Personal Injury Update - September 2017

Contents

Farrar's Building News

Huw P. Davies, **Editor**

We hope you have already received an invitation to our annual PI seminar, "Prostheses: Best Practice, Technology, Treatment and Cost", which is taking place on Thursday 28th September. We are delighted that Toby Carlson, a highly experienced prosthetist, expert witness and director of PACE Rehabilitation, has agreed to speak on a variety of issues concerning prostheses that will be of great interest to Claimant/Defendant lawyers and insurers.

If you would like to attend, please contact:-

Steve Gurnett at steve@farrarsbuilding.co.uk or 0207 5839241.

In this month's newsletter, Andrew Peebles reviews the most recent announcement by the MOJ as to the proposed change to the discount rate and gives some consideration as to the likely timescale for implementation and underlying assumptions. David Roderick reviews the issue of contributory fault and deduction of damages in light of the recent Court of Appeal decision in **The Department for Communities and Local Government v Blackmore** whilst Andrew Arentsen considers strict liability arising from defective products in light of the recent decision of **Baker v KTM Sportsmotorcyle UK Limited.**

The Personal Injury Update has been prepared by Laura Fitzgibbon and Tom Emslie-Smith, both of whom, we are pleased to announce, will be joining us as tenants in October,

Finally, we are very pleased to welcome a new addition to our Personal Injury team, Victoria Logue who joins after 10 years as a tenant at Parklane Plowden in Leeds.

We wish her every success at Farrar's Building.

The Discount Rate Review

by Andrew Peebles

On Thursday 7th September 2017 there was an announcement by David Lidington as Lord Chancellor as to the much awaited review on discount rates. The MOJ also published a document entitled "The Personal Injury Discount Rate; How it should be set in the future" which is a response to the consultation launched in March referred to below.

As is well-known, the previous Lord Chancellor in February 2017 set a new discount rate from 20 March 2017 applicable under section 1 of the Damages Act 1996. The previously applicable rate of plus 2.5% per annum was changed to minus 0.75% per annum.

The single most obvious effect was to increase damages to be awarded to claimants in all substantial personal injury cases.

The government also announced a further consultation on the topic. A consultation paper was published: "The Personal Injury Discount Rate: How it should be set in the future". The consultation period was to end 11 May 2017 and a response was programmed for 3 August 2017. It has now arrived.

The 7 September 2017 press release is limited in detail. It is that the basis for setting rates will now be premised on a low risk rather than very low risk investment. The bottom line as to what rate will be suggested is put with some degree of qualification: "While it is dificult to provide an estimate, based on currently available information if the new system were to be applied today the rate might be in the region of 0% to 1%."

However, more can be gleaned from both the response paper and the draft legislation.

The summary of conclusions at para 13 of the response paper is as follows:

a. "There is clearly a need for a fairer and better framework for the setting of the discount rate. The Government intends to make the following changes to the law:

b. The rate is to be set by reference to expected rates of return on a low risk diversiied portfolio of investments rather than very low risk investments as at present; and in assessing those rates the actual investment practices of claimants and the investments available to them should be considered. This will make the rate more realistic.

c. The principles for the setting of the discount rate should be set out in statute.

d. The rate is initially to be reviewed promptly after the legislation comes into force and, thereafter, at least every three years, with that period being re-set when the rate is changed. Reviews will be completed within 180 days of starting. This will avoid overlong delays between reviews, which will make changes in the rate more predictable and manageable.

e. The rate is to be set by the Lord Chancellor with advice from an independent expert panel (other than on the initial review which would be by the Lord Chancellor with advice from the Government Actuary). HM Treasury will, as at present, also be a statutory consultee for all reviews. The panel will be chaired by the Government Actuary and include four other members having experience as an actuary, an investment manager and an economist and, finally, experience in consumer investment affairs.

f. It will continue to be possible to set different rates for different types of cases, including by reference to the length of the award.

g. No changes are proposed to the law relating to PPOs.

This article can only be long enough to make summary observations. These are as to (a) timing (b) underlying approach to setting discount rates (c) the estimated actual revised rate.

The draft legislation and its accompanying notes assist in a more detailed answer to each question above.

In relation to timing, within 90 days of commencement of new legislation a maximum 180 day review period will commence at the end of which the Lord Chancellor will make a determination. It is not yet known when a Bill is likely actually to be proposed. In any event, it does not seem unrealistic to hazard a guess that not less than 6 months will pass before any review, and it is more likely to be more than a year.

Some of the underlying work has already been done, and the government is losing money with any further delay (assuming that the rate will go up signiicantly) so it is supposed that the government will be motivated not to dawdle. It will be important for those with much higher value and potentially longer running cases to keep abreast of the timeline in order to make informed decisions on settlements and what discount rate is used to achieve them.

In relation to underlying assumptions, much of the existing framework has been kept, but there are two key linked departures – the change to a low risk mixed portfolio from ILGS and the regard to how claimants actually spend their money.

Paragraph 4 of schedule A1 in the draft proposed legislation sets out assumptions to be made in setting the rate in greater detail.

"(2) The Lord Chancellor must make the rate determination on the basis that the rate of return should be the rate that, in the opinion of the Lord Chancellor, a recipient of relevant damages could reasonably be expected to achieve if he or she invested the relevant damages for the purpose of securing that—

a. the relevant damages would meet the losses and costs for which they are awarded;

b. the relevant damages would meet those losses and costs at the time or times when they fall to be compensated; and

c. the relevant damages would be exhausted at the end of the period for which they are awarded.

