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

In this week’s issue, we include case analysis of the recent Supreme Court decision in *Barton v Wright Hassall [2018] UKSC 12*, in which a litigant in person, on appeal, argued that service by email could be accepted as service by an ‘alternative method’. We also discuss the Court of Appeal decision in *Corstophine (an infant) v Liverpool City Council [2018] EWCA Civ 270*, which dealt with the effect of QOCS on an unsuccessful claimant, who added parties to a pre-LASPO claim.

In other news, we report that claimant firm and previous offshoot of Fairpoint Group, Simpson Millar, will be making 91 members of its staff redundant.

In this week’s feature, we provide an ‘Impact Note’, based on the latest mesothelioma breach of duty judgment in *Bussey v Anglia Heating Limited [2018] EWCA Civ 243*. This follows on from the ruling, which we analysed in last week’s edition of BC Disease News [here](#).

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

As always, warmest regards to all.

**SUBJECTS**

- Litigants in Person and CPR Service Compliance – QOCS Application Pre-LASPO
‘Good Service’ for Litigants in Person: Barton v Wright Hassall LLP [2018] UKSC 12

Last week, the Supreme Court handed down judgment in the case of Barton v Wright Hassall LLP [2018] UKSC 12, in which the unrepresented claimant sought to argue that service of proceedings, via an email to the defendant’s solicitors, constituted ‘good service’. In this article, we examine the significance of the court’s ruling, on appeal.

In edition 203 of BC Disease News (here), we reported that Barton v Wright Hassall [2016] EWCA Civ 177 had been granted appeal to the Supreme Court.

FACTS

In Barton, the claimant attempted to serve the Claim Form on the defendant’s solicitor as an email attachment.

In the CPR, Rule 6.3 prescribes service by method of electronic communication:

Methods of service

6.3

(1) A claim form may (subject to Section IV of this Part and the rules in this Section relating to service out of the jurisdiction on solicitors, European Lawyers and parties) be served by any of the following methods –

(a) personal service in accordance with rule 6.5;

(b) first class post, document exchange or other service which provides for delivery on the next business day, in accordance with Practice Direction 6A;

(c) leaving it at a place specified in rule 6.7, 6.8, 6.9 or 6.10;

(d) fax or other means of electronic communication in accordance with Practice Direction 6A;

(e) any method authorised by the court under rule 6.15.

However, the claimant did not comply with the relevant Practice Direction (below), as the defendant’s solicitors had not given express written permission:

Service by fax or other electronic means

4.1 Subject to the provisions of rule 6.23(5) and (6), where a document is to be served by fax or other electronic means –

(1) the party who is to be served or the solicitor acting for that party must previously have indicated in writing to the party serving –

(a) that the party to be served or the solicitor is willing to accept service by fax or other electronic means, and
Subsequently, the claim form expired, unserved, the following day. The claim was statute-barred. The claimant applied, under CPR 6.15 that he had effected service by bringing the claim form to the attention of the defendant by an ‘alternative method’.

The defendant contended that the conduct of the claimant did not constitute an ‘alternative method’ of service, pursuant to CPR 6.15, and

COURT OF APPEAL JUDGMENT

The claimant applied to retrospectively validate service, but the Court of Appeal Judge dismissed the application, as the District Judge and County Court Judge had done before him. Indeed, Floyd LJ ruled that the Civil Procedure Rules did not intend an ‘alternative method’ to mean any method which had not been expressly prohibited.

THE BASIS OF THE APPEAL

The premise of the appeal was to further seek ‘special dispensation’ for Litigants in Person ‘ill-equipped to understand the Civil Procedure Rules’. It is therefore the first Supreme Court decision to consider the ‘unrepresented status of a non-compliant litigant’, seeking the introduction of ‘special rules or indulgences’.

The claimant, represented by direct access counsel, argued that the Civil Procedure Rules are ‘too complex’ for litigants in person to navigate and, in attempting to access information, are ‘lost in a myriad of online options and jargon’, rendering compliance with the rules, ‘impossible’. Counsel submitted that:

‘Judges at all levels appear to have substantially underestimated the difficulty that a LiP would have in relation to the commencement and service of a claim’.

SUPREME COURT JUDGMENT

Lord Sumption clarified that the ‘rules governing service of a claim form do not impose duties, in the sense in which, say, the rules governing the time for the service of evidence, impose a duty. They are simply conditions on which the court will take cognisance of the matter at all’.

As a result, he indicated that “good reason” for validating the non-compliant service of a claim form is essentially a matter of factual evaluation’, meaning that there is little authority on the subject. However, ‘good reason’ was discussed by Lord Clarke JSC, in the case of Abela v Baadarani [2013] UKSC 44, where a test was established for exercising discretion of the powers available under CPR 6.15:

1. ‘The test is whether, “in all the circumstances, there is good reason to order that steps taken to bring the claim form to the attention of the defendant is good service”’ (para 33).
2. ‘Service has a number of purposes, but the most important is to ensure that the contents of the document are brought to the attention of the person to be served (para 37). This is therefore a “critical factor”. However, “the mere fact that the defendant learned of the existence and content of the claim form cannot, without more, constitute a good reason to make an order under rule 6.15(2)”’ (para 36).
3. ‘The question is whether there is good reason for the Court to validate the mode of service used, not whether the claimant had good reason to choose that mode’.
As such, Lord Sumption accepted the general principles raised by Lord Clarke, stating:

‘... the main relevant factors are likely to be (i) whether the claimant has taken reasonable steps to effect service in accordance with the rules and (ii) whether the defendant or his solicitor was aware of the contents of the claim form at the time when it expired; and, I would add, (iii) what if any prejudice the defendant would suffer by the retrospective validation of a non-compliant service of the claim form, bearing in mind what he knew about its contents. None of these factors can be regarded as decisive in themselves. The weight to be attached to them will vary with all the circumstances’.

Lord Sumption, in tackling the appeal, reasoned, at paragraph 18, that a lack of legal representation ‘... will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules … The rules do not in any relevant respect distinguish between represented and unrepresented parties’.

He went on to cite R (Hysaj) v Secretary of State for the Home Department [2015] 1 WLR 2472 and Nata Lee Ltd v Abd [2014] EWCA Civ 1652 as authorities establishing that unrepresented applicants, bringing applications under CPR 3.9 for relief from sanctions, will not benefit from strict enforcement of the Civil Procedure Rules, simply as a result of their status. Lord Sumption did, however, agree with Briggs LJ, in Nata Lee, who reasoned that, ‘at best, if [status of the litigant] may affect the issue “at the margin”’. Sumption JSC interpreted that ‘litigant in person’ status’... may increase the weight to be given to some other, more directly relevant factor. It is fair to say that in applications for relief from sanctions, this is mainly because of what I have called the disciplinary factor, which is less significant in the case of applications to validate defective service of a claim form’.

Nevertheless, the Supreme Court Judge highlighted ‘... good reasons for applying the same policy to applications under CPR rule 6.15(2) simply as a matter of basic fairness. The rules provide a framework within which to balance the interest of both sides. That balance is inevitably disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent. Any advantage enjoyed by a litigant in person imposes a corresponding disadvantage on the other side, which may be significant if it affects the latter’s legal rights, under the Limitation Acts for example. Unless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step which he is about to take’.

Are the Rules and Directions Inaccessible or Obscure?

At paragraph 19, Lord Sumption was unaccepting of the claimant’s argument that the rules on service were ‘inaccessible’ and ‘obscure’:

They are accessible on the internet'. Furthermore, when the claim form was issued, the Courts Service sent Mr Barton ... a blank certificate of service for him to complete when he had served it. This included the statement: “Rules relating to the service of documents are contained in Part 6 of the Civil Procedure Rules (www.justice.gov.uk) and you should refer to the rules for information.” ... apart from looking at the legal notices ... (which said nothing about email service), he took no steps to check ... or to ascertain what the rules regarding service by email were, but simply relied on his own assumption'.

He went on to say that the claimant’s assumption was not ‘in itself reasonable’. The claimant knew that not all solicitors accepted service by email and he was an ‘experienced litigant’.

Considering his ‘relevant factors’ for warranting the use of discretionary CPR 6.15 powers, he said, at paragraph 22:

‘... it is not necessarily a condition of success in an application for retrospective validation that the claimant should have left no stone unturned. It is enough that he has taken such steps as are reasonable in the circumstances to serve the claim form within its period of validity. But in the present case there was no problem about service. The problem was that Mr Barton made no attempt to serve in accordance with the rules. All that he did was employ a mode of service which he should have appreciated was not in accordance with the rules’.

