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BC LEGAL

BRINGING CLARITY

BC DISEASE NEWS

A WEEKLY DISEASE UPDATE

CONTENTS

Welcome

Welcome to this week's edition of BC Disease News. In the last week it has been announced that the Master of the Rolls will preside at the Plebgate appeal to determine how strict the post-Jackson approach should be, and the High Court, in another Jackson reforms decision, has refused to approve both parties' budgets where they were deemed to be disproportionate.

This week we present a feature on the recently published edition of the Judicial College Guidelines for the assessment of general damages. We compare the last edition with the new edition, noting the changes. We also include, as an appendix to this edition, the comparison between the old and new guidelines in a quick reference tabular format.

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

As always, warmest regards to all.

Confusion over approach to proportionality

There is confusion over what exactly the new proportionality test introduced by the Jackson reforms means.[1]

A new proportionality test to replace the one set out in *Lownds v Home Office* was one of the key reforms proposed by the Jackson Report.[2] It was implemented by amendments to the Civil Procedure Rules. CPR 44.3(2) provides that 'where the amount of costs is to be assessed on the standard basis, the court will only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred.'

What exactly does this mean? Professor Dominic Regan, a leading civil procedure commentator, candidly accepts: 'no one has a clue'. The issue is to precisely determine the boundary between what is reasonable and what is proportionate: when does a reasonable cost become a disproportionate one? Perhaps inevitably, the issue is almost certainly going to require resolution by litigation.

In the meantime, it is at least an opportunity for practitioners to make novel arguments on what is or is not proportionate.

High Court refuses to approve disproportionate costs budgets

A High Court Judge has refused to approve the costs budgets of both sides to a construction dispute on the ground that they were disproportionate and unreasonable. However, the successful party will still be able to recover some costs.[3]

In *Willis v MRJ Rundell and Associates*,[4] a case run under the costs management pilot in the Technology and Construction Court, Coulson J predicted that the outcome will not be uncommon under the new costs rules introduced as part of the Jackson reforms.

The case concerned a £1.6m professional negligence claim against a firm of construction professionals that was subsequently reduced to £1.1m. The budgets were £821,000 for the claimant and £616,000 for the defendant. There was some initial concern expressed at an early case management conference (CMC). Mediation followed and a later CMC heard that the budgets had increased to £897,000 and £703,000 respectively.

Coulson J refused to approve the budgets, holding that they were both disproportionate and unreasonable just on the basis that 'it will cost significantly more to fight this case than the claimant will ever recover'. His Lordship added: 'it seems to me that one test of proportionality is whether the trial is likely to be an end in itself, or merely a lesser part of the process which the parties will use in order to put themselves in the strongest position to argue that, subsequently, the other side should pay all or most of their costs. When the costs on each side are much higher than the amount claimed/recovered, the latter is almost inevitable. I have no doubt that will be the case here.'

His Lordship added, finally, that although some had taken the view that the absence of an approved costs budget means that the successful party would recover no costs at all, he did not take the view that such a draconian approach was in accordance with the letter or spirit of the costs budgeting rules.

Practitioners must therefore monitor costs closely, budgets which exceed the amount claimed are liable to be seen as an attempt to secure a favourable costs outcome and potentially disproportionate on that basis. Nevertheless, if a budget is not approved it does not mean that that a costs award will not be made.

Claimant lawyers urge caution on review of Jackson reforms

Claimant lawyers have suggested that the review into the implementation of the Jackson reforms may have come too early.[5]

The review, which is being conducted by Mr Justice Ramsey with the assistance of Mr Justice Stewart and District Judge Lethem, will focus in particular on the areas of the reforms which have proved problematic so far.

However, claimant groups have said the review is premature. Craig Budsworth of the Motor Accident Solicitors Society has said that '[s]ome caution has to be given to the fact further change at such an early stage may well miss some of the opportunities to understand the full impact of the reforms.'

Meanwhile, the Association of Personal Injury Lawyers (APIL) has said that even more areas need considering. Vice-President John Spencer has said that the regulation of damages based agreements (DBAs) needs amending to ensure the agreements are workable and used by practitioners.

The review is due to be completed by April 2014.

