DOLMANS INSURANCE BULLETIN

Welcome to the April 2022 edition of the Dolmans Insurance Bulletin

in this issue we cover:

REPORT ON

- Diagnosis in asbestos related disease provisional damages return claims - controversy at Inquest - *DL (Deceased) v RWE (as successor to the former Central Electricity Generating Board)*

FOCUS ON

- Judicial Review of the Compensation Recovery Scheme - *Aviva Insurance Ltd v Secretary of State for Work and Pensions [2022] EWCA Civ 15*

RECENT CASE UPDATES

- Costs - hourly rates
- Extension of time for service of Particulars of Claim - delay - relief from sanctions
- Fundamental dishonesty - notice - burden of proof
- Fixed costs regime - two Claimants - recoverability of two sets of costs

If there are any items you would like us to examine, or if you would like to include a comment on these pages, please e-mail the editor,
Justin Harris, Partner, at **justinh@dolmans.co.uk**

DOLMANS
SOLICITORS

REPORT ON

Diagnosis in Asbestos Related Disease Provisional Damages Return Claims - Controversy at Inquest

DL (deceased) v RWE (as successor to the former Central Electricity Generating Board)

Dolmans received initial instructions in relation to the above matter in September 2021 and were requested to assist with certain submissions invited to be made to HM Coroner for Kent and Medway (by that coroner) in relation to the pending Inquest touching upon the death of the deceased former employee of the Central Electricity Generating Board (CEGB).

At that point, our clients, Specialist Liability Services, the appointed claims handlers for the CEGB, had already been notified of a return claim for damages from the deceased's estate. The deceased had previously settled a claim (in 2003), on a provisional damages basis, following a diagnosis of pleural plaques (which, readers will recall, prior to 2007, were treated by all as a compensable condition). The solicitors instructed on behalf of the deceased's estate had provided a copy of the previous Consent Order (dated 28 February 2003) and Statement of Facts, plus a copy of a medical report from Dr Robin Rudd (dated 7 January 2002). At the same time, further medical evidence in the form of reports from Prof Britton (dated 24 March 2020 and 21 June 2021) were also provided confirming a diagnosis of asbestosis – i.e. fibrosis of the lung consequent upon previous asbestos exposure (see below).

The 2003 Consent Order, conventionally, provided for the deceased to be permitted to return to court for further damages should he develop one or more of a number of recognised further conditions as a consequence of previous asbestos exposure, notably, in this context, those conditions included asbestosis. It should be appreciated, at all times, that asbestosis is a dose related condition – which is to say it can only be appropriately diagnosed where there is sufficient evidence of exposure (which can be determined in various ways) to a sufficient amount of asbestos dust, such that the condition could have arisen. Those various methods of determination include lifetime evidence of exposure and (where appropriate/possible) post-mortem histopathological evidence of exposure, which can be determined via the presence of asbestos bodies (see below) and/or a mineral fibre analysis of lung tissue.

The deceased had died in January 2021, seemingly as a consequence of a pre-existing malignant condition (a form of lymphoma). However, chest x-rays taken in 2019 indicated the presence of lung fibrosis which, it was said, was a consequence of asbestos exposure, and therefore, amounted to asbestosis. A claim for return damages was, therefore, put in hand, based on the original provisional damages claim and the purported diagnosis of asbestosis. This claim was not notified, however, until July 2021, well after the deceased's death.

At that stage, the aforementioned medical evidence was deployed on behalf of the estate supporting a diagnosis of asbestos induced fibrosis, and, therefore, supported the claiming of further damages pursuant to the original Consent Order and/or return provisions.

REPORT ON

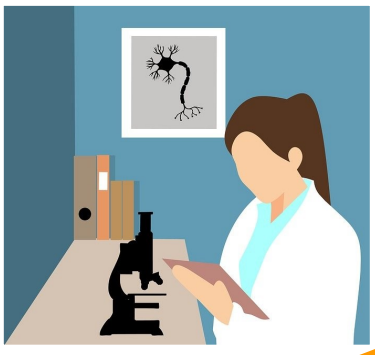
Prior to that, in May 2021, HM Coroner for Kent and Medway had contacted our clients to ask if they wished to be accorded Interested Person status in the context of the forthcoming Inquest touching upon the death of the deceased in June 2021. Our clients, at that stage, in the absence of any formal claim for return damages, resolved not to be involved in the Inquest – a not unreasonable response in the context of the then situation. Thus, in June 2021, a partial Inquest took place (based on written evidence, pursuant to Rule 23 of the Coroner's Rules, including a statement of the deceased's widow and a lifetime witness statement which was said to reflect the deceased's exposure to asbestos whilst employed by the CEGB from 1952 until 1992 when he retired). We were unaware of this partial Inquest until March 2022 (see below).

