Disease Newsletter

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Introduction

Written by Gareth McAloon

Welcome, once again, to our second edition of our Disease Newsletter. The summer and autumn months have certainly flown by but the uphill task of trying to progress personal injury and industrial disease litigation in these times affected by COVID-19, has got no easier. Unfortunately, we remain still very much in the midst of the pandemic and it appears will do so throughout the winter months. Here's hoping that Spring 2021 will perhaps bring that return to normality which we all crave.

But there is good news in amongst the annoyance of COVID-19. In October, we launched Ropewalk Blogs, the forerunner of which is our Chambers Disease Blog. We hope that everyone received our mailer and social media links which took you to the page and that many of you have had chance to have a look at some of the content we have been producing throughout the year on issues connected to Disease litigation. For those of you who have not yet had chance to visit the blog, you can do so by the link at the bottom of this page.

With the launch of our Disease Blog, we will be using our newsletter as a round-up of some of the subjects which we have been commenting on since our last issue so as to bring them all 'under one roof' for you. As you will see, despite the impact of lockdown, and the restriction in case numbers able to progress before the Courts, there have been significant developments in matters pertinent to disease litigation which may well be useful to keep abreast of moving forward.

We hope you enjoy this issue of our newsletter. We aim to bring our third edition in May 2021. In the meantime, may we wish you all a Merry Christmas and a Happy New Year coming up as we all hope for a 'normal' 2021!

Visit the

Ropewalk Disease Blog

www.ropewalk.co.uk/knowledge-sharing/blog/disease

The Correct Application of the Judicial College Guidelines to the Assessment of Damages for Asbestosis and Pleural Thickening

Written by Richard Seabrook

In _Hamilton v NG Bailey Ltd_ [2020] EWHC 2910 (QB), the High Court sought clarity from the editors of the Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases (the "JC Guidelines") about their proper application in asbestosis and pleural thickening cases. Richard Seabrook of Ropewalk Chambers appeared for the Defendant. The judgment can be found here.

The Facts

Hamilton was a routine, liability-admitted asbestosis claim that, on 8 October 2020, came before Dan Squires QC (sitting as a Deputy High Court Judge) for an assessment of damages hearing. The Claimant was seeking provisional damages with three specific return conditions, which the Defendant was content to agree. The only substantial issue at the hearing was as to the correct valuation of general damages for pain, suffering and loss of amenity assessed on a provisional damages basis. There were Part 36 offers on either side.

The Issue

The Claimant had a respiratory disability of 10%, which it was submitted on behalf of the Defendant put the Claimant in the lower of the two potentially relevant brackets for asbestosis and pleural thickening as contained in the JC Guidelines, namely:

"£14,140-£36,060. Asbestosis and pleural thickening — where the level of respiratory disability/lung function impairment attributable to asbestos is 1–10%. The level of award will be influenced by whether it is to be final or on a provisional basis and also the extent of anxiety."

The wording of this lower bracket expressly stated that it was applicable to awards for up to a 10% disability assessed on a final or a provisional basis. With no evidence of any particular anxiety, the Claimant being of relatively advanced years and with a modest impact upon him, consistently with the assessed level of 10% disability it was submitted that the award should be no more than £30,000 on a full and final basis and that it should be further discounted to about £24,000-£25,000 to reflect a deduction of the element of a final damages award, which on a provisional damages basis would be covered by the return conditions.

It was argued on behalf of the Claimant that the higher of the two potentially relevant brackets was the appropriate starting point, on the basis that, whilst the Claimant's current disability was 10%, the medical evidence was that he was likely to deteriorate, so that the level of disability would increase above 10%.