(3) In making the rate determination as required by sub-paragraph (2), the Lord Chancellor must make the following assumptions—

i) the assumption that the relevant damages are payable in a lump sum (rather than under a periodic payments order);

ii) the assumption that the recipient of the relevant damages is properly advised on the investment of the relevant damages;

iii) the assumption that the recipient of the relevant damages invests the relevant damages in a diversiied portfolio of investments;

iv) the assumption that the relevant damages are invested using an approach that involves—

1. more risk than a very low level of risk, but

2. less risk than would ordinarily be accepted by a prudent and properly advised individual investor who has different inancial aims.

(4) That does not limit the assumptions which the Lord Chancellor may make.

(5) In making the rate determination as required by sub-paragraph (2), the Lord Chancellor must—

(i) have regard to the actual returns that are available to investors;

(ii) have regard to the actual investments made by investors of relevant damages; and

( ) make such allowances for taxation, inlation and investment management costs as the Lord Chancellor thinks appropriate.

(6) That does not limit the factors which may inform the Lord Chancellor when making the rate determination.

(7) The Lord Chancellor must give reasons for the decisions made on the matters mentioned in sub-paragraph (5)(c).

(0) In this paragraph "relevant damages" means a sum awarded as damages for future pecuniary loss in an action for personal injury.

Essentially **Wells v Wells** [1992] 2AC 398 by which a notional claimant is entitled to be protected from risk by investing in ILGS is to be departed from. Instead the wider approach taken by Lord Irvine in his explanation of the 2.5% discount rate in July 2001 is adopted.

That explanation included:

"I consider that it is likely that real claimants with a large award of compensation, who sought investment advice and instructed their advisers as to the particular investment objectives which they needed to fulil (as they could reasonably be expected to do) would not be advised to invest solely or even primarily in Index–Linked Government Securities, but rather in a mixed portfolio, in which any investment risk would be managed so as to be very low. This view is supported by the experience of the Court ofProtection as to the independent inancial advice they receive. It is also supported by the responses of the expert inancial analysts whom I have consulted. No one responding to the consultation identiied a single case in which the claimant had invested solely in Index–Linked Government Securities and doubts were expressed as to whether there was any such case. This suggests that setting the discount rate at 2.5% would not place an intolerable burden on claimants to take on excessive, i.e. moderate or above, risk in the equity markets, and would be a rate more likely to accord with real expectations of returns, particularly at the higher end of awards."

There was a clear argument that (a) the claimant is free to spend his money how he wishes (b) since he/she is forced to invest a lump sum to obtain income over time, he/she may be presumed to do so on as nearly risk free a basis as possible by investing in ILGS (c) if a real claimant invests differently the resultant additional rate of return is due to the claimant's decision to take a greater risk with his or her money and is irrelevant to what risk the law presumes he or she should take, so evidence of actual over compensation is also irrelevant (d) anyway past investment behaviour will have been dictated by the need to match the underlying discount rates, which have consistently been too high.

However, the negative discount rate provided a starkly counter intuitive position where prudent claimants were unlikely actually to invest in ILGS, as better investments were readily available. If in fact Claimants were liable to be consistently over compensated over time in reality by using a negative discount rate, surely that should inform the setting of such a rate? That is particularly the case if there was also a low risk of under compensation resulting.

The latter proposition has won out. It is to be noted that there is no reference to risk free investment but instead to low risk rather than very low risk investment, presumably as investing in ILGS is not in fact risk free.

What constitutes low risk as opposed to very low risk remains fairly open notwithstanding the definition of entailing less risk that a notional normal prudent investor. It will mean using a diverse portfolio of investments, but that incorporates a lot of options.

Whatever it means, it will require some sophistication for a claimant to take a balanced attitude to risk if he/she is actually attempting to build a portfolio suited to make allowance for withdrawals over time presumed in the underlying award for future damages.

The practical risk to avoid for claimants is a sequencing risk: being forced to release capital to find income during a trough phase in the underlying investment, thereby increasing the pressure on the reduced remaining capital to generate higher return; that effect is then compounded by repetition without time for the capital fund to recover before entering a peak phase. The different types of investment will have different risk profiles and likely rates of return over time and may not all be capable of liquidation at any time.

The legislative assumption that a claimant is properly advised on the investment of damages will surely open up again the argument that a claim for investment advice should be open to claimants in larger awards, previously held to be irrecoverable in eg **Eagle v Chambers (no.2)** [2004] 1 WLR 3081 . It might be the case that adviser fees are built into the discount rate itself. Or perhaps there may be new rules allowing the court to give directions or for a claimant to elect to place monies in a mixed proportion of special account and the MOJ tracker fund.

The topic as to what risk and what kind of portfolio is low risk has some further light cast on it by the paragraphs 26 to 28 in the notes to the proposed legislation which deal with the estimated revised discount rate of 0-1%:

"26. The irst review of the rate under the proposed new law will not occur until the legislation has been enacted. It is not possible to predict what speciic rate a review under the new approach would produce.

27. Nonetheless, broadly speaking, based on the evidence currently available and without fettering the exercise of the Lord Chancellor's discretion in the future, the Government would expect that if a single rate were set today under the new approach the real rate might fall within the range of 0% to 1%.

28. This estimate of what the range of rates might be under the proposed law is primarily based on the expected returns over longer award periods, contained in the report from the Government Actuary's Department published alongside this paper, and has been reached by making illustrative assumptions as to appropriate allowances for investment expenses and taxation"

The GAD report is dated 19 July 2017. It makes calculations based on limited underlying assumptions. The primary calculations as to likely spread of rates of return are based on an example future damages of £10,000 a year over 30 years. In general shorter periods will have a lower return and longer period a better one. The risk spread for these is quite different, but there is no real sign that it is intended to set more than one rate. The measure of inflation used to see whether there was a net gain was a projected form of RPI. This rate is generally held to be discredited as a true rate, and has been projected to run at about 1% over CPI (MOJ 2015 Consultation Paper). The calculations were done without taking off any amount for investment fees, management charges, adviser fees and taxes. These were broadly estimated as being worth a 0.5% reduction in return rate or 0.5% increase in discount rate (see section 7).