That initial Inquest hearing was evidently adjourned because, in September 2021, our clients received further correspondence from the Kent and Medway Coroner, this time enclosing a post-mortem examination report. This post-mortem report indicated a complete absence of detected asbestos bodies (white blood cells impaled on asbestos fibres, where the cell is killed attempting to envelope and digest the spear-like asbestos fibre – as above, they are a recognised legacy of previous exposure to respirable asbestos) within the deceased's lung tissue.

Additionally, the post-mortem report indicated that the appearances of the fibrosis within the deceased's lung tissue at post-mortem appeared to more accurately resemble either idiopathic fibrosis (i.e. fibrosis of a constitutional nature) or the kind of fibrosis left as a consequence of COVID-19 infection. It was clear that the deceased – who had been admitted to hospital on a number of occasions for treatment for his lymphoma – had contracted, likely as a result of a hospital admission, COVID-19.

HM Coroner asked our clients for their observations on this further post-mortem material. We were instructed, at that stage, to assist with the preparation of appropriate correspondence to HM Coroner, which we did.

We noted, in that context, the diagnosis of asbestosis which Dr Britton was seeking to espouse in his two reports (see above). We pointed out the lack of asbestos bodies detected at post-mortem, and, in that context, that the relevant "gold standard" for diagnosis of asbestosis would be a mineral fibre burden analysis, as conducted by the Environmental Lung Disease Unit of the University Hospital of Wales, Cardiff, a national centre of excellence for such studies, led by Prof Richard Attanoos, Consultant Histopathologist. This kind of analysis, simply put, takes the deceased's lung tissue and removes from that tissue (through a process of digestion of the tissue) all mineral fibres. The resultant fibres are then correlated according to type and counted. The mineral fibre analysis then tabulates the number of amphibole asbestos fibres within a gram of dry lung tissue – to give a sense of overall asbestos exposure by reference to the retained asbestos fibres within the lung tissue.



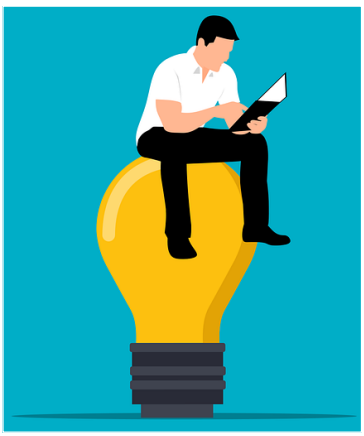
We also pointed out that the deceased's lifetime evidence (the witness statement of 13 September 2001 referred to in the earlier report of Dr Rudd) identified only circa 7 years (9 years of employment – 1952 to 1963, initially, broken by a period of 2 years national service in 1958 – 1960) of modest exposure to asbestos across his entire CEGB career, on the basis that asbestos exposure had been strictly controlled within the CEGB from the mid 1960s onwards. Indeed, in that regard, the report of Dr Rudd reported the evidence from the (now) deceased as follows:

"From 1969 to 1975 he worked for CA Parsons Limited. He worked in power stations which were new and he was not exposed to asbestos dust. When asbestos was to be removed the area was tented off with polythene sheeting."

"From 1975 until 1992 he worked again for the CEGB. He started at Deptford East Power Station as the third engineer. If any asbestos was to be removed this was done under strictly controlled conditions. Nevertheless, he is concerned that he may have had some exposure to asbestos dust from deteriorating lagging in the environment although he is not aware of anyone disturbing it without precautions. In 1977 he transferred to Tilbury A and B Power Stations and in 1984 he was transferred to Belvedere Power Station. He worked as a second engineer instruments. He was not present while asbestos lagging was disturbed without precautions; and he did not have occasion to disturb it himself. In 1986 he transferred to the transmission division where he was not exposed to asbestos. He retired in 1992."

At that point in time, again, we were unaware of the previous interaction which our clients had had with HM Coroner in May 2021. Moreover, the basis of the decision to instruct Prof Britton, rather than Dr Robin Rudd, the author of the original medical evidence, was not at all clear.

We suggested to HM Coroner that she might wish to consider obtaining a report from Prof Attanoos given the issues identified by Dr Bagla, the Pathologist responsible for the post-mortem report. We heard nothing further until February 2022, when our clients approached us again to indicate that HM Coroner had now obtained a report from Prof Attanoos and that a copy had been circulated to them for comment. We were provided with a copy of the same.



