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, Lord Justice Jackson published his report into extending the fixed recoverable costs regime, including NIHL claims. In this edition, we consider the potential changes, recommended in his report, which will, after a period of public consultation, be scrutinised by the Government.

The Personal Injury industry were also, this month, expecting the response to the consultation on how the personal injury discount rate is set, but the document is still yet to be published. However, in anticipation of the potential change, insurers have been reporting an unexpected increase in profits, which we discuss. In industrial news, the listed parent of several personal injury firms, Fairpoint plc, has officially entered into administration. We look at the implications of this announcement.

As far as data is concerned, the Claims Management Regulation Unit have released their annual report for the year 2016/17, which shows a shrinking personal injury market. We report on this, along with latest Claims Portal MI. Further, we extensively cover the amendments, proposed by the European Commission, which will extend the number of exposure limits imposed on carcinogenic agents, under the Carcinogens and Mutagens Directive 2004/37/EC2 (CMD). Elsewhere, we analyse the results of a recent British study, which is suggestive of the fact that there is a doubling of risk of developing multiple sclerosis among British armed forces personnel.

In addition, we include several case comments on a range of subject matters, including the application of the principle of ‘good reason’ for departing from a costs budget, as stated in Harrison, the most recent judgment to discuss late acceptance of Part 36 offers, the scope of retrospectivity of the Third Parties (Rights Against Insurers) Act 2010 and the refusal of QOCS protection for an NIHL claimant, where a pre-April 2013 CFA was subsequently terminated and replaced with a post-April 2013 CFA. What is more, in the most recent judgment in the Cape Group disclosure litigation, the Asbestos Victims Support Group Forum successfully prevented documents being destroyed, which allegedly relate to Cape’s knowledge of the risks of asbestos and mesothelioma during the period 1948 and 1982.

In this month’s feature, we analyse the arguments submitted in the Court of Appeal during the course of the asbestos related lung cancer trial: Blackmore v The Department for Communities and Local Government [2017] EWCA Civ 1136. In this case, the defendant sought to appeal the reduction made to the claimant’s damages award to account for the deceased’s smoking, so we consider the issues surrounding contributory negligence in asbestos related lung cancer claims.

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

CPR Part 45 sets out the current fixed costs regime and provides a matrix of fixed costs for the main categories of personal injury claims which are Road Traffic Accident (RTA), Employers’ Liability Accident (ELA) and Public Liability claims.

Most notably, fixed costs are currently excluded in non-personal injury RTA, holiday sickness and Employers’ Liability Disease (ELD) claims, the bulk of which are NIHL claims.

Jackson LJ, suggesting an extension of fixed recoverable costs in the fast track, has proposed a new banded system, as follows:

1) Band 1: RTA non-personal injury, defended debt cases.
2) Band 2: RTA personal injury (within Protocol), holiday sickness claims.
3) Band 3: RTA personal injury (outside Protocol), ELA, PL, tracked possession claims, housing disrepair, other money claims.
4) Band 4: ELD claims (other than NIHL), any particularly complex tracked possession claims or housing disrepair claims, property disputes, professional negligence claims and other claims at the top end of the fast track.

The proposed matrix of fixed recoverable costs for these bands are as follows:

<table>
<thead>
<tr>
<th>STAGE</th>
<th>COMPLEXITY BAND</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1</td>
</tr>
<tr>
<td>PRE-ISSUE</td>
<td>£1,001-£6,000</td>
</tr>
<tr>
<td>PRE-ISSUE</td>
<td>£5,001-£10,000</td>
</tr>
<tr>
<td>PRE-ISSUE</td>
<td>£10,001-£25,000</td>
</tr>
<tr>
<td>POST-ISSUE, PRE-ALLOCATION</td>
<td>£1,850</td>
</tr>
<tr>
<td>POST-ALLOCATION, PRE-LISTING</td>
<td>£2,200</td>
</tr>
<tr>
<td>POST-LISTING, PRE-TRIAL</td>
<td>£3,250</td>
</tr>
<tr>
<td>TRIAL ADVOCAACY FEE</td>
<td>a. £500</td>
</tr>
<tr>
<td></td>
<td>b. £710</td>
</tr>
<tr>
<td></td>
<td>c. £1,070</td>
</tr>
<tr>
<td></td>
<td>d. £1,705</td>
</tr>
</tbody>
</table>

**Key:**
- (a) claim value up to £3,000;
- (b) claim value £3,001 to £10,000;
- (c) claim value £10,001 to £15,000;
- (d) claim value £15,001 to £25,000.
Allocation

The report states that the pre-action protocols should be amended to require the parties to endeavour to agree pre-action, the appropriate track for cases and (for fast-track cases) the appropriate band. Claimants will be expected to state their proposals in this regard in the letter of claim and defendants should do the same in the letter of response. Once the claim reaches allocation stage, the district judge or master should allocate in the usual way and specify the band if that is in dispute. LJ Jackson goes on to say that either party could challenge the decision by an application on paper under CPR 3.3(5)(6) – with the unsuccessful party incurring the costs of £150. Finally, if the case settles before issue or before allocation, then the band allocation decision should fall to the judge assessing costs if there is disagreement between the parties.

Preliminary Issues

The report recommends that the costs of any preliminary issue trial should be recovered separately. Although, LJ Jackson did ‘strongly discourage’ the ordering of preliminary issue trials in the fast track. Specifically, he addressed the common practice of trying limitation as a preliminary issue in ELD claims. He said this was unwise for the following reasons:

i) There is much overlap of evidence between limitation and liability.

ii) The litigation will get hopelessly bogged down if the limitation decision goes on appeal.

iii) To have two trials of a fast track case drives up costs and is disproportionate.

iv) If the claimant wins on limitation and then loses on liability, the first trial has been a waste of time.

Clinical Negligence

It is unlikely that clinical negligence claims will fall within the Fast Track due to their often complex nature. However, the only claims which will fall within the fast track fixed costs scheme proposed in this chapter are those where breach and causation are admitted in the pre-action protocol letter of response and where the value is less than £25,000.

NIHL Claims

So this proposal will see ELD claims brought into the fixed costs regime. As for NIHL claims which remain in the fast track, the Civil Justice Council (CJC) set up a working party in 2015, utilising both claimant and defendant representatives and has reached an agreement in mediation for a bespoke, future fixed costs regime.

These proposals, the appendix 11 agreement are discussed in greater detail in the article below.

INTERMEDIATE TRACK

Possibly the most drastic of proposals, unearthed in Jackson LJ’s report, is the anticipated introduction of an ‘intermediate track’, which will further extend fixed costs to claims with modest complications, which are valued between £25,001 and £100,000. This is not as drastic as LJ Jackson’s initial suggestion that all claims up to the value of £250,000 should be subject to fixed costs.

The proposed criteria for allocating a case to the intermediate track are as follows:

- The case is not suitable for the small claims track or the fast track;
- If the case is managed proportionately, the trial will not last longer than three days;
- The statement of case shall be no longer than 10 pages, witness statements shall not exceed 30 pages and expert evidence should be no more than 20 pages (giving concurrent evidence at trial, if applicable);
- There will be no more than two expert witnesses giving oral evidence for each party;
- There are no wider factors, such as reputation or public importance, which make the case inappropriate for the intermediate track; and
- The claim is not for mesothelioma or other asbestos related lung diseases.

Mesothelioma and Other Asbestos Related Lung Diseases

It is clear then that mesothelioma and other asbestos related lung diseases are excluded from the intermediate track. LJ Jackson gave the following explanation for this:

‘These claims are managed in accordance with the procedure in the Mesothelioma Practice Direction (Practice Direction 3D). They are case managed in specific courts in specialist Asbestos Lists by judges experienced in this work. The law applying to the determination of such claims is in accordance with other personal injury claims, but in addition specific statutes and case law apply. The value of such claims varies. A few are of a value and/or level of complexity that would otherwise come within the intermediate track, principally claims for diffuse pleural thickening (many of which include a claim for provisional damages). Even so, I think that they should be excluded from the FRC regime. There is not always a clear distinction between mesothelioma cases and pleural thickening cases because i) quite frequently the diagnosis is not clear-cut, at least in the early stages, and ii) some claimants with relatively benign conditions will go on to develop mesothelioma or lung cancer or disabling respiratory disease’.

As such it was concluded that the Asbestos Lists are well used and have received few complaints, therefore it would likely cause inefficiencies if some of these claims were removed from the specialist management provided by PD 3D.

A draft grid of fixed recoverable costs is split into 4 bands:

1) Band 1: Least complex cases, over the fast track limit, only one issue and the trial will take a day or less, e.g. quantum only personal injury claims.

2) Band 2: More straightforward cases within ‘normal’ band.
3) Band 3: More complex cases within ‘normal’ band.
4) Band 4: Most complex cases, e.g. employers’ liability disease claim where there are serious issues of fact/law and the trial is likely to last three days.

The proposed grid of fixed costs for the new intermediate track are as follows:

<table>
<thead>
<tr>
<th>STAGE</th>
<th>BANDS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1</td>
</tr>
<tr>
<td>1</td>
<td>PRE-ISSUE OR PRE-DEFENCE INVESTIGATIONS</td>
</tr>
<tr>
<td>2</td>
<td>COUNSEL/ SPECIALIST LAWYER DRAFTING STATEMENTS OF CASE AND/OR ADVISING (IF INSTRUCTED)</td>
</tr>
<tr>
<td>3</td>
<td>UP TO AND INCLUDING CMC</td>
</tr>
<tr>
<td>4</td>
<td>UP TO THE END OF DISCLOSURE AND INSPECTION</td>
</tr>
<tr>
<td>5</td>
<td>UP TO SERVICE OF WITNESS STATEMENTS AND EXPERT REPORTS</td>
</tr>
<tr>
<td>6</td>
<td>UP TO FIR, ALTERNATIVELY 14 DAYS BEFORE TRIAL</td>
</tr>
<tr>
<td>7</td>
<td>COUNSEL/ SPECIALIST LAWYER ADVISING IN WRITING OR IN CONFERENCE (IF INSTRUCTED)</td>
</tr>
<tr>
<td>8</td>
<td>UP TO TRIAL</td>
</tr>
<tr>
<td>9</td>
<td>ATTENDANCE OF SOLICITOR AT TRIAL PER DAY</td>
</tr>
<tr>
<td>10</td>
<td>ADVOCACY FEE: DAY 1</td>
</tr>
<tr>
<td>11</td>
<td>ADVOCACY FEE: SUBSEQUENT DAYS</td>
</tr>
<tr>
<td>12</td>
<td>HAND DOWN OF JUDGMENT AND CONSEQUENTIAL MATTERS</td>
</tr>
<tr>
<td>13</td>
<td>ADR: COUNSEL/SPECIALIST LAWYER AT MEDIATION OR JSM (IF INSTRUCTED)</td>
</tr>
<tr>
<td>14</td>
<td>ADR: SOLICITOR AT JSM OR MEDIATION</td>
</tr>
<tr>
<td>15</td>
<td>APPROVAL OF SETTLEMENT FOR CHILD OR PROTECTED PARTY</td>
</tr>
<tr>
<td><strong>TOTAL DAMAGES</strong></td>
<td>a. £93,000</td>
</tr>
<tr>
<td></td>
<td>b. £60,000</td>
</tr>
<tr>
<td></td>
<td>c. £100,000</td>
</tr>
</tbody>
</table>
A new Practice Direction was recommended for the intermediate track which will include specific guidance on assignment to bands. There would also need to be a new directions questionnaire.

In relation to personal injury cases specifically, LJ Jackson predicted that the four column grid will be utilised as follows:

- Where only one issue (such as quantum) is in dispute, claims will generally go into Band 1.
- Where both liability and quantum are in dispute, claims will generally go into Band 2 or 3.
- Where there are serious issues on breach, causation and quantum (but which still fall within the intermediate track), claims will fall into Band 4.

The report states that courts will need to have a residual power to take cases out of the intermediate track as it may be necessary to do so if the nature of the case changes fundamentally.

**Final Comments and The Future**

In his concluding comments, Jackson states that the only effective way to control the costs of civil litigation is to do so in advance and that the time has come for the expansion of the scope of fixed costs. Jackson recommends that if these proposals are accepted and adopted, that after four years there should be a review of these arrangements and if they are working as desired then the CPRC could expand the scope of the intermediate track to include monetary claims above £100,000 and claims for non-monetary relief.

Whether or not these recommendations will be adopted by the Government remains to be seen. David Lidington, the Lord Chancellor said:

‘I am very grateful to Sir Rupert Jackson for the wisdom, industry and efficiency he has demonstrated in compiling this report, which makes the case for extending fixed recoverable costs in order to control the costs of civil litigation’.

It is not known, if accepted, how long these proposals will take to be transitioned in, however, Jackson’s previous fixed costs report was published in 2010 and did not come into force until 2013. However, it is thought that the provisions relating to NIHL claims will, if accepted, be brought into force much sooner as the CJC working group have been preparing these since 2015. Some have suggested that they may be in force by autumn 2018.

Initial responses from the civil litigation industry suggest that the majority of interested parties are relieved that the proposals did not go as far as Jackson’s original idea of imposing a fixed fee grid to all civil cases worth up to £250,000.

President of the Law Society, Joe Egan stated his relief that Jackson had listened to ‘strong feelings from solicitors and reduced the scale of his original plans’.

Although, it may take a while longer for the full impact of the potential new ‘intermediate’ track to become apparent.

The full report can be accessed here.

**NIHL Fixed Fees: The ‘Appendix 11’ Agreement**

We outlined in the article above that LJ Jackson’s proposals for fixed fees for all fast track cases, excluded NIHL claims.

This is because a working party set up by the Civil Justice Council (CJC), almost 2 years ago and reported on in edition 113 of BC Disease News, has put forward a prescriptive process for handling NIHL claims which remain in the fast track together with an accompanying grid of fixed recoverable costs.

These proposals follow an agreement made between the CJC and claimant and defendant representatives (Karen Jackson of Roberts Jackson solicitors and Ian Harvey of Pro Global respectively).

A summary of the agreement was included in Appendix 11 of LJ Jackson’s full report.

Pre-litigation

Pre-litigation the following categories of claims will fall outside the new NIHL process and costs regime:

1. Single defendant cases where the defendant puts their name on a list for all their cases to commence within the EL/PL portal
2. Single defendant cases commenced within EL/PL portal which subsequently fall out of the portal.
3. Military claims.
4. Claims valued at more than £25,000.
5. Claims with more than 3 defendants.
6. When a defendant argues in their letter of response:
   a. The occupational loss is de minimis;
   b. Requests a second audiogram;
   c. Requests their own medical evidence; or
   d. Treats this as a ‘test case’ (the scope of this has not been agreed).

Any argument by any defendant under a) to d) will remove the ‘whole case’ from the fixed fee regime. So once the claim falls out of scope for fixed fees it cannot come back in and costs going forward will be assessed on the standard basis. This is not the same where claims, pre-litigation, are run under the fixed fee regime and then fall out once litigation has started. These claims will attract the fixed fee outlined for pre-litigation but the post litigation costs will be paid on the standard basis.

There are 4 different stages defined in the appendix as follows:

**Liability Is Admitted**

2A = A claim that settles before the claimant’s solicitor has prepared papers to issue proceedings.
2B = A claim that settles after the claimant’s solicitor has prepared papers to issue proceedings.
**Liability Is Denied**

3A = A claim that settles before the claimant’s solicitor has prepared papers to issue proceedings.
3B = A claim that settles after the claimant’s solicitor has prepared papers to issue proceedings.