Two portfolios were taken as a basis of calculation. Both of these portfolios had different underlying balances of the same 8 underlying investments types – index linked gilts, conventional fixed interest gilts, UK equities, overseas equities, hedge funds, commercial property, UK investment grade corporate bonds and cash. Even then the predicted ILGS returns were premised on a 'considered approach' to different gilts with different maturity periods. These portfolios were expressly only used as exemplars but it is telling that they were picked as being illustrative.

Table 11 sets out the relative risk of over and under compensation at different unadjusted discount rates over 30 years. On the more conservative portfolio of investment at a 0.5% discount rate the median claimant would be over compensated by 12%, but there is a 12% risk of being undercompensated by 10% or more. Using the riskier portfolio, at 0.5% discount rate, the median claimant would be 33% overcompensated, but there is a 15% risk of being undercompensated by 10% or more. At 1% the median claimant would be 4% and 15% overcompensated respectively but the risk of under compensation by 10% or more is 22% or 21% respectively. There is no figure for a 1.5 % discount rate.

It is not clear how the upper range of the estimated discount rate after investment rates and expenses of 0% to 1% has been projected. However, these figures give some impression of what is meant by low risk. There is perhaps a greater emphasis towards exact compensation for the median claimant than avoiding the risk of under compensation than might have been expected given the rate set in February.

The GAD report may be compared with the conclusion of the MOJ's 2015 consultation paper in which there was further research done at the behest of the MoJ, by a panel of experts, about fair risk and rates of return. The Consultation Paper (paras 18 and 40) notes that a 25%/75% portfolio of non risk free/risk free investment producing minus 0.125% was considered reasonable in terms of risk, with a minority view considering that more risk was acceptable. A 50% balance would have resulted in a 0.75% rate of return. It appears that the non risk free option was a low risk portfolio of mainly bonds and some stock. The 100% option was back to 2.5% rate of return but had a higher volatility of 5% deviation. The more conservative GAD portfolio was only 20% gilts of which only 5% were index linked.

Reduction of damages for contributory negligence: a restatement of principle

By David Roderick

Summary

The appeal case of **The Department for Communities and Local Government v Blackmore** [2017] EWCA Civ 1136 ("**Blackmore**") is an important restatement of the principles governing the exercise of the reduction of damages for contributory negligence under s.1 (1) of the Law Reform (Contributory Negligence) Act 1945, and a defeat for a novel argument on behalf of defendants in asbestos related lung cancer cases.

Introduction

The Defendant/Respondent's strategy in the case of **Blackmore** was to attempt to overturn, in asbestos related lung cancer cases, a longstanding principle in contributory negligence that the assessment of responsibility for the injury includes consideration of both causative potency and relative blameworthiness as between the tortfeasor and injured claimant.

In attempting to establish this, the Defendant invited the court to apply the causation test for the attribution of liability derived from **Fairchild v. Glenhaven Funeral Services Ltd.** [2003] 1 AC 32 and developed in **Barker v. Corus UK Ltd.** [2006] 2 AC 572 to the apportionment of responsibility assessment in contributory negligence.

The Court of Appeal:

a. delivered a robust rejection of such an application of **Fairchild** principles;

b. reasserted the application of established contributory negligence principles even when medical evidence establishes the claimant's negligence was the majority cause of the condition; and,

c. provided guidance as to the pertinent factors on assessment of contributory negligence in the cases of smokers bringing asbestosis related lung cancer claims.

Facts and first instance decision

The deceased was employed between 1966 and 1986 by the appellant's predecessor departments as a decorator in Devonport Dockyard. His work involved significant contact with asbestos fibres, including clearing off asbestos from pipework and the preparation and stripping of asbestos in factories. Approximately 20% of his working time was spent in conditions where there was asbestos dust. At no time during the 20 years was he provided with a dust mask or any protective equipment. He was also a smoker, beginning aged 14 in 1950. He smoked around 20 cigarettes a day, until approximately 2005 when he cut down to about 12 cigarettes a day. He tried to give up on two occasions but was unable to do so. In 1976, he was advised to stop smoking after a spontaneous pneumothorax in his left lung, a condition which later resolved. He died from lung cancer in 2010. Mineral fibre analysis of the lungs post mortem indicated a quantity of total retained asbestos fibre count above the level at which the risk of contracting lung cancer doubles.

"*The "doubles the risk" test is one that applies epidemiological data to determining causation on the balance of probabilities where medical science does not permit determination with certainty of how an injury was caused. If statistical evidence shows that a tortfeasor more than doubled the risk that the victim would suffer the injury it follows that it is more likely than not that the tortfeasor caused the injury*." (paragraph [8], Lord Dyson MR in ***Heneghan v Manchester Dry Docks*** *[2016] 1 WLR 2036).* On that basis, primary liability and causation were admitted.

What fell to be determined at the first instance trial in **Blackmore** was what were the relative contributions to the deceased's death of asbestosis exposure and smoking (an issue on which significant disagreement between the party's experts needed to be resolved); and, whatever degree of relative contribution was established, was the court able or bound to calculate the deduction for contributory negligence by reference to the mathematical calculation as to the relative contributions?

