Welcome

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

In the last week Slater & Gordon Ltd has released the much anticipated financial results for the second half of 2015 which show a worsening in their financial crisis with a staggering half year loss of £505,633. Elsewhere, the Court of Appeal has ruled that there is no discretion when applying the Simmons 10% uplift to general damages.

This week we present the second feature focusing on last week’s Supreme Court judgment in Knauer v Ministry of Justice. This week’s article considers the impact of this decision on the calculation of damages for loss of dependency in fatal accident disease claims.

We continue with ‘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. This week we have seen some superficial case analysis of the decision amongst the claimant community but still no indication of any significant lobbying regarding the Compensation Act 2006.

Also, for further details regarding our new Disease Costs Guide and Costs Brochure, please see the ‘What’s New’ section at the end of this edition.

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

As always, warmest regards to all.

SUBJECTS

S&G Crisis – CJC Consult on Fixed Fees – Court of Appeal Ruling on Simmons Uplift – Farewell to McKenzie Friends – Case Comment: Cox v Ministry of Justice – Illness Associated with Commonly Used Herbicides – Fatal Damages Following Knauer.
Farewell to McKenzie Friends?

Following the rise in recent years in the number of both litigants in person and McKenzie Friends, the Judicial Executive Board (JEB) has issued a consultation paper proposing reforms to the existing guidance for ‘McKenzie Friends’. McKenzie Friends are non-lawyers who offer assistance and in some cases seek to appear as advocates on behalf of litigants-in-person.

The existing Practice Guidance on McKenzie Friends for the civil and family courts was issued in 2010, but the JEB is concerned that it needs to be updated to address issues and developments that have arisen since then. They point out that this may require replacing the Guidance with rules of court. They claim that this would enable reforms to be made, and allow difference for different types of proceedings (for example, between civil and family cases). Codification, they say, would also provide greater clarity and consistency in the approach courts take to McKenzie Friends.

The Consultation Paper summarises the current position and poses questions in a number of areas, including:

- **Terminology** – the paper addresses whether the term McKenzie Friends should be updated to something that is better understood e.g. ‘Court Supporter’.
- **Providing Notice** – the paper suggests reforms to help litigants in person understand what roles McKenzie Friends can play and any limitations on what they can do. Under these reforms litigants in person would need to inform courts in advance if they intended to use a McKenzie Friend.
- **Code of Conduct** – The paper proposes that the standard notice process includes a Code of Conduct for McKenzie Friends they would need to agree to comply with. This would ensure the duty of the court was recognised along with the duty of confidentiality in relation to litigation.
- **Prohibition on fee recovery** – The paper proposes a prohibition on fee recovery by paid McKenzie Friends in order to protect the public interest and vulnerable litigants from unregulated and uninsured individuals seeking to carry out reserved legal activities.

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

CJC Begin Consultation on Fixed Fees Extension

It has been reported that the Civil Justice Council has invited 20 senior judges, lawyers, costs lawyers and academics to begin hammering out the issues relating to the proposal of fixed costs being extended to all civil cases worth up to £250,000 as proposed by Lord Justice Jackson. This is what is thought to be the first of several workshops next week.1

The CJC has said that as the government had ‘expressed an interest’ in extending fixed recoverable costs, the workshop would address the ‘principle’ of the extension in the context of other changes taking place in the justice system. It is thought that this meeting will be limited to the principle of the fixed costs extension rather than looking at the figures.

When LJ Jackson made his proposals last month he said he believed that if the ‘political will’ is there, the changes could be accomplished ‘during the course of this year’. However, elsewhere this has been deemed unlikely. Professor Dominic Reagan has suggested that no action on the fixed fees extension will be taken this year due to the fact that, Secretary of State for Justice, Michael Gove is somewhat distracted by the pending EU Referendum. He also pointed out that despite the outcry from practitioners regarding the scale of the fixed fee extension, these figures are not set in stone and were given by way of example.2

Responding to Jackson’s speech, an MoJ spokesman said government ‘remains supportive of the principle of extending fixed recoverable costs and will consider Lord Justice Jackson’s comments carefully’.

