

Compass Chambers



Fibres, Foreseeability and Family Claims

INDUSTRIAL DISEASE CASE UPDATE 2025

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Asbestos: Mesothelioma and Low Exposure Cases





Asbestos: Mesothelioma and Low Exposure Cases

- Article Published 31 October 1965: Link between low asbestos exposure and mesothelioma





Pre-1965 Low Exposure

- Nicola Steven Watt or Murray & Others v Lend Lease Construction Limited [2023] CSIH 19
- Inner House Appeal from Lord Uist in the Outer House
- Mr. Watt died of mesothelioma
- Joiner to trade
- Employed by Bovis – large construction firm – during 1963
- Worked on construction of car park on Argyle Street in Glasgow
- Lined ceiling (25ft x20 ft) with asbestos sheets
- Required to cut the 8ft x 4ft sheets into 2ft x 2ft squares using a handsaw – 3 or 4 days

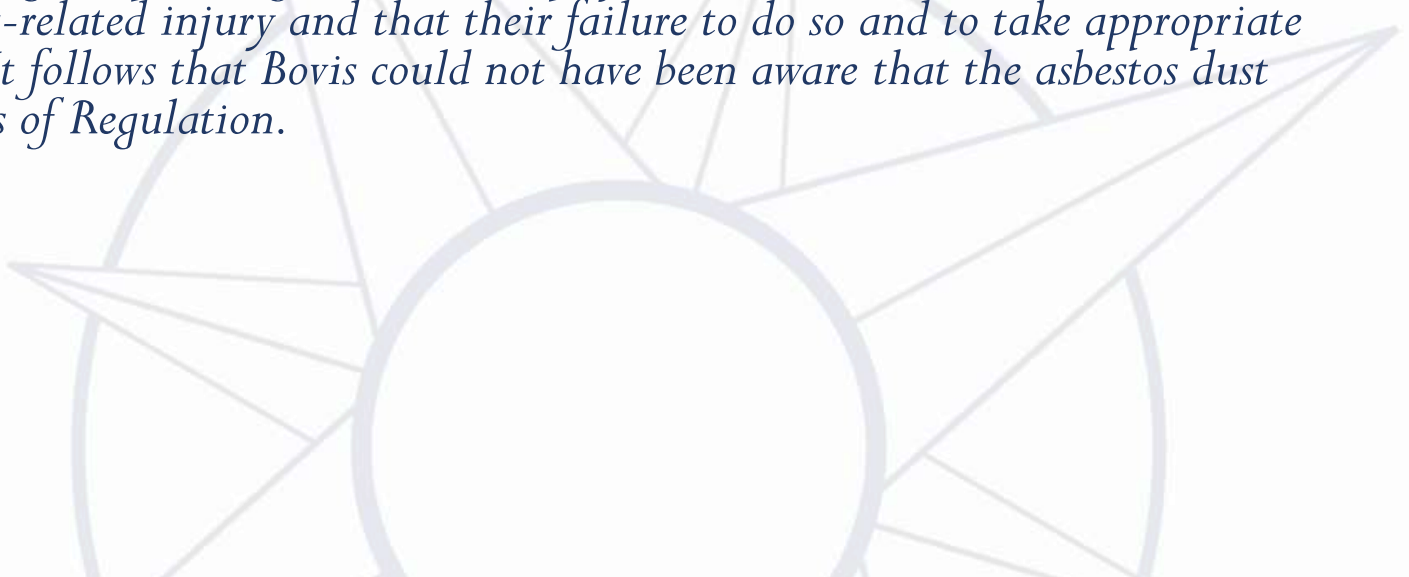




Pre-1965 Low Exposure

- Nicola Steven Watt or Murray & Others v Lend Lease Construction Limited [2023] CSIH 19
- Case fought on liability and foreseeability – accepted that mesothelioma was caused by exposure while employed by Bovis.

[para 21] Having considered the evidence of Mr Howie and Professor Willey I have reached the conclusion that it was not until after the publication of the Newhouse and Thomson paper in 1965 at the earliest that employers could have been aware that asbestos exposure at the level to which Mr Watt was subjected gave rise to the risk of injury. I therefore do not accept that during the period of Mr Watt's employment with them Bovis should have appreciated that he was at risk of asbestos-related injury and that their failure to do so and to take appropriate precautions for his safety was negligent. It follows that Bovis could not have been aware that the asbestos dust was "likely to be injurious" to him in terms of Regulation.

- First Instance: Case failed
- 



Pre-1965 Low Exposure

- Nicola Steven Watt or Murray & Others v Lend Lease Construction Limited [2023] CSIH 19

- Pursuers appealed to Inner House

Lord Ordinary erred in interpretation of cases from England – in particular had repeated the error made by Swift J in *Abraham v G Ireson & Son Limited* regarding the treatment of maximum exposure levels

Lord Ordinary erred in treatment of skilled witnesses

Appeal Heard by

- Lord Justice Clerk, Lady Dorrian, Lord Malcolm and Lady Wise



Pre-1965 Low Exposure

- Nicola Steven Watt or Murray & Others v Lend Lease Construction Limited [2023] CSIH 19
- Lady Wise: *He plainly decided the case according to the evidence before him, and in particular by reference to his preference for that of Professor Willey on the key issues. We see no proper basis to fault his decision in this regard. Whether Swift J made any error of fact in Abraham is beside the point: the Lord Ordinary not having fallen into the trap of adopting the factual basis of that case cannot be said to have adopted any error in this case.*
- Reclaiming motion refused.