The following matters were agreed between the experts instructed on behalf of each party, that:

a. Death was caused by the combined effects of smoking and exposure to asbestos.

b. Tobacco smoke is the most common cause of cancer of the lungs. Exposure to asbestos is the second most common cause. Further, given his history of smoking, the deceased's relative risk of developing adenocarcinoma of the lung was tenfold that of a non-smoker.

c. Tobacco smoke and asbestos exposure work in a synergistic manner in the causation of lung cancer and the precise cellular mechanisms of this synergy are not fully understood.

d. By reason of this synergy the deceased's risk of the development of lung cancer as a smoker exposed to asbestos was greater than a simple additive effect. Rather, the approach should be multiplicative.

However, the experts were signiicantly opposed in their views as to the relative contribution to the risk of developing lung cancer by smoking and exposure to asbestos. The Defendant proposed a precise mathematical epidemiological assessment, expressed by using the concept of relative risk ("RR") i.e. the incidence of the condition in an exposed population divided by the risk of an unexposed group. The Defendant calculated the RR for smoking was 9.1 and that for asbestos exposure was 2.1; a combined RR of 19.11. With the RR for asbestos exposure at 2.1, the contribution to the risk of developing lung cancer of smoking was asserted to be 90%. The Defendant's contention was that the contributory negligence deduction should be 85-90%.

The claimant's expert disagreed with that method as too blunt an analysis. Cancer is an indivisible injury and the biological process behind it not understood, and it probably varies between individuals. The irst instance Judge accepted those reservations, and pro-vided an analysis of the factors bearing on relative contribution which is likely to inluence the assessments made in future asbestos - related lung cancer cases:

Any approach to assessing relative contribution or apportionment must take into account that cancer is an indivisible injury and that there were possibly other factors at play.

The mathematical analysis was not wholly reliable and firmly based on a good understanding of the processes at play. (The first instance judge justified his cautious approach by reference to the views expressed in **Shortell v BICAL**, unreported, 16 May 2008, by MacKay J. and in ***Sienkiewicz v Greif (UK) Ltd*** *[2011] UKSC 10* by Lord Rodger at [163] and Lord Mance at [191] in respect of the use of an reliance upon epidemiological evidence). He concluded that reliance could be placed on the analysis of relative risk but that it could only be used as a basic broad guide and with caution.

Given the lack of knowledge of the dangers of smoking prior to the mid 1970s, any calculation should ignore the contribution to risk of smoking prior to that date (i.e. taking into account only the additional risk posed by smoking after that date). The calculation should also build into the assessment of relative risk, as against asbestos, the additional synergistic effect of the combination of asbestos exposure and tobacco for the ten years prior to the mid 1970s.

The first instance judge used as broad guidance to relative contributions to risk an RR for asbestos towards the bottom of the range 2 – 5 and an RR for smoking between 5.5 and 9.1.

The Defendant invited the judge to directly translate that figure into the percentage deduction for contributory negligence. That approach was rejected on the following grounds:

a. The concept introduced by s.1 (1) of the Law Reform (Contributory Negligence) Act 1945 ("the 1945 Act") was the requirement to consider the fault of the person suffering the damage in a comparative process with the fault of the tortfeasor. That comparative process should recognize respective duties, powers and resources. The judge particularly relected on the principle that the imposition of a high standard upon an employer in any comparative assessment in an employer's liability case relected the decision to impose such a duty in the first place.

b. Because the Defendant's approach essentially limited the task to an assessment of causation and limited the concept of blameworthiness only to a statement of the extent to which the person contributed to the damage.

c. It was regarded as wrong in principle that blameworthiness arising from a breach of employers' statutory duty was to be equated with the employee's breach of duty of care to himself by smoking.

<u>The Appeal</u>

The Defendant appealed on the basis that "*the conclusion when considering the amount of contributory negligence that the defendant should bear the lion's share of responsibility even where the court concludes that the evidence shows that the claimant's smoking was a greater contribution to the cancer than asbestos exposure is wrong in law.* Thus, there was no challenge to the conclusions of the first instance judge in respect of the relative contributions as expressed by the RR igures he reached, rather that it was wrong to not then translate directly those igure into an apportionment of liability on the grounds of contributory negligence.

The Defendant's approach would necessarily result in limiting the concept of responsibility under section 1 of the 1945 Act essentially to considerations of causation and exclude considerations of blameworthiness. That proposition will naturally disquiet common law practitioners, as it has been long established that "responsibility" under section 1 of the 1945 Act was a broad concept encompassing both causation and culpability.

The Defendant's novel arguments seeking to oust that general approach in the context of the particular case are where much of the interest in this case lies. It was argued that:

a. That considerations of blameworthiness should come into play in determining responsibility arising from contributory negligence only where the fault of the claimant falls within the scope of the very act which the employer or tortfeasor is expected to guard against;

b. They should not come into play where contributory negligence on the part of the claimant was entirely unrelated to his work or to the duty owed by the defendant.

In rejecting those arguments, reliance was placed by the Court of Appeal on a speech of Lord Hoffmann in ***Reeves v. Commissioner of Police of the Metropolis*** *[2000] 1 AC 360* , at p. 371, addressing one specific situation in which the policy of imposing liability on the tortfeasor may properly be relected in the degree of blameworthiness to be attributed to the claimant (the duty of care of the police and failure to prevent a suicide in custody). It had been made clear that assessing "responsibility" connotes assessing culpability as well as cause, and that the assessment of responsibility must take into account the policy of the rule by which liability is imposed.

The main thrust of the Defendant's argument however, was to attempt to equate apportionment of liability in asbestos-related lung cancer cases (i.e. the contributory negligence question) with the extent of recoverability principle in mesothelioma cases (the causation question) established in in ***Fairchild v. Glenhaven Funeral Services Ltd.*** *[2003] 1 AC 32* and developed in ***Barker v. Corus UK Ltd****. [2006] 2 AC 572*.

