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BC LEGAL
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BC DISEASE NEWS

A WEEKLY DISEASE UPDATE

CONTENTS

Welcome

Welcome to this week's edition of BC Disease News.

In the last week it has been announced that Slater & Gordon have requested a suspension of their shares on the stock exchange. Elsewhere, the Court of Appeal has ruled, a party who beats a part 36 offer in a case where fixed fees apply is eligible for indemnity costs.

This week due to the amount of case law we have covered in this edition we do not include our usual feature. We have provided a case comment on the Supreme Court's decision in *Knauer v Ministry of Justice* [2016] UKSC 9 and this will be followed by a feature in next week's edition which will contain full worked examples of the impact the judgment will have on calculating fatal accident damages.

We also introduce **'***Heneghan Watch'* in which we provide a weekly market watch on the impact of the Court of Appeal's apportionment of damages in asbestos related lung cancer and whether there is pressure to reverse the decision's impact by amendment to the Compensation Act 2006. We reported last week that there was no response from the claimant community or asbestos support groups and that remains the case this week. We will continue to update you with any developments.

Any comments or feedback can be sent to Boris Cetnik or Charlotte Owen.

As always, warmest regards to all.

SUBJECTS

New Litigation Funder enters PI Market – S&G Share Suspension – Part 36 Offers and Fixed Fees – Fundamental Dishonesty in NIHL Claims – Challenge to Pre-LASPO Switch to CFA – Lord Thomas at Justice Select Committee – Case Comment: *Jockey Club Racecourse v Willmott Dixon Construction* – Supreme Court Decision: *Knauer v Ministry Of Justice*

Canadian Litigation Funder Enters UK PI Market

A Canadian law firm financier, BridgePoint Financial Group, has created a business, SpectraLegal, which claims it will lend at least £50million to personal injury firms this year.[1]

SpectraLegal, which is headquartered in Ireland, says it has the backing of major institutions including Royal Bank of Scotland. The 'Who We Are' section of the SpectraLegal website provides the following insight:

'*We launched SpectraLegal in 2015 to offer specialist finance to British law firms operating in a new legal landscape brought about by The Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act of 2012 coupled with caution from traditional lenders. LASPO mirrored the reforms enacted in Ontario in 2003, in which contingency fees (known as damages-based agreements in England and Wales) were introduced. With our Canadian roots, the adoption of the Ontario model means that we are uniquely positioned to understand the pressures and opportunities that UK law firms are now experiencing*'.

It is true that securing loans from traditional lenders has proven increasingly difficult for the PI sector in recent years, with the Jackson reforms and fixed costs eating into profits and turnover. SpectraLegal says it has already approved more than £10m in loans to a handful of firms since arriving in the UK last October. It appears SpectraLegal provide cash advances to firm's against their WIP ('monetising WIP') or against expected costs awards where a claim is concluded-so that recovery can be more robust without having to compromise for the sake of cash flow.

Whether these loan facilities provide solutions to cash-hungry law firms in the long term-or whether the addition of debt adds to any existing financial problems remains to be seen.

SpectraLegal have provided funding for the expansion plans of Pure Legal and its recent £13m acquisition of clinical negligence specialist Pryers in December. Many readers will be aware that Pure Legal, headed by Phil Hodgkinson, the former CEO of Quindell, also has significant expansionist plans for the claimant NIHL market-see former editions, 100, 114, 115, 121, 127.

Slater & Gordon Suspend Shares on Stock Exchange

Slater & Gordon (S &G) currently holds around 12% of the UK personal injury market, however, since paying more than £600m for the legal arm of Quindell last year-predominantly for NIHL claims-the company has faced crisis after crisis. Firstly, the Financial Conduct Authority announced that it was conducting an investigation into the UK company's historic accounting practice, and then the Serious Fraud Office launched a criminal investigation into Quindell due to exaggerated profit predictions. Serious concerns have been raised about the quality of the NIHL claims that S & G has bought. All this precipitated a share price tumble of 17% in a single day, 40% in five days which was followed by a 90% fall within a year.[2]

Next, came the news that two Australian firms have begun mounting a class action on behalf of shareholders of S&G following accusations that it misled the market over the capital raising to acquire Quindell's legal arm and over its profit forecasting for 2016 financial year.