Pre-1965 Low Exposure

- Strachan v Glasgow City Council, Sheriff Dickson, ASPIC, 30 May 2024
- Mr. Strachan suffered from Diffuse Pleural Thickening
- He had worked for Glasgow Corporation between 1956 and 1966
- 1956 to 1963 – Electrician
- 1963 – 1966 – Work Study Observer
- Early 1958 – Glasgow High School





Pre-1965 Low Exposure

- Strachan v Glasgow City Council, Sheriff Dickson, ASPIC, 30 May 2024
- Rewiring Building – including Boiler Room
- Boiler Room took two weeks – 80 hours
- Lagers were present – mixing up asbestos lagging in a bath and applying it to pipework and boilers
- Mixing took 30 to 45 minutes per day
BUT dust remained in Boiler Room





Pre-1965 Low Exposure

- Strachan v Glasgow City Council, Sheriff Dickson, ASPIC, 30 May 2024
- *“That in early 1958 a reasonable and prudent employer, taking positive thought for the safety of their employees in light of what they knew at the time or ought to have known at the time, should have appreciated from a visual assessment of the school boiler room that there was a foreseeable risk of personal injury if their employee was exposed to the levels of asbestos that the pursuer was exposed to in the school boiler room for a period of about 80 hours.”*
- *“That Glasgow Corporation should have appreciated from a visual assessment of the school boiler room that the pursuer’s repeated exposure to asbestos during the mixing process in the school boiler room for a period of about 80 hours was, of itself, of sufficient intensity, duration and frequency to give rise to a foreseeable risk of injury to the pursuer.”*



Pre-1965 Low Exposure

- Strachan v Glasgow City Council, Sheriff Dickson, ASPIC, 30 May 2024
- Sheriff also commented on easy precautions that could have been taken – (i) segregating the work; (ii) steps to minimise the dust – exhaust ventilation, damping down and general ventilation; and (iii) doing the mixing outside.
- Judgement for the pursuer
- But bear in mind that task created visible dust and fell within ambit of Asbestos Industry Regulations 1931



Pre-1965 Low Exposure

- The approach in England and Wales

White v Secretary of State for Health
and Social Care

Cuthbert v Taylor Woodrow
Construction Holdings

Conjoined appeals: [2024] EWCA Civ 244





Pre-1965 Low Exposure

- White v Secretary of State for Health and Social Care
- Mr White died of Mesothelioma in April 2020 aged 87
- Worked as a Lab Technician at Sefton Hospital – 1949 to 1960
- Senior Biochemist – 1973/74 to 1991/92
- Alleged exposure to asbestos was through the use of Bunsen burner mats boards which were fragile and broke
- Evidence of defender's expert was 0.02 to 0.05 f/ml
- First Instance – court found irregular and intermittent exposure during first period of employment – *de minimus* – Case dismissed
- Claimant appealed



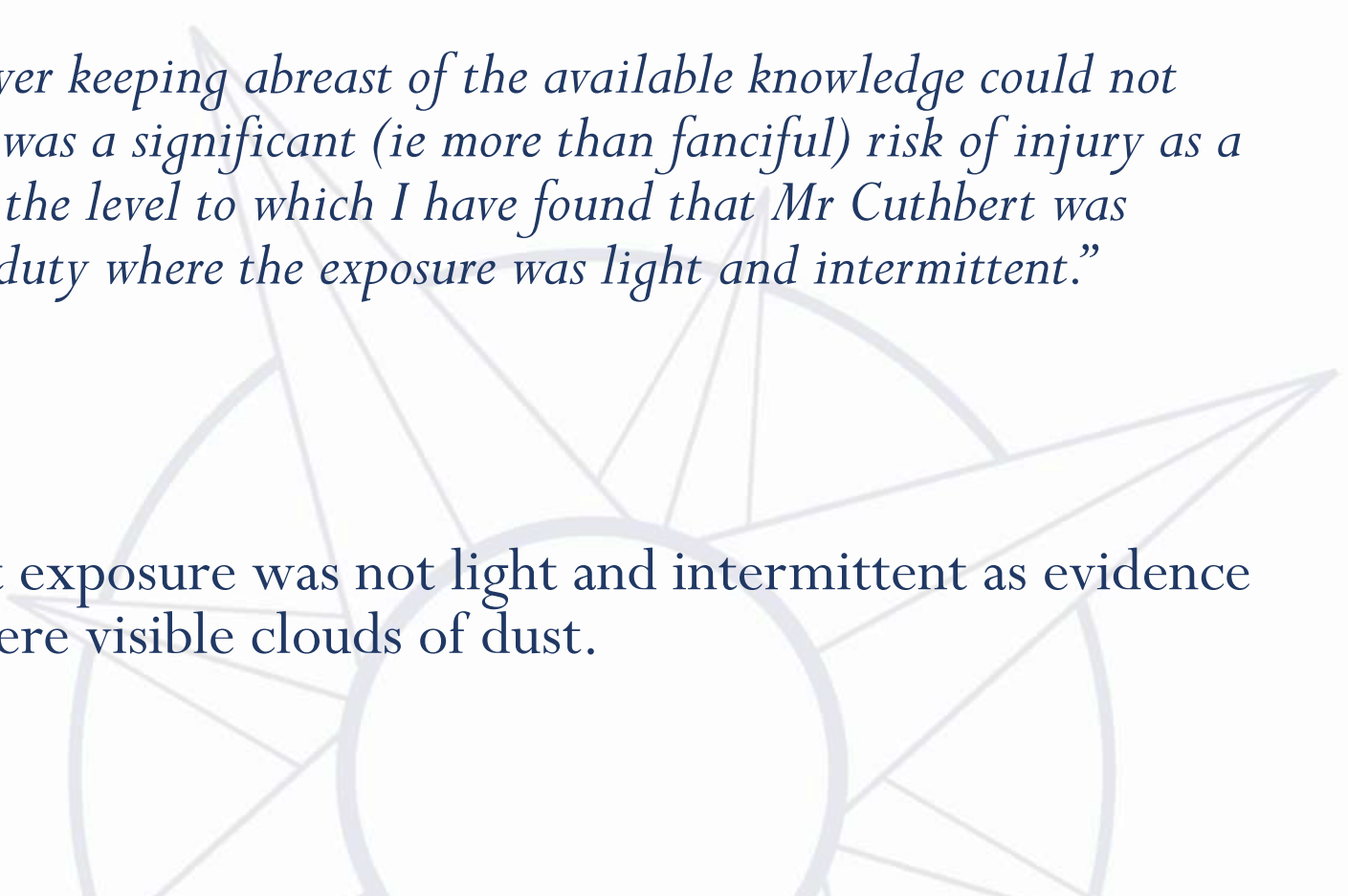


Pre-1965 Low Exposure

- Cuthbert v Taylor Woodrow Construction Holdings
- Mr. Cuthbert died of mesothelioma in April 2022 aged 83
- Worked for defenders as a labourer during construction of School in Cheshunt
- Employment took place between 1956 and 1959
- Alleged exposure came from being in vicinity of carpenters cutting asbestos materials and sweeping up from time to time.
- At first instance: “...his exposure to asbestos when employed by the defendant was of low order, light and intermittent and, in the main, as a bystander.”



