me that practicable must impose a stricter standard than reasonably practicable. It may be that certain matters one would take into consideration if the words were reasonably practicable, such matters as the cost and the like, have to be eliminated’.

If may be noted that Lord Parker CJ does not suggest that foreseeability is a difference. So what about ‘reasonably practicable’ and foreseeability?

In Abraham v G. Ireson & Son (Properties) Limited [2009] EWHC 2758 (QB), Swift J considered ‘reasonably practicable’ in relation to regulations 82 of The Building (Safety, Health & Welfare) Regulations 1948 and regulation 20 of the Construction (General Provisions) Regulations 1961. He stated that even if he had accepted the claimant’s argument that ‘likely to be injurious’ is an objective concept, that knowledge of risk must nevertheless be relevant to the issue of ‘reasonably practicability’.
This was supported by Smith LJ in the Court of Appeal decision of *Baker v Quantum* [2011] UKSC 17, who, in relation to s.29 of the Factories Act 1961 and the meaning of 'reasonably practicable', stated at para 83:

>'As a matter of common sense, if the employer does not know of the risk and cannot reasonably have been expected to know of it, it cannot be reasonably practicable for him to take any steps at all. If, on the other hand, the employer ought to have known of the risk but did not and therefore never applied his mind to it, the burden on the employer, seeking to make out the defence, would be to show that it would not have been reasonably practicable for him to avoid or reduce the risk even if he had thought about it'.

As such, the Court of Appeal accepted that there was an element of foreseeability within the phrase 'reasonably practicable'. However, Smith LJ went on in para 89 to say:

>'[…]Thus, once any risk has been identified, the approach must be to ask whether it is practicable to eliminate it and then, if it is, to consider whether, in the light of the quantum of the risk and the cost and difficulty of the steps to be taken to eliminate it, the employer can show that the cost and difficulty of the steps substantially outweigh the quantum of risk involved I cannot see how or where the concept of an acceptable risk comes into the equation or balancing exercise. I cannot see why the fact that a responsible or official body has suggested that a particular level of risk is ‘acceptable’ should be relevant to what is reasonably practicable. In that respect, it appears to me that there is a significant difference between common law liability where a risk might reasonably be regarded as acceptable and statutory liability where the duty is to avoid any risk within the limits of reasonable practicability'.

On appeal in the Supreme Court, Lord Mance, agreed that the phrase ‘so far as is reasonably practicable’ imports the concept of foreseeability but he disagreed with the Court of Appeal’s conclusion that the knowledge and standards of the day are not to be taken into account. He stated at para 82:

>'Had it arisen, I would have regarded the qualification as wide enough to allow current general knowledge and standards to be taken into account. Even the Court of Appeal in its formulation acknowledged the quantum of risk involved as material in the balancing exercise. But this can only mean that some degree of risk may be acceptable and what degree can only depend on current standards'.

Lord Dyson agreed with this interpretation and stated at para 123:

>'I would agree, however, that if the concept of reasonable foreseeability is not imported into “safe” in section 29(1), then it is imported into reasonable practicability for the reasons given by Smith LJ'.

He went on at para 129 to say:

>'…I do not agree with the Court of Appeal that the acceptability of risk is irrelevant to reasonable practicability. I would adopt what Lord Mance says at paras 82 and 83. Smith LJ refers to the “quantum of the risk” as being relevant to whether it is reasonably practicable to eliminate it. I agree. But if the quantum of the risk is relevant to that question, how can the fact that a Code of Practice says that a risk is acceptable not be relevant?’

Lord Kerr concurred at para 182 where he said:

>'By contrast, however, reasonable practicability does import consideration of what was known at the time that the injury was sustained. By definition it cannot be reasonable to put in place measures that are not known to be necessary. It may be practicable to do so but it cannot be said to be reasonably practicable. As the Court of Appeal in the present case said at para 83 of Smith LJ’s judgment, it is “a matter of common sense [that], if the employer does not know of the risk and cannot reasonably have been expected to know of it, it cannot be reasonably practicable for him to take any steps at all”'.

Finally Lord Clarke, who also agreed that the qualification ‘as far as reasonably practicable’ involves a consideration of what risks are reasonably foreseeable, relied upon the 14th edition of *Munkman* to conclude that the state of knowledge at the time must be taken into account. He held at para 214:
Those conclusions are consistent with the view expressed in the 14th edition of Munkman at para 5.89:

“In considering what is practicable, account must be taken of the state of knowledge at the time. A defendant cannot be held liable for failing to use a method which, at the material time, had not been invented: Adsett v K and L Steelfounders and Engineers Ltd [1953] 2 ALL ER 320; nor for failing to take measures against a danger which was not known to exist: Richards v Highway Ironfounders (West Bromwich) Ltd [1955] 3 ALL ER 205”.

As such, the Supreme Court found unanimously that the qualification of ‘so far as reasonably practicable’ must be judged according to the general knowledge and standards of the times and the burden is on the employee to show that the workplace was unsafe in that sense.

What is to be considered ‘reasonably practicable’?

Lord Mance disagreed with the Court of Appeal’s suggestion that ‘there must be at least a substantial disproportion’ before the desirability of taking precautions can be outweighed by other considerations, stating at para 84 that this approach:

‘...represents in my view, an unjustified gloss on statutory wording which requires the employer simply to show that he did all that was reasonably practicable’.

Lord Mance, also concluded that this qualification would allow current general knowledge and standards to be taken into account. He stated at para 82:

‘The criteria relevant to reasonable practicability must on any view very largely reflect the criteria relevant to satisfaction of the common law duty to take care. Both require consideration of the nature, gravity and imminence of the risk and its consequences, as well as of the nature and proportionality of the steps by which it might be addressed, and a balancing of the one against the other. Respectable general practice is no more than a factor, having more or less weight according to the circumstances, which may, on any view at common law, guide the court when performing this balancing exercise...It would be strange if the Court of Appeal was right in suggesting that, under the statutory formulation, this one factor is irrelevant, when the whole aim of the balancing exercise must, in reality, be to identify what is or is not acceptable at a particular time’.

Here then it seems that the Supreme Court have found that the term ‘reasonably practicable’ does import a concept of foreseeability and that this is no more onerous than the duty to take care at common law with the only difference being that the burden of proof on reasonable practicability is upon the employer.

THE DIFFERENCE BETWEEN STATUTORY DUTIES AND COMMON LAW

We have seen in this series of features the sometimes differing duties imposed by statutory provisions when compared to the common law but also seen that the two may simply mirror each other and are coterminous.