The judge went on to say, at paragraph 23:

‘A person who courts disaster in this way can have only a very limited claim on the court’s indulgence in an application under CPR rule 6.15(2). By comparison, the prejudice to Wright Hassall is palpable. They will retrospectively be deprived of an accrued limitation defence if service is validated. If Mr Barton had been more diligent, or ... [the defendant’s solicitor] ... had been in any way responsible for his difficulty, this might not have counted for much. As it is, there is no reason why Mr Barton should be absolved from his errors at Wright Hassall’s expense’.

Lord Wilson and Lord Carnwath agreed with Lord Sumption, in dismissing the appeal by 3:2.

Dissenting, was Lord Briggs, who would have allowed the appeal. Lady Hale agreed.

Firstly, Briggs JSC, without wishing to depart from Lord Clarke’s dictum in the Abela case, stated, at paragraph 28, that although ‘... the most important purpose of service is to ensure that the contents of the claim form (or other originating document) are brought to the attention of the person to be served, there is a second important general purpose. That is to notify the recipient that the claim has not merely been formulated but actually commenced as against the relevant defendant, and upon a particular day. In other words it is important that the communication of the contents of the document is by way of
service, rather than, for example, just for information. This is because service is that which engages the court’s jurisdiction over the recipient, and because important time consequences flow from the date of service, such as the stopping of the running of limitation periods and the starting of the running of time for the recipient’s response, failing which the claimant may in appropriate cases obtain default judgment.

He went on, in the next paragraph, to highlight the third purpose, also mentioned by Lord Sumption, ‘namely to ensure that recipients or their solicitors have the opportunity to put in place administrative arrangements for monitoring and dealing with what was then a new mode of service before being exposed to its consequences’.

Tackling the three distinct and separate purposes in order, the dissenting Judge reasoned:

‘As to the first, it is and always has been common ground that the defendant firm was, through its agent solicitors, fully appraised by the email of the contents of the claim form. As to the second, the claim form was sent expressly “by means of service upon you”. The recipient solicitors could have been in no doubt that Mr Barton was seeking to achieve service, with its important consequences, rather than just sending the claim form by way of information. As to the third, it has not been suggested that, by comparison with postal service, the recipient firm was in any way hampered by not having appropriate monitoring procedures in place, or that its email systems were insufficient to permit prompt receipt of the whole of the documentation actually sent, although the particulars of claim were voluminous’.

Since Lord Briggs perceived all three purposes to have been achieved, he saw that there was, prima facie, ‘good reason’ to validate service under CPR 6.15. Only adverse factors, such as a deliberate failure to comply with the Rules, failure due to negligence, or failure due to neglect, could change his ‘prima facie’ judgment, as these factors could encourage ‘procedural anarchy’.

Further, he discussed, at paragraph 32, that:

‘There are bound to be cases where the purposes have been fully achieved but there are no other good reasons for validation, where the failure to comply with the rules, though not excusable by a good reason for failure, is nonetheless only a minor or technical breach, or one readily understandable either because the relevant rule is obscure, or less accessible to a litigant in person than to an experienced and skilled lawyer’.

If cases where this is apparent, he advised that there ‘should not be a vain search for an additional good reason beyond full achievement of the purposes of the rules as to service, but rather a weighing of all the circumstances leading to defective service, to see whether the inevitable element of culpability of the claimant is or is not sufficiently large to displace the prima facie good reason constituted by the full achievement of those purposes’.

The judge also disagreed with Lord Sumption, in that he perceived that there would be no prejudice, on limitation, suffered by the defendant.

Additionally, Lord Briggs spoke briefly about the effect of adherence to the CPR on litigants in person, at paragraph 42:

‘If, as many believe, because they have been designed by lawyers for use by lawyers, the CPR do present an impediment to access to justice for unrepresented parties, the answer is to make very different new rules (as is now being planned) rather than to treat litigants in person as immune from their consequences’.

Nevertheless, he made sure to distinguish that ‘the good reason in the present case is not that he is a litigant in person, but rather the fact that Mr Barton’s attempted service by email achieved all the underlying purposes of the relevant rules.

His being a litigant in person, with the particular consequences described above merely mitigates, at the margin, the gravity of non-compliant conduct which, had it been done by a legal representative, would have been more serious as an impediment to validation … Taking all the relevant considerations into account, I consider that Mr Barton’s attempt at service by email should be validated. He may fairly be criticised for having failed to read the relevant part of the rules, and making an incorrect assumption instead, but this does not on balance detract from the good reason constituted by his having, albeit in a modestly non-compliant way, achieved all that which the rules as to service by email are designed to achieve’.

Lord Briggs, upon consideration of the effect of this decision, shared his aspiration that:

‘the Rule Committee might be able to find time to satisfy itself that this rule, and the provisions in the PD about service by email, still satisfy current requirements, in the context of giving effect to the Overriding Objective, and do so with sufficient clarity’.

Earlier in the judgment, at paragraph 25 of Lord Sumption’s majority judgment, professed:

‘I agree with the observations of Lord Briggs in his final paragraph that it is desirable that the Rules Committee should look at the issues dealt with on this appeal, if only because litigants in person are more likely to read the rules than the judgments of this court’.

Full text judgment can be accessed here.

Howard Elgot, instructed as claimant counsel in Barton, said:

‘The narrow majority by which our client’s case was lost reflects the difficulty judges have in deciding when to apply the dispensing provision for invalid service and what ‘special’ treatment, if any, should be afforded to litigants in person’.
An application to the European Court of Human Rights, on the grounds of Article 6 of the Convention, is being considered.1

QOCS Application for ‘Contingent’ Claim: Corstophine (an infant) v Liverpool City Council [2018] EWCA Civ 270

In this article, we discuss the judgement handed down from the Court of Appeal in Corstophine (an infant) v Liverpool City Council [2018] EWCA Civ 270.2 This was a ruling on the recoverability of costs and the court was at liberty to consider whether the first instance judge had erred in ordering an unsuccessful personal injury claimant to pay costs to defendants added to proceedings after qualified one-way costs shifting (QOCS) had come into force.

The claimant was seriously injured on a tyre swing. In 2012, a claim was brought, on behalf of the claimant, against Liverpool City Council (Council). The claimant’s litigation was funded by a CFA, backed by ATE insurance. The Council subsequently made a Part 20 claim, in October 2013, ‘against the manufacturer and seller of the swing’. These parties were added to the primary claim as the 2nd and 3rd defendants, in August of 2014.

The case was heard in July of 2014 and the claim was dismissed. A further judgement was handed down, in respect of costs, in February 2016. It was held that there was no reason to depart from the ‘general principle’ of costs and it should stand that the ‘unsuccessful party pays the costs of the successful one(s)’. Recorder Edge, at first instance, ordered the following:

(1) The Appellant pay the Respondent’s costs of the Primary Claim, including any costs of the other parties which the Respondent had been ordered to pay;
(2) The Appellant pay the Second and Third Defendants’ costs of the Primary Claim;
(3) The Respondent pay the Second and Third Defendants’ costs of the Additional Claim’.

As such, ‘in reaching these decisions, the judge held that the QOCS regime in CPR 44.13 to 44.17 did not apply to the Appellant’, in respect of the additional claim.

Recorder Edge considered that because the facts of the case were interconnected, any liability on the second and third defendant in the additional claim was contingent on the outcome of the primary claim. This was his reasoning as to why QOCS did not apply.

The claimant appealed the costs order on the following grounds:

(1) The judge erred in finding that the Appellant’s PCFA encompassed the claims brought against the Second and Third Defendants, with the result that he was not entitled to the benefit of QOCS in respect of their costs of the Primary Claim;
(2) The judge erred in the exercise of his discretion in directing that the Respondent was entitled to recover as part of its own claim for costs against the Appellant, those costs it had been ordered to pay the Second and Third Defendants’.

The appeal was heard by Lord Justice Hamblen LJ.

Firstly, the judge considered the 1st ground of appeal. Pursuant to CPR 48.2(1)(a)(i)(aa), in the wake of LASPO 2012, transitional provisions were created to clarify the costs implications of pre-commencement funding arrangements. According to (aa), litigation funding can be defined as a PCFA if:

(aa) the agreement was entered into before 1 April 2013 specifically for the purposes of the provision to the person by whom the success fee is payable of advocacy or litigation services in relation to the matter that is the subject of the proceedings in which the costs order is to be made; or

The claimant submitted that the relevant ‘matter’ in this case, in respect of the PCFA, was the claim for damages against the 1st defendant for personal injury, entered into pre-LASPO, and not the additional claim against the 2nd and 3rd defendants.

Hamblen LJ, considered the judgement from the Supreme Court in the case of Plevin v Paragon Personal Finance [2017] UKSC 23. The issue which arose in both Corosphine and Plevin was whether the transitional provisions applied to variations made to a pre-1 April 2013 PCFA in order to cover the costs of appeals, which variations were made after that date and the inception of the QOCS regime’. Further, the judge, at paragraph 32, cited Lord Sumption in Plevin:

‘At the time of the inception of QOCS the Appellant had no vested rights or expectations in respect of claims against the Second or Third Defendants. Its sole rights and expectations concerned the claim against the Respondent, which alone was the subject matter of the PCFAs. At the time of the PCFAs the underlying dispute was the claim against the Respondent, which was the only existing claim at that time. Similarly, it alone was the subject of the retainer.’

