

# Occupational Health Update

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# Occupational Health Update

- Case law update:-
  - PUWER
  - Corporate Manslaughter Act 2007
  - Asbestos liability decisions
  - Asbestos quantum decisions
  - Impending appeals
- Legislation update
  - Pleural plaques
  - Recoupment of PWC payments (T&N)
- Case Studies
  - Industrial deafness
  - Asymptomatic asbestosis

# Provision and Use of Work Equipment Regs 1998

- Smith v Northamptonshire County Council
  - [2009] UKHL 27
  - House of Lords split (3:2)
  - Circumstances of Accident:-
    - Ramp supplied by local NHS for disabled woman, Mrs Cotter, to access her home
    - Mrs Smith from local social services used the ramp to transport Mrs Cotter to a day centre
    - Ramp gives way when Mrs Smith stands on it

# PUWER

- Smith v Northamptonshire Cont...
  - Was the ramp “work equipment”?
  - Reg 3(2) PUWER
    - *The requirements imposed by these regulations on an employer in respect of work equipment shall apply to such equipment provided for use or used by an employee of his at work*
  - Was there a breach of Reg 5(1)?
    - *Every employer shall ensure that work equipment is maintained in an efficient state, in efficient working order and in good repair.*

# PUWER

- Smith v Northamptonshire Cont...
  - Lord Hope: (for Smith)
    - “Sufficient element of authorisation and control [of Smith’s use of the ramp]”
  - Baroness Hale (for Smith)
    - “use at work must be known about and authorised by the employer” and “for the purposes of the employee’s employment”

# PUWER

- Smith v Northamptonshire Cont...
  - Lord Mance: (for NCC)
    - “needs to be a nexus between the work equipment and the undertaking that the employer is carrying on”
    - The simple fact the employee uses the equipment is not enough to create that nexus
  - Lord Carswell (for NCC)
  - Lord Neuberger (for NCC)

# PUWER

- Smith v Northamptonshire Cont...
  - So what is the test now?!
    - Lord Hope:-
      - Control employer has over use of the equipment.
    - Lord Mance:-
      - Control employer has over the equipment itself.
  - Risk assessing:
    - Consider extent of Defendant's control over the actual equipment, i.e. repair, replacement etc

# Corporate Manslaughter

- Corporate Manslaughter Act 2007
  - In force from 6 April 2008
- Cotswold Geotechnical Holdings
  - Employee Mr Wright killed when pit collapsed where he was taking soil samples
  - company charged on 23.4.09 with corporate manslaughter = possible unlimited fine
  - Director Peter Eaton charged gross negligence manslaughter = possible life imprisonment
  - Trial due Feb 2010
  - Pleadings delayed...

# Breach of Contract

- Sean Fryers –v- Belfast Health and Social Care Trust [2008]
  - needlestick injury gets £3,000 in Northern Ireland High Court
  - upheld lower court decision to dismiss claim for PI (following pleural plaques)
  - But they did award damages for breach of contract
  - any opening for pleural plaques...?

# Asbestos Litigation - liability

- Willmore v Knowsley Metropolitan BC
  - [2009] EWHC 1831 (QB)
  - Exposure:-
    - 1972 – 1977 as a pupil at Bowring Comprehensive
      - Handling of / work on asbestos ceiling tiles in corridors
      - Damage to tiles from pupils' misbehaviour
      - Damage to tiles in girls toilets / storage of broken tiles
    - Nicol J accepted this caused dust exposure which materially increased the risk of mesothelioma
  - *“any more than minimal exposure to asbestos dust was foreseeably hazardous”*

# Asbestos Litigation - liability

- Abraham v (1) Ireson & (2) Reynolds
  - [2009] EWHC 1958 (QB)
  - D1 exposure:-
    - Employee 4.8.56 to 4.8.61 and 6 months 1961/62
    - Use of asbestos string to caulk joints
    - *“very light and occurred intermittently”*
  - D2 exposure:-
    - Employee 1962/3 to late 1965
    - Limited use of asbestos scorch pads when welding
    - Use of asbestos string to caulk joints
    - *“somewhat more frequent [but] still modest and infrequent”*

# Asbestos Litigation - liability

- Abraham v (1) Ireson & (2) Reynolds
  - Negligent? No.
    - Highly unlikely would be aware
    - Unless special degree of knowledge / experience
  - Breach of statutory duty? No.
    - Building (Health Safety & Welfare) Regs 1948
    - Construction (General Provisions) Regs 1961
      - *“likely to be injurious”*
      - Likely to = implies foreseeability

# Asbestos Litigation - appeals

- Employers Liability Trigger Litigation
  - High Court decision (“round 1”)
    - [2008] EWHC 2692
    - High court finding – EL policies triggered by exposure, not illness
  - Court of Appeal (“round 2”)
    - 11 and 24 November 2009
    - Rix, Janet Smith and Stanley Burnton LJJ
  - Round 3...?

