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

In the last week, the Court of Appeal overturned a decision not to award 10% interest on damages in a case where a defendant failed to beat a claimant’s Part 36 offer. Elsewhere, we provide further details of the Supreme Court judgment in *Plevin v Paragon Personal Finance Ltd* [2017] UKSC 23, which addressed both the assignment of CFAs and the recovery of a pre-LASPO success fee and after-the-event (ATE) premium where a CFA had to be extended after 1 April 2013 to cover appeals.

In this week’s feature, we consider the judicial interpretation of ‘likely to be injurious’, not only in the context of s.63(1)/s.47(1) but also in subsequent regulations relevant to asbestos claims, and whether this imports concepts of foreseeability as in negligence claims, or whether there is a stricter more onerous duty on employers than there is at common law.

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

As always, warmest regards to all.

**SUBJECTS**


Last week, the Court of Appeal considered what interest on damages the court should award when a claimant's CPR Part 36 offer is rejected, but the claimant achieves a greater award at trial. The court, in this case, overturned a decision not to award 10% interest on damages in a case where a defendant failed to beat a claimant's Part 36 offer.

The claimant made a Part 36 offer on 9th April 2014, offering to settle the litigation for $35million inclusive of interest together with costs. The defendant did not respond to or accept the offer or make any counter-offer but instead carried on to defend the claim at a lengthy trial in which the judge awarded the claimant damages without interest in the sum of $40million.

In the judge's judgment on interest, he stated that Petrom's case on liability 'rested in large measure on the evidence of witnesses who were liars and Glencore put Petrom through the hoops of having to establish liability, in a very flagrant case of fraud, in a manner which was wholly unreasonable'.

Despite this, the trial judge did not award the claimant 10% above base rate as interest for the period following the expiry of the Part 36 offer. Instead, interest was awarded, but at lower rates. The claimant appealed arguing that the judge ought to have awarded a rate of interest enhanced by the maximum amount of 10% per annum allowed under what was then CPR Part 36.14(3)(a) and (c).

The claimant asserted that the judge wrongly concluded, firstly, that the essential function of CPR Part 36.14(3)(a), as to interest on the award, was compensatory, so that the level of interest could not exceed what legitimately compensated Petrom for the disruption and difficulties of the litigation. Secondly, the claimant submitted that the essential function of CPR Part 36.14 (3)(c), as to interest on costs, was to reflect the cost of money.

Instead, the claimant submitted that the judge ought to have concluded that a party who has behaved unreasonably ‘forfeits the opportunity of achieving a reduction in the rate of additional interest payable’ as Lord Woolf MR held at paragraph 76 in Petrotrade Inc v Texaco Ltd [2000] EWCA Civ 512. The claimant went on to say that the power to award enhanced interest enables the court to disapprove of and to discourage unreasonable conduct, that enhanced interest should be fixed at a level which creates an appropriate incentive to settle, and that having regard to the defendant's conduct and to the absence of any meaningful incentives to settle under CPR Part 36.14 (3)(b)-(d), this was a clear case to award interest at the maximum level of 10% above base rate.

The defendant argued that the trial judge was correct in his approach and that the authorities on the matter had found these CPR provisions to be compensatory and these decisions had been applied consistently for over 14 years.

Giving his judgment, Sir Geoffrey Vos, Chancellor of the High Court, found that the trial judge had been wrong in deciding that the award of enhanced interest was entirely compensatory. He stated, ‘In my judgment, the objective of the rule has always been, in large measure, to encourage good practice’. This, he said, is supported by the negative formulation of CPR Part 36.14(3)(a) which states that the court will, unless it considers it unjust to do so, order that the claimant is entitled to one of the four available awards. He went on to say:

‘If the rule-makers had intended to say that all or any of the awards were only to be made if they represented compensation for litigation inconvenience, it would have been very easy to say so’.

However, he did also state:

‘In my judgment, the use of the word ‘penal’ to describe the award of enhanced interest under CPR Part 36.14(3)(a) is probably unhelpful. The court undoubtedly has a discretion to include a non-compensatory element to the award as I have already explained, but the level of interest awarded must be proportionate to the circumstances of the case. I accept that those circumstances may include, for example, (a) the length of time that elapsed between the deadline for accepting the offer and judgment, (b) whether the defendant took entirely bad points or whether it had behaved reasonably in continuing the litigation, despite the offer, to pursue its defence, and (c) what general level of disruption can be seen, without a detailed inquiry, to have been caused to the claimant as a result of the refusal to negotiate or to accept the Part 36 offer. But there will be many factors that may be relevant. All cases will be different’.