Hamblin LJ re-emphasised the importance of QOCS in protecting claimants from ‘adverse costs orders’. He considered that when proceedings involve additional parties, joined to proceedings post-introduction of QOCS, if the regime is seen to be inapplicable, claimants are left with ‘adverse costs’. 

1. Corstophine (an infant) v Liverpool City Council [2018] EWCA Civ 270.

2. This was a ruling on the recoverability of costs and the court was at liberty to consider whether the first instance judge had erred in ordering an unsuccessful personal injury claimant to pay costs to defendants added to proceedings after qualified one-way costs shifting (QOCS) had come into force.
The judge concluded, at paragraph 34, that QOCS protection applied to the additional claim against the 2nd and 3rd defendants, allowing the appeal on the first ground. The ‘underlying dispute’, per Sumption LJ in Plevein, formed the sole basis of the retainer and the claim against the 1st defendant was the ‘only existing claim at that time’.

Hamblen LJ went on to say that success on the first ground would be a ‘highly material factor to be taken into account in determining whether the Appellant should be liable to pay to the Respondent the costs it had to pay the Second and Third Defendants’ (the second ground).

On the second ground of the appeal, Hamblen LJ criticized Recorder Edge’s decision at 1st instance by saying that his order for costs ‘effectively deprives them [the claimant] of that protection … it makes the appellant indirectly liable for costs which could not be enforced against him directly’.

Hamblen LJ followed the Court of Appeal authority of Vos LJ, in Wagenaar v Weekend Travel Ltd [2015] 1 WLR 1968, in accepting the ‘clear distinction’ that QOCS applies to the main claim and not to 3rd party proceedings. Interestingly, Vos LJ also constituted the Court in Corstorphine. In any event, Hamblen LJ went on to say, at paragraph 38, that: ‘It would be surprising if a different result was to follow in a case such as the present where, although the QOCS regime does not apply to the claim against the defendant, it does apply to the claim against the additional parties’.

Held, at paragraph 39, allowing second ground of appeal: ‘... I consider that the judge [at first instance] has exercised his discretion on an erroneous basis in that he has failed to take into account a highly material factor, namely the applicability of the QOCS regime to the claims against the Second and Third Defendants. His decision should accordingly be set aside and this Court may itself exercise that discretion. In my judgment, for the reasons outlined above, the fair, just and proportionate order to make in the circumstances of the present case is to vary the costs order made in favour of the Respondent so as to exclude any costs of the Second and Third Defendants parties which the Respondent had been ordered to pay.’

Full text judgment can be found here.

Ogden Discount Rate and Insurer Profits

In this article, we seek to discuss the profit margins of insurers since the ‘government’s decision to cut the discount rate on personal injury settlements’, in February of 2018, when the then Lord Chancellor, Liz Truss, changed the personal injury discount rate for lump sum damages awards to (-0.75%) from 2.5%.

Last week, Allianz announced that its operating profit for 2017 increased by 26% to £121 million, stating that figures would have been £22m higher but for the change in the discount rate. Profits, hypothetically could have been 18% greater if the discount rate had remained the same as it had for 16 years previous.

Jon Dye, Chief Executive of Allianz, stated that providing compensation that was ‘fair and appropriate’ is the correct approach. He went on to warn that: ‘The sharp increase in the cost of settling personal injury claims is contributing significantly to rising premiums for customers. The pressure on insurers to pass on this cost to the customer can be removed by an appropriate government response. The implementation of a framework that delivers a fair outcome and brings greater clarity and certainty to the market is urgently needed.’

Similarly, Direct Line Group, this week, reported profits for the year ending 2017 of £610.9 million, equating to an increase of 51.6% on 2016. Group Chief Executive, Paul Geddes, said: ‘2017 is the fifth successive year in which we have delivered a strong financial performance. We have seen significant growth in our direct own brand policies as more customers respond positively to the many improvements we have made to the business’.

Responding to muted celebratory reactions over positive financial performance in 2017, Samantha Hemsley, National Head of Serious Injury and Clinical Negligence teams, suggested that: ‘Insurers like Allianz – who despite their griping still enjoyed a 26% increase in profits to £121m this year - could have put money aside for the inevitability of a discount rate increase.’

We are still awaiting Governmental progress on the implementation of a new discount rate, which is expected to rise to a percentage between 0% and 1%. Both claimant and defendant representatives assure that further reforms to the basis upon which the rate is calculated, are necessary.

Whiplash Reforms Incentivised by ‘Disingenuous’ Figures?

In this article, we report on claims brought by a representative of the Union of Shop, Distributive and Allied Workers (USDAW), at the Justice Select Committee hearing in January, that the Government and the insurance industry “are being “disingenuous” to insist that the small claims limit has not been increased since 1991”.

This resistance is in relation to the Government’s Civil Liability Bill, which includes reform on whiplash injuries, such as the increase in small claims limit to £5,000 for soft-tissue whiplash claims.

USDAW has queried, in written evidence to Bob Neill MP, whether the increase to
£5,000 is justified on the basis of ‘damages inflation’, as the insurance industry argues. The union submitted that:

‘In fact in 1999 the small claims limit did increase in real terms when special damages were removed from the calculation as to whether the value of a claim was less than £1,000 and therefore fell within the small claims court. This 1999 change represented a 20%+ increase in the small claims limit [even though] the value of the claim had not changed.’

Using Lord Justice Jackson’s cost review, which treated ‘1999 and not 1991 as the starting point for any inflationary rises’, USDAW calculates that consumer price index (CPI) figures show that a 1999 claim today would be inflated to £1,440, while retail price index (RPI) figures show that a 1999 claim today would be inflated to £1,620.

Moreover, USDAW cite the Jackson LJ recommendations, which supports stability in the small claims limit ‘until such time as inflation warrants an increase to £1,500’.

Since the CPI applies to pensions and benefits paid to injured workers, USDAW perceives CPI to be the ‘logical indexation’ for the small claims limit. If Jackson’s recommendations are followed, they argue that the small claims limit rise to would be premature.

Mark Carney, governor of the Bank of England, has stated that the RPI inflation index has ‘no merit’ and should be scrapped…’

Shirley Denyer, representative of the Forum of Insurance Lawyers (FOIL), said at the January hearing that ‘between 2012 and 2017, damages rose by 20%, while RPI was 5.5%.’

USDAW cited the Judicial College Guidelines, in attempting to disprove the evidence adduced by Ms Denyer, submitting that ‘damages inflation “in fact corresponds very closely with the RPI figure over the same period”’. Further, the union sought to place a lack of trust on RPI reliance, the preferred index rate of FOIL and the Judicial College, by quoting the governor of the Bank of England, Mark Carney, who recently stated that ‘the RPI inflation index has “no merit” and should be scrapped…’

FOIL, in its additional evidence, also argued that in updating the guidelines, ‘the Judicial College seeks to reflect not only inflation but also the decisions of the courts on quantum. This can lead to increases in the recommended awards significantly in excess of inflation’, meaning that neither index is necessarily an accurate indicator for change.

Government Defends ‘Confusing’ Cold-Calling Ban

This week, a member of the Treasury has provided an update in defence of the Government’s strategy on implementing a ban on cold-calling within the Financial Guidance and Claims Bill. In its present form, the Bill prohibits ‘live unsolicited direct marketing telephone calls in relation to claims management activities, except where the recipient has given explicit consent to receiving such calls’.

The Labour Party has previously argued that the Financial Conduct Authority (FCA) should not just take over regulation of claims management companies, but also have the power to enforce bans. Under current plans, the power would be vested in the Information Commissioner’s Office (ICO).

However, the Mr John Glen, Economic Secretary to the Treasury, has voiced his ‘confidence’ in the Government’s approach, arguing that giving the FCA this responsibility would ‘risk confusing consumers and industry … [to have] … different cold-calling regimes for different sectors’. By contrast, Mr Glen proposes that the ICO ‘would ensure that the ban was “plugged into the existing framework”’.

The Economic Secretary, later in his defence, went on to provide evidence to assure readers of the strength that the ICO would use against rogue cold-calling companies:

‘… under the Privacy and Electronic Communications Regulations (PECR), the ICO had “tough enforcement powers”, including the ability to fine firms based in the UK up to £500,000, and issued “fines totalling £2.83m in 2017”.

However, Mr Glen attempted to appease disappointed parties, who contend that the Bill does not go far enough to eradicate the problems caused by cold-calling. He discussed the fact that the FCA ‘have a role to play’ and will ‘be consulting on new rules for CMCs’.

