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BC DISEASE NEWS

A WEEKLY DISEASE UPDATE

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Welcome

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

In the last week, a regional costs judge has ruled that it should be for defendants to explain why interim costs payments should not be made in part 8 proceedings. Elsewhere, in a NIHL claim, BC Legal successfully overturned a first instance decision refusing the defendant permission to rely on a separate audiogram and its own medical evidence.

This week we present the second in our two part feature focusing on ultraviolet (UV) radiation. Last week we looked at what UV radiation is, what the potential health consequences are and who is at risk. This week we will look at what are employers' responsibilities in relation to UV exposure and outdoor workers, case law in this area emanating from Australia and what potential future claims within the UK may look like.

Any comments or feedback can be sent to [Boris Cetnik](#) or [Charlotte Owen](#).

As always, warmest regards to all.

SUBJECTS

Interim Payments – Fundamental Dishonest Judgment – Fixed Fees in Clin Neg – *Johnson Matthey* in Supreme Court? – Case Comment: Obtaining Own Medical Evidence – Ultraviolet Radiation Part II.



Interim Payments of Costs

In the first judgment on interim costs since the new rules came into force in April 2013, a regional costs judge has ruled that it should be for defendants to explain why interim costs payments should not be made in part 8 costs only proceedings.¹

Ruling in *Travers v Poole Hospital NHS Foundation Trust* (case no. C00LV184), District Judge Baldwin was giving guidance on the application of rule 44.2(8) which states that, *'where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs unless there is a good reason not to do so'*.

The claim was one of medical negligence which was settled for £1,500 in October 2015, on the basis that the defendant paid reasonable costs and disbursements. The claimant sent an informal bill for £14,164 the following month, but agreement of the costs was not reached. The claimant made an application for an interim costs payment of £7,780 in December, amounting to just under 55% of the final bill.

The NHS Litigation Authority argued that the application was 'misconceived and premature' and such an application should only be considered after provisional assessment. However, the claimant argued that defendants, often NHS bodies, seek to 'throw any obstacle in the way of any early payment of an "in principle" admitted costs liability in low – value claims'.

DJ Baldwin examined the interplay between rule 44.2(8) and rule 46.14(5), which concerns instances where the parties to a dispute have reached an agreement on all issues (including which party is to pay the costs) but they have failed to agree the amount of those costs and no proceedings have been started. In this case 46.14(5) states that the court may make an order for the payment of costs, the amount of which is to be determined by assessment and/or, where appropriate, for the payment of fixed costs.

Having considered both rules DJ Baldwin said: *'I am satisfied on a proper reading of rule 46.14(5), in the context of the rule change to rule 44.2(8), the court is, when exercising that power, making an order for costs of the type envisaged by rule 44.2(8) and that rule is accordingly engaged'*. He said that ideally there would be a procedure whereby the claimant states the amount of interim costs sought in the claim form, supported by a statement of truth and the burden then shifts to the defendant to show unreasonableness and/or a good reason not to make the order.

DJ Baldwin said neither the defendant's skeleton argument or submissions *'sought to raise any positive reasons arising out of fundamental objections to the costs sought on an interim basis'*, beyond procedural matters.

He concluded that there was no good reason not to exercise the court's power under CPR 44.2(8) and made an order for the defendant to pay the interim costs sought by the claimant.

Whilst the claimant solicitors are hailing this judgment as a success it should be borne in mind that this decision is first instance in the County Court and as such, it is not binding.

Trial Loss Does Not Equate to Fundamental Dishonesty

In the recent judgment in *Nesham v Sunrich Clothing Ltd*,² a circuit judge has rejected a claim of fundamental dishonesty that would have dislodged the protection of qualified one-way costs shifting against a claimant who lost at trial.³

Setting aside QOCS protection on grounds of fundamental dishonesty is governed by CPR r 44.16 and enables the court to set aside QOCS protection on litigated personal injury claims deemed fundamentally dishonest, enabling a defendant to recover costs from the claimant. Fundamental dishonesty in this context is purely a costs sanction enabling costs recovery where QOCS would otherwise apply. It is under this provision of the CPR that most cases of

alleged fraud are considered. This is as opposed to s.57 of the Criminal Justice & Courts Act 2015 (CJCA) which would dismiss a fundamentally dishonest claim in whole.

