QBE Business Insurance

# Technical claims brief

**Monthly update** | February 2016

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# Reform

## Momentum grows for the expansion of the fixed costs regime

Lord Justice Jackson (the driving force behind civil justice reform in April 2013) recently delivered a keynote speech to the Insolvency Practitioner's Association, calling for the expansion of fixed costs. He suggested the introduction of a regime of fixed recoverable legal costs throughout fast track claims (up to a value of £25,000) and also in what is referred to as "the lower reaches of the multitrack". Unsurprisingly, the speech has received a significant level of industry publicity.

The figures proposed by Lord Justice Jackson would cover claims up to £250,000 and would introduce a matrix which would be applied to broad value bands, allowing discrete amounts for key procedural steps and actions. The proposal would apply to all types of claim and there would be no distinction in the level of fixed costs allowed between different classes of claim. Disbursements would be outside the proposed matrix.

At the bottom end of the multitrack, a case with damages between £25,000 - £50,000, settled pre-action, would equate to £3,250 in costs (or £18,750 at trial), whilst at the top end, a claim with damages between £175,000-£250,000, settled pre-action, would equate to £12,000 (or £70,250 at trial). Costs would be awarded to a claimant on the basis of the damages awarded and, if a defendant was recovering costs, it would be based on the damages pleaded.

Lord Justice Jackson recognised the need for government to start the consultation process and to consider a variety of options, including a "totally fixed costs regime." He also intends to carry-out a judge-led review of fixed costs, with a view to having a detailed proposal completed by the end of 2016, in the hope of implementation in 2017. The government appears broadly supportive of the principle of extending fixed costs.

The timing of the proposal is relevant to a background of ongoing criticism of cost budgeting and disproportionately high costs for low value claims – proportionality is a key driver for Lord Justice Jackson and goes to the heart of his proposals. The full speech, including the matrix for proposed fixed costs, can be found at **https://www.judiciary.gov.uk/announcements/speech-by-lord-justice-jackson-fixed-costs-the-time-has-come/**

> Defendants, and their insurers, should benefit from a consistent approach to claimant costs, which will provide certainty, with better control and clarity around total claims spend. The parties to a claim would have absolute clarity around the cost of proceeding to trial, which could encourage positive behaviours around claims defensibility. The proposed single matrix would be a significant departure from the current classification between RTA, EL and PL claims, and the consultation process will be vital to contribute to, and understand the potential variances. The expansion of a fixed costs regime for claims up to £250,000 will not be uncontroversial, but the momentum for further civil justice reform may ultimately ead to the removal of solicitors' hourly rates from the vast majority of claims.

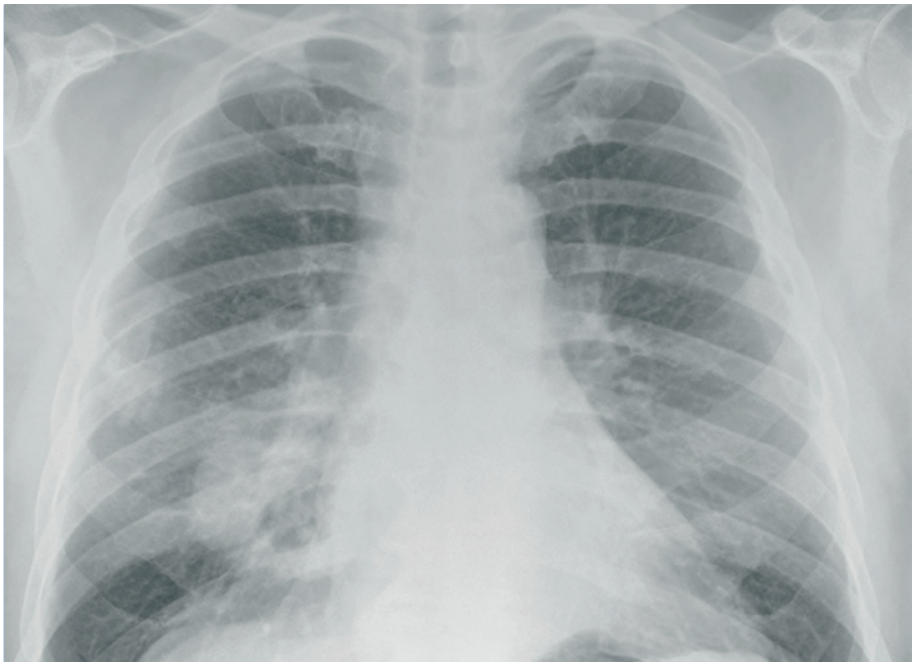
# Liability

## Asbestos related lung cancer, *Heneghan v Manchester Dry Docks Ltd* [2016]

This important case followed the tragic death of Mr Heneghan, who died of lung cancer, which had been caused by his exposure to asbestos fibres. He had been exposed to asbestos whilst he was employed successively by each of the six defendants. The biological evidence could not establish which, if any, of the exposures had triggered the cell changes in his body which led to his contracting the disease, but epidemiological evidence could establish by how much the exposure attributable to each defendant had increased the risk that he would contract the disease. Damages were claimed on behalf of Mr Heneghan's estate and widow. Judgment was entered by consent against all six defendants, which left the court to determine the issue as to whether each defendant was liable for damages in full, or for only a portion of the damages. The first instance judge applied the principle in *Fairchild v Glenhaven Funeral Services Ltd* [2002] and awarded damages against each defendant in proportion to the increase in risk for which it was responsible. The claimant appealed.