Government rejects its pledge not to make unsupported mesothelioma reforms

The Government has rejected claims made by asbestos charities that Minister Helen Grant agreed not to introduce changes to mesothelioma claims that they did not agree to support.[6]

According to the Asbestos Victims Support Groups Forum, Ms Grant 'assured all of the charities that she would not so anything that would not be welcomed by mesothelioma victims and their families.' They feel that the Government has adopted the Association of British Insurer's proposals.

However, the Ministry of Justice insists that no pledge was given. Ms Grant said: '[the charities] views will be valuable, along with those of others, as we develop our plans for reforms to help sufferers of this awful condition…I have asked the groups to respond fully to our consultation so they and others can inform our next steps.

The consultation closed on the 2 October.

Claimant's and defendants disagree over mesothelioma claims reforms

It appears there will be no consensus over potential reform of mesothelioma claims, after defendant representatives have expressed their support for the Government's proposals.[7]

Defendant representatives seem unified in calls for an immediate end to the exemption for mesothelioma cases from the costs provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Unlike other claims, success fees and ATE insurance premiums remain recoverable in mesothelioma cases by reason of the exemption granted in section 44(6) of the 2012 Act. Moreover, defendant firms have argued that mesothelioma claims are well suited to fixed recoverable costs with no success fees or recoverable insurance premiums because, they say, mesothelioma claims carry lower costs risks than other personal injury claims as they only usually deal with the issue of damages.

Meanwhile, the former president of the Association of Personal Injury Lawyers (APIL), Karl Tonks, disagrees, arguing that liability is not the clear cut issue that defendants see it as. He argues that 'taking cases to the specialist mesothelioma court is usually the only way to persuade defendants and their insurers to admit liability for causing the disease, and to the get the claims settled quickly…It is also often the only way to obtain early interim payments to help provide some comfort for the victim in his final months, without having to wait for the case to end…We know from experience and from our own research that almost half of those lawyers asked said defendants admit liability in fewer than 10% of cases during the protocol already in place.'

Finally, he added that a more rigid system will 'play into the hands' of insurers and mean victims spend their last months in dispute with the people who have caused their illness.

Master of the Rolls to lead Plebgate appeal

The Master of the Rolls Lords Dyson is expected to preside at the appeal to decide whether Andrew Mitchell MP should have his costs limited to court fees alone.[8]

The sanction was imposed after his legal team failed to file a costs budget at least 7 days before the case management conference. Master McCloud said this strict sanction was justified by the Jackson reforms. However, because she said there was uncertainty about exactly how strict the new regime should be, she granted permission to appeal. The case has now leapfrogged the High Court to the Court of Appeal and is set to be heard November.

The two remaining Lord Justices who will sit with Lord Dyson are yet to be named, although they are almost certainly going to be drawn from the panel of judges selected to hear appeals arising out of the Jackson reforms.

Mega-firms to dominate PI claims in three years, says Law Society policy chief

The law Society's director of legal policy has said that just five or six behemoth claimant personal injury firms will exist in three years' time after a major consolidation of the market.[9]

Mark Stobbs said at the Expert Witnesses Institute annual conference that the Jackson reforms had inadvertently incentivised the giant firms to drive up the claims numbers. The intention of the insurance industry to reduce margins could, he said, backfire once consolidation in the solicitors' market had concluded.

He suggested: it would not [be surprising] if in three or four years' times there were five or six major claimant firms, highly mechanised, employing significant quantities of paralegals, and aiming to get the claims through as quickly as possible.

There would be 'every incentive' for large firms to increase the number of cases. 'Insurers, in trying to reduce margins significantly, have managed to be providing an incentive to the large firms – those backed by substantial capital – to get as many [cases] in as they can.

This is exacerbated by the introduction of qualified one way costs shifting, which 'takes out a major disincentive for people to bring claims…how [does that fit] with the policy objectives of the Jackson Reforms and LASPO?'

Stobbs also expressed concern about the interests of claimants, arguing that if there is less money to employ qualified individuals and the objective is to settle cases as quickly as possible, then it might affect claimants receiving the damages they are actually entitled to.

This prediction is commensurate with our own: the PI market will undergo a significant consolidation.

Case note: claimants must not dispose of histological samples

Where a claimant did not unreasonably consent to destruction of histological examples which would have been of some evidential value in a fatal accident claim, that did not found grounds for striking out the claim as an abuse of process. However, claimants, coroners and solicitors should now be aware that histological samples should not be disposed of unless the solicitor has confirmed that they will not be required for the purposes of a claim. The Queen's Bench Division so held in *Matthews v Herbert Collins (trading as Herbert Collins and Sons)*,[10] a case concerning an estate and dependency claim by a widow for the death of her husband allegedly as a consequence of occupational exposure to asbestos.

