HENMANS LLP

EPIC (personal injury department newsletter)

April 2011

www.henmansllp.co.uk

Resolving claims where pre action protocols are ignored

Frustratingly, on occasion claimants' solicitors fail to comply with the pre action protocols. Whilst the point can be made later on costs, success cannot be guaranteed and in the meantime extensive pre litigation costs can be incurred.

We acted in a professional negligence claim where following settlement of the original personal injury claim, the claimant developed epilepsy. Breach of duty (in failing to advise on provisional damages/ the likely value of the claim should the claimant develop epilepsy) was admitted. Despite this, the claimant's solicitor refused to disclose medical records or reports unless we promised not to make a part 36 offer.

Loss of chance and causation were in issue. In the original claim the claimant was likely to have succeeded on primary liability with a discount for contributory negligence. It was arguable that the claimant was so desperate to settle the claim that he would have accepted the original offer whatever his solicitor advised and a Lawtel search revealed several cases of settlements with no provisional damages awarded where there was an increased risk of epilepsy. The claim was potentially substantial; the claimant was unlikely to return to his previous employment and required care.

We considered various options. Limitation was not due to expire for several years, and the claimant showed no signs of intending to issue proceedings so we could not make any application for directions. The claimant's solicitor had suggested asking a QC to advise on whether he should disclose information, but this was unlikely to solve the fundamental problem with the claimant's solicitor's obstructive attitude. A pre action disclosure application was not guaranteed to succeed and would increase costs. We considered writing to the claimant's solicitor summarising the failures to comply and reserving the right not to respond to more correspondence which went over old ground. We could do as little as possible so at least our own costs were minimised, or we could make a part 36 offer based on a combination of our best guess at the defendant's best possible case and the economics of contesting the matter further.

We wrote the claimant's solicitor a long letter summarising the history of the case coupled with a part 36 offer. Perhaps true to form, the claimant accepted the offer and what looked like being a long running expensive battle was settled.

Mary Duncan, partner

For more information please contact Mary Duncan (mary.duncan@henmansllp.co.uk)

Sienkiewicz v Grief (UK) Ltd and Willmore v Knowsley - mesothelioma update

Fairchild v Glenhaven Funeral Services [2003] 1 AC 32 held that in a claim for mesothelioma, the normal rules of causation are suspended when there are multiple defendants and it is not possible to identify which caused a claimant's exposure to the fibres responsible for the disease. Consequently, all defendants will be held jointly and severally liable for the full loss.

> *"The recent decision in the combined appeals of Sienkiewicz v Grief (UK) Ltd and Willmore v Knowsley MBC [2011] UKSC 10 will be unwelcome news for defendants and insurers."*

The recent decision in the combined appeals of *Sienkiewicz v Grief (UK) Ltd* and *Willmore v Knowsley MBC* [2011] will be unwelcome news for defendants and insurers because it confirms that *Fairchild* also applies to cases involving a single defendant. In both cases, the deceaseds had been exposed to small amounts of asbestos at work. *Sienkiewicz* was unsuccessful at first instance, as the deceased had suffered general environmental exposure to asbestos dust, and the tortious exposure had not more than doubled the risk of non tortious exposure.

The appellants (original defendants) argued that *Fairchild* should not apply because there was only one defendant in each case. It had been open to the claimants to rely on epidemiological evidence to prove that the respective exposure by the defendants was more than double that of any background exposure. If *Fairchild* did apply, exposure should only be defined as material if it more than doubled the risk of developing mesothelioma.

The Supreme Court dismissed the appeals. The exception in *Fairchild* was held to apply to single defendant claims. In respect of epidemiological evidence that purported to identify the causal link between sources of exposure and the development of the disease, the court held that such evidence should be treated with extreme caution and was not admissible. However, the usefulness of such evidence may improve in the future as medical science develops. The court found no basis for adopting the test that exposure should only be regarded as material if it doubled the risk. In both cases, the exposure was very low but was still held to be material.

For more information please contact Thomas Hallett, trainee solicitor (thomas.hallett@henmansllp.co.uk)

Henmans LLP. Regulated by the Solicitors' Regulation Authority

5000 Oxford Business Park South

Oxford OX4 2BH

Tel: 01865 781000

For more advice on the topics in this newsletter, please contact:

Mary Duncan

Partner and head of personal injury

mary.duncan@henmansllp.co.uk

Drop hands settlement achieved in slipping case

We successfully negotiated a "drop hands" settlement in a claim where we were dealing with a very persistent claimant.