Court of Appeal Rules No Discretion on Simmons Uplift

The Court of Appeal in *Summers v Bundy* [2016] EWCA Civ 126, has ruled that a circuit judge, HHJ Gargan in Sheffield, was wrong to believe he had discretion not to apply the post-LASPO 10% uplift in damages.3

HHJ Gargan refused to add the uplift on the basis that the claimant had been legally aided throughout the case. Permission to appeal had been granted by Lord Justice Jackson and the ruling was handed down by Lord Justice Davis who stated that: ‘There can, for reasons which do not need spelling out, be no judge with a greater knowledge and understanding of modern principles and procedures relating to costs. Jackson LJ took the view, as he stated, that the appeal was “bound to succeed”. Having taken that view, and with an evident desire to try and save costs, he dispensed with the need for the attendance of the appellant or representation of the appellant by counsel at the hearing of this appeal. Thus the matter comes before us today. Nevertheless, we do of course have to consider for ourselves whether this appeal should succeed’.

The rationale behind HHJ Gargan’s decision was that: ‘He [the claimant] does not have any uplift to pay to his solicitor from his general damages and it seems to me therefore that it would be wrong to penalise the defendant’. It appears that in doing so he was drawing an analogy with the Court of Appeal’s second ruling in *Simmons* which made an exception for conditional fee agreement cases started before 1 April 2013.

However, Davis LJ put the matter to bed by pointing out that ‘I do not think that this reasoning was open to him. In my view, the judge had been required to include the 10% uplift in the award of general damages. Simmons v Castle bound him to do so’.

He went on to say that there could be no principled reason for allowing some legally aided claimants to receive the 10% uplift of general damages and others not. Either they
should all get it or they should all not get it. It was pointed out that to do otherwise would result in uncertainty and inconsistency in awards which was the opposite intention of the decision in Simmons.

As a result, it was held by Davis LJ that: ‘It would, in my opinion, be wholly contrary both to the reasoning of and to the intent behind this Court of Appeal decision for trial judges then to introduce, by way of purported exercise of discretion, a yet further potential (and long-term) exception or exceptions. Furthermore, in my view it is inconceivable that the Court of Appeal or the professional bodies appearing before it on the second occasion would have overlooked the significant class of legally aided claimants had there been any notion that there should or might be some further exception applicable to that class’.

Slater & Gordon on Life Support?

Slater & Gordon’s (S&G) much anticipated financial results for the second half of 2015 were released earlier this week. The outcome is much as expected. The firm reported a net loss after tax of £492.5m across Australia and the UK, of which around £435m resulted from writedowns of goodwill relating to Slater Gordon Solutions, which represented the business assets acquired earlier in 2015 from Quindell PLC for £637m. These ‘business assets’ included a large volume of NIHL claims (figures variously placed this at between 50,000-70,000 claims). Before the sale to S & G, Quindell had made much noise that these NIHL claims where somehow ‘better than the rest’ within the market and in making predictions of future incomes were assuming claim success rates of 90-100%. It will perhaps be of little surprise to those with knowledge of the UK NIHL market that one of the reasons S & G now cite within its financial report for the horrific writedown of goodwill is the ‘lower resolutions in respect of Noise Induced Hearing Loss’. Further, the report states that ‘No value of work in progress has been recognised for Noise Induced Hearing Loss files as the amount of revenue cannot at this stage (31

December 2015) reliably measured’.

In addition, net debt stood at around £380m at the end of December, up more than £60m in the space of six months leaving just £35m as available resources. S & G is basically operating at a loss with expenditure more than income and so the debt position is continuing to worsen.

Following the news shares in the company on the Australian stock exchange plummeted by 45.7% in a single day on Monday to AU$0.315. In the course of less than one year, the company has declined in value by over 90%. The share price as it stands today is AU$0.37 which is higher than the low of AU$0.26 seen on Wednesday. The following graph shows how the stock of S&G has fallen over a period of 3 years to today.

