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

This week we report on the Court of Appeal decision in *Budana v Leeds Teaching Hospital NHS Trust*, which held that the transfer of a conditional fee agreement from one law firm to another around the time of Jackson reforms was valid and the success fee recoverable.

Elsewhere, we are pleased to announce that BC Legal have been awarded Defendant Personal Injury Team of the Year at the Personal Injury Awards 2017.

In this week’s feature we continue our series on fatal damages in mesothelioma claims and begin to look at heads of loss under the Fatal Accidents Act 1976 in particular, claims for loss of ‘intangible benefits’ of a spouse.

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

As always, warmest regards to all.

**SUBJECTS**

BC Legal Wins Defendant Personal Injury Team of the Year

At the 2017 Personal Injury Awards, which took place on 29 November, BC Legal was awarded Defendant Personal Injury Team of the Year.

The Judging Panel, comprising the CEO of both FOIL and APL, together with Frank Burton QC and Michael Redfern QC, praised BC Legal’s level of innovation. They were also impressed with the extent to which we use our market leading software to interact with clients and improve their outcomes.

Court of Appeal Rule on Transfer of CFA: Budana v The Leeds Teaching Hospital NHS Trust [2017] EWCA Civ 1980

At the Court of Appeal, Budana v The Leeds Teaching Hospital NHS Trust [2017] EWCA Civ 1980 has overruled the first instance decision, which erred in ruling that a Conditional Fee Agreement (CFA) had not been validly assigned. This decision is likely to affect tens of thousands of claimants, who entered into CFA’s preceding the introduction of the Jackson Reforms, and has been heralded as ‘probably the most significant costs case post Jackson’.

At the County Court, District Judge Besford ruled that the CFA, between the claimant and its first instructed firm of solicitors (BR), was not validly assigned to the second instructed firm of solicitors (NH) before the first firm closed its practice, on 22 March 2013. The judge reasoned that the CFA had been terminated prior to assignment. The implication of this was that the 100% success fee, in the event that the claimant won her case, was no longer recoverable from the defendant.

Here, the issue was whether the ‘new contract’, with the 2nd firm of solicitors, entered into on 10 April 2013, was an extension of the previous CFA, transferring all of the same obligations and rights, such as the recoverability of the success fee.

Lady Justice Gloster, handing down judgment at the Court of Appeal, found that the CFA had been validly transferred and could not be terminated unilaterally.

Discussing the nature and purpose of the CFA contract between client and Law Firm, she noted at paragraphs 46-48, that:

‘There is no reason in principle why rights and benefits [her emphasis] under a firm of solicitors’ contracts with its clients, or its books of business, should not be capable of assignment in today’s business environment...

Whereas generally a contract between a solicitor and his client might well be regarded as a personal contract from the point of view of both the solicitor and the client, the question is fact specific and depends on the individual retainer. Given the circumstances in which most claimant personal injury litigation is now conducted ... the CFA between a client and his solicitor in such a case lacks the features of a personal contract. What the client wants is representation by a competent practitioner and not necessarily representation by a specific individual (whom he or she may probably never meet).

ASSIGNMENT OR NOVATION?

It is important to consider the law governing the assignment of CFA’s which essentially represent a contract between a firm of solicitors and its client. It has been said that CFA’s should be regarded as personal contracts (a contract for the firm to provide a personal service to the claimant) and, as such, are not equivalent to a contract for the purchase of goods.
There are numerous decisions which confirm that a personal contract is not capable of assignment. However, even if it is deemed to be assignable, a number of potential issues remain. For example, all contracts have what are termed benefits and burdens. CFAs are no exception to this and, in a solicitor-client retainer, the benefit of the contract (from the solicitor’s point of view) is the right to payment from the client, while the burden on the solicitor is the obligation to work for the client.

The general rule (subject to very few exceptions) is that the benefit can be assigned, while the burden cannot. Where both parties to an existing contract and a new party agree that the new party should take over the benefits and burdens of a contract, i.e. the old contract has been rescinded, this is known as novation, rather than assignment. If the old contract is to be replaced with a new contract, it must be compliant with post-April 2013 CFA’s, which disallow the recoverability of fees from the losing opponent. If there is no alternative contract, then, on the face of it, there is no valid retainer and there may be no recovery of any costs, save for certain disbursements. We have discussed this previously in edition 154 of BC Disease News here.

The 29th edition of Chitty on Contracts identifies that, ‘in English law a distinguishing feature of novation from assignment is that the effect of novation is not to assign or transfer a right or liability, but to extinguish the original contract and replace it by another’.

In this scenario, the judge deemed that there had been a ‘novation’, as opposed to an ‘assignment’, of the CFA, although the technical analysis between the two terms was ‘finely nuanced’.

In spite of this, the judge clarified that:

‘... the fact that ... there may have been a novation ... does not predicate that the success fee payable by the claimant to NH could not qualify as “a success fee payable by .... [the claimant] under a conditional fee agreement entered into before” 1 April 2013’.

At paragraph 43 of her judgment, Gloster LJ gave her preference:

‘... to articulate the actual issue to be determined ... as:

whether, for the purposes of the transitional provisions of section 44(6) of LASPO, the fee payable by the claimant to NH, under the “transfer” arrangements between BR, NH, and the claimant, was “a success fee payable by ... [the claimant] under a conditional fee agreement entered into before” 1 April 2013’.

