THE LOST YEARS

Theo Huckle QC and Christopher Johnson report on an interesting recent living mesothelioma claim

In *M v MOD & Serco Limited*, the claimant's case was that he was tortiously exposed to asbestos while employed in the defendants' warehouse from 1983-1997 (employment TUPE transferred from D1 to D2 in around 1987).

The facts

The alleged exposure was disputed. The claimant's case was that he was exposed to asbestos dust from brake pads stored in boxes on shelves or loose in bins. As well as getting dust on his hands when handling the pads, the claimant said he was required to sweep these bins and shelves, causing visible clouds of dust.

On the defendant's case, the claimant experienced very low exposure, with brake pads being boxed or in sealed plastic bags, and handled only very occasionally by the claimant.

Prior to his illness, the claimant provided care for his disabled wife. He sought damages in respect of her care for the rest of her life. The claimant also sought damages in respect of immunotherapy treatment that he intended to undertake, but had not yet begun.

The interlocutory dispute

Following the deadline for the exchange of witness evidence, the claimant, by chance, encountered D2's former health and safety manager, who agreed to give evidence on his behalf.

The evidence supported the claimant's factual case, as well as supporting a systems case against D1 under the Control of Asbestos at Work Regulations 1987 ('the 1987 Regulations').

The claimant applied for permission to serve the statement out of time and to amend the particulars of claim so that breach of the 1987 Regulations was pleaded against D1 as well as D2, and also for a split trial, so that further evidence in relation to immunotherapy could be obtained.

The claimant could not afford the preliminary assessment for that treatment, but very much wanted to undertake it in the hope of prolonging his life.

The application was heard initially by Master Gidden in half an hour over the telephone, and was rejected. The claimant appealed. The appeal was allowed.

May J, whose decision is reported at [2017] EWHC 1752 (QB), permitted the claimant to rely on the new witness statement and to amend the particulars of claim.

The application for a split trial was denied, although the judge specifically anticipated that the trial judge would, if finding for the claimant on liability, be able to consider an application to split off the claim for immunotherapy assessment from the rest of the quantum, to enable other awards to cover those costs initially at least; or else that the trial listing allowed insufficient time for quantum to be determined, so that those assessment costs might instead be covered by an appropriate interim payment pending the adjourned quantum hearing.

The settlement

Shortly after the decision of May J, the claimant accepted £500,000 in full and final settlement of his claim. The settlement leaves a number of interesting legal points unresolved. These are discussed below.

Liability – the proper interpretation of the 1987 Regulations

The main legal issue in relation to liability concerned the proper

interpretation of the 1987 Regulations, including whether or not it is a defence to liability pursuant to Regulation 8 that asbestos-related injury was not a foreseeable consequence of the exposure.

It is right to note that this would in any event have depended on the judge's findings of fact as to the level of exposure in this case, and state of knowledge after the Advisory Committee Report of 1979 and 1983-4 when guidance EH10 was twice revised, and other specific and extremely cautious guidance followed (including 'Working with Asbestos - A Guide for Supervisors and Safety Representatives' in 1983 and 'Asbestos Alert for the Garage Workers' in 1985, both of which denied that the regulatory hygiene standards could be considered safe).

However, we consider the matter of law on the assumption that the defendants could perhaps make a credible case on lack of knowledge.

Regulation 8 provides:

> 8. – *(1) Every employer shall –*
>
> *(a) prevent the exposure of his employees to asbestos;*
>
> *(b) where it is not reasonably practicable to prevent such exposure, reduce to the lowest level reasonably practicable the exposure of his employees to asbestos by measures other than the use of respiratory protective equipment.*

So far as we are aware, there is no authority on the proper interpretation of Regulation 8 (or the 1987 Regulations at all). This is perhaps itself testament to the previously generally held view that there was likely to be little in the way of defence under them, certainly not based upon 'unknown risks'.

The obligation to prevent or reduce exposure certainly arises regardless of whether or not it was foreseeable that such exposure would result in harm (here contrast the Asbestos Regulations 1969 where the obligations only arise in respect of 'dust consisting of or containing asbestos to such an extent *as is liable to cause danger to the health* of employed persons' (Regulation 2(3))).

Naturally, a defendant may argue that foreseeability should be taken into account by a court considering what is 'reasonably practicable': *Baker v Quantum Clothing* [2011] UKSC 17. The extent to which this is correct is yet to be determined. Clearly with the continuing rise of mesothelioma (currently running at perhaps a plateau of c. 2,500 cases / fatalities pa – see http://www.hse.gov.uk/statistics/causdis/mesothelioma/index.htm) and the related claims, and buoyed up by their controversial successes in the *Williams* and *Macarthy* line of cases (*Williams v Birmingham Univ.* [2012] PIQR P4 CA; *Macarthy (Heward) v M&S* [2014] EWHC 3183 (QB) Pittaway QC), the liability insurers are keen to take any available point.