Table taken from Financial Times Today (04/03/2016)

This has led to some financial analysts describing S&G’s financial position as ‘precarious’. Deutsche Bank described the result as ‘materially weaker than anticipated’. UBS has now followed in the footsteps of Bank of America Merill Lynch and said they will no longer lend money for buyers to purchase S&G stock.  

Within their announcements made to the Australian Stock Exchange (ASX), S&G confirm they have agreed to deliver an operating plan and restructure proposal to their lenders and financial advisers in March 2016. Following these proposals, S&G lenders will decide whether they will amend the lending agreement. If the agreement is amended and S&G does not implement the changes by the end of April 2016 then repayment dates for the loans may be brought forward to late March 2017, which would cast further doubt upon the future of the company.

What next?

Managing director Andrew Grech, who offered to tend his resignation to the Board of Directors, but was unanimously rejected, said the results were ‘clearly very disappointing’ and haa brought about a r

The decline in business performance in the UK is of serious concern to all at Slater and Gordon and equally will be of concern to our investors. We will therefore be taking a number of necessary and significant steps to improve the operational performance of the both the UK businesses and the broader Slater and Gordon group’.

It is thought that the restructure proposal will involve many branch closures, particularly in the UK. Indeed, in the announcement to the ASX, the firm stated that ‘it is anticipated to result in the closure of a number of current sites’. As part of what is being termed the ‘UK Performance Improvement Programme’, S&G intends to operate three specialised legal services divisions across the UK in future: fast track personal injury claims, serious and specialist personal injury claims and general law services. Personal injury law services will
be provided through a ‘more limited number of regional centres’ while specialist and general law services will also be ‘consolidated into specialised units at selected, strategically important locations’.

However, yesterday S&G was reported as stating to staff that ‘Under the reorganisation plan, the majority of our sites will remain open. Where sites are impacted, because the site may be closed or certain practice areas will be impacted, there will be a staged consultation process across the UK’. The firm have also said that where appropriate, they will ‘help transition’ affected staff to new roles within Slater and Gordon.6

However, to add to the group’s woes it is now reported that a UK-based litigation funder is backing a shareholder class action against S&G. ACA Lawyers said that S & G’s announcement on Monday has strengthened the class investigation it is pursuing. It seems all but certain that S&G will face class actions on behalf of aggrieved investors.6

Case Comment: *Cox v Ministry of Justice [2016] UKSC 10*

The Supreme Court considered the approach to be adopted in deciding whether a relationship other than one of employment can give rise to vicarious liability. The Ministry of Justice was vicariously liable for an employee’s responsibility for the acts of its employees, but did not impose liability where a tortfeasor’s activities were entirely attributable to an independent business. The defendant did not have to carry on commercial activities, nor did it need to derive a profit from the tortfeasor’s activities. It was sufficient that there was a defendant carrying on activities in furtherance of its own interests. Defendants could not avoid liability by technical arguments about the employment status of the tortfeasor.

(1) The Christian Brothers approach extended the scope of vicarious liability beyond an employer’s responsibility for the acts of its employees, but did not impose liability where a tortfeasor’s activities were entirely attributable to an independent business. The defendant did not have to carry on commercial activities, nor did it need to derive a profit from the tortfeasor’s activities. It was sufficient that there was a defendant carrying on activities in furtherance of its own interests. Defendants could not avoid liability by technical arguments about the employment status of the tortfeasor.

