Health&Safety news

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Tom Jones, head of policy at Thompsons, urges the government to "be bold" and scrap proposed changes to the small claims limit in the Civil Liability Act

A government that listens or a feeding frenzy for insurers?

IT'S BEEN almost five years since the Conservatives announced plans to increase the small claims limit for road traffic accident (RTA) and workplace claims from £1,000 to £5,000.

The increase for work accidents has since been reduced from £5,000 to £2,000.

> *Ninety per cent of those injured at work face having to fight insurers on their own... or will have to pay fees out of damages that, today, they would get in full*

Vulnerable road users' (VRU's) – cyclists, pedestrians, motorcyclists and horse riders – as well as children and protected people who bring a personal injury claim, have also been exempted entirely from any increase in the small claims limit.

The Civil Liability Act passed through Parliament in April 2020 but its implementation has been delayed - ostensibly by the Covid-19 pandemic - until at least April 2021. The delay gives time for the government to reflect on who is the real target of this Act – whiplash claims as they stated at the time – or is it really about limiting access to justice for others whose claims have nothing to do with whiplash?

The government has chosen to exempt VRU's, children and those under a disability from having to take on the might of the insurance industry on their own in their own time, but so far they seem unconcerned about the impact that the Civil Liability Act will have on those injured at work in England and Wales.

Ninety per cent of injured workers claims are worth less than the proposed increase to £2,000. Under these proposals 90 per cent of those injured at work face having to fight insurers on their own or, if they choose to instruct a lawyer to make sure they get the maximum, fair compensation, they will have to pay the lawyers' fees out of damages that, today, they would get in full.

Rip it up

The Johnson government appears willing to rip up a principle established for generations, that the person who caused the injury pays the compensation but also pays for the injured worker to get independent legal advice. The rule that those who are injured at work should get all the compensation for their injuries and all their losses without lawyers' fees being deducted will be a thing of the past.

Civil Liability Act

Since August 2019 an unprecedented alliance of Thompsons Solicitors, trade union USDAW, the Association of British Insurers (ABI), the Law Society and the British Safety Council has been making the case that Employers Liability (EL) and Public Liability (PL) claims aren't the same as RTA whiplash claims.

Unlike with whiplash claims, no one has said there is a problem with fraudulent EL or PL claims or a boom in them. In fact, the numbers are, thankfully, dropping due to better health and safety. Ministry of Justice figures show there were around 27,000 personal injury claims in the final quarter of 2019 – down five per cent on the previous quarter and the lowest level since 2011. Yet the government wants to reduce access to justice for those injured at work.

The government has promised that the whiplash reforms will result in lower motor insurance premiums. Putting to one side our doubts that there will in fact be any or any long term reductions in premiums, its noticeable that no insurer has said that it is necessary to include EL and PL in the small claims increase to deliver the reductions promised. In fact, it's clear that taking EL and PL out of the equation won't have any impact on the promised premium reductions, and the government has no need to attack claims by injured workers to deliver them.

> *"Why attack the rights of injured workers when there is no need to do so?"*

In Scotland, those injured at work get a lawyer – 'the polluter pays'. If the Prime Minister means it when he talks about a 'United Kingdom', a good place to start would be to have a system in place that means workers in England and Wales are offered the same legal protection and respect as those north of the border.

During the passage of the Bill much was said from the government benches about claims companies and cold calling yet taking away free legal representation will only see the claims management companies and their cold callers move in on injured workers.

Doubling the small claim's limit for employer's liability cases will place strains on an already creaking justice system, by increasing the number of unrepresented claimants. The RTA changes are significant in themselves and removing EL and PL claims will also make the route to RTA reform simpler and easier to deliver.

Here is a test for a government that got elected with lots of warm words about workers' rights being safe in their hands after Brexit (73 per cent of UK voters say the government must protect and enhance current workplace rights) and for a Prime Minister who has made much of his concern for voters in 'Red Wall' seats. Why attack the rights of injured workers when there is no need to do so?

A lawyer on their side

Excluding VRU's already means the cycling postie, bobby on the beat, courier delivery driver or teacher hurt walking with their class to an event will have a lawyer on their side to help them bring a claim and face no deduction for legal fees. Yet their colleague injured in the depot, in the station, the sorting office or the classroom will be treated differently and have to fight their claim on their own or face reduction in damages if they instruct a lawyer.

The fair answer, the one that all sides of the debate agree on, is to exclude EL and PL claims from the proposed small claims limit increase just as they are excluding VRU's.

Excluding EL and PL from these reforms is a get out of jail card for a government wanting to be seen to be delivering but not wanting to be seen as disadvantaging workers in the process (and the public still get to keep any motor insurance premium reductions).