Considering the facts of the present case, Judge Vos highlighted the following factors as relevant to the determination of the appropriate rate of enhanced interest:

a) the defendant's refusal to engage in settlement discussions or to respond to the Part 36 offer
b) the fact that the eventual award was very significantly greater than the Part 36 offer itself and
c) the defendant's conduct of the litigation as described by the trial judge

In doing so he concluded that the trial judge in this case ought to have imposed the full 10% uplift for the enhanced rate of interest on the award.

It is clear then from this judgment of the Court of Appeal, which is the most significant judgment on Part 36 this year, that the penalties contained in Part 36 are not only designed to compensate the successful party, but can also include a penal element aimed at a party’s misconduct.

The full judgment can be accessed here.
We briefly mentioned last week, the Supreme Court judgment of Plevin v Paragon Personal Finance Ltd [2017] UKSC 23, which addressed both the assignment of CFAs and the recovery of a pre-LASPO success fee and after-the-event (ATE) premium where a CFA had to be extended after 1 April 2013 to cover appeals.

Both the CFA and insurance was agreed in 2008, but the former was varied, by way of two changes of solicitor, and the latter topped up twice after 1 April 2013 to deal with the appeals to the Court of Appeal and then the Supreme Court. The recoverability of a success fee under the CFA and the ATE insurance premium depends on the costs regime which, subject to transitional provisions, was brought to an end on 1 April 2013 by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).

Costs in the Supreme Court were assessed by Master O’Hare and Mrs Registrar di Mambro at £751,463.84, including £31,378.92 for the solicitors’ success fee and £531,235 for the ATE insurance premium. However, Paragon argued that:

a) In relation to the success fee, the CFA was not validly assigned to the firms that replaced the claimant’s original solicitors on the record;

b) In relation to both the success fee and the ATE premium, these were not recoverable because they were payable under arrangements made by the respondent after LASPO came into force and so were not covered by the transitional provisions of section 44(6) of LASPO.

The defendant’s argument in relation to the success fee was rejected. Section 44(6) states:

‘The amendment made by subsection (4) does not prevent a costs order including provision in relation to a success fee payable by a person (“P”) under a conditional fee agreement entered into before the day on which that subsection comes into force (“the commencement day”) if—

a) the agreement was entered into specifically for the purposes of the provision to P of advocacy or litigation services in connection with the matter that is the subject of the proceedings in which the costs order is made, or;

b) advocacy or litigation services were provided to P under the agreement in connection with that matter before the commencement day.’

The court held that the ‘matter that is the subject of the proceedings’ in section 44(6)(a) means ‘the underlying dispute’. The two deeds of variation provided for litigation services in relation to the same underlying dispute as the CFA, albeit at the appellate stages. Both deeds are expressly agreed to be a variation of the CFA, and so did not discharge it. Further, they were not a sham designed to avoid the operation of section 44(4) of LASPO and as such were covered by the transitional provisions within LASPO. The success fee was therefore recoverable.

The recoverability of the ATE premium turns on the meaning of section 46(3) of LASPO which refers to an insurance policy ‘in relation to the proceedings’ and not to the subject matter of the proceedings; i.e. the requisite link is with the proceedings. Before 1 April 2013 there was an ATE policy in place, but not yet in relation to the appeals before the Court of Appeal or Supreme Court. The critical question was therefore whether the two appeals constituted part of the same ‘proceedings’ as the trial.

The court noted that the starting point is that, as a matter of ordinary language, one would say that the proceedings were brought in support of a claim and were not over until the courts had fully disposed of that claim. They went on to point out that the purpose of the transitional provisions of LASPO was to preserve rights and expectations vested under the previous law. If there was a rigid distinction between different stages of the same litigation, this would defeat that purpose. As such, the ATE premium was also recoverable.

The full judgment can be found here.

New EU PPE Regulations to Tackle the ‘Effects’ of Health and Safety Risks and Not the ‘Cause’?