In *Nesham*, HHJ Freedman sitting as circuit judge, was considering the provision of r 44.16. The claim was for a road traffic accident and it was agreed at the original trial that on the balance of probabilities the claimant could not prove that the defendant had breached the duty of care that was owed to him. It was not until after counsel and the judge had agreed that QOCS applied that the defendant then alleged that the claimant was fundamentally dishonest. DJ Charnock-Neal ruling in the first instance stated that: *'the claimant gave me his version of events. I have preferred not to accept that version, but it does not necessarily follow that he was fundamentally dishonest'*.

This decision was upheld by HHJ Freedman on appeal who stated that: *'it is the experience of everybody who litigates in this field that drivers involved in a accidents will give different and contrary versions of accidents to the extent of not just which lane they were in, but where they came from, the route they had taken and so forth... which may not constitute dishonesty, far less fundamental dishonesty'*.

As such the defendants were ordered to pay the claimant's costs of the appeal. Whilst this judgment is in relation to an RTA claim, its lessons can be applied to disease claims, especially as these types of claims often rely heavily on the claimant's memories from many years ago which whilst mistaken may not necessarily be fundamentally dishonest. In edition 135 of BC disease news we provided a feature in which we considered the defences which should be raised where the claimant's case relies predominantly on unreliable historical oral evidence.

For more details on what type of behaviours constitute fundamental dishonesty, please see edition 137 of BC disease news.



Implementation Period for Fixed Fees in Clinical Negligence Claims

It has been reported this week that the Law Society has asked the government to give lawyers 18 months to prepare for the introduction of fixed fees in clinical negligence work.⁴

This comes as the Law Society, alongside the Association of Personal Injury Lawyers (APIL), the Society of Clinical Injury Lawyers and the charity Action against Medical Accidents put forward a proposal for fixed fees for claims up to £25,000, significantly lower than the £100,000 or £250,000 threshold that Lord Justice Jackson has called for.

Catherine Dixon, chief executive of the Law Society has indicated that her concern is not only with the implementation of fixed fees in clinical negligence claims but also with the personal injury reforms generally. Having written to the civil justice minister, Lord Faulks, she set out alternatives to the proposals included in George Osborne's autumn statement and has indicated that the Law Society are due to launch an Access to Justice Campaign. She stated: *'We are continuing to monitor developments in respect of the government's proposals on personal injury and clinical negligence, so that if and when they require a campaigning approach, work plans can be developed for them. We are also considering how pro bono might fit into the messaging within the campaigns'*.

Elsewhere, the Law Society are due to publish a report in autumn entitled 'LASPO Three Years On'.

The progress of the personal injury reforms remains unknown following the exiting of Britain from the EU and the sacking of Justice Secretary, Michael Gove. Gove has been replaced by the former Environment Secretary, Elizabeth Truss and it is yet to be seen how she will prioritise the many outstanding projects on the Ministry of Justice's agenda, such as fixed fees for NIHL claims, court and tribunal fees and a review of LASPO due later this year.

However, what is known is that on justice issues, Truss voted for legal aid reforms in every vote leading up to the Legal Aid, Sentencing and Punishment of Offenders Act. She also backed limits on success fees paid to lawyers in no-win no-fee cases.⁵

De Minimis Case Heads To Supreme Court?

