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BC LEGAL

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BC DISEASE NEWS

A WEEKLY DISEASE UPDATE

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In other news…

Welcome

Welcome to this week's edition of BC Disease News. In the last week the Civil Justice Council has published new guidance on instructing expert witnesses and the Government has said the new fundamental dishonesty provisions will act as a deterrent.

This week we present the first of two features on tinnitus. Solicitor Ashley Collins considers the nature and causes of tinnitus.

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

As always, warmest regards to all.

Making defendant pay 10% more for rejecting Part 36 offer would add a penal element, says High Court

The High Court has ruled that making a defendant who rejected a Part 36 offer pay an additional 10% of the sum awarded for costs would introduce a 'penal element' and be unjust.[1]

Mr Justice Warby said that 'in some cases it would be just to impose such a liability on a defendant', such as when an offer 'ought to have been seen immediately as at least equal to the best outcome the defendant could reasonably expect.' However, in the case before him, it was said the defendant had a 'legitimate argument' for a shorter period of restraint under an injunction preventing him for working for another company. 'Moreover, it would be unduly harsh to criticise the defendant for failing to accept the offer promptly given the pace with which the proceedings were advancing, the pressures imposed by that pace, that the late stage during the 21 days at which he obtained sight of the claimant's statements.

Those observations were made in Elsevier v Munro (supplementary judgement) [2014] EWHC 2728 (QB), after Warby J had granted Elsevier an injunction restraining Robert Munro from joining another company before the end of his 12-month notice period.

The claim had been issued on 4 June 2014, with Elsevier making a Part 36 offer on 9 June which would have seen Mr Munro work for a new firm on 1 January 2015, three months before the end of his notice period.

Mr Munro allowed the 21-day time limit for accepting the offer to expire. At the end of the trial, which concluded on 16 July, Warby J ruled that Elsevier was entitled to an injunction restraining Mr Munro from working for another employer until April 2015, thus Elsevier had done better than its Part 36 offer.

In consequence, under CPR 36.14, Elsevier could claim, following the Jackson reforms to Part 36, an additional 10% to the amount awarded to it by way of costs in the case of an injunction (had it been a money claim the additional amount would have been 10% of the damages).

Warby J noted it had already been agreed that Mr Munro would pay costs on an indemnity basis and interest on those costs from 1 July at 4.5% above the base rate. Mr Munro argued that the Part 36 offer was made close to trial, there was little time for negotiation and he did not have the claimant's witness statements until the last day for acceptance of the offer.

Warby J added that the imposition of the additional 10% would impose a liability in respect of some costs incurred before any offer was even made. He concluded: 'The imposition of an additional liability would therefore involve an element of penalty that I do not consider is just to impose on this defendant, and I decline to make an order for an additional amount'.

Government confirms fall in rogue CMC numbers

The Government has confirmed that almost 600 of the claims companies responsible for bombarding people with nuisance calls and texts have left the industry.[2]

The Government has said the latest figures show that robust enforcement against claims management companies (CMCs) and stricter rules raising standards have had a dramatic effect. The number of firms regulated to handle compensation claims (which include personal injury matters) has fallen from 2,693 in April 2013 to 2,907 in March 2014.

The Government attributes this fall to measures introduced to combat bad business practices as well as increasing regulation fees, and to the introduction of larger fines. This follows the ban on incentives, and the ban on referral fees introduced with the Jackson reforms.

Kevin Rousell, head of the Claims Management Regulation (CMR) Unit said: 'We have made it very clear to businesses that we take a zero tolerance approach to any malpractice or attempts to take advantage of victims of crime…Our changes have made a clear impact, for the benefit of consumers…But no regulator can ever stand still and we are going further. The new fines we are introducing this year will give us the power to impose tough sanctions on those firms that flout the rules with much more precision, power and proportionality than ever before'.