This report from Prof Attanoos made for very interesting reading. It made several observations and findings:

- Firstly, it identified that the level of commercial amphibole asbestos fibres within the deceased's lung tissue, albeit elevated above that of an unexposed individual, was still considerably less than the threshold of exposure required (pursuant to the overall study cohort within the University Hospital of Wales' cohort study) to confidently diagnose asbestosis. As above, since asbestosis is a dose related condition, it was, in our submission, very important that the level of asbestos fibres within the deceased's lung tissue suggested he had not received a sufficient dose of asbestos to go on to develop asbestosis.

- Secondly, microscopic examination of the deceased's lung tissue found a pattern of fibrosis, not consistent with asbestosis, but rather, more in keeping with lung fibrosis either caused by pneumonia secondary to COVID-19 infection or idiopathically (i.e. without a known cause).

- Thirdly, on the basis of the above, Prof Attanoos was not prepared to accept that this was a (valid) diagnosis of asbestosis. In his view, there was insufficient asbestos fibre within the lung tissue for that. Moreover, and again, the morphology of the lung fibrosis did not fit either; in other words, on a microscopic level, the lung fibrosis did not 'look like' asbestosis.

We assisted our clients with the preparation of appropriate further submissions. In essence, we submitted that the evidence was now pointing in the direction of idiopathic fibrosis or COVID-19 induced fibrosis, rather than asbestos induced fibrosis.

In early March 2022, we received further contact from our clients to indicate that HM Coroner had now listed an Inquest hearing for 21 March 2022 and we were asked to arrange appropriate representation of our clients at the Inquest itself. We, therefore, instructed appropriate counsel to conduct the Inquest hearing (which was due to be heard remotely via MS Teams).

As part of our due diligence for the Inquest hearing itself, we requested copies of all relevant papers from HM Coroner. In the course of this process, it emerged that there had been the initial hearing in June 2021 and that some sort of lifetime statement on behalf of the deceased had been read into the coroner's record, pursuant to Rule 23 of the Coroner's Rules (see above). At first, we assumed that this must have been the witness statement referred to in the report of Dr Rudd (see above). However, it then emerged that HM Coroner had, in fact, 'read in' a witness statement from the deceased dated November 2019 (see above). This statement, again, indicated exposure to asbestos ***throughout*** the deceased's career with the CEGB until 1992.

We requested a copy of the same and on receipt of such noted that it was unsigned. We, therefore, pointed this out to HM Coroner and queried what weight could be attached to this statement. We also requested sight of a signed version.

At the same time, we noted that the expert evidence to be considered by HM Coroner at Inquest, would be as follows:

- The post-mortem report of Dr Bagla.
- The two reports of Prof Britton.
- The mineral fibre count and pathology commentary from Prof Richard Attanoos.

REPORT ON

On the eve of the Inquest itself, received via HM Coroner's Officer, a copy of a (further) witness statement from the Claimant's solicitors (evidently in response to a request from HM Coroner given our observations as to the lack of signature on the statement) indicating that the statement 'read in' in June 2021 was, indeed, unsigned, but, that this statement had been compiled following a face-to-face meeting with the Claimant/deceased in November 2019.

Following that meeting, the deceased had been unable to sign the statement, it was said, due to his worsening health and due to anxiety consequent upon the coronavirus pandemic situation. The statement from the Claimant's solicitors exhibited the original report from Dr Rudd and made reference to its reference to the exposure history provided by the deceased in his original witness statement from 2001. That original witness statement remained, however, elusive (and has not been traced, to date).

The matter came before HM Coroner (via the aforesaid MS Teams hearing) on 21 March 2022. At that hearing, the medical reports from Prof Britton, Dr Bagla and Prof Attanoos were considered. Counsel for the CEGB submitted that the relevant question was not the question of asbestos exposure, but, rather, the extent of that exposure and, in that regard, the evidence of Prof Attanoos was material. Additionally, the deceased's own witness statement (from 2001 – as summarised by Dr Rudd in his 2002 report) clearly indicated only modest overall exposure due to the stringent controls which were instigated in the mid 1960s. It was submitted that the weight of expert evidence favoured a cause of death without reference to asbestosis at all. Put simply, there was insufficient evidence for HM Coroner to reach a conclusion as to cause of death, on balance of probability, which involved asbestosis.