However an important point of distinction to highlight is that where any statutory provisions require the occupier (or employer) to take ‘all practicable measures’ or measures which are ‘reasonably practicable’, the burden of showing that these were not practicable / reasonably practicable rests upon the occupier / employer. The point must be pleaded and evidence advanced. This was first held in Nimmo v Alexander Cowan & Sons Ltd [1968] A.C. 107, and reaffirmed by Lord Dyson in Baker v Quantum [2011] UKSC 17, at para 125 where he stated:

‘There are, in any event, two important respects in which section 29(1) clearly does not reflect the common law. First, if a defendant wishes to say that it was not reasonably practicable to make or keep a place of work safe, the burden is on him to do so; it is not on the claimant to prove that it was reasonably practicable. I accept that few cases of this kind are likely to be decided on an application of the burden of proof. Nevertheless, in this respect there is a legal difference between the statutory and common law positions. Secondly, the fact that breaches are offences is a very significant difference. The fact that, as we were told, there have been few (if any) prosecutions is immaterial. Parliament considered that a breach of section 29(1) was sufficiently serious to attract potential liability to criminal sanctions’.
More recently, Lady Hale stated in *McDonald v National Grid Electricity Transmission Plc [2014] UKSC 53* at para 109 where she stated:

‘The question then is whether practicable measures could have been taken to protect persons employed from inhaling the dust. But that issue has not been raised by the appellant defendant, who has throughout argued that the section does not apply, rather than that there was nothing the appellant defendant could reasonably have done about it. The burden was upon the appellant defendant to make such a case and the appellant defendant has not’.

**CONCLUSION**

We established in edition 180 of BC Disease News that the first limb of s.63(1), the requirement to protect against dust ‘likely to be injurious’, does import notions of foreseeability and is no stricter than the test of foreseeability at common law.

Conversely, the second limb to protect against dust be of ‘substantial quantity’, involves no consideration of what the defendant ought to have known but instead is a purely quantitative assessment (what this assessment involves was discussed in last week’s feature).

However, once any duty is triggered the defendant must take all ‘practicable measures’ to protect the persons employed against inhalation of the dust or fume which we then imports the concept of foreseeability. So whilst the second limb of s.63(1) may be absolute in its terms, it is not absolute in its effect.

Both the terms ‘practicable measures’ and ‘reasonably practicable’, found elsewhere in the FA and other statutory provisions, import notions of foreseeability.

However, a more onerous duty is established by practicable measures. Firstly, it seems such measures must be adopted wherever there is a foreseeable risk-this is not necessarily the case where the requirement is to take reasonable practicable measures. Secondly issues which are relevant to reasonable foreseeability—such as time & cost—as discussed below are irrelevant.

Where the employer is required to take ‘reasonably practicable’, such a duty does not inevitably arise for all foreseeable risks. There may well be a risk which is foreseeable but none the less standards and guidance of the day suggest such risk is ‘acceptable’. There is no requirement to implement reasonably practicable measures to safeguard against such risks. The test is more lenient than ‘practicable’. The risks—in terms of the likelihood of risk occurring and the severity of injury should it materialise—will be balanced against factors such as the cost, time and trouble involved in adopting measures to safeguard against the risk will be taken into consideration. If the proposed measures are grossly disproportionate to the risks then there is unlikely to be a duty to adopt any reasonably practicable measures.

Whether a statutory provision uses the term ‘practicable measures’ or ‘reasonably practicable measures’, the onus is on the defendant to plead/advance evidence that (i) the risks were not foreseeable, or that (ii) no practicable or reasonably practicable measures could be adopted in respect of any known risks.
Mesothelioma Series: Part 11: Practical Handling of Mesothelioma Claims

INTRODUCTION

A common feature of many present day mesothelioma claims is the low level nature of the alleged exposure to asbestos. Increasingly this raises 3 issues. Firstly, the level of exposure may have been so low that it is difficult for the claimant to prove there was exposure to asbestos at all. Secondly, if there is proven exposure then the level may be such as was regarded as ‘safe’ at the material time. Thirdly, any exposure may be so light and trivial so as to be considered de minimis and not materially contributing to the risk of injury.

Liability is becoming an increasingly live issue in mesothelioma claims and so far in this series of mesothelioma features we have considered how the courts deal with these liability issues and what practical handling guidelines can be gained. In edition 170 of BC Disease News we considered the essential requirement of the claimant proving exposure on the balance of probabilities. In editions 171, 174 and 175, we looked at the common law regime for proving exposure and illustrated why exposure to any level of asbestos does not automatically amount to a breach of duty of care. Finally, in editions 178, 180 and 182 we compared the approach at common law with the statutory regime for asbestos and concluded that the latter simply mirrors those obligations at common law imposing no more onerous duties on an employer.

This week, we work through a practical case example, utilising the insights gained from our previous features, in order to outline the steps needed to determine the key liability issues.

CASE EXAMPLE

- Claimant was employed and exposed to asbestos with 2 employers between 1961-1975: Employer 1 for 10 years between 1961-1970 and Employer 2 for 5 years between 1971-1975;
- Both employers operated in the construction industry building residential houses. Roof soffits and facias of the houses were constructed using asbestos cement sheets;
- Exposure with employer 1 arose from the claimant directly cutting the asbestos cement sheets with a circular saw for 1 hour per day on a daily basis over 10 years;
- Exposure with Employer 2 arose from the claimant standing in the vicinity of other employees hand sawing asbestos cement sheets for 1 hour per day for 6 months of each year over 5 years;
- The claimant developed mesothelioma alleged to arise from asbestos exposure in breach of the employers’ common law and statutory duty;
- Employer 1 is no longer in existence, its historic EL insurers cannot be identified and it is not sued. The claim proceeds against Employer 2 only.

<table>
<thead>
<tr>
<th>EMPLOYER</th>
<th>PERIOD OF EXPOSURE</th>
<th>TYPE OF EXPOSURE</th>
<th>DURATION</th>
<th>FREQUENCY</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>1961-1970</td>
<td>C cutting asbestos cement sheets with a circular saw</td>
<td>1 hour per day</td>
<td>Daily</td>
</tr>
<tr>
<td>2</td>
<td>1971-1975</td>
<td>C standing in the vicinity (20-30 ft.) of other employees hand sawing asbestos cement sheets</td>
<td>1 hour per day</td>
<td>Every other day (or 6 months per year)</td>
</tr>
</tbody>
</table>

Table: Summary of alleged exposure
How to Determine Liability?

There are 10 key questions that need to be answered to determine the issue of liability in our case example:

1. To what type of asbestos fibres was the claimant exposed?
2. What industry 'control limits' of exposure applied?
3. What was the claimant’s dose of exposure to asbestos?
4. How did the claimant's exposure compare to the industry control limits?
5. Was the claimant's exposure considered to be 'safe' in the context of these control limits or was the exposure excessive so as to be considered in breach of common law?
6. Did any statutory duty apply in respect of the claimant’s employment / exposure?
7. Did any applicable statutory duty simply 'mirror' any co-existing common law duty of care or did it impose a higher standard and duty of care?
8. Did any exposure in breach of duty materially contribute to the risk of injury or was it so trivial as to be considered de minimis?
9. Can the diagnosis of mesothelioma be accepted?
10. Did any exposure in breach of duty materially contribute to the risk of injury or was it so trivial as to be considered de minimis?

We now consider each of these questions in turn.

1. To what type of asbestos fibres was the claimant exposed?

All 3 main types of asbestos fibres (crocidolite: blue, amosite: brown and chrysotile: white) were used in asbestos containing materials (ACMs) in the 20th century.