(2) The Christian Brothers requirements were met and the ministry was vicariously liable, Christian Brothers applied. The Prison Service carried on activities in furtherance of its aims. The fact that the aims were not commercially motivated, but served the public interest, was no bar to imposing vicarious liability. Prisoners working in the kitchens were integrated into the operation of the prison, so that the activities assigned to them by the Prison Service formed an integral part of the activities it carried on, in particular the activity of providing meals for prisoners. The prisoners were placed in a position where there was a risk that they could commit a variety of negligent acts within the field of activities assigned to them. Further, they worked under the direction of prison staff. C had been injured as a result of negligence by the prisoner in carrying on the activities assigned to him (para. 32). The fact that setting prisoners to work was one means by which the Prison Service sought to rehabilitate prisoners did not alter that conclusion. Rehabilitation was not the only objective: the Prison Service also intended that prisoners should contribute to the cost of their upkeep by providing services. The prisoners’ activities formed part of the operation of the prison and were of benefit to the Prison Service itself. It was not essential to the imposition of vicarious liability that the defendant should seek to make a profit. Nor did it depend on alignment of the objectives of the defendant and the tortfeasor. The fact that prisoners were required to serve part of their sentence in prison and to undertake work there for nominal wages, bound them into a closer relationship with the Prison Service than would be the case for an employee. The fact that payments were below commercial level reflected the context in which prisoners worked, but did not mean that vicarious liability should not be imposed. Payment of a wage was not essential, Christian Brothers applied. The fact that prison operators were under a statutory duty to provide prisoners with useful work was not incompatible with vicarious liability. The Christian Brothers criteria were designed to ensure that vicarious liability was imposed where it was fair, just and reasonable to do so: where the criteria were satisfied, it would not generally be necessary to reassess the fairness of the result. However, where a case concerned circumstances which had not previously been the subject of authoritative judicial decision, it could be valuable to consider fairness. The instant appeal was such a case; however, for the Prison Service to be liable to compensate for negligence by the prison catering team appeared just and reasonable whether the tortfeasor was a civilian or a prisoner. The court rejected arguments based on the risk of further claims being brought (paras 34-45).

The appeal was dismissed
First Study to Describe Scope of Illness Associated with the Use of Two Commonly Used Herbicides

A majority of herbicide-related deaths are caused by just two of the more commonly used weed killer—paraquat and diquat—according to new research published in the journal, Environmental Research by the National Institute for Occupational Safety and Health (NIOSH). To identify the magnitude of illness attributed to the use of paraquat and diquat in the U.S., as well as the causes of illness, researchers examined combined data from three sources from 1998 to 2011: the NIOSH Sentinel Event Notification System for Occupational Risks (SENSOR) Pesticides Program; the California Department of Pesticide Regulation Pesticide Illness Surveillance Program; and the U.S. Environmental Protection Agency, Office of Pesticide Programs’ Incident Data System. Additionally, researchers assessed data from a national database, the National Poison Data System, for national trends of paraquat- and diquat-related illnesses.

NIOSH Director John Howard MD said: “This is really the first time we’ve looked at the extent of illness caused by these herbicides, we now know that all of the cases of illness and death related to these products are preventable, which will help us identify ways to better protect both the workers who need to use these products as part of their job and others exposed to these potentially harmful chemicals.”

The study found 300 paraquat- and 144 diquat-related acute illnesses were reported in 35 states and in 1 U.S. territory; 76 percent of paraquat-related cases were work-related. While the majority of cases of paraquat-related illness were low to moderately severe—health effects commonly included skin, eye, or neurological symptoms—researchers identified several deaths. Compared to other pesticides, paraquat or diquat was responsible for the majority, 85 percent, of herbicide-related deaths in the U.S.

Of the cases reported, 43 individuals ingested paraquat and 25 ingested diquat. The majority of ingestion cases were unintentional and frequently occurred because the pesticides were improperly stored (e.g. in beverage bottles).

Failure to wear Personal Protective Equipment (PPE), especially eye protection, was the most common reason people were sickened by paraquat; other causes included drift from the pesticide application site and accidental spills or splashes. For diquat, the most common cause of illness stemmed from application equipment failure followed by accidental spills or splashes.

The NIOSH Medical Officer and senior author of the study, Geoff Calvert, MD, MPH, suggested that when less harmful weed control options are not an option, additional training and stricter compliance with label instructions to ensure proper herbicide storage and PPE use are important measures to help prevent illness or even death.

Feature

Fatal Damages and The Application of the Ogden Tables: The Impact of Knauer in Fatal Disease Claims

Introduction

Last week we provided a case comment on the decision of Knauer v Ministry of Justice [2016] UKSC 9 in which the Supreme Court overturned two previous House of Lords judgments and unanimously ruled that the multiplier in assessing damages for fatal accident claims should be calculated from the date of the trial, not the date of death. We have previously considered the first instance decision of the High Court in edition 60 (here).
The pre-Knauer method of calculating dependency was as follows:

1. Calculate the overall period of dependency

In this case the overall period of dependency is the same as the deceased’s ‘but for’ life expectancy of 17.2 years (as determined by the medical evidence). In some cases it may be shorter—for example the dependent may have a reduced life expectancy and would have died before the deceased or the deceased’s health may have prevented services being provided beyond a certain age.