WAS THE SUCCESS FEE RECOVERABLE?

Under s.44(6) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), the claimant can still recover a success fee.

Interpreting the facts, with respect to s.44(6), Gloster LJ stated, at paragraphs 71 to 74:

‘It is clear ... that, objectively construed, the intention of the parties was that ... [NH] ... should simply be substituted in ... [BR’s] ... place ... under and subject to the same terms of the existing (and so far as the parties were concerned, at least) continuing retainer ...’

She went on to say, at paragraph 74:
‘[It would be] an overtechnical application of the doctrine of novation so as to prevent any litigant, who had begun a claim under a CFA prior to 1 April 2013, from recovering costs in respect of a success fee, simply because a novation had occurred as a result of a change in the constitution of the firm of solicitors acting for her, or as a result of the conduct of her claim being transferred, for whatever reason, to a new firm of solicitors.’

As such, it was seen to be the case that rights and obligations of the CFA were transferred from the 1st claimant solicitor to the 2nd, meaning that the 100% success fee originally payable to the 1st solicitor was still enforceable against the 2nd.

Lord Justice Davis, also giving judgment in this case, opined, at paragraph 81, that:

‘... an overall conclusion in favour of the defendant would appeal to no sense of the merits. It would mean that the claimant will be deprived of costs to which she might ordinarily expect to have been entitled. It would mean that the defendant is absolved from paying those costs by virtue of adventitious technicality’.

However, unlike Gloster LJ and Beatson LJ, who were in agreement that the transfer of the CFA fell under the doctrine of novation, LJ Davis saw the transfer as an assignment, concluding:

‘... if the parties to an agreement expressly agree in it that one party may assign both the benefits and the obligations of performing the contract to another then in my opinion there can be no legal objection to the efficacy of such an assignment, as an assignment, if effected thereafter’.

The full judgment can be accessed here.

Calculating Interest When Claimant Beats Part 36 Offer: Mohammed v The Home Office [2017] EWHC 3051 (QB)

The High Court has handed down judgment in the case of Mohammed v The Home Office [2017] EWHC 3051 (QB), which ruled on the issue of how much interest claimants are entitled to when they beat their own Part 36 offer.

On 2 March 2017, the Claimant made a Part 36 offer of £70,000 for a false imprisonment claim. Later, on 8 November, the claimant obtained an order for damages, of £78,500, in the case of Mohammed v The Home Office [2017] EWHC 2809 (QB). As this was more advantageous than the claimant’s original offer, in March, the judgment satisfied CPR 36.17(1)(b).

Further, the judge ordered interest on damages at a rate of 2% per annum from service of proceedings, totalling £2,753. Pursuant to CPR 36.17(4)(a), the court is entitled to order the additional payment of interest ‘at a rate not exceeding 10%’ of any part of the damages.

The judge had therefore complied with the necessary Procedure rules.
Handing down his initial judgment, Mr Pepperall QC described the claimant as a ‘violent and prolific offender’, who, although ‘not the most wicked of men’, maintained a presence which was ‘not conducive to the public good’. As a result of this, Mr Pepperall QC was requested by the defendant to reconsider and ‘temper’ his discretionary award of 2% interest.

The judge referred to Sir Geoffrey Vos, who provided guidance in the case of OMV Petrom SA v. Glencore International AG [2017] EWCA Civ 195, at the Court of Appeal, stating that 10% is not ‘a starting point. It … [is] … the maximum possible enhancement’.

Sir Geoffrey went on to advise, at paragraphs 38 to 39:

‘The court undoubtedly has a discretion to include a non-compensatory element to the award …, 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. Just as the court is required to have regard to ‘all the circumstances of the case’ in deciding whether it would be unjust to make all or any of the four possible orders in the first place, it must have regard to all the circumstances of the case in deciding what rate of interest to award under Part 36.14(3)(a).’

**HOW DID ‘ALL OF THE CIRCUMSTANCES’ POINT TO AN AWARD OF INTEREST?**

Mr Pepperall QC reasoned that the award of interest should be moderated by the conduct of the litigation and not ‘whether the claimant had led a blameless life up until the moment when a tort was committed’ against them. In respect of conduct, the judge said it was necessary to consider:

- the level of the offer;
- the time between offer and judgment;
- the claimant’s conduct of the case;
- the defendant’s conduct of the case; and
- the general level of disruption.

In relation to the claimant’s conduct, the judge noted:

‘Whatever his criminal background, Mr Mohammed has, through the skill of his legal team, prosecuted this claim reasonably. A proper application for interim relief was made successfully to Hayden J. A fair and properly reasoned settlement offer was made and, when it was not accepted, Mr Buttler and his instructing solicitors presented this claim fairly and moderately’.

However, he went on to point out that the defendant should have recognised the weakness of its defence significantly earlier than it had done and this should have led to an earlier concession of liability.

As such, the judge awarded enhanced interest at the rate of 6% ‘over base from 23 March 2017 until judgment’, when the claimant’s Part 36 offer expired.

The judge then awarded costs on the indemnity basis from 23 March 2017 until judgment, plus enhanced interest on costs ‘incurred on or after 23 March 2017 from the date when the work was done or liability for the disbursement incurred’, also at 6%.