Pre-1965 Low Exposure

- Cuthbert v Taylor Woodrow Construction Holdings
 - *“I consider that a reasonable employer keeping abreast of the available knowledge could not reasonably have foreseen that there was a significant (ie more than fanciful) risk of injury as a result of the exposure to asbestos at the level to which I have found that Mr Cuthbert was exposed.... there was no breach of duty where the exposure was light and intermittent.”*
 - Case dismissed
 - Claimant appealed on basis that exposure was not light and intermittent as evidence was when sweeping up there were visible clouds of dust.
- 



Pre-1965 Low Exposure

- Appeals were conjoined
- Knowledge before the 1960's was of the risk of asbestosis
- No support in literature that there was awareness of a significant risk of pulmonary injury on exposure to asbestos levels significantly below that needed to cause asbestosis.
- Not the law that parties were required to take steps to prevent a risk that was not reasonably foreseeable.
- *Jeromsen* not binding upon the Court of Appeal – distinguished as exposure was very different
- No error in law or findings in fact
- Appeals dismissed





Asbestos: Mesothelioma and Low Exposure Cases

- *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10
- Fairchild exception in single exposure case – applied
- Relevant test – material increase in risk
- No need to show exposure doubled the risk over environmental exposure
- “...therefore, mesothelioma claims must now be considered from the defendant’s standpoint a lost cause” Lord Brown, para 286





Post 1965 – Low Level Exposure

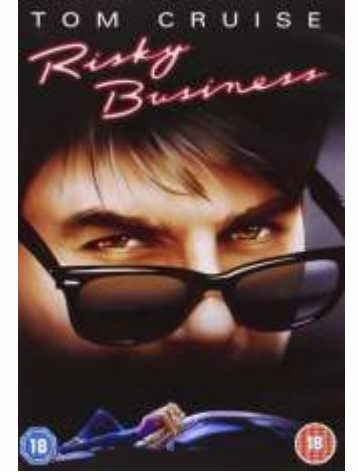
- Kerr v Midlothian Council and Moray Council [2024] CSOH 112
- Mrs Kerr died of peritoneal mesothelioma in June 2022
- Employed as a Chemistry and Science Teacher
 - Midlothian Council: July 1983 to Late 1985 and May 1999 to November 2023
 - Moray Council: late 1985 to June 1990 and 1992 to 1995
- Exposure from asbestos bunsen burner mats and associated wire gauzes.





Post 1965 – Low Level Exposure

- Kerr v Midlothian Council and Moray Council [2024] CSOH 112
- Exposure was to chrysotile (white) asbestos – lowest potency for malignancies
- Exposure was low level – 0.046 f/ml years
- Epidemiology evidence – suggested peritoneal mesothelioma probably not caused by asbestos exposure
- Lord Malcolm followed Bannister v Freemans Plc [2020] EWHC 1256 (QB)



“[75] In summary, I accept the evidence to the effect that if Mrs Kerr’s work as a teacher exposed her to any risk of developing peritoneal mesothelioma, a doubtful proposition in itself, the risk was so small as to merit disregard (sometimes referred to as being de minimis). In other words it was not material. In these circumstances there can be no liability, see Prescott v The University of St Andrews, [2016] CSOH 3, per Lord Pentland at paragraph 64. It also follows that even if the Fairchild exception could be in play, it would not be applied in the claimants’ favour.”



Post 1965 – Low Level Exposure

- Johnstone v Fawcett's Garage (Newbury) Ltd
- First Instance: [2023] EWHC 3010 (KB)
- Court of Appeal: [2025] EWCA Civ 467
- Supreme Court: UKSC/2025/0102 – *permission to appeal refused*





Post 1965 – Low Level Exposure

- Johnstone v Fawcett's Garage (Newbury) Ltd
- Elaine Johnston died of mesothelioma in August 2019
- She had worked for the defenders
- Employed between 1982/3 and 1989/90
- Based in the office
- Office was across a yard from the workshop
- Admitted there were unsafe practices that involved release of asbestos dust –grinding and filing asbestos brake and clutch components and using airlines to blow out brake and clutch dust



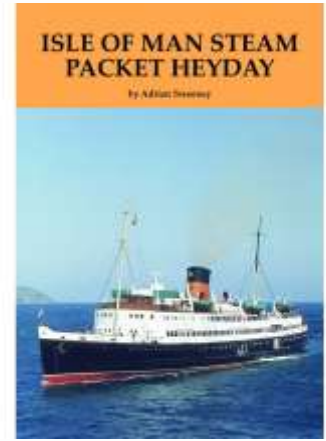


Post 1965 – Low Level Exposure

- Johnstone v Fawcett's Garage (Newbury) Ltd – First Instance
- Refusal to allow a late witness
- Defender had not carried out air monitoring – claimant sought an adverse inference to be drawn against them in relation to the fibre levels
- Whether there had been a material increase in the risk of mesothelioma
- Appropriate method of assessing the increase in risk



