

16 December 2016

Disease Brief

Welcome to the latest edition of Disease Brief.

Headlines in this edition include:

- Ministry of Justice to announce its discount rate decision
- Consultation to increase the small claims limit
- Review to extend the fixed recoverable costs regime
- The civil courts structure review: removing the 'A' from 'ADR'
- Transforming the Scottish civil justice system
- Decline of noise-induced hearing loss workplace cases over last decade
- Mesothelioma: multiple drugs trials and specialist service for military personnel
- U-turn on plans to delete company records
- The Third Parties (Rights against Insurers) Act 2010: in force from 1 August 2016

Please see our market insights article for further details.

As always, we hope you enjoy reading this edition and welcome your feedback.

Philippa Craven
philippa.craven@kennedyslaw.com

Partner

Disease Brief December 2016: market insights

For more information please contact:

Philippa Craven philippa.craven@kennedyslaw.com

A summary of key developments including the discount rate review, raising the small claims limit, review of fixed recoverable costs, proposals for transforming the justice system, justice reforms in Scotland, decline of noise-induced hearing loss workplace claims, developments in mesothelioma, plans to delete company records and the Third Parties (Rights against Insurers) Act 2010.

Discount rate review: decision expected January 2017

The Ministry of Justice will announce by the end of January 2017 the results on whether to change the discount rate. The decision follows the legal action taken by the Association of Personal Injury Lawyers (APIL) challenging the delay in providing a conclusion to the review. Kennedys has urged the government to ensure its decision reflects its own research that personal injury claimants do not simply put their damages into low-risk investments. The earlier research also recognised that even a small reduction in the rate would have a significant impact on public bodies and insurers.

Related item: <http://www.kennedyslaw.com/news/kennedys-urges-government-to-reflect-reality-of-investment-in-discount-rate-decision/>

For more information please contact:

Christopher Malla; christopher.malla@kennedyslaw.com

Reforming the claims process: small claims limit

The Ministry of Justice has published its long anticipated consultation into reforming whiplash claims, which goes beyond the motor space with the proposal to raise the small claims limit for all personal injury claims to £5,000. While the measures are aimed at tackling whiplash claims, the government is also looking to gather views that affect the wider personal injury space including early notification, rehabilitation and recoverability of disbursement. The consultation closes on 6 January 2016.

For more information please contact:

Deborah Newberry; deborah.newberry@kennedyslaw.com

Related item: <http://www.kennedyslaw.com/article/whiplash-consultation-full-steam-ahead/>

Lord Justice Jackson to review extension of fixed recoverable costs

HM Judiciary has announced that Lord Justice Jackson will lead a review of fixed recoverable costs. The review's recommendations will help to inform a government public consultation on reforms to extend fixed recoverable costs to further areas of civil litigation. The terms of reference include consideration of the types and areas of litigation in which such costs should be extended, and the value of claims to which such a regime should apply. A consultation on the review is open until 16 January 2017. Jackson LJ is to submit his report by 31 July 2017.

For more information please contact:

Martin Cox; martin.cox@kennedyslaw.com

Related item: <http://www.kennedyslaw.com/article/fixed-recoverable-costs-mixed-news-for-defendants/>

Transforming the justice system

The Ministry of Justice has published "Transforming our Justice System", a paper proposing approximately £1 billion of reforms to the justice system to meet the aim of automating and digitising the entire process of civil money claims in the civil courts by 2020. The proposals seek to speed up resolution by replacing paper and post with digital working and to look at options to extend fixed recoverable costs much more widely. The consultation closed on 27 October 2016.

For more information please contact:

David Bywater; david.bywater@kennedyslaw.com

Civil courts structure review: final report published

The final report of Lord Justice Briggs' Civil Courts Structure Review was published on 27 July 2016. His key recommendation is the creation of a three-stage online court, intended to deal with all claims up to £25,000. Briggs LJ told the Chartered Institute of Arbitrators' mediation symposium that his recommendation for the online court will bring alternative dispute resolution (ADR) 'into the mainstream' of civil dispute resolution - removing the 'A' from 'ADR'.