It was argued that in mesothelioma cases **Barker** established that liability was limited to the degree to which a tortfeasor had increased the risk of developing the disease. Latterly, the Court of Appeal in ***Heneghan v. Manchester Dry Docks*** *[2016] 1 WLR 2036* concluded that the ***Fairchild*** approach was equally applicable to lung cancer cases. The Defendant submitted that the ***Barker*** approach to apportionment of damages by reference to epidemiological data was therefore sustainable in lung cancer cases where the relative apportionment of damage between asbestos exposure and smoking is determined by reference to the contribution to risk that each posed.

It was argued that it would be highly anomalous if an employer liable under the ***Fairchild*** principle were liable only to the extent that his conduct contributed to the increase in risk (i.e. purely a causation test) whereas an employer liable under the doubling the risk test in a case where there was contributory negligence would be subject to a less favourable basis of apportionment between him and the claimant which took account not only of causation but also of blameworthiness.

The ostensible comparison was strongly rejected however, Lloyd-Jones LJ stating:

a. '*...I am satisied that* [the Defendant's] *submission is lawed because it is based on a false analogy. The Fairchild principle applies in certain cases where a claimant cannot prove causation of damage and, exceptionally, established liability by reference to each defendant's contribution the increase in the risk of the damage occurring.* **Barker v Corus** *established that liability under this principle is several as opposed to joint and several. Accordingly, each defendant is liable only to the extent that he has caused an increase in the risk of the damage occurring. As a result, questions of contributory negligence never arise...by contrast, liability on the basis of doubling the risk is founded on orthodox principles of causation. It proceeds by drawing an inference from the increase in risk of contracting the disease that the agent in question was a cause of the disease. (***Novartis Grimsby Ltd v John Cookson** [2001] EWCA Civ 1261 per Janet Smith LJ at [74]; **Heneghan** per Lord Dyson MR at [8].) *Where liability is established in this way, a defendant who has made a material contribution to the damage is, prima facie, liable for the full extent of the damage suffered (***Bonnington Castings Ltd v Wardlaw** [1956] AC 613). *It is at this point that questions of contributory negligence may arise'.*

b. '*There is therefore to my mind, no inconsistency between liability under the* **Fairchild** *principle, which is limited to the contribution made by the tortfeasor to the increase in risk of contracting the disease and where contributory negligence does not arise, and liability under the doubling the risk principle, where the tortfeasor has made a material contribution to the damage and is liable for the full extent of the loss subject to contributory negligence. I can, therefore, see no good reason, when determining responsibility under section 1 of the 1945 Act in cases such as the present, to limit consideration to matters of causation or to deny any role to blameworthiness'.*

Summary points

The argument that a claimant's contribution to the relative risk of contracting or developing a disease should determine, or even be the preeminent factor in, the assessment of contributory negligence has been robustly rejected.

The case is of course directly applicable to the approach to contributory negligence now to be taken in asbestos-related lung cancer claims; but by extension also to other types of cases where epidemiological evidence demonstrates the claimant's acts or omissions had overwhelmingly "caused" the development of a health condition.

Furthermore, a high degree of causative potency (possible on the epidemiological evidence to quantify at 85-90%) does not oust blameworthiness, the assessment of blameworthiness in contributory negligence can thereafter incorporate policy considerations, underlying for example the principle that a breach of statutory duty is likely to outweigh a claimant's own fault. Thus, influenced by the historical case law in employers' liability cases at least, it will be difficult for Defendants to shift the apportionment to greater than 50%.

The deduction for contributory negligence applied at first instance and upheld on appeal in **Blackmore** was 30%, a greater deduction than in earlier asbestosis/lung cancer cases such as in **Badger v Ministry of Defence** [2005] EWHC 2941 (QB) the deduction was 25%, while in **Shortell v Bical** (QBD, 16 May 2008) the deduction was 20%. The fact that the claimant contributed so significantly to the relative risk of developing lung cancer does appear at least to have been sufficient to count against the fact that he had not known of the risks (and therefore been blameless) for much of his smoking life, and had not been warned against those risks by medical professionals to a significant extent.

APPLYING THE BRAKES TO STRICT LIABILITY

By Andrew Arentsen

The Court of Appeal has recently provided updated guidance to help determine whether a product is defective so as to give rise to strict liability under the Consumer Protection Act 1987. In **Baker v KTM Sportmotorcycle UK Limited** [2017] EWCA Civ 378 the court considered the question of whether motorcycle brakes were defective so as to impose strict liability on the manufacturer for catastrophic injuries suffered by the Claimant.

The Claimant had purchased a KTM Supermoto 999 motorcycle in November 2009. At that date it was less than a year old and had only travelled 1,676 miles. It had been manufactured in March 2008 and had 1 previous owner. It had been fully serviced by a KTM dealership prior to the sale to the Claimant. By the date of the accident it had 3,935 miles on the odometer.

The Claimant was an avid motorcyclist. He owned 6 motorcycles. After using each he would wash the bike down using a hose. He would pay particular attention to washing the brakes.

On 24th February 2010 the Claimant was riding the motorcycle in Derby. He was travelling within the speed limit. Suddenly and without warning the front brake seized causing him to be thrown from the motorcycle and sustain very serious injuries.