With the same ACM the asbestos fibre composition often changed over time. So for example up to 1969 all 3 types of asbestos were used in the manufacture of asbestos cement - although chrysotile was the main fibre type used. From 1970 crocidolite was no longer used in its manufacture - it was predominantly chrysotile and to a far lesser extent amosite.

In our example the claimant was exposed with Employer 2 to asbestos cement during 1971-1975.

There are a number of key industry publications and guidance notes available to determine the type of asbestos fibre(s) to which the claimant may have been exposed dependent on (i) the ACM, and (ii) the period of exposure.

Using sources such as Asbestos Safety & Control booklet, Asbestos Information Committee, June 1970, Asbestos Materials in Buildings, Department of the Environment, 1986 and EH36 Work with Asbestos Cement, HSE (1984) we can determine that asbestos cement sheets in the 1970s typically contained 10-15% white (chrysotile) asbestos [although brown asbestos (amosite) was also used to a far lesser extent].

2. What industry 'control limits' of exposure applied?

The recommended exposure limits for employees under various guidance documents and legislation have been based on continuous 8 hour or 4 hour or 10 minute exposure periods. These limits have existed since 1960 and have been variously called 'Threshold Limit Values', 'Hygiene Standards', 'Control Limits' and 'Exposure Limits'. As knowledge of the risks associated with asbestos have developed over time so have the exposure limits fallen.

The guidance limits between 1960 and 1990 are shown in the table below. Note that prior to 1970 the different asbestos fibre types were not distinguished and the same 8 hour time weighted average applied to all asbestos types. As knowledge developed regarding the greater risks of harm associated with the blue and brown forms of asbestos - particularly with the emergence of knowledge of risks of mesothelioma from even modest exposures – so these had lower exposure limits imposed compared to white asbestos.
Table: Summary of Occupational Hygiene Standards and Limits

<table>
<thead>
<tr>
<th>DATE &amp; DOCUMENT</th>
<th>TYPE OF STANDARD</th>
<th>LIMIT VALUES</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>CRYSTOBLE</td>
</tr>
<tr>
<td>March 1960</td>
<td>Toxic Substances in Factory Atmospheres</td>
<td>177 ppcoc as 8 hour TWA</td>
</tr>
<tr>
<td>1966 Dust and Fumes in Factory Atmospheres</td>
<td>Threshold Limit Value (TLV)*</td>
<td>5 mppcf (=177 ppcoc) as 8 hour TWA</td>
</tr>
<tr>
<td>1968 Dust and Fumes in Factory Atmospheres</td>
<td></td>
<td>5 mppcf (=177 ppcoc) as 8 hour TWA</td>
</tr>
<tr>
<td>March 1970 and January 1971 Technical Data Note 13 (TDN 13)</td>
<td>‘Standard for use with Asbestos Regulations’</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 Asbestos Dust Concentrations for use with Asbestos Regulations 1965’</td>
<td>2 fibres/ml (4 hour TWA) or 12 fibres/ml (10 minute TWA)</td>
</tr>
<tr>
<td>December 1976 EH10</td>
<td>‘Hygiene standard’</td>
<td>As TDN (above) but subject to “exposure to be reduced to the minimum reasonably practicable” requirement. The requirement applies to all subsequent standard setting documents below.</td>
</tr>
<tr>
<td>April 1983 EH10</td>
<td>Control Limit</td>
<td>1 fibre/ml (4 hour TWA)</td>
</tr>
<tr>
<td>July 1984 EH10</td>
<td></td>
<td>0.5 fibre/ml (4 hour TWA)</td>
</tr>
<tr>
<td>February 1988 EH10</td>
<td></td>
<td>0.5 fibre/ml (4 hour TWA) or 1.5 fibre/ml (10 min TWA)</td>
</tr>
<tr>
<td>June 1990 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.

In our example the claimant was exposed with Employer 2 to asbestos cement during 1971-1975. The figure below depicts the gradually reducing hygiene standards contained in the relevant industry guidance between 1970 and 1984.

**Figure: Hygiene standards for asbestos between 1970 and 1984**
3. What was the claimant’s dose of exposure to asbestos?

There are a number of considerations in determining the claimant’s daily dose of exposure to asbestos.

i. What task(s) caused the exposure and how were these tasks being performed?
ii. What is the likely asbestos dust concentration arising from the task(s) generating the exposure?
iii. Who gave rise to the exposure—the claimant or others?
iv. What was the claimant’s proximity to the exposure?
v. What was the overall duration of exposure over the course of the working day?

Using sources such as Probable asbestos dust concentrations at construction processes, Technical Data Note 42, Department of Employment 1973 & 1976 and Probable asbestos dust concentrations at construction processes, Guidance Note EH35, HSE, 1985 and 1989 the probable dust concentration from hand sawing asbestos cement sheets was between 2–4 fibres/ml. In our worked example we select and apply the top of this range - so 4 fibres/ml.

The claimant was standing c.20ft away from the cutting of the sheets. The above guidance states that the dust concentration can be reduced to a 1/10th to reflect exposure of others standing at this distance from the sawing. Therefore the assumed dust concentration for the claimant was 0.4 fibres/ml.

The exposure was for 1 hour per day every other day.

The daily exposure dose to asbestos is calculated using the formula:

\[
\text{Dust concentration x exposure time minutes / 480 minutes working day for 8 hour threshold limit value-or 240 minutes for 4 hour TLV or 10 minutes for 10 minute TLV}
\]

At the material time of exposure a worker’s exposure dose was typically assessed as a 4 hour time weighted average (4hr TWA).

The claimant’s average exposure over 4 hours was therefore:

\[
0.4 \text{ fibres/ml x 1/4} = 0.1 \text{ fibres/ml}
\]

4. How did the claimant’s exposure compare to these control limits?

For the claimant’s period of alleged exposure to chrysotile fibres between 1971-1975 industry guidance as to ‘safe’ exposure was found within publication Technical Data Note 13 issued by the Department of Employment to accompany the Asbestos Regulations 1969. The control limit for chrysotile was 2 fibres/ml averaged over 4 hours (time weighted average or TWA).

5. Was the claimant’s exposure considered to be ‘safe’ in the context of these control limits or was the exposure excessive so as to be considered in breach of common law?

The claimant’s estimated exposure dose averaged over 4 hours was 0.1 fibres/ml - a 20th of the 2 fibres / ml control limit. Below is a comparison of the claimant’s 0.1 fibres/ml exposure (blue line) with the 2 fibres/ml control limit for chrysotile (red line).
We considered in more detail, in edition 175 of BC Disease News, whether exposure limits contained within industry guidance post 1970, can be considered ‘safe’ limits so that any exposure below those limits cannot result in a breach of duty on the part of the employer. The timeline below provides an overview of the approach taken in the cases to date.

As the relevant control limit for our example is contained within TDN13, we can see from the timeline that the claimant’s exposure would very likely be considered ‘safe’ such that any unprotected exposure would not give rise to any common law duty of care upon the insured.

6. Did any statutory duty apply in respect of the claimant’s employment / exposure?

Based upon (i) the period of alleged exposure, (ii) the industry in which alleged exposure arose, and (iii) how exposure arose, we can determine which statutory regulations are likely to apply and whether these ‘mirror’ co-existing common law standards and duties of care (i.e. are no more onerous), or whether stricter standards and duties exist under legislation.