For more information please contact:

Mark Burton; mark.burton@kennedyslaw.com

Scotland: pre-action protocol becomes compulsory

The compulsory pre-action protocol became compulsory in Scotland on 28 November 2016. The protocol will replace the voluntary version and apply to most pre-litigation personal injury claims up to the value of £25,000. Earlier on 6 September 2016, the Scottish government announced its Programme for Government 2016-17. Proposed legislation includes the Expenses and Funding of Civil Litigation Bill, which will include provisions to introduce sliding caps for

success fees in personal injury and other civil actions, allow damages-based agreements and introduce qualified one-way costs shifting for personal injury cases and appeals.

For more information please contact:

Rory Jackson; rory.jackson@kennedyslaw.com

Noise-induced hearing loss (NIHL): decline in cases over last decade

The latest estimates published by the Health and Safety Executive state that an estimated 20,000 people working during last year suffered from NIHL. Overall, the cases of NIHL claims has declined over the past decade. 100 new claims were submitted to the Industrial Injuries Disablement Benefit Scheme, compared to 130 and 120 in 2014 and 2013, respectively. The findings are based on data from the Labour Force Survey. Other estimates from the Survey show the total number of cases of work related stress, depression or anxiety in 2015/16 was 488,000 cases, a prevalence rate of 1,510 per 1000,000 workers. The estimated number and rate have remained broadly flat for more than a decade.

For more information please contact:

Cameron Clark Cameron.clark@kennedyslaw.com

Mesothelioma: multiple drugs trials

The Combinations Alliance has announced that is exploring new combinations of multiple drugs for mesothelioma. The Alliance, in conjunction with Cancer Research UK, brings together UK researchers and drug companies from around the world to explore new combinations of cancer drugs. The Alliance aims to increase treatment options for patients as well as tackle drug resistance.

Meanwhile, the government has awarded £379,000 funding to Mesothelioma UK to establish a specialist military information, advice and support service for military personnel and veterans who have been affected by mesothelioma.

For more information please contact:

Philippa Craven philippa.craven@kennedyslaw.com

Companies House: U-turn on plans to delete records

The government announced on 29 November 2016 that it would maintain the status quo for the length of time public records are retained for dissolved companies at Companies House. It had been proposed that the length of time would be reduced from 20 to six years. There was concern that this would cause difficulties for insurers and claimants alike, particularly in occupational disease and fraud cases, where historic company records can be a vital part of the investigations in long tail claims.

For more information please contact:

Lorna Henderson; lorna.henderson@kennedyslaw.com

Third Parties (Rights against Insurers) Act 2010

The Third Parties (Rights against Insurers) Act 2010 came into force on 1 August 2016. The provisions of the Act make it easier for a third party to bring a claim against an insurer when the insured has become insolvent. The key change is that the third party will only have to issue one set of proceedings, against the insurer. It will then ask the court to make declarations both on the insured's liability to the third party and the insurer's liability under the policy. The Act replaces the Third Parties (Rights against Insurers) Act 1930.

For more information please contact:

Michael Hogg; Michael.hogg@kennedyslaw.com

Related item: <http://www.kennedyslaw.com/article/the-third-parties-rights-against-insurers-act-1930-is-finally-coming-into-force/>

Disease Brief: latest decisions December 2016

For more information please contact:

David Bywater; david.bywater@kennedyslaw.com

A round up of recent court decisions raising issues relating to contribution in asbestos cases, latent damage in noise-induced hearing loss cases, duty of care in mesothelioma cases and economic loss in the context of workplace safety.

Asbestos: contribution

Carder v University of Exeter [29.07.16]

The claimant suffered from asbestosis whilst employed as an electrician with four former employers. The defendant was responsible for 2.3% of the claimant's overall exposure to asbestos dust. The medical expert found that the defendant's contribution was so small it made no difference to the claimant's condition; the defendant therefore argued that it could not have made a material difference to any injury. The court found the defendant liable.

On appeal, the Court of Appeal unanimously found that although a contribution of 2.3% was 'very small', the defendant could not escape the claim by arguing that its contribution was de minimis.

For more information please contact:

Cameron Clark Cameron.clark@kennedyslaw.com

Noise-induced hearing loss: latent damage

Mark Ross v Lyjon Limited [23.09.16]

The claimant pursued the defendant for alleged noise exposure whilst in his employment as an electrician. In 1993, the year after he left the defendant's employment, the claimant had undergone an audiogram, which both experts agreed showed no hearing loss. Both experts agreed that a second audiogram in 2011 did show characteristics of NIHL. The claimant argued that the 1993 audiogram was unreliable, and in the alternative, that damage to hearing can be latent and was caused in part by his former employer (even though the damage was not shown on the 1993 audiogram).