# Asbestos Litigation - appeals

- Shortell –v- BICAL Construction Ltd
  - (2008) unreported
  - [www.12kbw.co.uk](http://www.12kbw.co.uk)
  - lung cancer caused by asbestos
    - Asbestos exposure + smoking
    - test is whether the asbestos more than doubled the risk of developing lung cancer
  - Appeals?
    - Defendants got permission to appeal on contrib – wanted more than 15% off for smoking, but...
    - Decision not being appealed
    - Watch out for Cotton's case\* in Australia – 50% reduction, going to Australian High Court
    - \**The State Of South Australia & Ors -v- Ellis* [2008] WASCA 200

# Asbestos Litigation - quantum

- Devoy v William Doxford & Sons Ltd
  - [2009] EWHC 1598; 2009 WL 2207439
  - Mesothelioma quantum case
  - General Damages
    - 9 to 12 months symptoms
    - Considered Cameron –v- Vinters Defence Systems Ltd
    - Award = £59,000
  - Non-financial dependency:
    - Wife suffered from Parkinson's, increasing symptoms
    - Relied on her husband for care
    - Award = £330,000
  - Loss of love and affection from deceased husband
    - Award £2,000

# Asbestos Litigation - quantum

- Storey v James Marmon & Son Ltd
  - (2008) unreported, Liverpool County Court
  - Mesothelioma quantum case
  - PSLA:
    - Aged 78, 6 years life expectancy but for meso
    - 3 months symptoms
    - Cameron –v- Vinters considered...
    - And rejected: award = £47,500
- Caselaw responding to Vinters
  - Look at Andrew McDonald's article
  - APIL PI Focus Vol 19 Issue 6
  - Summary of meso court awards & JSB Guidelines

# Asbestos Litigation - quantum

- Watson v Cakebread Robey Ltd
  - [2009] EWHC 1695 (QB); 2009 WL 1949562
  - Claim for living meso victim on ‘lost years’
    - General Damages:-
      - 57 years old, 24 years life expectancy but for meso
      - 1<sup>st</sup> Symptoms Oct 2007, death expected Apr 2010
      - Peritoneal (stomach) mesothelioma
      - Award = £75,000
    - Funeral expenses
      - not recoverable in lifetime
      - Claimant cannot step into shoes of the estate

# Legislation

- Damages (Asbestos-related conditions) (Scotland) Act 2009

- passed 11.3.09

- Act into force on 17 June 2009

- [http://www.opsi.gov.uk/legislation/scotland/acts2009/pdf/asp\\_20090004\\_en.pdf](http://www.opsi.gov.uk/legislation/scotland/acts2009/pdf/asp_20090004_en.pdf)

- Axa General Insurance Ltd & Others

- [2009] CSOH 57

- Judicial review

- failed on 27 April 2009

# Legislation...?!

- Pleural plaques
  - progress in government review?
  - Promises ....
    - “within a month [of the October 2008 deadline]”
    - “very soon” (Gordon Brown, February 2009)
    - “when we return after Easter” (April 2009)
    - “before the summer recess” (Jack Straw, May 2009)
  - We are still waiting...!

# Legislation

- Turner & Newell payments & CRU
  - Child Maintenance & Other Payments Act 2008 – problem caused by overlap
    - Social Security (Recovery of Benefits) (Lump Sum Payments) (Amendment) Regulations 2009
    - [http://www.opsi.gov.uk/si/si2009/uksi\\_20091494\\_en\\_1](http://www.opsi.gov.uk/si/si2009/uksi_20091494_en_1)
    - Came into force on 13 July 2009
    - Exempts T&N Trust payments from CRU
    - DWP confirmed end of July retrospective
    - Can receive reimbursement in full

# INDUSTRIAL DEAFNESS

- Baker –v- Quantum Clothing Group & Ors
  - [2009] EWCA Civ 499
  - [2009] PIQR 19
  - Appeal to decision of HHJ Inglis

# INDUSTRIAL DEAFNESS

- Baker –v- Quantum Clothing Group & Ors
  - Originally 7 Claimants (700 similar claims)
    - Workers from the knitting industry in Nottinghamshire and Derbyshire
    - Working 1970's to 1990's
    - Exposed to range: 80 - 89db(A)lepd
    - But less than 90db(A)lepd
    - All developed deafness