Post 1965 – Low Level Exposure



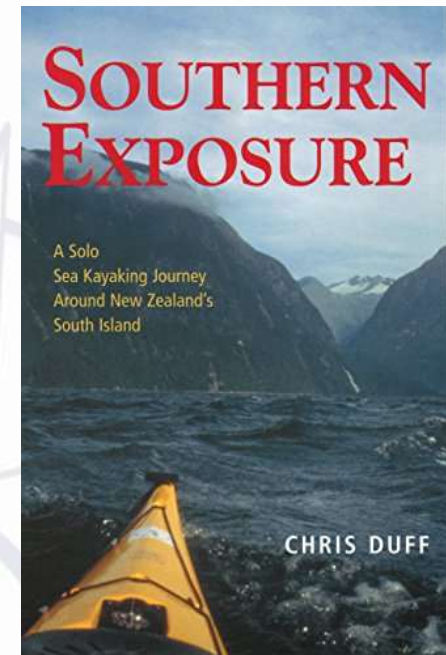
- Johnstone v Fawcett's Garage (Newbury) Ltd – First Instance
- Inference re monitoring: -

“I have also considered carefully the adverse inference point made by C, but I do not find it helpful in this case. The difference between the calculations of the occupational hygienists rested in large measure on their very different interpretation of RR’s evidence, which required judicial determination. Any measuring of levels could only have assisted in relation to RR’s exposure, but would then have been the subject of judicial determination as to what such figures represented. Any measurement would not have assisted in relation to identifying the reduction factors to be applied to EJ’s exposure, which also required judicial determination. It does not seem to me to be a sustainable argument that the lack of monitoring should lead the Court to adopt uncritically Mr Chambers’ calculations in circumstances where I have concluded that they do not reflect the factual matrix I have found to exist at the relevant time”



Post 1965 – Low Level Exposure

- Johnstone v Fawcett's Garage (Newbury) Ltd – First Instance
- Detailed review of liability evidence
- Accepted defender's experts estimate of exposure
 - 5 to 10 minutes per day (lower end more likely)
 - 0.001 to 0.002 f/ml-y





Post 1965 – Low Level Exposure

- Johnstone v Fawcett's Garage (Newbury) Ltd – First Instance
- Assessing risk

Evidence from Professor Norrie, Biostatistician and Epidemiologist and Professor Stephen Jones, Professor of Environmental and Occupational Toxicology

Hodgeson and Darnton (2000): The quantitative risks of mesothelioma and lung cancer in relation to asbestos exposure

Peto, J., C. Rake, et al. (2009). Occupational, domestic and environmental mesothelioma risks in Britain: a case-control study, HSE Research Reports, RR696, Health and Safety Executive, London.

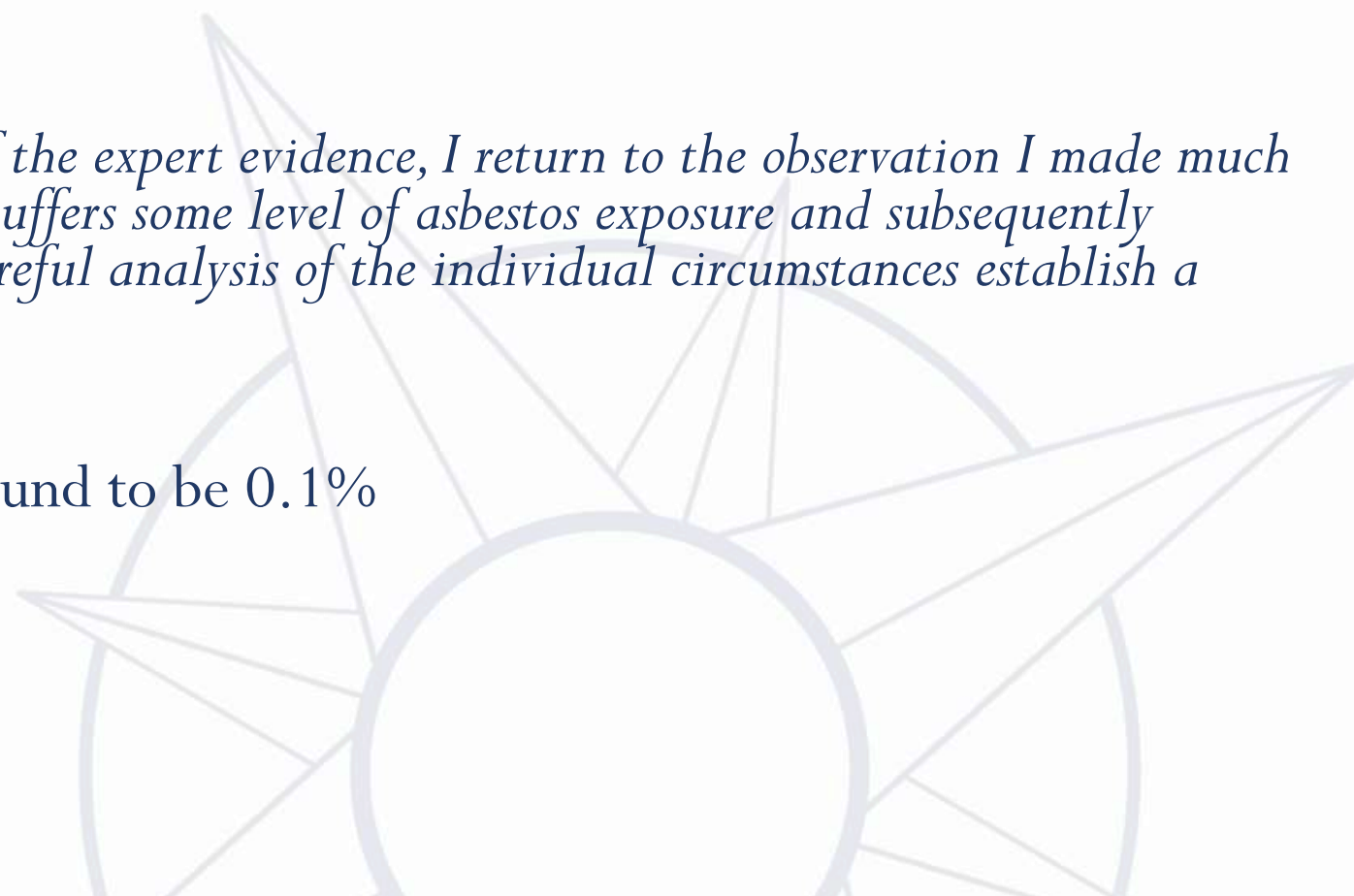


Post 1965 – Low Level Exposure

- Johnstone v Fawcett's Garage (Newbury) Ltd – First Instance
- Assessing risk

“Having considered carefully all of the expert evidence, I return to the observation I made much earlier that the fact that a person suffers some level of asbestos exposure and subsequently develops MMP does not without careful analysis of the individual circumstances establish a material increase in risk.”