The family solicitor sought to argue that he had experience of cases where idiopathic fibrosis had been caused by asbestos exposure. Counsel for RWE objected to these submissions on the basis that they represented the Claimant's solicitor seeking to provide expert evidence. We submitted that the relevant expert evidence in this case was the three reports before HM Coroner – the reports of Prof Britton, on the one hand, together with the two reports of Dr Bagla and Prof Attanoos. Prof Britton sought to establish a diagnosis of asbestosis, but his evidence contained no basis to explain either the lack of sufficient asbestos fibres within the deceased's lung tissue (as detected at post-mortem) or the morphologically inconsistent appearances of the fibrosis (if it was asbestosis).

Ultimately, HM Coroner accepted that the issue in this case was not the question of asbestos exposure as a principle, but the quantum of that exposure. The unsigned lifetime witness statement from November 2019 was given little weight. The reporting of the earlier statement from 2001 (in Dr Rudd's report) was given much greater prominence. Indeed, HM Coroner acceded to counsel's request that this report (that of Dr Rudd) be admitted into the record. Critically, the exposure history provided to Dr Rudd was in keeping with what Prof Attanoos found at post-mortem and what Dr Bagla had already concluded, based on the lack of asbestos bodies in the lung tissue.

Accordingly, a cause of death excluding asbestosis was arrived upon and/or a conclusion given of "death by natural causes" as distinct from "death due to industrial disease".

Comment

The COVID-19 pandemic has provided a layer of significant further complication in asbestos related lung disease cases. Vulnerable individuals (as a consequence of historic asbestos exposure) can seek to argue that their condition and/or death arose, or was contributed to, because of the pre-existing asbestos induced pathology. This situation gives rise to the opportunity, in appropriate cases, for possible post-mortem dependency claims (or, at least, a proportion of the same), even if the immediate cause of death is COVID-19 infection.

In this case, the return claim for damages depended on the estate being capable of showing that the deceased's fibrosis was caused by asbestos exposure. However, a careful and forensic examination of the evidence, coupled with taking the opportunity to suggest to HM Coroner that further expert histopathology evidence (from Prof Richard Attanoos) should be obtained for the Inquest, had paid off. The cause of death was explicitly found not to be asbestos related, which will clearly make any return claim difficult (if not impossible). The opportunity for a mineral fibre analysis of the deceased's lung tissue, if not grasped as part of the Inquest process, might have been lost for all time (if tissue samples were destroyed following the inquest process, as sometimes happens).

This case also illustrates the importance of ensuring early expert legal representation in difficult and/or complex Inquests. Without the submissions made in this case and the representation at Inquest, the outcome could have been quite different and would likely have led to a post-mortem return claim for damages, the financial ambit of which can only be speculated upon at this stage. Indeed, such a claim might yet materialise, but, if it does, the findings at post-mortem and/or Inquest will make it a more difficult claim to succeed in for the claimant.

Mineral fibre burden analysis remains a very helpful tool in asbestosis cases – because of the dose relationship between exposure and manifestation of the condition. In which regard, a note of caution is also worth sounding – a mineral fibre analysis can just as likely confirm a diagnosis of asbestosis as it will refute the same because the extent of mineral fibre in a deceased's lung tissue is an entirely objective data point. Hence why this investigation is often referred to as the "gold standard" in such cases.

Peter Bennett
Partner
Dolmans Solicitors

For further information regarding this article, please contact
Peter Bennett at **peterb@dolmans.co.uk**
or visit our website at **www.dolmans.co.uk**

FOCUS ON

Judicial Review of the Compensation Recovery Scheme

Aviva Insurance Ltd v Secretary of State for Work and Pensions [2022] EWCA Civ 15

Where a compensation payment has been made in respect of an accident, injury or disease, then amounts of social security benefits paid as a result can be recovered by the Department for Work and Pensions' Compensation Recovery Unit ("CRU"). This is known as the Compensation Recovery Scheme (and similar schemes operate to recover costs incurred by NHS Hospitals and Ambulance Trusts for treatment from injuries from road traffic accidents and personal injury claims - i.e. NHS Charges, and for Criminal Injuries Compensation).

The Compensation Recovery Scheme requires compensators to register claims with the CRU within 14 days of notification of the claim and whether or not liability for the claim is in dispute. Compensators can then request a Certificate setting out their potential liability for Recoverable Benefits. The CRU states that it will issue a Certificate within 28 days of receiving the request. Where a compensation payment is made, then Recoverable Benefits must be repaid in full at the same time to the CRU.

The legal framework for the Compensation Recovery Scheme is set out in a number of Acts and Regulations, but principally in the Social Security (Recovery of Benefits) Act 1997. The Scheme encompasses the underlying principle that a person should not be compensated twice over in respect of the same accident, injury or disease. Liability for certain Recoverable Benefits can be offset against heads of damage. For example, compensation for loss of earnings may be reduced where a number of income based benefits, including Employment and Support Allowance, has been paid. Certain lump sum payments - e.g. under the Pneumoconiosis etc. (Workers' Compensation) Act 1979, can be offset against general damages.