However, as an a *priori* question of liability, it is very difficult for the employer who (as here) has done nothing to assess the risk of asbestos exposure, to avoid the necessary breaches of Regulations 4 and 5 (prior identification and assessment):

Identification of the type of asbestos

> 4. *An employer shall not carry out any work which exposes or is liable to expose any of his employees to asbestos unless either—*
>
> *(a) before commencing that work, he has identified, by analysis or otherwise, the type of asbestos involved in the work; or*
>
> *(b) he has assumed that the asbestos is crocidolite or amosite and for the purposes of these Regulations has treated it accordingly.*

Assessment of work which exposes employees to asbestos

> 5.—*(1) Subject to paragraph (3), an employer shall not carry out any work which exposes or is liable to expose any of his employees to asbestos unless he has made an adequate assessment of that exposure.*
>
> *(2) Without prejudice to the generality of paragraph (1), that assessment shall—*
>
> *(a) subject to regulation 4, identify the type of asbestos to which employees are liable to be exposed;*
>
> *(b) determine the nature and degree of exposure which may occur in the course of the work; and*
>
> *(c) set out the steps to be taken to prevent or reduce to the lowest level reasonably practicable that exposure.*

If the requirement to act at all under the Regulations was only triggered by excess of the action limits (hygiene standards), it is difficult to see the need for the distinctions drawn by Regulation 6 (notification):

> 6.—*(1) This regulation shall apply to any work in which an employee is or is liable to be exposed to asbestos unless—*

(a) the extent of that exposure neither exceeds nor is liable to exceed the action level; or

(b) the employer is licensed under regulation 3(1) of the Asbestos (Licensing) Regulations 1983(2) ...

(2) An employer shall not carry out any work to which this regulation applies for the first time unless he has notified the enforcing authority in writing of the particulars specified in Schedule 1 ...

Further, the information obligations under Regulation 7 do not depend on notions of reasonable practicability:

Information, instruction and training

7. Every employer shall ensure that adequate information, instruction and training is given to his employees—

(a) who are or are liable to be exposed to asbestos so that they are aware of the risks from asbestos and the precautions which should be observed;

(b) who carry out any work in connection with the employer's duties under these Regulations, so that they can carry out that work effectively.

In this case, only an argument that at low levels it was not foreseeable that the hygiene standards/action levels would be exceeded lay for the defendants, yet neither of them had made any attempt to identify what asbestos was in the workplace or assess the nature and extent of exposure; nor had Mr M or his colleagues ever been warned (as late as 1997 no less) even as to possible asbestos risks. This is surely just the sort of behaviour that the 1987 regulations were intended to condemn. It was a courageous defence, as Sir Humphrey would have said, and in the end it was not tested.

Quantum – the claim for care and assistance during the lost years

The claim included sums in respect of the gratuitous care provided by the claimant to his wife. Undoubtedly, the claimant was entitled to damages for the period up to his death during which he will be unable to care for his wife as a result of his mesothelioma (*Lowe v Guise* [2002] EWCA Civ 197). In relation to this period, the dispute was only as to the amount of damages payable.

The claim for gratuitous care during the 'lost years' posed more difficulty. In *Phipps v Brooks Dry Cleaning Services Ltd* [1996] PIQR Q100, the Court of Appeal held that the claimant could not recover damages in respect of the DIY or gardening he would have carried out gratuitously during the lost years. The reason given by Stuart-Smith LJ was that the claimant 'has not lost anything of value in performing work which would save him expense which he will never incur.' This reasoning extends to claims for gratuitous care which, pursuant to *Lowe v Guise*, are justified on the basis of the loss suffered by the claimant care giver, not the loss suffered by the person in receipt of the care.

In contrast, pursuant to the Fatal Accidents Act, the claimant's wife will be entitled, on his death, to a claim for loss of dependency, including the loss of gratuitous care.

Although the rationale for the *Lowe v Guise* claim and the Fatal Accidents Act claims differ, the present position - whereby a claimant cannot recover for gratuitous care in the lost years in an action brought before his death - in our view creates what the 'Clapham omnibus man' would almost certainly regard as a gap in our law.

Is it possible to adjourn the assessment of the lost years claim?

The legal position outlined above left the claimant with two options: (1) to appeal *Phipps* (an appeal that would have had to proceed to the Supreme Court); or (2) to seek to adjourn the assessment of the 'lost years' gratuitous care damages until after his death.

The safer option (albeit an unsatisfactory one for a claimant seeking to ensure financial security for his family following his death) was to adjourn the lost years aspect of the care claim, and HHJ Walden-Smith, sitting as a deputy, did just this in the recent case of *Andreou v Booth Horrocks* 2017] EWH 174 (QB).