The deceased had allegedly been exposed to asbestos during his employment by the seven defendants through cutting, mitering and drilling asbestos cement sheets and boards between 1973 and 1980/81. It was alleged that the deceased contracted asbestosis and lung cancer in consequence of this exposure. The deceased had previously smoked heavily. The defendants denied liability and causation, arguing that the diseases were caused by an unknown cause.

Death occurred on 21 January 2009 and a post mortem concluded that asbestos exposure had contributed to the death. An inquest concluded that death had occurred by reason of an industrial disease. The expert evidence was conflicting. Lung tissue samples acquired during the post-mortem were disposed of in November 2010 with the consent of the claimant. The claimant sought the advice of the Coroner's officer who confirmed samples were usually not retained. When the defendants became aware of the disposal they sought strike of the proceedings on the basis that allowing the destruction of the samples was unreasonable and culpable such as to amount to an abuse of process. Further, they argued that destruction of the samples prevented them from examining the samples leading to a real risk of injustice making a fair trial impossible.

Swift J held that the claimant could not be criticised. She would not have appreciated the need to keep the samples and had sought advice which suggested destruction was the proper course. This contrasted with other cases where the potential evidential value of the samples was known prior to destruction being authorised. Her Ladyship further held that it was not unreasonable for the claimant's solicitors to have assumed that the Coroner's office would have contacted them prior to destruction. Although the samples would have been of some evidential value there was ample other evidence on which a judge could fairly try the claim. A fair trial was not compromised despite the destruction of the samples. The strike out application was therefore dismissed.

Swift J finally noted that she would send to all Coroners a request that, where industrial disease is recorded as a contributory cause of death, they advise the deceased's family to speak to their solicitor about destruction of histological samples where a claim is pending. Moreover, solicitors should advise their client and the relevant Coroner's Office that disposal of samples should not be undertaken without confirmation from those solicitors that the samples are not required for the purposes of a claim.

Following this judgment there will be no room for claimants to argue that they inadvertently consented to the destruction of histological samples without realising their importance. Claimants can expect strike out to be the likely sanction in the future.

Feature: The Judicial College Guidelines – a comparison

Introduction

The 12th edition of the *Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases* has now been published. In this article we compare the previous edition to the new edition.

Preliminary points

Firstly, the Guidelines are only guidance, they are not law. They can be departed from if the circumstances of the case so require. In *Cameron v Vinters Defence Systems Ltd* Holland J noted,[11] at [7], that the starting point is the Guidelines, but that they can be departed from with justification. Accordingly, the circumstances of the case must be regarded as the ultimate determinative factor in any award of damages.

Secondly, each subsequent edition of the Guidelines reflects inflationary changes, any new decisions and any changes in policy. Ordinarily, therefore, in each subsequent edition the figures increase.

Thirdly, and related to the second point, one part of the Jackson reforms was a 10% increase in general damages. This was designed to offset the loss to claimants from no longer being able to recover success fess and after the event (ATE) insurance premiums. It also partially offsets the portion of damages claimants will lose if they sign up to a damages based agreement (DBA). The 10% uplift in damages was implemented in the decision of *Simmons v Castle*.[12] The Court of Appeal subsequently revisited its decision in that case and held that the 10% uplift would not be awarded in those cases where a success fee was still recoverable,[13] that is those cases where a conditional fee arrangement (CFA) with a success fee was entered prior to 1 April 2013.

The 10% uplift is shown in a separate column throughout the Guidelines. Certainly during the life of this edition of the Guidelines, practitioners can expect to be referring to both the column without the uplift and with the uplift. Indeed it is likely that in the short term many cases will be decided under the column without the uplift. It is vital that the appropriate column is identified when advising on damages for pain, suffering and loss of amenity, by reference to whether a success fee is recoverable in the case.

Finally, it is worth bearing in mind that the changes to the brackets may (discounting the 10% uplift) seem relatively modest. This is because the 12th edition has followed the 11th edition with just a year between the two, since publication of the 12th edition was expedited to reflect the Jackson reforms. Ordinarily there is two years between each edition, so there is naturally more inflationary increase between other editions.