So will the government back off from an increase from £1,000 to £2,000 in the small claims limit in workplace injury claims before it is too late, or will they carry on regardless and in doing so reveal how, for all the talk, workers' rights aren't safe in their hands?

Helen Tomlin, a specialist asbestos solicitor at Thompsons' Leeds office, discusses the "chaotic scenario" posed by cases focussing on low-level asbestos exposure

No level is 'low level'

THERE ARE two recent cases that highlight a potentially concerning precedent around the topic of 'low level' asbestos exposure: Bannister -v- Freemans Plc and Hemms -v- The Trustees of the Countess of Huntingdon's Connexion and Bath and North East Somerset Council.

The significant difference between the cases is that Bannister was a High Court decision and binding authority on other asbestos cases, whereas Hemms settled before trial, and therefore is not binding.

It is also worth noting that there is a Supreme Court decision in the case of **Sienkiewicz**, which is still useful law.

Both Bannister and Hemms dealt with the same point, and came to different decisions, which does have the potential to create uncertainty.

Bannister -v- Freemans Plc

Mr Bannister worked as a manager for the catalogue company, Freemans. His office was divided from others by a partition, which had a steel outer frame and an inner sheet. In around 1983, the company management sent round a memo stating that work would be carried out over the weekend to remove the partition inners, which were made of asbestos.

When Mr Bannister attended work on the Monday, he had dust all over his office. He recollected being able to taste it in his mouth, and he had to brush the dust from his desk. The following weekend, the partition inners were replaced with non-asbestos board.

Despite the memo stating that the infill boards were made of asbestos, the Judge found as fact that the partition infills were not asbestos and the case failed.

In rejecting the claimant's case, the Judge went on to make some very unhelpful comments, which have the potential to severely impact upon claims in the future.

Firstly, the defendant counsel tried to characterise these cases as "ultra-low level". Such a designation does not exist.

However, it was successful in that it led the Judge to query whether the level of exposure was "sufficient" to be held responsible in terms of both breach of the relevant legislation in place at the time, and to have caused a material increase in the risk of that person contracting mesothelioma in the future.

Secondly, the Judge disregarded much of the testimony from the claimant and his witnesses as unreliable, even though the defendant was unable to refute the claims that there was a memo identifying the board as asbestos.

The Judge found that he could not rely on the claimant's testimony because he had failed to mention the memo to either his treating doctors, or at the time of completing his Industrial Injuries Disablement Benefit (IIDB) application forms.

While commercial court decisions commonly have significant amounts of documentary evidence on both sides of the argument, asbestos cases rely almost entirely on memory and oral evidence.

Asbestos exposure

Thirdly, the Judge made some very unhelpful comments on the legal test for causation in mesothelioma cases. It has been a long-established line of authority, since the union backed test case of **Fairchild** – that Thompsons ran - that any defendant who can be shown to have materially increased the risk of a claimant contracting mesothelioma is held liable for 100 per cent of the damage.

This is because there is no "dose response" for asbestos exposure and mesothelioma, no link between the amount of asbestos exposure and either their risk of contracting mesothelioma, or the severity of that mesothelioma if they do contract it.

In Bannister, the Judge ignored this line of authority and came up with his own, two-pronged approach to causation.

Firstly, he said, there has to be an assessment of the risk of death. In Mr Bannister's case, the dose was calculated as 0.0004 f/ml years, which gave an annual risk of death of one in 50 million. The HSE generally states that a risk of one in one million is an acceptable risk of death.

Secondly, having established the level of risk of death, the Judge said that the relevant question for the court is whether that risk is "significant" and a "significant" risk would be a dose that the reasonable person, who knew the level of risk of developing mesothelioma, would be willing to accept, and which a medical practitioner, aware of the level of risk, would not worry about and, furthermore, would reassure a patient about.

Bannister is subject to appeal by the claimant.

Hemms -v- The Trustees of the Countess of Huntingdon's Connexion and Bath and North East Somerset Council

Mr Hemms' case exposure was even lower than Mr Bannisters. He was involved in mitring the corners of asbestos cement roofing sheets for a period of two days and the only witness was his son, who was 13 years old at the time.

In this case, the exposure was calculated at 0.0008f/ml, or 1 in 100 million risk of death.

Nonetheless, Mr Hemms settled out of Court.

What should be done about pursuing so-called "low-level" asbestos claims?

Defendants will use "low-level" cases to delay and defeat valid claims brought by deserving claimants. We are already seeing an increased focus on the IIDB and benefit application forms, and defendants seeking to make mileage in a defence of any discrepancies between

the information on the forms and court statements.