In edition 139 of BC disease news (here) we reported on the Court of Appeal decision in *Greenway & Ors v Johnson Matthey Plc* where it was held that claimants who had developed sensitivity to platinum had not suffered injury. The claimants have now sought permission to appeal this decision to the Supreme Court.⁶

At first instance, Justice Jay held that no actionable injury in tort arose in former employees of the defendant who had developed sensitivity to platinum as a result of exposure to complex halogenated platinum salts. The claimants unsuccessfully argued that they had sustained actionable injury as their sensitisation had led directly to a diminution in their earning capacity. Lord Sales, sitting in the Court of Appeal, in *Greenway & Ors v Johnson Matthey Plc* [2016] EWCA Civ 408, ruled that the appellants had no completed cause of action in tort and were not entitled to recover anything more than nominal damages for breach of contract. He ruled that they had not suffered physical injury necessary to give them a cause of action in tort, on the basis of which they could claim damages for consequential loss of earnings suffered by them. He decided that their claim was purely for economic loss. He also ruled that the losses the appellants claimed to have suffered were outside the scope of the relevant contractual duty owed to them by Johnson Matthey under their contracts of employment.

Lord Sales stated: *'The law does not furnish a remedy for every harm suffered by an individual, and in particular does not do so where the infliction of the harm in question does not constitute a 'wrong' in the contemplation of the law'*.

However, the former employees are determined to continue pursuing the company for the damages they say have been 'devastating'. One former employee has been noted as saying:

'I was diagnosed with platinum allergy and my world fell apart ... This was an extremely stressful time in all of our lives and, with the whole country in recession, finding a job was impossible, let alone a well-paid one'.

The claimants' legal representatives acting for the men on a no-win-no-fee basis, said:

'Johnson Matthey have for years paid small exit packages to our clients' fellow employees who have been similarly been affected by these chemicals for many years. This case is highly significant because Johnson Matthey accept that they negligently exposed them to dangerous levels of platinum salts. However, they have refused to pay fair and adequate compensation. If we do not win this case in the Supreme Court, other employers may use this case to sidestep their responsibilities with regards to health and safety, and negligently expose others to hazardous work conditions'.

Permission has yet to be granted by the Supreme Court.

Defendants Obtaining Medical Evidence: Case Comment: *Bartlett v Round Oak Steel Works Limited*

This week we report on another NIHL claim in which BC Legal, acting for the defendant, was successful in overturning a first instance decision refusing the defendant permission to rely upon a separate audiogram and its own medical evidence.

The claim involved Roberts Jackson solicitors and the claimant's expert was Mr Zeitoun.

In overturning the decision of District Judge Jabbar, His Honour Judge Mithani QC reiterated that an appellate court should not interfere with a case-management decision by the first-instance judge lightly. However, the defendant had submitted that there were



errors in Mr Zeitoun's report and so it should be allowed to rely on its own expert.

In considering the defendant's submissions, HHJ Mithani stated:

'In a case such as this, where the interpretation of medical evidence is not easy, a party is usually allowed to rely upon an additional report. Audiology reports are susceptible to wide and varied interpretations and a party should not ordinarily be allowed to steal a march on the other party, particularly where, as is the position in this case, there were other audiology reports which, through no fault of either party, are now no longer available.'

Whilst he made it clear that he was not advocating the use of two experts wherever a defendant attacked the contents of the claimant's audiology report he did feel that:

'...where a party identifies a reasonable basis of attacking a report which has been obtained at the instigation of another party, it would be wrong to allow that report to stand as the only expert evidence in the case simply because, as the District judge observed, "the testing was carried out in accordance with the necessary criteria". It would be wrong, in those circumstances, to refuse to allow the other party to challenge that report by seeking to commission its own report and seeking to put the findings of that report before the trial judge.'

In order to overturn the first instance decision it must be established that the District Judge erred in law. At para 26, HHJ Mithani found that:

'...if she had considered the objections which had been put forward by the first defendant at that particular point, she is likely to have come to the conclusion that it would not have been appropriate for the first defendant to be shut out completely in relation to the medical evidence which it intended to adduce at the trial. So I am satisfied that the approach which she took to the first defendant's application was misconceived.'