The Liverpool County Court dismissed the claimant's case, stating that: (1) it was not up to the defendant to show that the 1993 audiogram was reliable; it was up to the claimant to prove that it was unreliable, and he was unable to do so. (2) Although there was a possibility of latent damage occurring the claimant had fallen well short of establishing it. The court appeared concerned by the possibility that

discarding the conventional method of diagnosis (audiograms) would open the floodgates indicating that this had 'the potential to send shockwaves through the insurance industry'.

For more information please contact:

David Bywater; david.bywater@kennedyslaw.com

Mesothelioma: duty of care

Smith v Portswood [22.04.16]

The claimant was employed by the defendant as a joiner from 1973 to 1977. Before his death from mesothelioma in 2015, he alleged that he had been exposed to asbestos when involved in the manufacture of fire doors and that the defendant had breached its duty of care to him by exceeding the asbestos dust concentration limits under the Factories Act 1961.

Having established that the claimant only worked occasionally on fire doors containing asbestos, the court decided that the claimant was unlikely to have been exposed to asbestos fibres exceeding the concentration limits set out in the relevant standard (1970 Factories Inspectorate Technical Date Note 13). Where the exposure had occurred many years earlier, it is not for a defendant to show that such a risk was not reasonably foreseeable; it is for a claimant to prove negligence. Given the prevailing state of knowledge of the risks associated with working with asbestos, the claimant could not show on the balance of probabilities that the defendant had breached its duty of care in exposing the claimant to asbestos fibres.

For more information please contact:

Philippa Craven philippa.craven@kennedyslaw.com

Workplace health and safety: economic loss

Greenway v Johnson Matthey [28.04.16]

A number of employees were exposed to platinum salts by the defendant. Workplace testing revealed that the claimants had become sensitised, which was the first step towards developing a platinum allergy. None of the employees developed an allergy, but under a trade union agreement, the claimants were either moved away from the work or left their employment with an *ex gratia* payment.

The claimants brought a claim for loss of earnings as a result of the exposure. The claim failed at first instance and on appeal. The platinum sensitisation was deemed not sufficiently harmful in itself to lead to an actionable injury. Further, the court decided that a duty of care requiring an employer to protect an employee from economic loss could not be implied into contracts of employment: the steps taken by the defendant were to avoid physical harm, not economic harm. The defendant had made *ex gratia* payments and it was not fair for it to have any further responsibility for its employees' financial welfare.

For more information please contact:

John Mackenzie; john.mackenzie@kennedyslaw.com

E-cigarettes: a smokescreen for greater problems?

Nicotine is the addictive element of tobacco, but is not the element that causes most harm. Whilst quitting smoking is regarded as the best option for smokers, pure nicotine products, such as electronic cigarettes (e-cigarettes), are a recognised option to help smokers cut down or stop smoking. 2.8 million adults now use e-cigarettes in the UK, up from 700,000 in 2011 (Source: Action on Smoking and Health (ASH)). Marketed as a safer source of nicotine, are e-cigarettes risk-free, especially when it comes to minors (young people)?

Health concerns

Concerns exist about health risks, especially from long-term use, and of associated product liability claims arising. The lack of regulation and research to date has also been of concern.

Public health experts are worried that e-cigarettes may increase nicotine addiction and tobacco use in young people, with the marketing of flavours explicitly targeting them a particular concern. The concern is that they could be a gateway into tobacco use, although research is limited. In the UK, 4% of 11-18 year olds who have tried e-cigarettes (21%) had never smoked tobacco. (Source: ASH)

The current drive for technology means that new products often reach the market quickly. This should be of concern if insufficient time has been allowed for research and adapting any applicable regulation and poses a health risk.

For instance, even if the harmful ingredient of, say, nanoparticles presents a health risk to only 0.1% of the people who use e-cigarettes, that would be a significant number of people potentially at risk over time. Similarly, whilst vaping is taken by most experts to be much safer than smoking, that does not mean that its long term use is necessarily 'safe'.