Comparison between the guidelines: asbestos related diseases

The Guidelines for asbestos related diseases appear in chapter 6(C). The following table shows a comparison between the previous edition and the new edition:

JC Bracket 6(C)	11th Edition Figures	12th Edition Figures	12th Edition Figures with 10% uplift
(a) Mesothelioma	£50,000 to £90,000	£51,500 to £92,500	£56,650 to £101,750
(b) Lung cancer	£50,000 to £69,500	£51,500 to £71,500	£56,650 to £78,650
(iii) Asbestosis and pleural thickening -Respiratory disability >50% top end of bracket -Disability between 30-50% middle of bracket -Disability 10-30% lower end of bracket	£27,450 to £75,600	£28,250 to £77,800	£31,075 to £85,580
(iv) Asbestosis and pleural thickening where respiratory disability between 1-10%	£10,750 to £27,450	£11,100 to £28,250	£12,210 to £31,075

The following observations may be made. Firstly, there have been no policy changes to these categories; the brackets have risen with inflation alone. In relation to mesothelioma it is noteworthy that the mesothelioma scheme established by the Mesothelioma Bill will award in the region of 75% of the bracket. Presumably this will be the bracket with the 10% uplift. That would lead to awards being made under the scheme of between approximately £42,500 and £76,300.

Interestingly, in the 11th edition a distinction was made between pleural thickening and asbestosis, with each disease having its own bracket. In the 12th edition however, the diseases have been consolidated into one bracket. That new bracket is divided into two based on the level of respiratory disability. The narratives accompanying these two conditions have changed considerably. It appears this will affect the awards that are made in the future. For example, in the 11th edition, asbestosis of 10-20% would attract an award of £50,000. In the 12th edition it appears an award of £28,250-£44,800 would be made.

The consolidation of the two brackets is without explanation in the Guidelines. Moreover, it is without explanation generally. The trend observed with previous editions was that each subsequent edition would breakdown conditions into separate categories so that awards were more focused and accurate. Conflating the two categories will simply make it more taxing to arrive at appropriate guidelines figures.

In addition, the bracket for provisional awards (6(C)(f)) has been removed altogether from the 12th edition. In its place is some narrative: 'The level of award will influenced [sic] by whether it is to be final or on a provisional basis'.

Comparison between the guidelines: deafness/tinnitus

The Guidelines for deafness/tinnitus appear in chapter 5(B)(d). The following table shows a comparison between the previous edition and the new edition:

JC Bracket 5 (B) (d) Partial Hearing Loss and/or Tinnitus	11th Edition Figures	12th Edition Figures	12th Edition Figures with 10% uplift
(i) Severe tinnitus and hearing loss.	£21,250 to £32,500	£21,800 to £33,500	£23,980 to £36,850
(ii) Moderate tinnitus and hearing loss or moderate to severe tinnitus or hearing loss alone.	£10,600 to £21,250	£11,000 to £21,800	£12,100 to £23,980
(iii) Mild tinnitus with some hearing loss.	£9,000 to £10,600	£9,250 to £11,000	£10,175 to £12,000
(iv) Slight or occasional tinnitus with slight hearing loss.	£5,300 to £9,000	£5,400 to £9,250	£5,940 to £10,175
(v) Slight hearing loss without tinnitus or slight tinnitus without hearing loss.	Up to £5,000	Up to £5,150	Up to £5,665

There have been no significant changes to this category, with the brackets simply reflecting inflationary changes. Of course, there is the addition of the new column with the 10% uplift. There has been no change to the narrative text accompanying the brackets. The highest award now in the case of severe tinnitus and hearing loss is £36,850. Meanwhile, the lowest award in the case of slight hearing loss without tinnitus or slight tinnitus without hearing loss is £5,665.

Comparison between the guidelines: vibration white finger (VWF) and/or hand arm vibration syndrome (HAVS)

The Guidelines for vibration white finger (VWH) and/or hand arm vibration syndrome (HAVS) appear in chapter 7(j). The following table shows a comparison between the previous edition and the new edition:

Comparison between the guidelines: vibration white finger (VWF) and/or hand arm vibration syndrome (HAVS)

The Guidelines for vibration white finger (VWH) and/or hand arm vibration syndrome (HAVS) appear in chapter 7(j). The following table shows a comparison between the previous edition and the new edition:

Bracket 7(J) Vibration White Finger (VWF)and/or Hand Arm Vibration Syndrome (HAVS)	11th Edition Figures	12th Edition Figures	12th Edition Figures with 10% uplift
(a) Most Serious	£22,600 to £27,450	£23,250 to £28,250	£25,575 to £31,075
(b) Serious	£12,000 to £22,600	£12,300 to £23,250	£13,530 to £25,575
(c) Moderate	£6,175 to £12,000	£6,350 to £12,300	£6,985 to £13,530
(d) Minor	£2,150 to £6,175	£2,200 to £6,350	£2,420 to £6,985

Again, there have been no significant changes to this category; the brackets reflect inflationary changes. In addition there have been no changes to the narrative text accompanying the brackets. The highest guideline award now in the most serious cases is £31,075. Meanwhile the lowest award in a minor case is now £2,420.

Conclusion and practical handling points

There have been modest increases in the disease Guidelines which reflect inflation. Aside from the consolidation of asbestosis and pleural plaques, and of course the 10% uplift, there has been no real changes. However, in this transitional period, where awards will be made with both the 10% uplift and without it, it is vital that practitioners use the correct set of figures in each case to ensure they do not give negligent advice. In determining when the 10% uplift should be paid, it cannot be put better than it was by the Court of Appeal in its second decision in Simmons, at [50]:[14]

> 'Accordingly, we take this opportunity to declare that, with effect from 1 April 2013, the proper level of general damages in all civil claims for (i) pain and suffering, (ii) loss of amenity, (iii) physical inconvenience and discomfort, (iv) social discredit, or (v) mental distress, will be 10% higher than previously, unless the claimant falls within section 44(6) of LASPO. It therefore follows that, if the action now under appeal had been the subject of a judgment after 1 April 2013, then (unless the claimant had entered into a CFA before that date) the proper award of general damages would be 10% higher than that agreed in this case, namely £22,000 rather than £20,000'.

Please see the appendix for a quick reference guide to the changes in the Judicial College Guidelines disease categories.

Appendix: Quick reference guide to changes in the Judicial College Guidelines disease categories – 11th to 12th edition

JC Bracket 6(C) Asbestos-Related Disease	11th Edition Figures	12th Edition Figures	12th Edition Figures with 10% uplift
(a) Mesothelioma	£50,000 to £90,000	£51,500 to £92,500	£56,650 to £101,750
(b) Lung cancer	£50,000 to £69,500	£51,500 to £71,500	£56,650 to £78,650
(iii) Asbestosis and pleural thickening -Respiratory disability >50% top end of bracket -Disability between 30-50% middle of bracket -Disability 10-30% lower end of bracket	£27,450 to £75,600	£28,250 to £77,800	£31,075 to £85,580
(iv) Asbestosis and pleural thickening where respiratory disability between 1-10% Note: The 11th edition distinguished between pleural thickening and asbestosis with each disease having their own brackets. These diseases are now combined in 1 bracket in the 12th edition. The narratives have changed significantly. In the 11th edition asbestosis of 10-20% would attract an award of £50,000. In the 12th edition it would appear to be between £28,250 and £44,800. The bracket for provisional awards 6(C) (f) has disappeared altogether.	£10,750 to £27,450	£11,100 to £28,250	£12,210 to £31,075
JC Bracket 5(B)(d) Partial Hearing Loss and/or Tinnitus	**11th Edition Figures**	**12th Edition Figures**	**12th Edition Figures with 10% uplift**
(i) Severe tinnitus and hearing loss.	£21,250 to £32,500	£21,800 to £33,500	£23,980 to £36,850
(ii) Moderate tinnitus and hearing loss or moderate to severe tinnitus or hearing loss alone.	£10,600 to £21,250	£11,000 to £21,800	£12,100 to £23,980
(iii) Mild tinnitus with some hearing loss.	£9,000 to £10,600	£9,250 to £11,000	£10,175 to £12,000
(iv) Slight or occasional tinnitus with slight hearing loss.	£5,300 to £9,000	£5,400 to £9,250	£5,940 to £10,175
(v) Slight hearing loss without tinnitus or slight tinnitus without hearing loss.	Up to £5,000	Up to £5,150	Up to £5,665
Bracket 7(J) Vibration White Finger (VWF)and/or Hand Arm Vibration Syndrome (HAVS)	**11th Edition Figures**	**12th Edition Figures**	**12th Edition Figures with 10% uplift**
(a) Most Serious	£22,600 to £27,450	£23,250 to £28,250	£25,575 to £31,075
(b) Serious	£12,000 to £22,600	£12,300 to £23,250	£13,530 to £25,575
(c) Moderate	£6,175 to £12,000	£6,350 to £12,300	£6,985 to £13,530
(d) Minor	£2,150 to £6,175	£2,200 to £6,350	£2,420 to £6,985

Reference

1 'Everything in Proportion' (Solicitors Journal, 1 October 2013) <http://www.solicitorsjournal.com/litigation/costs/litigation-everything-proportion> accessed 3 October 2013.