As such, he went on to consider the issue himself. In doing so he referred to the judgments of *Daglish v Forest Gardens (Property) Limited* and *Langley v Catheram Marble and Granite Ltd* and concluded that:

'In a case such as this, it is normal for the discretion of the court to be exercised in favour of what is commonly referred to as 'equality of arms' – rather like a clinical negligence case – where both parties have the benefit of instructing their own expert, or, at any rate, the instruction of a joint expert. Plainly, it is necessary to exercise the case-management powers of the court in a manner which is proportionate and economic. However, it is equally the case that it should also be exercised in a way which is just and fair to all the parties.'

He went on to say: *'Plainly, expert evidence on this issue is necessary. It is an important part of determining the issue of liability.'*

As such the defendant was granted permission to obtain their own audiogram and expert medical report. This judgment follows a number of similar judgments which we have reported on in BCDN. Most recently we provided a feature article in which we discussed recent developments on the topic of defendants obtaining their own medical evidence in edition 144 of BC disease news [here](#).

We have also updated our template letter outlining the legal basis for defendants requiring their own medical evidence which can be accessed [here](#).

Feature Ultraviolet Radiation: The Risk to Outdoor Workers – Part II

Introduction

This week we present the second in our two part feature focusing on ultraviolet (UV) radiation. Last week we looked at what UV radiation is, what the potential health consequences are and who is at risk. This week we will look at what are employers' responsibilities in relation to UV exposure and outdoor workers, case law in this area emanating from Australia and what potential future claims within the UK may look like.

The Law

The Health and Safety at Work Act 1974, makes it clear that there is a legal duty on

every employer to ensure, as far as reasonably practical, the health of their employees. It also says that employers must provide 'information, instruction, training and supervision' to ensure employees' safety.

Also, the Management of Health and Work Regulations 1999, require employers to conduct a suitable risk assessment of the risks to the health of their workforce. The Regulations also say that an employer has to remove any risk, or if that is not possible, look at other ways of preventing or reducing exposure, including, as a last result protective equipment. Arguably such risks would include UV radiation.

The HSE state that workers should be encouraged to keep covered up during the summer months, especially at lunch time when the sun is at its hottest. The HSE advise that this can be done by wearing long-sleeved shirts and hats that have a brim or flap which protects the ears and neck. Workers should be strongly encouraged to wear at least Sun Protection Factor (SPF) 15 sunscreen on any part of their body which is not covered.

This could be considered to be protective equipment under the Personal Protective Equipment Regulations. These regulations require employers to provide and implement the use of protective equipment where there are risks to health and safety that cannot be adequately controlled in other ways.

The Institute of Occupational Safety and Health, claim that skin cancer is an avoidable disease and employers should initially carry out an assessment of the risks of exposure by considering the following factors:⁷

- Do any employees work regularly outside?
- Are workers exposed to higher levels of solar radiation for significant periods? (use of the UV Index mentioned in last week's feature should be utilised to determine the levels of radiation as the strength of solar UV radiation isn't connected to temperature e.g. 30-40 per cent of UV rays can penetrate overcast skies)
- Are workers working unprotected from the effects of solar radiation?

As well as a risk assessment the HSE suggest that as a part of their legal obligations, employers should include sun protection



advice in routine health and safety training. They say it is particularly important for employers to challenge the widely held belief that having a tan is healthy. As we highlighted in last week's feature, a tan is a sign that skin has already been damaged by the sun.⁸

Finally, employers should consider scheduling work to minimise workers exposure to UV radiation, including encouraging them to take their breaks in the shade and providing water points and rest areas in the shade.