In our example the following legislation and statutory duties are likely to apply:

<table>
<thead>
<tr>
<th>LEGISLATION</th>
<th>APPLICABLE BETWEEN</th>
<th>APPLICABLE TO</th>
<th>DUTIES</th>
<th>ONEROUS V COMMON LAW OR SAME?</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Construction (General Provisions) Regulations 1961</td>
<td>1.3.1962 – 1.10.1989</td>
<td>Construction &amp; Building Operations</td>
<td>Regulation 2(2) Where in connection with any grinding, cleaning, spraying or manipulation of any material, there is given off any dust or fume of such a character and to such extent as to be likely to be injurious to the health of persons employed all reasonably practicable measures shall be taken either by securing adequate ventilation or by the provision and use of suitable respirators or otherwise to prevent inhalation of such dust or fume.</td>
<td>Same as common law duty. The words ‘...likely to be injurious’ import notion of foreseeability.</td>
</tr>
<tr>
<td>The Construction (Working Places) Regulations 1966</td>
<td>1.6.1966 – 2.9.1996</td>
<td>Construction &amp; Building Operations</td>
<td>Regulation 6(2) Without prejudice to the other provisions of these regulations, every place of work at which any person at any time works shall, so far as is reasonable practicable, be made and kept safe for any person working there.</td>
<td>Same as common law duty. The words ‘...safe...as far as is reasonably practicable’ import notion of foreseeability.</td>
</tr>
<tr>
<td>The Asbestos Regulations 1969</td>
<td>14.5.1970 – 01.3.1988</td>
<td>All Workplaces - Regulation 3(2) Every process involving asbestos or any article composed wholly or partly of asbestos.</td>
<td>Regulation 2(3) ‘References in these Regulations to asbestos dust shall be taken to be references to dust consisting of or containing asbestos to such an extent as is liable to cause danger to the health of employed persons.’</td>
<td>Same as common law duty. The words ‘...liable to cause danger’ import notion of foreseeability.</td>
</tr>
</tbody>
</table>
7. Did any applicable statutory duty ‘mirror’ any co-existing common law duty of care or did it impose a higher standard and duty of care?

We discussed this in greater detail in editions 178 and 179 of BC Disease News in which we concluded that the applicable statutory duties simply mirrored any co-existing common law duty of care. Notions of foreseeability are relevant to both consideration of common law and statutory breach.

If the claim fails at common law it also fails under any statutory duty.

8. Was the employer 2 in breach of any statutory duty?

No - see above at 6 and 7.

9. Did any exposure in breach of duty materially contribute to the risk of injury or was it so trivial as to be considered de minimis?

Under the special rule of law for mesothelioma, an individual will have demonstrated a causal link where the defendant has, in breach of duty, been responsible for exposing the individual to a significant quantity of asbestos dust and thus materially increased the risk of the individual contracting mesothelioma. Moreover, if there are multiple exposures by multiple defendants they will each be held jointly and severally liable for causing the disease.

The individual must be exposed to more than a trivial amount of asbestos and it must increase the risk of contracting mesothelioma by more than a trivial amount. This requires the individual to actually prove, on the balance of probabilities, that they were exposed to a material amount of asbestos from a certain source which materially increased their risk of contracting the disease. It is also not enough to simply point to the only possible source of exposure and say it must have caused the mesothelioma.

In some cases, exposure with an individual employer/occupier may be of a type and so small in the context overall occupational / lifetime exposure as to be considered insignificant and not materially contributing to risk of injury. In such cases the exposure may fall within de minimis principles.

To help determine this issue the courts must look at the type of asbestos exposure and also relative doses of exposure. In terms of the type of asbestos exposure, exposures to chrysotile will be less dangerous than exposure to crocidolite which is thought to have a 200 times greater causative potency in the development of mesothelioma.
An individual’s cumulative exposure to asbestos with employers and over a lifetime can be expressed in terms of fibre/ml years—the formula and its application in our example is shown in the box below:

### Calculating the Cumulative Exposure—Fibre/ml Years

An individual’s cumulative exposure to asbestos with employers and over a lifetime can be easily calculated using the formula:

\[
\text{Exposure concentration} \times \left(\text{Hours of Exposure per day} / 8 \text{ hour working day}\right) \times \left(\text{Number of days’ exposure} / 240 \text{ working days per year}\right) \times \text{Number of Years’ Exposure}
\]

**Example**

**Recap of Facts of Exposure**
- Claimant is employed and exposed to asbestos with 2 employers. Employer 2 is only party sued.
- Exposure with employer 1 arises from cutting asbestos cement sheets with a circular saw for 1 hour per day on a daily basis over 10 years.
- Exposure with Employer 2 arises from standing in the vicinity of other employees hand sawing asbestos cement sheets for 1 hour per day for 6 months of each year over 5 years.

**Levels of Exposure**
- According to HSE Guidance TD542 EH35 exposure concentrations for cutting asbestos cement sheets using a circular saw is 20 fibres/ml.
- According to HSE Guidance TD542 EH35 exposure concentrations for hand sawing asbestos cement sheets is 4 fibres/ml.
- According to the above guidance this level can be reduced to 1/10th to reflect exposure of others standing 20-30 feet away so 0.4 fibres/ml.

**Cumulative Exposure with Employer 1**
- \(20 \text{ fibres/ml} \times (1/8) \times (240/240) \times 10 \text{ years} = 25 \text{ fibres/ml years}\)

**Cumulative Exposure with Employer 2**
- \(0.4 \text{ fibres/ml} \times (1/8) \times (120/240) \times 5 \text{ years} = 0.13 \text{ fibres/ml years}\)

**Cumulative Exposure with Both Employers**
- Employer 1 = 25 fibres/ml years
- Employer 2 = 0.13 fibres/ml years
- Cumulative exposure = 25 + 0.13 fibres/ml years = 25.13 fibres/ml years

**Contribution of Each Employer to Cumulative Exposure Dose**
- Employer 1 = 25/25.13 = 99.50%
- Employer 2 = 0.13/25.13 = 0.50%

In our example as well as arguing that there was no breach of either common law or statutory duty of care we would further contend that any exposure was of a fibre type and of a dose so negligible as to be de minimis / non-causative.

10. Can the diagnosis of mesothelioma be accepted?

In the vast majority of cases the diagnosis of mesothelioma can be accepted. Sometimes however a firm diagnosis of mesothelioma within lifetime can be difficult to make.

A Claimant may have undergone biopsy either by needle or endoscope to obtain tissue samples to test for diagnosis. A common symptom of mesothelioma is the Claimant presenting with fluid effusion and samples of the drained liquid can also be tested.

Often medical records and hospital records will provide an immunohistochemistry profile following the testing of tissue or fluid samples. Immunohistochemistry is a branch of chemistry that involves the study of the molecular mechanisms underlying the function of the immune system. The immunohistochemistry profiling is used to distinguish between different types of cancer based on which proteins are present and in what quantity. There are a number of common proteins present within mesothelioma which may provide for an alternative diagnosis and in some cases, further assessment by a medical expert would be recommended.