2 [2002] EWCA Civ 365.

3 Neil Rose, 'High Court Judge Expressly Declines to Approve "Disproportionate" Costs Budgets' (Litigation Futures, 4 October 2013) <http://www.litigationfutures.com/news/high-court-judge-expressly-decline-approve-disproportionate-costs-budgets> accessed 4 October 2013.

4 [2013] EWHC 2923 <http://www.bailii.org/ew/cases/EWHC/TCC/2013/2923.html> accessed 4 October 2013.

5 Katie Marriner, 'Claimant Lawyers Warn Against Rushing into Review of Jackson's "Problem Areas"' (Post Online, 2 October 2013) <http://www.postonline.co.uk/post/news/2297977/claimant-lawyers-warn-against-rushing-into-review-of-jackson-s-problem-areas> accessed 3 October 2013.

6 Neil Rose, 'Mesothelioma Charities Clash with Ministry of Justice Over Grant "Pledge"' (Litigation Futures, 2 October 2013) <http://www.litigationfutures.com/news/mesothelioma-charities-clash-ministry-justice-grant-pledge> accessed 3 October 2013.

7 John Hyde, 'Battle Lines Drawn Over Mesothelioma Fixed-Costs Regime' (Law Society Gazette, 4 October 2013) <http://www.lawgazette.co.uk/practice/battle-lines-drawn-over-mesothelioma-costs/5038012.article> accessed 10 October 2013.

8 Katy Dowell, 'Master of the Rolls to Preside Over Plebgate Appeal' (The Lawyer, 3 October 2013) <http://www.thelawyer.com/news/practice-areas/litigation-news/master-of-the-rolls-to-preside-over-plebgate-appeal/3010510.article> accessed 3 October 2013.

9 Dan Bindman, 'Law Society Policy Chief: Mega-Firms Could Dominate PI Claims in Three years' (Litigation Futures, 8 October 2013) <http://www.litigationfutures.com/news/law-society-policy-chief-mega-firms-dominate-pi-claims-three-years> accessed 8 October 2013.

10 [2013] EWHC 2952 (QB) <http://www.bailii.org/ew/cases/EWHC/QB/2013/2952.html> accessed 10 October 2013.

11 [2007] EWHC 2267 (QB)

12 [2012] EWCA Civ 1039.

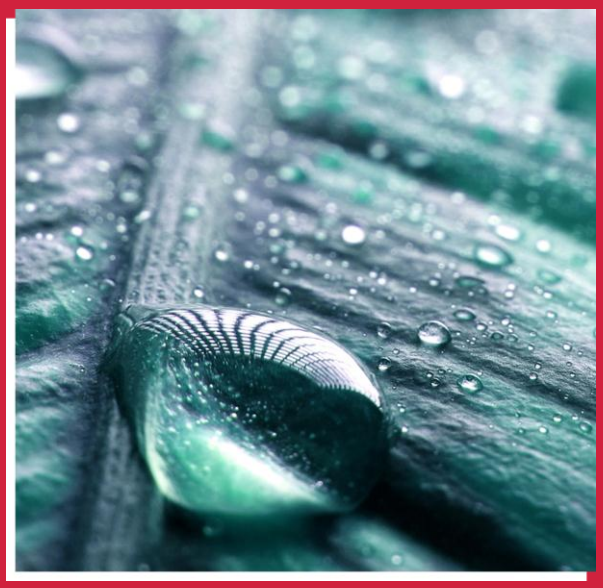
13 [2012] EWCA Civ 1288.

14 Ibid.

WHAT'S NEW?

Revised editions of our Mesothelioma and NIHL PSLA Guides reflecting the new Judicial College Guidelines are in preparation and will be available shortly.

We are also updating our PSLA tools to reflect the new Guidelines



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