The Claimant brought his claim against the Defendant under the Consumer Protection Act 1987. He alleged that the front brake was defective. The Defendant was the manufacturer of the motorbike. Section 3 of the act provides:

> *"Meaning of defect"*
>
> *(1) – Subject to the following provisions of this section there is a defect in a product for the purposes of this Part if the safety of the product is not such as persons generally are entitled to expect; and for those purposes "safety" in relation to product shall include safety with respect to products comprised in that product and safety in the context of risk of damage to property as well as in the context of risks of death or personal injury.*
>
> *(2) – in determining for the purposes of subsection (1) above what persons generally are entitled to expect in relation to product all the circumstances shall be taken into account, including:*
>
> *a. the manner in which and the purposes for which the product has been marketed, its get-up, the use of any mark in relation to the product and any instructions or warnings with respect to doing or refraining from doing anything with or in relation to the product;*
>
> *b. what might reasonably be expected to be done with or in relation to the product; and*
>
> *c. the time when the product was supplied by its producer to another;*
>
> *and nothing in this section shall require a defect to be inferred from the fact alone that the safety of a product which is supplied after that time is greater than the safety of the product in question."*

The Claimant and the Defendant each called expert mechanical evidence. The Claimant's expert contended that blue surface discoloration on the surface of the left side brake disc suggested that it had been subject to significantly high operating temperatures and that the brakes were not operating in an evenly balanced way. Deposits containing copper, iron, chromium, nickel and zinc were found on the inner wall of the piston. These deposits were aluminium oxide produced by galvanic corrosion. Such a level of corrosion would not be expected in a motorcycle of that age. To clean and remove such corrosion would require specialist knowledge and equipment.

The Defendant's contention was that there was no evidence of galvanic corrosion in the annular space that would effect the normal operation of the brakes. Post accident the brakes were sent back for analysis by the actual producer and were found to be normal. There were no grounds for concluding that galvanic corrosion was caused by a design or manufacturing defect. Galvanic corrosion was not of itself a defect and no design defect had been pleaded or adduced in evidence by the Claimant to demonstrate how and why abnormal galvanic corrosion occurred. The expert concluded that the most likely cause of the failure of the brakes was a failure to adequately maintain the brakes by the Claimant.

Earlier legal guidance on the interpretation of Section 3 was provided in the case of **Ide v ATB Sales Limited and Another** [2008] EWCA Civ 424. The Claimant had sustained serious injury when he fell from his mountain bike. The issue in that case was whether the handlebar of the bike fractured before or during the accident. At first instance Gray J considered: "*I do not consider it be necessary for me to determine the precise mechanism which led to the handlebar fracturing but rather whether the evidence supports the conclusion that, as a matter of probability, the handlebar was defective in a way which caused it to fracture*." He found that it was defective and that this caused an instantaneous and catastrophic fracture. A standard non-defective handlebar would not have failed in such circumstances.

The Court of Appeal determined that this was a permissible approach. During the appeal judgment Thomas LJ noted:

> "*The application of this approach by a Court considering the claim under Consumer Protection Act 1997 in respect of a defective product can often be simpler. Under Section 2 and 3 of the Act if a person is injured by a product his claim succeeds if he establishes there is a defect in the product and that defect caused the loss, unless the Defendant can rely on one of the statutory defences. In determining whether the loss or injury has been caused by a defect or by some other cause although the process of reasonable involved an explanation as to who the defect was caused the task of the Court is simply to determine whether the loss was caused by the defect and not by another cause. As is apparent from the irst of the appeals that distinction is important and can make the task of the Court as a simple one as no doubt Parliament intended*.".

Thus *Ide* determined that the Court may find a defect within the meaning of Section 3 even though the precise mechanism through which that defect arose is not proven or indeed understood.

At first instance in *Baker* the Recorder found that the white corrosion products were the result of galvanic corrosion and that the brakes seized because of galvanic corrosion. He specifically rejected the suggestion that the brakes seized because they had not been cleaned regularly enough. He found that the galvanic corrosion "*happened as a result of a design defect combined with faulty construction or the use of faulty or inappropriate materials."* The galvanic corrosion was "*the probable cause of the brakes seizing*". These "*defects in the braking system*" meant that the braking system was "*not such as persons are generally entitled to expect*". They were defects within the CPA and the accident occurred as a result.

The Defendant appealed arguing that the Recorder was wrong to find that there was a defect in the construction and design of the mo-torcycle's front braking system. He was wrong to find that galvanic corrosion was the result of a design defect and/or faulty construction or the use of faulty or inappropriate materials and also wrong to conclude that galvanic corrosion was the immediate cause of the accident.

The Defendant submitted that galvanic corrosion was not itself a defect within the meaning of Section 3 and that no specific design or manufacturing defect which would lead to such corrosion was advanced by the Claimant in his pleaded case or in the evidence. *The Defendant submitted that to prove his case the Claimant had to show that there was a particular feature of the design or manufacture of the braking system which led to galvanic corrosion and he had not done so*.

Hamblen LJ rejected this contention. It was not necessary to show how a defect was caused. It was sufficient to find that there was likely to have been a defect at the point of manufacture. The Claimant did not need to plead and prove a specific design or manufacturing defect. In this case the defect was the susceptibility for galvanic corrosion to develop in the front brake system when it should not have done, i.e. after limited and normal use and notwithstanding proper servicing, cleaning and maintenance. At the date of the accident the motorcycle was less than 2 years old, its mileage was low, it had been fully serviced, it was only halfway through its service cycle, it was regularly and appropriately cleaned and its use was normal. It is self-evident that one does not expect to find a heavily corroded brake system in a recently purchased, low mileage motorcycle which had been properly serviced and maintained.

It was open to the Recorder to infer that the susceptibility of the motorcycle's braking system to corrosion was a defect and that there must have been a defect for the galvanic corrosion to develop as it did. It was open for the Recorder to infer that this susceptibility must have been as a result of a defect in design and/manufacturing but there was no necessity for him to identify the precise nature of that defect.