Justice Minister Lord Faulks said: 'We have made major reforms to turn the tide on compensation culture, drive down insurance premiums and help honest people…What we have already seen is that this has had a significant impact on the amounts people are having to pay and the departure of a large number of claims companies will be welcomed by many'.

CJC publishes new expert evidence guidance

The Civil Justice Council (CJC) has published updated guidelines for instructing experts.[3]

The new guide is designed to ensure lawyers, litigants and experts follow best practice and comply with court orders and Part 35 of the Civil Procedure Rules, which contains the rules on expert evidence and assessors.

The guidelines, which have been updated in a minor way, now include a reference to 'hot-tubbing', which was introduced by the Jackson reforms and entails experts giving evidence simultaneously in court. The guidance recommends that experts need to be told in advance of the trial if the court has made an order for concurrent evidence.

The new guidance is not formally in force yet, although it is intended that it should replace the Protocol on Experts which currently appears alongside Part 35 CPR. The Guidance has been issued in anticipation of the Protocol's removal from the Practice Direction in the autumn of this year. The guidance will then formally be in force.

The guidance can be found here.

Fundamental dishonesty provisions to act as a deterrent, says Government

The Government has stated that it believes its new 'fundamental dishonesty' provisions may have some 'deterrent effect' against exaggerated claims, in addition to reducing the number of personal injury claims.[4]

The new provision, currently proceeding through parliament as Clause 45 of the Criminal Justice and Courts Bill, would require courts to dismiss claims in their entirety where the claimant had been 'fundamentally dishonest', unless this would result in substantial injustice.

In the recently published impact assessment on the new rule, the Ministry of Justice said the change would 'send a strong message to claimants that if they act in a fundamentally dishonest way there is a greater probability that they will lose all compensation'.

The document continued: 'The Government anticipates that this will reduce the number of fundamentally dishonest PI claims, and the associated costs of paying compensation, which are met by insurers and by bodies such as the NHS which are not insured…In addition, as a behavioural response, the Government expects that other PI claims may be exaggerated less, again leading to lower compensation paid by defendants'.

The assessment said the Government does not record data on the number of claims involving 'fundamental dishonesty' and it also accepted that only a 'small number of claims' would be considered by the courts to be fundamentally dishonest. The assessment said: 'In the absence of a firm body if evidence to the contrary, it has been assumed that, overall, the amount of legal work required to settle claims in future will remain broadly the same, both on the part of defendants and claimant lawyers…It could be that less work is required to resolve some claims in future if the claim appears to defendants to be less exaggerated and if defendants accept the claim with less discussion and negotiation. Conversely it could be that claimant lawyers devote more resource in future to demonstrating that a claim is honest'.

The Ministry of Justice has said the Government had made 'no assumption' about the reduction in compensation paid as a result of some settlements being lower. It did say, however: 'The Government believes it is reasonable to consider that the increased prospect of a claim being dismissed with no compensation paid at all may have some form of a deterrent effect on other cases'.

Case note: subsequent claims against different defendants

The High Court has ruled once again in another asbestos claim, this time holding that a claimant, who in 2003 had settled a claim arising from asbestosis against seven of his 10 former employers, was not precluded from pursuing a claim against the three remaining employers, who had not being pursued in the first action for legitimate reasons, in respect of the development of mesothelioma.

Dowdall v William Kenyon and Sons Ltd [2014] EWHC 2822 (QB) concerned a claim brought by the claimant (C) against three defendants (W, B and G). C had been exposed to asbestos by many employers. In June 1998, he was diagnosed as suffering from asbestosis and pleural plaques. An action was

begun against seven of his former employers; it was settled in 2003 for £26,000. A claim for provisional damages, relating to the risk that C would later develop a serious disease or condition, was made but not pursued. C subsequently developed mesothelioma. The three defendants had employed C during the 1960/1970s but they were not sued in the first action.