**Conclusion**

To help determine these liability issues BC Legal has launched its unique asbestos claims handling tool - **ABC Asbestos**.

**ABC Asbestos** allows you to quickly and easily determine:
the type(s) of asbestos fibres giving rise to alleged exposure;
'daily exposure dose' to asbestos;
the industry guidance 'control limits' relevant to the time of exposure which may dictate 'safe' levels of exposure;
what common law and / or statutory duties apply to the employer / occupier;
whether there is a potential breach defence;
whether there is a de minimis defence;
whether a diagnosis of mesothelioma is valid;
whether the 'medical causation threshold' of exposure has been reached in a lung cancer and asbestosis claims.

Where potential defences are identified ABC Asbestos will generate detailed and bespoke letters of repudiation fully referenced with supporting industry guidance and literature and case law.

The tool also includes:
- an easy to use library of over 400 key documents including case law, legislation, medical literature, industry publications and guidance and occupational hygiene reports.
- our other asbestos claims handling apps such as the Mesothelioma PLSA damages calculator, and our Apportionment Calculator.

You can register or log into ABC Asbestos here. If you are interested in training on this unique asbestos system please contact Boris Cetnik.
Breach of Duty in Pleural Thickening Claim: McGowan (deceased) v AMEC Buildings Limited

INTRODUCTION

This month, BC Legal has been successful in defending a claim for pleural thickening in the High Court case of McGowan (deceased) v AMEC Buildings Limited, based on a failure of the claimant to prove, on the balance of probabilities, that the deceased had been exposed to negligent levels of asbestos during his employment with the defendant.

The purpose of this feature is to explain the decision and how it may be used in practice, alongside a review of how our tool, ABC Asbestos, can be utilised in claims such as this.

FACTS

The claim was brought by the widow of the deceased, Mr McGowan, who died in January 2013 of an unrelated cardiac arrest. The claimant alleged that the deceased, a bricklayer, working in the erection of structures comprising reinforced concrete blocks, developed pleural thickening as a result of occupational exposure to asbestos between 1949 and 1973 whilst employed by the defendant.

The claim was pursued in both negligence of common law and breach of the statutory duties set out in the provisions of the Building (Health, Safety and Welfare) Regulations 1948, the Construction (General Provisions) Regulations 1961 and the Construction (Working Places) Regulations 1966.

The claim was originally one for asbestosis, however, on the basis of both the parties’ medical evidence, it was agreed the deceased had suffered from idiopathic pulmonary fibrosis of unknown cause, rather than asbestosis and by trial the claim was for bilateral diffuse pleural thickening and folded lung which the medical experts likely attributed to asbestos exposure whether occupational, domestic or environmental. However, the experts agreed that there was a lack of evidence to establish where or when the deceased was exposed to asbestos, to what levels, and whether these fell within the limits that were perceived at the relevant time of exposure to be safe.

Both parties instructed histopathologists, who carried out tests on samples of the deceased’s lung taken after death. It was agreed that this showed no evidence of asbestosis with only one asbestos body discovered on seven sections of lung. Further, electron microscopic mineral fibre analysis detected no asbestos in what was described as a ‘well-sampled’ lung.

The claimant submitted that this absence could be due to fibres degrading or being cleared from the lungs over time. However, the defendant, submitted that even taking into account the passage of time, one would have expected more fibres to have been present in the lungs if the deceased had occupational levels of asbestos exposure. On this issue, Mrs Justice Andrews found that absence of fibres detected in the lung tissue after death, which occurred 40 years after the deceased ceased working for the defendant, did not undermine the thesis that the cause of the bilateral diffuse pleural thickening could have been exposure to significant levels of asbestos, either at work or somewhere else.

Instead she phrased the key issue for the court as follows:

‘…to determine …whether Mr McGowan was exposed to concentrations of asbestos dust that would have been foreseeable as causative of harm by the standards of the day, during the course of his employment with the defendant’.

In relation to this point she went on to say that:

‘If the levels of asbestos to which an employee was exposed were not contemporaneously recognised as hazardous, then the employer cannot be found in breach of duty because personal injury in such circumstances would not be foreseeable’.
Andrews J confirmed that the approach to foreseeability is that established in the leading judgment in Williams v The University of Birmingham [2011] EWCA Civ 1242, i.e. level of exposure would be deemed as recognisably hazardous if they exceeded the limits specified in the available guidance at the time.

[Importantly, Andrews J pointed out that the concept of foreseeability is imported into the statutory obligations the claimant relied upon and as such there is no material distinction to be drawn between the different causes of action in terms of what the claimant must prove in order to establish liability – as per Abraham v Ireson & Son (Properties) Limited [2009] EWHC 1958 (QB).]

The focus of this case was on the period between 1966-1973 and as such the argument was concentrated on whether the deceased was exposed to levels of asbestos dust that were higher than those that were perceived to be safe during this period-which from 1970 were the hygiene levels imported via the Asbestos Regulations 1969 and the 1970 Department of Employment and Productivity Technical Data Note 13.

The experts were unable to put forward any medical or other literature that suggests what the level of exposure would have to be to cause pleural plaques and whether this would exceed those considered to be safe. Although the ‘Helsinki criteria’ for diagnosis and attribution of asbestos-related diseases was relied upon by the claimant, which states:

‘For diffuse pleural thickening, high exposure levels may be required. Bilateral diffuse plate pleural thickening is often associated with moderate or heavy exposure as seen in cases of asbestosis and should be considered accordingly in terms of attribution – i.e. this type of pleural thickening is considered to be close to asbestosis in terms of exposure’.

The claimant argued therefore that based on the deceased’s medical condition he must have been exposed to levels exceeding the recognised hygiene levels from 1966 onwards. The defendant countered this by reiterating that the sample of the lungs had shown no asbestos fibres of asbestos.

Interestingly, the HSE mesothelioma occupation statistics for male and female deaths aged 16-74 in Great Britain in the period from 2002-2010 were relied upon by the defendant in order to show that male bricklayers and masons have a lower proportional mortality ratio for mesothelioma than the average mortality rate for mesothelioma across all male occupations. Andrews J said that this use of mesothelioma as the calibrator was appropriate, because levels of exposure and the incidence of mesothelioma are closely correlated so that:

‘…if Mr McGowan had been working only as a bricklayer, the statistical evidence suggests that the background levels of exposure to asbestos fibres in the construction environment would not have been sufficient to render his employers in breach of duty. Likewise, the statistical evidence in relation to steelworkers does not show a higher proportional mortality rate’.

Despite the fact that the deceased did not only work as a bricklayer and when looking at similar statistics for the construction industry this showed that deaths from mesothelioma were higher than average, Andrews J still held that it would be dangerous to seek to draw any adverse conclusions from the fact that somebody was working on a building site at the relevant time.