- Overall Increase in Risk was found to be 0.1%
- Not material – Case dismissed



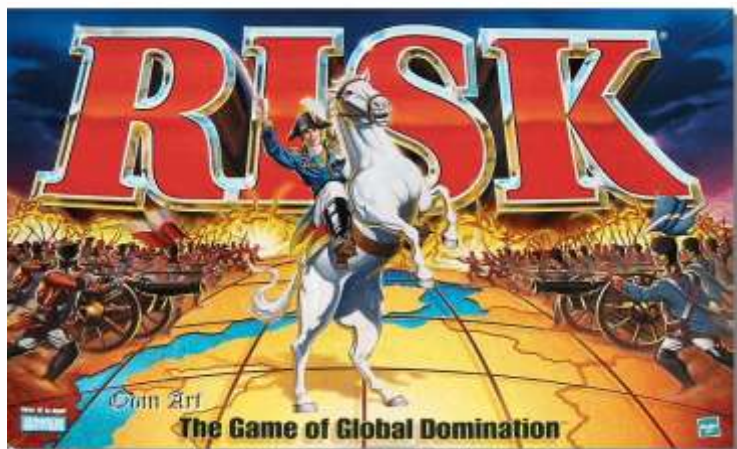


Post 1965 – Low Level Exposure

- Court of Appeal - Coulson, Davies and Zacaroli LJJ
- Grounds of Appeal

Rejection of the Adverse Inference Argument

Four issues regarding the approach used by court in relation to the increased risk





Post 1965 – Low Level Exposure

- Court of Appeal - Coulson, Davies and Zacaroli LJJ
- Adverse Inference:
 - Lack of evidence that there was an obligation to monitor
 - In any event, cannot require court to ignore factual findings
 - Court did not have to balance competing evidence – claimant's factual evidence was uncontested





Post 1965 – Low Level Exposure

- Court of Appeal - Coulson, Davies and Zacaroli LJJ
- Risk
- Judge entitled to use direct risk model, and this was not an error in law

Direct risk is an extrapolation of the risk based on occupational and background risk from Hodgeson and Darnton

- There was an error in the calculation made by the Judge but did not affect the conclusion that the increase was less than 0.1%
- Court should not apply most favourable figures from the occupational and background risk



Post 1965 – Low Level Exposure

- Court of Appeal - Coulson, Davies and Zacaroli LJJ

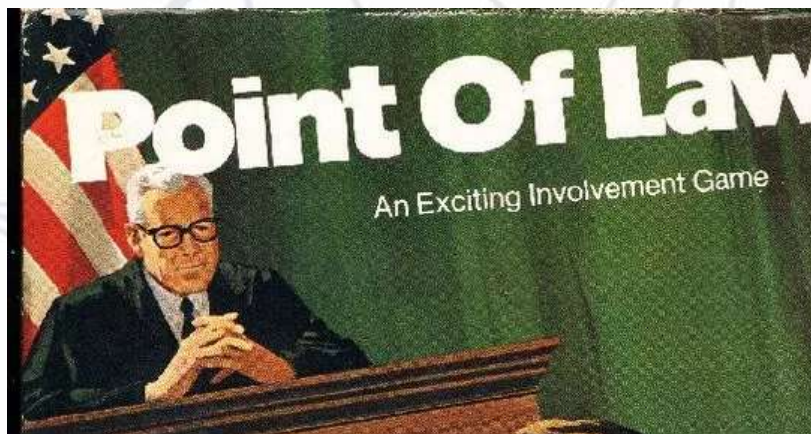
Points to Note

- Direct risk a permissible approach but can be challenged
- Court of appeal did rule out the absolute risk approach – this is where the risk would be assessed by a medical expert not the judge – exposure could be material but might only amount to a medically insignificant chance overall
- Appeal Dismissed



Post 1965 – Low Level Exposure

- Supreme Court
- Refused as does not raise an arguable point of law
- Unsuitable case for airing the Royal Statistical Society's concerns re the use of statistics





Post 1965 – Low Level Exposure

Uphill Struggle





Post 1965 – Low Level Exposure

- Low exposure cases much more difficult now
- Particularly so for Chrysotile
- Detail of exposure, duration and regularity – critical information
- Need to obtain and consider engineer/occupational hygienist evidence at an early stage
- Is there a need for evidence from a Statisticians/Epidemiologists
- Expectation Management of pursuer/family
- Be wary –breach and causation very different



Mesothelioma: Family Claims

- Crozier or Veale and Others v Scottish Power UK Plc (UKSC/2025/0002)
- Supreme Court Hearing: 3 November 2025 – *Judgement Awaited*
- Interpretation of s.5 of Damages (Scotland) Act 2011

5 Discharge of liability to pay damages: exception for mesothelioma

(1) This section applies where—

- (a) the liability to pay damages to A (or to A's executor) is discharged, whether by antecedent agreement or otherwise, by A before A's death,
- (b) the personal injury in consequence of which A died is mesothelioma, and
- (c) the discharge and the death each occurred on or after 20th December 2006.

(2) Liability arises under section 4(1) but is limited to the payment of such sum of damages as is mentioned in paragraph (b) of section 4(3).