The higher bracket in the JC Guidelines provides:

"£36,060-£99,330. Asbestosis and pleural thickening — where the level of disability attributable to asbestos will be in excess of 10% causing progressive symptoms of breathlessness by reducing lung function. Awards at the lower end of the bracket will be applicable where the condition is relatively static. Higher awards will be applicable where the condition has progressed or is likely to progress to cause more severe breathlessness. Awards at the top end of the bracket will be applicable where mobility and quality of life has or is likely to become significantly impaired and/or life expectancy significantly reduced. This is a wide bracket and the extent of respiratory disability will be highly significant with disabilities of 10–30% being at the lower end, 30–50% in the middle, and in excess of 50% at the higher end."

On the basis of the likely progression of the respiratory disability to 15-20% it was submitted that the higher bracket was appropriate, with a provisional damages award on the financial cusp of the two brackets, namely £36,000, equating to a final award of about £41,000.

The Judge's Finding as to the Correct Bracket

In accepting the Defendant's submission that the Claimant came within the lower of the two brackets, Mr Squires QC said this at [44]:

"The key factor separating the brackets is the level of current impairment. The fact that the Claimant's condition is likely to deteriorate by a further 5% is relevant to an assessment of quantum, but in my view it is a factor that goes to where he is

placed within the lower bracket, rather than moving him from the lower to the higher bracket. One can imagine, for example, a person with an impairment of 8% who is diagnosed as likely to deteriorate by a further 5% over the course of their life. In my view such a person would fall within the lower bracket for the purpose of assessing damages as they currently have a disability below 10%, even if at some point in their life they are likely to suffer a disability in excess of 10%. The Claimant does not currently have a disability in excess of 10%, and notwithstanding the likelihood of deterioration, his case falls within the lower asbestosis bracket."

The Difficulty Identified

However, when considering how to approach the assessment of damages within one of the two relevant brackets, the Judge identified a difficulty in ensuring a continuum between the brackets, born out of the wording of the brackets in the JC Guidelines. At [27] he observed:

"As set out above, there are two potential brackets in the Guidelines I am considering. That raises a question as to whether I should treat the brackets for awards in asbestosis cases as reflecting full and final damages awards or provisional awards or some mixture of both. As the introduction to the Guidelines makes clear, their aim is to achieve consistency in awards of damages through a "distillation of awards of damages that have been or are being made in the courts". They are intended as "guidelines and not tramlines" with the ultimate assessment a "prerogative of the courts." While the Guidelines are not to be read as statutes, it is important in understanding the Guidelines to know what the figures they contain are intended to refer to. The top end of the lower asbestosis bracket, and the lowest end of the higher bracket, give a figure of damages of £36,060. Is that intended to be a figure for claimants receiving full and final damages whose injuries lie on the boundary between the brackets or those receiving a provisional award or some combination of the two?"

Having heard submissions from both parties, he concluded that both suggested approaches to the application of the Guidelines created difficulties and, at [35], he stated:

"Ultimately it may be something that would be helpful for those drafting the Guidelines to clarify. It does not matter whether the Guidelines, and the brackets for different levels of severity of injury, reflect awards that are regarded as appropriate on a provisional basis or on a final basis, but it does seem to me that it needs to be clear which. It strikes me as potentially problematic, especially when applied to cases near the borderline of different brackets, for the Guidelines to seek to reflect both types of awards at the same time in an undifferentiated way."

Because of the difficulty identified, and having accepted that damages assessed at £35,000 on a final basis would fall to be reduced by £5,000 (i.e. to £30,000), the judge went on to say this at [50]:

"I also bear in mind that the JC Guidelines are intended to be guidelines not tramlines, and that they are intended to assist with, rather than dictate, an assessment, and that it is not entirely clear whether the Guideline's starting points are intended to be for full and final damages or provisional damages. I consider that in those circumstances it is appropriate to adjust the figure of £30,000 up slightly. I consider that an award of £32,000 is appropriate in this case."