Eventually, the lack of a witness statement from the deceased proved fatal to this claim as it was concluded that:

‘At the end of the day, unfortunately for the claimant, the claim fails at the very first hurdle because it is impossible on the evidence for the court to determine what level of exposure, if any, to asbestos fibres Mr McGowan was exposed to during the period with which this case is concerned. It seems plain to me, on the balance of probabilities, that the diffuse pleural thickening was due to some form of exposure to asbestos, but there is no evidence as to when that happened, what level of exposure there was or over what period he was exposed to it. One cannot draw an adverse inference against the defendant simply because Mr McGowan spent a very lengthy period working for the defendant. There is no evidence that he was exposed to asbestos in childhood but, equally, there is no evidence that he was not. Similarly, there is no evidence that he was not exposed to asbestos when he was working as a clerk of works after he ceased working for the defendant’.

**DISCUSSION**

The Judgment does not yet have a neutral citation number, but will soon be reported on Lawtel and Westlaw and will likely be subject to the same scrutiny that any Judgment in asbestos litigation is subject to.
While only a first instance decision and not binding on any lower Court, these decisions do provide road maps and a judicial rationale for subsequent decisions. You only need to look at Paragraph 2 of Mrs Justice Andrews Judgment in McGowan, as mentioned above, to see that she followed the exact same rationale of Mrs Justice Swift in Abraham v Ireson & Sons (Properties) Limited [2009] EWHC 1958 (QB), another first instance decision, in relation to the concept of foreseeability being imported into the various Construction Regulations.

The case adds to the asbestos jurisprudence in some areas, fails to deal with controversial areas of law in others, but does provide helpful passages that we believe will be quoted at ‘show cause’ hearings and Trials going forward. The Judgment also deals with the first foray into the evidential weight to be placed on mortality data for the trade of a Claimant and whether any inference as to the level of exposure can be drawn.

AREAS OF INTEREST

The following areas are identified as areas where the case will have an impact and they will be addressed in turn in this feature:

1. Further confirmation from the High Court that the Building & Construction Regulations do not add to common law duties.
2. Another case in which a Claimant failed to prove exposure to asbestos/breach of duty.
3. Useful passages on the evidence required to prove breach of duty that correspond to the analysis provided by BC Legal Breach of Duty Tool.
4. The conflict between Cherry Tree and Williams v University of Birmingham [2011] EWCA Civ 1242 and post 1965 exposure to asbestos.
5. The use of mortality data for various trades to bolster or undermine allegations of significant exposure to asbestos.
6. The dosage threshold for pleural thickening.

BUILDING (HEALTH, SAFETY AND WELFARE) REGULATIONS 1948, CONSTRUCTION (GENERAL PROVISIONS) REGULATIONS 1961 AND CONSTRUCTION (WORKING PLACES) REGULATIONS 1966 ADD NOTHING TO THE COMMON LAW

The interpretation of the above Regulations is of crucial importance as many asbestos claims involve the Construction Sector in the 1960’s—mid 1990’s.

The position taken in McGowan was that the words ‘likely to be injurious’ within the Building and Construction Regulations import an element of foreseeability and that an employer must have known the exposure to C was capable of being ‘injurious’. This wording is also found in s.63(1) of the Factories Act 1961 which imposes a duty on a factory occupier to protect against exposure to dust. Crucially, however under the second limb of section 63(1) there is also a duty to protect against exposure to ‘substantial dust of any kind’, which arguably involves no element of foreseeability. However, this second limb does not appear in the Construction Regulations and thus we are left being able to argue that the statutory provisions simply mirror the co-existing common law duty of care and what is foreseeable is to be judged by the relevant standards of the day.


2. The claim is brought both in negligence of common law and for breach of the statutory duties set out in provisions of the Building (Health, Safety and Welfare) Regulations 1948, the Construction (General Provisions) Regulations 1961 and the Construction (Working Places) Regulations 1966. It is common ground that the concept of foreseeability is imported into the statutory obligations - see Abraham v Ireson & Sons (Properties) Limited [2009] EWHC 1958 (QB). Therefore, there is no material distinction to be drawn between the different causes of action in terms of what the claimant must prove in order to establish liability.

There is now another hurdle in the way of a Claimant aiming to argue a stricter interpretation of the Building and Construction Regulations and another High Court Judge is less likely to find an alternative interpretation, where it would mean departing from two previous decisions of the High Court. The case presents a further evidential hurdle for those trying to make that argument and is enough to avoid Judgment at a ‘show cause’ hearing, where such a point is taken.

ANOTHER CASE WHERE THE CLAIMANT HAS FAILED TO ESTABLISH EXPOSURE / BREACH OF DUTY
Claimants are currently having a bad run of cases where they are failing to discharge their evidential burden of proof:

- *Brett v University of Birmingham* [2007] EWCA Civ 88
- *Harrington v DECC* [2008] EWHC 2658 (QB)
- *Pugh v Joseph Parkes* [2008] EWHC 2964 (QB)
- *Reynolds v DECC* [2010] EWHC 1191 (QB)
- *Asmussen v Filtrona* [2011] EWHC 1734 (QB)
- *Williams v University of Birmingham* [2011] EWCA Civ 1242
- *McGregor v Genco* [2014] EWHC 137
- *Atkinson v DECC* [2014] EWHC 3773 (QB)
- *McCarthy v M & S* [2014] 3183 QB
- *Woodward v DECC* [2015] EWHC 3604 (QB)
- *Prescott v University of St Andrews* [2016] CSOH 3
- *Sloper v Lloyds Bank* [2016] EWHC 483 (QB)
- *Smith v Portswood House* [2016] EWHC 939 (QB)
- *McGowan (Deceased) v AMEC* (2017)

*McGowan* will be added to that list and when viewed as a whole it can be seen how important the quality of evidence as to exposure is to the success of a claim.

In many cases that evidence will be lost forever, upon the death of the Deceased.

**FINDINGS ON EXPOSURE - ‘THE FIRST HURDLE’**

Andrews J was unable to make findings of negligent exposure to asbestos or findings of exposure to asbestos at all.

Crucially she gave Judgment on what evidence was missing that meant she could not make key findings of fact:

28. **At the end of the day,** unfortunately for the claimant, the claim falls at the very first hurdle because it is impossible on the evidence for the court to determine what level of exposure, if any, to asbestos fibres Mr McGowan was exposed to during the period with which this case is concerned. It seems plain to me, on the balance of probabilities, that the diffuse pleural thickening was due to some form of exposure to asbestos, but there is no evidence as to when that happened, what level of exposure there was or over what period he was exposed to it. One cannot draw an adverse inference against the defendant simply because Mr McGowan spent a very lengthy period working for the defendant. There is no evidence that he was exposed to asbestos in childhood but, equally, there is no evidence that he was not. Similarly, there is no evidence that he was not exposed to asbestos when he was working as a clerk of works after he ceased working for the defendant.

22. **The experts who gave oral evidence,** Mr Brady and Mr Stelling, were in agreement that the likely background level of asbestos fibres in air was greater in construction environments during the relevant period than it was in the built environment after construction had been completed. They agreed that Mr McGowan may have been unknowingly exposed to an elevated background concentration of asbestos given off by other trades working at the same construction sites and that, prior to 1970, this would have included some exposure to crocidolite. However, as both of them very readily accepted, there is no evidence as to what Mr McGowan was actually doing at any given time, and no evidence that he worked anywhere at a time when he was exposed to asbestos, let alone any evidence as to the frequency and levels of his exposures to asbestos if he was so exposed. Nor is there any evidence as to how close or far he would have been from work being carried out by others which would have involved exposure to asbestos.
The key evidence missing was:

1. Evidence as to frequency of exposure.
2. Evidence as to level of exposure.
3. Distance from exposure if asbestos usage is by others.