As to W (William Kenyon), C recalled being employed by 'Kenyons' and that they were based in Manchester. However, information from HM Revenue and Customs indicated that he had been employed by Charles Kenyon and Sons Ltd. His solicitors made enquiries about that company, being informed that it had changed its name and then been dissolved. C's actual employer had been W, who remained in business. B and G were dissolved companies. C's present solicitor explained that, when C first instructed solicitors in 1998, there was no scheme in place for the purpose of tracing the liability insurers who had provided cover for the defunct employers (the ELCOP and ELTO schemes were subsequently devised).

The issues for determination were (1) whether the present action was an abuse of process; (2) whether D was precluded from bringing the claim by the 2003 settlement; and (3) whether the action was barred by the Limitation Act 1980.

Andrew Edis QC, sitting as a Deputy High Court Judge, held that the action was not an abuse of process. The three defendants were not parties to the first action. There was no evidence that C had manipulated the process of the court with the intention of 'having his cake and eating it'. The decision not to proceed against the three defendants in the initial action had been honestly made; it was made because in each case C and his solicitors had been unable to discover an insurer liable to meet the claim.

As to the 2003 settlement, the question was, following *Heaton v Axa Equity and Law Life Assurance Society Plc* [2002] UKHL 15, whether C had accepted a sum which was intended to represent the full measure of his estimated loss. The answer was clearly not. He had elected to accept a sum for the risk of mesothelioma and in return decided not to seek an order permitting him to return to court in the event that mesothelioma actually developed. The settlement deliberately excluded any sum which would follow from the development of the condition. To adopt the other way in which Lord Bingham had framed the issue in *Heaton*, namely whether the claimant could prove that he had suffered loss as a result of the allegedly tortious conduct of the defendants, the answer was yes: C had suffered a condition which developed after the first action settled and for which he had not been compensated.

In relation to limitation, it was determined that C had knowledge within section 14(1)(b) of the 1980 Act in June 1998 as far as B and G were concerned. As to W, he had knowledge 12 months later; he and his solicitors could reasonably have been expected to ascertain that William Kenyon and Sons Ltd was the company which had employed him. However, it was held it was appropriate to disapply the limitation period under section 33. There were significant arguments both ways. The main factor was that C had a substantial claim for a very serious injury. He had very good prospects of establishing that the three defendants had contributed to the causation of the risk of contracting mesothelioma and were liable for it. Although witnesses would have died or become unavailable since 1998, it had not been shown that their evidence would have afforded any viable defence to the claim. There was therefore no evidential prejudice sufficient to outweigh the undoubted prejudice to C should he lose the chance to pursue his claim. The real argument was a financial one. However, the increased liability really followed from the development of mesothelioma. The fact that the defendants might have had a chance to avoid paying for that by being joined in an action which settled before the condition developed really meant that they had lost a chance of escaping without paying C the damages to which he was otherwise presumed to be entitled. Viewed that way, the financial consequences of what had occurred did not justify preventing C from seeking compensation for the harm which his very serious condition involved. Accordingly, C could proceed with his claim.

The judgement can be read here.

Feature: Tinnitus – part 1

In the first of a two-part series on tinnitus, solicitor Ashley Collins considers the nature and causes of tinnitus.

Introduction

Tinnitus often forms part of a personal injury claim for NIHL and where present can significantly increase the value of the claim.

It can be difficult to rebut a claim for noise-induced tinnitus as it is a subjective condition and there is no objective method of assessment. Whether tinnitus even exists and the grading of the tinnitus is essentially based on the claimant's own evidence.

What and Why?

What is Tinnitus?

The British Tinnitus Association provides the following definition of tinnitus:

"The word 'tinnitus' comes from the Latin word for 'ringing' and is the perception of sound in the absence of any corresponding external sound. This noise may be heard in one ear, in both ears or the middle of the head or it may be difficult to pinpoint its exact location. The noise may be low, medium or high pitched. There may be a single noise or two or more components. The noise may be continuous or it may come and go."