Finally, Mr Pepperall QC turned to consider the ‘additional amount’, eligible to the claimant under CPR 36.17(4)(d).
The parties were in dispute over the construction of CPR 36.17(4)(d), due to conflicting case law. Defendant counsel submitted that the appropriate uplift should be 10% of the net award of damages, as ‘the natural construction of “the amount awarded” is the capital sum excluding interest.’ This was the approach taken in Watchorn v Jupiter Industries Ltd [2014] EWHC 3003 (Ch), where the judge highlighted ‘difficulty in the gross approach since the effect would be to make an additional award of 10% on interest already awarded at 10% over base, thereby taking the total award of interest to over 11%’.

In contrast, claimant counsel submitted that the appropriate uplift should be 10% of the gross award, including interest under s.35A of the Senior Courts Act 1981, ‘because the draftsman would otherwise have expressly excluded interest as he did in r.36.17(4)(a).’ This was the approach taken in Bolt Burdon Solicitors v Tariq [2016] EWHC 1507 (QB), who said, ‘As a matter of statutory construction, the inclusion of the words ‘excluding interest’ in one part of the rule but the omission of the same words in another part, is a strong indication that there was intended to be a difference,’ and distinguished the decision from Watchorn.

In deciding whether the ‘amount awarded’ meant:
1. the award of damages net of any interest
2. the award of damages inclusive of any interest awarded under the 1981 Act (before the court considers Part 36); or
3. the award of damages inclusive of any interest awarded under the 1981 Act and inclusive of any award of enhanced interest under r.36.17(4)(a),
Mr Pepperall QC criticised the judge’s reasoning in Watchorn. It was noted that the court had not taken into account the 2nd ground, ‘namely that the court should take into account the interest awarded under the 1981 Act but not the enhanced interest awarded under r.36.17(4)(a).’

Held, at paragraph 27:
‘In my judgment, the proper construction of r.36.17(4)(d)(i) is clear. In calculating the additional amount, the court should take into account the gross award that would have been made but for Part 36. That is the sum that the court was about to award when taken to the Part 36 offer. Such assessment therefore includes basic interest, whether awarded pursuant to contract (as in Bolt Burdon) or to the court’s discretionary power, but excludes any enhanced interest awarded under r.36.17(4)(a).’

Mr Pepperall QC therefore awarded the additional amount of 10% of his award of damages, including the agreed interest, pursuant to the 1981 Act.

The full judgment can be found here.

Contributory Negligence and ‘Momentary Inadvertences’: Casson v Spotmix Limited [2017] EWCA Civ 1994

This month, the Court of Appeal handed down judgment in the case of Casson v Spotmix Limited [2017] EWCA Civ 1994, which considered whether the judge at first instance was correct in ruling that the claimant was contributorily negligent, pursuant to the Law Reform (Contributory) Negligence Act 1945, resulting in a reduction of damages payable by 10%?

Under s.1(1) of the Law Reform (Contributory Negligence) Act 1945:
‘Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage...’

Most case law advises that ‘momentary inadvertences’ are not to be taken into account when considering whether an employee has been contributorily negligent. An example of this was exhibited in the case of Summers v Frost [1955] A.C., where ‘only a mere momentary inadvertence ... fell short of negligent conduct’.

In Casson, the claimant was injured when climbing a ladder to brush off debris from the side of a machine. The 1st and 3rd defendants argued that cleaning the vertical surface immediately below the conveyor, put the claimant partly at fault for trapping himself and suffering damage. Mr Casson ‘was an inexperienced employee whose training and instruction were entirely silent on the method to be deployed when cleaning the conveyor’. As such, both defendants were in breach of duty for ‘failing to provide adequate training’.

At first instance, the defendant relied on evidence relating to another employee, who worked at a similar station. The witness statement indicated that ‘...hypothetically, he would not have cleaned in the area immediately below the moving parts because it would have been dangerous to do so’. However, workers were given ‘no opportunity’ to clean the machine when the rollers were not in motion, so it would always have been dangerous to do so. In any event, the first instance judge ruled that the claimant had contributed to his negligence and reduced the award of damages by 10%.

On appeal, Sir Terence Etherton MR reasoned that the ‘Judge was wrong to place such heavy, and indeed virtually exclusive, reliance upon the fact that the claimant under cross examination had acknowledged “albeit with the application of hindsight and common sense the risk arising from moving his hand close to the machinery”, before going on to say:

‘In our view, the fact that every other employee charged with the task of cleaning the machine did exactly what the claimant did is strongly supportive of the conclusion that the extent to which the claimant’s conduct could be criticised fell considerably short of that which could properly be categorised as amounting to contributory negligence’.

Held, reversing the first instance decision:

‘Accordingly ... we are satisfied that his finding of contributory negligence was wrong and that this appeal must be allowed’.

Casson, therefore, reinforces the fact that ‘momentary inadvertences’ are not usually categorised as negligent conduct and, consequently, have no effect on the level of damages payable to claimants.

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

### Cape Disclosure Granted

We reported, in edition 198 ([here](#)), that The Asbestos Victims Support Group Forum had been successful in preventing documents relating to Cape Group’s knowledge of the risks of asbestos and mesothelioma from being destroyed. The application for disclosure of these documents has now been heard with judgment being handed down this week.

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

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

We reported in edition 177 of BC Disease News ([here](#)) that Cape had entered into settlement agreement with the insurers before judgment could be handed down.