On the definition of ‘consent’, which, according to the Bill, would render unsolicited calls solicited, Mr Glen stated that consent must be ‘knowingly and freely given, clear and specific’. In addition, if consent is given, the extent of it must be recorded by companies.

Further, on the issue of when consent elapses, Mr Glen stated:

‘There is no fixed time limit after which consent automatically expires but consent does not remain valid forever.’

Redundancies at Simpson Millar

This week, it has been reported that 91 staff members have been made redundant at claimant firm, Simpson Millar. Simpson Millar was acquired by Fairpoint Group in June of 2014, the first of multiple Law firm acquisitions. However, the share price of the ABS ‘plummeted’ to 10p from
192p in 2016, on the basis of ‘downgraded’ profit projections in a ‘turbulent’ 2017. Subsequently, in June of last year, Fairpoint was forced to suspend trading and entered into administration.

In edition 197 of BC Disease News (here), we reported that Doorway Capital Limited would provide a ‘Receivables Funding Facility’ of ‘up to £5 million’ in working capital to Simpson Millar (and its subsidiaries) to ‘take advantage of the growth opportunity presented by the size and highly fragmented nature of the consumer legal services market-place’.

In an announcement to the London Stock Exchange, Fairpoint assured that:

‘The appointment of administrators to Fairpoint Group Plc will have no impact on the day to day running of these businesses’.

In August of last year, Simpson Millar predicted that:

‘Whilst we are saddened that this has been a difficult time for Fairpoint Group, it is business as usual at Simpson Millar and we do not anticipate any significant changes as a result of Fairpoint Group’s announcement’.

Nevertheless, Simpson Millar will commence with redundancies across the firm’s 9 offices in England and Wales, including 20 fee earners and 71 members of back-office staff.

Cuts have been attributed to ‘significant under-investment’ by Fairpoint and the firm has called for stability, as 8 employees are redeployed to new roles and 6 further positions are considered.

Yesterday, it was reported that Doorway Capital have ‘written off almost £30 million in acquired debts’, while provisional accounts for the year ending 31 December 2017 show ‘recorded losses of £7.6m’. 9

As a consequence, auditors for the accounts have noted that further funds will be necessary in order to continue financing the firm. Julien Rye, of accounting firm, BDO, has confirmed that the conditions of Simpson Millar ‘may cast significant doubt about the limited liability partnership’s ability to continue as a going concern’.

Hearing Loss in American Agriculture, Forestry, Fishing and Hunting Sectors

A new study from the USA involved investigation of hearing loss in workers in the Agriculture, Fishing, Forestry and Hunting (AFFH) sectors10. This is the first study to estimate prevalence and risk of hearing loss for sub-sectors within the AFFH sector11.

Audiograms from 1.4 million workers, of which 17,299 were in the AFFH sectors, were examined between 2003 and 2012. Over all sectors combined, the prevalence of hearing loss was 19%, and the prevalence among the AFFH sector overall was lower, at 15%. However, some sub-sectors had higher prevalence of hearing loss, such as forest nurseries and gathering of forest products, with a prevalence of 36%, timber tract operations, with a prevalence of 22%, and fishing, with a prevalence of 19%.

‘While we found the overall prevalence of hearing loss in the AFFH sector to be less than all industries combined, which is 19 percent, our study shows there are many industries within the sector that have a large number of workers who have or are at high risk for hearing loss,’ said Elizabeth Masterson, PhD, epidemiologist and lead author of the study. ‘Workers in the high-risk industries identified in this study would benefit from continued hearing conservation efforts.’12

Cardiovascular Effects in Workers Exposed to Carbon Nanotubes

A new study has found increased levels of a ‘marker’ for cardiovascular disease in workers of a company producing multi-walled carbon nanotubes (MWCNTs)13. Production of carbon nanotubes (CNTs) is increasing worldwide, and though there have been studies of cell cultures and animals, there are few studies of humans exposed to CNT-containing products.

CNTs are tube-shaped structures made of carbon atoms, in which the tube ‘wall’ is one atom thick. MWCNTs are tubes with multiple layers, and can take two forms: a ‘Russian doll’ model, in which several tubes are arranged with the narrowest on the inside and larger tubes forming a concentric pattern around the smaller tubes, and the ‘Parchment’ model, in which a single 2-dimensional sheet of carbon atoms is rolled up like a scroll. A characteristic feature of CNTs is that they have very large aspect ratios, whereby their length is far greater than their diameter. They are used in the manufacture of very strong, but lightweight, materials, and have applications in products such as bicycles, other sports equipment, helmets, aircraft, cars, and computer motherboards.

The study involved comparison of 22 workers of a company commercially producing MWCNTs with 42 unexposed controls. Blood samples were taken, and the researchers looked for twelve signs of inflammation and damage to the linings of blood vessels. An upward trend in the concentration of one marker of damage was observed with increasing exposure to MWCNTs. The trend was significant in different worker categories of lab personnel with low and high exposures and operators, and across different exposure concentrations. No consistent significant associations were found for the other eleven markers investigated.

The associations between MWCNT exposure and the marker suggest that there is increased inflammation and damage to blood vessel linings in workers exposed to MWCNTs.
Black Lung Disease Found in Former and Current US Coal Miners

Researchers at the National Institute of Occupational Safety and Health (NIOSH) and staff from some lung clinics in Virginia have reported the largest cluster of severe black lung disease ever described in the scientific literature\(^6\).

Black lung disease is also known as coal workers’ pneumoconiosis, and the severe disease found in these workers, defined by the size of the damaged areas of the lung and features visible in chest X-rays, is referred to as progressive massive fibrosis (PMF)\(^5\). Early detection of black lung disease is critical, in order to prevent its progression to the most severe and disabling form.

The study was undertaken after the director of three black lung clinics in Virginia requested assistance from NIOSH in determining the burden of severe black lung disease among the patients served by the clinics. Data, including chest X-rays, from 11,200 patients served by the clinics between January 2013 and February 2017 were analysed. There were 416 coal miners who met the definition of progressive massive fibrosis. The mean age was 61.8 years, with a range from 38.6 to 88.7 years. The time spent working in coal mining ranged from 8 to 64 years, with an average of 27.9 years. 80 of the miners (22.7%) reported working in mines for 20 years or less, which suggests that the disease has progressed rapidly in these patients. 42 of the patients were still working as miners at the time the X-ray was taken. The actual number of miners in this region with PMF is likely to be much higher, as this study only included three clinics.

These findings reflect a failure to protect these coal miners from work-related exposure to coal mine dust. The Coal Workers’ Health Surveillance Program, founded in 1970, offers periodic chest X-rays to miners as screening for signs of black lung disease. The proportion of screened miners with the disease reached the lowest levels in the late 1990s, and then began to increase. Efforts have been made in recent years to increase the protection given to miners; for example, in 2014 the amount of respirable coal dust permitted in mines was reduced, changes in monitoring airborne dust levels were implemented, and the Coal Workers’ Health Screening Program was expanded.

In the UK, the Mines Regulations 2014 include the requirements to perform risk assessments for inhalable dust, to sample levels of respirable dust, and to place any worker who may be exposed to dust under suitable health surveillance. The Health and Safety Executive provides Guidance on the Regulations\(^6\).

New Crystalline Silica Standards in the USA: Exposure Limit Half of UK Limit

The United States’ Occupational Safety and Health Administration (OSHA) has published information on its new standard for exposure to respirable crystalline silica in general industry and maritime\(^7\). The maximum exposure limit is now half of the maximum exposure allowed in the UK.

Crystalline silica is a common material that is found in materials such as stone, artificial stone, and sand. When workers use and manipulate these materials, dusts of fine particles are produced. The tiny particles, known as respirable particles, can penetrate deeply into the lungs and cause diseases such as silicosis, lung cancer, chronic obstructive pulmonary disease and other respiratory diseases. Workers can be exposed to crystalline silica during the manufacture of glass, pottery, ceramic, brick, concrete and other products, during the use of sand in maritime operations, and by the use of sand in operations such as foundry work and hydraulic fracturing.

The new standard for exposure to crystalline silica in general industry and maritime\(^8\) includes:

- An action level of 25 micrograms of silica per cubic metre of air, averaged over an 8-hour day;
- A permissible exposure limit (PEL) of 50 micrograms of silica per cubic metre of air, averaged over an 8-hour day.

The action level is the level above which action must be taken to reduce or limit exposure, and the PEL is the maximum ‘allowed’ exposure. The standard requires employers to take actions such as:

- Limit access to areas where workers may be exposed above the PEL;
- Provide respirators when dust controls and safer work methods cannot limit exposure to the PEL;
- Offer medical exams, including chest X-rays and lung function tests, every 3 years to workers exposed at or above the action level for 30 or more days a year.

OSHA also offer advice on housekeeping practices and dust control methods that can help to reduce workers’ exposure.

