Welcome to this week’s edition of BC Disease News. In the last week the Supreme Court has stressed the importance of compliance and an insurer has called for clarification of the Government’s new ‘fundamental dishonesty’ clause.

This week we present a feature examining de minimis in disease claims in light of the recent decision of the High Court in *Greenway v Johnson Matthey Plc*.

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

As always, warmest regards to all.
SRA in regular contact with Quindell

The Solicitors Regulation Authority (SRA) has confirmed that it is in touch with claimant alternative business structure (ABS) Quindell on a ‘regular basis’ following widespread speculation about what action the regulator is taking given Quindell’s recent drastic fall in share price.1

Founder and executive chairman Rob Terry has resigned from Quindell’s board of directors, relinquishing his rights to acquire nearly 9 million shares under a sale and repurchase deal that had seen the share price nose-dive.

A spokesperson for the SRA said: ‘Quindell is a firm that is part of our Regulatory Management programme and we therefore engage with them on a regular basis’.

The SRA’s Regulatory Management scheme focuses on the top 200 ‘high impact’ firms. They are selected not because of their size but, instead, on their impact on the legal services market should they fail, including the impact on consumers.

A poll of 59 firms subject to the Regulatory Management scheme conducted by the SRA showed that 60% thought the scheme had allowed them to comply more effectively with regulation. More than half said the extra responsibilities of being in the scheme meant they spent greater time on compliance.

The SRA concluded that the introduction of Regulatory Management has enabled the regulator to identify and better understand the risks associated with particular firms. This has been facilitated through more regular interaction between firm representatives and the SRA’.

In a blog for the Financial Times, Dan McCrum, questioned whether there are enough large, specialised law firms available to take on Quindell’s caseload, in the event that it should fail.

Quindell said in June that it was on course to nearly double the number of staff working in the legal division to 1,500 by the end of 2014, making it one of the largest providers of legal services in the country.

It has also said it plans specifically to target deafness claims. They will be part of a total of 6,000 claims that it wants to handle each month, each just generating over £9,000 in base costs, success fee, costs drafting fees and ‘ancillary’ income – nearly 75% of the firm’s income from personal injury.

Expert witnesses pressured

Research has shown that nearly one third of expert witnesses say they have been put under pressure to alter a report in a way that damages their impartiality.5

Experiences of expert witnesses included being asked to remove ‘damaging’ sections of their reports or being asked to re-write sections in the client’s favour. Some experts even said that solicitors had refused to pay them for their ‘unhelpful’ report.

The results were captured in a survey of 186 expert witnesses at the Bond Solon annual expert witness conference in London. Experts are bound by the Civil Procedure Rules (in the case of civil claims) and have a duty to the court to assist it with matters within their expertise. This duty overrides any duty to the paying client.

However, one expert recalled: ‘Solicitors were asking for quoted GP notes entries to be changed. I always refused.’ Another expert recounted how a solicitor had told them ‘you have a duty to the court to do as instructed by the solicitor’. Meanwhile another was threatened with liability for wasted costs if they refused to make changes to their report.

A substantial proportion of the experts – 45% – said they had encountered ‘hired guns’ in the past year, supporting a recent BBC Panorama investigation that found experts in handwriting, CCTV analysis and animal behaviour prepared to help clients hide the truth.

About one third of experts supported mandatory accreditation in their area, as the Government is currently proposing in the field of whiplash claims, and 44% would like to see better regulation of experts. That said, 39% thought the scheme would not raise standards, compared to 35% who thought it would.3 Furthermore, Timothy Dutton QC, a guest speaker at the conference, told delegates it would be ‘difficult’ to set up a separate regulatory entity for experts outside of the whiplash arena.

QOCS inapplicable to appeals in pre-LASPO cases

The Senior Courts Costs Office (SCCO) has ruled that qualified one-way costs shifting (QOCS) does not apply on appeal if it did not apply at first instance.4

According to the terms of the Civil Procedure Rules, QOCS is retrospective in its application, except where CPR 44.17 applies, which provides: ‘This section [the QOCS provisions] does not apply to proceedings where the claimant has entered into a pre-commencement funding arrangement (as defined in rule 48.2).

In Landau v The Big Bus Company, the claimant signed a conditional fee arrangement (CFA) in August 2011 to bring a personal injury claim against the defendants over an accident occurring in 2009. The claim was rejected by the High Court in October 2013. Permission to appeal was granted and a second CFA was entered into in November 2013. The Court of Appeal dismissed the appeal in August this year.

The Court of Appeal referred to the SCCO the issue of whether the costs orders made against the claimant in respect of each defendant were subject to QOCS. Master Haworth ruled that they were not.