The claimant accepted that, if the judge had been right to have said that mesothelioma and lung cancer were legally indistinguishable, then he had been right to have applied the *Fairchild* exception, qualified by *Barker v Corus UK Ltd* [2006]. That was because the reversal of *Barker* brought about by section 3 of the Compensation Act 2006, only applied to mesothelioma claims. However, the claimant submitted that lung cancer and mesothelioma were distinguishable. His case was not that the exposure attributable to each defendant had made a material contribution to the risk that the deceased would contract lung cancer; it was that the exposure attributable to each defendant had contributed to the disease itself. The claimant cited the authority of *Bonnington Castings Ltd v Wardlaw* [1956].

In dismissing the claimant's appeal, the Court of Appeal held that there was a fundamental difference between making a material contribution to an injury and materially increasing the risk of an injury. If the two were the same, *Fairchild* would not have been seen to have been the ground-breaking decision that it was, and the decision in *Barker* would have been difficult to understand.



Further, it was clear that the House of Lords in *Fairchild* had not been determined on the basis of the fiction that a defendant who had created a material risk of mesothelioma was deemed to have caused or materially contributed to the contraction of the disease itself. The *Bonnington* test was to be applied where the court was satisfied on scientific evidence that the exposure for which the defendant was responsible had contributed to the injury. That was distinguishable in the case of divisible injuries (such as silicosis and pneumoconiosis), where the severity was proportionate to the amount of exposure to the causative agent. The response of the law to the problem posed in a case where the scientific evidence did not permit a finding that the exposure attributable to a particular defendant had contributed to the injury was to apply the *Fairchild* exception.

Importantly, the factors identified in *Fairchild* were mirrored here:

(i) All the defendants had conceded breach of duty;

(ii) All had increased the risk that the deceased would contract lung cancer;

(iii) All had exposed the deceased to the same agency that had been implicated in causation (asbestos fibres); but

(iv) Medical science was unable to determine which, if any, of the defendants there should be attributed the exposure which had actually caused the cell changes which had initiated the genetic changes culminating in the cancer.

> “As a matter of law, there was no reason for the Court of Appeal not to apply the *Fairchild* exception. The absence of epidemiological evidence proving that all, or any, of the defendants had made a material contribution to the contracting of lung cancer was crucial. The evidence was that the defendants had materially contributed to the risk that he would contract lung cancer. As a result, the claimant can recover damages against each defendant for the proportion of their individual periods of exposure. This raises the possibility that another claimant could go uncompensated for missing periods of defendants or insurers. The Compensation Act addressed such a problem with mesothelioma claims and one wonders whether further reform will follow for lung cancer claims.”

## Part 36 offer to pay 95% is genuine attempt to settle claim, *Jockey Club Racecourses Ltd v Wilmott Dixon Construction Ltd* [2016]

The claim concerned a dispute about the defendant's design and construction of a new grandstand at the claimant's racecourse. The claimant issued court proceedings, and then on 30 January 2015 they served draft amended particulars of claim, whilst making a Part 36 offer to settle the issue of liability on the basis that the defendant would pay 95% of the claimant's claim for damages (to be assessed). There was no response to the offer. The 21-day period for acceptance of the offer expired several weeks before service of the formally amended particulars of claim, which included for the first time, the sums claimed in respect of the need to carry out a complete replacement of the roof. A pre-trial review was fixed for December 2015, by which the defendant had conceded liability and the preliminary issues of liability were resolved by consent in the claimant's favour. The claimant applied for indemnity costs following the defendant's failure to accept the claimant's Part 36 offer.

The court was required to determine:

1. Whether the claimant's 'Part 36 offer' was an offer within the meaning of CPR Part 36 at all;
2. If so, whether it had been a genuine attempt to settle liability; and
3. If the answer to those questions was yes, whether it would be unjust to make an order reflecting some or all of the incentives in CPR Part 36.

Having considered the party's respective positions, it was readily apparent that this was a claim where the outcome could only be success or failure for either party - there was no room for apportionment of liability. Therefore, the court would never conclude that the defendant was 95% liable for the losses. The question was whether that was fatal to the offer being considered as a valid offer for the purpose of CPR Part 36.

A secondary question was whether an offer that came close to requiring total capitulation could be an offer at all. Applying previous authority, the offer had been a valid offer within the meaning of CPR Part 36 and it had been a genuine attempt to settle the claim, rather than simply a tactic to try and obtain the benefits afforded by Part 36. The court were content to find that the claimant had genuinely attempted to compromise their claim, by offering a 5% discount.