The extent and nature of the ill health effects of e-cigarette use by young people may take time to emerge. How might such damage be caused? E-cigarettes deliver nanoparticles that can trigger inflammation and are linked to asthma. Among youths, risks involve accidental nicotine exposure, including poisoning by ingestion or inhalation. In children, exposure to Propylene Glycol (PG) may exacerbate or induce rhinitis, asthma, eczema and allergic symptoms; or increase the risk of asthmas, bronchitis and other inflammatory pulmonary disease. A thermal breakdown of solvents in the e-liquid can transform into carbonyls, including formaldehyde - a known carcinogen. Research also suggests that e-vapours may make MRSA harder to fight.

Regulation

Until now there has been little regulation, with e-cigarettes regulated only as consumer products. Change does now appear afoot. Transport for London has banned smoking and vaping, and in June 2015, the Welsh Government announced planned legislation to extend the ban on public smoking to include electronic cigarettes.

From 1 October 2015, new legislation in England and Wales makes it illegal to smoke in a vehicle carrying someone who is under 18. Whilst the new laws do not apply to e-cigarettes, it is also now illegal for retailers to sell e-cigarettes or e-liquids to a minor and for adults to try to buy e-cigarettes (or tobacco products) for someone under 18. The UK Tobacco and Related Products Regulations 2016 came into force on 20 May 2016, which introduce requirements for e-cigarettes and refill containers; bringing e-cigarettes under the control of the Medicines and Healthcare Products Regulatory Agency (MHRA). From 20 May 2016 onwards, producers of new e-cigarette products will need to submit a notification to the MHRA six months in advance for approval. Producers of existing products have until 20 November 2016 to submit a notification. Going forward, there will be a greater emphasis on producers to report concerns about safety and risk to human health.

Regulation and research is key to providing certainty to insurers surrounding the long term risks associated with the exposure of young people and e-cigarettes. The product's warnings must state it can be addictive or harmful.

Insurers and manufacturers should keep up-to-date with the risks and regulations in this area, including the potential long term implications for young people and provide suitable warnings as appropriate.

For more information please contact:

John Mackenzie; john.mackenzie@kennedyslaw.com

Karishma Paroha; karishma.paroha@kennedyslaw.com

Mesothelioma: still under the spotlight

For those dealing with mesothelioma litigation, there has been a period of judicial calm since the enactment of the Mesothelioma Act 2014 and the decision of the Supreme Court in *Zurich Insurance PLC v International Energy Group* [2015] <http://www.kennedyslaw.com/casereview/mesothelioma-justice-for-all/>. In the medical and research world, however, there is much to talk about.

Kennedys were delighted to attend a seminar at the House of Lords on 1 November 2016, jointly arranged by the Association of British Insurers (ABI) and the British Lung Foundation. Leading doctors, professors and bio-chemists spoke about how the very nature of a mesothelioma tumour makes it difficult to eradicate and explained the steps being taken in research. There was considerable optimism about genuine progress and the research being undertaken towards treating the disease.

Sadly, while the prospect of an effective treatment may now be real, the scale of the problem does not seem to be met by a corresponding optimism. In his presentation to the Lords, Sir Anthony Newman-Taylor, Director of Research and Development in National Heart and Lung Institute, Imperial College, spoke about the prospect of a further 50,000 cases in the UK alone, with claims continuing until the 2050s. If, as predicted, the current presentation is not a legacy issue, UK Plc and its insurers face an ongoing and significant cost exposure.

Research

Despite the optimism alluded to above, research to date has not found a cure. In line with our understanding, it is unlikely that a complete cure will ever be found. Instead, what the scientific community is looking at are ways to treat the tumour so that it becomes manageable and enables victims to live longer and with a greater quality of life.

One of the leading experts informed the Lords' forum that progress in immunotherapy can be likened to training a person's immune system to react in the same way as a sniffer dog is trained to sniff out a particular drug. In the field of radiotherapy new techniques are being trialled where targeted radiotherapy seeks to eradicate a diseased area of tissue without doing the same to the healthy tissue in its vicinity. The forum was advised that it is hoped that further information on the progress and success of these current trials will be forthcoming in 2017. We await the outcome with interest and hope.

Funding

The last government announced a £5 million contribution to the development of a National Mesothelioma Centre. This, coupled with the funding already being

received from the ABI and insurers Aviva and Zurich, has enabled a considerable injection of much-needed cash into this research. A philanthropic businessman, Victor Dahdaleh, has also matched the government's £5 million.