Master Haworth examined the wording of CPR 48.2(1)(i)(aa), which applies to CFAs ‘entered into before 1 April 2013 specifically for the purpose of the provision...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’.

Agreeing with the submissions put on behalf of the defendants, the master said: ‘It was clearly Parliament’s intention that a pre-commencement CFA entered into in respect of the “matter” would disapply QOCS in any “proceedings” arising out of that matter’. That was to say the since a pre-1 April CFA had been entered in relation the claim – the ‘matter’ – the effect was to disapply costs. The master said the rule could have been differently formulated had the intention been different.

In the event he was wrong, Master Haworth went on to rule that an appeal does not constitute separate ‘proceedings’ in the context of section 2 of CPR 44.

While the master expressed sympathy with claimant’s position, since he did not have ATE insurance for the appeal, he said that ‘whilst it may be unreasonable, unfair and inconvenient to deny the claimant the benefit of QOCS in this case, for the reasons given on a true construction of the relevant provisions of the CPR in this case, QOCS does not apply’.

Jackson laments inadequate skeleton arguments

The legal profession is failing to get the message about skeleton argument, Lord Justice Jackson has said.

The author of last year’s civil litigation reforms used a Court of Appeal judgment to ‘speak more bluntly’ about the ‘poor quality and excessive length of some skeleton arguments in the upper courts’. Lord Justice Jackson’s criticism and guidance to practitioners was set out plainly in paragraphs [52]-[57] of his judgment in Inplayer Ltd v Thorogood [2014] EWCA Civ 1511. Those paragraphs are reproduced below:

52. I have protested previously about the poor quality and excessive length of some skeleton arguments in this court. On occasion the Court of Appeal has deprived successful parties of the costs of preparing their skeletons. So far, unfortunately, this message has failed to reach the profession. Mild rebukes to counsel and gentle comments in judgments have no effect whatsoever. Therefore, with regret, I must speak more bluntly.

53. The rules governing skeleton arguments for the Court of Appeal are contained in paragraph 5 of Practice Direction 52A and paragraph 31 of Practice Direction 52C. (Paragraph 32 deals with supplementary skeleton arguments.) These rules do not exist for the benefit of judges or lawyers. They exist for the benefit of litigants, namely (a) to ensure that their contentions are presented most effectively to the court and (b) to enable the court to deal with its caseload expeditiously, bearing in mind that there is always a queue of appellants and respondents waiting for their matters to be heard.

54. In essence an appellant’s skeleton should provide a concise, user friendly introduction for the benefit of the three judges who will probably
have had no previous involvement in the case. The skeleton should then set out the points to be argued clearly and concisely, with cross-references to relevant documents and authorities, in the manner prescribed by Practice Direction 52A paragraph 5. The skeleton should not normally exceed 25 pages. Usually it will be much shorter. In a straightforward case like this the skeleton argument would, or at least should, be much less than 25 pages.

55. As anyone who has drafted skeleton arguments knows, the task is not rocket science. It just requires a few minutes clear thought and planning before you start. A good skeleton argument (of which we receive many) is a real help to judges when they are pre-reading the (usually voluminous) bundles. A bad skeleton argument simply adds to the paper jungle through which judges must hack their way in an effort to identify the issues and the competing arguments. A good skeleton argument is a real aid to the court during and after the hearing. A bad skeleton argument may be so unhelpful that the court simply proceeds on the basis of the grounds of appeal and whatever counsel says on the day.

56. The appellant’s skeleton argument in this case does not comply with the rules. It is 35 pages of rambling prolixity through which the reader must struggle to track down the relevant facts, issues and arguments.

57. Although the successful appellant in this case is entitled to his costs, he will not recover the costs of the skeleton argument against the respondents to the appeal.

Lord Justices Treacy and Lewison agreed with Jackson LJ, with Lewison LJ specifically endorsing Jackson LJ’s comments on skeleton arguments. Practitioners must ensure skeleton arguments comply with the rules, not least because poor skeleton arguments are unlikely to serve their client’s best interests.

Supreme Court stresses importance of compliance

The Supreme Court has now joined the Court of Appeal in stressing the importance of compliance with court orders, as it dismissed an appeal by a Saudi prince who failed to personally sign a witness statement in breach of an unless order.6

The President of the Supreme Court, Lord Neuberger, said that ‘the importance of litigants obeying orders of court is self-evident. Once a court order is disobeyed, the imposition of a sanction is almost always inevitable if court orders are to continue to enjoy the respect they ought to have’.