The previous PELs for crystalline silica were 100 \(\mu\)g/m\(^3\) for general industry and 250 \(\mu\)g/m\(^3\) for construction and shipbuilding\(^9\). These limits were adopted in 1971, and OSHA found that they did not adequately protect workers, and were outdated, inconsistent and difficult to understand. The limits were based on research from the 1960s and did not reflect more recent scientific evidence; since the limits were adopted, the U.S. National Toxicology Program, the International Agency for Research on Cancer, and the National Institute for Occupational Safety and Health have all identified respirable crystalline silica as a human carcinogen\(^10\).

In December, OSHA published guidance\(^11\) on the respirable crystalline silica standard for work in the construction industry. The action level and PEL are the same as those in the general industry and maritime...
standard, and control methods are required.

In the USA, about 2.2 million workers are exposed to crystalline silica. OSHA predicts that the new standards will save nearly 700 lives and prevent 1600 new cases of silicosis per year once they are fully implemented. General industry and maritime employers must comply with all requirements of the standard by 23 June 2018, with two exceptions: hydraulic fracturing operators, who must implement dust control measures to limit exposures to the new PEL by 23 June 2021; and medical surveillance of those exposed above the action level for 30 days or more must be offered by 23 June 2020.

For comparison, in the UK, the workplace exposure limit for respirable silica dust is 0.1 mg/m$^3$, averaged over 8 hours, which is equivalent to 100 μg/m$^3$. This is the same as the old United States limit for general industry.

New Evidence Associating Shift Work and Diabetes

Two new studies have added to the evidence for a link between shift work and diabetes. One study examined whether those who work shifts are more likely to have diabetes, and included analysis of genetic information, and the other study looked at mice, in order to investigate how disruption of the body clock interacts with the effects of a high fat diet. The first study concluded that shift workers are more likely to have diabetes than non-shift workers, and the second study found that shift work can enhance the negative effect of a high fat diet on metabolic disorders, such as diabetes.

The study of diabetes risk and genetics used data from the UK Biobank. Associations of current and lifetime night shift work exposure with risk of type 2 diabetes were examined. Genetic data was available for 44,141 workers. Certain genes can increase the risk of type 2 diabetes, and the researchers assigned each participant a genetic risk score. Compared with day workers, all current night shift workers, whether they worked some night shifts or usual night shifts, were at higher risk of type 2 diabetes. The only exception was those who work night shifts exclusively. Considering a person’s lifetime work schedule, working more night shifts per month was associated with higher risk of type 2 diabetes. The association between genetic predisposition to type 2 diabetes and actually developing type 2 diabetes was not modified by shift work. This suggests that genetics and shift work are independent factors for type 2 diabetes, and that there is no interaction between the two factors. The researchers emphasise that this finding needs to be replicated in further studies.

The study of mice aimed to address the difficulty in determining cause and effect for the observation that shift workers tend to be at higher risk of disorders that can result from a fatty diet. It is difficult to determine whether the adverse health effects are caused by the shift work itself, or by the poor dietary habits that tend to accompany shift work, such as eating fatty food late at night. For the study, mice were fed a high fat diet and exposed to a light-dark cycle that offset by 12 hours every 5 days, to simulate 5 days of day work followed by 5 days of night work. Effects were observed in the immune cells of mice exposed to chronic shift cycling, and there was also exacerbation of diet-induced increases in body weight, insulin resistance and glucose intolerance. The researchers suggest that the mechanism by which these effects are enhanced by circadian disruption is related to how immune cells mediate inflammation.

‘We hope that we can find therapeutics to cancel out some of the problems caused by circadian rhythm disturbances’, said David Earnest, the lead researcher. ‘There are many people who are required to function well on irregular cycles, and if we can find a way to cut down the inflammation this causes, we may be able to minimize the long-term effects.’

Risk of Adverse Births in Female Veterinarians

Women in veterinary occupations are routinely exposed to potential reproductive hazards, yet there is little research into their birth outcomes. Researchers in Washington State, USA, compared birth outcomes from 2,662 mothers in veterinary professions to those from 10,653 mothers in dental professions and 8,082 other employed mothers. Data was collected from birth certificates, fetal death certificates and hospital discharge data. The outcomes studied were premature birth (less than 37 weeks), small for gestational age (SGA), malformations and fetal death (death at 20 weeks’ gestation or more). No statistically significant associations were found. There was a slight trend for SGA births in mothers in all veterinary professions compared with mothers with dental professions, and in veterinarians compared to other employed mothers, but these findings were not statistically significant, and could therefore be due to chance. There was also a positive but non-significant association for malformations among mothers working in veterinary support roles. Overall, this study provides little evidence that veterinary work is associated with adverse birth outcomes.

Possible Link Between Solvent Exposure and Male Breast Cancer

A new study has found a possible link between organic solvent exposure and male breast cancer (MBC). Despite the rarity of breast cancer in men, any connection with solvent use is of interest, because occupational exposures too many chemicals are present in many jobs mostly held by men. In a previous study, the same research group found that motor vehicle mechanics and painters with probable exposure to organic solvents had a two- to three-fold increased risk of MBC, and the aim of the current study was to advance the hypothesis of a link between solvents and MBC.
The researchers compared 104 cases of MBC with 1901 controls. The participants provided detailed information on their work history, medical history and lifestyle. A job-exposure matrix was used to estimate their exposure to some types of solvents. Exposure to higher cumulative levels of trichloroethylene was associated with an approximately doubled risk of MBC, and the risk increased with increasing level of exposure. There was a possible increased risk with exposure to benzene, but some risks were not statistically significant, and there was no exposure-response trend (the increased risk from lower exposures was greater than the increased risk from higher exposures).

Although this is the largest case-control study of MBC and exposure to solvents, a limitation of the study is that there were only small numbers of cases exposed to some solvents. This means that the analyses have low statistical power for detecting associations. The researchers conclude that more epidemiological studies of populations with well-characterised exposures are required.

Nitrate in Drinking Water Increases the Risk of Colorectal Cancer

A new study from Aarhus University has found that levels of nitrate in drinking water that are lower than the current acceptable standard are associated with increased risk of colorectal cancer\(^2\).

Nitrate is a widely used fertilizer, and can be ingested by humans via run-off and accumulation in water supplies. Those that live in agricultural areas are likely to have the highest exposure, particularly those with private wells. Studies have suggested links between waterborne nitrate and colorectal\(^2\) and other\(^3\) cancers, and conversely, a 2001 study found that, among women, there was a decreased risk of rectal cancer with higher nitrate levels\(^4\).

After ingestion, nitrates are transformed in the body into compounds known as N-nitroso compounds. Ingested nitrate that results in formation of N-nitroso compounds is classified as probably carcinogenic to humans by the International Agency for Research on Cancer\(^5\).

In the new study, individual nitrate exposure was calculated for 2.7 million adults based on more than 200,000 samples of drinking water from public waterworks and private wells between 1978 and 2011. For the main analyses, data from the 1.7 million individuals with the highest exposure were included. There were 5,944 new cases of colorectal cancer during the study. Those exposed to the highest nitrate levels (more than 9.3 mg/L) were 16% more likely to develop colorectal cancer than those with the lowest exposure (less than 1.3 mg/L). There were significantly increased risks at drinking water levels above 3.87 mg/L, which is well below the current standard for drinking water of 50 mg/L. The current standard was devised with the intention of preventing blue baby syndrome, which can occur when infants have high nitrate exposure.

‘The conclusion in our study is in line with the findings of several international studies, which indicates that the drinking water standard ought to be lower in order to protect against chronic health effects and not only acute effects such as Blue Baby Syndrome. With identical results from different studies, this points towards a need for reconsidering the drinking water standard,’ says Professor Torben Sigsgaard from the Department of Public Health at Aarhus University, who has been involved in the research project\(^6\).
Feature:

**Bussey v Anglia Heating Limited [2018] EWCA Civ 243 – Impact Note**

In our feature article, we provide an ‘Impact Note’ on Bussey v Anglia Heating Limited [2018] EWCA Civ 243, the Court of Appeal decision which we examined in last week’s edition of BC Disease News (here). The ruling was in relation to breach of duty in a mesothelioma claim.

WHAT IS CLEAR FROM THE COURT OF APPEAL IN BUSSEY?

Not much. However if it was as simple as from 1965 respirators must be provided, it would have been a short and straightforward Judgment.

From Rupert Jackson LJ, giving the lead Judgment of the Court of Appeal we can decipher:

**WILLIAMS V UNIVERSITY OF BIRMINGHAM [2011] EWCA 1242 WAS NOT WRONG…**

…on the facts of that case:

45. It follows from the foregoing that, despite Mr Rawlinson’s criticisms, the Court of Appeal applied the correct legal principle in Williams. I propose to apply precisely the same legal principle in determining the present appeal.