The International Agency for Research on Cancer, suggest that concerns regarding the effects of UV radiation first began in the 1980s and early 1990s.⁹ However, the HSE Guidance, 'Keep Your Top On', which identifies the health risks from working in the sun, was first published in 1998. In addition to this there are no mention of the risk of UV radiation and skin cancer in Parliament until 2010 and this is in relation to artificial UV radiation via sunbed equipment. It could be argued then that employers of outdoor workers in the UK could not have been expected to be aware of the risks of UV radiation until sometime in the 1990s. This is important, as in common law, employers are not liable for injury which arises from dangers that are unforeseeable. It could be argued that employers will not have been burdened with actual or constructive knowledge of the risks of UV radiation until the publication of the HSE guidance in 1998 and therefore any injury sustained from exposure before this point would not have been foreseeable.

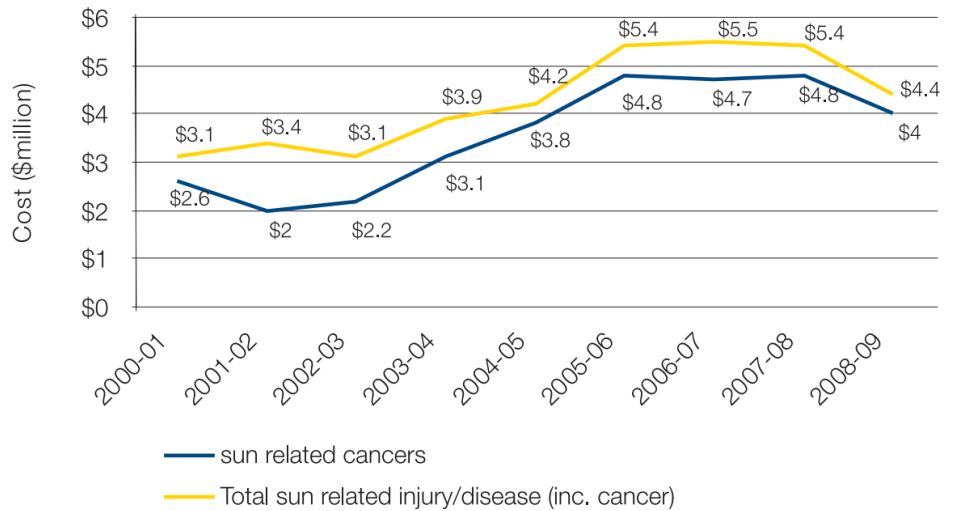
Occupational Skin Cancer Claims In Australia

According to the national campaign, SunSmart, Australia has the highest incidence of melanoma in the world for both males and females with two in three Australians being diagnosed with skin cancer by the age of 70.

The issue of occupational exposure to UV radiation in Australia is becoming increasingly recognised. There are a considerable number of workers compensation cases in which claimants have proved their skin cancers were caused by occupational sun exposure and have successfully claimed against their employers

or former employers for breach of duties. Statistics gathered by SafeWork Australia,¹⁰ show that a total of 1,970 workers compensation claims for sun related injury/disease have been made in Australia between 2000 and 2012 at a total cost of \$63 million. The graph below shows the total costs of compensations paid to workers in Australia for all sun related injury/disease, as well as costs specifically for cancers caused by sun exposure and highlights how these figures are increasing significantly.

Cost of sun related injury/disease (including cancers), in Australia by year of lodgement, 2000-2009



Most of these claims in Australia are for workers claiming short absences from work or a permanent incapacity.¹¹

It is useful to consider these cases and the approach taken in Australia in order to compare how such claims might translate in the UK. In order to do so it is important to set out the terms of the relevant legislation. In Australia section 4 of the Workers Compensation Act 1987, under which these claims are pursued, 'injury' is defined as a 'personal injury arising out of or in the course of employment' and includes 'a disease which is contracted by a worker in the course of employment and to which the employment was a contributing factor' and 'the aggravation, acceleration, exacerbation or deterioration of any disease, where the employment was a contributing factor to the aggravation, acceleration, exacerbation or deterioration...'. Sections 15 and 16 of the Act state that compensation is payable by the employer who last employed the worker in employment to the nature of which the disease was due or that was a substantial contributing factor to the aggravation, acceleration, exacerbation or deterioration.