He continued: ‘And, if persistence in the disobedience would lead to an unfair trial, it seems, at least in the absence of special circumstances, hard to quarrel with a sanction which prevents the party in breach from presenting (in the case of a claimant) or resisting (in the case of a defendant) the claim…And if the disobedience continues notwithstanding the imposition of a sanction, the enforcement of the sanction is almost inevitable, essentially for the same reason’.

In Prince Abdulaziz v Apex Global Management (Rev 2) [2014] UKSC 64 the Supreme Court was required to consider the approach courts should take when deciding whether to stay a default judgment entered following breach of an unless order. A member of the Saudi royal family had failed to comply with an order than he personally sign a witness statement in breach of an unless order.

Lord Neuberger rejected specific arguments that the sanction was disproportionate – saying it was hard to maintain an argument that although each decision on the way to the final result was unassailable, the final result was wrong on the grounds of proportionality – and that the prince had a very strong case.

He said: ‘In my view, the strength of a party’s case on the ultimate merits of the proceedings is generally irrelevant when it comes to case management decisions of the sort [in this case]’.

His Lordship said more generally that the Supreme Court should be ‘very diffident about interfering with the guidance given or principles laid down by the Court of Appeal’.

Giving the lead judgment of the court and dismissing the appeal against the ruling of the Court of Appeal, Lord Neuberger found that the three lower court decisions were unassailable and that there were no special factors. Lord Clarke dissented.

Lord Neuberger said: ‘It is difficult to have much sympathy with a litigant who has failed to comply with an unless order, when the original order was in standard terms, the litigant has been given every opportunity to comply with it, he has failed to come up with a convincing explanation as to why he has not done so, and it was he, albeit it through a company of which he is a major shareholder, who invoked the jurisdiction of the court in the first place…One of the important aims of the changes embodied in the Civil Procedure Rules and, more recently, following Sir Rupert Jackson’s report on costs, was to ensure that procedural orders reflected not only the interest of the litigation concerned, but also the interest of the efficient administration of justice more generally’.

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Feature: De minimis in disease claims – the decision in Greenway v Johnson Matthey Plc

Introduction

We have previously dealt with the importance to disease practitioners of knowing when an injury is actionable in edition 39 of Disease News. By way of synopsis, the Jackson reforms have resulted in disease claims being the remaining source of profitability for claimant practitioners. Consequently, more claimant practitioners can be expected to undertake disease work. While disease claims remain profitable for claimant practitioners, fundamentally profitability derives from conducting the maximum number of cases. In pursuit of greater claims numbers, claims are emerging for ‘conditions’ which would not traditionally have been made; claims for seemingly trifling conditions. It is therefore vitally important that practitioners know when a condition actually attracts an award of damages.

In this article we consider the previous case law on what amounts to actionable harm set against the recent decision of the High Court in the disease case of Greenway v Johnson Matthey Plc [2014] EWHC 3957 (QB).

De Minimis Principles

The fundamental proposition is not disputed: liability does not arise for trivial harm. A claim can only be successfully pursued when a breach of duty results in material damage. That was clearly stated by Lord Reid in Cartledge v E Jopling and Sons Limited: ‘...a cause of action accrues as soon as a wrongful act has caused personal injury beyond what can be regarded as negligible…’.1 Harm that is de minimis – negligible or trivial – is not actionable. What is de minimis? The question is a matter of degree. In Cartledge, Lord Pearce said:

‘It is for a judge or jury to decide whether a man has suffered any actionable harm and in borderline cases it is a question of degree. My noble and learned friend, Lord Reid, observed in a pneumoconiosis case (Bonnington Castings Ltd. v. Wardlaw): “What is a material contribution must be a question of degree. A contribution which comes within the exception de minimis non curat lex is not material, but I think that any contribution which does not fall within that exception must be material. I do not see how there can be something too large to come within the de minimis principle but yet too small to be material.” Although those words were spoken with reference to the emission of the harmful dust, they are equally applicable to the injuries caused by it. It is a question of fact in each case whether a man has suffered material damage by any physical changes in his body. Evidence that those changes are not felt by him and may never be felt tells in favour of the damage coming within the principle of de minimis non curat lex. On the other hand, evidence that in unusual exertion or at the onslaught of disease he may suffer from his hidden impairment tells in favour of the damage being substantial’.