Conclusion

It is respectfully suggested that Hamilton has identified an issue about whether the higher and lower asbestosis/ pleural thickening brackets as presently written can be applied as intended, so as to operate as a continuum with the lowest end of one bracket being the same as the highest end of the bracket below. It is hoped that the editors of the JC Guidelines might now take the opportunity to re-draft the wording of the relevant brackets to better achieve the stated aim of ensuring consistency in awards of damages.

Nivolumab and Ipilimumab Approved as Immunotherapy Treatments in the USA

Written by Philip Turton

On 2 October 2020, the American Food & Drug Administration approved a combination of nivolumab (OPDIVO, Bristol-Myers Squibb Co) and ipilimumab (YERVOY, Bristol-Myers Squibb Co) as a first-line treatment for adults with unresectable mesothelioma. Randomised open-label trials suggest an improvement in overall survival in the order of approximately 25% when compared with chemotherapy.

The full announcement is available here.

As yet, the treatment is not approved for use in the UK.

Asbestos in Schools

Written by Gareth McAloon

It may be re-called that in our inaugural edition of the newsletter we did a feature on asbestos in schools. In that feature, we reported that the Department for Education's survey, launched in 2018, had revealed that some 87% of the schools that responded to the survey confirmed that they had asbestos in at least one location on their sites. As such, lobbying of government to address the problem has been launched through the Joint Union Asbestos Committee.

At that point we indicated that schools were therefore likely to be a source of asbestos claims in the future from teachers, to pupils, to administrative and maintenance staff and other visitors to sites.

It came as no surprise then that, following our last edition, such a claim has recently made the national press. On 6th November 2020, the BBC in Wiltshire reported that a former teacher of art at two schools in Swindon between 1979 - 1993, had sadly passed away of mesothelioma in 2018 and his family had recently settled a claim against the predecessor local authority who ran the schools, Wiltshire County Council. A full link to the article on the BBC's website can be found here.

The family of Mr McLaughlin were represented by Hodge, Jones and Allen Solicitors LLP in London. Allegations included that Mr McLaughlin would use asbestos gloves and would also clean and refurbish asbestos kilns which had been installed on site for ceramic lessons.

Fatal Accident Claims

Statutory Bereavement Damages Extended (Only) to Cohabiting Partners

Written by Damian Powell & Samuel Shelton

The Fatal Accidents Act 1976 (Remedial) Order 2020 ("the Order") came into force on 6 October 2020. This is particularly relevant to disease claims where the Claimant has died as a result of the disease, the most obvious examples being fatal asbestos-related injury claims such as, mesothelioma.

The effect of the Order is to extend the eligibility for bereavement damages under section 1A of the Fatal Accidents Act 1976 ("the Act") to cohabiting partners, provided that such partners are able to satisfy the same criteria they currently have to satisfy to qualify for dependency damages under section 1 of the Act.

The Order can be viewed here.

The position in respect of bereavement damages prior to the Order

A claim for bereavement damages has long been available in England and Wales under section 1A of the Act. However, it has only ever been available to a very limited class of claimants.

When section 1A of the Act first came into force, the list of claimants who could benefit from bereavement damages under that section was limited, by the wording of section 1A(2) of the Act, to the following:

a) *the wife or husband of the deceased; and*

b) *where the deceased was a minor who was never married:*

   i. *the child's parents if the child was "legitimate"; or*

   ii. *(only) the child's mother if the child was "illegitimate".*

Since then, the only addition to the list of claimants entitled to recover bereavement damages was brought about by section 83(7) of the Civil Partnership Act 2004. With effect from 5 December 2005, the words *"or civil partner"* were added to (a) above and *"or a civil partner"* added to (b) above, to give civil partners the same rights as spouses and to give parents the same residual rights irrespective of whether their child was neither married nor a civil partner.

The case of Smith and the need for the Order

It wasn't until the recent case of *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2018] QB 804 (*"Smith"*) that the issue of the legitimacy of the limited class of claimants entitled to bereavement damages came before the courts.