It was the documents that were disclosed between the parties in the lead up to this trial that the Forum wished to have access to. The documents include, inter-company indemnities, insurance arrangements, marketing materials relating to the products in question, historic technical information about the materials and codes of practice. This principally concerned the period from 1948 to 1982.

The Forum argued that it was in the public interest for these documents to be disclosed and the intended use of the documents was to:

- Make the material publicly available.
- By making it available to promote academic consideration as to the science and history of asbestos...
and asbestolux exposure and production.

- Improve the understanding of the genesis and legitimacy of TDN13 and any industry lobbying leading to it in the 1960s and 1970s.
- Understand the industrial history of Cape and its development of knowledge of asbestos safety.
- Clarify the extent to which Cape is or is not responsible for product safety issues arising from the handling of asbestolux boards.
- To assist court claims and the provision of advice to asbestos disease sufferers.

Hearing the application, Master Victoria McCloud at para 21, concluded these are legitimate aims. She stated that the content of the documents that were sought:

'... would be likely to be of academic and scientific interest as part of public and social discourse as to the history of asbestos safety, regulation and knowledge as it developed during the 20th century

- Would be likely to be considered by advisers advising parties to asbestos litigation as to the merits of their cases whenever issues arise which touch upon Technical Data Notice 13 and connected Regulations,
- Is likely to be relevant to the product safety of asbestos insofar as understood within the major manufacturers and connected companies as compared with general public at various points in the 20th century, and
- Is likely to be relevant to the extent to which employer defendants could have been expected to appreciate the risks of asbestos.'

She went on at para 27 to say:

'I was not presented with substantial evidence or argument from Cape as to harm to it would suffer from disclosure, at the level of particular documents or classes of document within the paper files. I do not regard the post hoc concerns now raised by Cape about the privacy of persons named in the documents in connection with asbestos related disease as a ground for refusing public disclosure of these documents as a credible or weighty one in this instance'.

As such, the application was allowed for disclosure of the following documents:

- The witness statements including exhibits,
- Expert reports
- Transcripts
- Disclosed documents relied on by the parties at trial i.e. those in the paper bundles only
- Written submissions and skeletons
- Statements of case to include requests for further information and answers if contained in the bundles relied on at trial

Graham Dring, of the Asbestos Victims Support Group Forum UK, said:

'This decision is fantastic news. Cape, along with Turner & Newall were the two biggest asbestos companies in this country. Their activities and products exposed thousands of workers and their families to asbestos and caused many deaths from mesothelioma and other asbestos-related diseases. It is essential we now find out exactly how much they knew about the dangers of their products and when they knew this. These documents could also shed light on the close relationship between the Factory Inspectorate, whose function was supposed to be protecting the health and safety of workers, and the asbestos industry that they were supposed to be regulating. We need to know how and why the biggest industrial disaster to hit this country, one that has not yet played out, was allowed to happen.'

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

New CPRC Rules on Hot-tubbing and Costs Management

A fortnight ago, on 22 November, new rules on expert hot-tubbing and costs management entered into force to ‘give court users a useful steer’. More specifically, these amendments give judges a wider range of powers to order the concurrent giving of expert evidence, otherwise known as hot-tubbing, and clarify how the costs of costs management should be calculated.

The Civil Justice Council had recommended hot-tubbing amendments in a report last year, after having found that hot-tubbing improves evidential quality, saves trial time and aids judges with their decision making. We reported on this in edition 191 of BC Disease News [here](#). However, the CPRC have chosen to implement a less ‘radical’ version of the report.

As such, the CPRC has amended Practice Direction 35 to permit the court to direct that evidence is given ‘in any appropriate manner’, and ‘This may include a direction for the experts from like disciplines to give their evidence and be cross-examined on an issue-by-issue basis, so that each party calls its expert or experts to give evidence in relation to a particular issue, followed by the other parties calling their expert or experts to give evidence in relation to that issue (and so on for each of the expert issues which are to be addressed in this manner).

Moreover, courts will now be empowered to set the agenda of hot-tubbing, additional to ordering parties engaged in litigation to set the agenda between themselves. Further, the CPRC has also decided to limit the concept of concurrent expert evidence to ‘classic’ hot-tubbing, opting against ‘embracing the full range of methods, including back-to-back, issue-by-issue expert evidence, and ‘hybrid’ procedures’.

In addition, on the topic of costs management, the CPRC has revised Practice Direction 3E, paragraph 7.2, so that it now reads:

'7.2 Save in exceptional circumstances—(a) the recoverable costs of initially completing Precedent H shall not exceed the higher of £1,000 or 1% of the total of the incurred costs (as agreed or allowed on
A2J Say Whiplash Reform Will Save Motorists Just £16

Access to Justice (A2J) has conducted analysis of official figures, produced by the Treasury. Its aim was to calculate the future cost of Insurance Premium Tax, in preparation for impending whiplash reforms, packaged within the Civil Liability Bill. We have already reported, in previous editions of BC Disease News, that there will be an increase in the small claims limit, to £5,000, for soft-tissue RTA injuries, to combat a scourge of fraudulent claims. Even though this new measure would inevitably lead to many more litigants in person, according to the Ministry of Justice (MoJ), this would be offset by a reduction in motor insurance premiums. To what extent is this assertion still true?