The Compensation Recovery Scheme can lead to some odd situations and it is possible, for example, to find that Recoverable Benefits exceed the value of damages. In some cases, a lump sum payment can reduce the damages paid to a claimant to nil. Because of this, and because the Scheme often increases the overall costs burden to insurers whilst reducing the damages payable to injured parties, compensators and claimants alike have looked to minimise the effect of the Scheme.

In *Aviva Insurance Ltd v Secretary of State for Work and Pensions [2022] EWCA Civ 15*, Aviva Insurance Ltd and Swiss Reinsurance Company Ltd sought a Judicial Review of the Compensation Recovery Scheme on the basis that it was incompatible with their rights as insurance companies under Article 1 of the First Protocol to the ECHR that "*every natural or legal person is entitled to the peaceful enjoyment of his possessions*".

The insurance companies were primarily concerned with situations in longtail asbestos related disease claims where they found themselves liable to pay the whole of the Recoverable Benefits notwithstanding that their insured's fault had not caused the whole of the damage. In particular, they identified five features of the Compensation Recovery Scheme as objectionable (the "*Five Features*"):

- Contributory negligence – compensators are required to repay the whole of the Recoverable Benefits even though the injured person contributed to his injury (interestingly, repayment of NHS Charges can be discounted to take account of contributory negligence);

- Full recovery regardless of others' fault in '*divisible*' claims (i.e. dose related injuries such as asbestosis) – compensators are required to repay the whole of the Recoverable Benefits in situations where, for example, other untraced employers had contributed to the injury. In these cases damages are usually discounted, but not so repayment of Recoverable Benefits;

- Full recovery regardless of others' fault in '*indivisible*' claims (such as mesothelioma where a single exposure to asbestos can theoretically cause the whole of the injury) – compensators are required to repay the whole of the Recoverable Benefits in situations where, for example, their employment was only responsible for a tiny share of the overall exposure. Compensators cannot discount damages in this scenario, but injustice of having to pay all of the Recoverable Benefits is still keenly felt;

- Benefits not corresponding to heads of loss – the Scheme aims to recover benefits arising out of the injury even though the benefits themselves are heads of loss and recoverable as such; and

- Economic settlements without admission – where compensators are required to repay the whole of the Recoverable Benefits even though they have settled the claim on an economic basis without an admission or at a significant undervalue. Significant Recoverable Benefits can often stand in the way of compensators settling claims on economic grounds to the detriment of all parties.

At Trial, Henshaw J in the High Court found that three out of the Five Features were incompatible with the insurers' rights under ECHR in respect of contributory negligence and indivisible and divisible claims. Henshaw J did not consider that repayment of Recoverable Benefits which did not closely correspond to heads of loss or where claims had been settled on economic grounds breached the ECHR. At a subsequent hearing, Henshaw J clarified that his Judgment applied equally to employed injured persons and those not employed, was restricted to disease claims and did not include accident claims, only applied to those insurance policies written before the introduction of the 1997 Act and the Scheme was only incompatible from 2 October 2000 in respect of contributory negligence and divisible claims and from 20 June 2002 in respect of indivisible claims.

Both the DWP and the insurers (in respect of the heads of loss point only) appealed. The Court of Appeal found that Henshaw J had erred and that the Compensation Recovery Scheme was not incompatible with the insurers' ECHR rights. Henshaw J allowed himself to be misled into using the legislative materials to determine the aim of the legislation. As a result, the Judge came to find that there was no rational connection to the legitimate aim in two of the four situations about which complaint was made by the insurers. The Court of Appeal then proceeded to undertake the analysis for itself and found that there was a rational connection between the objective of the legislation and the interference with insurers' interests in each of the five situations about which complaint was made. It was difficult to see what less intrusive measures would have achieved the same outcome in each of the four situations. A fair balance had been achieved in ensuring that claimants retained the benefits of all their claims for personal injuries (save where there was a claim for financial losses which corresponded with a state benefit which had been paid). Insurers benefited from only having to repay benefits up to the date of compromise (and not the whole of the benefits paid over the injured person's lifetime), from free medical care (avoiding the need for payment of medical expenses by claimants which would then be recovered from compensators) and that damages for loss of earnings were generally claimed and paid net of income tax (thus depriving the state of income tax).