At the beginning of this year, S&G lenders invited independent auditors to scrutinise its accounts after S&G admitted that it was downgrading its profit forecasts after slower case resolutions than expected.

In the last month we have reported on announced redundancies at S & G and also the exiting of their head of UK operations, Neil Kinsella. Shortly after this, S&G announced that they are in discussions with consultants FTI Consulting over debt restructuring in an attempt to fix its financial health. We now report that this week Slater & Gordon have asked for their shares on the stock exchange to be suspended. [3]

There are a number of reasons that a company might request a suspension, for example, if a company is about to announce news of material significance to investors and it fears that a disorderly market may be created by a leak, it can ask the stock exchange to suspend trading in its shares until after the announcement. Additionally, a suspension may be requested where unusually bad news is to be announced.

S & G has made the request ahead of the announcement of its financial results for the second half of 2015 next week. In a letter to the exchange this week, company secretary Moana Weir explained: '*The reason for the request is that there are certain material items in the half-year results which are not yet finalised, including, as foreshadowed in December, testing and assessment of the goodwill values for impairment of the UK business. Slater & Gordon continues to work with its auditors and external advisers to finalise and confirm those material items, and is not in a position to make an announcement until that work is concluded*.'[4]

Weir added that the benefit of entering into a voluntary suspension would allow the firm to '*manage its continuous disclosure obligations in relation to the above matters and to avoid trading in its shares happening on a basis that is not reasonably informed*'.
It has been predicted elsewhere that S & G will write down the entire $710million (USD) in goodwill acquired in the Quindell transaction which is more than double the company's $292 million (USD) market capitalisation.[5]
So what does this mean?

When the value of acquired goodwill goes down, it is generally due to decreased brand value, negative market information about the acquired or the need to adjust for overpaying for the acquired goodwill.
Is the acquisition of Quindell and their huge reservoir of NIHL claims partly responsible for share suspension?

Could we see S&G extracting themselves from the NIHL claims market? Will anyone else buy the former Quindell NIHL claims?

Beating a Part 36 Offer Where Fixed Fees Apply

A party who beats a part 36 offer in a case where fixed fees apply is eligible for indemnity costs, the Court of Appeal ruled this week following conflicting decision at circuit judge level.[6]

The decision of *Broadhurst & Anor v Tam & Anor* [2016] EWCA Civ 94, dealt with two cases started under the RTA protocol where successful part 36 offers were made.

In Broadhurst, HHJ Robinson in Sheffield ruled that part 36 applied but there was no difference between profit costs assessed on the indemnity basis and the fixed costs prescribed by Table 6 of rule 45.29C.

In Smith, HHJ Freedman in Newcastle-upon-Tyne also held that part 36 applied but did not equate indemnity costs with fixed costs.

Giving the judgment of the court, the Master of the Rolls, Lord Dyson, analysed the respective provisions of parts 36 and 45, and concluded that as a 'straightforward matter of interpretation' there was no doubt as to their true meaning: 'The tension is clearly resolved in favour of rule 36.14A.' (This rule has been removed from CPR r.36.)

This was supported, he said, by the fact that: '*Where there is an intention for only fixed costs to be recoverable under part 36, part 36 has been modified to make this clear*'. He also stated that, were it needed, the explanatory memorandum to the 2013 changes to part 36 which went before Parliament could be used as an aid to interpretation. The explanatory memorandum states:

'If a defendant refuses a claimant's offer to settle and the court subsequently awards the claimant damages which are greater than or equal to the sum they were prepared to accept in the settlement, the claimant will not be limited to receiving his fixed costs, but will be entitled to costs assessed on the indemnity basis in accordance with rule 36.14'.