We feel the ‘falls at the very first hurdle’ will be a much used quote where the evidence is poor or incomplete by ‘show cause’ hearing or trial.

CHERRY TREE v WILLIAMS

Exposure post 1970 is clearly governed by Williams and the guidance given to employer within TDN13.

61. 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.

The guidance within TDN13 allows an employer to weight an exposure over a 4 hour period, so long as the peak exposure does not exceed prescribed levels over a 10 minute weighted period. What was the position prior to 1970? The Ministry of Labour produced guidance to employers based on an 8 hour time weighted period, that did not deal with shorter term peak exposures. That guidance was contained within the various ‘Toxic Substances in Factory Atmospheres / Dust and Fumes in Factory Atmospheres’ 1960, 1966 and 1968. Those documents deal only with 8 hour time weighting and relatively high short term peak exposures would fall below such levels when averaged over an 8 hour period. One question is whether short term exposures, that may be high, but with an average below the guidance to industry when weighted, can give rise to negligence at common law?

Given her findings on the absence of evidence of exposure, Andrew J did not have to deal with this. However, she endorsed both approaches:

18. The leading case on the approach to foreseeability to be taken by the court in cases such as these is Williams v The University of Birmingham [2011] EWCA Civ 1242. At paragraph 44, Lord Justice Aikens set out five questions of fact that the court should determine, namely:

“(i) the actual level of exposure to asbestos fibres to which the employee was exposed;

(ii) what knowledge the employer ought to have had at the time about the risks posed by that degree of exposure to asbestos fibres;

(iii) whether, with that knowledge, it was (or should have been) reasonably foreseeable to the employer that, with that level of exposure, the employee was likely to be exposed to asbestos related injury;

(iv) the reasonable steps that the employer should have taken in the light of the employee’s exposure to that level of asbestos fibres; and

(v) whether the employer negligently failed to take the necessary reasonable steps.”
19. When assessing the foreseeability of risk, the court should take account of the risks involved in the potential maximum exposure – see Shell Tankers UK Limited v Jeronson [2001] EWCA Civ 101 per Lady Justice Hale at paragraph 37:

“However, where an employer cannot know the extent of any particular employee’s exposure over the period of his employment, knows or ought to know that exposure is variable, and knows or ought to know the potential maximum as well as the potential minimum, a reasonable and prudent employer, taking positive thought for the safety of his workers, would have to take thought for the risks involved in the potential maximum exposure. Only if he could be reassured that none of these employees would be sufficiently exposed to be at risk could he safely ignore it.”

Williams is stated as the ‘leading case’, but account given to the effect of peak exposures. To that end it might be read that Williams and Cherry Tree are not that inconsistent, as high short term peaks would be caught by the short term levels within TDN 13. This was the thinking of Bean J in Hill v John Barnsley [2013] EWHC 520 (QB):

36. 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 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 TDN 13 levels of exposure would be exceeded, then injury from asbestos fibres was not reasonably foreseeable. She agreed. Mr Phillips also agreed that this is the effect of paragraph 61 (although he submitted that it is not part of the ratio of the case, and cannot be reconciled with previous authorities). 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.

In Hill exposure was up to 99 fibre/ml, so very high in 1968/69 and its negligence was obvious. The key question remains unanswered where the peak exposures are much lower than this.

USE OF MORTALITY DATA IN ASBESTOS CASES

McGowan is the first time HSE mortality data has been used to prove factual exposure, or the absence of it.

The Claimant’s case was based on inference that an employee working in the Construction Sector would likely have been exposed to significant quantities of exposure, by the very nature of the job.

Mr McGowan was actually a steel erector and his job was compared to that of a brick layer, which based on HSE data, carried a statistically low risk of mesothelioma. As such the HSE data assisted the defendant’s argument:
For Mr McGowan the data rebutted the presumption, as the risk to his profession was low at 85.6-106 mortality ratio.

Claimants may use this data in weak cases to bolster the poor evidence left. However, general data on risk cannot prove specific exposure and the burden will always be on the Claimant to prove what he did, how he did it and the nature and extent of his exposure. All the data can show is that others working with the same job title were exposed and have a higher risk of mortality. It cannot prove where the Claimant would fall within that data set. A Claimant cannot use generic epidemiology to prove specific exposures or causation. This falls foul of the general principle that the general does not prove the specific. In *Sienkiewicz v Greif (UK) Ltd [2011] UKSC 10*, Lord Rodger discussed this problem as follows:

"The example in question can be traced, via the speech of Lord Mackay of Clashfern in Hotson, at p 789, to the dissenting judgment of Brachtenbach J in Herskovits v Group Health Cooperative of Puget Sound (1983) 664 P 2d 474 a decision of the Supreme Court of Washington:

"Brachtenbach J dissented. He warned against the danger of using statistics as a basis on which to prove proximate cause and indicated that it was necessary at the minimum to produce..."
evidence connecting the statistics to the facts of the case. He gave an interesting illustration of a town in which there were only two cab companies, one with three blue cabs and the other with one yellow cab. If a person was knocked down by a cab whose colour had not been observed it would be wrong to suggest that there was a 75% chance that the victim was run down by a blue cab and that accordingly it was more probable than not that the cab that ran him down was blue and therefore that the company running the blue cabs would be responsible for negligence in the running down. He pointed out that before any inference that it was a blue cab would be appropriate further facts would be required as, for example, that a blue cab had been seen in the immediate vicinity at the time of the accident or that a blue cab had been found with a large dent in the very part of the cab which had struck the victim."

However, the data may be useful for raising the spectre of exposure elsewhere not considered by a Claimant. Judges like to be able to identify a possible cause other than the Defendant, if they are going to find against a Claimant. It always assists a Defendant to be able to point to another potential cause. In this case McGowan worked as a Clerk of Works with other Defendants and at 143, this carried a higher mortality risk due to mesothelioma than either of his trades with AMEC:

Table 1: Highest risk* occupations for males (SOC2000 3 digit codes)