The following sounds can be heard when suffering from tinnitus:

- Buzzing
- Humming
- Grinding
- Hissing
- Whistling
- Sizzling

Grading of Tinnitus

There are various classifications for the grading of tinnitus. The following guidelines for grading by *McCombe et al* are commonly used[5]:

1. Slight. Only heard in a quiet environment, very easily masked. No interference with sleep or daily activities. This grading should cover most people who are experiencing but are not troubled by tinnitus.

2. Mild. Easily masked by environmental sounds and easily forgotten with activities. May occasionally interfere with sleep but not daily activities.

3. Moderate. May be noticed, even in the presence of background or environmental noise, although daily activities may still be performed. Less noticeable when concentrating Not infrequently interferes with sleep and quiet activities.

4. Severe. Almost always heard, rarely, if ever masked. Leads to disturbed sleep pattern and can interfere with ability to carry out normal daily activities. Quiet activities affected adversely. There should be documentary evidence of the complaint having been brought to the general (or some other) practitioner (prior to any medico-legal claim). Hearing loss is likely to be present but its presence is not essential. Given the epidemiological data, grading in this group should be uncommon.

5. Catastrophic. All tinnitus symptoms at level of severe or worse. Should be documented evidence of medical consultation. Hearing loss is likely to be present but its presence is not essential. Associated psychological problems are likely to be found in hospital or general practitioner records. Given the epidemiological data, grading in this group should be extremely rare.

The majority of people suffering tinnitus will fall into the mild and moderate categories. The grading of severe tinnitus should be uncommon. In the UK, around 6 million people (10% of the population) are thought to have mild tinnitus, with about 600,000 (1%) experiencing it to a severity where it affects their quality of life1. As a result, written questions under CPR 35 should always be raised to a medical expert whenever s/he grades a claimant's tinnitus as severe (or catastrophic – although this is extremely rare), as it is more likely to fall into the mild or moderate categories.

7% of the population suffering from tinnitus in the UK consult their GP[7]. As a matter of course, one would expect an individual suffering from tinnitus to affected their quality of life would fall into this percentage. Indeed, the Guidelines for the grading of tinnitus state that for tinnitus to be graded as severe there should be documentary evidence of a complaint having been brought to a general (or some other) practitioner prior to any medico legal claim. Therefore, if a claimant alleges tinnitus, which is graded as severe but the claimant has not attended his GP on the issue, such a grading should be robustly challenged and submitted that a lower grading would be more appropriate.

The Causes of Tinnitus

Hearing Loss

Tinnitus is generally associated with hearing loss. In simple terms, tinnitus is caused by the brain over-compensating for hearing loss[8].

There are two types of hearing loss. The first is conductive hearing loss, which arises from problems within the outer and middle ears so that sound cannot pass freely to the inner ear. A cause of conductive hearing loss can be infections in the outer ear (otitis media) or a build-up of wax.

The second is sensori-neural hearing loss which arises as a result of damage to the inner ear. Specifically, it is damage to the hair cells within the cochlea or the hearing nerve or both. This damage can occur through a number of different ways, including as part of the aging process or as a result of prolonged exposure to noise.

If the cochlea stops sending information to parts of the brain (due to noise not reaching the inner ear due to problems in the outer/middle ears or parts of the cochlea being damaged), these areas of the brain will then actively 'seek out' signals. These signals are over-represented in the brain and cause the sound of tinnitus.[9]

Both types of hearing loss can be associated with tinnitus, although it is

appears more common for sensori-neural hearing loss (i.e. inner ear damage) to be present when tinnitus arises.

Tinnitus can affect people of all ages but is more common in people aged over 65. This would suggest that age associated hearing loss is one of the main causes of tinnitus.

'Hidden Hearing Loss'

In most cases, tinnitus is associated with hearing loss, but around 10% of tinnitus patients do have a normal audiogram.