The fixed costs are determined by the stage at which a claim concludes and also the number of defendants involved—with an additional £500 for each defendant successfully pursued as shown in the table below:

<table>
<thead>
<tr>
<th>STAGE</th>
<th>1 DEFENDANT</th>
<th>2 DEFENDANTS</th>
<th>3 DEFENDANTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>2A</td>
<td>£2,500</td>
<td>£3,000</td>
<td>£3,500</td>
</tr>
<tr>
<td>2B</td>
<td>£3,000</td>
<td>£3,500</td>
<td>£4,000</td>
</tr>
<tr>
<td>3A</td>
<td>£3,500</td>
<td>£4,000</td>
<td>£4,500</td>
</tr>
<tr>
<td>3B</td>
<td>£4,000</td>
<td>£4,500</td>
<td>£5,000</td>
</tr>
</tbody>
</table>

All these fees are exclusive of costs and any reasonable disbursements.

In addition, restoration fees of £1,280 (exclusive of VAT) per restored defendant successfully pursued will be paid, plus any reasonably incurred disbursements but not counsel’s fees.

**Litigation**

In litigation the fixed costs regime will again not apply to:

1. Military claims.
2. Claims valued at more than £25,000.
3. Claims with more than 3 defendants.
4. Claim allocated to the multi-track.
5. When a defendant argues in their letter of response:
   a. The occupational loss is de minimis;
   b. Requests a second audiogram;
   c. Requests their own medical evidence;
   d. Treats this as a ‘test case’ (the scope of this has not been agreed).

Pre-litigation costs will be paid as per fixed costs - irrespective if the claim falls out of the regime on litigation, with post litigation costs paid on a standard basis.

Below is the proposed matrix of fixed recoverable costs for litigated NIHL claims:

<table>
<thead>
<tr>
<th>STAGE</th>
<th>NIHL CLAIMS WITH VALUE LESS THAN £25,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>PRE-ISSUE</td>
<td>£4,000 + £500 PER EXTRA DEFENDANT</td>
</tr>
<tr>
<td>POST-ISSUE, PRE-ALLOCATION</td>
<td>£5,650 + £830 UPLIFT PER EXTRA DEFENDANT</td>
</tr>
<tr>
<td>POST-ALLOCATION, PRE-LISTING</td>
<td>£7,306 + £1,161 UPLIFT PER EXTRA DEFENDANT</td>
</tr>
<tr>
<td>POST-LISTING, PRE-TRIAL</td>
<td>£9,187 + £1,537 UPLIFT PER EXTRA DEFENDANT</td>
</tr>
<tr>
<td>TRIAL ADVOCACY FEE</td>
<td>NOT AGREED</td>
</tr>
</tbody>
</table>
The £4000 figure for pre-issue in this matrix refers to the pre-litigation fee in the table above for the category ‘3B’ i.e. a single defendant where the claimant solicitor has prepared papers to issue proceedings (which of course they would have if this litigated matrix is being used). As per the pre-litigation matrix, £500 is added per extra defendant.

Once the claim is issued, post litigation costs for a single defendant (excluding VAT and reasonable disbursements) are as follows:

<table>
<thead>
<tr>
<th>Issued to Allocation</th>
<th>Post Allocation to Listing</th>
<th>Listing to Trial</th>
</tr>
</thead>
<tbody>
<tr>
<td>£1,650</td>
<td>£1,656</td>
<td>£1,881</td>
</tr>
</tbody>
</table>

For each additional defendant successfully pursued a 20% uplift is applied per defendant at each stage.

The figures in the post-litigation matrix are cumulative so you can see that once the claim is issued, but not yet allocated, a single defendant claim would have a fixed fee of £5,650. We have broken down each stage, along with the uplift calculations for extra defendants below:

Post Issue – Pre Allocation Calculation

£4000 (pre-litigation fee) + £1,650 (issued to allocation for single defendant) = £5,650.

If there is an extra defendant, you must add £500 from the pre-litigation stage to 20% of the £1,650 (£330) issue to allocation fee, which will give you the £830 uplift at this stage.

Post Allocation – Pre-Listing Calculation

If the claim is then allocated but not yet listed, another £1,656 can be added, which represents the £7,306 figure.

Again, if there is an extra defendant, you must add the £500 from the pre-litigation stage to the 20% uplift for the issued to allocation stage (£330) and 20% of the post allocation to listing fee (£331) which will give you the £1,161 uplift for this stage.

Post- Listing – Pre Trial Calculation

Finally, once the claim is listed £1,881 can be added which equates to £9,187 as above.

If there is an extra defendant, you must add the £500 from the pre-litigation stage to the 20% uplift for the issued to allocation stage (£330), plus 20% of the post allocation to listing fee (£331) and 20% of the listing to trial fee (£376) which will give you the £1,537 uplift.

In addition to the above and as previously stated, a fee of £1,280 would be recoverable for restoring a company to the register.

The CJC working group did not reach full agreement on the trial advocacy fee, however, Jackson recommended that these be the same as those proposed for Band 4 claims in the new ‘intermediate’ track i.e. £1,380 so this can be added to the final fee of £9,187.

Each stage in the post-litigation fixed fee matrix also has the 20% figure which would need to be added for each extra defendant.

Where there is more than one defendant, the applicable fees for pre and post-litigation can become fairly complicated and difficult to navigate. As such we have created an easy to use tool which will calculate the fees available depending on each particular scenario - please contact us if you would like a copy.

The final report is with the CJC for approval and it is anticipated that it will be published soon.

In the meantime, a summary of the NIHL mediated agreement can be accessed here.

Insurers Report

Increased Profits as New Discount Rate is Delayed

Whilst the personal injury and insurance industry await the result of the delayed Government consultation on how the personal injury discount rate should be set, insurers are reporting soaring profits.²

It was anticipated that the response to the publication would be published yesterday, however it has been announced that the Ministry of Justice have delayed the publication of the consultation until further notice with no specific date given.³

In their first half results of 2017, the insurer Direct Line increased its dividend to shareholders by 39%.

These results come as a surprise to many, as it was predicted by Direct Line itself that the recent change in the discount rate from 2.5% to (–)0.75% would mean a dramatic increase in the amount of compensation paid out to claimants for personal injury claims and as a result insurers would see a reduction in profits. Indeed, we reported in edition 175 of BC Disease News (here), that several senior insurance figures, representing 15 of the UK’s most notable motor and commercial liability insurers, lobbied Chancellor of the
Exchequer, Phillip Hammond, hoping to prevent the discount rate reduction.

The interim results report one of the reasons for this increase in profits as being due to: ‘bodily injury claims continue to trend more favourably than expected’. This is a direct contradiction to the insurance industry’s previous position that the market had been flooded with fraudulent whiplash claims and that the UK faced a ‘compensation culture’.

However, these results will not come as a surprise to some. We reported in edition 182 of BC Disease News (here) that the Ministry of Justice Claims Portal figures showed a fall in whiplash claims of 7.58% in the 11 months preceding March 2017 and in 9 of the previous 10 months before March, frequencies of claims were reduced when compared with the equivalent month in the previous year.

Despite these figures, the Association of British Insurers announced last month that annual charges had increased by 11% (£48) to an average figure of £484, which represents a rate of increase 4 times the rate of inflation (see edition 194 here).

The Government have confirmed that the so called ‘whiplash’ reforms will be going ahead and we await the setting of the new Ogden discount rate.

**Claims Management Regulation Unit Annual Report for 2016/17**

On 4 August 2017, the Claims Management Regulation Unit (CMRU), managed by the Ministry of Justice under Part 2 of the Compensation Act 2006, published their 2016/17 annual report. 4

BC Legal last discussed the CMRU in edition 151 (here). In the latest document, the government body discussed ‘notable decreases’ in nuisance personal injury calls over the past year and a total turnover of £726m, a reduction on last year’s £751 million turnover. Of this £726 million, 25% is made up of turnover from the personal injury industry.

The following diagram, taken from the CRU Annual Report breaks down the 2016/2017 turnover by industry:

As can be observed in the table below, personal injury turnover figures have mirrored the total turnover trend over the past 5 years. After the industry briefly recovered from suffering a major decline in 2013/14, turnover has persistently fallen. For example, this year’s turnover of £182 million is just 49% of the personal injury turnover calculated during the period of 2012/13.5
The initial reduction was attributed to reforms, introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, such as the prohibition of referral fees, which sought to moderate the cost of civil litigation, premiums associated with motor insurance and numbers of spurious claims for personal injury.6

Meanwhile, claims for industrial injury disablement benefit in this year’s report equate to approximately 0.2% of the cumulative turnover, equating to £726 million.

What is more, the report states that: ‘Applications from businesses intending to operate in the personal injury sector were down by 47%...’ Imminent reforms, such as the rising of the small claims limit for soft tissue whiplash claims, to £5,000, are suspected to be the cause of...
deteriorating commercial interest, causing ‘future uncertainty and difficulties in business planning’. It is interesting to note, however, that while only a small number of businesses, working with a ‘panel of solicitors’, continue to maintain their dominant share in the personal injury market, small to medium sized businesses have, upon establishing themselves with ‘single solicitors’, brought stability to the sector. Nonetheless, ‘For many of these smaller CMCs, personal injury work is now subsidiary to other ancillary business activities, such as accident management, vehicle recovery, storage, repair and vehicle hire’.

Indeed, the number of authorised CMCs has fallen, overall, by 23% (from 979 totalled in 2015 to 752 in the report published this month). More than 100 of these CMCs were affiliated with the personal injury industry. When put into perspective, though, prior to the implementation of the ban on referral fees, there were 2,316 authorised personal injury CMCs.7

The image below, taken from the CRU Annual Report shows the total number of authorised CMCs by sector over the past 3 years.

Looking to the future, the report infers that the ‘emergence and decline of noise induced hearing loss activity’, in recent times, has seen a ‘significant growth’ of holiday sickness claims. As yet, it is unclear whether the necessary shifting of resources to tackle malpractice in this area will need to be a permanent measure, but the CMRU have established a dedicated team and a prepared program of CMC audit, regardless.

Legal Services Business ‘Safe’, as Listed Fairpoint Enters Administration

In edition 107 of BC Disease News (here), we reported on Fairpoint Group’s £9 million acquisition of personal injury firm, Colemans-CTTS, increasing its number of fee earning staff by 67. This week, we consider the fate of Fairpoint’s legal operations, subsequent to the announcement that the Board would be appointing administrators by 18 August. Indeed, on 10 August, Fairpoint officially appointed RSM Restructuring Advisory LLP to carry out the administration process, ‘in order to try and preserve any remaining stakeholder value’.8

Fairpoint, listed on the London Stock Exchange, previously specialised in personal debt advice and debt management, before acquiring Simpson Millar LLP in June of 2014. Then, Fairpoint, now an ABS, acquired Foster & Partners,9 Colemans-CTTS10 and Abney Garsden,11 in order to strengthen Simpson Millar’s business presence. Upon completion, Fairpoint’s legal services arm represented 67% of the Group’s revenues, which was recorded in its latest annual accounts (here).

Last year Fairpoint’s share price ‘plummeted’ to 10p from 192p, on the basis of ‘downgraded’ profit projections in a ‘turbulent’ 2017.12 Facing obvious financial difficulties and withdrawn support from its bank, on 28 June 2017, Fairpoint suspended trading.13 In an announcement to the London Stock Exchange, on 4 August 2017, Fairpoint stated that:
‘... ongoing support for the Group’s subsidiaries outside of the Legal Businesses is made more difficult due to the existence of the onerous lease on the Group’s head office which has an annual commitment of £1m per annum for a further 4 years.’

Nevertheless, Doorway Capital Limited, which was assigned the debt of former creditors, AIB Group (UK) plc, has provided a ‘Receivables Funding Facility’ of ‘up to £5 million’ in working capital to Simpson Millar (and its subsidiaries) to ‘take advantage of the growth opportunity presented by the size and highly fragmented nature of the consumer legal services market-place’.

In a separate statement, Simpson Millar emphasised that:

‘Whilst we are saddened that this has been a difficult time for Fairpoint Group, it is business as usual at Simpson Millar and we do not anticipate any significant changes as a result of Fairpoint Group’s announcement.’

Yesterday, in their latest announcement to the London Stock Exchange, Fairpoint gave assurance that:

‘The appointment of administrators to Fairpoint Group Plc will have no impact on the day to day running of these businesses [Simpson Millar et al.]’.

Reflecting on its current position, comparisons may logically be drawn between Fairpoint Group plc and Slater and Gordon Limited, both of which are, or have been, listed on stock exchanges; both of which demonstrated an opportunistic approach towards expansion in the wake of legal reform, introduced in 2013; and both of which, albeit for contrasting reasons, have struggled to adjust to increases in corporate size. Slater and Gordon are currently undergoing strategic review of its legal services, ‘which may lead to “dozens” of its lawyers being shown the door’.

### Gym Class Noise Exposure

In the US, research conducted by the Massachusetts Eye and Ear Infirmary into ‘spin classes’ has revealed that participants are exposed to noise levels that are, on average, 8.95 times (± 1.2) greater than the recommended daily exposure over an average 8 hour working day.

To obtain valid readings, smartphones, using an external sound level meter to within 2 dBA of accuracy, were placed in bike cup holders at 17 ‘spinning classes’ in Boston studios. For 31.6 minutes (± 3.8) of an average 49.8 minute session (± 1.2), the mobile app, SoundMeter Pro, recorded noise levels which exceeded 100dB. According to the National Institute for Occupational Safety and Health (NIOSH), this measurement is double the recommended daily dose.

That being said, none of the ‘spin classes’ were in breach of NIOSH guidelines for instantaneous exposure, nor did noise levels elevate beyond the legally binding industrial limits, prescribed by the Occupational Safety and Health Administration’s (OSHA).

Those likely to be at risk are ‘spin class’ instructors, who, if they have not been provided with adequate PPE, could potentially bring claims against their employers. Alternatively, regular gym-goers are at risk, many of whom are evidently contributing towards their own hearing loss, prejudicing any future EL claims of their own.

Studies have also shown the same issue to be prevalent among ‘Bodypump’ and ‘Zumba’ classes.

### Updated Claims Portal MI

The Claims Portal has released its latest management information (MI) for July 2017.

In July, 746 disease claims entered the Portal. Of these 746 claims, 348 left it at Stage 1. The majority of these, 283 were because of the time to reply expired. 65 cases were denied or admitted with an allegation of contributory negligence. The following graph shows a 12 month rolling summary of the number of CNFs that left the Portal at Stage 1 in 2016-2017. A 12 month summary takes into consideration the total sum of CNFs for each month, adding them together and then subtracting the last month before adding the next month’s amount to get the overall number for the previous 12 months. This is why the numbers in the graph below do not constantly increase.

The figures include CNFs that have not had a response at the end of Stage 1—CNFs where liability has not been accepted and CNFs where liability has been accepted with contributory negligence. The figures do not include CNFs that were taken out of the process using the Exit function during Stage 1.

8 claims left the Portal at Stage 2 for reasons other than settlement. 380 were exited from the Portal: amongst these, 13 were duplicate claims and 33 were because of an incomplete claim notification form. 229 claims left the Portal because the claim required further investigation.

Consistent with the trend seen throughout the past two years, there was a low of 38 claims that settled through the Portal last month. Meanwhile 1 additional case saw court packs completed so the court was able to adjudicate on quantum. Of those claims that have settled through the Portal, the average amount of damages in July 2017 was £4,191, £438 more than the amount recorded in July 2016 (£3,753). In June of this year, the average general damages payment was £3,519, up from £3,208 in May 2017, when we last reviewed portal figures (here). The table below shows the trend in the amount of damages secured from 2013-2017:

Carcinogens and Mutagens Directive Amended

Current worker protection from carcinogens in the workplace across the European Union is afforded under a combination of 24 EU Occupational Safety and Health directives, including, amongst others, Directive 89/391/EEC (the ‘Framework Directive’), the Chemical Agents Directive 98/24/EC (CAD), and the Carcinogens and Mutagens Directive 2004/37/EC2 (CMD). The latter of these, deals specifically with chemical risks to workers, generally through inhalation and dermal absorption. On 11 July, the Council’s Permanent Representatives Committee (COREPER) approved the provisional agreement with the European Parliament, initially made on 28 June, to revise the 2004 CMD by, among many changes, setting broader and stricter exposure limits.