Lord Dyson went on to describe indemnity and fixed costs as conceptually different, stating:

'Judge Robinson considered that Parliament could not have intended that a claimant should recover indemnity costs in a section IIIA case because of the practical difficulties that such an interpretation would entail. I accept that there are bound to be some difficulties of assessment where the costs are partly fixed and partly assessed. But I also accept the submission of [Ben Williams QC, for the claimant argument] and the written submissions of [John] McQuater on behalf of the Association of Personal Injury Lawyers that these were overstated by Judge Robinson. Where a claimant makes a successful part 36 offer in a section IIIA case, he will be awarded fixed costs to the last staging point provided by rule 45.29C and Table 6B. He will then be awarded costs to be assessed on the indemnity basis in addition from the date that the offer became effective. This does not require any apportionment. It will, however, lead to a generous outcome for the claimant. I do not regard this outcome as so surprising or so unfair to the defendant that it requires the court to equate fixed costs with costs assessed on the indemnity basis. As Mr Williams says, a generous outcome in such circumstances is consistent with rule 36.14(3) as a whole and its policy of providing claimants with generous incentives to make offers, and defendants with countervailing incentives to accept them…I am not persuaded that the problems identified by Judge Robinson, if they exist at all, are so serious that they cast doubt on the interpretation which I favour or that they justify the surprising conclusion that fixed costs are to be equated with assessed costs'.

As a result, the court allowed the appeal in *Broadhurst* and dismissed it in *Smith*. This decision will affect all litigants, but particularly those who use the RTA or EL/PL portals. The ramifications will be even wider felt if the recommendations of Lord Justice Jackson regarding fixed fees for all civil claims of a value up to £250,000.

Fundamental Dishonesty in NIHL Claims: James v Diamantek Limited

In the appeal decision of *James v Diamantek Limited,* it was found that a Claimant who had lied throughout his evidence about the provision of training and use of hearing protection, was fundamentally dishonest such that he lost his protection against paying the Defendant's costs of the action.[7]

Mr. James worked for the Defendant from 2003 to 2013. There was no issue that he worked in a noisy environment. The dispute throughout was whether he was provided with and wore hearing protection, which he denied in his letter of claim, medical report, Part 18 Replies and witness evidence.

At the end of cross examination at the original trial, the Claimant conceded that he 'had hearing protection 100% of the time, which he wore 100% of the time' for the last 7 years of his employment and part-time during the first three years. The District Judge dismissed his claim and rejected the Claimant's evidence in relation to the earlier period (of which there was no other evidence).

However, at an adjourned hearing, dealing with the issue of costs and whether the claimant had the benefit of costs protection under QOCS, the judge said '*I did find that he did not tell the truth on the day. I do not think that the fact that I did find that he did not tell the truth makes him a dishonest person. I think it is possible to be honest and not to tell the truth'*. And so QOCS protection remained intact.

The Defendant appealed the decision to the Designated Civil Judge in Coventry. In particular, the appeal turned on the misapplication of the relevant test under rule 44.16 whereby a claimant would lose the protection afforded by one-way costs shifting if the claim was found '*on the balance of probabilities to be fundamentally dishonest',* which the District Judge appeared to consider

required some assessment of the Claimant's character rather than the effect of the Claimant 's dishonesty on the claim (thus inconsistently with *Gosling v Hailo & Screwfix* and *Zimi v London Central Bus Company Ltd*). Secondly, the test that she appeared to set required higher standards of proof than that required for committal for contempt of court, which merely required proof of dishonesty and a lack of belief in the statement.

HHJ Gregory found that the judge had applied the wrong test, that her findings were that the Claimant had been dishonest and that the issue of the provision and use of hearing protection was fundamental to the Claimant's allegations, so the relevant test i.e. that the claimant had been found *'on the balance of probabilities to be fundamentally dishonest',* had been met. The Judge removed QOCS protection and awarded the Defendant's costs to be paid albeit discounted by ⅓ to reflect the Claimant's financial position.

Inconsistencies in claimant evidence arise all too regularly in NIHL claims and should be closely scrutinised and explored. Are the inconsistencies just due to difficulties in recollecting events from many years ago or an indication of a less than truthful history of exposure?

This decision shows the risks to NIHL claimants who lie in evidence and cavalierly pursue claims behind the perceived costs protection of QOCS.