In *Ranking v Idoko Pty Ltd* [2000] NSWCCR 607, the claimant was a former bricklayer who died from malignant melanoma. He was fair-skinned and red-headed (high risk factors), who was exposed to UV radiation for a prolonged period in the course of his employment. He was frequently sun burned on exposed areas of his face, arms and legs. He had a primary malignant melanoma excised from his lower back in 1986 and by 1995 the cancer had spread to other parts of his body. He died of the effects of malignant melanoma in 1997. The court found that cumulative exposure to the sun was a characteristic of the claimant's employment as a bricklayer, and accepted the medical evidence that cumulative exposure to the sun creates a risk of melanoma. It found that his exposure to UV radiation over a prolonged period of time increased his risk of developing melanoma and substantially contributed to his developing melanoma. The claimant was therefore successful in his claim against his employer.



More recent and slightly more complicated was the case of *Port Stephens Shire Council v Cessnock City Council and Anor* [2010] NSWCCPD 60 (31 May 2010), in which there was a dispute between two insurers over who was responsible for the claimant's skin cancer.

The claimant commenced employment with Cessnock City Council as a surveyor in August 1990. In this role his duties required him to work outdoors in the sun for at least two or three days per week. He was issued with a uniform consisting of a short-sleeved shirt and short trousers, although in 2002 there was a transition to long trousers and long-sleeved shirts. In 1998 the claimant developed skin cancers on various parts of his body for which he received treatment in 1998 and again in 2003 and 2006. Liability for this treatment and associated absences from work were accepted by the council's insurer, GIO General Limited. Shortly after this, the claimant began work at Port Stephens Shire Council where he was provided with long-sleeved shirts, long trousers, a hat and sunscreen. In 2008 he contracted further lesions on his left leg for which he had surgery. He attempted to claim for this injury against his previous employer's insurer but they refused on the basis that his condition was a disease for which his later employer was responsible. His claim against Port Stephens' insurer, StateCover Mutual Limited, was also denied, principally on the basis that his employment with Port Stephens was not a substantial contributing factor to his condition.

The question that the arbitrator posed for himself was *'whether this malignant melanoma is a separate disease of earlier squamous cell cancers and basal cell cancers, and actinic keratoses that Mr Evans [the claimant] suffered during his employment with the first respondent and, if I find it is, whether his employment with the second respondent was a substantial contributing factor to the aggravation, acceleration, exacerbation or deterioration of this separate disease of malignant melanoma'*.

He went on to consider the medical evidence given on this point and stated: *'The evidence on this issue is similarly scant. Neither Dr Mayers nor Dr Sippe expressed an opinion as to whether employment with Port Stephens*

was a substantial contributing factor to Mr Evans' condition. Dr Mayers thought that the development of the melanoma was "mainly due to sun exposure sustained while working with Cessnock City Council". He added that sun exposure with Port Stephens "would have played less of a role". He concluded that Mr Evans' employment with Cessnock "played a more significant part". Dr Sippe said that all the sun exposure that Mr Evans had was "relevant to the causation of his skin cancers". He concluded that employment with Port Stephens had "contributed, aggravated and accelerated his skin cancer condition and the development of his melanoma".

However, Port Stephens submitted that there was insufficient evidence to come to this conclusion stating that the claimant did not state that he sustained any sun damage during his employment with Port Stephens, the positive evidence of safe sun practices adopted by Port Stephens is not contradicted by the claimant and it would be impossible to exclude recreational sun exposure as a cause of the skin cancer. Despite the claimant and Cessnock disputing these submissions it was concluded that whilst there was some evidence of exposure to sunlight in the course of Mr Evans' employment with Port Stephens, and that there was medical evidence to support the proposition that it contributed to the claimant's condition, the evidence was insufficient and so the claimant's exposure during his time with Port Stephens did not constitute a substantial contributing factor to the aggravation of the disease as per section 4 of the 1987 Act. As such Cessnock Council were ordered to pay the claimant's compensation.