2. Calculate the multiplier for the overall period of dependency

Given the medical evidence of life expectancy the multiplier is taken from Ogden Table 28 (a term certain). For a period of 17.2 years the multiplier is 14.01 (2.5% discount rate and interpolation).

3. Calculate the pre-trial dependency

This is £10,000 over 3 years or £30,000. The 3 year loss from death to date of trial is effectively treated as special damages attracting interest of £225.

4. Calculate the post trial dependency.

The 3 year period is subtracted from the overall multiplier of 14.01 to calculate the multiplier for post trial dependency. The balance of the multiplier is 11.01 (14.01-3).

The post trial dependency is therefore 11.01x £10,000=£110,100. No interest is awarded on this future loss.

5. The overall claim

\[
\text{The overall claim} = (\text{i}) \text{ Pre trial dependency (+interest)} + (\text{ii}) \text{ Post trial dependency} = £30,000 + £225 + £110,100 = £140,325
\]

To our timeline we have now added the overall duration of dependency and Table 28 multiplier and further broken this down to show the pre-trial and post trial multipliers.
The new methodology

How does the approach differ post Knauer?

The Justices appear to advocate the methodology provided by the Ogden Working Party and set out in the Explanatory Notes to the Ogden Tables—see the current 2015/16 edition of Facts and Figures at section A8, paragraphs 64-91 (pages 70-79) and also paragraphs 64 to 81 of the seventh edition of the Ogden Tables downloaded here. It is referred to as the ‘actuarially recommended approach’.

This new approach assesses the multiplier as at date of trial and applies discount factors to both pre-trial and post-trial losses to reflect the risk that the deceased may have died in any event and not survived to provide the dependency. These discount factors are found at Table E for pre-trial dependency and Table F for post-trial dependency.

Part of Table E is replicated below and in our example of a male aged 70 at death and a 3 year period lapsed between death and trial the discount factor is 0.97.

Table: Extract from Ogden Table E for males showing discount factor for 3 year pre-trial losses dependent on age

<table>
<thead>
<tr>
<th>Age of deceased at date of death</th>
<th>3 year period from death to trial</th>
</tr>
</thead>
<tbody>
<tr>
<td>60</td>
<td>0.99</td>
</tr>
<tr>
<td>65</td>
<td>0.98</td>
</tr>
<tr>
<td>70</td>
<td>0.97</td>
</tr>
<tr>
<td>75</td>
<td>0.94</td>
</tr>
<tr>
<td>80</td>
<td>0.90</td>
</tr>
</tbody>
</table>

The multiplier for future dependency is then assessed from date of trial and not death. That multiplier also has to be discounted by the Table F factor to reflect the risk that the deceased might have died anyway before the trial and not survived to provide any post-trial dependency.

Part of Table F is replicated below and in our example of a male aged 70 at death and a 3 year period lapsed between death and trial the discount factor is 0.93.

Table: Extract from Ogden Table F for males showing discount factor for post-trial damages where 3 years period from death-trial

<table>
<thead>
<tr>
<th>Age of deceased at date of death</th>
<th>3 year period from death to trial</th>
</tr>
</thead>
<tbody>
<tr>
<td>60</td>
<td>0.97</td>
</tr>
<tr>
<td>65</td>
<td>0.96</td>
</tr>
<tr>
<td>70</td>
<td>0.93</td>
</tr>
<tr>
<td>75</td>
<td>0.88</td>
</tr>
<tr>
<td>80</td>
<td>0.83</td>
</tr>
</tbody>
</table>

So in our example the dependency is assessed as follows:

1. Pre-trial dependency

3 years x £10,000 x 0.97 Table E discount factor = £29,100.