[Readers may have seen an article from the claimant solicitors in this case published in the Law Society Gazette after trial and prior to the appeal suggesting that issues of fundamental dishonesty had no place in disease claims and that such a finding would be sought wherever the Defendant's evidence was preferred to that of the Claimant. The article can be accessed here. Counsel for the defendant, Douglas Cooper of Deans Court Chambers, has subsequently said,[8] that this article omits some of the material facts.]

High Court Allows Challenges to Pre-LASPO Switch to CFA

In the two recent decisions of *AH v Lewisham Hospital NHS Trust* [2016] EWHC B3 (Costs) and *Ramos v Oxford University NHS Trust* [2016] EWHC B4, the High Court has ruled against law firms who switched from legal aid to a conditional fee agreement (CFA) shortly before 1 April 2013, when LASPO restricted the right to recover success fees and ATE insurance premiums. [9]

In AH, Deputy Master Campbell at the Senior Courts Costs Office, heard that the claimant became seriously ill after day surgery, and was taken to intensive care, where she suffered a series of strokes and irreversible brain damage. She later accepted a defendant's part 36 offer of £325,000 plus a payment to the Compensation Recovery Unit of £26,400. The claimant solicitors claimed £32,350 for the success fee, £4,380 for counsel's success fee and £18,900 for the ATE insurance premium.

Deputy Master Campbell said the advice the claimant received from their solicitors was not just incomplete, but a 'very significant component' was missing. He stated:

'What the client should have been told was that 'if you move to a CFA you will forfeit immediately the right to an additional 10% of the general damages you recover, which we estimate could be £175,000, so as much as £17,500'. It was therefore advice that was unreasonable. By way of example, had the extra 10% been £175 and not £17,500 it would have had no bearing on the client's decision because it was de minimis, but where, as here, it could have been as much as £17,500, it is likely to have been a factor, if not the factor, critical in persuading the claimant whether or not to move from legal aid to a CFA'.

It was therefore concluded that as the claimant's decision was based on advice that was flawed in a material way, it was not objectively reasonable and the claims for the success fees and ATE premium therefore failed.

The case of *Ramos*, was heard by Master Leonard and involved a claimant that had suffered a brain injury at the age of 17, as a result of medical negligence by the defendant. The defendant had admitted breach of duty in May 2012 and the claim was settled in November 2014. Meanwhile, in February 2013, Mrs Ramos, the claimant's mother, signed a 'CFA Lite' and her legal aid certificate was discharged.

As in *AH*, Master Leonard found that the claimant was 'not in a position to make an informed choice about the change of funding from LSC to CFA/ATE', due to the lack of advice she received about the *Simmons v Castle* uplift in damages. It was also pointed out that the claimant solicitors were under an obligation to advise Mrs Ramos that she might have to pay part of all of her ATE premium which could have 'serious financial consequences'.

Online Courts, Court Fees and Fixed Fees: Lord Thomas Gives Evidence to Justice Select Committee

Lord Thomas has this week been answering questions about his annual report from MPs on the justice select committee.

During the session Lord Thomas discussed the proposal of Lord Justice Briggs earlier this year that an Online Court (OC) should become the compulsory starting point for money claims worth up to £25,000 and which would be designed for use by litigants without lawyers.

Lord Thomas indicated he was in favour of this proposition stating that the current civil justice system was designed for lawyers and must be redesigned so people can do it themselves although he did recognise that in some cases people did need 'legal assistance, but at a cost proportionate to the sums in issue'. He felt that the solution to this was the OC. Interestingly, he pointed

out that such a system would require primary legislation to underpin the operation of an OC as the CPR was too complicated and designed for lawyers and the system would need to 'start again'. The White Book would he said still be required for complex litigation.

He went on further to suggest that although the initial limit proposed by Briggs LJ was 'a lot of money', he said that if the limit worked, 'we can push it upwards'.

When asked about the plans of Lord Justice Jackson in relation to a grid of fixed fees for all civil claims worth up to £250,000 he said: 'The fixed costs regime is something we ought to expand. I suspect the way to deal with fixed costs is an incremental rise, and not just one big bang. I think people would find that uncomfortable and we would need to monitor how it's working'.