Initially, the Government Budget, in November 2015, predicted annual savings of £50. Following the June 2017 general election, the Queen’s Speech talked these savings down to £35 per year. In the wake of the Autumn Budget, A2J have examined the latest available MoJ data, which suggests that savings will be around £458 million per year. Divide this among 28 million motorists registered with the DVLA, however, and individual savings are almost halved, when compared with the previous Government estimate, equating to just ‘2% of the cost of a typical car insurance policy’, or £0.30 per week. A2J spokesperson, Andrew Twambley, stated:

‘In light of this new information from the Treasury, following the budget, we call on the MoJ to update its official assessment of the impact of the whiplash reforms, so that MPs can decide whether denying legal advice to 600,000 injured people a year for the sake of £16 they’ll never receive is a policy this country can be proud of’.

Providing a more conservative outlook on the MoJ data, the Association of British Insurers (ABI) calculated savings on a ‘per household’ basis, as opposed to a ‘per motorist’ basis. Since roughly 20 million households are covered by a motor policy, whiplash reforms would save approximately £23 annually, or £0.44 weekly. This is still a significant drop from the 2015 assessment of £50 per year.

We will report on any Government responses to A2J’s challenge in due course.

Slater and Gordon Update

Last week, we reported that Slater and Gordon (S&G) plans to shut down four of its UK offices, in Chester, Wrexham, Milton Keynes and Oldham as part of its solvent restructuring. We also noted that the proposed recapitalisation plan was being put to shareholders at its Annual General Meeting this week.

This meeting has now taken place and the recapitalisation plan which will see lenders, headed up by Anchorage Capital – an American hedge fund – take control of S&G as part of a debt-for-equity deal, has been approved by 70% of shareholders.

This will mean that S&G’s new lenders will write off most of the company’s debt in return for 95% of the firm’s equity with the remaining 5% going to already existing shareholders. Although it has been reported that the remaining shares are barely worth ‘peanut shells’ following the new deal.

Currently, S&G share price stands at $0.043 AUD and $0.02 GBP. We also reported in edition 199 (here) that S&G’s annual accounts showed the costs of restructuring had increased by 41% in 2016/17 from the previous year, totalling almost £30m.

Chairman, John Skippen, stated that the board ‘understands that the outcome is disappointing for shareholders’, but it was better than the alternatives. The alternatives, he said, were the company becoming insolvent and shareholders receiving nothing.

Brazil to Ban Asbestos

Brazil is the third-largest producer of chrysotile, or white, asbestos worldwide, and the third-largest exporter, shipping primarily to Asia, the USA, Mexico and Colombia. Brazil is also the fourth largest consumer. In 2013, 307,000 metric tons of asbestos were mined in Brazil, and 181,168 metric tons were used. Most asbestos produced in Brazil is used in the production of asbestos cement or fibre cement. Use and trade of chrysotile is allowed by Federal law in Brazil, although spraying chrysotile and trading it in bulk in the form of powder fibres is forbidden. Amphibole asbestos is banned in Brazil. Since 2001, chrysotile has been banned in several states: Sao Paulo, Rio de Janeiro, Minas Gerais, Rio Grande do Sul, Pernambuco and Mato Grosso. However, despite the ban in these states, some companies have obtained judicial exemptions and can still use asbestos.

Now, Brazil has initiated a complete ban. Brazil’s Supreme Court has ruled to ban the production, distribution and use of...
asbestos. This makes Brazil the most populous nation to ban asbestos; China, India and the USA, all with greater populations, still use chrysotile.

Brazil is the fourth country this year to announce a ban on asbestos. Canada, another major chrysotile producer, is on track to ban chrysotile asbestos by 2018. Ukraine has adopted a ban on the use of all types of asbestos, though the government may delay the implementation of the ban following political and economic pressure from the asbestos industry. Moldova also intends to ban the sale and import of chrysotile asbestos and asbestos-containing products by 2019.

The ban in Brazil is particularly significant, because asbestos is still a large part of the Brazilian economy. This move will be interpreted by some as further acceptance that chrysotile asbestos is dangerous, a viewpoint strongly contended by the asbestos industry.

Feature
Fatal Damages Part 7: Loss of Care and Affection of Spouse

INTRODUCTION

This week we continue our series on fatal damages in mesothelioma claims and begin to look at heads of loss under the Fatal Accidents Act 1976. We pointed out in Part 2 of this series that claims under the FAA can only be brought by dependants of the deceased (see here). Typical heads of loss under the FAA include:

- Loss of care and attention of spouse/parent
- Dependency on income and services
- Statutory bereavement award
- Funeral expenses

We look first at claims for loss of care and attention of a spouse or parent also known as awards for ‘loss of intangible benefits’. In edition 21 of BC Disease News we considered these awards in accordance with the principle expressed in Regan v Williamson, which involved death of a wife and mother. We looked again at this decision in edition 177 in which we discussed the decisions of Mosson v Spousal (London) Ltd [2015] EWHC 53 (QB) and Wolstenholme v Leach’s of Shudehill Ltd [2016] EWHC 588 (QC).

In this week’s feature we provide an update on this head of loss, following the more recent decisions in Magill v Panel Systems (DB Limited) [2017] EWHC 1517 (QB) and Grant (Widow & Executrix of the Estate of Douglas Michael Grant, Deceased) v Secretary of State for Transport [2017] EWHC 1663 (QB).