Interest of £218 would be awarded on this past loss in the usual way.

2. Post-trial dependency

Determine the multiplier from trial and not death. The deceased would have been aged 73 with a life expectancy of 14.9 years.

The Ogden Table 28 multiplier (2.5% discount rate and with interpolation) is 12.48.

Future dependency=£10,000 x 12.48 x 0.93 Table F discount factor=£116,064.

No interest is payable on future loss.

3. The overall claim

The overall claim=(i) Pre trial dependency (+interest) + (ii) Post trial dependency=

£29,100+ £218 +£116,064.= £145,382.

The Impact on Quantum

In our worked example the dependency claim has increased by £5,057 or 3.6% - a modest increase individually but not necessarily insignificant across a large book of mesothelioma claims.

Range of Impact in mesothelioma claims

Most fatal occupational disease cases arise from asbestos related mesothelioma. The HSE have reported that the majority of mesothelioma deaths in recent years has been in those aged 75-80.

In the table below we show the impact of the new methodology on dependency claims for deceased males with age ranges of 65-80 at the time of death. We assume for all ages:

- dependency multiplicand on pension income = £10,000.
- dependency multiplicand on services until age 80 = £1,500.
## Ready Reckoner Reserve Uplift

How do these increases in dependency impact upon the typical overall value of mesothelioma claims? We show the £ and % uplift to the typical overall claim values in our Ready Reckoner Uplift table below. We assume typical dependency claims as above plus the following heads of loss which will be fixed and applicable to all the claims:

- General Damages (PSLA) = £75,000
- Past Care = £15,000
- Other Past Losses = £10,000
- Bereavement Award = £12,980
  Total = £112,980

### Ready Reckoner Uplift Table

<table>
<thead>
<tr>
<th>Deceased age at death</th>
<th>Pre Knauer valuation-Overall Claim</th>
<th>Post Knauer valuation-Overall Claim</th>
<th>Increase in Overall Valuation</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>£298,348</td>
<td>£307,636</td>
<td>£8,288 2.77%</td>
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<tr>
<td>65</td>
<td>£267,528</td>
<td>£271,728</td>
<td>£4,200 1.5%</td>
</tr>
<tr>
<td>70</td>
<td>£232,888</td>
<td>£233,937</td>
<td>£1049 0.4%</td>
</tr>
<tr>
<td>80</td>
<td>£199,405</td>
<td>£200,440</td>
<td>-£665 -0.7%</td>
</tr>
</tbody>
</table>

### Table

<table>
<thead>
<tr>
<th>AGE RANGES (AGE AT DEATH)</th>
<th>DEPENDENCY MULTIPLIER ON PENSION</th>
<th>DEPENDENCY MULTIPLIER ON SERVICES</th>
<th>DEPENDENCY INCREASE</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Pre – Knauer</td>
<td>Post – Knauer</td>
<td>Increase £/%</td>
</tr>
<tr>
<td>65</td>
<td>£167,525</td>
<td>£175,252</td>
<td>£7,727 4.6%</td>
</tr>
<tr>
<td>70</td>
<td>£141,225</td>
<td>£145,382</td>
<td>£4,157 2.9%</td>
</tr>
<tr>
<td>75</td>
<td>£112,825</td>
<td>£113,771</td>
<td>£946 0.8%</td>
</tr>
<tr>
<td>80</td>
<td>£88,125</td>
<td>£87,460</td>
<td>-£665 -0.7%</td>
</tr>
</tbody>
</table>
The % increases in the final column could be used to provide a quick and broad-brush indication of the % uplift to be applied to reserves across a book of mesothelioma claims. Ironically it appears the new methodology has a negative impact on the dependency claim where the deceased was near the end of normal life expectancy and will reduce the claim value slightly.

It is important to note that this decision impacts on all Fatal Accident claims that are currently proceeding.

The judgment in *Knauer v MOJ* can be downloaded from [here](http://www.pdf.com).

### References


In addition to this week’s edition of BCDN News we will be releasing a new Disease Costs Guide and Costs Brochure.

These will be emailed separately.

Disclaimer

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

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