It is believed that, across the EU, 102,000 people die as a result of industrial exposure to carcinogens, representing 53% of the total number of deaths due to occupation, compared to 28% for circulatory diseases and 6% for respiratory diseases. In the preamble to the Carcinogens and Mutagens Directive and Article 16, it advises that ‘occupational exposure limit values’:

‘... must be revised whenever this becomes necessary in the light of more recent scientific [and technical] data’.

Therefore, in 2016, after more than 10 years of legislative inaction, the European Commission tabled a proposal to alter and create exposure limits of 13 cancer causing chemicals commonly found in labour environments. At the time, Marianne Thyssen, Commissioner of Employment, Social Affairs, Skills and Labour Mobility stated:

‘With this proposal we will save 100,000 lives in the next 50 years. Protection of workers is at the core of the Commission’s commitment to a strong social Europe’.
Annex III to the first version of the CMD, in accordance with Article 16, suggested, as follows:

<table>
<thead>
<tr>
<th>CHEMICAL AGENTS</th>
<th>EXPOSURE LEVELS</th>
<th>PROPOSED OELs</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>[MG/M³ (MILLIGRAMS PER M³)]</td>
<td>[PPM (PARTS PER MILLION) ]</td>
</tr>
<tr>
<td>HARDWOOD DUSTS</td>
<td>5 MG/M³</td>
<td></td>
</tr>
<tr>
<td>VINYL CHLORIDE MONOMER (VCM)</td>
<td>7.77 MG/M³ OR 3 PPM</td>
<td></td>
</tr>
<tr>
<td>BENZENE</td>
<td>0.75 MG/M³ UNTIL 27 JUNE 2003, AFTER WHICH: 3.25 MG/M³ OR 1 PPM</td>
<td></td>
</tr>
</tbody>
</table>

However, in the second, approved iteration of the CMD, the table of occupational exposure limits (OELs) is set to be extended, as follows:

<table>
<thead>
<tr>
<th>CHEMICAL AGENTS</th>
<th>PROPOSED OELs</th>
<th>RELEVANT SECTORS</th>
<th>TYPES OF CANCER</th>
<th>NO. OF EXPOSED WORKERS IN THE EU</th>
</tr>
</thead>
<tbody>
<tr>
<td>1,2-EPoxypropylene</td>
<td>2.4 MG/M³ OR 1 PPM</td>
<td>CHEMICAL MANUFACTURE: SYNTHETIC LUBRICANTS, OIL FIELD DRILLING CHEMICALS, POLYMERCYRE SYSTEMS.</td>
<td>LYMPHOMA, CANCER OF OTHER ILLNESSES</td>
<td>685-1,500</td>
</tr>
<tr>
<td>1,3-Butadiene</td>
<td>2.2 MG/M³ OR 1 PPM</td>
<td>MANUFACTURE OF REFINED PETROLEUM PRODUCTS, MANUFACTURE OF RUBBER PRODUCTS</td>
<td>LYMPHOMA, CANCER OF OTHER ILLNESSES</td>
<td>27,000</td>
</tr>
<tr>
<td>2-Butene</td>
<td>18 MG/M³ OR 6 PPM</td>
<td>MANUFACTURE OF BASIC CHEMICALS, MANUFACTURE OF AIRCRAFT AND SPACECRAFT (DOWNSTREAM USE)</td>
<td>LIVER TUMOURS</td>
<td>51,400</td>
</tr>
<tr>
<td>Acrylamide</td>
<td>0.1 MG/M³ OR 1 PPM</td>
<td>MANUFACTURE OF CHEMICALS AND CHEMICAL PRODUCTS, EDUCATION, RESEARCH AND DEVELOPMENT, OTHER BUSINESS ACTIVITIES: HEALTH AND SOCIAL WORK, PUBLIC ADMINISTRATION AND DEFENCE</td>
<td>PANCREATIC CANCER</td>
<td>54,100</td>
</tr>
<tr>
<td>Bisphenol A</td>
<td>4.4 MG/M³ OR 1 PPM</td>
<td>CHEMICALS AND REFINED PRODUCTION: RUBBER AND PLASTIC PRODUCTION, LEATHER AND LEATHER PRODUCTION, FABRICATED METAL PRODUCTION FOR WHOLESALE TRADE</td>
<td>LIVER CANCER</td>
<td>NA</td>
</tr>
<tr>
<td>BROMOETHANE</td>
<td>0.010 MG/M³ OR 0.025 MG/M³ FOR WELDING OR PLANAR CUTTING PROCESSES THAT GENERATE FUME</td>
<td>PRODUCTION AND USE OF CHROMIUM-C ContAINING COMPOUNDS, PAINTS AND METAL CONVERSION COATINGS, IN TERMS OF DOWNSTREAM USE, CHROMIUM COMPOUNDS, INCLUDING NICKEL CHROMITE, ZINC CHROMATE AND CALCIUM CHROMATE, MAY BE USED AS BASIC PRIMERS AND TOP COATS IN THE AEROSPACE INDUSTRY</td>
<td>LUNG CANCER AND ORAL CANCER</td>
<td>916,000</td>
</tr>
<tr>
<td>Ethylene Oxide</td>
<td>1.8 MG/M³ OR 1 PPM</td>
<td>EXPOSURE OF CRUDE PETROLEUM AND NATURAL GAS, SERVICE ACTIVITIES INCIDENTAL TO OIL AND GAS EXTRACTION, MANUFACTURE OF FOOD PRODUCTS, TEXTILES, CHEMICALS, CHEMICAL PRODUCTION, MEDICAL, PRECISION AND OPTICAL INSTRUMENTS, WITCHES, CLOCKS: HOSPITAL AND INDUSTRIAL STERILIZATION, RAIL: PUBLIC ADMINISTRATION AND DEFENCE, EDUCATION, HEALTH AND SOCIAL WORK.</td>
<td>LEUKAEMIA</td>
<td>15,500</td>
</tr>
<tr>
<td>Hardwood Dust</td>
<td>3 MG/M³ OR 0.01 PPM</td>
<td>FOR 5 YEARS AFTER EXPOSURE INTO FORCE OF DIRECTIVE, AFTER WHICH: 2 MG/M³</td>
<td>WOOD WORKING INDUSTRY, FURNITURE MANUFACTURE SECTORS AND CONSTRUCTION</td>
<td>LUNG AND NOSOLOGY CANCERS</td>
</tr>
<tr>
<td>Hydrazine</td>
<td>0.015 MG/M³ OR 0.01 PPM</td>
<td>CHEMICAL BLENDING AGENTS: AGRICULTURAL PESTICIDES: WINTER TREATMENT</td>
<td>LUNG AND COLONOSCAL CANCERS</td>
<td>212,000</td>
</tr>
<tr>
<td>O-Toluidine</td>
<td>0.3 MG/M³ OR 0.1 PPM</td>
<td>MANUFACTURE OF CHEMICALS, CHEMICAL PRODUCTS AND MAKAMATIC FIBRES, MANUFACTURE OF TEXTILE PRODUCTS, RESEARCH AND DEVELOPMENT: PUBLIC ADMINISTRATION AND DEFENCE, EDUCATION, HEALTH AND SOCIAL WORK.</td>
<td>BLADDER CANCER</td>
<td>5,600</td>
</tr>
<tr>
<td>Respiratory Cyanide: silica (RCs)</td>
<td>0.1 MG/M³</td>
<td>MINERALS, GLASS MANUFACTURING, CONSTRUCTION AND ELECTRICITY, GAS, STEAM AND HOT WATER SUPPLY INDUSTRIES.</td>
<td>LUNG CANCER, LUES</td>
<td>5,300,000</td>
</tr>
<tr>
<td>Respiratory Ceramics fibres (RCs)</td>
<td>0.3 PPM</td>
<td>MANUFACTURE: FIBRE PRODUCTION, FINISHING INSTALLATION, REMOVAL, ASSEMBLY OPERATIONS, MOLDING FORMING</td>
<td>ADVERSE RESPIRATORY EFFECTS: SKIN AND EYE IRRITATION, POISONING LUNG CANCERS</td>
<td>10,000</td>
</tr>
<tr>
<td>Vinyl Chloride Monomer (VCM)</td>
<td>2.6 MG/M³ OR 1 PPM</td>
<td>MANUFACTURE OF CHEMICALS AND CHEMICAL PRODUCTS (VCM AND PVC PRODUCTION)</td>
<td>ANGIOSARCOMA, HEPATOCELLULAR CARCINOMAS</td>
<td>15,000</td>
</tr>
<tr>
<td>Benzene</td>
<td>2.26 MG/M³ OR 1 PPM</td>
<td>BENZENE PRODUCTION, PETROCHEMICALS, PETROLEUM REFINING, AND COAL AND COAL CHEMICAL MANUFACTURING; STEEL WORKERS, PRINTERS, BURBERRY WORKERS, SHOE MAKERS, LABORATORY TECHNICIANS, FIREFIGHTERS</td>
<td>LEUKAEMIA, NON-HODGKIN LYMPHOMA</td>
<td>NA</td>
</tr>
</tbody>
</table>
As can be seen from the information displayed in the table above, various chemical agents, which have met the criteria for classification as carcinogenic, now have binding ‘limit values’. Meanwhile, the exposure levels, already in existence for vinyl chloride monomer (VCM) and hardwood dusts, will be tightened significantly, only to, in certain circumstances, be further constricted after a 5 year buffer, which serves as reactionary period, in order to ensure Member State compliance. Indeed, in the initial impact assessment, it was highlighted that:

> *In some cases, Member States either have no OELs or have ones that are less protective of worker health than the value recommended by Advisory Committee on Safety and Health at Work (ACSH).*

As a guide to comparison, in the table below, we present the UK’s workplace exposure limits for the 13 chemical agents subject to current EU regulatory amendment. These limits are ascribed to the Health and Safety Executive, many of which, when cross-referenced with the table above, are less stringent than the revised CMD would advocate.

<table>
<thead>
<tr>
<th>CHEMICAL AGENTS</th>
<th>CURRENT UK EXPOSURE LIMITS [MG/M³ (MILIGRAMS PER M³) PPM (PARTS PER MILLION) F/ML (FIBRES PER ML)]</th>
</tr>
</thead>
<tbody>
<tr>
<td>1,2- EPOXYPROPANE</td>
<td>12 MG/M³</td>
</tr>
<tr>
<td></td>
<td>OR</td>
</tr>
<tr>
<td></td>
<td>5 PPM</td>
</tr>
<tr>
<td>1,3- BUTADIENE</td>
<td>22 MG/M³</td>
</tr>
<tr>
<td></td>
<td>OR</td>
</tr>
<tr>
<td></td>
<td>10 PPM</td>
</tr>
<tr>
<td>2-NITROPROPANE</td>
<td>19 MG/M³</td>
</tr>
<tr>
<td></td>
<td>OR</td>
</tr>
<tr>
<td></td>
<td>5 PPM</td>
</tr>
<tr>
<td>ACRYLAMIDE</td>
<td>0.3 MG/M³</td>
</tr>
<tr>
<td>BROMOETHYLENE</td>
<td>NO LIMIT SET IN UK BEFORE²⁷</td>
</tr>
<tr>
<td>CHROMIUM (VI) COMPOUNDS</td>
<td>0.05 MG/M³</td>
</tr>
<tr>
<td>ETHYLENE OXIDE</td>
<td>9.2 MG/M³</td>
</tr>
<tr>
<td></td>
<td>OR</td>
</tr>
<tr>
<td></td>
<td>5 PPM</td>
</tr>
<tr>
<td>HARDWOOD DUSTS</td>
<td>5 MG/M³</td>
</tr>
<tr>
<td>HYDRAZONE</td>
<td>0.03 MG/M³</td>
</tr>
<tr>
<td></td>
<td>OR</td>
</tr>
<tr>
<td></td>
<td>0.02 PPM</td>
</tr>
<tr>
<td>O-TOLUIDINE</td>
<td>0.89 MG/M³</td>
</tr>
<tr>
<td></td>
<td>OR</td>
</tr>
<tr>
<td></td>
<td>0.2 PPM</td>
</tr>
<tr>
<td>RESPIRABLE CRYSTALLINE SILICA (RCS)</td>
<td>0.1 MG/M³</td>
</tr>
<tr>
<td>REFRACTORY CERAMIC FIBRES (RCF)</td>
<td>5 MG/M³</td>
</tr>
<tr>
<td></td>
<td>OR</td>
</tr>
<tr>
<td></td>
<td>1 F/ML</td>
</tr>
<tr>
<td>VINYL CHLORIDE MONOMER (VCM)</td>
<td>7.8 MG/M³</td>
</tr>
<tr>
<td></td>
<td>OR</td>
</tr>
<tr>
<td></td>
<td>3 PPM</td>
</tr>
<tr>
<td>BENZENE</td>
<td>3.25 MG/M³</td>
</tr>
<tr>
<td></td>
<td>OR</td>
</tr>
<tr>
<td></td>
<td>1 PPM</td>
</tr>
</tbody>
</table>
With Brexit on the horizon, it is uncertain as to how far the UK will be bound to transpose amendments into national law, since Article 2 of the CMD states:

‘Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than two years after the date of entry into force of this Directive. They shall forthwith communicate to the Commission the text of those provisions’.

Nonetheless, the British Occupational Hygiene Society has strongly welcomed the proposal, with Tracey Boyle, President of BOHS, stating:

‘These proposed changes plainly illustrate the importance of controlling exposure to carcinogens and mutagens. In terms of Britain’s Control of Substances Hazardous to Health (COSHH) regime, there is already a legal duty to reduce exposures to as low a level as reasonably practicable and certainly it would not be wise to aim to merely meet the occupational exposure limits for carcinogens, mutagens and sensitisers. For companies that are applying good practice in occupational hygiene, therefore, these proposals, if passed, will not represent the need for significant changes’.

Delving deeper into the implications of failing to implement domestic legislation prescribing OELs, the document inferred:

‘A lack of national Occupational Exposure Limits (OELs) for some carcinogens, and the high levels of others, not only leads to inadequate protection for EU workers but can also have negative consequences for the internal market. It leads to situations, where businesses located in Member States with less stringent levels (where there are no set occupational exposure limit values, or where they are set at a high level, allowing for greater worker exposure) may benefit from an undue competitive advantage ... From a more general perspective, therefore, OELs promote consistency by defining a ‘level playing field’ for all users and a common objective for employers, workers and enforcement authorities. The proposal therefore leads to a more efficient system of workers’ health protection in the single market’.

Moreover, with respect to reprotoxic substances which cause impaired fertility or infertility, and have a negative impact on foetal development and lactation, the Commission plans to produce further proposals, by developing the current scope of the directive by the first quarter of 2019 at the latest. Interestingly, BC Disease News, in edition 180 (here), discussed instances where South Korea branded occupational exposure to chemicals in Samsung semi-conductor factories as an ‘occupational disease’, thus demonstrating the growing number of examples for which employers can be held liable.

As part of the next wave of exposure level limit evaluation, the Commission have also committed themselves to reviewing the restrictions (‘respirable fraction’) on respirable crystalline silica (RCS) fumes, of which 70% of construction employees face exposure.

Further, employers across the EU are currently obliged, by Article 4 and 5 of the CMD, to input measures, such as:

‘... in so far as it is technically possible, the replacement of the carcinogen or mutagen by a substance, mixture or process which is not dangerous or is less dangerous to worker’s health, use of a closed system or other measures aimed at the reduction of the level of workers’ exposure’.