Thus, after a complex and lengthy process of initial Judicial Review, followed by appeals (by both sides, as it were), the status quo has been restored with compensators remaining liable for the whole of the Recoverable Benefits (as defined by the Scheme) irrespective of their actual contribution to the injury sustained, whether in percentage terms or in respect of heads of loss.

In this context, it remains important that compensators identify and trace other employers/ tortfeasors in order to reduce their Recoverable Benefits liability and/or to secure a contribution to the same. The potential impact of the first instance decision remaining partly or fully in place, following the appeal, would have been potentially profound. Albeit, following the clarification as to the ambit of the decision by the first instance Judge, its application would have been to longtail claims almost exclusively, the impact as to the reduction of payments back to the CRU by compensators would have been significant.

Jamie Mitchell
Associate
Dolmans Solicitors

For further information regarding this article, please contact
Jamie Mitchell at **jamiem@dolmans.co.uk**
or visit our website at **www.dolmans.co.uk**

RECENT CASE UPDATES

Costs - Hourly Rates

Samsung Electronics Co Ltd v LG Display Co Ltd [2022] EWCA Civ 466

Following a successful one-day appeal on the issue of the appropriate forum for the Trial, the Defendant, LG, was awarded its costs of the appeal, to be summarily assessed on the standard basis. LG's solicitors, who billed in US dollars, claimed hourly rates equivalent to between £1,131.75 and £801.40 for Grade A, and between £704 and £443.27 for Grade C, fee earners. These rates significantly exceeded the guideline hourly rates for London 1 (£512 for Grade A; £270 for Grade C) which applies to 'very heavy commercial and corporate work by centrally based London firms'. LG did not attempt to justify the hourly rates other than observing that "*its hourly rates are above the guideline rates, but that is almost always the case in competition litigation*".

The Court of Appeal stated that if a rate in excess of the guideline rate is to be charged to the paying party, a clear and compelling justification must be provided. It is not enough to say that the case is a commercial case, or a competition case, or that it has an international element, unless there is something about these factors in the case in question which justifies exceeding the guideline rate.

The Court held that there was nothing in this appeal that justified exceeding the guideline rate. LG's costs were reduced from the £72,818.21 claimed to the sum of £55,000.

Extension of Time for Service of Particulars of Claim - Delay - Relief from Sanctions

CDE v Buckinghamshire County Council [2022] EWHC 738 (QB)

The Claimant, 'C', came to the UK as an unaccompanied child seeking asylum. The Defendant Council, 'D', began looking after him in 2010. C has numerous psychological and psychiatric disorders and brought a claim for damages for personal injury and under the Human Rights Act 1998 alleging that D, in failing in its duties to him, had caused or aggravated his mental health.

Protective proceedings were issued on 23 March 2017, just before C's 21st birthday. Between July 2017 and September 2019, C made 6 without notice Applications for extensions of time for serving the Claim Form, which were granted. On 13 January 2020, a 7th such Application was made, in response to which the Assigned Master remarked that it was unreasonable to extend time further as distinct from serving the Claim Form but seeking an extension of time for service of Particulars of Claim.

RECENT CASE UPDATES

On 21 February 2020, C made an Application to extend time for service of Particulars of Claim until 2 September 2020. D opposed the Application and sought to strike out the claim as an abuse of process. The strike out Application came before the Court in September 2020, when the Judge commented that C was "*now in the last chance saloon*". At a further hearing in October 2020, it was noted that C's solicitors were still seeking expert medical evidence on causation and C was due to be assessed by a psychiatrist in October 2020. Independent Social Work (ISW) experts had also been identified, who were anticipated to be able to report by January or early spring 2021. The Judge granted an extension of time for service of the Particulars of Claim to 31 March 2021. Whilst declining to make this as an 'unless' Order, the Judge ordered that since this was a substantial extension, any Application for a further extension of time had to be made by 17 March 2021.

On 17 March 2021, C made an Application for an extension of time to serve Particulars of Claim until 30 June 2021. C had instructed new solicitors. The Application indicated that Legal Aid funding had transferred just before Christmas. An application to the Legal Aid Agency for permission to instruct an ISW had been declined, but allowed upon appeal on 11 March 2021. A report was anticipated by the end of May 2021. D agreed to the application.

On 29 June 2021, C issued an Application to extend time for service of the Particulars of Claim until 31 August 2021 on the grounds that C's solicitors had had to prepare the documents for instructing the ISW and liaise with the Litigation Friend who was in India with limited access to emails, such that the ISW expert had not been instructed until 14 April 2021. The ISW had then advised that, due to personal difficulties, the report would be delayed to the end of July. Counsel would then be on leave and unable to prepare Particulars of Claim until 31 August 2021. D consented to the Application.