<table>
<thead>
<tr>
<th>SOC2000 Code &amp; Occupation description</th>
<th>Deaths</th>
<th>Expected Deaths</th>
<th>PMR</th>
<th>Lower</th>
<th>Upper</th>
</tr>
</thead>
<tbody>
<tr>
<td>531 - Construction Trades</td>
<td>1811</td>
<td>692.0</td>
<td>261.7</td>
<td>249.8</td>
<td>274.0</td>
</tr>
<tr>
<td>524 - Electrical Trades</td>
<td>789</td>
<td>341.8</td>
<td>230.8</td>
<td>215.0</td>
<td>247.5</td>
</tr>
<tr>
<td>521 - Metal Forming, Welding And Related Trades</td>
<td>355</td>
<td>175.2</td>
<td>202.6</td>
<td>182.1</td>
<td>224.9</td>
</tr>
<tr>
<td>522 - Building Trades</td>
<td>405</td>
<td>243.6</td>
<td>166.6</td>
<td>150.8</td>
<td>183.7</td>
</tr>
<tr>
<td>814 - Construction Operatives</td>
<td>173</td>
<td>114.4</td>
<td>151.2</td>
<td>129.5</td>
<td>176.5</td>
</tr>
<tr>
<td>522 - Metal Machining, Fitting And Instrument Making Trades</td>
<td>476</td>
<td>339.9</td>
<td>140.1</td>
<td>127.8</td>
<td>153.2</td>
</tr>
<tr>
<td>311 - Science And Engineering Technicians</td>
<td>87</td>
<td>60.2</td>
<td>144.4</td>
<td>115.7</td>
<td>176.2</td>
</tr>
<tr>
<td>243 - Architects, Town Planners, Surveyors</td>
<td>85</td>
<td>60.7</td>
<td>139.9</td>
<td>111.8</td>
<td>173.0</td>
</tr>
<tr>
<td>312 - Draughtspersons And Building Inspectors</td>
<td>58</td>
<td>40.6</td>
<td>143.0</td>
<td>109.6</td>
<td>184.9</td>
</tr>
<tr>
<td>212 - Engineering Professionals</td>
<td>184</td>
<td>150.0</td>
<td>122.6</td>
<td>105.5</td>
<td>141.7</td>
</tr>
<tr>
<td>112 - Production Managers</td>
<td>246</td>
<td>208.2</td>
<td>118.1</td>
<td>103.8</td>
<td>133.9</td>
</tr>
</tbody>
</table>

*Occupations with PMR greater than 100 and statistically significant.

This point was not lost on Andrews J:

26. Of course, Mr McGowan was not just working as a bricklayer. Mr Stelling agreed that there is nothing in the statistics specifically relating to people who work with concrete as he did, and that the construction industry in general produced statistics of deaths from mesothelioma that were higher than average. Nevertheless, the statistical evidence indicates that it would be dangerous to seek to draw any adverse conclusions merely from the fact that somebody was working on a building site at the relevant time. Mr Platt pointed out that, after Mr McGowan ceased to work for the defendant, he became the clerk of works on a number of other building sites, and that building inspectors (who spent less time on sites than a clerk of works would) had higher than average statistical levels of exposure to asbestos causing mesothelioma.

The data may well assist the construction of a competing narrative on exposure and a Judge who feels the mesothelioma might have been caused by another unpursued entity may have more reason to find for the Defendant in front of them.

We may see more use of this data and it is obvious from an analysis of it, that those in the Construction sector were exposed to asbestos on a regular basis. The generic cannot prove the specific and that remains the Claimant’s evidential burden.
THE DOSAGE THRESHOLD FOR PLEURAL THICKENING UNDER HELSINKI 2014?

Andrews J gives possible authority for a much higher than expected dosage threshold for diffuse pleural thickening:

20. It is well established that pleural plaques can occur at very low levels of exposure to asbestos and, therefore, the presence of such plaques sheds no light on the question of whether the levels of such exposure exceeded the levels that were perceived at the time to be safe. There is no medical or other literature that either party has been able to put before the court to suggest what the level of exposure would be in terms of fibre/ml in order to create bilateral diffuse pleural thickening. The nearest that one gets to any medical data is the indication in the so-called “Helsinki criteria” for diagnosis and attribution of asbestos-related diseases upon which Mr Norton understandably relied.

21. The 1997 guideline, which was reiterated and confirmed in 2014, says this:

“For diffuse pleural thickening, high exposure levels may be required. Bilateral diffuse plate pleural thickening is often associated with moderate or heavy exposure as seen in cases of asbestosis and should be considered accordingly in terms of attribution – i.e. this type of pleural thickening is considered to be close to asbestosis in terms of exposure.”

Her summary of Helsinki criteria confirms diffuse pleural thickening needs ‘high exposure’ levels and that bilateral diffuse plate pleural thickening is often associated with ‘moderate to heavy exposure’ akin to the type seen in asbestosis.

This did not accord with the medical evidence in this case or what we would consider to be established thinking. Quantum was agreed in advance of Trial and no oral evidence was heard from the Chest Physicians and no submissions made on Helsinki, beyond the requirement within the Joint Report that the pleural thickening would be attributable to asbestos exposure, if the Helsinki criteria for that are met. The defendant proceeded on the basis of the exposure needing to be higher than that for pleural plaques, but that no one knew how high, and the Claimant could not prove the extent of the deceased’s exposure.

Pleural disorders

“Pleural plaques represent circumscribed areas of fibrous thickening typically of the parietal pleura.” “In regions where plaques are not endemic, 80–90% of the plaques that are radiologically well-defined are attributable to occupational asbestos exposure.”

“Diffuse pleural fibrosis designates non-circumscribed fibrous thickening of variable cellularity” involving mainly the visceral pleura. It “is probably the result of benign asbestos pleuritis with effusion. Diffuse pleural thickening can be associated with rounded atelectasis, it can be associated with mild or rarely moderate or severe restrictive pulmonary defects.”

“Low exposures” from various sources “may induce pleural plaques. For diffuse pleural thickening higher exposure levels may be required”.

Andrews J gave Judgment that exposure akin to asbestosis levels was required to establish diffuse pleural thickening, but the 2014 Helsinki paper actually indicates that, for low grade asbestosis, lower exposure levels (than 25 fibre/ml years) may establish causation.
“Asbestosis is generally associated with relatively high exposure levels.” It is however noted that mild fibrosis may occur at lower exposure levels and that histologically detectable fibrosis can occur in situations when radiological criteria are not fulfilled.

This is the first time a Court has referred to the updated Helsinki criteria.

CONCLUSIONS

The Judgment is helpful on a number of levels, but these are summarised as follows:

1. Further confirmation of the various Building and Construction Regulations adding nothing to the common law.
2. Claims will face significant hurdles where the evidence of exposure is poor, or just not concluded. There are several passages on what evidence is required to find against a Defendant that will help a Defendant ‘show cause’.
3. ‘Falls at the first hurdle’ which be a much used quote at show cause hearings and trial.
4. We may see more use of mortality data which is not generally favourable in respect of the Construction Industry. However, the general findings cannot assist a Court with the specific findings required to establish liability.
5. The Court appears to accept that pleural thickening requires a higher levels of exposure than previously thought.
References


5 [2017] EWCA Civ 269


87 Accessed via Westlaw.
Disclaimer

This newsletter does not present a complete or comprehensive statement of the law, nor does it constitute legal advice. It is intended only to provide an update on issues that may be of interest to those handling occupational disease claims. Specialist legal advice should always be sought in any particular case.

© BC Legal 2016.

BC Legal is a trading name of BC Legal Limited which is registered in England and Wales under company number 08963320. We are authorised and regulated by the Solicitors Regulation Authority. The registered office is 1 Nelson Mews, Southend-on-Sea, SS1 1AL. The partners are Boris Cetnik and Charlotte Owen. More details on the firm can be found at www.bc-legal.co.uk