Such loss is commonly sought in fatal mesothelioma claims but is it recoverable in law?

BACKGROUND

It is an inevitable and grossly unfortunate consequence of an individual contracting mesothelioma that the children and partner of the deceased are left without a mother/wife or, more often, a father/husband. Of course, they can bring a dependency claim under the Fatal Accidents Act 1976 for future financial losses and loss of future services that would have otherwise been provided but for the death and we will discuss these heads of loss in greater detail in future articles in this series. However, the services provided by a parent or partner go far beyond that which could be replaced by commercially sourced services. Parental life guidance, for example, is irreplaceable. However, the general rule under the Fatal Accidents Act is that damages are solely for lost financial dependency. So are these ‘intangible’ services compensable?

The principle in Regan v Williamson

In Regan v Williamson, Watkins J affirmed, at 308, that the law was simply to compensate for lost services, not to compensate for grief, loss of companionship, or loss of parental guidance. However, he noted that it may seem a harsh law. Whilst he did not go so far as saying these things could be compensated as services as such, as Lord Edmund-Davies opined as arguable in Hay v Hughes; he held, at 309, that the notion...
of ‘services’ had been construed too narrowly.

‘It should, at least, include an acknowledgement that a wife and mother does not work to set hours and, still less, to rule. She is in constant attendance, save for those hours she may well give the children instruction on essential matters to do with their upbringing and, possibly, with such things as their homework. This sort of attention seems to be as much of a service, and probably more valuable to them, than the other kinds of service conventionally so regarded’.

On that basis, any award for services may, therefore, acknowledge that a wife or mother is in constant attendance upon her children or husband.

SUBSEQUENT AUTHORITY AND EXTENSION OF THE PRINCIPLE

The Regan decision was first instance so does not strictly bind other courts. Curiously, it has not been the subject of any considerable higher judicial consideration, despite seemingly creating a new head of loss, or, at the very least, significantly modifying an existing head of loss. That said, in Spittle v Bunney, it was held, at 858-859, that the ‘special qualitative factor’ in Regan had been approved, at least by implication, in the Court of Appeal decision of Abrams v Cook.

Importantly, in Beesley v New Century Group Ltd, Hamblen J held, at [83], that ‘the principle of making awards for loss of intangible benefits is now well established...It reflects the fact that services may be provided by a mother, wife, father or husband over and above that which may be provided by a paid replacement. In principle, there is no reason for differentiating between the position of children and spouses in connection with the availability of such awards.’

Beesley not only confirmed the principle but confirmed it extended further than mothers/wives to fathers/husbands.

Departure from Status Quo

However, in the more recent High Court decision of, Mosson v Spousal (London) Ltd [2015] EWHC 53 (QB) this approach was thrown into doubt. The court declined to make an award for loss of intangible services in a claim for damages for personal injury under the Law Reform (Miscellaneous Provisions) Act 1934 and Fatal Accidents Act 1976 brought by a widow after her husband’s death following a prolonged illness with mesothelioma.

This was a claim for the inconvenience of paying for the services under the loss of services claim and using the damages to purchase them. The defendant alleged that it was not a valid head of claim, however, the claimant argued that such claims are now ‘well established’ as per Beesley.

Garner J, preferred the approach of the defendant and found that:

‘I have had careful regard to these previous cases, in particular to the reasoning of Hamblen J and Mackay J. I take on board the fact that the making of awards of this sort has become increasingly commonplace. However I regret to say that, for two reasons, I find myself in disagreement with the conclusions of the other judges of this Court to whom I have referred. I can see no proper jurisprudential foundation for this claim’.

The judge’s reasons were firstly, that damages for personal injury were intended to put the claimant in the position she would have been had the tort not occurred but there could be no precise equivalence in money terms of every loss that flowed from an injury or a death. In the case of claims for services, the award was the best estimate of the value, rather than the cost, of services lost. The court had already made an award in respect of loss of services which was done by estimating the cost of providing commercially what would otherwise have been provided by the deceased. The award recognised the advantages and disadvantages of having services provided commercially rather than by the deceased and there was no room for an additional award for the loss of intangible benefits over and above the claim for lost services.

Secondly, he found that the claimant was seeking further compensation for the inconvenience of paying someone to do what her husband would have done voluntarily and that was a claim of the sort which bereavement damages were intended to cover, as described in William Latimer-Sayer, Personal Injury Schedules: Calculating Damages, 3rd edn (London: Bloomsbury Professional).

He concluded at para 77 that:
'Bereavement takes many forms and has many consequences. Where the consequence can be valued in financial terms, they can be a separate head of claim. But where they cannot, in my judgment, they fall to be regarded as part of bereavement damages. In those circumstances the claim for intangible services is not a proper claim in law.'

Although he did note that:

'Were a higher court to say that I was wrong about that, and that such an award could be made in principle, I would favour the approach of Mackay J over that of Hamblen J. In my view, it would be necessary to prove some circumstance out of the ordinary to justify an additional award. There is no such unusual circumstance here; the claimant is the spouse of the deceased, not his child and she and he were of a similar age.'