On 26 August 2021, C applied for a further extension of time to 14 September 2021 on the grounds that the ISW expert's father had died and the expert had indicated that the report would not be available until the end of August 2021. D again consented to the Application.

No Particulars of Claim were served by 14 September 2021. On 6 October 2021, C applied for a retrospective extension of time until 10 December 2021 on the grounds that the ISW had identified that he required sight of missing documents before finalising his report and these documents had not been disclosed by D until 4 October 2021. The Application requested that an Order be made without a hearing. No Order was made. It subsequently transpired that this was because the Application had been rejected on the Court's CE Filing system, but the Claimant's solicitor had not realised this. C's solicitors took no action to chase up the Application with the Court in the meantime.

In any event, C's solicitors were not in a position to file Particulars of Claim by 10 December 2021. They issued a further Application on 8 February 2022 seeking an extension of time until 31 March 2022. In support of this Application, it was stated the ISW report had been received in October 2021, but Counsel had advised in November 2021 that psychiatric evidence was now required. Authorisation for funding for this was required from the Legal Aid Agency.

C made an offer to settle in December 2021, which was rejected by D in January 2022. There had been difficulties identifying a suitable psychiatric expert, but such an expert had been instructed on 16 March 2022 and had confirmed a report would be produced by the end of March 2022. The Application was heard on 23 March 2022, by which time draft Particulars of Claim had been produced.

D submitted that the negligence claim was unlikely to succeed due to a lack of any duty of care as per *CN v Poole BC [2019]* and that the Human Rights Act claim was limitation barred. Further, D was severely prejudiced by the delay.

As C's Application was made after time for service of the Particulars of Claim had passed, relief from sanctions was required. The Master held that the delay between 14 September 2021 and 8 February 2022 was serious and significant. Whilst it was noted that despite the delay to date C was now going to be in a position to comply with the original Order for service of Particulars of Claim, this was not sufficient reason to justify relief. The reasons relied upon by C for the delay were not new and could have been advanced earlier, such that there was already significant delay before 14 September 2021. Good reason for the delay thereafter was not made out. The Application made on 8 February 2022 was not made promptly and the ineffectual October 2021 Application provided no mitigation. It was not reasonable to delay compliance with an Order because an offer to settle had been made and such offer could have been made months earlier. Against the background of significant delay, it was inappropriate to pursue a full Part 35 psychiatric report before preparing Particulars of Claim or promptly applying for directions. There was also no explanation regarding the previous indication that C was due to be assessed by a psychiatrist in October 2020. The Master found nothing in all the circumstances of the case that mitigated the serious breach.

Accordingly, C's Application for an extension of time to serve his Particulars of Claim was dismissed.

Fixed Costs Regime - Two Claimants - Recoverability of Two Sets of Costs

Melloy & Another v UK Insurance Ltd
[2022] EW Misc 4 (CC)

The Claimants were successful at Trial in a road traffic accident action subject to the fixed costs regime. The Claimants suffered relatively modest 'whiplash' type injuries and were awarded £1,750 and £1,500 respectively. The Judge had to determine whether one, or two, sets of fixed costs were payable.

The Claimants contended that the Costs Order should contain a separate award under Section C of Table 6B to CPR 45 in respect of each Claimant. The Protocol, and therefore CPR45.29A, contemplated only a single claim and a single claimant. Accordingly, each claimant is entitled to recover the fixed costs in Table 6B.

The Defendant conceded that a separate award could be made under paragraph (b) of that Section (in respect of the additional 20% of the damages awarded), but that otherwise only a single award could be made. They argued that 'the claim' for this purpose is the claim which had been issued by the Claimants. There was only one such claim (even though there were two Claimants) and, therefore, there could only be one award of fixed costs.

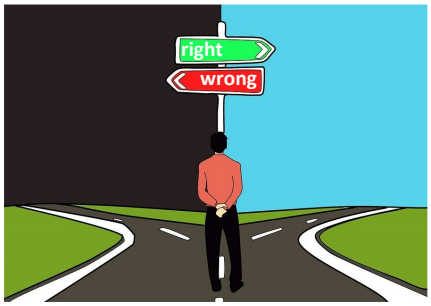
Having considered the Rules and the Protocol, His Honour Judge Glen found that the answer to the issue had to be derived from a construction of the relevant Rules against the context of the purposes of the Protocol and the fixed costs regime. In doing so, he concluded that where there are two or more claimants in proceedings for damages that fall within Part IIIA of CPR45, each claimant (if they have each submitted a CNF) is separately entitled to the costs set out in Table 6B.