46. As previously noted, in [61] Aikens LJ held that TDN13 was the best guide to what were acceptable and unacceptable levels of exposure in 1974. He was not there formulating a principle of law. He was setting out a mixed finding of fact and law. That finding was based upon the expert evidence adduced in the case before him.

In undertaking a mixed finding of fact and law, Aikens LJ was right to consider and attach weight to TDN13. However, in Jackson LJ’s view, he may have gone a little too far.

**TDN13 IS NOT A ‘RIGHT LINE’ OF LIABILITY**

Where HHJ Yelton may have fallen into error is treating TDN13, as the sole determinative factor:

47. In my view TDN13 does not establish a ‘bright line’ to be applied in all cases arising out of the period 1970 to 1976. Still less is it a bright line to be applied to asbestos exposure in a different period whether before or after 1970 to 1974.

48. At this point in the analysis I regard it as relevant that neither Jeromson nor Maguire was cited in Williams. If Aikens LJ had those two decisions in mind, I do not think that he would have suggested (if indeed he did suggest) that TDN13 was a general yardstick for determining the foreseeability issue.

Had Maguire and Jeromson been cited to Aiken LJ then in Jackson LJ’s view, Aiken LJ would have looked at a wider range of issues to determining the standard of a reasonable employer.

It is clear that our asbestos tools are able to calculate that ‘bright line’.
Assessing liability is not as clear as being above or below a 2 fibre/ml 4 hour TWA, but in training to clients and our solicitors, we have never presented it that way. What does seem clear from Jackson LJ is that exposure when measured against Occupational Hygiene levels is a factor, it is just not determinative of negligence on its own:

59. Let me now return to the judgment under appeal. It is clear from paragraphs 40 to 45 that the judge treated the levels specified in TDN13 as determinative of the present case. He considered that the Court of Appeal’s decision in Williams compelled that result. Whilst I understand why the judge in this case (and judges in some other first instance decisions) took that view, I do not regard it as correct. TDN13 sets out the exposure levels which, after May 1970, would trigger a prosecution by the Factory Inspectorate. That is a relevant consideration. It is not determinative of every case.

Other factors need to be considered:

50. I hasten to say that I am not criticising the actual decision in Williams. The deceased in that case was exposed to very low levels of asbestos for a relatively short time. The total exposure in Williams was much lower than the total exposure in the present case. The Court of Appeal very properly took into account the provisions of TDN13 in addition to the expert evidence.

IF TDN13 IS NOT A BRIGHT LINE HOW DO WE ASSESS LIABILITY?

Jackson LJ requires a more ‘nuanced approach’:

49. A more nuanced approach is required than that. It is necessary to look at the information which a reasonable employer in the defendant’s position at the relevant time should have acquired and then to determine what risks such an employer should have foreseen.

So what would that more nuanced approach look like? We would suggest the following as a starting point:
1. Exposure level when compared to the maximum permissible occupational hygiene level. That exposure is well below such a level is a factor (see below as to our comments on back calculations/back-guestimations).

2. Other available industry guidance and medical literature.

3. The opinion of experts in the case as to what was available to a reasonable employer and what reasonable employers were doing at the period of exposure.

4. What could have been done to reduce exposures.

**'BACK CALCULATION/BACK-GUESTIMATIONS'**

It is clear that Underhill LJ is not in favour of back calculations, believing them to be "unsound":

62. I agree that this appeal should be allowed and, reluctantly, that it must be remitted to the Judge for further consideration. My reasons at most points correspond to those given by Jackson LJ. In particular, I think that the Judge was wrong to treat this Court in *Williams* as having laid down a binding proposition that employers were entitled to regard exposure at levels below those identified in TDN 13 as "safe", even in the period 1970-1976, still less at a period prior to its publication. There is the further point that in the present case, and I suspect in many others, there is no reason to suppose that the employer took any steps to measure the level of exposure which Mr Bussey or others doing similar work encountered and could not have accordingly known whether it was above or below any supposed "maximum safe limit". Attempting to answer the issue in this case by comparing back-calculations (it might be fairer to say "back-guestimations") of Mr Bussey's exposure against subsequently published figures of the kind appearing in TDN 13 is in my view unsound.

This presents some problem, as this is routinely how liability is assessed. However these findings are against the backdrop of the agreed expert evidence that it was not possible to measure the actual level of exposure at the time of Mr Bussey's employment:

55. On the judge's findings of fact, the asbestos levels to which Mr Bussey was exposed came close to (but did not exceed) those mentioned in TDN 13. At the time Anglia had no way of measuring the actual level of asbestos to which Mr Bussey was exposed. Nor could Anglia compare those levels to TDN13 (which was not published until some years later). All that Anglia knew, or ought to have known, was that Mr Bussey's work regularly exposed him to small quantities of asbestos dust.

If you are unable to assess the fibre/ml exposure level, then obviously it is not acceptable to assume the risk to be acceptable. The more appropriate course would be to assume the worst, as advocated in *Jeromson*. Some commentators have suggested Underhill LJ's may be adopted on a wider scale with the role of engineers being questionable.

However what about when you can calculate the fibre/ml exposure? Surely then the amount generated by the activity is a factor to which considerations of risk must be attached? The truth of the matter is that once an employer is capable of assessing the fibre/ml exposure in factual circumstances, then the back calculation becomes a viable consideration, as the Court needs to know what level of exposure would have been found, had the employer measured it, to give weight to that point. If this was not the case, TDN13 would not have been found to hold any significance. It was, just not determinative of the whole issue.

In a great many incidences government guidance was that environmental testing was not required, as HM Factories Inspectorate had taken on this responsibility for employers.

See TDN42, which was relied upon by HHJ Yelton to determine Mr Bussey's likely exposure, though would not have been available to Anglia Heating, at the time of exposure:
If the Court is again to consider lower exposure cases, it is assumed that the extent of exposure will be pretty low. In those factual circumstances, is it unreasonable for an employer to not undertake their own testing and place reliance on the figures within TDN42? That was the very purpose of the document:

This information has been provided as a guide to the Construction Industry in answer to a request made to the Inspectorate by representatives of the Industry, meeting in a sub-committee of the Joint Advisory Committee on Safety and Health in the Construction Industry. The concentrations have in the main been determined by collecting dust on membrane filters by the use of personal samplers and then evaluating the dust collected by optical microscopy as described in “Technical Note 1” issued by the Asbestososis Research Council. The Council have also verified the ranges of concentrations shown.

Even if capable of undertaking testing, if literature is available to advise an employer on likely exposure levels to their employees, should they be required to have undertaken their own testing and evidentially prejudiced by a failure to evidence testing results? In our view the comments of Underhill LJ should be viewed against the factual back drop and agreed expert evidence in Bussey that testing could not be undertaken and that none was. There is much litigation to come about the position when testing could be undertaken and whether it was reasonable, in light of other industry guidance available to the reasonable employer, to have done so.

WHEN IS AN EMPLOYER CAPABLE OF MEASURING ASBESTOS FIBRE/ML GENERATION?

The accepted position in Bussey was that it was not possible for Anglia Heating to have tested the fibre/ml generation in 1965-68. We would not accept that as correct. Testing was possible in 1963:
And in 1968 testing was undertaken using both midget impinger and membrane filter methods:

**SOME OBSERVATIONS ON ASBESTOSIS**

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**Fig. 6.** Concentrations of asbestos dust particles in the air of a corridor during and after mixing. The dotted line is the M.A.C.
The famous Harries paper was published in 1971, but was a result of testing undertaken in 1967 and when setting out the sampling method, it is clear he used methods that had been endorsed from around 1963:

### Table V

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### Table VI

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**ASBESTOS DUST CONCENTRATIONS IN SHIP REPAIRING: A PRACTICAL APPROACH TO IMPROVING ASBESTOS HYGIENE IN NAVAL DOCKYARDS**

P. G. HARRIS

Medical Research Unit, HM Dockyard, Devonport

(Received 4 January 1971)

**Dust sampling survey**

Sampling was planned in an attempt to give some idea of dust concentrations likely to have been present in the ships over the last 25 yr. The revision of design specifications, as well as substitution to reduce the dust hazard, made it necessary to take the bulk of these samples in ships containing the old materials in order to give some idea of past conditions. The opportunity to do this occurred in an aircraft carrier and a cruiser in 1967. The samples during other processes, especially the application of insulation, have been taken in destroyers and frigates, as well as in the larger vessels so as to give an idea of present working conditions.