In *Smith*, the claimant was the unmarried partner of a man who died as a result of clinical negligence. As a cohabiting partner, she was able to claim dependency damages under section 1 of the Act but was unable to claim bereavement damages under section 1A of the Act. Her inability to claim bereavement damages was purely a result of her being unmarried to the deceased. On that basis, her case was that section 1A of the Act was incompatible with Articles 14 and 8 of the European Convention on Human Rights ("the Convention") and she invited the Court of Appeal to make a declaration of that incompatibility in accordance with section 4 of the Human Rights Act 1998. The Court (Sir Terence Etherton MR giving the leading judgment) agreed and declared section 1A to be incompatible with the Convention. A copy of the decision can be found here.

Many had considered that the decision in Smith would reignite a wider debate for reform of the eligibility for bereavement damages and would result in significant general change. Indeed, the UK Parliament's Joint Committee on Human Rights published a report on 16 July 2019 in response to the draft of the Order ("the Report"), in which it expressed the view that, whilst the draft order remedied the incompatibility identified in Smith, *"section 1A of the FAA is discriminatory against certain close family members. We therefore suggest that the Government should use this opportunity to look more broadly at the bereavement damages scheme and undertake a consultation with a view to reforming the scheme"* (paragraph 54).

The full text of the Report can be found here.

The Order

The Order simply, although not insignificantly, adds *"cohabiting partner"* to the class of persons entitled to bereavement damages under section 1A of the Act.

But not all cohabiting partners are eligible. The Order borrows the cohabiting partner relationship criteria from section 1 of the Act and so inserts a definition of "cohabiting partner" as:

"any person who –

- *a) was living with the deceased in the same household immediately before the date of the death; and*
- *b) had been living with the deceased in the same household for at least two years before that date; and*
- *c) was living during the whole of that period as the wife or husband or civil partner of the deceased."*

There are two further points which arise from the Order.

The first is that the Order is not retrospective. The amendments apply only to causes of action which accrue on or after 6 October 2020.

The second is that the award in respect of bereavement damages, currently set at £15,120 (recently increased from £12,980 as of 16 March 2020 by the Damages for Bereavement (Variation of Sum) (England and Wales) Order 2020), is intended as a global award to be shared between all eligible claimants.

Under the old regime prior to the Order, the only circumstance in which two claimants could jointly claim bereavement damages was if there were two parents of a *"legitimate"* unmarried child. That specific scenario was therefore expressly catered for: *"Where there is a claim for damages under this section for the benefit of* *both the parents of the deceased**, the sum awarded shall be divided equally between them"* (section 1A(4) of the Act; emphasis added).

However, the inclusion of a cohabiting partner as an eligible claimant gives rise to various other scenarios in which more than one claimant may claim bereavement damages, for example: a claim by the parent(s) and cohabiting partner of deceased who was an unmarried child, or a claim by both the cohabiting partner and a (separated) husband, wife or civil partner of the deceased.

Accordingly, the Order amends section 1A(4) of the Act and replaces the underlined text above with the words *"more than one person"*. The result is that where more than one person claims bereavement damages, the award of £15,120 shall be divided equally between them.

Conclusion

The effect of the Order is extremely limited: it extends the right to claim bereavement damages under section 1A of the Act to just one further category of claimant – "cohabiting partners" – and only then if specific criteria are satisfied. This is, perhaps, hardly surprising given that the sole purpose of the Order is to remedy the specific incompatibility (of section 1A of the Act with Articles 14 and 8 of the Convention) declared by the Court of Appeal in Smith, in which case the claimant was the *"cohabiting partner"* of the deceased.

The Government did not, on this occasion, in response to Smith and/or the Report, take the opportunity to pass primary legislation to reform the entire bereavement damages scheme so as to prospectively widen the categories of claimant entitled to claim bereavement damages under section 1A of the Act.