Building on the duty to eliminate or reduce risks to a minimum, the newly amended piece of secondary EU legislation seeks to introduce obligatory health surveillance, per Article 14 of the CDM, additional to mandatory surveillance prior-to and during exposure periods, stressing that:

‘... it should be possible for appropriate health surveillance of workers who reveal a risk to health or safety to continue after the end of exposure following an indication by the doctor or authority responsible for the health surveillance’.

Championing the latest announcement that agreement between institutional bodies has been met, Commissioner Thyssen said:

‘Today’s agreement therefore marks a milestone in the protection of workers’ health and safety, in particular against cancer at the workplace. Protecting workers’ health and safety in general, and the fight against work-related cancer in particular, are a top priority for this Commission’.

The EU has already, or intends in the future, to protect workers against a total of 25 priority carcinogenic, or mutagenic, agents, which equates to 5% of known carcinogens registered by the International Agency for Research on Cancer (IARC). In the CMD impact assessment, a SHEcan project discusses an Institute of Occupational Medicine report, insinuating that ‘at least 20 million workers in the EU are, to a lesser or greater extent, exposed to one or several of these 25 chemical agents’.

Consequently, research has already begun into a third CMD proposal, concerning 5 previously withheld carcinogenic agents for presentation in 2018, including beryllium and beryllium compounds, hexachlorobenzene, diesel engine exhaust emissions, rubber process fumes and dust, and 4,4’-methylene bis 2-chlororaniline. The next stage of the process for the Commission, however, will be to decide whether to establish ‘limit values and/or skin notations with regard to seven additional carcinogens’. 
Multiple Sclerosis Causes Twice as Many Deaths for British Military Personnel

Details of a British study, published in June in the journal of Occupational Medicine, ‘Mortality from multiple sclerosis in British military personnel’, has shown that British soldiers, sailors and airmen are almost twice as likely to die from multiple sclerosis (MS), when compared with other occupations.

MS is an incurable neurological condition, caused by a destructive immune system, which attacks the protective tissue (myelin sheath) surrounding nerves. This disrupts and slows the transmission of chemical and electrical messages along the neural pathway. Consequently, symptoms can include loss of physical and sensory function, additional to an average life expectancy reduction of between 7 and 9 years.

Currently, it is believed that MS affects more than 100,000 in the UK alone, including 2 to 3 times more women than men. Further, the autoimmune disease is understood to be triggered by a combination of genetic and environmental factors, such as exposure to infections which relate to the Epstein Barr virus, smoking and vitamin D deficiency.

The latest investigation, undertaken by the Medical Research Council (MRC) and Health and Safety Executive (HSE), saw scientists examine the death certificates of 3.7 million men, aged between 20 and 74, over a 31 year period with a view to finding a link between the prevalence of MS as a cause of death and employment type.
For those whose most recent employment was in a British military role, the risk of contracting and dying from MS was much greater. From 1979 to 2010, out of a total 7485 recorded MS-related deaths, 129 were last hired by the military, yielding a proportional mortality rate (PMR) of 243:

What is more, deaths were most common for service men in the age bracket of 45-59:

Although the reasoning behind the occupational disease relationship was left unexplained in the study, the author was certain of the fact that ‘the consistency and statistical significance of the excess indicate that it is most unlikely to have occurred simply by chance’ and ‘was unlikely to be the result of fewer deaths from other causes, such as heart disease, or by factors related to social class’.

Instead, it has been inferred that an ‘unidentified occupational hazard’ may be the root cause of ‘elevated proportional mortality ... in each of three successive decades’.

As was mentioned above, infectious disease may be legitimate cause of MS and, speculating on the conditions of British armed forces recruits, the study implies that:

‘... the close proximity in which military recruits live and work might facilitate the transmission of one or more infections that trigger later MS’.

In the UK, the figures collated were consistent for each decade, across the 31 years, showing similar PMR. This differs from previous US studies, as those indicated a mortality spike for military workers who served in the Gulf War between 1990 and 1991.

The Ministry of Defence has called for more research to be conducted in order to establish preventative measures, given the findings were suggestive of an increased risk of death, attributed to MS. This will undoubtedly require analysis of data from other established military cohorts.

We will continue to report on any developments in this area in future BCDN editions.
Case Law

QOCS Protection Refused For NIHL Claim: *Catalano v Espley-Tyas Development Group Limited* [2017] EWCA Civ 1132

On appeal from Manchester County Court, the Lord Justice Longmore, at the Court of Appeal, handed down judgment on *Catalano v Espley-Tyas Development Group Limited* [2017] EWCA Civ 1132, a NIHL claim, in which the judge affirmed the order, made by Deputy District Judge Harris, that QOCS did not apply and for the defendant's costs to be paid by the claimant.

The main issue in this case was the retrospectivity of QOCS and CPR 44.17 which states that:

‘This section does not apply to proceedings where the claimant has entered into a pre-commencement funding arrangement (as defined by rule 48.2)’

This issue was also raised in the case of *Landau v The Big Bus Company and another*, which we discussed in edition 107 of BC Disease News here. In this case the claimant signed a conditional fee agreement (CFA) in August 2011 to bring a personal injury claim against the defendants over an accident in 2009. This claim was rejected by the High Court in October 2013 but permission to appeal was granted. As such, a second CFA was entered into in November 2013, but the appeal was dismissed. The Court held that the claimant was not protected by QOCS as CPR 48.2(1) (i) (aa) states:

[an] agreement...entered into before 1 April 2013 specifically for the purposes of the provision...of advocacy or litigation services in relation to the matter that is the subject of the proceedings in which the costs order is to be made'.

The judge held that:

'It was clearly Parliament’s intention that a pre-commencement CFA entered into in respect of the “matter” would disapply QOCS in any “proceedings” arising out of that matter'.

As such, an appeal was deemed to be proceedings arising out of the original matter for which the original CFA was entered into and so QOCS protection was not afforded to the claimant.

In the present case of *Catalano* an initial conditional fee agreement (CFA), between the claimant and their instructed firm of solicitors, was entered into on 13 June 2012. Evidence of this CFA was sent via letter to the defendant on 6th September 2012, on the same day the claimant’s application for ATE insurance was declined.

The claimant then entered into a new CFA on 15th July 2013. Proceedings were then issued against the defendant, on 26 July 2013, arising out of alleged noise-induced hearing loss and damage, suffered during the course of their employment.

On 16 December 2013, the claimant filed their costs budget, which referred to pre-action (‘incurred’) costs, totalling £5,375. Subsequently, the defendant was supplied with notice that litigation would be funded by the July 2013 CFA. Although the provision of notice acknowledged the June 2012 CFA, ‘the box available for saying it had been terminated was left unticked.

Trial was scheduled for 14 January 2015. Just a day beforehand, however, the claimant served a notice of discontinuance. Further, on 28 April 2015, in accordance with CPR 38.6, the defendant filed and served a bill of costs on the claimant, totalling £21,675.52, excluding interest. At the Manchester County Court, DDJ Harris rejected the claimant’s contention with the bill of costs served, arguing that, despite having discontinued, they were protected by QOCS.

As we outlined above, CPR 44.17 provides that QOCS does not apply where the claimant has entered into a pre-commencement funding agreement. A pre-commencement funding agreement is a CFA or ATE policy entered into before 1st April 2013. CPR 48.2 defines this as:
On appeal, claimant counsel, Mr McGhee, submitted that, within the definitions provided in CPR 48.2(1), a ‘funding arrangement’ was synonymous for an ‘un-terminated funding arrangement’. In this way, Mr McGhee sought to rely on the second CFA by ‘reading a word into the rules’ which diminished reliance on the first CFA.

Observing consistency between legislative provisions, at paragraph 26, the judge stated:

“If Mr McGhee’s argument were correct it would either be necessary to read the words “a conditional fee agreement” in section 44(6) [of the Legal Aid, Sentencing and Punishment of Offenders Act 2012] as “an un-terminated conditional fee agreement” which would be impermissibly to read the word “un-terminated” into the statute or there would be a complete mismatch between the statute and the rule when the statute and the rule were self-evidently intended to cover the same ground albeit from the two different perspectives of continuing entitlement to recover the success fee as part of the costs and the non-application of QOCS to agreements already made. In any case, therefore, in which litigation services have in fact been provided under a CFA made before 1st April 2013, success fees can continue to be recovered as costs and QOCS will not apply even if the CFA is terminated and a second CFA is made’.

Held, at paragraph 24, rejecting the insertion of the word ‘unterminated’ to interpret ‘pre-commencement funding arrangements’:

‘... such a construction would lead to a situation where a claimant could have the best of both worlds. A claimant could make an agreement providing for a success fee and purchase ATE insurance and wait until shortly before trial to re-assess his or her prospects. If they appeared to be high, such claimant could continue and claim the cost of the ATE premium and the success fee as costs from the defendants; if they appeared to be low, he or she could cancel the original CFA, make a second CFA and then discontinue the claim a day later and escape the costs consequences. The framers of the rules could not have intended that a claimant should be able to blow hot and cold in that way. The right construction of the rule, therefore, is to give the words “funding arrangement” their natural meaning and apply them to any pre-1st April 2013 agreement (whether terminated or not).

Conducting analysis, LJ Longmore perceived pre-1 April 2013 funding arrangements to include the ‘remarkably wide’ provision of services, not just before QOCS came into force, but beyond that date too. Under CPR 44.17, QOCS does not apply where a claimant has entered into a pre-commencement funding arrangement before 1 April 2013. In Catalano, services were provided to the claimant (obtaining expert report) before this date and were recorded as ‘incurred costs’. Interestingly, LJ Longmore went on to contemplate the repercussions of a hypothetical case where a second CFA was agreed to replace a pre-QOCS CFA, under which solicitors had not yet billed any time. In this scenario, at paragraph 29, the judge opined that the likelihood of this situation:
‘... will be comparatively rare since almost inevitably some chargeable work will be done at about the time the first CFA is made’.

What is more, a second hypothetical case was deliberated, in which work, carried out under a retainer, created before 1st April 2013, was terminated. If new solicitors, after 1 April 2013, replaced the retainer under a second CFA, LJ Longmore suggested:

‘If ... work had been done ... unless it could be said that the second CFA retrospectively discharged and extinguished the first agreement and replaced it with the second agreement. That was contemplated as a possibility by Lord Sumption (with whom the majority of the Supreme Court agreed) in Plevin v Paragon Personal Finance Ltd [2017] 1 WLR 1249, para 13 where however the second and third CFA were held on the facts to be merely a variation of the first agreement.

The Court of Appeal held, for these reasons, that the claimant did not have the protection of QOCS and was liable to pay the defendant’s costs.

We discussed the case of Plevin in edition 180 of BC Disease News (here), which stressed the importance of comparing the ‘underlying dispute’ when deliberating transitional provisions between CFAs.

Drawing comparisons between Catalano and previous decisions, Catalano shows consistency with the approach taken by judges thus far. In Landau, Costs Master Haworth concluded that:

‘... the word “proceedings” must be decided in the context in which the words appear’.

Landau was distinguished in the decision of Casseldine, where District Judge Phillips ensured QOCS protection for a claimant, who had obtained a second CFA with new solicitors, after having had the first CFA terminated by initially instructed solicitors, stating:

‘In the case before me, proceedings were never commenced in relation to the first CFA, but only the second. So far as the first CFA was concerned, it was the solicitors (Thompsons) who terminated the CFA, and therefore had no entitlement to payment of any success fee or costs’.

The determinate factor in respect of CFA transition, therefore, seems to question whether there is a rigid distinction between different stages of the same litigation, in-between agreements of multiple CFAs. Generally, the more rigid the distinction, the less likely that the later CFA will apply and provide QOCS protection.

‘Good Reason’ to Depart from Budget: RNB v London Borough of Newham [2017] EWHC B15 (Costs)

On 21 June 2017, the same date that Harrison v University Hospitals Coventry and Warwickshire Hospital NHS Trust (2017) 3 Costs LR 424 was heard at the Court of Appeal, Deputy Master Campbell heard the case of RNB v London Borough of Newham [2017] EWHC B15 (Costs). Coincidentally, both cases were centred on the significance of costs budgeting at the costs assessment phase. We discussed the decision taken by Sir Terence Etherton M.R. in Harrison, in edition 190 of BC Disease News (here).

On 29 October 2015, proceedings were issued against the defendant in the case of RBN. The claimant’s budget was filed and served on 25 July 2016, followed by the defendant’s budget on 3 August. At the costs and case management conference (CCMC), on 12 August, a costs management order for £143,692.36 was made, agreeing the claimant’s budget under CPR 3.17. On 4 January 2017, a consent order settled the claim for £250,000, plus costs to be assessed if not agreed. A detailed assessment hearing was consequently listed, in respect of the claimant’s bill of costs, totalling £121,051.40.

On assessment, on 21 June 2017, the claimant’s approved Precedent H fee-earning rates during costs budgeting were reduced for incurred costs before the CCMC, as follows, on the basis that ‘the uplift on outer London guideline rates was excessive on the standard basis, having regard to the CPR 44.4(3) factors, and the increases year on year were too high given the level of inflation, were unexplained and could not be justified by reference to, for example exceptional overhead expenses’:

<table>
<thead>
<tr>
<th>Role</th>
<th>Figures in Precedent H Cost Budget, Approved by Costs Management Order</th>
<th>Figures After Costs Assessment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Partner</td>
<td>£355 to £375</td>
<td>£340</td>
</tr>
<tr>
<td>Senior Solicitor</td>
<td>£235 to £280</td>
<td>£275</td>
</tr>
<tr>
<td>Associate</td>
<td>£295</td>
<td></td>
</tr>
<tr>
<td>Solicitor</td>
<td>£215 to £225</td>
<td>£180</td>
</tr>
<tr>
<td>Legal Assistant</td>
<td>£145 to £160</td>
<td>£135</td>
</tr>
</tbody>
</table>

After having reduced the hourly rates for incurred costs the costs judge had to decide if there was ‘good reason’ to depart from the budgeted figures, already agreed in the claimant’s costs budget at the CCMC, which were instrumental to the CMO? Given the potential impact of Harrison, the costs judge listened to the parties’ submissions and reserved judgment on the matter.
The defendant submitted that Practice Direction 3E Paragraph 7.10 (above) proves it is not the role of the CCMC ‘to fix or approve the hourly rates claimed in the budget’. Since the assessment provided the only opportunity for the paying party to challenge the hourly rates, the defendant’s argument hinged on the fact that ‘the budget is not a costs cap’. Thus, the determination of reasonableness on assessment ‘needed to be applied equally to the incurred and budgeted costs’ and the adjustment to incurred costs supplied ‘good reason’ to depart from the budget.

On the other hand, the claimant submitted that the function of the CCMC is to approve an amount, of which expenditure is then ‘up to that party’. The claimant argued, therefore, that the purpose of the CCMC is not to fix hourly rates and working hours, but to ensure that the party completes work within the ‘amount agreed’, ensuring proportionality. Furthermore, applying the rate of incurred costs to budgeted costs would demonstrate a departure from the budget, without ‘good reason’ contrary to the intentions of costs management, explained in decisions of binding authority in Merrix and Harrison.

At paragraph 92 of Mrs. Justice Carr’s judgment in Merrix, she clarified that:

‘... where a costs management order has been made, when assessing costs on the standard basis, the costs judge will not depart from the receiving party’s last approved or agreed budget unless satisfied that there is good reason to do so. This applies as much where the receiving party claims a sum equal to or less than the sums budgeted as where the receiving party seeks to recover more than the sums budgeted’.