Authorities Since Mosson

The findings in Mosson were contrary to several cases following Regan as was noted in Wolstenholme v Leach’s of Shudehill Ltd [2016] EWHC 588 (QC). This was a mesothelioma claim in which a widow brought a claim on behalf of her husband’s estate under the Law Reform (Miscellaneous Provisions) Act 1934 and as his dependent within the meaning of the Fatal Accidents Act. As part of the claim, the head of loss for loss of the special services of the husband was included. The defendant submitted that this was not a recoverable head of loss and in doing so, relied on the judgment in Mosson. The claimant relied on a number of authorities, including Beesley. HHJ McKenna, sitting in the High Court, in making an award of £2,500 under this head of loss, said:

'For my part, I am persuaded that such awards are indeed usual to reflect the advantages in having jobs around the house being done by a husband or partner in his or her own time and convenience rather than having to go out to find and choose commercial providers and to have to work around their convenience and or availability and the decision in Mosson is, as it seems to me, contrary to the weight of authority'.

Similarly, the claimant in Grant (2017) said that she had 'lost not just someone who provided income, services and care; but the convenience, comfort and security of having someone who gave this help out of love and affection. She has also lost the deceased’s emotional support, kindness and companionship'.

The defendant relied on Mosson, and submitted that this is not a recoverable head of loss.

Chamberlain QC examined the authorities in this area. He derived the following principles:

1. Aside from the award for bereavement, there can be no claim under the 1976 Act for non-pecuniary loss. This means that there is no right to compensation for loss of ‘emotional support, kindness and companionship’.
2. The courts have sometimes recognised that a dependant may suffer a pecuniary loss as a result of the death of a relative that is not adequately compensated by an award for services dependency. The award for services dependency is calculated with reference to the cost of replacing those services commercially and this cost may be an imperfect proxy for the true value of the deceased’s services lost.
3. There is a separate reason why an award for services dependency, calculated by reference to the cost of replacement services, may be inadequate to value the loss of the deceased’s services. A wife whose husband used to do all the minor repair work around the house now has to find and choose the painter, plumber, decorator et al and make the arrangements for them to come and do what needs to be done. These are things she did not have to do before. The time spent by the claimant in doing them has a pecuniary value.

As such, it was concluded that the judge in Mosson was incorrect to find that cases which allowed claims for loss of intangible benefits lack a proper jurisprudential foundation because they offend the principle that damages are available for pecuniary loss only. As such, he awarded a modest sum of £2,500 for this loss.

It seemed that Mosson was a temporary departure from the usual approach to loss of intangible services claims and that the position in Regan and Beesley has been restored following Wolstenholme and Grant.

However, the most recent decision of Magill (2017) has thrown further confusion on the matter. The claimant sought £5,000 for loss of her partner’s care and attention. The defendant relied on the authority of Mosson and contended that this is what the bereavement award is for and no further award should be made.
HHJ Gosnell, in this case agreed with the judgment in *Mosson* and held that:

‘I recognise that these claims have become commonplace but I find myself in agreement with Mr Justice Garnham [the judge in *Mosson*] for the same reasons he gives… I have no doubt that the claimant has lost the care and attention of the deceased in the emotional sense and the loss of that cannot be minimised but it does not sound in additional damages because this is exactly the loss that the bereavement award (modest though it is) is intended to compensate for’.

He then went on to say that the origins of the claim under this head were based upon the perceived advantages of having a service performed by a member of the family rather than a commercial provider (and compensation for that loss). However, he noted, if the claim was actually put forward simply for loss of love and affection, it would fail for being encompassed in the bereavement award.

As such he made no award under this head of loss.

It seemed then that *Mosson* was merely a brief departure from the authorities on claims for loss of ‘intangible benefits’ and the status quo was shortly resumed. However, the decision in *Magill* has caused further uncertainty.

Despite the confusion regarding whether or not claims for loss of ‘intangible benefits’ will be awarded, it is clear that most awards have been made in respect of the loss of a wife/mother; mesothelioma has been the area where extension of the awards has been made to husbands/fathers. How much are these *Regan v Williamson* awards? The decided cases suggest that the average award is £2,000 to £3,000. Children tend to be awarded less than spouses, in the region of £500 to £1,000 more.

The following section reviews *Regan v Williamson* awards that have been made in mesothelioma claims and a range of other claims.

**CASES MAKING A REGAN AWARD**

- *Mehmet v Perry* [1977] 2 All ER 529 – fatal accident leading to the death of wife/mother. Held it was reasonable for father to give up working to care for (5) children, of whom two (aged 6 and 3) suffered a rare blood disorder. Husband and children entitled to recover relatively small sums for the loss of personal care and attention from the deceased over and above the loss of housekeeping services. £1,500 (£9,113 in 2017) awarded to the children; £1,000 (£6,075 in 2017) awarded to the husband.

- *Topp v London Country Bus (South West) Ltd* [1992] PIQR 206 – the deceased wife/mother was killed by a minibus belonging to the defendants. Liability not established but quantum was nevertheless addressed. Child would have been awarded £2,500 (£4,894 in 2017) for loss of her mother’s care and advice; husband would have been awarded £2,000 for loss of his wife’s care and attention.


- *Johnson v British Midland Airways Ltd* [1996] PIQR Q8 – the deceased wife/mother was killed along with two of her three children in an aeroplane crash. Liability admitted. Award made for loss of the value of services over and above those which can be bought. Caution exercised to avoid overlapping awards. Child awarded £3,500 (£6,186 in 2017); husband awarded £2,500 (£4,419 in 2017).