Anything that raises a question mark over the reliability of oral evidence is being used to avoid judgment being entered at the show cause hearing, a procedure established in the mesothelioma claims track precisely to speed up the judgment process and allow claimants early access to interim payments, typically of £50,000.

Defendants are also claiming they need further expert evidence and using that to delay progress. Given that part of most claims is for private treatments including immunotherapy not currently available on the NHS, claimants have a small window of opportunity to take advantage – and any delay reduces the chances of claimants being eligible.

With typical treatment costs at around £17,000 per cycle, and treatments being pursued every three or four weeks until they stop working, this offers defendant insurers the chance to save hundreds of thousands of pounds.

Low dose uncertainty

Low dose uncertainty is also being used to reduce settlement values in cases. If the defendants make an offer to a claimant who only has a very short life expectancy, which is below the correct settlement offer, they know many will just take the low offer rather than proceed to a full hearing – especially now the Bannister case has set a concerning precedent. All in all, this will lead to further savings for insurers.

The practical steps that claimant lawyers can take are very limited, unless and until the insurers decide to run another case to court that overturns the Bannister judgment, or the original judgment is overturned in the Court of Appeal.

Claimant solicitors cannot choose the cases that go to trial, it is in the hands of the defendants to settle or run a case and, if Bannister isn't given permission to appeal, or it is and the judgment of the lower court is upheld, it will remain a precedent that defendants can use to cause uncertainty.

Given the uncertainty, it is even more important that claimants are directed to specialist solicitors to avoid any errors in the preparation and handling of the next 'low dose' claim. Asbestos support groups have their own lists of local, specialist solicitors, and many of these firms are national presences with multiple offices, which means they can take a co-ordinated and strategic response to claims.

The national charity, Mesothelioma UK, has also recently appointed eight firms – including Thompsons Solicitors – that are recognised as specialists in the field of mesothelioma litigation.

It is also more important than ever that solicitors interview claimants immediately, get early access to HMRC employment histories, medical records and IIDB application forms, deal with any inconsistent evidence, and the statements relied on are detailed as to the nature, frequency and intensity of exposure.

Where cases are identified that it is considered that a "low dose" argument might be run and succeed, extra care needs to be taken in their preparation. Engineering evidence will be needed to assess the dose, and medical evidence will need to look at the links between the level of exposure and the increase in risk.

At the heart of the matter

Finally, we need to remember the claimants and the families at the heart of all this. This may be a tactical game to defendants but for those who went to work, were negligently exposed to asbestos, and have developed a life-limiting, terminal condition, it is no esoteric, theoretical question.

Our response cannot be to fight less but to fight smarter and harder, work more collaboratively, and push the litigation forward as fast as we can to protect the rights of the claimants to their compensation, and the financial security and treatment options that brings.

If we fight shy of pursuing low level claims the defendants control the narrative and then they will truly have won.

Ian Cross, a senior industrial disease solicitor at Thompsons, talks of the impact of hearing loss at work and the challenges of successfully pursuing these claims

Clear hearing at work

HANDLING CLAIMS for industrial disease has evolved over the years – but few have changed as much as those for noise induced hearing loss (NIHL).

NIHL is a hearing impairment that goes beyond its old-fashioned title of "industrial deafness". It is more than an inability to hear – it can include other conditions such as tinnitus; an often constant and irritating ringing or whistling in someone's ears.

In my experience, the most significant change is that they have gone from being – in most cases – fairly routine, to the situation now where they are almost always difficult, technical and contested.

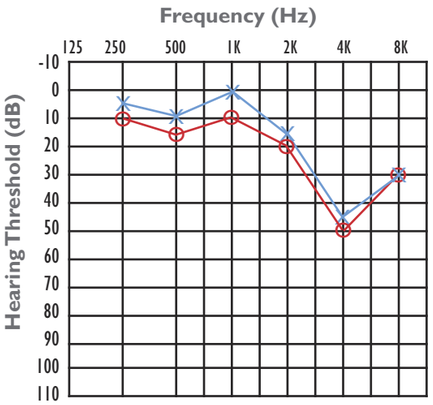
The Noise at Work Regulations came into force on 1 January 1990. They required employers to assess exposure to noise, to reduce the exposure and to provide hearing protection where noise was above 90 decibels.

Hearing protection was to be provided, if requested, where noise was above 85 decibels. This was accompanied by the provision of information to employees – to allow them to make an informed choice.

Before the 1990 Regulations, there was very little legislation about workplace noise levels, which meant that when the law came into force, many workers had already suffered hearing loss from noisy work environments. That meant that claims made on behalf of those already affected were often uncontested.