Then, in Harrison, the definition of ‘good reason’ was expanded, at paragraph 44:

‘Where there is a proposed departure from a budget – be it upwards or downwards – the court on detailed assessment is empowered to sanction such a departure if it is satisfied that there is good reason for doing so ... Costs Judges should therefore be expected not to adopt a lax or over-indulgent approach to the need to find “good reason”; if only because to do so would tend to subvert one of the principle purposes of costs budgeting and hence the overriding objective ... the existence of the “good reason” provision gives a value and an important safeguard in order to prevent a real risk of injustice .... As to what will constitute “good reason” in any given case, I think it is much better not to seek to proffer any further, necessarily generalised, guidance or example. The matter can safely be left to the individual appraisal and evaluation of Costs Judges by reference to the circumstances of each individual case’.

Deputy Master Campbell went on to the default position, at paragraph 18:

‘The starting point is that the court does not approve or disapprove hourly rates when budgeting costs under CPR 3.12-18. It simply approves an amount which it is reasonable, necessary and proportionate for a party to incur for each of the ten phases of the litigation, with the exception of the incurred costs. So far as the latter is concerned, the court at the budgeting stage does not and cannot carry out a detailed assessment; what it can do is to comment on the costs under PD 7.4 and take those comments into account when fixing the budget. Here, no comments were made at the CCMC, and working out whether it was reasonable, necessary or proportionate to incur those costs has been for the court to decide at (if I may adopt respectfully, the words Davis LJ in Harrison) the “conventional detailed assessment” I have just undertaken’.

However, when deliberating changes to budgeted costs, the costs judge reasoned, at paragraphs 22 to 25:

‘At the assessment hearing, I made reductions to the hourly rates claimed for the incurred costs to a level which has meant that the overall recovery by the Claimant for the period of work before the CMO has been reduced by significant amounts. Were that not to be reflected in the budgeted costs, that would mean that the Claimant will appear to recover an hourly rate as set out in Precedent H for the budgeted stage at a level that significantly exceeds the figure I consider to be reasonable and proportionate for the pre-budget stage.

If, (as is the case), the hourly rate is a mandatory component in Precedent H which is not and cannot be subjected to the rigours of detailed assessment at the CCMC, it makes no sense if it is automatically left untouched when the rates for the incurred work are scrutinised at the “conventional” assessment. Such an approach would offend against the guidance given in Harrison at paragraph 44. Indeed, as Mr Clayton points out, it is only on that occasion that a paying party has an opportunity to challenge the rate and I agree with him for the reasons given above, that is that a “good reason” to depart from the costs allowed in the Claimant’s last approved budget.

If I am wrong, the same conclusion can be reached by a different route, as I have said in paragraph 5 above, proportionality was raised by the paying party in the points of dispute. With regard to costs incurred on the standard basis, CPR 44.3(2) provides that :- “...the court will – (a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; ..”
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“...the court will – (a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; ...”

\[5\] Costs Incurred are proportionate if they bear a reasonable relationship to –

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

Upon concluding the line-by-line assessment, the costs judge reasoned, at paragraph 31, giving regard to CPR 44.3(5) factors (above):

‘Having aggregated those figures and looking at matters in the round, as Harrison has directed that I must, it is my view, having regard to the CPR 44.3(5) factors, that the resulting figure if left unaltered would result costs that it would be disproportionate for the defendant to pay. Expressing the point a different way, having regard to the amount recovered and the complexity of the litigation (a part 36 offer having been made at the outset, the fact that the action was settled without a trial and that I do not consider additional work was generated by the conduct of the defendant by, for example, putting the claimant to proof at a trial about the distressing history of the allegations of abuse), it is my judgment that the aggregate of the incurred costs as assessed and the budgeted costs as assessed thus far, if left unaltered, would result in the court allowing costs that were reasonable and necessary but not proportionate. That difficulty can be addressed by permitting the Claimant to recover the sum that would have been allowed had the assessed rates for the incurred costs been applied to the budgeted costs.

As such, the budgeted costs of £143,692.36 and the bill of costs for £121,051.40, upon the application of Merrix/Harrison, were reduced to the final amount of £43,000.

The full judgment can be accessed here.

Late Acceptance of Part 36 Offers: Jordan v MGN Limited [2017] EWHC 1937 (Ch)

In July, the case of Jordan v MGN Limited [2017] EWHC 1937 (Ch) came before Mr Justice Mann at the High Court. In his judgment, Mann J dismissed the claimant’s ‘desperate’ application to bring an end to the action, on the basis that an earlier Part 36 offer had been accepted. The court ordered the claimant to pay the defendant’s costs, on the indemnity basis, for the period between expiry of the offer and acceptance and limited the recovery of claimant costs up to the expiration date of the offer. Jordan highlights the significance of ‘a culpable failure to engage in negotiations which would, if conducted more properly, have been likely to have led to a settlement’.

On 12 August 2014, the claim form was issued, valuing the claim at £100,000. Then, on 24 September 2014, the first Part 36 offer of £15,000 was made. A letter, dated 14 October 2014, declined acceptance of this offer. The defendant made successive Part 36 and ‘Without Prejudice Save As To Costs (WPSAC) offers of £20,000, £45,000, £30,000, £40,000, £60,000, £80,000 and £80,000 again, between December 2014 and 26 August 2016. The claimant failed to respond to any offers, but, on 18 April 2017, proposed their own Part 36 offer of £90,000.

Reacting to this, the defendant counter-offered damages of £90,000 and costs up to 7 July 2016, but requested that the claimant pay the defendant’s costs from 16 September 2016 on the indemnity basis. The defendant’s letter also stated:

‘Had you approached us in July 2016 with the proposal that you have made, for the very first time, in April this year, this case
would, as you know, have been settled on 7 July 2016. But instead of negotiating, your client has sat on his hands until late in the day... The costs that have been incurred on each side since MGN made its offer on 19 July 2016 will outweigh the £10,000 difference between us in damages many times over. It follows that by waiting until now to make your offer, the real issue between our client is not damages but costs. If your client had engaged with us properly in WPSAC correspondence, as a normally funded litigant would, extensive costs would have been avoided. It would appear that if your client did not have the benefit of a CFA and ATE insurance, he would have taken a more sensible and proportionate approach to settlement... It appears your client expects MGN to bear its costs as well as his costs for the entirety of this litigation to date. This seems to us to be little short of outrageous when your client could have secured a settlement along the lines of what he is now seeking to achieve in July 2016 if he had only engaged in constructive negotiation... Our client remains just as willing to settle this claim as it always has been. It does not wish to go to trial when there is only £10,000 between the parties on damages. MGN does not view this claim as being worth £90,000 or anything close to that figure but, as it has always been, MGN is willing to approach settlement negotiations commercially with an eye to the costs being incurred in this litigation on both sides’.

Regardless, the claimant rejected the defendant’s ‘tactical offer, stating that it ‘will not and cannot – as you will know – be accepted. Further, on 19 June, the claimant solicitor sought consent to increase the value of claim on the claim form to £150,000, which was granted. The highest offer was tabled on 22 June, at a ‘without prejudice meeting’, where the claimant and defendant offered to settle at £160,000 and £100,000 respectively.

After various failed propositions to reach a financial arrangement, the claimant solicitor attempted to accept the previous offer of £90,000 but they were unable to do so since the offer had already been rejected and could no longer be accepted.

However, the claimant argued that to proceed to trial would be unnecessary and sought to accept the first offer, made on 24 September 2014 for £15,000; 10% of the recently amended claim value. The defendant solicitor responded to this by saying:

‘... MGN’s Part 36 offer of 24 September 2014 remains open for acceptance, though that will not necessarily continue to be the position. For the avoidance of doubt, acceptance of that offer - out of time – would be permitted by MGN on the basis that your client pays MGN’s costs from the end of the Relevant Period (15 October 2014) to the point of acceptance pursuant to CPR 36.10(5)(b) as applicable to Part 36 offers made before 6 April 2015). This would be on the basis that MGN’s costs would be assessed if not agreed on the standard basis even though MGN has very good arguments that acceptance of that Part 36 offer at this stage should lead to its costs being paid/assessed on the indemnity basis. Had your client engaged constructively in settlement, and accepted MGN’s reasonable offers instead of overstating his case, this claim would have settled a long time ago at a fraction of the cost. Having regard to that, we are entirely unmoved by your now urging MGN to take a “reasonable, sensible and proportionate settlement” when that is precisely what you and your client have consistently failed to do’.

On 4 July 2017, a day before the trial, which was subsequently vacated, the claimant made an application to bring an end to the action. The grounds of their application included the fact that ‘the defendant’s conduct had become abusive of the process, or a determination that there was or could be a valid compromise, or that the claimant was entitled to accept, and did accept, a very old Part 36 offer’. However, the application dwindled to a single footing; that the claimant had accepted the September 2014 Part 36 offer and was due costs post-initial acceptance from the defendant, or, if a cost order obliged the claimant to pay, that this should not be on an indemnity basis.

At the application hearing, Mann J considered the former edition of CPR 36.10, governing cost consequences of offers predating 6 April 2015, to decide whether it would be ‘unjust’ to depart from the ‘normal’ order as to costs from the date of the expiry of the relevant period.

From paragraphs 54 to 56, Mann J reasoned:

‘If one asks who has been responsible for incurring unnecessary costs then the answer, in my view, is plainly Mr Jordan, once he has accepted the Part 36 offer. He has accepted an offer which is very much less than the range of subsequent offers that were made on terms which were comparable in relation to non-monetary relief. He could have had as much as £80,000 instead of the £15,000. After incurring very large amounts of costs he decided to go back and accept the earlier and much lower sum. Nothing had happened which would
have made MGN responsible for the incurring of costs which had accrued in the period after its Part 36 offer. It is not as though (for example) late in the day MGN disclosed something which it ought to have disclosed before, which was unknown to and unanticipated by Mr Jordan and which demonstrated after all that his case was worth only £15,000. Nothing like that happened. What happened is that Mr Jordan decided, for his own reasons (which are considered below in connection with the indemnity costs point) not to take the action to trial. He was responsible for all the costs, which turn out to be wasted since he originally failed to accept the Part 36 offer.

Mr Browne simply failed to make a case for saying that (on this hypothesis) his client’s decision not to pursue the claim to trial to test the claim (and perhaps do better than £90,000), and pursue his costs claim, should render reasonable his decision to accept a much lower sum, which he could have accepted 2½ years previously, and not to have to pay the costs of the intervening period, much less recover his own.

In my view Mr Browne has not even begun to make a case for departing from the usual order. The usual order is amply justified in this case. That conclusion is reinforced by what I find below in relation to indemnity costs. The claimant has been responsible for prolonging litigation for a considerable period and then (basically) caving in. The just result is that the normal consequences of the late acceptance of a Part 36 offer should follow.

Justifying the order of indemnity costs, which usually apply when the conduct of the paying party is unreasonable to a high degree, Mann J stated, at paragraph 64:

‘... the failure to start to engage when the 2016 offers started coming in and increasing is culpable. One would have thought that a client who was willing to consider settlement would have started to engage more at that point. I find it hard to believe that a normal paying client, who was not litigating under a CFA and with the protection of ATE insurance, would have adopted the tactic of not responding and not engaging further’.

He went on to conclude, at paragraph 72:

‘The bottom line is that Mr Jordan did not advance any explanation, let alone a good one, why, having run his case for 2½ years, having failed to respond properly to a number of offers, one of which was close to his own proposed financial settlement, having caused himself and the other side to run up significant amounts of costs, and having exposed the defendant to the prospect of having to pay the CFA uplift and ATE premiums (which I am satisfied is a powerful threat to a defendant), should at the last minute do the equivalent of walking away from the action. I consider that all those factors, and the other matters referred to in this section, are good reasons for ruling that the costs be paid on the indemnity basis, and I so order.’

Mesothelioma Claim

Dismissed on Facts:

Lugay v London Borough of Hammersmith and Fulham [2017] EWHC 1823 (QB)

The High Court in the case of Lugay v London Borough Of Hammersmith and Fulham [2017] EWHC 1823 (QB) have rejected a claim for damages brought by a widow who argued that her husband had developed mesothelioma as a result of exposure to asbestos during his tenancy of a council owned property.

The deceased in this case died aged 73 of a heart attack, although it was agreed, based on the medical evidence, that his death was accelerated by four years by reason of his mesothelioma. The claim was based on the medical evidence, that his death was accelerated by four years by reason of his mesothelioma. The claim was brought by the claimant, the deceased’s widow, who sought damages totalling £138,729 from the defendant council. The claimant argued that the deceased’s exposure to asbestos during his tenancy of a flat owned by the council had caused his mesothelioma and, as such, the council were in breach of the Landlord and Tenant

Act 1985, Defective Premises Act 1972 and Occupier’s Liability Act 1957. The defendant denied any breach of duty or any causative exposure through the deceased’s occupancy of the flat.

The deceased was born in the Dominican Republic and worked in the building industry as a carpenter, before moving to the UK when he was 19. In the UK, he worked as a bus conductor for London Transport for 35 years and until his death, he worked as a cleaning supervisor for Lambeth Council.

The deceased had lived in the flat from 1972 and in 2003, his wife moved into the flat with him. In 2011, he was diagnosed with mesothelioma and he died in June 2012.

As to the cause of the deceased’s mesothelioma, the judge noted that a history of occupational or other exposure to asbestos dust is present in nearly 90% of cases in the UK. In people without known exposure to asbestos, mesothelioma is rare accounting for about one in ten thousand deaths. However, unfortunately, the deceased had passed away before proceedings were started and without providing a witness statement, so little information was available about the source of his exposure to asbestos.

So the question posed was: ‘... whether the limited factual evidence available and the expert evidence enable the court to be satisfied on the balance of probabilities as to the source of asbestos exposure in this case’.

Exposure

The flat that the deceased had lived in was constructed in the 1960s with the use of asbestos containing materials (ACM), including chrysotile asbestos containing floor tiles, amosite asbestos insulation panels in the meter cupboard, amosite asbestos-containing toilet cistern and chrysotile asbestos containing textured decorative coatings to the ceilings.

In the communal parts of the block, there were asbestos insulation boards, linings within the lift and stair lobbies, asbestos debris within the stair risers, asbestos paint on the walls and asbestos floor tiles.
The claimant argued that the deceased was exposed to asbestos fibres in the flat through:
- Redecorating the flat once a year, including stripping walls and ceilings and sanding them down.
- In 1987/1988 the installation of central heating had disturbed asbestos which was cut, drilled and removed which left the flat very dusty.
- Flushing the toilet entailed brushing up against the asbestos side of the cistern which gradually deteriorated.
- Asbestos used in communal areas of the block of flats disintegrated, releasing asbestos into the atmosphere.
- Wearing and disintegration of asbestos floor tiles.

In relation to the last three grounds put forward for exposure, i.e. the presence of asbestos within the building, the experts agreed that this would not have increased exposure above background levels of up to 0.0005 f/ml. They also agreed that walking on the floor tiles, brushing against the toilet cistern and carrying out general housework and reading the meter in the meter cupboard, probably would not have increased exposure above background levels.

With regards to the communal areas, it was agreed that, although asbestos was used in the insulation boards, it would be embedded in the panels and not located on the surface and despite disrepair, the asbestos in the panels would not be released.

Turning to the installation of the central heating system in 1987/88, the experts agreed that this was a factual issue for the court to resolve as if it was found that these works involved disturbance of ACMs without precautions and the deceased was present at the time then he was probably exposed at some level.

Evidence on this matter was given by the deceased’s daughter and the witness for the Council who claimed that the defendant would not have disturbed the textured decorative coating of the ceiling. The claimant’s expert claimed that the textured decorative coating of the ceiling would have contained between 1-5% chrysotile. These fibres would not be released until disturbed but if the deceased sanded the coating, fibres would have been released and he estimated that the deceased would have been exposed to between 4-400 times the accepted background level, although in short and intermittent periods.