- Does the 'mesothelioma' exception apply where the deceased settled a pleural plaques case on a full and final basis?



Loss of Society: s.4(3)(b) Damages (Scotland) Act 2011

Violet Paterson and Others v Lanarkshire Health Board
[2023] CSOH 1 – January 2023

Deceased aged: 35 (died in 2015)

Life Expectancy: not given in judgement



Mother	£100,000		£112,267.55
Siblings (brother and half-sister)	£5,000	Distant relationship, large age gap, medical entry re P. ostracised by family. Brother gave evidence but could not remember when D died and did not return to finish evidence	£5,613.38
Children	£70,000	Aged 20 and 22 at proof, 13 and 15 at date of death	£78,587.29



Mesothelioma: Jury Trials

- MacVicar and Others v Robert Nimmo [2025] CSOH 85
- Lord Cubie, 22 April 2025
- Pursuers: Family and Estate of Edward Samuel Butt
- Mr Butt died on 28 November 2021 of mesothelioma (within 3 years of the diagnosis)
- Exposure to asbestos occurred in the late 1970's
- Pursers sought issues — that was opposed



Mesothelioma: Jury Trials

- Issue arises from terms of s.17 and s.18 of the Prescription and Limitation (Scotland) Act 1973
- Where negligence was many years before an injured party brings their case under s.17(2)(b)
- The family of a deceased bring their case in terms of s.18(2)(a)
- The issue arose from s.22(4): -

“(4) An action which would not be entertained but for the said subsection (2)(b) shall not be tried by jury”



Mesothelioma: Jury Trials

- The defender argued that s.17(2)(b) was the gateway for the family claims and the prohibition on a jury trial applied to them
- The terms of s.22(4) were the result of a policy decision
- Defender's counsel said that existing authorities in which Jury Trials had been allowed (*Mitchell v Advocate General* 2015 SLT 92 and *McLean v Fairfield Shipbuilding Limited* 2019 SLT 476) were only persuasive and that in each case the Lord Ordinary misdirected themselves.





Mesothelioma: Jury Trials

- Pursuer argued that *Mitchell* was correctly decided
- s.18(2)(b) did not apply as the claims were brought in time
- s.22(4) was not engaged





Mesothelioma: Jury Trials

- Court Agreed with Pursuer : Issues were allowed
- Follows the decision in *Mitchell*





Asbestosis and DPT: Quantum



- Hamilton v NG Bailey Limited [2020] EWHC 2910 (QB)
- Asbestosis: 10% respiratory disability likely would acquire additional 5% respiratory disability (could rise to 10%)
- Future Risks: Mesothelioma; 3% and 3% risk of lung cancer
- Case on borderline between brackets, at time 10% bracket went up to £36,060
- Court awarded £32,000 (with RPI: £44,156.30) on a provisional basis
- Now firmly in the 6((C)(c) over 10% bracket rather than 6(C)(d) upto 10%



Asbestosis: Quantum



- Peter Frank Brown v G & K Manson Limited [2022] EWHC 3004 (KB)
- Asbestosis: by Feb 2022 55% overall respiratory disability 25% due to asbestosis and likely to progress to 30% over lifespan
- Future Risks: Mesothelioma; Lung cancer; and Diffuse Pleural Thickening
- JCG Bracket (at that time): £35,500 to £105,850 – court split into lower, middle and higher bands – with 30% being the cut off between lower and middle band (this was £58,951)
- Court awarded £55,000 on a provisional basis



Pleural Plaques Limitation and s.19A

- Kinghorn v Martin Acoustics, Sheriff Mackie, Glasgow Sheriff Court, 26 July 2023
- Smith v Hall Russell Limited, Sheriff Campbell K.C., ASPIC, 28 March 2025





Kinghorn v Martin Acoustics, Sheriff Mackie, Glasgow Sheriff Court, 26 July 2023

- Pursuer diagnosed with Pleural thickening on 17 October 1996 – told by GP not to worry, might develop something but not for 30 years if it happens at all
- Shortly after goes to local library and researches pleural plaques – reads about mesothelioma - shaken by knowledge that he has a serious condition
- 1997 – Some discussion with asbestos charity – benefits application made on 3 December 1997
- 4 December 1997 – further discussion with GP about chest x-ray
- 2008 – underwent a further chest x-ray - advised he had pleural thickening
- 3 April 2014 after further scans told that he has Pleural Plaques and signs of early asbestosis – given leaflet about asbestos related lung disease



Kinghorn v Martin Acoustics, Sheriff Mackie, Glasgow Sheriff Court, 26 July 2023

- 4 April 2014 – attends a meeting with an asbestos charity as a follow up the pursuer is sent a benefits application form and advised he might have a legal claim – the charity offers to put him in touch with solicitors and warn about the 3-year time limit for bringing a claim
- 29 April 2014 pursuer returns benefit application form and asks to be referred to solicitors
- Pursuer was referred to Thompsons – he was advised verbally on 30 April 2015 his claim was time barred and that was confirmed in writing on 5 May 2015
- Thompsons had carried out various investigations – Pursuer at no point told Thompsons that the charity had told him he had no claim