The general process was that the claimant would see a medical expert – known as an ENT surgeon – who would arrange a hearing test. This would produce an audiogram; a graph plotting the extent of the hearing loss across a range of frequencies.

The medical expert would look for an audiogram of a particular shape – a notch. If the notch looked right the expert would say it was probably noise induced. The insurers invariably settled.



This audiogram is one that would have been expected to lead to settlement

To begin with, the Noise at Work Regulations had a limited effect, and many workplaces were slow to implement the measures.

Many did, however, start to test the hearing of employees. A significant number of workers were found to have a hearing loss and put in claims – particularly in unionised workplaces.

Given the lack of regulation before, and the volume of claims that were being submitted, insurers, unsurprisingly, started to push back.

Test cases had already established that, in most instances, employers (and therefore insurers) were not liable for noise damage caused prior to 1963.

This year was accepted as the employers' "date of knowledge" after which they were expected to have known of the dangers of noise and to have taken steps to reduce them.

➲ The insurance company push back involved an increasingly forensic analysis of hearing loss claims, particularly a consideration of the levels of noise in the workplace and the exact shape of the audiogram – and the link between the two.

A very significant development occurred in 2000 when three medical experts (Coles, Lutman and Buffin) published a paper called "Guidelines on the diagnosis of noise-induced hearing loss for medico legal purposes".

These provided guidelines to medical experts when considering whether the shape of the audiogram did or did not indicate noise damage, bearing in mind the evidence of noise exposure.

For a few years after the paper was published, the guidelines did not have much impact, but they have since become more and more important. They have gone from being guidelines to, in the eyes of many, absolute rules.

As the guidelines depend upon evidence of noise levels and duration (a total noise dose – or "noise immersion level") it has become necessary to instruct an acoustic engineer.

At least one, and sometimes more than one, engineer would be instructed.

These claims have gone from needing one expert to needing multiple experts – which has meant greatly increased cost.

At the same time as the court process has become more complex, the industry has, in the main, got its act together.

The 1990 Regulations were replaced by the, stricter still, 2005 Regulations.

Decline in heavy manufacturing

To a large extent these have done what they were designed to do. This has been coupled with a decline in British heavy manufacturing.

It is now rare to find an industrial workplace where noise levels are hazardous or where, at least, good quality hearing protection isn't used.

Not many, in traditional industry, have suffered noise damage in recent years.

There is a three-year time limit to bring a personal injury claim, which in deafness claims means that court proceedings need to be issued within three years of the date that a claimant actually knows, or ought to know, that their hearing might have been damaged by noise.

Ageing, on top of noise damage, can combine to effect a person's ability to hear, but often many claimants with noise damage have long been aware of hearing problems and either knew it might be due to work or ought to have done. Finding a deafness claim that is still within the time limits has become increasingly rare.

Very different workplaces

What we do come across is claims arising out of workplaces that are very different from the old-style heavy industries.

Anyone who goes into a pub or club on a Saturday night is likely to find it noisy. The staff can be exposed to this for hours on end, and while their employees are unlikely to have considered the noise regulations, they certainly apply. There may well be employees in such workplaces who are suffering noise damage.

I have run and settled a claim for an employee at an all-day concert who was stood next to the speakers without hearing protection. My requests for documents showing compliance with the Noise Regulations drew a blank. The fact was, it had not been considered.

> *"My requests for documents showing compliance with the Noise Regulations drew a blank. The fact was, it had not been considered"*

This was nevertheless a difficult case, particularly as the period of exposure was so short. While unusual, the fact that the employer had not even considered the risks of noise damage, and the relevant legislation, helped us to win it.

More recently, The Royal Opera House was found in breach of the 2005 Regulations in exposing a viola player to the trumpets of a Wagner opera.

It seems likely that, in years to come, deafness claimants will come from non-traditional exposure and, sadly, these cases are likely to be difficult.

Gone are the days of employees doing the same job, with the same employer, for forty years. In today's economy an employee may move from job to job in 40 weeks.

Proving noise levels and damage, and even finding an insurer, in an evolving workplace environment will bring new challenges and, for insurers, no doubt a new way for them to wriggle out of paying compensation.

Standing up for the **injured and mistreated**

"It often felt like every time we turned a corner in the search for the insurer, a door would shut in our face, but Thompsons kept on fighting. I really don't think many law firms would have gone to the same lengths."

Vivienne Swain
Thompsons Solicitors' asbestos client

As the UK's leading trade union law firm, Thompsons Solicitors offers specialist and bespoke legal services to trade union members and their families. We remain committed to the trade union movement, as we always have been since our own creation in 1921, and are proud to have never worked for employers or insurance companies.

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