Accordingly, the consequences that follow from the claimant beating their own offer had to be given effect, unless it would be unjust to do so. Having had regard to CPR 36.17(5)(c) in particular, it would be unjust to award indemnity costs from 21 days after the date of the offer, given that the defendant had only just been made aware that the claim against it had been increased to £850,000. However, there was no reason why the claimant should not be entitled to indemnity costs from the earliest date after that by which the defendant could reasonably have put itself in a position to make an informed assessment of the strength of the claim on liability. That date was four months from the date of the offer, so 29 May 2015.

> This is an interesting judgment, which deals with offers to settle, which on the face-of-it do not appear to be much of a compromise. The courts have previously tried to discourage parties from making such offers, which were nothing more than a tactical ploy to maximise their costs. On this occasion the court distinguished the position given the likely outcome of the claim and decided to criticise the defendant, rather than the claimant. The case underlines the importance of properly considering all Part 36 offers upon receipt, but also as the claim develops and when there is a change of material circumstance. It is not clear from the judgment, why the defendants didn't simply accept the Part 36 offer, rather than conceding liability in full and consenting to judgment being entered (thus triggering CPR Part 36.17) – late acceptance of a Part 36 offer does not automatically trigger costs on an indemnity basis.


## Duty of Care, *Rathband & Ors v Chief Constable of Northumbria* [2016]

The claim followed the tragic events of 3 July 2010, when Raoul Moat shot and injured his former partner Ms Stobbart and killed her partner Christopher Brown in the mistaken belief that he was a police officer.

At 00.29 on 4 July, Mr Moat rang the police to outline his grievances and made open threats to kill officers and concluded by saying, 'I am hunting for officers now.' The senior investigating officer, Superintendent Farrell, was immediately made aware of the call and decided to make two enquiries before warning officers of the threat: to carry out cell site analysis to identify Mr Moat's location and to conduct a proper analysis of the call.

Less than nine minutes after concluding his call, and seven and a half minutes after Superintendent Farrell had been made aware, Mr Moat shot PC Rathband at close range causing him serious injury including the loss of his sight. PC Rathband sadly took his own life on 29 February 2012. He had commenced a claim in negligence against the chief constable.

The court had to consider the following legal principles:

1. The duty of care to take reasonable care for their safety of their officers. This is a different starting point from cases such as *Hill* where no duty is owed to members of the general public in the investigation or prevention of crime.
2. The duty of care may be excluded as a matter of public policy where it would not be fair, just and reasonable to impose it (the *Hill* core principle). The imposition of such a duty could lead to a defensive approach and inhibit the police in their duty to investigate and prevent crime.
3. The duty of care will be excluded where operational decisions are made under pressure in the investigation or prevention of crime: the core functions of policing.

In applying these principles to the facts, the court decided that Superintendent Farrell took an operational decision, under considerable time pressure, which was directly concerned with the investigation and prevention of crime. Therefore, the public policy exclusion would be triggered and the claim in negligence would be dismissed.

> "The judgment acknowledges the difficult decisions which must be made by the police, under extreme pressure and with human life at risk. The protection afforded to the Chief Constable highlights judicial reluctance to go-behind the police's contemporaneous decision-making and to question whether there might have been negligence. The existence of the duty of care to take reasonable care for officers' safety remains, but claims in negligence will be difficult to prove."

# Quantum

## Fatal accident claims & multipliers, *Knauer v Ministry of Justice* [2016]

The Supreme Court heard oral submissions on 28 January 2016 and have now handed down judgment in an important case regarding the assessment of damages for fatal accident claims. The Court had been asked to review the law on multipliers, which had been set back in 1979 in the case of *Cookson v Knowles*. In that case it was held that the multiplier should run from the date of death.

The decision in *Cookson* had been widely criticised, including by the Law Commission, as it placed dependants of the deceased in a worse position than personal injury victims, whose multiplier is calculated from the date of trial. A dependant's multiplier could be shortened by a significant period, which had the subsequent effect of reducing the level of damages, by comparison.

A panel of seven Justices of the Supreme Court unanimously agreed that the basis for calculating future loss of dependency should be from the date of trial, as the starting point for the calculation. The change brings English law into line with Scotland, where the position was changed in 2011.

The new approach is more robust in terms of forensic and actuarial application, which will result in increased damages and awards for dependency. In *Knauer*, adopting the new approach added over £50,000, or around 10% of the total damages awarded. The change in the law will therefore lead to increases in case reserves for these claims, albeit it is positive that fatal accident claims are relatively limited.

The court concluded that: "There has been a material change in the relevant legal landscape since the earlier decisions, namely the decision in *Wells v Well* and the adoption of the Ogden Tables [which] gives rise to an overwhelming case for changing the law."

> No insured or insurer wants to be involved in the human tragedy of a fatal accident. The impact and aftermath of such an accident can significantly affect employees, senior management and the reputation of an organisation. Insurers should play their part in providing support where necessary, which may be multi-faceted and sensitive in nature. The introduction of the new sentencing guidelines will need to be considered by insureds and their insurers, alongside potential increased damages payments from resultant civil claims.

Completed 26 February 2016 – written by QBE EO Claims. Copy judgments and/or source material is available from Tim Hayward (contact no: 0113 290 6790, e-mail: tim.hayward@uk.qbe.com).

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