However in relation to court fees he stood by his position that more work needs to be carried out in order to strike the correct balance between what the public should pay and what the individual litigant should pay. He reiterated that he would be interested in having further discussions with the Ministry of Justice on this matter.

The Lord Chief Justice's Annual Report can be accessed here.

Case Comment: *Jockey Club Racecourse v Willmott Dixon Construction* [2016] EWHC 167 (TCC)

A part 36 offer which did not reflect an 'available outcome of the litigation' was nonetheless valid, the High Court has ruled. [10]

The claim was brought by the Jockey Club against developers Willmott Dixon over problems with the roof of a new grandstand at Epsom racecourse. The court heard that the roof of the new grandstand was damaged twice by strong winds – but not exceptionally so – in 2012, with further damage the following year.

The Jockey Club made an offer to settle in January 2015, on the basis that the defendant would 'accept liability to pay 95% of our client's claim for damages to be assessed'. Willmott Dixon made no response, and the 21-day period for acceptance expired.

Edwards-Stuart J said: 'This is not a case where there is any possibility of a reduction for contributory negligence. Either the defendant is liable for the full extent of the claimant's damages, as assessed or agreed, or it is not. Accordingly, a decision that the defendant is to pay 95% of the claimant's damages, as assessed or agreed, is not one that is open to the court. The offer, therefore, does not reflect a possible outcome, but is purely commercial'.

The judge said the 5% discount probably represented a reduction that the claimant was prepared to accept in order to achieve 'a certain and early outcome', but it 'probably' did not matter. 'All that is, or may be, relevant is that the offer did not reflect an available outcome of the litigation'.

The defendant argued that the Jockey Club did not make a valid offer.

Referring to the ruling of Mr Justice Henderson in *AB v CD* [2011] EWHC 602 (Ch), in which the judge said the concept of a settlement 'must, by its very nature, involve an element of give and take', Edwards-Stuart J said: 'Although the claimant's offer in this case was hardly generous, in my view it cannot be described as "all take and no give"'.

Edwards-Stuart J said he was persuaded by the authorities, including the Court of Appeal ruling in *Huck v Robson* [2003] 1 WLR 1340, that the Jockey Club's offer was a valid one within the meaning of part 36 and a 'genuine attempt' to settle the claim.

He went on: 'Whilst the discount was very modest, even in the context of a claim of some £400,000 it amounted to £20,000, which in my view cannot be described as derisory'.

Edwards-Stuart J awarded the claimant indemnity costs, not from 21 days after the date of the offer, because the defendant had 'only just been made aware for the first time that the claim against it had been increased to about £850,000'.

Instead he said the Jockey Club should be entitled to indemnity costs 'from the earliest date after that by which the defendant could reasonably have put itself in a position to make an informed assessment of the strength of the claim on liability'.

Edwards-Stuart J decided that this was four months from the date of the offer, and ordered that the claimant should have costs in relation to liability on the standard basis up to 29 May 2015 and after that on an indemnity basis.

Fatal Damages and the application of the Ogden Tables: Multipliers for Future Dependency Must be Assessed as at the Date of Trial and Not Death

Introduction

In *Knauer v Ministry of Justice* [2016] UKSC 9, the Supreme Court this week has overturned two previous House of Lords judgments in unanimously ruling that the multiplier in assessing damages for fatal accident claims should be calculated from the date of the trial, not the date of death. In this article we provide a brief outline of the decision as next week's feature will be an in-depth analysis of its impact on the assessment of fatal damages, with working examples. We have previously considered the first instance decision of the High Court in edition 60 (here).

Background

Since the House of Lords' decisions in *Cookson v Knowles* [1978] and *Graham v Dodds* [1983] there has been a distinct approach to the calculation of damages in

fatal accident claims. This approach is that damages ought to be split into two parts, pre-trial loss and future loss.