A 2011 study entitled 'Tinnitus with a Normal Audiogram: Physiological Evidence for Hidden Hearing Loss and Computational Model'[10] shows that there may be something termed as 'hidden hearing loss' causing tinnitus. This is said to arise when an individual is exposed to excessive noise for a relatively short period of time, such as exposure to noise at night clubs (i.e. 2-3 hours of 100dB(A) Leq). Although the individuals hearing threshold levels would recover to normal levels and produce the results of a normal audiogram within days, there may still be permanent damage on the inner ears. Although the damage is too minor to have an effect on an individual's hearing, the damage may cause either temporary or permanent tinnitus.

Other Causes

Other than hearing loss or 'hidden hearing loss', the following are also possible causes of tinnitus:

Acoustic Shock	**Exposure to a sudden and/or very loud noise.**
Meniere's disease	A condition that affects part of the inner ear known as the labyrinth and causes balance problems.
Ototoxic drugs	Ototoxic drugs can include: • Aminoglycoside antibiotics – drugs used to treat very serious infections. • Cytotoxic – drugs used to treat cancer. • Loop diuretics – drugs used to treat heart failure, high blood pressure and some kidney disorders.[11] Some ototoxic drugs can cause permanent damage to an individual's hearing loss/tinnitus, although the majority only have a temporary effect.
Common drugs	Drugs that are reported to cause tinnitus include: • Antimalarial drugs – There is no evidence of permanent damage on hearing/tinnitus when taken in the low dosage prescribed for malaria. However, if taken in high doses, such drugs can cause permanent damage. • Aspirin – Use of this drug does not appear to cause permanent hearing loss/tinnitus, although it may affect it temporarily. • Antihypertensives. • Antihistamines. • Anti-inflammatories.
Anaemia	A reduced number of red blood cells that can sometimes cause the blood to thin and circulate so rapidly that it produces a sound.
Others	• Hypertension. • Hyperthyroidism (an overactive thyroid gland). • A perforated ear drum. • A head injury. • Solvent, drug and alcohol misuse. • Paget's disease.

Contributing Factors

Although tinnitus is not generally believed to be a direct cause of stress, in *Tinnitus in the General Population with a Focus on Noise and Stress: A Public Health Study*[1] it was reported that an individual's exposed to stress can increase the possibility of tinnitus.

Further, the paper purports that a connection can be made between an individual's stress levels and the degree of discomfort they suffer due to tinnitus. In other words, if someone's stress levels worsen, potentially so will the tinnitus. In their study involving 12,166 subjects, of the 2,024 that reported to have tinnitus, stress was calculated as being an attributable risk in 19% of cases.

A recent study from The Karolinska Institute in Sweden "*found that tinnitus is 2.5 times more prevalent in people who are under long-term stress*"[1]. It is therefore widely accepted there is a link between stress and tinnitus, although it is still unclear the extent that stress increases the risk of tinnitus.

Conclusion

Having identified the nature and causes of tinnitus, the second part of this article will go on to consider noise induced tinnitus in detail and future potential claims.

In other news…

August is a notoriously quiet month in the legal world, but that has not prevented a rather unpleasant form of advertising personal injury services from emerging.[1]

For Claims Management Company, Amber Claims Management, being an 'ambulance chaser' did not appear to be good enough. It went one step further and has been driving around in – you guessed it – a converted ambulance to promote its services.

The following images evidence the offending vehicle, which could formerly be seen in the North West of the country:

Unfortunately for Amber Management, they neglected to remove the NHS logo from the vehicle, instead opting to modify it to read (somewhat originally) 'National Help Service'. Naturally, this has not impressed the individuals beavering away at the Department of Health, who are most displeased. A spokesman for the Department said: 'We have contacted the company concerned and asked them to remove the NHS logo. If they fail to do so, we will take legal action'.

Amber Management has said it will happily remove the logo, stating that the marketing ploy was nothing more than a creative 'tongue-in-cheek' departure from the business's standard advertising in conventional media.

It is to be hoped that legal services advertising on ambulances will be banished to the darkest corner of the regulatory dustbin.

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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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