If the conclusion drawn by the Joint Committee in paragraph 49 of the Report is correct, it may be that section 1A of the Act (as amended by the Order) still "*discriminates against other family members in analogous positions to existing eligible claimants"*. Therefore, this could lead to the categories of claimant entitled to claim bereavement damages under section 1A of the Act being widened, not by primary legislation, but by further orders in response to specific applications to the Court for declarations of incompatibility in respect of particular types of relationship.

A more detailed piece on the decision, written by Damian and Sam, can be found on our Disease blog by clicking here.

Noise Induced Hearing Loss

Obtaining Your Own Expert Evidence After Instructing a Single Joint Expert

Written by Jessica Woodliffe

In *Hinson v Hare Realizations Ltd* [2020] EWHC 2386 (QB), the High Court reaffirmed the factors relevant to an application to abandon a single joint expert report and rely on one's own expert evidence. To read the full judgment, please click here.

Background

The Claimant claimed that in the 1970s and 1980s, while working in a Machine Shop for the Defendant, Hare Realizations Ltd, he was exposed to high levels of noise resulting in noise-induced hearing loss ("NIHL").

Proceedings were issued in September 2017. The parties agreed on the joint instruction of Ms Laura Martin of Strange, Strange and Gardner to produce an expert acoustic engineering report. Ultimately, Ms Martin's report was unfavourable to the Claimant. Nevertheless, trial was listed for 27 February 2020, having previously been adjourned on two occasions.

On 20 December 2019, in discussions with another expert, Mr Adrian Watson, in relation to another NIHL claim, the Claimant's solicitor learned that there might be deficiencies in Ms Martin's report relating to the PERA Survey of Noise in Engineering Workshops (1996) which set out typical noise levels in machine shops. They subsequently instructed Mr Watson to provide a report in Mr Hinson's claim and then sought permission to rely upon that report just prior to trial.

When will a court allow a party to abandon single joint expert evidence?

Martin Spencer J dismissed the Claimant's appeal against the decision of the Recorder. He held that the correct approach to applications by parties to abandon a single joint expert and adduce their own expert evidence was set out by Eady J in *Bulic v Harwoods* [2012] EWHC 3657 (QB).

Summarising [21] to [24] of Martin Spencer J's judgment and the authorities cited therein:

- The fact that a party has agreed to a joint report does not prevent it from being allowed facilities to obtain a report from another expert or rely on another expert's evidence.
- If a party has obtained a joint expert's report but, *"for reasons which are not fanciful"*, wishes to obtain further information before deciding whether to challenge the joint report in part or as a whole, then they should be permitted to obtain that evidence, subject to the wide and fact-sensitive discretion of the court.
- What counts as "good reason" to abandon a single joint expert is fact-sensitive; even if a reason qualifies as a "good reason" in one case, it might not count as a "good reason" in another case.
- The court must have regard to the overall justice to the parties which is a fact-sensitive question.

The following points are also clear from Eady J's judgment in *Bulic*:

- Where the court is concerned with a relatively "peripheral" issue or evidence of a non-technical nature, the court will be less likely to dispense with a single joint expert.
- Whether a case is "substantial" is relevant to, but not determinative of, the court's discretion to justify dispensing with a single joint expert. If a claim is of less than a certain monetary value, this does not necessarily mean that a court will decline to allow a party to engage his own expert evidence where he has lost confidence in a single joint expert, especially where the evidence is of a technical nature and is likely to be determinative on liability.
- One should not become too focused on the exceptional nature of an application to dispense with a single joint expert's evidence; regard should be had to all of the relevant factors.