As we have highlighted, the test in these Australian cases is whether the occupational exposure to the sun is a contributing factor to the disease itself or whether it was a substantial contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease.

How does this compare to the test which would be applied in any future claims potentially brought in the UK?

Occupational Skin Cancer Claims In The UK

Claims for occupational skin cancer caused by UV radiation in the UK are likely to be for negligence and/or breach of statutory duty, both of which require proof that a duty of care was owed, which was breached and which caused damage in consequence.

Issues may arise with each of these elements. Firstly, in relation to duty of care in negligence, it is trite law that a duty of care only arises when the risk of harm is reasonably foreseeable, there must be knowledge of the risk or the risk ought to have reasonably been foreseen. As we highlighted in last week's feature article, there is a strong link between exposure to the sun and skin cancer and the risks of over exposure to the sun are becoming increasingly well known. Considering the guidance that was available to employers of outdoor workers in the UK, outlined above, it would perhaps not be difficult for an outdoors worker to establish that a duty of care arises in respect of sun exposure from the late 1990s. We have also outlined at the beginning of this article, the statutory duties that are owed by employers in relation to UV exposure i.e. risk assessments, information, instruction, training and supervision and the provision of protective equipment. But how easy is it for workers to establish breach of duty?

If it is assumed for a moment that a common law duty of care was established, could it be said that it had been breached by an employer if a worker was exposed to high levels of UV radiation? Put differently, would it be a breach of duty not to prevent exposure to UV radiation? For example, would it be incumbent on all employers of outdoors workers to provide sun protective clothes, sunscreen, shaded breaks and other protective measures? Certainly these measures could significantly reduce the effects of UV radiation, but would failure to adopt these measures fall short of the standard of care? Given that there is an abundance of evidence which links UV radiation to skin cancer it could indeed be argued that it is reasonably practicable for employers to prevent exposure and a failure to do so would be a breach of duty. At the very least should the employer ensure that employees are warned of the risk and in a



position to make informed choices as to whether avoid / reduce such risks and safeguard their health?

However, the greatest obstacle for any claimant in an occupational skin cancer claim would undoubtedly be causation.

There are 3 basic tests of legal causation:

- the conventional 'but for' test

But for the defendant's exposure would the claimant have developed injury? The claimant must prove on a simple balance of probabilities – i.e. greater than 50% – that breach caused injury.

- the 'material contribution' test

Also commonly referred to as the *Bonnington Castings* test,¹² where defendants are liable for contribution to the overall damage – usually restricted to dose related and divisible diseases where the severity of the injury itself is related to cumulative exposure.

- the *Fairchild* test¹³

Where defendants are liable for contributing to the risk of injury only because of the impossibility of the 'but for' test proving who caused injury. The *Fairchild* test was further extended in *Barker*,¹⁴ such that where it applied, defendants would only be liable to the extent that the exposure they were responsible for had contributed to risk – i.e. apportionment of damages applied (which in the case of mesothelioma was subsequently reversed by the Compensation Act 2006).

Where there is a single cause of disease and single exposure to the same then the 'but for' test is easily applied. The courts however have had difficulty in recent years in applying the correct test of causation where there are (i) multiple sources of exposures to one known cause of disease, or (ii) multiple exposures to multiple causes of disease, or (iii) scientific and medical knowledge of aetiology of the disease is simply not sufficiently developed to say precisely how a disease has developed or how potential multiple causes of the same may have contributed either to the disease itself or the risk of developing the disease.