- *H v S* [2003] QB 965 (CA) – divorced mother of four children, three of whom were minors, killed in a car accident. Awards were initially made of £1,000 (£1,488 in 2017); £5,000 (£7,441 in 2017) and £7,000 (£10,417 in 2017) for special services that only a mother could provide. On appeal, the latter two awards were reduced to £3,500 (£5,208 in 2017) and £4,500 (£6,697 in 2017) respectively. There was no reason to depart from the conventional maximum of £5,000 (£7,441 in 2017), even in the case of a very young child.
- Beesley v New Century Group Ltd [2008] EWHC 3033 (QB) – deceased husband died of mesothelioma following occupational exposure to asbestos. The deceased performed a number of jobs around the home at his own time and convenience. This was the intangible benefit. An award of £2,000 (£2,530 in 2017) was made to the widow.

- Manning v King’s College Hospital [2008] EWHC 3008 (QB) – deceased wife/mother died following clinical negligence. The children were each awarded £4,000 for the loss of the love and devotion of a mother. The husband, who himself had a shortened life expectancy owing to cancer and would therefore have relied on the special care and attention provided by his wife, was awarded £3,000 (£3,796 in 2017).

- Fleet v Roy [2009] EWHC 3166 (QB) – The deceased husband died of mesothelioma following occupational exposure to asbestos. Interestingly, at [25], it was said the awards are traditionally an attempt by the courts to value the services of a mother or a father over and above the commercial cost of replacing them; it should not be always automatically be extended between spouses. However, in this case, a payment was justified because the widow was considerably older than her husband and would, as the years went on, needed more than usual care. The husband was awarded £2,500 (£3,159 in 2017).

- Streets v Esso Petroleum (2009) Lawtel Document Number: AM0201440 – Deceased husband and father died of mesothelioma following occupational exposure to asbestos. The son was aged 22 at the time of trial. A Regan award of £2,000 (£2,527 in 2017) was made to the widow.

- Devoy v Doxford [2009] EWHC 1589 (QB) – Deceased husband died of mesothelioma following occupational exposure to asbestos. The deceased’s wife was 63 at the time of death and suffered from Parkinson’s disease, osteoporosis and a painful spinal condition. It was held the widow could recover for the loss of the deceased’s love and affection. Such a claim could arise where undoubtedly the widow has lost the love and affection and the very special attention which the deceased would have given to her in respect of her disabilities had he lived. The sum of £2,000 (£2,527 in 2017) was awarded.

- Wolstenholme v Leach’s of Shudehill Ltd [2016] EWHC 588 (QC), - the deceased died of mesothelioma following occupational exposure to asbestos. The deceased’s wife had three sons and brought a claim as a dependent. It was held that the widow could recover for the loss of the services of her husband around the house. The sum of £2,500 (£3,159 in 2017) was awarded.

- Grant (Widow & Executrix of the Estate of Douglas Michael Grant, Deceased) v Secretary of State for Transport [2017] EWHC 1663 (QB) – the deceased died from mesothelioma following exposure as an employee of British Railways Board (BRB) and his wife brought a claim under both the LRMPA and the FAA. An award of £2,500 was made for the time which would now be spent in organising replacement services that her husband once carried out.

**CONCLUSION**

In the last two years we have seen four conflicting High Court decisions on whether awards for loss of ‘intangible benefits’ are recoverable. The outcome of each are summarised in the table below:

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Recoverable</th>
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<tbody>
<tr>
<td>Masson v Spousal (London) Ltd[2015]</td>
<td>✗</td>
</tr>
<tr>
<td>Wolstenholme v Leach’s of Shudehill Ltd[2016]</td>
<td>✓</td>
</tr>
<tr>
<td>Grant (Widow &amp; Executrix of the Estate of Douglas Michael Grant, Deceased) v Secretary of State for Transport[2017]</td>
<td>✓</td>
</tr>
<tr>
<td>Maqili v Panel Systems (DB Limited)[2017]</td>
<td>✗</td>
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</tbody>
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The High Court are not bound by other High Court decisions but they are of strong persuasive authority and are usually followed. It is clear then, that further guidance is needed, ideally an authoritative decision from the Court of Appeal – although it is unclear when this will be provided.

Despite this lack of clarity around the jurisprudential foundation of this head of loss, some guidance can be found in the authorities in which awards were made:

- They are modest awards. In 2003, *H v S* suggested a maximum conventional award of £5,000. In 2017, that means a *Regan* award should not exceed in the region of £7,700. Typically, in the case of the loss of a father/husband in mesothelioma claims, the award will be in the region of £2,000-£3,000.

- Awards are not automatic - it appears that some justification – some very special care – is still necessary to enable a *Regan* award to be made. In *Beesley* the deceased performed domestic tasks, in *Fleet* the deceased would have provided more than usual care, and in *Devoy* very special care would have been given by the deceased in relation to his widow’s disabilities.

As such, as well as challenging the legitimacy of these claims, on the authority of these cases, *Regan* awards should be resisted in cases where there is not some justification for making the award in respect of a father/husband.
References


11. (Unreported, 18 November 1987).

12. [2008] EWHC 3033 (Q8).
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