The relevant factors

Returning to *Hinson*, Martin Spencer J held that the Recorder had acted well within the generous ambit of her discretion, weighing up all the relevant matters without unduly emphasising any particular matter. Those relevant

matters included:

- the overriding objective;
- the interests of the Claimant;
- the centrality of the single joint expert report to the issues of the case;
- the technical nature of the single joint expert report;
- the Claimant having "good reason" for wishing no longer to rely on the joint report;
- the application was made at a late stage and would, if granted, result in the breaking of a fixture with potential waste of court time and inconvenience to other parties;
- the case had already been adjourned twice but not for reasons relating to the Claimant's conduct;
- the single joint expert was chosen by the Claimant;
- the Claimant had raised Part 35 questions of the joint expert on two occasions; and
- if the application were granted, the case would be re-allocated to the multi-track resulting in a significant increase in costs.

Conclusion

Hinson helpfully sets out some of the factors relevant to the court's wide exercise of discretion when considering *Daniels v Walker* applications to abandon single joint expert evidence and rely on one's own expert evidence. Hinson demonstrates that an unfavourable single joint expert report need not necessarily sound the death knell for a successful outcome in the case.

A more detailed piece on the decision, written by Jessica, can be found on our Disease blog by clicking here.

Limitation in Disease Cases Where the Defendant is Insolvent - Part 1

Written by Philip Godfrey

Defendant insurers responding to industrial disease claims have recently been met with a novel and ingenious argument on limitation where the Defendant company has been in liquidation, and then dissolved.

The argument runs as follows: (1) The Defendant company was in liquidation; (2) The Defendant was then dissolved; (3) The Claimant applied to have the Defendant company restored to the register for the purposes of bringing a claim against the company, to be satisfied by the Defendant's historic employer's liability insurer; (4) Upon restoration of the company, the Defendant is returned to the position that it was in immediately prior to dissolution (namely, a position of liquidation) by operation of s.1032 of the Companies Act 2006; (5) The general moratorium with regard to the running of limitation periods against companies in liquidation therefore applied, namely that limitation did not run in such circumstances; (6) As such, the limitation defence did not apply to periods in which the Defendant was in liquidation, and the Defendant was unable to assert a limitation defence for these periods.

There is case law in support of this position, in particular *Financial Services Compensation Scheme Ltd v Larnell* [2005] EWCA Civ 1408.

In many cases, it produced a rather perverse result. Say the Claimant was employed by Company A, up until he was made redundant in 1989 due to the company becoming insolvent. In 1990, Company A entered liquidation and was dissolved in 1994. In 2005, the Claimant was diagnosed with noise induced hearing loss by his doctor. The Claimant's solicitors apply to restore Company A to the register in 2018 and then subsequently issue proceedings for personal injury. In this example, applying *Larnell*, the Claimant's case (despite being ostensibly brought ten years' out of time) would not be limitation-barred.

The High Court has now considered this argument in the context of historic disease cases. In *Holmes v S & B Concrete Limited* [2020] EWHC 2277 (QB), Martin Spencer

J considered this issue. The Court rejected the argument that the Court should discount the periods in which the Defendant was in liquidation when assessing the limitation defence. A copy of the judgment can be found here.

Martin Spencer J, in his Judgment, held that Parliament could not have considered *Larnell* when passing the 2006 Act. At paragraphs 16 and 17 of the Judgment, the Court set out that it could not have been Parliament's intention for the Companies Act to have the effect contended for by the Claimant. *Larnell* was therefore distinguished.

Dismissing the appeal, Martin Spencer J further held that this was a desirable outcome. It avoided *"an unexpected and undeserved windfall"* for Claimants. It should make no difference whether or not the Company was in liquidation at the time it was dissolved.

This decision provides welcome clarity to an area in which there has been some contention.

The position is now clarified as follows: a Claimant bringing a claim for personal injury cannot generally rely upon the provisions of the Companies Act 2006 to avoid a limitation defence on the basis of *Financial Services v Larnell*.

A more detailed piece on the decision, written by Philip, can be found on our Disease blog by clicking here.

Limitation in Disease Cases Where the Defendant is Insolvent - Part 2

Written by Gareth McAloon

Following on from the above piece on Holmes above, the Court of Appeal has recently refused the Claimant permission to appeal the decision of Martin Spencer J.