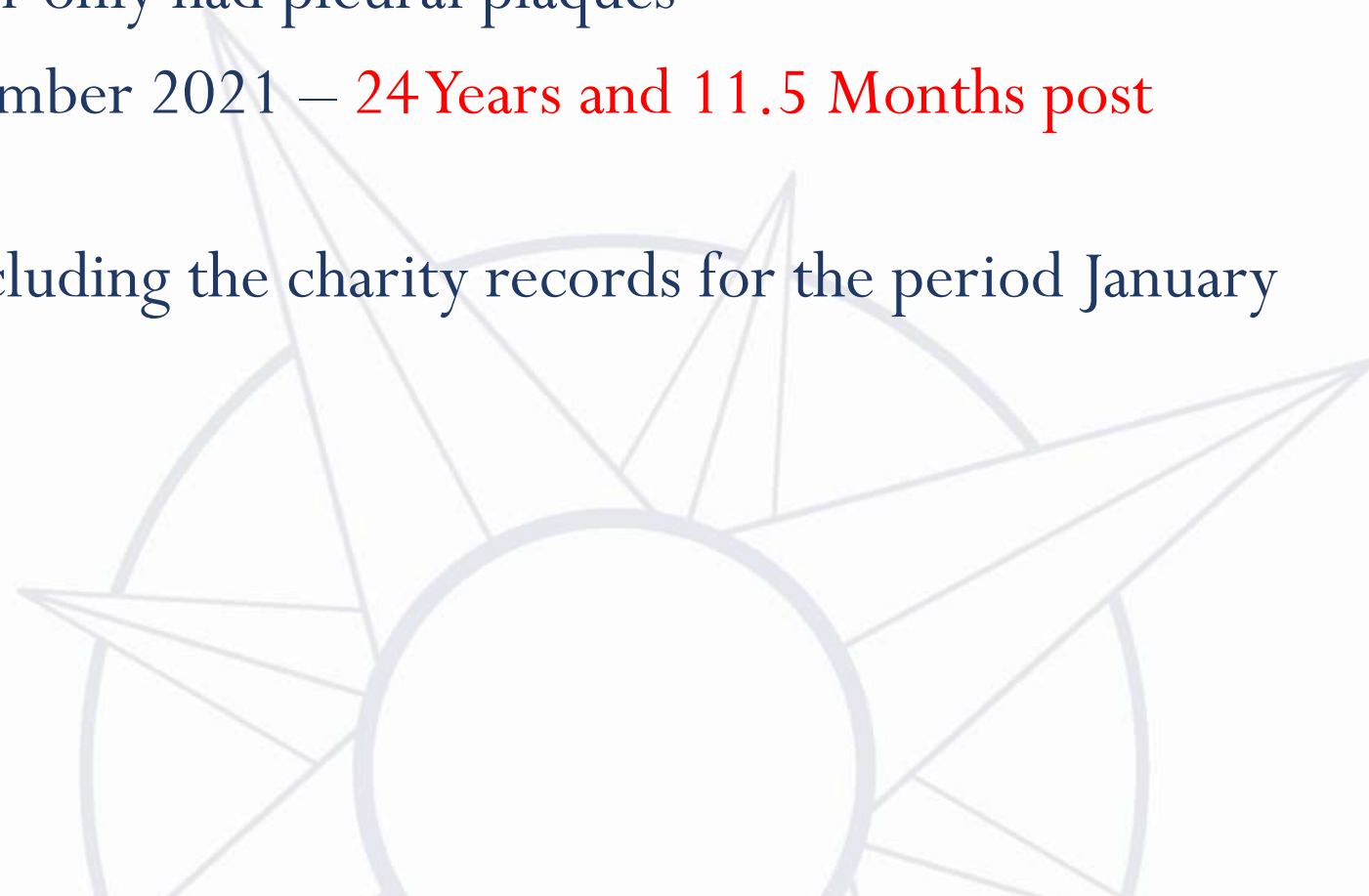
Kinghorn v Martin Acoustics, Sheriff Mackie, Glasgow Sheriff Court, 26 July 2023

- 7 April 2016 – Pursuer attends respiratory clinic for lung function tests
- 13 April 2017 - Pursuer attends respiratory clinic for lung function tests told lung condition unchanged
- 12 October 2017 - Pursuer attends respiratory clinic for lung function tests – told he remained stable
- 16 March 2018 pursuer approaches Digby Brown
- 28 March 2018 – Digby Brown advise case is time barred and that because of failure to act so are any subsequent claims for conditions caused by asbestos exposure
- Pursuer at no point told Digby Brown that the charity had advised him he had no claim



Kinghorn v Martin Acoustics, Sheriff Mackie, Glasgow Sheriff Court, 26 July 2023

- Pursuer consulted further set of agents in October 2020 – medical evidence is obtained showing the pursuer only had pleural plaques
- Court Action raised in September 2021 – 24 Years and 11.5 Months post diagnosis in 1996
- Specification was granted including the charity records for the period January 1996 to December 1996
- No records were recovered





Kinghorn v Martin Acoustics, Sheriff Mackie, Glasgow Sheriff Court, 26 July 2023

- Case proceeded to a Preliminary Proof on Timebar
- The pursuer argued that the case ought to be allowed to proceed in terms of s.19A
- He had been ignorant of his legal rights despite knowing the diagnosis and seriousness of the condition
- He had provided an explanation for the delay in raising proceedings

He was advised by a charity advisor in November 1996 he had no claim.

- On this basis it would be equitable to allow the action to proceed



Kinghorn v Martin Acoustics, Sheriff Mackie, Glasgow Sheriff Court, 26 July 2023

- Court did not agree – case was dismissed
- The court rejected the pursuer's evidence about the conversation in 1996 with the charity advisor, there was no contemporary documentation to support the pursuer's position, and the charity advisor did not give evidence.
- The court also commented on the fact the pursuer had not told either Thompsons (again rejecting the pursuer's evidence) or Digby Brown about the conversation in 1996.