A changed litigation landscape?

Do these positive signs for mesothelioma sufferers translate to a positive outcome for insurers and their insureds? In particular, will we see:

- Claimants looking for provisional damages in the first instance to see how long and how effective new treatments are?
- A decrease in the level of damages in respect of nursing care and aids and equipment as more effective treatment relieves the need for care?
- New heads of loss claiming for these potential new treatments and therapies to be provided privately if, as is suspected, the initial costs of treatment will be largely prohibitive to the average sufferer?

While questions remain, it is evident that the mesothelioma space continues to move, bringing with it ongoing considerations for all involved.

For more information please contact:

Philippa Craven philippa.craven@kennedyslaw.com

Related item: <http://www.kennedyslaw.com/casereview/mesothelioma-justice-for-all/>

Looking forward: where next for occupational disease?

As we head towards a new year, we look at the issues that have shaped occupational disease litigation over the past 12 months and look ahead to what the next 12 months have in store for us.

Noise

The scale of the problem with regard to noise induced hearing loss (NIHL) claims is well known. In the past few years, insurers and other compensators, including large corporate and public bodies, have experienced a significant rise in the number of claims being submitted for NIHL. Whilst claims notified reached a peak in 2013 following the introduction of the Jackson-led civil justice reforms, claims up until 2014 have remained high with the estimated number of claims notified in 2014 39% higher than in 2012.

The extent of the problem was reflected in the final report of the Insurance Fraud Taskforce (published in January 2016), noting that the figures for total compensation in NIHL claims rose from £83 million in 2010 to £360 million in 2014.

However, the news is not all bleak. According to data from the Compensation Recovery Unit (CRU) NIHL claims have fallen significantly in the past 12 months with a drop of 30% in the number of reported claims in 2015. There are various reasons for this decrease.

Working in collaboration with our clients and other defence lawyers, we have identified the key fraud indicators arising out of deafness litigation. By adopting a robust stance against suspected fraudulent activity, a significant number of claims are not now being pursued beyond the first letter of claim, or are not proceeding to litigation after initial investigations.

For now, while the current tidal wave may be ebbing, we believe that issues remain within occupational health surveillance in industry that continue to expose compensators to a claims risk. In particular, inadequate hearing monitoring and testing exposes employees to the risk of injury. Unless steps are taken to review and redress deficiencies now, there will be another surge in years to come.

Chest

Mesothelioma and risks of e-cigarettes are just two aspects of occupational chest disease.

There is a rising incidence in the numbers of reported chronic obstruction pulmonary disease patients, where smoking is not a main or linked cause. We expect to see a rise in the numbers of claims being brought in the future.

Fumes and dust are known irritants. Many of the risks are known and industry acts upon them to minimise any impact. For instance, there remains a high number of claims arising from diesel fume exposure that are being brought. The Institution of Occupational Safety and Health (IOSH) reported in September 2014 that there are 650 recorded deaths each year as a result of lung or bladder cancer. In response, IOSH has introduced its 'No Time to Lose' campaign, which aims to get carcinogenic exposure issues more widely understood and help businesses take action.

Nanotechnologies - based on the application and use of carbon nanotubes - have also raised speculation around adverse health conditions similar to those seen in asbestosis.

Stress

Health and Safety Executive statistics have not shown any major changes in the number of occupational stress claims being recorded in recent years. Nevertheless, concern remains that these claims will increase in the next few years. We live in uncertain times politically and economically. The impact of Brexit may result in our workforce being put under greater pressure to deliver more for less, which may in turn, create increased levels of stress. Where employees are able to demonstrate a link to employment and any recognised psychiatric injury, claims may follow.

Hand-arm vibration

Employers need to remain alert to the risks of hand-arm vibration (HAV) claims from the use of vibratory tools. In addition to the risk of a personal injury claim, a number of health and safety prosecutions have been made in the past 12 months against companies' safety failings following reported HAV claims. With the introduction of the new Definitive Guideline of the Sentencing Council on Health and Safety in February 2016, the financial impact of such claims poses significance to UK Plc. Increased fines higher insurance premiums to reflect an increased claims risk and the cost of the claims themselves, mean that employers need to remain vigilant over the workforce and maintain stringent risk management processes.

Contact: Philippa Craven

Related articles: <http://www.kennedyslaw.com/article/emerging-risks-report-2016/>