Cartledge was a case concerned with limitation. However, it was necessary to resolve when an actionable injury had been sustained so that the moment the cause of action accrued could be determined. The claimants had contracted pneumoconiosis in consequence of tortious exposure to silica dust. The disease was asymptomatic but could readily be diagnosed by X-ray. Moreover, even following the cessation of exposure to silica, there was a risk the disease would continue to progress. Further, the claimants were more susceptible to tuberculosis, bronchitis and other pulmonary afflictions. The disease might also have manifested itself upon unusual exertion. The House of Lords held that there had been actionable injury, notwithstanding the condition ordinarily being asymptomatic, given that the disease could progress even after the end of exposure and resulted in an increased risk of other pulmonary conditions.

Having identified the fundamental principle, the issue of what is or is not trivial did not receive any real consideration for decades, largely because ‘people do not often go to trouble of bringing actions to recover damages for trivial injuries’.

However, the matter received considerable attention in the pleural plaques litigation, otherwise known as Rothwell v Chemical and Insulating Ltd. This issue was whether asymptomatic pleural plaques were actionable. The plaques would not progress or impact the claimants’ lives. Further, they did not increase the risk of developing other asbestos-related conditions. They were simply physiological beacons of exposure to asbestos; nothing more than biological enclaves. It was held unanimously by the House of Lords that they were not an actionable injury. Although the decision was clear, the reasoning was not settled on what made an injury actionable or not.

Lord Hoffman said at [7], [8] and [19]:

‘…Damage in this sense is an abstract concept of being worse off, physically or economically, so that compensation is an appropriate remedy. It does not mean simply a physical change, which is consistent with making one better, as in the case of a successful operation, or with being neutral, having no perceptible effect upon one’s health or capability…’

‘…How much worse off must one be? An action for compensation should not be set in motion on account of a trivial injury. De minimis non curat lex. But whether an injury is sufficiently serious to found a claim for compensation or too trivial to justify a remedy is a question of degree…’

…the question is whether the claimant has suffered damage. That means: is he appreciably worse off on that account. Likewise, the man with the disfiguring lesion is worse off because he is disfigured. In the usual case, however (including those of all the claimants in these proceedings) the plaques have no effect. They have not caused damage.’
Lord Hope said at [50]:

‘… I would hold however that there is no cause of action because the pleural plaques in themselves do not give rise to any harmful physical effects which can be said to constitute damage.’

And Lord Rodger said at [88]:

‘…Taken by themselves, however, the plaques are benign and asymptomatic. So, assuming that the plaques could constitute a relevant ‘injury’ to the claimants’ bodies, they do not cause them any material damage and so do not give rise to a cause of action…’

In those three opinions alone, there are multiple formulations of what constitutes material damage. Lord Hoffman said damage amounted to being worse off, physically or economically. An individual must be ‘appreciably’ worse off. Meanwhile, Lord Hope equated damage with harmful physical effects. What is ‘harmful’ is itself an unanswered question. Finally, Lord Rodger stated there was no damage because the plaques were asymptomatic. There is no settled test.

While Rothwell was not clear on exactly would constitute damage, it is crucial to be clear on what it was not saying. Rothwell is not authority for the proposition that once a condition is symptomatic it is actionable; that any symptoms, however inconsequential, will found a claim. That is clear from the judgment of Lord Hope, where he said at [47]:

‘…But the policy of the law is not to entertain a claim for damages where the physical effects of the injury are no more than negligible. Otherwise the smallest cut, or the lightest bruise, might give rise to litigation the costs of which were out of all proportion to what was in issue…’

There is a real danger of interpreting Rothwell in a way that elides symptoms with actionable damage. That is not the case; it just so happened in Rothwell that the absence of symptoms justified the conclusion that there was no material, actionable, damage. It is entirely possible that a negligent act or omission can cause symptoms which are so trivial that liability does not arise. Defendant practitioners should be astute to this.

Greenway v Johnson Matthey Plc

With that background in mind, we can now move on to consider the application of the principles in the recent decision of the High Court in Greenway v Johnson Matthey Plc [2014] EWHC 3957 (QB). Greenway concerned claims by five claimants for the development of sensitivity to platinum allegedly caused by wrongful exposure to complex halogenated platinum salts during the production of catalytic converters. The claimants were found to have developed sensitivity to platinum following regular skin prick testing and were consequently removed from such work. Four of the claimants no longer worked at the defendant company and made claims for substantial damages for loss of earnings or earning capacity. The claimants had developed sensitivity to platinum – demonstrated by the presence of IgE antibodies – but were not displaying symptoms. The issue for the High Court was whether an actionable injury had been sustained.

The relevant medical evidence was that further exposure would result in the development of symptoms relating to one of more of the eyes, nose, chest and skin. However, if exposure ceased before the development of symptoms then no symptoms would develop. Indeed, the sensitisation would be likely to reduce. There would be no progression without further exposure. Those that were sensitised to platinum would not be limited in the course of their lives except they must avoid circumstances in which they are exposed to platinum salts.