In the present case the brakes were defective in that they allowed galvanic corrosion to develop following normal use in circumstances of a standard non-defective brakes would not have done so. There was no necessity for comparative evidence to suggest that the Defendant had departed from standards employed by other motorcycle manufacturers. In fact there was no evidence of this type. The essential point was that there was galvanic corrosion where there ought not to have been. The Recorder was entitled to infer from that that there must have been a defect in the braking system on this particular motorcycle. The appeal was dismissed.

In some respect **Baker** does little to add to **Ide** and the earlier interpretation of Section 3. However the fact that it was appealed demonstrates the ongoing efforts that are made to dilute the strict liability provision and make the Claimant's case much harder to prove. The case is further support for the strict nature of the duty and further support for the proposition that where an accident is not readily explicable following ordinary use of the product then that can of itself is sufficient to demonstrate that the specific product was defective.

Personal Injury Law UPDATE

By Laura Fitzgibbon and Tom Emslie-Smith

Howe v Motor Insurers' Bureau [2017] EWCA Civ 932

Significance: Qualified one-way costs shifting (QOCS) provisions under CPR 44.13 are to apply to claims for compensation from the Motor Insurer's Bureau.

Facts: Mr Howe claimed compensation from the MIB after sustaining personal injury in an accident with a lorry that subsequently could not be traced. His claim failed as it was statute barred. The judge held that QOCS did not apply to his claim because CPR 44.13 applies to "proceedings which include a claim for damages... for personal injuries." It was held that a claim under the Regulations was for a claim for a civil debt rather than a claim for damages.

Held: Reference to "a claim for damages" in CPR 44.13 is to be read to include a claim for compensation under the Regulations. The Regulations were enacted to give effect to the EU Fourth Motor Insurance Directive, so the procedural provisions governing costs in MIB claims must be read compatibly with the underlying EU law. The costs provisions must not be less favourable than in claims against insured drivers, and they must not render the exercise of the rights conferred by the Directives excessively difficult.

FB v Rana [2017] EWCA Civ 334

Significance: The Court of Appeal considered the standard of care required of an inexperienced professional in clinical negligence cases. Should they be held to the standard of an experienced doctor?

Facts: A young doctor in the early years of her career discharged a child who was later diagnosed with pneumococcal meningitis. The Claimant alleged that she negligently failed to take an adequate history. Had she done this to the standard of a competent Senior House Officer, she would have referred the Claimant to the paediatric team, and serious brain damage would have been avoided.

The judged dismissed the claim. It was held that while a more experienced consultant would have been expected to elicit the relevant history, it was not substandard for the Defendant to fail to do so.

Held: Appeal allowed. Jackson LJ's judgment dealt with the point of principle. Following *Wilsher v Essex AHA [1987] 1QB 730,* he said that a doctor is to be judged by the standard of skill and care appropriate to the post which he or she was fulfilling. The experience and length of service are to be left out.

Thirlwall LJ found force in the appellant's submission that the judge had elided the standard to be expected of an SHO in picking up subtle signs on examination and the standard when obtaining a history. The latter was a basic skill that doctors at all levels are expected to possess.

Shaw (The Personal Representative of the Estate of William Ewan (Deceased)) v Kovac, University Hospitals of Leicester NHS Trust [2017] EWCA Civ 1028

Significance: Where a patient's claim is founded upon the failure to provide information about the risks of treatment, no separate head of claim should be introduced to reflect the patient's loss of the right to make an informed decision about treatment.

Facts: The Claimant's husband died following a heart valve implant procedure in surgery. The Defendant admitted that there had been a failure to provide information as to the risks of the procedure such as to allow the Claimant to give fully informed consent to the treatment. It was also admitted that had the patient been properly informed, he would not have gone through with the operation and would have lived longer. The trial judge awarded general damages for pain, suffering and loss of amenity, but declined to make a separate award in respect of the deprival of informed consent.

Held: The Court of Appeal rejected the appellant's argument that a new head of damages should be introduced to relect the patient's right to give informed consent to treatment. It was argued that the recent decisions in *Chester v Ashfar [2004] UKHL 1* and *Montgomery v Lanarkshire Health Board [2015] UKSC 11* are based upon the recognition of such a right, and that the Court should award damages for breach of this right.

Davis LJ held that those cases do not support the award of damages for failure to provide the requisite information. *Chester* was a case on causation, *Montgomery* concerned breach of duty. Neither suggested that it would be appropriate to establish a separate remedy for failure to provide information.

There were also a number of reasons why, in principle, such an award should not be recognised in law. There is nothing that such an award would compensate over and above what has already been covered by the award for PSLA. The fact that a person's suffering has increased through the invasion of his or her personal autonomy without proper consent can be relected in the level of PSLA damages. Furthermore, if such a principle were well founded, it would be recoverable even when treatment had been a success. It was also unclear how such a head of damages might be quantiied.

Catalano v Espley-Tyas Development Group Ltd [2017] EWCA Civ 1132

Significance: The Court of Appeal provided guidance on the applicability of QOCS to cases when there was both a pre-1 April 2013 funding arrangement and a post-1 April 2013 funding arrangement, providing some certainty in an area in which there had previously been two conlicting unreported decisions.

Facts: The Claimant employee began proceedings under a conditional fee agreement (CFA) entered into on 13 June 2012. On the same date, after the event (ATE) insurance was declined. Expert evidence was obtained under the CFA and it was common ground between the parties that it was 'a funding arrangement as deined by CPR r.43.2(1)(k)(i)' for the purposes of CPR r 48.2.

On 15 July 2013, the employee entered into a new CFA with the same solicitors (following the introduction of QOCS on 1 April 2013), which was said to have replaced the prior arrangement. The Claimant employee served a notice of discontinuance the day before trial.