**Sampling methods**

The membrane filter method of sampling and evaluation described by Holmes (1965) was used for this survey. Millipore type QA 20 and 25 mm membrane filters, pore size 0.45 μm were used in Gelman sampling heads, and air was drawn through them by using Hunt personal samplers (Hunt and Ellison, 1963), Austen-Dymax diaphragm pumps, or Dräger hand pumps. The Hunt samplers run at a flow rate of 11.3 ml/min, and the Austen-Dymax pumps at 200 ml/min. Both were calibrated with a suitable Rotameter flow meter. The Hunt samplers were worn by men to give an estimate of personal exposure, or were placed alongside long-running gravimetric samplers to provide an estimate of the fibre content of the dust; sampling lasted over a working shift. Austen-Dymax pumps were used to take shorter samples. A comparison between the results of gravimetric sampling and fibre counting is the subject of a separate report.
We do not say fibre/ml testing would not be expensive and that it was readily available and whether such testing could reasonably be undertaken would depend on the size of the Defendant and its resources. Such testing was in its infancy and the accuracy of those methods may now be doubted. However if we are looking to a nuanced approach and what an employer could have ascertained at the time, then the results of such testing must be a factor, though not determinative.

However it cannot be said that testing was not possible in the 1960’s and as time advanced, that testing became cheaper and more readily available. Defendants will rarely be able to establish testing was undertaken, but the passage of time should not be used to make findings of fact that such testing was not undertaken. We simply will not know in the majority of cases. Literature was available to employers to inform them as to fibre/ml generation and risk and it is appropriate that they react to the level of risk perceived within. The Leathart & Sanderson paper from 1963 quoted above was published in the Annals of Occupational Medicine, the same as the Thompson & Newhouse paper in 1965, which forms the ‘watershed of knowledge’, though admittedly the Sunday Times did not pick up and publicise its findings.

Claimants will no doubt give evidence that no testing was undertaken in their presence. This may give the presumption that testing was not undertaken. Claimants may also look to Keefe v Isle of Man Steamship [2012] EWCA that the Defendants must be in breach of duty, as they can adduce no positive evidence of testing. To that we would say, the position where a Defendant can no longer adduce evidence as to whether testing was done, due to the passage of time, is no evidence that none was ever undertaken and Keefe can be distinguished on a similar basis to it was in Heavey v TMD Friction (Lawtel Document No. AC0139095) in respect of noise readings that could no longer be located:

24. The absence of engineering evidence is unusual but not necessarily fatal to the claimant’s case. In Keefe v Isle of Man Steam Packet Company, there was no such evidence yet the claimant succeeded on appeal. However, Keefe was, in my judgment, almost the exact converse of the present case. In breach of their duty in Keefe, the ship owners had failed to make any noise measurements, so that it was, to say the least, unattractive for them to argue, absent surveys, that noise levels probably fell below the required for action. In the present case, noise levels were routinely measured, and it is unattractive for the claimant to argue that in the absence of those records, which probably results from his delay, noise levels were probably excessive. Moreover, in Keefe, it is apparent from the transcript that there was some expert evidence that, based upon the anecdotal evidence given about sign language and hand signals for communication at a distance of 10 feet or so, an inference could be drawn that noise levels were at or about 90 decibels, and that such levels were maintained for eight hours or more in a 16 hour shift. Here, there is no such evidence. I find it quite impossible, in

Testing may or may not have been undertaken. But if it had, what would it likely have revealed? This can only be done with the assistance of expert evidence. If TDN13 and other historical OH levels remain relevant, if not determinative on their own, then the Claimant still has a burden of proving a level of exposure that can be measured against those levels. They may not be required to prove exposure necessarily in excess of TDN13, but they will need to establish exposure at a level that would be of concern to employers, having regard to historical knowledge of the time.

If a case were to reach the High Court, it is envisaged it would be with expert evidence that readings would have been below the relevant OH levels, if located, then it seems unlikely the Claimant would derive much evidential advantage from their absence, assuming the quality of the Defendants expert evidence is strong.

As such, if we accept that Bussey does not remove Factories Inspectorate fibre/ml levels as a factor to be considered by an employer (though not the sole factor), then ‘back calculation’ seems to have a place from the mid to late 1960’s as a relevant guide for a Trial Judge on what is an acceptable response to risk. If TDN13 remains relevant, then the Claimants exposure when measured against it must also be relevant and this can only be obtained by a back calculation.
OTHER FACTORS TO BE CONSIDERED IN A ‘NUANCED APPROACH’ TO THE ATTITUDE TO RISK?

INDUSTRY GUIDANCE

It is clear that medical literature and industry guidance will have to be considered, alongside exposure against permitted limits (where assessment was possible):

49. A more nuanced approach is required than that. It is necessary to look at the information which a reasonable employer in the defendant’s position at the relevant time should have acquired and then to determine what risks such an employer should have foreseen.

As well as allowing BC Legal clients to assess exposure against industry guidance figures, ABC asbestos has a full and evolving back of industry guidance for assessing what a reasonable employer could have ascertained when assessing risk:

A ‘NUANCED APPROACH’ TO CONSIDERING POST 1970 EXPOSURE

Consider a small dissolved construction company in 1975 that has its employees using hand tools to cut asbestos cement on site and outdoors. We do not now know if TLV calculation was undertaken, but it was possible with back calculation. D argued that it was entitled to rely on TDN42 figures from government, as its actual work with asbestos was very limited. C would spend 30 mins per day on the activity;
This work, applying a 4 hour TWA is 25% of TDN13. Not determinative of an employer’s liability, but a factor for them to consider. If the Factories Inspectorate attended their premises and got these readings, then there is no way there would be any chance of prosecution.

Applying a more nuanced approach, the employer would then have to look at the other literature available on working with asbestos cement with hand tools. So an employer goes to the Asbestos Research Council (ARC) a body set up (albeit by asbestos manufacturers) to assist the industry with the management of risk. This guidance is quite clear that ‘Work can be carried out quite safely on asbestos cement materials with power drills, hand saws and other hand tools’:
And if that employer went to the ARC paper on ‘Control and Safety’ for working with asbestos sheets, what would he be told? That no precautions were required:

In light of this guidance, specific to the task being undertaken by this employee, can an employer be negligent for determining that no precautions were required?

STATUS OF EXPERT EVIDENCE?

The case has been remitted back to the High Court for further determination by HHJ Yelton, as he has heard the relevant expert evidence:

60. If the judge had not felt so constrained he would have looked at the issues of foreseeability and breach more broadly. Anglia called no factual evidence about what it knew or considered in the late 1960s. Instead Mr Feeny places reliance on certain answers which he elicited from Mr Brady in cross-examination. He has set these passages out in section 5 of his skeleton argument and taken us through them in his oral submissions. Unlike the judge we have not heard the oral evidence of the experts. Nor do we have a full transcript of the evidence called. I have come to the conclusion, with considerable regret, that the Court of Appeal is not in a position to decide the liability issue on the basis of the material before us.
Experts therefore have a key role to play on what the literature would have told employers, what fibre/ml levels would have been found if tested and what a reasonable employer was doing at the point in time of exposure. It is clear that experts will still have a key role to play in determining the approach of a reasonable employer to risk:

50. I hasten to say that I am not criticising the actual decision in Williams. The deceased in that case was exposed to very low levels of asbestos for a relatively short time. The total exposure in Williams was much lower than the total exposure in the present case. The Court of Appeal very properly took into account the provisions of TDN13 in addition to the expert evidence.

The ABC Asbestos Tool has an evolving data base of expert reports from previous cases which can be word searched to identify the likely expert evidence, relevant to similar facts as the case you face. The database currently has 70+ reports and is constantly growing:

Each case will turn on its own facts, not the bright line of TLV level

Given the Judgment in Bussey, it is clear the Court of Appeal are reluctant to set broad guidance on the law of negligence, beyond the statement that it is not determined by a simple mathematical calculation. Each case will turn on its facts and Williams was just one such example, as were all the other cases that followed that decision;
There are of course many first instance decisions on foreseeability of the risk of mesothelioma at different dates. Counsel have taken us through several of them. Each one turns upon the circumstances of that case and the expert evidence which was called. I bear those decisions in mind, but do not embark upon a recitation of those authorities.

Bussey sets no real test and cases going forward will be assessed on the facts, on expert evidence and with TLV level as a factor, if not the determinative factor.

IS IT EVER ACCEPTABLE TO TAKE NO PRECAUTIONS?

Jackson LJ stated that it is not possible to remove the risk altogether. The risk remains once precautions have been taken is the 'acceptable risk':

I reject that submission. Anyone who works or lives in proximity to asbestos faces some risk of mesothelioma. It is possible to reduce that risk by taking available precautions. It is not possible to eliminate it altogether. The residual risk or the risk which remains after taking all proper precautions may be regarded as an “acceptable” risk.

The Claimants representatives would have had the law that everyone encountering asbestos from 1965 should be wearing a respirator. Jackson LJ does not go that far, but the reading of Paragraph 43 above does not sit well with industry guidance in the 1970's, which indicates scenarios where asbestos is used and precautions are not required that would factor into his ‘nuanced approach’. We would refer back to our example of working with asbestos cement and hand tools.