Fundamental Dishonesty - Notice - Burden of Proof

Jenkinson v Robertson
[2022] EWHC 756 (Admin)

The Claimant, a litigant in person, had sustained personal injuries in a road traffic accident. Liability was accepted. The dispute between the parties at Trial was as to causation and quantum.

The Claimant's case was that he had sustained multiple injuries in the accident. All the injuries were accepted, save for an ongoing mid-back injury. The issue at Trial was whether there was any causative link to the accident. During closing submissions, Counsel for the Defendant invited the Judge to find that the Claimant had been fundamentally dishonest, thereby triggering Section 57 of the Criminal Justice and Courts Act 2015 to dismiss the Claimant's entire claim. The Trial Judge accepted these submissions and dismissed the Claimant's claim.



The Claimant was given permission to appeal on three grounds:

(1) Procedural fairness: There had been inadequate notice of the allegation of fundamental dishonesty.

(2) The Judge had wrongly reversed the burden of proof.

(3) The Judge was led into error, or was wrong, in relation to each of the factors upon which he based his decision that the Claimant was fundamentally dishonest.

The Court held:

(1) It was in the interests of justice that a Claimant should be given adequate warning of and an opportunity to deal with the possibility of a finding of fundamental dishonesty. No express notice was given to the Claimant in advance of Trial. The Defendant had merely put the Claimant to strict proof. Correspondence which asserted that the claim was *"exaggerated and unreasonable"* was not sufficient to equate to allegations of fundamental dishonesty. A claim that is unreasonable is not necessarily dishonest, it may be misconceived. The basis upon which the dishonesty was alleged to have arisen should have been made clear. The Defendant had refused to provide any particulars of dishonesty prior to Trial, despite the difficulties that the Claimant, as an unrepresented litigant, would face. At Trial it was never asserted that the Claimant was being dishonest about the onset of symptoms. He was merely asked whether he had in fact suffered the pain which he now alleged. There was, therefore, a serious procedural irregularity in that the Claimant had not been afforded adequate notice.

(2) It could not be said that the Judge had been plainly wrong in the application of the burden of proof. The Judge had not relied on the burden of proof to resolve an issue in favour of either party.

(3) There were substantial errors in respect of the three matters relied upon by the Judge in concluding that there was fundamental dishonesty (an error in the Special Damages Schedule, the reasons behind the non-disclosure of a radiological report and the Claimant's reaction to being challenged in relation to his medical records). That conclusion was mainly wrong and could not stand.

The Claimant's appeal was allowed.

For further information on any of the above cases, please contact:

Amanda Evans at **amandae@dolmans.co.uk** or
Judith Blades at **judithb@dolmans.co.uk**

DOLMANS
SOLICITORS

DOLMANS

TRAINING OPPORTUNITIES

At Dolmans, we want to ensure that you are kept informed and up-to-date about any changes and developments in the law.

To assist you in this, we can offer a whole range of training seminars which are aimed at Local Authorities, their Brokers, Claims Handlers and Insurers.

All seminars will be tailored to make sure that they cover the points relevant to your needs.

Seminars we can offer include:

- Apportionment in HAVS cases
- Bullying, harassment, intimidation and victimisation in the workplace – personal injury claims
- Conditional Fee Agreements and costs issues
- Corporate manslaughter
- Data Protection
- Defending claims – the approach to risk management
- Display Screen Regulations – duties on employers
- Employers' liability update
- Employers' liability claims – investigation for managers and supervisors
- Flooding and drainage – duties and powers of landowners and Local Authorities for drainage under the Land Drainage Act 1991. Common law rights and duties of landowners in respect of drainage
- Flooding and drainage – duties and powers of Highway Authorities for drainage and flooding under the Highways Act 1980. Consideration of case law relating to the civil liabilities of the Highway Authority in respect of highway waters
- Highways training
- Housing disrepair claims
- Industrial disease for Defendants
- The Jackson Reforms (to include : costs budgeting; disclosure of funding arrangements; disclosure of medical records; non party costs orders; part 36/Calderbank offers; qualified one way costs shifting (QWOCS); strikeout/fundamental dishonesty/fraud; 10% increase in General Damages)
- Liability of Local Education Authority for accidents involving children
- Ministry of Justice reforms
- Pre-action protocol in relation to occupational disease claims – overview and tactics
- Public liability claims update

If you would like any further information in relation to any of our training seminars, or wish to have an informal chat regarding any of the above, please contact our Training Partner, **Melanie Standley** at **melanies@dolmans.co.uk**