# INDUSTRIAL DEAFNESS

- Baker –v- Quantum Clothing Group & Ors
  - Finding
    - 6 failed on causation
    - Mrs Baker
      - 1971 – 1991
      - established causation
      - but claim dismissed – no liability
  - HHJ Inglis:
    - No breach of s.29 Factory Act 1961
    - Not negligent

# INDUSTRIAL DEAFNESS

- Baker –v- Quantum Clothing Group & Ors
  - Appeal
    - Mrs Baker: appealed on negligence / breach
  - Cross-Appeal (Theoretical)
    - Finding of liability from 1985 onwards
    - Meridian Ltd: claim no liability until 1990
    - Pretty Polly Ltd: claim no liability until 1986

# INDUSTRIAL DEAFNESS

- Baker –v- Quantum Clothing Group & Ors
  - Appeal allowed
    - Breach
      - s.29 Factories Act 1961?
        - » Duty is absolute
        - » No requirement for foreseeability
        - » Minority of people would suffer appreciable harm at 85db
    - Knowledge
      - By early 1970's any employer would know prolonged exposure to 85db(A)lepd was harmful

# INDUSTRIAL DEAFNESS

- Baker –v- Quantum Clothing Group & Ors
  - Negligence
    - Burden of proof on employee to show employer has not taken reasonable care to avoid risks which he ought reasonably have foreseen might arise
  - Factories Act
    - Burden on employee...
      - to show workplace not safe
    - Then, burden passes to employer
    - **Burden of proof on employer to show not reasonably practicable to eliminate risk of harm**

# INDUSTRIAL DEAFNESS

- Baker –v- Quantum Clothing Group & Ors
  - Dept of Employment, Code of Practice 1972
    - By late 1976 / early 1977 average sized employer in knitting industry should have made an informed assessment of the risk
    - From 1977 not reasonably practicable to fail to provide ear protectors

# Asbestos Litigation - liability

- Beddoes & Others v Vinters Defence Systems Ltd and Others
  - (2009) Unreported, Newcastle County Court
  - 4 test cases for symptomless asbestosis
  - Judgment handed down 2 March 2009
  - HHJ Walton
  - See [www.12kbw.co.uk](http://www.12kbw.co.uk)

# Asbestos Litigation - liability

- Beddoes & Ors v Vinters... and Ors
  - Look at each case on its own facts
  - Issue:
    - whether injury is “more than minimal”
    - Even if Claimant is unaware of injury
    - Cannot take account of possible future symptoms
  - Follows Johnson [2008] – whether the Claimant is “appreciably worse off”

# Asbestos Litigation - liability

- Beddoes & Ors v Vinters... and Ors
  - HHJ Walton
    - Rejects that effect must be perceptible (physically noticeable by Claimant)
    - But also rejected “abnormal and irreversible disease process” (first appearances) as sufficient
  - *“if medical science can identify an effect upon the Claimant before he is aware of a symptom, that can amount to damage, provided it is more than minimal”*

# Asbestos Litigation - liability

- Beddoes & Ors v Vinters... and Ors
  - Mr Beddoes
    - Fibrosis affecting 5-10% of lungs
    - No respiratory symptoms
    - But restriction on lung function when he engaged in vigorous activity
    - Overall respiratory disability = 5%
    - Caused by asbestosis, emphysema + obesity
    - Contribution from asbestos = 1.6%

# Asbestos Litigation - liability

- Beddoes & Ors v Vinters... and Ors
  - Mr Cooksey
    - Fibrosis affecting less than 5% of lungs
    - No respiratory symptoms
    - But restriction on lung function when he engaged in vigorous activity
    - Overall respiratory disability = 5%
    - Caused by asbestosis, asthma, emphysema + hypertension
    - Contribution from asbestos = 1.25%

# Asbestos Litigation - liability

- Beddoes & Ors v Vinters... and Ors
  - Mr Minniken
    - Fibrosis “very minor”
    - No respiratory symptoms
    - No deficit in lung function
    - = no claim

# Asbestos Litigation - liability

- Beddoes & Ors v Vinters... and Ors
  - Summary
    - No subjective symptoms needed (Claimant unaware)
    - But objective sign of harm above simply radiological evidence
  - HHJ Walton
    - Significant area of lung fibrosis +
    - Identifiable contribution to breathlessness =
    - Complete cause of action.

# Asbestos Litigation - liability

- Beddoes & Ors v Vinters... and Ors
  - Appeal?
    - One outstanding issue to be finalised
    - Permission to appeal
    - Probably unlikely

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Any questions?

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