This was based on the assumption that the deceased sanded down the edges of the ceiling over a period of 6 hours on each occasion.

The defendant’s expert disagreed and said that this activity would not have exposed the deceased to above background levels, as the walls were probably majority plaster and contact with the edges of the asbestos containing ceiling would have been minimal.

The judge, on this issue, accepted the evidence of the claimant that the deceased did indeed redecorate the flat in order to address the mould. However, photos of the ceiling, which were admitted into evidence and taken relatively recently, showed that the textured surface of the ceiling was intact. As such the judge concluded:

‘If, as claimed by the claimant, Mr Lugay had sanded down the edges of the ceilings each year, for 40 years, the textured coating would be missing, at least in areas. However, the photographs show the textured coating intact up to the corners where the ceilings meet the walls. I find that Mr Lugay stripped the wallpaper and sanded the walls, in preparation to receive fresh wallpaper. He cleaned the mould from the tops of the walls and the edges of the ceiling with a cloth. He used sandpaper to remove remaining traces of mould but did not rupture, fragment or remove any part of the textured coating on the ceiling. Any contact with or disturbance of the asbestos within the textured coating would have been intermittent and de minimis.’
Breath of Duty?

Due to the experts agreeing that the presence of ACMs does not of itself give rise to any risk of exposure above background levels, breach of statutory duty based on any defect in the property was dismissed.

As such the claimant had to establish her claim based on a breach of common law duty of care.

It was agreed that the defendant, as landlord, owed a duty of care to the deceased not to expose him to a foreseeable risk of asbestos related injury.

The court phrased the test of whether the defendant had breached their duty of care as follows:

‘The court must compare the steps taken by the defendant to prevent the victim from being exposed to asbestos fibres with an objective standard of what reasonable steps should have been taken to avoid reasonably foreseeable injury in the factual circumstances prevailing at the time’.

The court held that the factors to take into account in determining the issue of foreseeability in cases such as these were set out by Aikens LJ in Williams v University of Birmingham, at paragraph [44]:

‘i) the actual level of exposure to asbestos fibres to which the deceased was exposed;
ii) what knowledge the defendant 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 defendant that, with that level of exposure, the deceased was likely to be exposed to asbestos related injury;
iv) the reasonable steps that the defendant should have taken in the light of the deceased’s exposure to that level of asbestos fibres; and
v) whether the defendant negligently failed to take the necessary reasonable steps’.

Reviewing the publicly available information which would have been available to the defendant at the time, it was concluded that from the mid-1980s, if not before, the defendant should have been aware that:

- there were asbestos-containing materials in the flats;
- if asbestos-containing materials in the flats were disturbed, tenants occupying the flats would be subjected to risks associated with exposure to asbestos fibres; and
- there was no safe level of exposure to asbestos fibres.

However, the issue in this case was whether the defendant should reasonably have foreseen that tenants carrying out maintenance or decoration in their flats might disturb asbestos-containing materials, giving rise to a risk of exposure to asbestos fibres, such that the defendant should have taken steps to reduce the risk by removing all asbestos, prohibiting works in the flats, or issuing warnings about the presence of asbestos.

The following dicta of Lady Hale LJ in Shell Tankers (UK) Ltd v Jeromson [2001] EWCA Civ 100, was referred to in which she said:

‘The issue in this case is not one of balancing the effectiveness, expense and inconvenience of the precautions required against the extent of the risk: the issue is whether the risk should have been identified’.

Hale LJ, at paragraph 37, rejected the submission that in assessing risk it was adequate for an employer simply to consider the average exposure, rather than the potential exposure:

‘…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’.

O’Farrell J concluded that there was no duty to remove all asbestos from the flats, as the experts had agreed that the mere presence of asbestos does not, of itself, present a material risk of exposure to asbestos fibres.

There was also found to be no such duty in respect of the cleaning and decorating activities carried out by the deceased, as those activities did not involve abrasive techniques that breached the textured coating on the ceilings. On the facts of the case, it was found that the deceased was not exposed to asbestos fibres during his cleaning and decoration of the flat and, as the disturbance to the edges of the ceiling would have been de minimis, the judge held that the defendant was not in breach of its duty of care.

As a result, for the same reasons, causation could not be proved and the claim was dismissed.

The full judgment can be accessed here.


We reported in edition 143 of BC Disease News that the Third Parties (Rights Against Insurers) Act 2010 had come into force on 1 August 2016 – 20 years since the Law Commission recommended reforms in this area and 6 years since the Act received Royal Assent.

The 2010 Act addresses the process by which third party claimants issue proceedings against the insurer of an insolvent insured. It incorporates developments in insolvency law over the
course of the last 80 years, whilst simultaneously updating and repealing the Third Parties (Rights Against Insurers) Act 1930.

As a reminder, the key provisions of the 2010 Act are as follows:

1. The Act removes the costly, financially and with respect to time – process of multiple proceedings. Under the 1930 Acts, a third party cannot issue proceedings against an insurer without first establishing the existence and amount of the insured’s liability. This may involve expensive and time-consuming legal proceedings. The Act removes the need for multiple sets of proceedings by allowing the third party to issue proceedings directly against the insurer and resolves all issues (including the insured’s liability) within those proceedings.

2. The third party is no longer required to issue proceedings for the insolvent insured to be restored to the Company Register in order to sue, as established in the 1930 Act. This is because the 2010 Act allows for proceedings to be immediately initiated against the insurer.

3. The Act improves the third party’s rights to information about an insurance policy allowing the third party to obtain information at an early stage about the rights transferred to him or her in order to enable an informed decision to be taken about whether or not to commence or continue litigation. If the third party reasonably believes that an insured has incurred a liability against the third party, then that third party is now entitled to issue a notice to an insurer requesting information on their insurance policy before any liability is established against an insured and the information is to be provided within 28 days of the request. This notice may also be sent to any entity that could reasonably be believed to know about it e.g. an insurance broker, an employee or an administrator/liquidator of the company.

4. The scope of the 2010 Act has been enlarged, removing the ambiguity of the 1930 Act by stating that the voluntary incurred nature of a liability does not matter. It will also apply regardless of the presence of any foreign element in a domestic insolvency, such as the insurer being based abroad or in the instance whereby and insurance policy was chosen to be created under a foreign legal system.

5. It is of note that the 2010 Act does not apply to reinsurance.

Importantly, the transitional provisions of the 2010 Act state that the new Act will only apply to claims in which the insolvency process commenced on or after 1 August 2016, or the liability for which the relevant person is insured, was incurred on or after that date.

Although this point seems clear, based on the legislation itself, the High Court last month felt it necessary to consider the issue of retrospectivity in Redman v Zurich Insurance Plc & ESJS1 Limited [2017] EWHC 1919 (QB).

The facts of this case were as follows; between 1952 and 1982, the deceased worked for ESJS1. On 5 November, the deceased died from lung cancer, alleged to have been caused by exposure to asbestos during his employment with the defendant. Soon after, ESJS1 was the subject of a voluntary winding up on 30 January 2014 and was finally dissolved on 30 June 2016.

The deceased’s widow then brought a claim for negligence against the defendant, on the grounds that they had exposed the deceased to asbestos, causing his lung cancer. The claimant brought the claim under the 2010 Act, in order to circumvent the more onerous requirements of the 1930 Act.

The defendant sought to strike out the claim, or, alternatively, to obtain summary judgment.

The issue in this case was therefore the extent to which the 2010 Act applies retrospectively to cover claims where the remedies of the claimant would previously have been covered only by the less attractive 1930 regime.

In considering this point, Mr Justice Turner first turned to the drafting of the transitional provisions within the 2010 Act. He concluded that:

‘The wording of schedule 3 makes it expressly clear that under section 1(1) where two conditions are fulfilled the 1930 Act continues to apply. The conditions are that before 1 August 2016:

i) The relevant person has incurred a liability against which that person is insured under a contract; and

ii) The person subject to such a liability has become a “relevant person”.’

The term ‘relevant person’ refers to an individual or corporate body falling within any of the formal legal categorisations of insolvency therein listed in the Act.

In this case, there was no dispute that ESJS1 became a relevant person under section 6 of the 2010 Act when it was being wound up voluntarily, which occurred over two and a half years before the 2010 Act came into force.

The claimant made several arguments. Firstly, it was argued that ESJS1 had ‘not incurred a liability against which that person is insured under a contract before 1 August 2010. However, Turner J immediately found, without hesitation that ‘such a proposition does not stand up even to the most casual scrutiny’. In doing so, he relied upon the dicta of Lord Denning in Post Office v Norwich Union Fire Insurance Society Ltd [1967] 2 Q.B. 363, in which it was said:

‘Under that section [section 1 of the 1930 Act] the insured person steps into the shoes of the wrongdoer. There are transferred to him the wrongdoer’s “rights against the insurers under the contract.” What are those rights? When do they arise? So far as the “liability” of the insured is concerned, there is no doubt that his liability to the injured
person arises at the time of the accident, when negligence and damage coincide. But the “rights” of the insured person against the insurers do not arise at that time’.

This line of argument was shortly abandoned by the claimant and Turner J concluded that:

‘In my view, this decision was not only right but inevitable. Liability is incurred when the cause of action is complete and not when the claimant’s rights against the wrongdoer are thereafter crystallised whether by judgment or otherwise’.

The claimant, having to therefore concede that the 1930 Act did indeed apply to this claim, then relied upon their second, more tenuous argument, namely that the proper interpretation of the transitional provision was that the application of the 1930 Act does not preclude the retrospective but parallel operation of the 2010 Act to all claims which had previously been brought under the 1930 Act. In justifying this approach, the claimant pointed out that this would avoid the need to identify the date upon which damage was caused which can often be challenging in industrial disease claims. In particular, identifying the point at which the process of the development of malignancy gives rise to damage can be controversial.

However, the judge described this submission as ‘brave’ and as ‘an interpretation of the schedule which not only bore no relation to the basis upon which this claim was purportedly brought under the 2010 Act but was entirely inconsistent with it’.

In rejecting it, he outlined the following 3 grounds:

i) The purpose of transitional provisions is to identify the respective scope of application of earlier and later legislation. If the claimant’s approach were correct, there would be no such transition because the 2016 regime would apply retrospectively and indiscriminately without reference to any point or circumstances of transition. I invited counsel for the claimant to identify any circumstances within the scope of his interpretation in which the 1930 regime would operate and not the 2010 regime. He was unable to do so.

ii) If Parliament had intended the 2010 regime retrospectively to apply to all third party claims against insurers then it would have taken a relatively straightforward drafting exercise to achieve this.

iii) If the provisions of the 2010 Act were to apply retrospectively but in parallel with the 1930 regime then one would expect that there would be some merit in affording the claimant a choice between the two. However, counsel for the claimant was unable when pressed on the topic to identify any circumstances in which it would benefit a claimant to elect to deploy the more procedurally unfavourable provisions of the 1930 Act.

As such, the defendant’s application to strike out was successful on the grounds that the claim disclosed no reasonable grounds for bringing a claim.

It is clear then that:

- A relevant person incurs a liability under section 1 of the 2010 Act when the cause of action is complete and not when the claimant has established the right to compensation whether by a judgment or otherwise;
- The transitional provisions do not provide for the 2010 regime to be applied retrospectively so as to run in parallel with the 1930 regime. In any given circumstances, either the 1930 regime applies or it does not. Where it does continue to apply then the 2010 regime has no application.

It was stated within the judgment that a number of claims were expected to be brought against insurers under the 2010 and it was hoped that this decision on the proper interpretation of the transitional provisions would prevent an accumulation of such claims giving rise to wasted costs and time.

Asbestos Victims Support Group Forum Success
With Disclosure Application

The Asbestos Victims Support Group Forum have this month been successful in preventing documents relating to Cape Group’s knowledge of the risks of asbestos and mesothelioma from being destroyed. The application for disclosure of these documents will be heard in October 2017.

The documents relate to the underlying litigation for which there were two sets of claims, tried together. These have become widely known as the Product Liability (PL) claims and the CDL claims, so called because they were claims brought by Aviva on behalf of its insured customer Cape Distribution Limited.

In the PL claims a consortium of insurers brought subrogated claims seeking contributions from Cape Intermediate Holdings PLC arising from insurance policies which the PL claimants had written regarding employee liability insurance for various clients, mainly building companies. The insured employers were sued or received notices of claims from former employees in respect of mesothelioma contracted by them due to occupational asbestos exposure. The claims were settled by the insurers and that gave rise to the subrogated PL claims by which the insurers sought contributions from the Defendants. The basis for the PL claims was that the claimants alleged that the employees in question had been exposed to dust from ‘Asbestolux’ and ‘Marinite’ boards manufactured and supplied by members of the Cape group of companies, and that Cape and/or its subsidiaries had failed adequately to warn of the risks of occupational asbestos exposure at the time.

We reported in edition 177 of BC Disease News that Cape had entered into settlement agreement with the insurers before judgment could be handed down. This can be accessed here.

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We reported in edition 177 of BC Disease News that Cape had entered into settlement agreement with the insurers before judgment could be handed down. This can be accessed here.
It was the documents that were disclosed between the parties in the lead up to this trial that The Forum wish to have access to. The documents include, inter-company indemnities, insurance arrangements, marketing materials relating to the products in question, historic technical information about the materials and codes of practice. This principally concerned the period from 1948 to 1982.

These documents are of interest to lawyers and members of the public interested in asbestos safety and asbestos-related disease and, it is argued by The Forum, illuminate what Cape really knew about the risks of asbestos and mesothelioma. Indeed, Counsel for one of the insurers is reported to have said that the documents were ‘the single most important weapon against TDN13’.

The applicant was successful in preventing these documents from being destroyed and removed from the Court in an urgent ex parte application in April 2017 and Master McCloud, at that time, made an order for the application to come before the court by way of a hearing, for further consideration.

At this hearing, earlier this month, the matter of The Forum having access to these documents was discussed. As interested parties Cape was given notice of this application and informed the court they wished to make submissions against the application of The Forum. Master McCloud agreed that they should be allowed to address the court.

As such the substantive hearing was listed for October 2017.

Master McCloud made no order as to costs as the application was made in the public interest.

The full judgment can be accessed here. We will continue to report on any developments in future editions of BC Disease News.

Precedent H Costs Inconsistencies: Woodburn v Thomas (Costs budgeting) [2017] EWHC B16 (Costs)

On 11 August, judgment was handed down from the Senior Courts Costs Office on a matter concerning the structure of Bills of Costs, when Precedent H cost budgeting applies, as well as subsequent impacts on detailed assessment, where interpretive inconsistencies of governing legal provisions arose.

An order, with respect to budgeted costs, was made on 18 May 2016, by District Judge Avant in the Central London County Court. A further CMC, listed for 6 December, was then aborted, on the day of the conference, since the Court was not supplied with the case’s file, leaving parties without substantive progress or a revised or agreed budget. Shortly after, the matter was settled.

Problems then arose, regarding the way that the Bill of Costs was drafted by the claimant’s Costs Lawyer. Precedent H costs separate fees claimed on a phase by phase basis, of which each phase has a budgeted limit. As recently as last week, we discussed the relevance of departing from a Costs Management Order at detailed assessment, since ‘good reason’ is required once agreement on budgeted costs has been reached.

The predominant issue in this case surrounded the allocation of Precedent H budgeted costs in Case Management Conference (CMC), Pre-Trial Review (PTR) and ‘non-phase’ segments of the Bill of Costs, namely, whether there should be ‘wholly’ and ‘exclusive’ correspondence, in order to prevent the need for cumbersome, ‘item by item’ resolution.