The relaxed *Fairchild* test has traditionally been sought by claimants in disease cases to overcome causation issues where claims would fail on the traditional but for test. In *Sienkiewicz* the Supreme Court appeared to firmly restrict the *Fairchild* test to cases of asbestos related mesothelioma and re-emphasised the relaxed causation test was an exception made for this disease alone. However, in the landmark Supreme Court decision of *IEG v Zurich* [2016] A.C. 509, Lord Hodge at para 98 stated that the *Fairchild* rule of causation was not 'confined' to mesothelioma. This has recently been tested in the Court of Appeal decision of *Heneghan v Manchester Dry Docks Ltd & Others* [2016] EWCA Civ 86, which concerned asbestos related lung cancer. The court unanimously dismissed the claimant's appeal from the judgment of Mr Justice Jay. It was held that, once it is established that lung cancer is caused by asbestos exposure on a conventional balance of probabilities basis, the principle laid down by the House of Lords in *Fairchild* applies to the second stage of the causation test which is required where there has been asbestos exposure with multiple employers.

The claimant in *Heneghan* had been exposed to asbestos by each of the six defendants who were responsible for 35.2% of the deceased's total asbestos exposure. It was deemed impossible to determine which exposure had caused the cancer.

The Court of Appeal held that a two-stage approach should be taken to causation in lung cancer cases. Firstly, the 'what' question i.e. what caused the deceased's cancer? In the case of occupational skin cancer would this be UV radiation or some other constitutional predisposition? If it cannot be proven on the balance of probabilities that sun exposure had caused the claimant's skin cancer then the claim will fail and will not proceed to the second stage.

The second stage, is the 'who' question i.e. who caused the cancer? This often arises in multi-contributor cases, for example, if a claimant had worked in the construction industry outdoors for many employers it may be impossible for medical science to confirm what exposure actually caused the skin cancer. Under the normal rules of causation the claim would fail, however, when we apply *Fairchild* all those employers who had

materially contributed to the risk of contracting the disease would be liable. Following *Barker*, a defendant will only be liable in proportion to its own contribution to the exposure. Whilst this apportionment was reversed in cases of mesothelioma by amendment of the Compensation Act 2006, following *Heneghan*, it remains unknown whether the same will be attempted for asbestos related lung cancer and any other disease *Fairchild* is extended to.

Occupational skin cancer, like lung cancer, has multiple causes and multiple potential sources of exposure, for example, an outdoor worker may also use sunbeds or have high levels of non-occupational exposure. As such, provided a claimant could show, on a balance of probabilities that UV exposure was the cause of their cancer / disease, under the *Fairchild* test of causation they would just have to prove exposure with a particular employer contributed materially to the risk of injury to succeed on causation.

Conclusion

We outlined in last week's feature the link between sun exposure, UV radiation and skin cancer. It is clear that skin cancer is becoming increasingly prevalent in the UK with outdoor workers such as construction and agricultural workers being most at risk.

This week, we have outlined what duties employers might owe to such workers in terms of preventing sun exposure and the legal obstacles that such claims would face in the UK. It would appear that the extension of *Fairchild* through *Heneghan* would undoubtedly assist claimants in establishing causation between their occupational exposure to the sun and skin cancer. In addition, despite the lack of litigation thus far in the UK, several claimant solicitors have begun advertising for UV radiation claims and as such this is an area that defendant insurers should continue to be alive to.



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- ⁹ World Health Organisation, 'Exposure to Artificial UV Radiation and Skin Cancer' (IARC 2006)< <https://www.iarc.fr/en/publications/pdfs-online/wrk/wrk1/ArtificialUVRad&SkinCancer.pdf>> accessed 15 July 2016.
- ¹⁰ Safe Work Australia. *Workplace compensation data*. Canberra, Australia: National Data Team, Safe Work Australia; 2014.
- ¹¹ Cancer Council Western Australia, 'Occupational Exposure to Ultraviolet (UV) Radiation: Workers' Compensation Claims Paid in Australia' (*Cancer Council Western Australia Monograph Series* 2011).
- ¹² The test derives from *Bonnington Casting Ltd v Wardlaw* [1956] AC 613.
- ¹³ First posited in *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32.
- ¹⁴ *Barker v Corus (UK) plc* [2006] UKHL 20, [2006] 2 AC 572.



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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