However, the decision in *Andreou* is problematic, and contrary to other authority - though of even level of course, as HHJ Walden-Smith was sitting in the High Court. In *Thompson v Arnold* [2007] EWHC 1875 QB, Langstaff J specifically denied the possibility of an adjournment, citing *Read* (1867-68) L.R. 3 Q.B. 555. Neither of these cases were cited in *Andreou*, and we have been unable to find any more recent authority contradicting Langstaff J.

Advice for claimants

There is authority that a claim for gratuitous services in the lost years will not be recoverable unless made after the victim's death. However, waiting to bring a claim until the victim has died has obvious and significant drawbacks.

For the time being, claimants can take some comfort from the pragmatism shown in *Andreou*, as well as from the approach of defendants apparently willing, when settling claims, to include some money for gratuitous services after death (see this claim, and also *Crowther v Jones* LTLPI 22/04/09).

Periodical payments?

A further possibility for the living claimant is to use an award by way of periodical payment to cover 'his loss' *but payable for future periods for the benefit of his dependants*, as seems to be contemplated by CPR41.8(2):

> *41.8*
>
> *(1) Where the court awards damages in the form of periodical payments, the order must specify –*
>
> *(a) the annual amount awarded, how each payment is to be made during the year and at what intervals;*
>
> *(b) the amount awarded for future –*
>
> *(I) loss of earnings and other income; and*
>
> *(ii) care and medical costs and other recurring or capital costs;*
>
> *(c) that the claimant's annual future pecuniary losses, as assessed by the court, are to be paid for the duration of the claimant's life, or such other period as the court orders; and*
>
> *(d) that the amount of the payments shall vary annually by reference to the retail prices index, unless the court orders otherwise under section 2(9) of the 1996 Act.*
>
> *(2) Where the court orders that any part of the award shall continue after the claimant's death, for the benefit of the claimant's dependants, the order must also specify the relevant amount and duration of the payments and how each payment is to be made during the year and at what intervals.*

It is as yet not known whether this express provision in the rules, not presaged in the underlying amended Damages Act 1996, overcomes the difficulties identified in allowing to the living claimant awards intended for the benefit of dependants, and the authorities against; but one can perhaps expect that the court will apply the express provisions of even secondary legislation over its own previous view. If we interpret it correctly, this allows for an interesting mixing of the living claimant v dependency claim forms of action, when previously we have understood that 'never the twain shall meet'.

Quantum – the claim for potentially life-extending treatment

The claimant claimed for the cost of immunotherapy. He had no evidence of whether such treatment would be appropriate in his case. While the claimant may have succeeded in recovering the cost of a trial course of immunotherapy, it is likely that (without the results of that trial course) he would not have discharged his burden of proof in relation to the costs of the full treatment.

The claimant would have sought an adjournment of the immunotherapy issue. The law on whether or not an adjournment will be allowed is relatively unclear (contrast, for example, *A v National Blood Authority* [2002] Lloyd's Rep. Med. 487 and *Adan v Securicor* [2009] EWHC 394 (QB)), but it is thought that an adjournment was more likely than not to be granted in this case.

This is a controversial but fast moving area of medical intervention. There have, it is said, been notable successes in some cases, including apparently that of former President Carter, but, understandably, many physicians are sceptical. However, the chance of success is part of the balance, but far from determinative. We submit that the court only has to conclude that it is reasonable for an injured claimant to seek to undergo a particular form of treatment before allowing its full cost. Success is never guaranteed with any treatment.

We doubt whether treatment with even a small percentage chance of success in staving off the inevitable is likely to be denied by the court to a claimant whose early death is otherwise inevitable - and the fault of the defendant. For a more detailed consideration of the issues relating to claims for immunotherapy, see our article in the following edition of *PI Focus*.

Conclusions

This case provided interesting examples of novel issues arising in mesothelioma claims, as to:

a. nature and extent of liability under the Control of Asbestos at Work Regulations 1987, as to prior identification and assessment duties, information duties and reasonable practicability in prevention/minimising of exposure to asbestos;

b. claim for care of another during the 'lost years';

c. periodical payments to the living claimant to continue for the benefit of dependants post death;

d. immunotherapy claims – reasonableness of choice of treatment and cost of suitability assessment and treatment itself.

It is shame that these 'interesting' issues remain without authoritative resolution, and we look forward to further opportunities to test these points in other cases. Mr M understandably preferred to settle his case for a substantial sum, which would provide security for his disabled wife for the future, rather than suffer the stress of ongoing delays of adjournment required for those issues to be fully argued.

In mesothelioma cases that is likely to be a recurring obstacle for the lawyers and courts, unless a defendant is determined to fight liability altogether. For this reason, it may be more likely for them to be determined in cases of exposure prior to the 1980s, prior to the 1987 regulations, where 'low exposure' defences have achieved some recent success. Either way, we stand ready and willing on our little cab rank!

Theo Huckle QC is head of the Doughty Street clinical negligence, personal injury and product liability teams. Chris Johnson has recently joined these teams. See www.doughtystreet.co.uk/civil-expertise/clinical-negligence-and-personal-injury