One of the main safeguards for employers and employees in respect of health and safety risks at work is that personal protective equipment (PPE) exists and is readily available. For more than 20 years, the EU Regulation governing PPE has been the same. This is no longer the case, however, given the introduction of PPE Regulation (2106/425) from 21 April 2018, which will deal with the manufacture, sale and importation of PPE. The new piece of legislation is likely to be adopted before Britain terminates its membership of the EU.
and, if so, will therefore have binding effect.²

It seems that physical injury has been shifted from primary focus, as policy makers pay increasing attention to long-term impairments, such as respiratory illnesses, musculoskeletal disorders (MSD) and noise induced hearing loss (NIHL). This is reflected in the new PPE Regulation, evidenced by Annex I, which categorises 3 levels of risk, as opposed to equipment type. For instance, ‘harmful noise’ or ‘cuts by hand-held chainsaws’ are placed in ‘Category III’ (‘risks that may cause very serious consequences such as death or irreversible damage to health’).³ Clearly, emphasis is being given to the effects and less so the cause, in order to improve both the quality of working conditions and the quality of life for those who suffer from a debilitating illness.

Rigour and stringency will be applied to testing and certification of PPE to ensure that supply to businesses meets the latest EN or ISO requirements and is completely fit for the purpose of employment that their workers undertake. The aim is for this to positively impact upon the speed at which modern advances in technology are acquainted with the market, providing the opportunity to go beyond ‘mere compliance’.

One example of software eagerly anticipated is a sensor which can be embedded within PPE to produce data that, upon analysis, will monitor ‘real-time’ risk, allowing employers and safety managers more time to devise training programs and advise best practice to prevent exposure to potentially injurious occupational conditions.⁴

If the development of PPE accelerates at currently projected rates could it be that the effects will trickle down to the personal injury market so that we see better management of health and safety risks and ultimately fewer claims successfully brought against employers?

Hot-Tubbing: Now a ‘Default Position’ in Certain Courts?

One of the Jackson reforms, which came into force on 1 April 2013, was expert ‘hot-tubbing’ i.e. concurrent expert evidence. It was thought that this addition to civil procedure would remedy some of the concerns flagged in Jackson LJ’s final report on civil litigation costs, such as the length and cost of obtaining expert evidence.

Paragraph 11 of Practice Direction 35 allows experts to give evidence concurrently (otherwise known as ‘hot-tubbing’), which supplements and extends existing powers of the court under CPR Rules 32.1 and 35.1. Rule 32.1 bestows upon the court powers to direct experts to the subject, nature and method of necessary evidence, while Rule 35.1 enables the court to direct opposing experts to discuss (particularly) issues and, where possible, reach an agreed opinion, which can be prepared as a statement.

Expert ‘hot-tubbing’ removes the burdensome need for cross-examination or re-examination by opposing parties’ solicitors, since judge-led joint examination of evidence allows the court to come to a better determination on technicalities which may be contested. More information explaining the process in detail can be found in edition 102 of BCDN (here).

In edition 152 of BCDN, we reported on a study carried out by the Civil Justice Committee (CJC), which found that 83% of judicial respondents considered that the quality of expert evidence had improved as a result of ‘hot-tubbing’ and that trial delays had reduced. Another conclusion reached was that PD 35.11 should be amended to separate the various types of ‘hot-tubbing’ that have emerged, e.g. ‘sequential, back to back’ and ‘teach-in’ examination, thereby extending the powers of the judiciary to advise experts. This, it was proposed, would take the form of a Guidance Note.

The CPRC subsequently appointed Kerr J, as chairman of the CPRC sub-committee tasked with identifying specific classes of case or types of issue requiring expert evidence for determination. In the sub-committee’s most recent report to the CPRC in February, they disappointingly revealed that ‘hot-tubbing’ has not caught on, has not been taken up voluntarily and is not the default position, suggesting that unless it is actively promoted it will not deliver the desired benefits.⁵

The report continued by disclosing the details of a clinical negligence case where ‘hot-tubbing’ was not used, to his dismay, stating:

“When I raised the issue with the parties at the start of the trial, one counsel was very hostile and the other (quite junior) looked blank, as though he did not know what hot tubbing was. Concurrent expert evidence had not been considered by the parties and appeared alien to their culture and experience of litigation.”⁶

Without CMC direction the case proceeded to deliver evidence ‘sequentially by discipline’, resulting in a ‘wasteful duplication of effort and cost’.

The sub-committee requested guidance from the CPRC on whether it should dictate the use of ‘hot-tubbing’. In response, the CPRC urged that a balance must be met between the exercise of caution over an extension of ‘hot-tubbing’ scope and encouragement of further ‘hot-tubbing’ uptake. Although there is a genuine fear that ‘little headway’ will occur in generalised PI courts, the sub-committee claim they favour a ‘default position’ for specialised courts only as it would represent a gradual approach to procedural change.