The precautions available to Anglia Heating by HHJ Yelton were to work outside or wear a respirator. Does outdoor working represent appropriate reaction to risk? Do we have a higher duty of care between October 1965 and TDN13 than after the publication of TDN13?

WHAT COULD ACTUALLY BE FORESEEN FROM 1965?

Underhill and Moylan LJ are perhaps more critical of the Defendants approach to risk. Much of that criticism stems from their starting position that by 1965 the knowledge of mesothelioma being caused by small amounts of asbestos was well known:

I also regret that, in the absence of the necessary findings, the evidence is not sufficient to enable this court to determine the issue of liability. This is particularly regrettable because the experts agree (as set out in [54] above) that Mr Busscy’s employment with Anglia “would have post-dated knowledge of the risks of mesothelioma and that exposure to relatively small quantities of asbestos dust … was potentially harmful”. This provides strong support for the conclusion that the relevant risk of injury would have been reasonably foreseeable to Anglia. However, it does not necessarily provide the answer to the issue of liability in particular because of the matters identified by Underhill LJ.
This all flows from the Thompson & Newhouse paper and 'Killer Dust' article in the Sunday Times in 1965. This article did reveal the dangers posed by small levels of asbestos. However if we are adopting a nuanced approach to the consideration of risk, we need to consider the perception of risk by individual fibre types. In 1960 Wagner identified that those working in a crocidolite mine were contracting mesothelioma. It is certainly arguable that the Thompson & Newhouse paper did nothing to dissuade that theory, as in each case where the type of asbestos encountered could be identified, crocidolite was present, albeit on occasions with other fibre types:

<table>
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<th>Subject to regulations</th>
<th>Job</th>
<th>Male</th>
<th>Female</th>
<th>Material</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Spinning</td>
<td>0</td>
<td>4</td>
<td>Crocidolite</td>
</tr>
<tr>
<td></td>
<td>Causing</td>
<td>1</td>
<td>1</td>
<td>Crocidolite</td>
</tr>
<tr>
<td></td>
<td>Clothing and weaving</td>
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<td>0</td>
<td>Crocidolite, chrysotile, amosite</td>
</tr>
<tr>
<td></td>
<td>Disintegrating and opening</td>
<td>2</td>
<td>1</td>
<td>Crocidolite, chrysotile, amosite</td>
</tr>
</tbody>
</table>

**Mesothelioma Series**

**Occupational Exposures.**—There are details available for the 18 mesothelioma patients who had worked at one asbestos factory which used crocidolite asbestos with small amounts of chrysotile and first introduced amosite in 1926. Eleven started work before 1933 (the year when the asbestos regulations controlling the manufacture of asbestos goods and the protection of asbestos workers became effective), and seven started work between the beginning of 1933 and the end of 1942. The occupations of these workers and the type of asbestos they used are shown in Table 4. All of the 17 for whom details were available had used crocidolite asbestos.

Anyone experienced in examining historic responses to the 1965 article will have seen companies of the belief that the risk from asbestos were predominantly linked to the use of crocidolite asbestos. Indeed the 1966 Factories Inspectors Report identifies that all the evidence of risk from chrysotile indicate that is that it is less dangerous:
In industrialised countries such as Britain, it is difficult if not impossible to observe a population exposed to one form of asbestosis only. A further difficulty is that many occupational histories are deficient. Of necessity, evidence has to be collected from other countries, but there seems little doubt that chrysotile appears to be less dangerous. Much of the evidence is of a negative character; some of it is confusing or even ambiguous. There is no evidence of the occurrence of cases of mesothelioma in the chrysotile mining areas of Rhodesia and Cyprus, and such cases are extremely rare in the asbestos mining regions of Canada, the principal producer (together with the U.S.S.R.) of chrysotile.

There was some support for this being the belief in 1968:

In 1968, the Ministry of Labour were advocating the substitution of crocidolite for amosite or chrysotile and it must be right that an employer would approach the risk from each fibre differently. Is the substitution of crocidolite with chrysotile an appropriate precaution as the Ministry of Labour suggest:

41. These words aptly sum up our own views on the aetiology of mesotheliomas. However, we feel we must go a bit further and pose the question "Can we in the light of the existing evidence incriminating crocidolite afford to wait, perhaps for several more years, until pure population studies give a final answer to this problem?" This we appreciate is not solely a medical question, but we feel it is within our competence to recommend that, unless special considerations operate, crocidolite should wherever possible be replaced by another variety of asbestos and whatever measures may be adopted to control asbestos dust, these must be even more rigidly applied to crocidolite.
Adopting a ‘nuanced approach’ to risk and assessing what a reasonable employer would have thought as to the risk would require an assessment of the fibre type used in the process as an employer’s response to crocidolite exposure after 1965 would be different where it can be established that only chrysotile was used. Bussey identifies chrysotile and amosite fibre types (Paragraph 11) and there was no finding of crocidolite exposure, though it is not clear whether the arguments around risk perception per fibre type was ever explored in Bussey. Certainly no mention of such arguments was made in oral argument in the Court of Appeal. Adopting Ministry of Labour guidance in 1968, cited above, the move from crocidolite to amosite or crocidolite might have been considered an acceptable precaution to meet the risk.

The BC Legal ABC Asbestos Tool allows you as it first stage of breach of duty analysis to make a decision on the most likely form of asbestos used in the operation, with reference to over 500 data sources:

A respirator may be required for an appropriate response to crocidolite, but perhaps not in the case of white asbestos? An adoption of such a ‘nuanced approach’ encourages the Court to examine such matters and perhaps the law in respect of risk may be considerably differently in respect of chrysotile than of other fibre types?

Hawkes v Warmex [2018] EWHC 205 gives some insight into a ‘nuanced approach’. Expert evidence was heard, a back calculation had been undertaken and there was detailed literature as to the asbestos content of the task. We will leave to one side the interpretation of Factories Act and Asbestos Regulations 1931 in that case, which are controversial. Bussey concerned only the common law and how a reasonable employer might approach a known risk and this is what the Trial Judge sought to do in Hawkes. Exposure took place between 1946 and 1952 where obviously the fibre/ml level could not be tested. This informed the decision that no safe level could be assumed;
Hawkes provides only obiter statements, as ultimately the Court did not find exposure to asbestos. It is also of limited application as to any tension between Jeromson and Williams, given the Court of Appeal have now decided on the issue. However Bussey and Hawkes are consistent that there is no tension between those two decisions. Hawkes concerned work in an asbestos textile environment, where the risks from asbestos were first noticed and prompted the 1931 Regulations, albeit Hawkes concerns work with asbestos textiles, rather than the production of such textiles. Adopting the nuanced approach advocated by Jackson LJ is likely to have presented a similar outcome on common law duty, given the literature available to the Defendant, in that case and the very known dangers of working with asbestos textiles and the number of deaths seen in that industry.

CONCLUSION

Cases where no testing was possible and where no precautions were taken, will be very difficult to defend indeed. An employer has to assume the worst. However the more the risk could be measured and understood, the more a nuanced approach might present a differing reaction to precautions.

The Court of Appeal refused to give real guidance where fibre/ml exposure can be realistically calculated and decided that Williams, Jeromson and Maguire sit happily together, as each case is correctly decided, relevant to its own facts.

Each subsequent case must therefore be decided on its own facts. One things that is clear is that TDN13 and other Government documents on TLV’s cannot determine liability on their own, but they remain a relevant factor, where technology existed to test fibre/ml exposure levels.

First Instance Courts must adopt a ‘nuanced approach’ to the assessment of the foreseeability of risk in any given factual scenario and in doing so, they will have regard to the following:

1. The TLV level
2. Industry guidance as to the risk of the activity
3. The asbestos fibre type
4. Medical literature as to the risk of the activity
5. Practical precautions that could have lowered the risk to the employee
6. Expert evidence will inform several of the above

After Williams we saw a spate of cases decided for Defendants based on TDN13 and supporting documents. It is crucial that insurers consider carefully the next cases to come to first instance Trial on the issue of exposures below TLV’s as the next case may well set the tone for who benefits most from the lack of clarity offered by Bussey.
ABC Asbestos Tools allows you to assess the likely asbestos fibre type to which the Claimant would be exposed, calculate the Claimant’s likely exposure and measure it against the TLV in place at the time. It also has a library of industry and medical publications and allows the user to assess what an expert would likely say, without the cost of obtaining that evidence. It allows the user to properly adopt a ‘nuanced approach’ to the assessment of the risk and its foreseeability, applied directly to the facts of the case.

Liability arguments are not dead, but are ever more fact specific and require more detail than ever before to allow insurers to put themselves in the shoes of the historical employer at the time of exposure and assess what approach to risk would have been taken by that employer at the time.
References


5 Ibid at 3


12 Ibid


Ibid


Disclaimer

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

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