Permission to appeal was refused on the papers on 17 November 2020 by Floyd LJ. His cited reasons were as follows:

"The principles relevant to this type of case were settled by this court's decision in Smith v White Knight Laundry Limited [2002] 1 WLR 616. Financial Services Compensation Scheme Limited v Larnell (Insurances) Limited [2005] EWCA Civ 1408 was not concerned with the effect of the restoration of a company to the Register, which is or should be to "place the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved". The effect of deeming the company not to have been dissolved in the present case is that time was running during the period of more than 10 years between the date of knowledge (2007) and the commencement of proceedings (2018). The principle, recognised in FSCS, that a limitation period may cease to run during the period of a winding up does not assist the applicant. Even where the principle applies, the limitation period ceases to run only "so far as the operation of the winding-up is concerned" see per Lloyd LJ at [13]. So stated, the principle is not inconsistent with Smith v White Knight. The appeal would not have a real prospect of success, and there is no compelling reason to hear it."

Dementia and Concussion: Future Industrial Diseases?

Footballer's Death Attributed to Dementia Induced by Professional Football

Written by Alex Denton

Recently, in October, HM Senior Coroner John Gittins found that the death of former international footballer, Alan Jarvis, was caused by his participation in professional sport.

During the 1960s and 1970s, Mr Jarvis played for Everton, Hull City and Mansfield Town, as well as securing international caps for Wales. He died in 2019 from Alzheimer's disease, having repeatedly headed footballs during his career.

The conclusion is the second known of its kind in the UK. In 2002, an inquest into the death of former England and West Bromwich Albion footballer, Jeff Astle, found that Mr Astle developed dementia as a result of his occupation, having spent years heading heavy leather footballs. The conclusion also coincides with an increase in research being conducted into the incidence of neurodegenerative disease in professional sport. One such study was recently led by the University of Glasgow in 2019 and funded by the Professional Footballers' Association Charity and Football Association. It concluded that the rate of death due to neurodegenerative disease was approximately 3.5 times higher amongst former professional footballers when compared to the average person, including a 5 times higher rate of incidence of Alzheimer's disease.

Overall, the conclusion as to the cause of Mr Jarvis's death could pave the way for professional athletes (or families on their behalf) to claim compensation for industrial disease after sustaining head injuries during their career.

Paris: Match Postponed

Written by Patrick Limb QC & Kam Jaspal

Last month nothing happened and that matters.

The International Conference on Concussion in Sport (organised by the Concussion in Sport Group) is a key meeting at which, on a broadly quadrennial basis, a group of approximately 40 experts explore and review the developments in sports related concussion injuries. The 6th Conference was due to take place in Paris over the last week in October 2020 but, on account of COVID-19, has been re-scheduled a year from now.

Following the 1st Conference, which took place in Vienna in 2001, the Group's Consensus Statement was published, providing recommendations for the improvement of health and safety of athletes who suffer concussive injuries in rugby, football, hockey and other sports. The Statement has been updated and revised following each subsequent Conference (the latest version can be read here) and the current Side-line Concussion Assessment Standard (SCAT5) was updated following the 5th Conference, which took place in Berlin in October 2016.

It is noteworthy that the Group's previous Statement reached the consensus that a cause and effect relationship between chronic traumatic encephalopathy (CTE) and sports-related concussion had not yet been demonstrated. Whether that consensus will hold now falls to be reviewed in October 2021 in the face of a tension between that '2016 consensus' on the one hand and large settlements that have been reached in some arenas (both sporting and jurisdictional) on the other – latterly, in 2018, the National Hockey League settling group litigation involving 300 former players for close to $19 million. The passage of four, soon-to-be five, years has seen, and will see, advances in medical diagnostic techniques (both in terms of scanning and biomarkers) and more nuanced or sophisticated forms (actual or asserted) of diagnosis.

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