Where ‘hot-tubbing’ has been used, undoubtedly, the justice system has benefitted. However, according to an Expert Witness Institute (EWI) survey, referred to in edition 162 of BCDN, only 15% of experts questioned admitted hot-tubbing participation.
Dutch Study Ties Electromagnetic Field Exposure to Motor Neurone Disease

Results of a Dutch Study, carried out over 17 years, into the relationship between Amyotrophic Lateral Sclerosis (ALS), a rare neurodegenerative disorder and extremely low frequency magnetic fields (ELF-MF) have revealed that:

Men who were occupationally exposed to high levels of ELF-MFs were 2.19 times more likely to develop ALS than those who had never been exposed to them. Additionally, those in the top tertile (or the top 30 percent) of cumulative exposure were almost twice as likely to develop ALS.¹³

For years it has been argued that, ALS, which effects 2 out of every 100,000 in the UK, is attributable, not only to environmental activity, such as smoking, or a lack of physical exercise, but also to occupational factors. As the disease is untreatable, most sufferers die of respiratory failure 3-5 years post-diagnosis, due to a progressive loss of bodily function. In fact, only 10% of diagnosed individuals survive longer than 10 years after having contracted this form of motor neurone syndrome.

The Dutch study was led by Roel Vermeulen of Utrecht University, alongside, Maastricht University and University Medical Centre Utrecht researchers, in order to further examine the effects of occupational exposure to ELF-MF. Electric shocks, metals, e.g. lead and mercury, solvents and pesticides have also been suggested as causal factors of ALS mortality, but were not considered in this study. Findings have subsequently been published in the Journal of Occupational and Environmental Medicine.¹⁰

The cohort group of 58,279 men and 62,573 women, between the ages of 55 and 69, were enrolled in 1986 and successively surveyed for almost two decades. Random sampling saw 2,411 men and 2,589 women selected, from which 76 men and 60 women consequently died. Given that, according to job employment matrices, less than 2% of women experienced the desired employment conditions, i.e. where ELF-MF was present, no observations on female ELF-MF exposure were interpreted.

It has been deduced from the results that men are more than twice as likely to develop ALS through high levels of exposure (top 30%) compared to those who had never been exposed through their work.

Nevertheless, if the values are accurate, positions carrying the most risk may include:
- Welders;
- Electric line installers;
- Repairers and cable jointers;
- Sewing machine operators; and
- Aircraft pilots.¹¹

The explanation for this would be that they involve work in close proximity to powerful electrical equipment - the source of ELF-MF.¹²

It is worth noting though, that despite the fact the class of individuals was large, it is still possible that the results are down to chance, as the rarity of the medical condition undoubtedly increases the risk of statistical error. In spite of this, given that 5% of ALS cases are hereditary, it could be that ELF-MF is one factor, among many, which provokes the onset of ALS.

In edition 132 of BC Disease News, we reported on the potential link between radiofrequency (RF) electromagnetic fields (EMF) and cancer. Mobile phones have been the main culprit under surveillance in studies, although, to this date, there is still little convincing evidence that mobile phones pose a risk to human health.

Nevertheless, in edition 145, we announced the transposition of EU Directive 2013/35/EU (adopted in June 2013) into British law under The Control of Electromagnetic Fields at Work Regulations (CEMFAW) 2016. This piece of legislation provides employees with a body of legal protection to guard against excessive EMF exposure at work, which implies that there are genuine hazards to defend against.

Samsung Worker Has Infertility Classified as an ‘Industrial Accident’

South Korea has, this month, recognised infertility as an ‘industrial accident’ for the first time in its national history after a long term, female employee at Samsung’s semiconductor plant, was exposed to small quantities of ethylene glycol.¹³

Ethylene glycol is a clear, colourless liquid with a syrup-like consistency and is commonly used in antifreeze solutions, deicers and as an engine coolant. The general public are most likely to be exposed to ethylene glycol although in the UK safe limits are enforced to protect employees.¹⁴ Public Health England (PHE), list the following possible symptoms of exposure to this substance:

Small spills of ethylene glycol on the skin are unlikely to cause harm provided they are washed off immediately. Ethylene glycol is an irritant and splashing it in the eyes could cause stinging, though this should not lead to permanent damage. Following ingestion of large amounts, symptoms may appear like "drunkenness", after this serious damage to the heart, lungs and kidneys may arise and can lead to coma, nerve damage and death. Inhalation of ethylene glycol is not considered to be a serious risk to health. It is unlikely that environmental contamination will result in any adverse health effects'.