In Woodburn, the claimant’s costs Lawyer included all of the CMC-related costs, except costs budgeting and case management-related fees, which were placed in a separate ‘non-phase’ section of the Bill of Costs. ‘Non-phase’ items were attributed to categories within CPR Practice Direction 3E, paragraph 7.2, underlined below:

7.2 Save in exceptional circumstances:
   (a) the recoverable costs of initially completing Precedent H shall not exceed the higher of £1,000 or 1% of the approved or agreed budget; and
   (b) all other recoverable costs of the budgeting and costs management process shall not exceed 2% of the approved or agreed budget.

7.3 If the budgeted costs or incurred costs are agreed between all parties, the court will record the extent of such agreement. In so far as the budgeted costs are not agreed, the court will review them and, after making any appropriate revisions, record its approval of those budgeted costs. The court’s approval will relate only to the total figures for budgeted costs of each phase of the proceedings, although in the course of its review, the court may have regard to the constituent elements of each total figure. When reviewing budgeted costs, the court will not undertake a detailed assessment in advance, but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs.

The motivation behind the receiving party’s decision to separate all costs affiliated with costs budgeting and case management from the ‘CMC phase’ of the Bill of Costs, relied on the decision of Costs Judge, Master Gordon-Saker, in BP v Cardiff & Vale University Local Health Board [2015] EWHC B13 (Costs):
‘On a detailed assessment it will be necessary to identify (a) the costs of initially completing Precedent H and (b) all other costs of the budgeting and costs management process. Where a costs management order has been made and the receiving party’s budget has been agreed by the paying party or approved by the court it will be both necessary and convenient that the bill be divided so as to identify the costs of initially completing Precedent H and the other costs of the budgeting and costs management process, unless those costs can be clearly identified in some other way.’

However, the defendant, who would be the paying party, submitted that many of the ‘non-phase’ costs were included in the ‘CMC phase’ of the Precedent H budget, in line with the Guidance Note, and should therefore have appeared in the ‘CMC phase’ of the Bill of Costs, which was exceeding the budgeted limit in any event.

Indeed, at paragraph of Practice Direction 3E, it states (see underlined text):

6.

(e) Unless the court otherwise orders, a budget must be in the form of Precedent H annexed to this Practice Direction. It must be in landscape format with an easily legible typeface. In substantial cases, the court may direct that budgets be limited initially to part only of the proceedings and subsequently extended to cover the whole proceedings. A budget must be dated and verified by a statement of truth signed by a senior legal representative of the party.

(b) Parties must follow the Precedent H Guidance Note in all respects.

(c) In cases where a party’s budgeted costs do not exceed £25,000 or the value of the claim as stated on the claim form is less than £50,000, the parties must only use the first page of Precedent H.

Moreover, paragraph 4 of the Precedent H Guidance Note directs, if read narrowly:

4. This table identifies where within the budget form the various items of work, in so far as they are required by the circumstances of your case, should be included.

The table, annexed to the Guidance Note, lists relevant ‘phase assumptions’ (see underlined for assumptions at play in Woodburn):

<table>
<thead>
<tr>
<th>CASE MANAGEMENT CONFERENCE</th>
<th></th>
<th>Subsequent CMCs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Completion of DQs</td>
<td>Arranging a CMC</td>
<td>Preparation of costs budget for first CMC</td>
</tr>
<tr>
<td></td>
<td>Reviewing opponent’s budget</td>
<td>(this will be inserted in the approved budget)</td>
</tr>
<tr>
<td></td>
<td>Correspondence with opponent to agree directions and budgets, where possible</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Preparation for, and attendance at, the CMC</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Finalising the order</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>PRE-TRIAL REVIEW</th>
<th></th>
<th>Assembling and/or copying the bundle</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bundle</td>
<td>Preparation of updated costs budgets and reviewing opponent’s budget</td>
<td>(this is not the examiners’ work)</td>
</tr>
<tr>
<td></td>
<td>Preparing and agreeing chronology, case summary and dramatics personae (if ordered and not already prepared earlier in case)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Completing and filing pre-trial</td>
<td></td>
</tr>
<tr>
<td></td>
<td>checklists</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Correspondence with opponent to agree directions and costs budgets, if possible</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Preparation for and attendance at the PTR</td>
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</tr>
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</table>
At detailed assessment, Master Victoria McCloud, sitting as Deputy Costs Judge at the Senior Courts Costs Office, considered the inconsistencies between Precedent H Guidance and Practice Directions, which seemed to factor costs budgeting and case management costs within the remit of Precedent H ‘CMC’ and ‘PTR’ phases, and the guidance of Master Gordon-Saker in BP.

The judge deemed the ‘assumptions’ in Precedent H Guidance to be the starting point. She diminished the significance of the ordinary meaning of ‘guidance’, at paragraph 4, considering:

‘... the requirement in the PD that it must be followed in all respects, which at face value elevates it beyond guidance and into the realm of that which must be obeyed in all respects, the meaning is nonetheless clear enough: in drafting the Precedent H the costs lawyer should follow the Guidance. An unspecified sanction could presumably result from breach if the Costs Judge disapproved of a departure from the Guidance’.

Inclining ‘to the narrow view’ of paragraph 4 of the Guidance Note, Master McCloud reasoned that the assumptions on which a budget is approved, or agreed, is the ‘best guide’ as to how costs should be set out in the Bill of costs, so to ameliorate any future uncertainty over ‘what goes where and how to treat it’, such as which budget limit costs are effective. This would mean ensuring that the Bill phases were identical to the Precedent H phases.

Although the Deputy Costs Judge ‘did not purport to suggest that the approach is the only, or the ideal approach to take but only that it is the approach which was taken here’, she held, at paragraph 21:

‘I therefore directed that the items in the ‘non phase’ part of the Bill which fell within the CMC phase assumptions of the approved Precedent H (and Guidance) should be treated as if they had been pleaded in the CMC phase of the Bill, and that all other costs of costs budgeting and costs management should remain in the non-phase part of the Bill and be subject to the 2% (and 1%, as appropriate) caps’.

Concluding her judgment, Master McCloud emphasised, at paragraphs 23 and 24:

‘The above approach is not ideal. Whilst it ensures that the CMC budget phase matches exactly the Bill CMC phase, it has the undesirable effect of dividing the costs budgeting costs into two parts (those subsumed into the CMC budgeted phase and those in the ‘non phase’, non-budgeted part of the Bill). Separating those in that way then arguably causes difficulties in application of the 2% cap on budgeting costs, and in this judgment I was not asked to rule on the question as to whether the costs budgeting costs in the CMC phase were subject to the budget for that phase only, or whether they were subject to both the phase budget and the 2% cap.

It may be helpful for the Rules Committee to consider whether the Guidance for Precedent H should stipulate a simple solution, namely that any costs referable to costs budgeting and costs management are not to be included in the Precedent H other than for the purposes of the 1% and 2% caps on budgeting costs. Taking that approach would mean that CMC budgets would be as their name suggests, budgets for case management conferences and case management, and not the costs management aspects of the case, which (consistently with the Senior Costs Judge’s guidance in BP v Cardiff & Vale University Local Health Board) could helpfully be spelled out in one clear part of the Bill to which the relevant percentage cap can easily be applied’.

The full judgment can be accessed here.

Defective Service? Batt v English (2017), Winchester County Court (unreported)

On 3 March, Winchester County Court handed down judgment on the case of Batt v English, which overturned a first instance decision to strike out a claim on the basis of defective service of the claim form. This case is important for discerning the lengths to which a Solicitor must confirm details of instruction, when an action involves both an insured and an insurer on the same side of litigation.

The claimant, Mr Nicholas Batt was injured in a road traffic accident on 15 January 2013. Correspondence then began between the defendant and claimant Solicitor, initially with a letter from the defendant Solicitor, on 30 October, stating:

“Dear Sirs,

Our Client Lee English – Your Client Mr Nicholas James Batt
Date of Incident: 15 January 2013

We are instructed by Aviva Insurance Limited to act on behalf of the defendant.”

Later in the line of correspondence, on 6 May 2015, another letter from the solicitor read:

“Dear Sirs,

Our Client Lee English – Your Client Mr Nicholas James Batt
Date of Incident: 15 January 2013

We refer to the above matter. Liability for the accident is disputed and your client is put to proof as to how this accident occurred.

We are instructed to accept service of proceedings on behalf of Aviva Insurance Limited. Please quote the above reference.

Yours faithfully.”
As can be observed in the written messages between parties, the defendant consistently referred to their client as Lee English, the defendant insured in the case, although the defendant Solicitor’s client was, despite never stating as much, Aviva, the insurer.

Proceedings were issued on 17 January 2016, after which, the claimant, who had instructed new solicitors, served the claim form, on 11 May.

Subsequently, on 2 June, the defendant issued an application notice, seeking relief from the action, on this basis:

“The claimant’s claim be struck out because the claim form and particular of claim were not correctly served pursuant to CPR 6.7 in that the claimant was not in receipt of the written notification that DAC Beecroft Claims Limited were instructed to accept service of proceedings on behalf of Mr Lee English.”

In response, on 26 July, the claimant submitted a cross-application, arguing:

“That under CPR 6.15(2) the steps already taken by the claimant represent good service of the claim form and particulars of claim; (2) Under CPR 6.16 service of the claim form, etc, be dispensed with.”

On 9 November, Deputy District Judge Smith, at first instance, struck out the claim, on the basis that there had been defective service, and decided against using their discretion to remedy ‘good service’.

The claimant was granted permission to appeal against the decision:

“Permission to appeal is granted. The grounds of appeal are certainly arguable. The letter from the solicitors appointed by insurers to act for the defendant, dated 6 May 2015 ought to be the subject of careful scrutiny on appeal.”

On appeal at Winchester County Court, Recorder Davidson, on first impression, perceived the application to be ‘a little surprising’, since a claim, served against the defendant, within the limitation period, without prejudice, being struck out, seemed, ‘on the face of it’ to be ‘odd’.

Analysing CPR 11 (displayed above), regarding jurisdiction of the Court, the Recorder approved of the ‘nuanced’ and ‘common sense’ approach taken at first influence by the Deputy District Judge, who decided against taking a ‘strict’, ‘black letter law’ reading of the law on application notices and rejected the claimant’s submission that application notices must ‘specifically recite or at least expressly refer to, CPR 11’.

As to the main issue at hand, i.e. whether service was defective, the letter, sent on 6 May 2015, was most relevant. Did the admission that the defendant solicitor was instructed to accept service on behalf of Aviva, their client, mean that they were also instructed on behalf of the defendant?
Between paragraphs 6 and 10 of her judgment, the Deputy District Judge reasoned:

"Insurance law is highly complex, and I do not pretend to understand its intricacies, but I do know that insurers and insured are different entities. I accept that there are often joint retainers in relation to instructions that are given to solicitors, and I accept that, ultimately, many claims are subrogated ones, but that does not depart from the fundamental rule that they are separate entities that have, at times, both different perspectives and can part company at any point during litigation. To that extent, they are never, and should never, be considered to be one and the same."

However, on appeal, Recorder Davidson took issue with the Deputy District Judge’s assertion that instruction to accept service on behalf of an insurer, by virtue of the fact that they are a separate ‘legal entity’, would mean exactly that and nothing more. Since insurers commonly exercise their rights of subrogation to defend claims against insured parties, restrictions imposed on instruction, which had not been explicitly corresponded in this scenario, ‘would be highly unusual’. It is worth noting also that the claimant Solicitor never threatened to bring a separate claim against Aviva as opposed to, or in addition, to the claim brought against the defendant.

Supporting this position, the Recorder utilised a witness statement, quoting a partner of the defendant Solicitor as saying:

"This firm confirmed that we were instructed on behalf of Aviva to act on behalf of the defendant, Mr English. This is by virtue of the right of subrogation under the motor insurance policy, and is standard matters in insurance matters. It is correct that throughout correspondence Mr English has been named as our client."

This was, therefore, not an example of a case where the insurer and insured would be acting separately, and thus:

'...instructions to accept service on behalf of Aviva, plainly meant Aviva “standing in the shoes of” the defendant.'

"6.7-(1) solicitor within the jurisdiction: subject to Rule 6.8(1), where — (b) a solicitor acting for the defendant has notified the claimant in writing that the solicitor is instructed by the defendant to accept service of the claim form on behalf of the defendant at a business address within the jurisdiction the claim form must be served at the business address of that solicitor.”

Held, at paragraphs 26 to 28:

The correct construction of the 6th May 2015 letter is not that DAC were instructed to accept service on behalf of the defendant as well as Aviva. The correct instruction is that they were instructed to accept service on behalf of the defendant because it was exclusively in their capacity as subrogated to the defence of the claim that Aviva were essentially acting. I say essentially, because whatever may have been happening behind the scenes between Aviva and their insured is, so far as CPR 6.7(1)(b) is concerned, simply irrelevant. It follows that that Rule was engaged, and service on DAC was both mandatory and good service.

In the light of those findings the issue whether to order that the steps taken to bring the claim form to the attention of the defendant should stand as good service under CPR 6.15(2) does not arise. If it did, it would be necessary for me to identify some error on the part of the deputy district judge in applying that Rule, and, indeed, CPR 6.16, which was, somewhat optimistically, also raised. She approached this part of her decision in a way that it is not possible to fault, and I would dismiss part of the appeal.

Overall, the result of my rulings is that the appeal must be allowed, and the decision of the deputy district judge set aside, and that is what I do.

The full judgment can be accessed here.
INTRODUCTION

We discussed last week, the Court of Appeal’s decision in the asbestos related lung cancer claim of Blackmore v The Department for Communities and Local Government [2017] EWCA Civ 1136, in which the defendant sought to appeal the reduction made to the claimant’s damages award to account for the deceased’s smoking.

This week we take a closer look at some of the arguments put forward by both sides and consider the issues surrounding contributory negligence in asbestos related lung cancer claims.

BACKGROUND

It is well established that smoking causes lung cancer. As a result, in cases of asbestos related lung cancers where there has been a significant smoking history post 1971 (when the first health warnings were put on cigarette packets), deductions of 20-30% in compensation are usual to reflect contributory negligence. In Blackmore, at first instance, the deceased had died as a result of asbestos related lung cancer but had been a heavy smoker for the majority of his life, consequentially a reduction in damages of 30% was made to reflect the deceased’s contributory negligence.

The facts of Blackmore were that the deceased was employed between 1966 and 1986 by the appellant’s predecessor departments in the Devonport Dockyard as a general decorator. His work involved significant contact with asbestos fibres, including clearing off asbestos from pipework and the preparation and stripping of asbestos in factories. Approximately 20% of his working time was spent in conditions where there was asbestos dust. At no time during the 20 years was he provided with a dust mask or any protective equipment.

Additionally, the deceased started smoking in 1950 when aged 14. He smoked around 20 cigarettes a day, until roughly 2005 when he cut down to about 12 cigarettes a day. He tried to give up on two occasions but was unable to do so. In 1976 he was advised to stop smoking after a spontaneous pneumothorax in his left lung, a condition which later resolved.

His lung cancer became symptomatic in 2009 and he died on 28 October 2010 aged 74 years. Mineral fibre analysis of the lungs post mortem indicated a quantity of total retained asbestos fibre count above the level at which the risk of contracting lung cancer doubles.

Claims in negligence and breach of statutory duty were brought by the estate of the deceased against the defendant who subsequently conceded causation and primary liability for death. Damages were agreed under the Law Reform (Miscellaneous Provisions) Act 1934 and the Fatal Accidents Act 1976 in the sum of £118,460.57. The case at first instance was relating entirely to the issue of what apportionment, if any, there should be for contributory negligence under s.1 of the Law Reform (Contributory Negligence) Act 1945. This provision states:

‘1. Apportionment of liability in case of contributory negligence

Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage’.