Giving judgment in the Queen’s Bench Division, Mr Justice Jay – of Leveson Inquiry fame – examined in detail the decision in Cartledge. He noted at [24] that the decision was predicated on findings that, firstly, exposure to silica caused a progressive disease process including scarring to otherwise healthy lung tissue; secondly, that there was an enhanced susceptibility to other serious lung conditions, and; thirdly, that there was potential loss of physiological function which might have manifested itself in extreme circumstances.

Mr Justice Jay then proceeded to consider in detail the decision in Rothwell, observing at [27] that pleural plaques would never cause symptoms, would not increase the susceptibility of the individual to other conditions, and did not reduce life expectancy. They were to be contrasted with the pneumoconiosis in Cartledge, which was progressive, increased the risk of other conditions and could manifest itself under extreme exertion. Jay J conceded at [30] that there was some difference between plaques and platinum sensitisation, specifically that further exposure to asbestos would not materially worsen the plaques, while further exposure to platinum salts would result in the development of symptoms, and that plaques were a ‘biological cul-de-sac’ while the progression from sensitisation to allergy could be envisaged as part of a causal pathway.

However, and critically, Jay J observed at [31] that in the case of sensitisation to platinum, progression would not occur in the absence of further exposure to platinum salts. This was unlike the pneumoconiosis in Cartledge, which may progress even if the sufferer is removed from the source of the dust. Taking all that into account, Mr Justice Jay held at [32]:

In my judgment, one cannot define the actionable injury by the steps which are taken to prevent it. Those steps may result in economic loss, but that is not the same as, or an ineluctable component of, the injury. The correct approach is to analyse the sensitisation in terms of the physical (or physiological) harm it may be causing, not any financial loss which may be consequent upon that harm. The sensitisation is no more, and no less, than the presence of antibodies which in themselves are not harmful. They may become harmful if they endure or multiply to the extent that they subsequently interact with mast cells such that...
histamine is generated, but that harmful state of affairs requires further exposure. Thus, something more has to happen before actionable injury may be sustained, and that something more cannot as a matter of logic and principle be the very thing (sc. the preventative measures) which precludes the development and manifestation of symptoms, in other words injury.

Therefore, properly analysed, the claim was for pure economic loss in consequence of no longer being able to work with platinum salts. Accordingly, there had been no actionable injury and the claims in tort failed.

A Contractual Alternative?

In Greenway the claimants had an alternative argument based in contract, contending that there was an implied term co-extensive with the defendant’s obligation under the general law of tort to provide and maintain a safe place and system of work, and to take reasonable care for the claimants’ safety; that the claimants’ loss was within the scope of that duty; that it was not a pre-requisite of a claim in contract that personal injury be sustained, and that the loss (of earning capacity) was a natural consequence of the breach, falling within the first limb of Hadley v Baxendale (1854). Mr Justice Jay considered at [46]-[47] that where the law imposes an implied term by reason of the relationship between the parties, essentially for policy reasons, and that implied term was in substance the same as the obligations in the law of tort, it was necessary to consider the scope of the public policy which created the duty. He concluded that the public policy was to safeguard the health and safety of employees from sustaining personal injury, not economic loss suffered without personal injury. Therefore there must have been an actionable personal injury. Since there had not been, the claim failed.

Discussion and Conclusion

What can we discern from the authorities as added to by the decision in Greenway about actionable injuries? We learn that asymptomatic conditions that will not progress, or increase the risk of contracting other conditions, or manifest themselves in particular circumstances are de minimis and outside the realm of compensation, even if preventing the progression of a condition, further deterioration, or the risk of contracting other conditions requires some preventative measures, particularly where those measures have a limited impact on the life of the claimant. It is only where some harm that is more than negligible has been sustained that there will be an actionable injury. However, the presence of symptoms alone is not enough; they themselves must be more than minimal.

In addition, we learn from Greenway that personal injury claims for concurrent contractual liability cannot circumvent the need to demonstrate the occurrence of an actionable personal injury. Since the contractual liability mirrors the tortious liability, it follows that the same elements must be proven in both claims.

There is now a coherent body of law dealing with the matter of what harm is or is not actionable. It is imperative that defendant practitioners are conversant with it.

We will shortly be revisiting the issue of de minimis specifically in the context of noise-induced hearing loss claims.
References


7 [1963] AC 758.

8 Rothwell v Chemical and Insulating Ltd [1963] AC 758.

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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