In relation to the effect of ethylene glycol on pregnant women and unborn children, PHE state that:

There are limited data available on the effects of exposure to ethylene glycol on
pregnancy and the unborn child. Effects on the unborn child are more likely to occur at levels that harm the mother."

However, the recent recognition by the Samsung occupational disease mediation committee, that infertility caused by ethylene glycol is ‘potentially subject to compensation’ and the South Korean government’s acknowledgment of it as an occupational disease, suggests that such toxic organic compounds may pose more of a risk to female workers than initially thought.

Indeed, a Korea Occupational Safety and Health Agency (KOSHA) survey, conducted in 2014, revealed that 33,828 out of a total class of 499,194, were at high risk of exposure to reproduction-toxic factors, with the most affected industries being:

- Leather, handbag, and shoe manufacturing;
- Electronics;
- Textile manufacturing; and
- Food manufacturing.

This supports recorded rates of stillbirth and miscarriage among timber, lumber, furniture, rubber and plastic manufacturing, which, according to a 2016 report published by the National Human Rights Commission of Korea, was between 16 and 17% between the years of 2017 and 2015.

It is therefore possible that growing concerns over South Korea’s low birth rate had a strong influence on the decision to label infertility as an ‘occupational disease’, especially as the toxic substances in question have demonstrated a hereditary link. However, even if this is the case, nothing should denigrate the statistics, which show a noticeable link between reproduction-toxic substances and fertility-related issues.

Will this open the floodgates to occupational infertility claims?

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**Asons Update**

Last week, we announced that Asons Solicitors had ceased trading and Banks Solicitors, trading as Coops Law, had changed its registered address to that of Asons, alongside a TUPE transfer of all Asons staff to Coops. Banks Solicitors is an ABS owned by Irfan Akram, brother of the former Asons founders.

However, it has recently been reported that following an SRA intervention Coops file handlers have been prevented from continuing their progress on ‘ongoing’ Asons cases unless they have a written mandate from the client.

As yet, it is difficult to predict what the outcome will be, since the grounds for this action have been vague. It has simply been stressed that they wish to ‘protect the interests of clients and former clients’.

We will continue to update readers on future developments.
Feature

INTRODUCTION

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

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

Each of these elements are required in order to establish liability under the sub-section. Having dealt with the meaning of ‘any process carried on’ and ‘persons employed’ for the purposes of this section, we now turn to the two limbed test contained within it. Firstly, is the dust or fume ‘likely to be injurious’? Secondly, has there been a ‘substantial quantity’ of dust?

In this feature we consider the judicial interpretation of ‘likely to be injurious’, not only in the context of s.63(1)/s.47(1) but also in subsequent regulations relevant to asbestos claims, and whether this imports concepts of foreseeability as in negligence claims, or whether there is a stricter more onerous duty on employers than there is at common law.

We will then go on in the coming weeks to look at what is meant by ‘substantial quantity’ of dust and ‘all practicable measures’.
Firstly let us consider the regulations/legislation relied upon within asbestos claims in which ‘likely to be injurious’ appears. It is important to note that whilst all of these Regulations use the same phrase, they vary in their application as can be seen from the table below:

<table>
<thead>
<tr>
<th>Statutory Provision</th>
<th>Applicable Between</th>
<th>Industrial Application</th>
<th>Duties Under Legislation</th>
<th>Employer/Occupier?</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Building (Safety, Health &amp; Welfare) Regulations 1948</td>
<td>02/10/1948 – 02/03/1962</td>
<td>Construction, Structural Alteration, Repair or Maintenance of a Building (Including Re-Pointing, Re-Decoration and External Cleaning), Demolition and Preparation, Laying of Foundations of an Intended Building on or Adjacent to a Site of Engineering Construction and Machinery or Plant Used in Such Operations</td>
<td>Regulation 82 - 'Where in connection with any grinding, cleaning, spraying or manipulation of any material, there is given off any dust or fume of such a character and to such an extent as to be likely to be injurious to the health of persons employed all reasonably practicable measures shall be taken either by securing adequate ventilation or by the provision and use of suitable respirators or otherwise to prevent inhalation of such dust or fume.'</td>
<td>Employer – see Abraham in which it was confirmed that the 1948 Regulations applied to both defendants as firms undertaking building operations to with the 1948 Regulations applied. Also regulation 4, which states ‘It shall be the duty of every contractor and employer of workmen who is undertaking any of the operations to which these Regulations apply…’</td>
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<tr>
<td>Construction (General Provisions) Regulations 1961</td>
<td>01/03/1962 – 01/10/1989</td>
<td>Building Operations and Works of Engineering Construction</td>
<td>Regulations 20 - Where in connection with any grinding, cleaning, spraying or manipulation of any material, there is given off any dust or fume of such a character and to such extent as to be likely to be injurious to the health of persons employed all reasonably practicable measures shall be taken either by securing adequate ventilation or by the provision and use of suitable respirators or otherwise to prevent inhalation of such dust or fume.'</td>
<td>Employer – see Abraham in which the second defendant admitted that the 1961 Regulations applied to the work carried out by them. Also see regulation 3 which states ‘It shall be the duty of every contractor and employer of workmen who is undertaking any of the operations to which these Regulations apply…’</td>
</tr>
<tr>
<td>Factories Act 1937/1961</td>
<td>01/07/1938 – 01/04/1962</td>
<td>Factories, Factories Occupying Parts of Buildings, Electrical Stations, Institutions Constituting a Factory, Docks, Wharves, Quays, Warehouses, Building and Engineering Construction</td>
<td>Section 4(1) - 'Effective and suitable provision shall be made for securing and maintaining by the circulation of fresh air in each workroom the adequate ventilation of the room, and for rendering harmless, so far as practicable, all fumes, dust and other impurities that may be injurious to health generated in the course of any process or work carried on in the factory.'</td>
<td>Occupier</td>
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Now we have established when, where and to whom these regulations apply and how they differ in their application to any particular scenario, we can now consider the judicial interpretation of 'likely to be injurious'.

WHAT IS LIKELY TO BE INJURIOUS?

It is now accepted that the first limb of s.63 imports notions of foreseeability i.e what the reasonably well informed factory occupier knew, or ought to have known, about reasonably foreseeable risks.

In *Jones v Metal Box* (Cardiff County Court, 11 January 2007), the deceased had developed mesothelioma as a result of exposure to asbestos during her employment on a production line in the defendants factory in the 1950s and 1960s. The claimant alleged that the defendants were in breach of s.4, s.29, and s.63 of the Factories Act 1961. In relation to s.63, the claimant did not seek to satisfy the second condition and so discussion was had about the term 'likely to be injurious or offensive'.

HHJ Hickinbottom, held that:

""Likely" in this context does not mean "more probable than not" but merely "such as might happen" or "such as might well happen" (Knox v Cammell Laird Shipbuilders Ltd, Simon Brown J, 30 July 1990, Transcript Pages 92B–94B). The condition is therefore satisfied if injury is something that merely might well happen as the result of exposure to the dust. This interpretation, with which I respectfully agree, is of course consistent with the purpose of the provision, namely to protect employees from inhalation of potentially injurious dust etc."

He then went on to say that the phrase should be read in the sense of likely to be injurious according to the estimation of a reasonably well-informed factory occupier or which the actual occupier knew, or ought to have known, to be likely to be injurious. He relied on the statement of Simon Brown J in Knox where he said:

'I conclude, therefore, that the question posed by Section 47 of the Factories Act 1937, which was in essentially similar terms to Section 63(1) of the 1961 Act is whether the employers should have recognised the risk that fume inhalation might well injure some of the work force operating in confined spaces'.

It is therefore accepted that it is necessary to show that there is some foreseeable risk of injury for liability to flow from this statutory duty. It was argued in *Jones* by the defendant, that the test is no stricter than at common law. HHJ Hickinbottom, found that this test had been met and that the question posed by Simon J had been answered in the positive:

'From October 1965, in respect of this case I unhesitatingly answer the question posed by Simon Brown J in the positive. From that date, on the basis of the Sunday Times article referred to above, the Defendants should have recognised the risk that inhalation of chrysotile dust emanating from the transfer belts of the NVOs might well injure those working on or by the NVOs. By virtue of Section 63, the Defendants were therefore required to take all practicable steps to protect their workforce. The Defendants do not plead that reasonably practicable precautionary or preventative measures were not available to them. As indicated above in connection with the claim in negligence, they clearly were available (see Paragraphs 82–83). The obvious, simple, cheap and effective step would have been to have eliminated asbestos dust emissions altogether by changing the belt to a non-asbestos belt. In any event, the Defendants took no steps at all'.