As such, at first instance, Judge Cotter identified the specific issues requiring determination, as follows:

1. What were the relative contributions to the deceased’s death of smoking and asbestos exposure?
2. Is the court entitled or bound to calculate the deduction for contributory negligence by reference to a mathematical calculation as to relative contribution to risk?
It was agreed between the experts instructed on behalf of the claimant and the defendant, that:

1. Death was caused by the combined effects of smoking and exposure to asbestos.
2. Tobacco smoke is the most common cause of cancer of the lungs. Exposure to asbestos is the second most common cause. Further, given his history of smoking, the deceased’s relative risk of developing adenocarcinoma of the lung was tenfold that of a non-smoker.
3. Tobacco smoke and asbestos exposure work in a synergistic manner in the causation of lung cancer and the precise cellular mechanisms of this synergy are not fully understood.
4. By reason of this synergy the deceased’s risk of the development of lung cancer as a smoker exposed to asbestos was greater than a simple additive effect. Rather, the approach should be multiplicative.

However, the main area of dispute between the experts was in relation to the relative contribution to risk made by smoking and exposure to asbestos. The defendant’s expert used epidemiological evidence to contend that the claimant’s smoking was the overwhelmingly more significant contributor to the risk of him developing lung cancer. Indeed, even after discounting the first 25 years of smoking – which occurred at time when the claimant could not have been regarded as knowing the dangers (because of the level of scientific knowledge at the time) – smoking caused 90% of the claimant’s cancer risk. The remaining 10% risk was attributable to the exposure to asbestos. The defendant contended that a commensurately large deduction to the damages ought to have been made for contributory negligence, namely a deduction of 85% or 90%.

The court rejected that argument on two principal grounds. Firstly, it criticised the basis of the defendant’s figures. The judge accepted criticism directed at the defendant’s expert that his figures were unreasonably precise. Secondly, and more importantly, the defendant’s argument was rejected on the basis of a review of the law of contributory negligence.

The judge found that the negligent smoking (after the first 25 years) was between two and three times more potent a cause of the claimant’s cancer than his exposure to asbestos. As to the law on contributory negligence, the judge emphasised that assessment of contributory negligence is a jury question, rather than one which relies on identifying the precise degree of contribution to an injury. The exercise comprised two components; first, considering the level of causative potency of the claimant’s actions, and, secondly, considering the overall relative blameworthiness between the claimant and the defendant. In this regard, the judge noted that when blameworthiness is considered it would usually be wrong axiomatically to give equal weight to a breach of statutory duty on the one hand and a claimant’s own failures on the other. The judge observed, echoing MacKay J, in Shortell:

‘...that the defendant should bear the lion’s share of responsibility in a case of prolonged breaches of statutory duty such as this is a proposition which does not give me pause’.

Bearing this in mind, the court emphasised the policy considerations behind imposing statutory duties on and employers and noted that they had been repeatedly breached by the defendant. Relatively, the claimant’s actions were morally less blameworthy. This he said was due to the impact of the early ‘innocent’ years of smoking, which, had increased the risk of lung cancer significantly. The judge found that the years of innocent smoking presented a continuing risk which should properly reduce the risk factor attributable to the subsequent 35 years of ‘guilty’ smoking.

The judge expressed his conclusion on contributory negligence as follows:

‘Here the claimant was a smoker long before he commenced employment with the defendant and long before it was known to be a hazard to health. He does not have an extensive history of having been advised to stop, tried to give up smoking twice and eventually cut down. Although the risk from smoking was probably between double and treble the risk of asbestos, having considered all relevant features I assess the degree of contributory negligence on the facts of this case at 30%’.

Against those findings, the court ruled there would be a 30% deduction from the claimant’s damages on account of his contributory negligence in smoking after the risks were well known. This is somewhat higher than the deduction in earlier cases. For example, in Badger v Ministry of Defence [2005] EWHC 2941 (QB) the deduction was 25%, while in Shortell v Bical (QBD, 16 May 2008) the deduction was 20%.

THE APPEAL

The defendant appealed this order on the following grounds:

‘The conclusion when considering the amount of contributory negligence that the defendant should bear the lion’s share of responsibility even where the court concludes that the evidence shows that the claimant’s smoking was a greater contribution to the cancer than asbestos exposure is wrong in law’.
As such, the appeal was not seeking to challenge the conclusion of HHJ Cotter Q.C that the relative contributions to the increase of risk were higher for smoking than for asbestos — instead they sought to argue that the judge had failed to translate that risk directly into an apportionment of liability on ground of contributory negligence under the Law Reform (Contributory Negligence) Act 1945. The defendant felt that this should have been reflected in a higher reduction than 30% as ‘the reduction in the claimant’s damages of 30% is less than half of the actual contribution that the court found he had made to the relative risk of contracting cancer through his smoking’.

So the question before the Court of Appeal was whether the defendant was justified in seeking to limit the concept of responsibility under section 1 of the 1945 Act to considerations of causation alone, excluding considerations of blameworthiness in the circumstances of this case.

What does responsibility mean in the context of section 1?

In order to answer this question, the Court looked back at the authorities and noted that, from an early stage, responsibility has been a broad concept which includes consideration of both causation and blameworthiness. The case of Davies v Swan Motor Co [1949] 2 KB 291, was relied upon to support this statement in which Denning LJ observed:

‘Whilst causation is the decisive factor in determining whether there should be a reduced amount payable to the plaintiff, nevertheless, the amount of the reduction does not depend solely on the degree of causation. The amount of the reduction is such an amount as may be found by the court to be ‘just and equitable’ having regard to the claimant’s “share in the responsibility” for the damage. This involves a consideration, not only of the causative potency of a particular factor, but also of its blameworthiness. The fact of standing on the steps of the dustcart is just as potent a factor in causing damage, whether the person standing there be a servant acting negligently in the course of his employment or a boy in play or a youth doing it for a lark: but the degree of blameworthiness may be very different’.

Despite this obvious inclusion of the consideration of blameworthiness, the defendant sought to distinguish the present case on the grounds that blameworthiness should come into play in determining responsibility arising from contributory negligence only where the fault of the claimant falls within the scope of the very act which the employer or tortfeasors is expected to guard against.

Lord Justice Lloyd Jones, rejected this argument and held at para 25:

‘However, I can see no reason in principle for drawing a general distinction between a claimant who contributes to his injury by conduct related to his work and one who contributes to his injury by conduct unrelated to his work. The concept of responsibility under section 1, incorporating tests of causative effect and blameworthiness, is broad enough and flexible enough to cover both situations and to give effect to the competing considerations in any given situation. While it may well be appropriate in a given case to accord less weight to contributory negligence arising in the context of the tortfeasor’s duty e.g. a failure to wear a protective mask, I do not consider that it is possible to construct a general principle that in all cases greater weight should be attributed to negligent conduct outside the scope of the employer/employee relationship. Whether it is appropriate to do so will depend on the facts of each case’.

Causation

The main thrust of the defendant’s submissions came in relation to the comparison between the apportionment of liability under the 1945 Act and the extent of recoverability under the principle established in Fairchild v Glenhaven Funeral Services Ltd [2003] 1 AC 32 and developed in Barker v Corus Uk Ltd [2006] 2 AC 572.

Let us briefly remind ourselves of the different tests of causation and how these apply to asbestos related lung cancer.

There are three well-recognised legal tests of causation that are adopted in personal injury claims. The first, and traditional test, is the ‘but for’ test. Here, the courts ask whether, on the balance of probabilities, the claimant can establish that but for the breach of duty the injury or disease would not have occurred. The second test is the test of material contribution, which was first applied in Bonnington Castings Ltd v Wardlaw [1956] AC 613, a case that concerned pneumoconiosis resulting from exposure to silica dust from two concurrent sources, one of which was tortious and the other innocent. It was not possible to determine which source had resulted in the disease on the traditional but for basis, indeed the two sources had acted cumulatively to cause the disease. But it was clear that the tortious exposure had materially contributed to the disease, for without it the claimant may not have developed the disease when he did or at all. The House of Lords accepted that in cases where there are multiple sources of exposure to the same causative agent, causation is satisfied when the tortious exposure made a material contribution to the disease.
The third test of causation, the ‘Fairchild’ test, is more limited in scope, applied initially to claims for mesothelioma. In *Fairchild v Glenhaven Funeral Services Ltd*[2003] 1 AC 32 the House of Lords accepted a relaxation of the but for test so that causation would be satisfied where a defendant’s tortious activity materially increased the risk of mesothelioma occurring.

The *Fairchild* test was subsequently extended by *Barker v Corus* so that multiple defendants would not be liable in full but only to the extent that their culpable exposure had contributed to the risk of disease – in other words, damages could be apportioned. This was reversed (for mesothelioma claims only) by the Compensation Act 2006 which provided that:

‘... when a victim contracts mesothelioma each person who has, in breach of duty, been responsible for exposing the victim to a significant quantity of asbestos dust and thus creating a “material increase in risk” of the victim contracting the disease will be held to be jointly and severally liable for causing the disease’.

Whilst the *Fairchild* principle was initially applicable to only mesothelioma claims, the Court of Appeal in *Heneghan v Manchester Dry Docks Ltd and Ors*[2016] EWCA Civ 86, extended this to asbestos related lung cancer claims – although the Compensation Act 2006 has not been amended and therefore, defendants will not be held jointly and severally liable in asbestos related lung cancer claims.

Before the *Fairchild* principle was extended beyond mesothelioma, the courts had difficulty determining which test of causation to apply in lung cancer cases. This is because science does not presently permit ready identification of the cause of cancer since its development is fundamentally random. But science has identified certain exposures which are likely to increase the risk of certain cancers developing.

How then were the courts to approach causation in cases where the claimant had been tortiously exposed to a substance that is known to significantly increase the risk of cancer, but where the claimant could not show that their cancer would have occurred ‘but for’ the exposure?

In the present case, liability was admitted by the defendant on the basis of the doubling of the risk principle which uses epidemiological data to determine causation on the balance of probabilities where medical science does not permit determination with certainty of how the injury was caused. Epidemiology is the science of studying populations and the incidence of diseases within populations. It establishes, firstly, the underlying incidence of a disease in a non-exposed population and then, secondly, the incidence of disease in an exposed population. It allows the presentation of relative risk (RR) ratios: if an individual is as likely to develop a condition as the rest of the population then it is said the RR is 1.0. If an individual has been exposed to substance that increases the risk of a condition by 60%, the RR is 1.6. Thus the doubles the risk test asks if an individual is more than 100% more likely to develop a condition compared with the rest of the population.

As we outlined above, it was accepted at first instance, based on the epidemiology that the deceased’s smoking in *Blackmore* had been a greater contributor to the cancer than the defendant’s negligent exposure.

The defendant’s main argument came in relation to these differing tests of causation. It was submitted that it would be irregular for an employer liable under the *Fairchild* principle to be liable only to the extent that his conduct contributed to the increase in risk whereas an employer liable under the doubling the risk test in a case where there was contributory negligence would be subject to a less favourable basis of apportionment between him and the claimant which took account not only of causation but also of blameworthiness.

Rejecting this argument, LJ Lloyd Jones stated at para 33:

‘... I am satisfied that Mr.Fortt’s submission is flawed because it is based on a false analogy. The *Fairchild* principle applies in certain cases where a claimant cannot prove causation of damage and, exceptionally, established liability by reference to each defendant’s contribution the increase in the risk of the damage occurring. *Barker v Corus* established that liability under this principle is several as opposed to joint and several. Accordingly, each defendant is liable only to the extent that he has caused an increase in the risk of the damage occurring. As a result, questions of contributory negligence never arise...by contrast, liability on the basis of doubling the risk is founded on orthodox principles of causation. It proceeds by drawing an inference from the increase in risk of contracting the disease that the agent in question was a cause of the disease. (Novartis Grimsby Ltd v John Cookson [2001] EWCA Civ 1261 per Janet Smith LJ at [74]; *Heneghan* per Lord Dyson MR at [8]) Where liability is established in this way, a defendant who has made a material contribution to the damage is, prima facie, liable for the full extent of the damage suffered (Bonnington Castings Ltd v Wardlaw [1956] AC 613). It is at this point that questions of contributory negligence may arise’.

He went on to conclude at para 35:
There is therefore to my mind, no inconsistency between liability under the Fairchild principle, which is limited to the contribution made by the tortfeasor to the increase in risk of contracting the disease and where contributory negligence does not arise, and liability under the doubling the risk principle, where the tortfeasor has made a material contribution to the damage and is liable for the full extent of the loss subject to contributory negligence. I can, therefore, see no good reason, when determining responsibility under section 1 of the 1945 Act in cases such as the present, to limit consideration to matters of causation or to deny any role to blameworthiness.

So now it has been confirmed that blameworthiness is a factor to be taken into consideration, what is the correct approach to contributory negligence?

Contributory Negligence

Giving judgment, Lord Justice Lloyd Jones concluded that the correct approach to the assessment of contributory negligence was that summarised in Badger v Ministry of Defence [2005] EWHC 2941, in which Stanley Burnton J stated:

‘… Once contributory negligence has been established, the court must take into account both the extent of the claimant’s responsibility for his injury and damage and the blameworthiness of his conduct as opposed to that of the defendant in deciding on the reduction in damages that is just and equitable. The decision as to the appropriate reduction in the claimant’s damages is to be dealt with in a broad, jury like and common sense way: …’

Commenting on the case before him, LJ Jones stated at para 39:

‘In carrying out the apportionment exercise under section 1 of the 1945 Act the judge in the present case gave what I consider to be appropriate weight to all of the competing considerations and underlying policies. Had his approach been limited to an assessment of relative contributions to causation, it would necessarily have failed to differentiate between the blameworthiness of the employer in exposing employees to asbestos and that of the employee in smoking.

I agree with the judge that such an approach would have been wrong in principle. There is a particular policy underlying Parliament’s strict prohibition of the exposure of workers to asbestos and other harmful substances which needs to be reflected in the apportionment of responsibility. Here the judge was right to give very considerable weight to the blameworthiness of the employer in exposing its employee to asbestos in breach of a strict statutory duty in circumstances where the dangers of asbestos to health were well known. By comparison, a lesser degree of blame attaches to the conduct of Mr. Blackmore in continuing to smoke after the dangers of smoking to health became known. Moreover, as the judge concluded, it was necessary to take account of the earlier period of innocent smoking and the medical uncertainty attaching to the impact and synergistic effect of that earlier period of innocent smoking. In all the circumstances, I consider that the judge’s apportionment of contributory negligence at 30% was well within the range of options open to him’.

As such the appeal was dismissed and the 30% reduction of the claimant’s damages was upheld.

CONCLUSION

What can we learn from this judgment about the approach to contributory negligence in asbestos related lung cancer claims?

Firstly, it is clear that the claimant’s contribution to the relative risk of disease will not be automatically translated into a reduction in damages for contributory negligence. This is for a number of reasons:

• The epidemiology used to calculate the relative risk posed by the claimant’s activity (in this case smoking) is not well suited to a precise percentage reduction;

• The claimant’s blameworthiness will also be taken into account which can reduce the reduction in damages that he will face. In this regard, the judge noted that when blameworthiness is considered it would usually be wrong axiomatically to give equal weight to a breach of statutory duty on the one hand and a claimant’s own failures on the other.

In this respect contributory negligence does differ to the Fairchild and Barker approach seen in multiple defendant lung cancer claims – where a defendant will be liable only for the portion of risk he is responsible for. However, it is clear from the judgment in Blackmore that this is an acceptable deviation.

It is therefore, unlikely, based on these decisions that we will see reductions for contributory negligence at a much higher rate than 30% in the near future.

The full judgment can be accessed here.

19 ‘Spinning class noise is 9 times higher than recommended’ (1 August 2017 Hear It) <http://www.hear-it.org/spinning-class-noise-9-times-higher-recommended-0> accessed 2 August 2017.


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