The claimant slipped on a ceramic tiled floor in her workplace. It was agreed that the floor had not been wet. The case turned on whether the floor surface was so slippery as to pose a risk. The claimant relied on three witnesses, who described the floor as dangerous when dry and lethal when wet and who described near misses not reported in the accident book.

The defendant argued that there had been no previous accidents or complaints and the floor surface was suitable. The defendant was in the process of replacing the floor and the claimant relied on this as evidence that it was unsuitable. We obtained witness evidence setting out the reasons for changing the floor.

The parties obtained joint expert engineering evidence. The expert concluded that the floor was within safe co-efficiency measurements when dry. However, the claimant refused to discontinue her case and made a part 36 offer of £5,000. The expert had unhelpfully commented that he had never found any floor that was other than reasonably safe unless it was contaminated by liquid and/or solids. The claimant was insisting on calling the expert to be cross examined at trial.

The expert also suggested that the change in floor type from carpet to ceramic tiles could have caught the claimant unawares. She sought to amend her particulars of claim to add this to her pleadings. However, a finding in favour of the claimant on this basis was unlikely as it would have huge implications for owners, occupiers and employers.

Nevertheless, there was a risk of a sympathetic judge preferring the claimant's evidence, and therefore we made a "drop hands" offer and stood our ground. The offer was ultimately accepted.

For more information please contact Paul Chadder (paul.chadder@henmansllp.co.uk)

First corporate manslaughter conviction: company fined £385,000

Cotswold Geotechnical Holdings was the first company to be tried under the Corporate Manslaughter and Corporate Homicide Act 2007 ("the Act"). In February it was fined £385,000, payable over 10 years. The company director had previously been charged with gross negligence manslaughter although was judged too ill to stand trial.

The case involved the death of a 27 year old employee who was investigating soil quality in a trench when it collapsed. The prosecution alleged that the company failed to take all steps reasonably practicable to prevent him from working in a dangerous trench. The jury found that the system of work was unnecessarily dangerous and that the company had not followed industry guidance.

Under the Act, a company may be found guilty if a gross breach of duty of care to the employee had occurred, causing a death. A substantial element of the breach will focus on the way in which the company organises and manages its activities.

Cotswold Geotechnical Holdings has only a sole director and eight employees, and is arguably not representative of the large companies that the Act was intended to encompass. It remains to be seen how the Act will operate in relation to companies with complex management structures.

The Sentencing Council recommended that fines should seldom be less than £500,000. The level of the fine in this case reflects the small size of the company but was over three times the company's annual turnover. The judge commented that if the fine put the company out of business this would be a consequence of the breach. This suggests that judges will not shy away from harsh fines if appropriate.

Jane Lightfoot, Associate

For further information please contact Jane Lightfoot (jane.lightfoot@henmansllp.co.uk)

Court of Appeal ruling to prevent "expert shopping"

The Court of Appeal has ruled that disclosure of experts' reports obtained pre-proceedings can be ordered to prevent "expert shopping". In *Edwards-Tubb v JD Wetherspoon PLC* (2011), the claimant had obtained a report and then switched experts after proceedings were issued. The defendant applied for disclosure of the claimant's initial report.

Allowing the appeal, Hughes LJ stated: "Whatever the reason for subsequent disenchantment with expert A may be, once a party has embarked on the pre-action protocol procedure of co-operation in the selection of experts, there seems to me no justification for not disclosing a report obtained from an expert who has expert who has been put forward by that party as suitable for the case, has been accepted by the other party as suitable, and has reported".

This is a helpful judgment for defendants and insurers, as claimants will essentially be required to disclose any reports obtained, if they wish to rely on expert evidence in the relevant field, irrespective of whether or nor they support their claim.

The firm is not authorised under the Financial Services & Markets Act 2000 but we are able in certain circumstances to offer a limited range of investment services to clients because we are members of the Solicitors' Regulation Authority. We can provide these investment services if they are a part of the professional services we are engaged to provide. Professional advice should always be sought for assistance in specific areas of the law, and we cannot accept any responsibility for any action based on these articles.