It was therefore held that the defendants were in breach of their duty owed by virtue of s.63 FA 1961.

In *Abraham v G Ireson & Son (Properties) Limited* [2009] EWHC 1958 (QB), the case of Knox was again followed. In this case the claimant was exposed to asbestos during two employments as a plumber between 1956-1965 with two very small general building / plumbing firms. The judge found his exposure was from ‘…use of asbestos string and / or asbestos scorch pads’ which was described as being ‘very light and occurring intermittently and infrequent’. Despite this the engineering evidence was that exposure could have been reduced further by the use of asbestos free string.

The claimant alleged that he was exposed to asbestos dust in the course of his employment, negligently and in breach of statutory duty by virtue of regulation 82 of the Building (Health, Safety and Welfare) Regulations 1948 and/or regulations 20 and/or 21 of the Construction (General Provisions) Regulations 1961.
The claimant submitted that the word ‘injurious’ in regulation 20 was an objective term and involved no element of foreseeability. The then decision of the Court of Appeal in *Baker v Quantum Clothing Group* [2009] EWCA Civ 499, was relied upon, which approved the approach of *Larner v British Steel* [1993] ICR 551 in which it was found that the obligation to ensure that a workplace was ‘safe’, for the purposes of s.29 of the Factories Act 1961, was absolute (subject to the defence of reasonable practicability).

The claimant argued that ‘likely to be injurious’ should be construed in the same way and be considered objectively, regardless of the state of knowledge of the defendants at the material time under consideration.

[It should be noted that, the claimant sought to rely on the Court of Appeal decision in *Baker* before the Supreme Court had handed down its judgment effectively overturning the ruling on the meaning of ‘safe’ within s.29. The Supreme Court held that ‘there is nothing in section 29 to introduce the principle of reasonable foreseeability into the meaning of “safe”. This will be discussed in greater detail in future features.]

The defendant relied upon the decision in *Knox* where it was found that the concept ‘likely to be injurious’ pre-supposed a degree of knowledge on the part of the employer. In coming to this conclusion, Brown J was following the judgment in *Brookes v J&P Coates (UK) Limited* [1984] 1 All ER 702 in which Boreham J, considering section 4 of the FA 1961 and the phrase ‘may be injurious to health’, concluded that:

‘The section imposes a qualified duty, namely, a duty to render harmless, so far as practicable, such dust as may be injurious to health. There has been a difference of opinion as to whether or not it is necessary for the plaintiff to show that the defendants knew or at least ought to have known that there was a risk to health; in this case a risk from the dust generated in the course of any process or work carried out in the factory. I prefer the view that the defendants, if they are to be liable in this regard, must be shown to have known or it must be shown that they ought to have known of the danger, namely, that the dust might be injurious to health otherwise how are they to judge what is practicable?’

The judge, Swift J, in *Abraham*, rejected the claimants arguments and concluded that *Baker* would not affect the findings of Brown J’s construction of ‘likely to be injurious’ in *Knox*. She stated at para 92:

‘It seems to me that the phrase “likely to be injurious” is a very different concept from that of “safe”. The words “likely to” plainly imply that a degree of foreseeability is required. Otherwise, as Mr Feeny [counsel for the defendant] observed, it is difficult to see why the word “injurious” alone was not used’.

*Knox* was also relied upon in the High Court decision of *Asmussen v Filtrona United Kingdom Limited* [2011] EWHC 1734 (QB), in which Mr Justice Simon held that the question which should be asked is: *judged by what was known at the time, should the defendant have recognised the risk of the inhalation of asbestos fibres might well injure some of the workforce working in confined spaces?*

He went on:

‘It seems to me that the words of the statutes relied on by the Claimant involve a consideration of what should have been known and understood at the time. Although it may be misleading to introduce concepts of foreseeability, the words “likely to be injurious” plainly involve a degree of foresight. As Swift J noted in *Abraham* (above) at [92], if it were otherwise it is difficult to see why the word “injurious” was not used alone’.

In answering these questions, Simon J considered what information and advice would have been available to the defendant at the time regarding what levels of asbestos exposure were considered acceptable – much the same considerations as are had in relation to allegations of negligence which we discussed in editions 172, 173 and 174 of BC Disease News.