Pre-trial losses will attract interest at half the normal rates from death until trial, but the latter will attract neither interest nor an allowance for inflation. In addition, one must take the multiplier for the calculation of future dependency as at the date of death and then deduct from it the number of years that has elapsed between the death and the trial to reflect the deduction for early receipt.

However, this has since been the subject of academic criticism and judicial scrutiny, particularly in the case of the Law Commission, who recommended in their report *Claims for Wrongful Death* (1999, Law Com No 263),[11] that the law in this area was in need of reform. The Law Commission recommended that Ogden Table multipliers should be assessed as at the date of trial and not death-the latter methodology was actuarially flawed and incorporated a 'discount' for early receipt in the period prior to trial and resulted in under compensation for claimants. Further, it was suggested that the application of the multiplier from the date of trial might be thought simpler and/or more accurate than date of death assessment.

The Ogden Working Party from as long ago as 2000 considered these criticisms valid and had set out alternative guidance on how multipliers for fatal damages should be assessed-see A8 Section D, pages 68-72 of 'Facts and Figures' 2015/2016.[12] However, until this week, when faced with future loss of dependency claims the courts have found themselves bound by the decision of the House of Lords in *Cookson* and have not followed the approach recommended by the Ogden Working Party-see the 3 leading judgements of *White v ESAB Group (UK) Ltd* [2002] P.I.Q.R. Q6, *H (A Chid) v S (Damages)* [2002] 3 W.L.R. 1179 and *Fletcher v A Train & Sons Ltd* [2008] EWCA Civ 413.

The facts of Knauer

Mrs Knauer was employed by the Ministry of Justice as an administrative assistant at Her Majesty's Prison, Guy's Marsh. In the course of her employment, she contracted mesothelioma, from which she died in August 2009. Her husband, Mr Knauer, made a claim for future loss of dependency under the Fatal Accidents Act 1976. The Ministry of Justice admitted liability for Mrs Knauer's death in December 2013. In a hearing before Bean J in July 2014, the parties agreed the annual figure for the value of the income and services lost as a result of Mrs Knauer's death-the "multiplicand". A dispute arose between the parties as to whether the number of years by which that figure is to be multiplied-the "multiplier", should be calculated from the date of death or from the date of trial. The trial judge held that he was bound to follow the approach adopted by the House of Lords in the cases of *Cookson v Knowles* [1979] AC 556 and *Graham v Dodds* [1983] 1 WLR 808 and to calculate the multiplier from the date of death. The trial judge made it clear that, absent that authority, he would have preferred to calculate the multiplier from the date of trial in line with the approach recommended by the Law Commission in their report *Claims for Wrongful Death* (1999, Law Com No 263). Bean J granted a certificate under section 12 of the Administration of Justice Act 1969 to enable Mr Knauer to leapfrog the Court of Appeal and for the matter to be considered again by the Supreme Court.

Supreme Court Decision

It was unanimously held that calculating damages for loss of future dependency from the date of death, rather than the date of trial, meant that the claimant was suffering a discount for early receipt of compensation which would not in fact be received until after trial. In most cases it would result in the claimant being under-compensated. It was therefore found that that the multiplier in assessing damages for fatal accident claims should be calculated from the date of the trial, not the date of death

[Note: The judgement is also of interest in how the Supreme Court can depart from previous House of Lords decisions-see paras19-26].

What does this mean for the assessment of damages for dependency in fatal accident claims and should such losses now be calculated? We will compare the old and new methodologies to assess the future loss multipliers in next week's feature. It is important to note that this decision impacts on all Fatal Accident claims that are currently proceeding.

Most fatal occupational disease cases arise from asbestos related mesothelioma and lung cancer. The HSE have reported that the majority of mesothelioma deaths in recent years has been in those aged 75 and above.[13]The Institute of Actuaries Asbestos Working Party,[14] suggests that most asbestos lung cancers are diagnosed around the age bracket of mid-60s to early 70s and that a typical age of claiming compensation for lung cancer is about 67 / 68.

Next week we consider some worked examples using these age parameters to see how the decision affects the typical values in mesothelioma and lung cancer cases.

The judgment in *Knauer v MOJ* can be downloaded from here.

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