At first instance, Deputy District Judge Harris held that QOCS was not applicable in the employee Claimant's noise-induced hearing loss claim and so was liable for the Defendant employer's costs.

The Claimant appealed and permission was given for a leapfrog appeal to the Court of Appeal.

The Appellant employee's submissions were:

i) the Judge should have followed followed *Casseldine v Diocese of Llandaff Board for Social Responsibility (A Charity) unreported* because her solicitors had terminated the irst CFA, just as Thompsons had done in that case;

ii) it was irrelevant that in this case that Ms Catalano's solicitors remained the same after terminating the first CFA; the second CFA replaced the irst which was no longer in force and should therefore be treated as being abandoned; and

iii) Ms Catalano was not therefore operating under a pre-commencement funding arrangement, did not have the benefit of ATE cover and should have the benefit of QOCS.

The Respondent employer submitted:

i) The appellant was reading the words "a funding arrangement" in CPR 48.2(1)(a)(i) as "an un-terminated funding arrangement" which was to read a word into the rule which was not there;

ii) it could not be the intention of the rule to allow a claimant to cherrypick the advantages of both regimes by proceeding first with the benefit of an ATE premium and a success fee which would be recoverable from the defendant and then, by adopting a new CFA, avoid the costs consequences of losing the case;

) since Ms Catalano's proposal for ATE insurance had been declined, but she decided to proceed in any event, she was always going to be liable for the costs if she lost; and

i) the deputy district judge was therefore right to say that there was a pre-commencement funding arrangement and QOCS did not apply.

Held: The concept of a pre-1 April 2013 funding arrangement under CPR 48.2(1)(a) included not only an agreement where services had been provided before 1 April 2013, but also an agreement made before 1 April 2013 for the provision of such services in the future.

In this case, it was clear that the appellant employee's solicitors had provided services before 1 April 2013, for which a charge of £5375 had been included in their costs budget. Therefore, unless the appellant employee was right to read the word "un-terminated" into CPR 48.2(1)(a)(i), there was undoubtedly a pre-commencement funding arrangement within CPR r.48.2(1). It was held that the appellant employee was not correct to read words into a statute that were not there. Furthermore, such a construction would lead to a situation where a claimant could have the best of both worlds.

It was held that the correct construction of CPR 48.2(1)(a)(i) was to give the words "funding arrangement" their natural meaning and apply them to any pre-1 April 2013 agreement whether terminated or not. Therefore, in any case where litigation services have in fact been provided under a CFA made before 1 April 2013, success fees can continue to be recovered as costs and QOCS will not apply even if the CFA is terminated and a second CFA is made.

The appeal was therefore dismissed.

The Court preferred not to express a concluded view, though commented on, the different question of a case where a CFA is made before 1 April 2013 but, before any work is done, a second CFA is made after 1 April 2013, or the case where work is done but the retainer terminated (whether by the solicitors or the client) before 1 April 2013 and a second CFA is made by new solicitors after 1 April 2013.

Patricia Grant (Widow & Executrix of the estate of Douglas Michael Grant, Deceased) v Secretary of State for Transport [2017] EWHC 1663 (QB)

Significance: In assessing the quantum of damages in a claim brought by a widow following the death of her husband from mesothelioma, the court reviewed the authorities and made an award for intangible benefits.

Facts: The Claimant's husband passed away following a long suffering with mesothelioma. The court considered the quantum of damages for Mr Grant's estate under the Law Reform (Miscellaneous Provisions) Act 1934 and for Mrs Grant under the Fatal Accidents Act 1976 on the facts of the case. In relation to the claim for intangible beneits, the court reviewed conlicting irst instance decisions and awarded £2500 in respect of the head of loss.

Held: Having reviewed the authorities, including the cases of **Beesley v New Century Group** [2008] EWHC 3033 (QB), **Mosson v Sopousal (London) Ltd** [2016] EWHC 1429 (QB) and **Wolstenhome v Leach's of Shudehill** [2016] EWHC 588 (QB), the court derived the following principles from the authorities:

1 – Aside from the award for bereavement, there can be no claim under the 1976 Act for non-pecuniary loss;

2 – the courts have sometimes recognised that a dependant may suffer a pecuniary loss of a result of the death or a relative that is not adequately compensated by an award for services dependency;

3 – *"... there is a separate reason why an award for services dependency, calculated by reference to the cost of replacement services, may be inadequate to value the loss of the deceased's services. A wife whose husband used to do all the minor repair work around the house now has to ind and choose the painter, plumber, decorator et al. and make the arrangements for them to come and do what needs to be done. These are things she did not have to do before. The time spent by the claimant in doing them has a pecuniary value. That was the basis for the awards made by Hamblen J in* Beesley *and by HHJ McKenna in* **Wolstenholme***. The dif iculty of assessing that value precisely accounts for the modesty of the awards generally made under this head. It does not, however, transform the award from (permissible) compensation for pecuniary loss to a form of (impermissible) solatium. With respect to Garnham J, I do not see why the ordinary activities of family members other than the deceased would be less affected if DIY is done by outside contractors than if done by the deceased himself. Garnham J was no doubt correct to point out that work done by a commercial contractor might be of better quality than that done by the deceased, but that would not necessarily be so. In any event, a services dependency award is, or should be, valued by reference to the cost of replacing the lost services on a like-for-like basis. There is no reason to assume that such awards generally confer a pecuniary advantage on claimants such as to justify a refusal to compensate for losses – real, albeit dif icult to assess – of the kind identiied by Hamblen J in* Beesley *and HHJ McKenna in* Wolstenholme*.*

The court therefore concluded that an award for intangible beneits should be made in the sum of £2500 (£5000 was claimed).

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