In *Jeffery Jones & Others v The Secretary of State for Energy and Climate Change, Coal Products Limited (“The Phurnacite Workers Group Litigation”)* [2012] EWHC 2936 (QB) at [429] Swift J found that:

‘It is clear from the authorities that the words “likely to be injurious” imply a degree of foresight about the possible risks. Thus, the claimants must prove that the defendants should have recognised at the relevant time, according to the knowledge and standards of the day, that such exposure might well injure workers exposed to the relevant dust and/or
fume. It is not necessary that the defendants should have recognised the specific nature of the risk involved; all that is required is a recognition of the risk of some personal injury’.

The highest level at which the foreseeability element of the phrase ‘likely to be injurious’ has been discussed was by the Supreme Court in *McDonald v National Grid Transmission Plc* [2014] UKSC 53 at [109] Lady Hale stated (albeit in passing) that foreseeability applies to the first limb when she stated:

‘…This issue was not addressed by the trial judge, who was side tracked into issues of foreseeability and whether the dust was likely to be injurious, which are relevant to negligence and to the first limb of section 47, but not to the second.’

Since *McDonald*, there have been several decisions in which the meaning of the first limb of s.63(1)/s.47(1) and the term ‘likely to be injurious’. The first, was *Smith v Portswood* [2016] EWHC 939 (QB) in which a former employee worked as a joiner for the defendant employer between 1973 and 1977 and was required to cut and trim asbestos sheets ‘very occasionally’. The exposure to asbestos would take place for around 10 minutes and the concentration of asbestos, it was found, did not exceed the thresholds contained in TDN13.

As such, it was concluded that it would be ‘wholly unrealistic’ for the defendant company to have been in a position in which it could be said to have been able to foresee the risk of injury to the deceased. Therefore, the claim failed both under the common law and s.63(1). HHJ Curran, throughout paras 26 to 34, reiterated the authorities on the meaning of ‘likely to be injurious’ and concluded that it requires foreseeability on behalf of the defendant.

Most recently, in *Prater v British Motor Holdings Limited* (Bristol County Court, 9 June 2016), the court did not question the foreseeability element of ‘likely to be injurious’ but rather accepted it as the status quo.

In this case it was found that when considering whether the dust given off was of such a character and of such a quantity that it was likely to be injurious or offensive, regard should be had to the state of knowledge at the particular time. The judge stated:

‘These enactments envisage two different situations. Firstly, where the dust given off is of such a character and of such a quantity that it is likely to be injurious or offensive to persons employed. This imports foreseeability of harm, having regard to the state of knowledge at the particular time. The second relates to where a ‘substantial quantity’ of dust of any kind is given off, irrespective of whether it was foreseeable that such may cause harm’.

The judge then went on to consider what the defendant ought to have known about the deceased’s exposure having regard to the information available at the time. He concluded:

‘I am quite satisfied that the knowledge at the relevant times of the risks of injury from the inhalation of asbestos dust was such as to require the Defendants to take all practicable measures to prevent the same, both under the Factories Acts and at common law, and that their failure to do so puts them in breach.’

**CONCLUSION**

It is therefore clear that foreseeability is imported into the first limb of s.63(1)/s.47(1) and the phrase ‘likely to be injurious’. To that end the first limb does not impose a more onerous duty than that imposed at common law and breach of statutory duty will only arise where injury was reasonably foreseeable to the reasonably well informed factory occupier.

However, s.63 is a two limbed test, and so even if an employer can rely on a foreseeability defence to show that they ought not to have known that the dust they exposed the claimant to was ‘likely to be injurious’ they must still show that they did not expose the claimant to a ‘substantial quantity’ of dust, otherwise they must show that they took all practicable measures to protect them against inhalation of that dust.

Does ‘substantial quantity’ also import notions of foreseeability or is it a stricter, more onerous duty on employers? What amount of dust will be considered to be a ‘substantial quantity’?

In next week’s feature we will be looking at these questions, amongst others, during our deconstruction of the second limb of s.63.
References


11. Ben Spencer, ‘Motor neurone risk may be higher for pilots and welders: Workers exposed to electromagnetic fields are more likely to develop most common form of the disease’ (30 March 2017 The Daily Mail) <http://www.dailymail.co.uk/health/article-4362598/Motor-neurone-risk-higher-pilots-welders.html> accessed 03 April 2017.


15. Ibid at 13.

Ibid at 13.

‘SRA shuts down Asons and tells staff transferred to another firm they can’t have their files’ (31 March 2017 *Legal Futures*)<http://www.legalfutures.co.uk/latest-news/sra-shuts-asons-tells-staff-transferred-another-firm-cant-files> accessed 03 March 2017.
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