Kinghorn v Martin Acoustics, Sheriff Mackie, Glasgow Sheriff Court, 26 July 2023

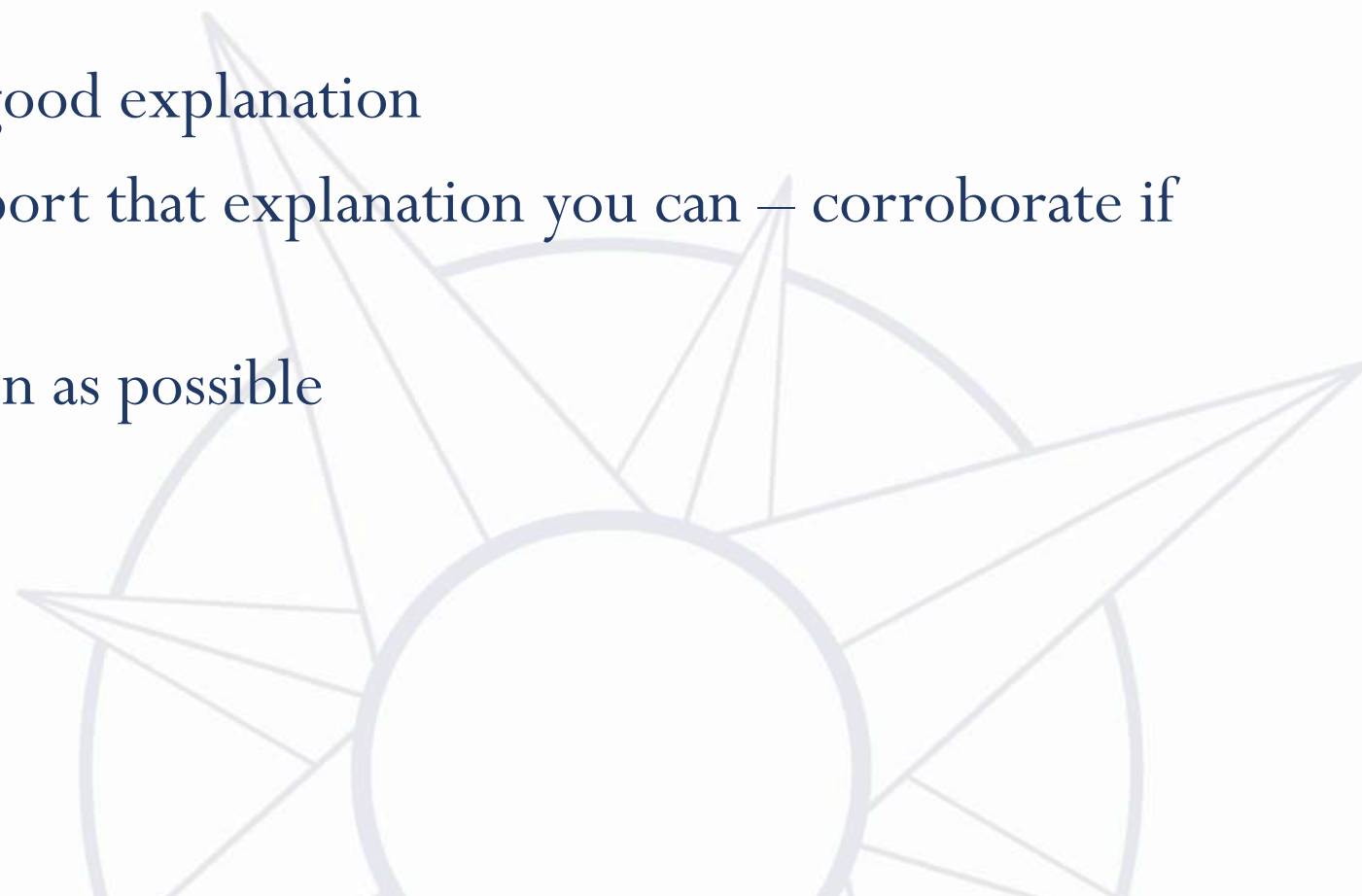
- Court put weight on the periods of inaction by the pursuer
 - the delay between diagnosis (1996) and first consulting solicitors (2014)
 - The 3-year delay between consulting a further firm
 - The 2-year delay after consult with Digby Brown before seeking further advice





Kinghorn v Martin Acoustics, Sheriff Mackie, Glasgow Sheriff Court, 26 July 2023

- What can we take from this decision
- To succeed in a 19A need a good explanation
- Lead all the evidence to support that explanation you can — corroborate if possible
- Bring a 19A argument as soon as possible





Smith v Hall Russell Limited, Sheriff Campbell K.C., ASPIC, 28 March 2025





Smith v Hall Russell Limited, Sheriff Campbell K.C., ASPIC, 28 March 2025

- Pursuer worked for the defender from 1967 to 1969 as an apprentice joiner
- He worked on board ships under construction
- In April 2019 the pursuer developed a dry cough
- He was sent for an x-ray and then referred for a CT Scan
- 5 June 2019 he was told he had pleural plaques – the pursuer was given information about seeking compensation





Smith v Hall Russell Limited, Sheriff Campbell K.C., ASPIC, 28 March 2025

- Pursuer contacted an asbestos charity and was referred to a firm of solicitors
- He provided a statement to his solicitors on 10 June 2019
- His claim was intimated to Capita (the defender's insurer being out of business the claim fell to be dealt with in terms of the FSCS) on 3 January 2020
- Capita acknowledged the letter of intimation on 17 January 2020
- Totality of correspondence between the pursuer's initial agents and Capita
- The pursuer proceeded to email his solicitors on a number of occasions over the following months/years to which he received no reply



Smith v Hall Russell Limited, Sheriff Campbell K.C., ASPIC, 28 March 2025

- The pursuer wrote to his solicitors on 10 February 2021 to enquire if his emails were being received
- Receipt of that letter was confirmed in writing on the 15 February 2021
- The pursuer wrote to his solicitors on 23 May 2022, 31 May 2022 and 13 July 2022 enquiring about his case and asking if there was a problem
- The pursuer did not receive a reply
- The pursuer instructed new agents on 22 July 2022
- The file was recovered by mandate and was hand delivered on 19 August 2022
- By this time the Triennium had expired



Smith v Hall Russell Limited, Sheriff Campbell K.C., ASPIC, 28 March 2025

- The pursuer case had time barred in the hands of his original agents
- A court action was raised on 24 May 2023 seeking to proceed under s.19A





Smith v Hall Russell Limited, Sheriff Campbell K.C., ASPIC, 28 March 2025

- Why a 19A rather than a negligence action against the original solicitors?
- Provisional Damages:

12

Award of provisional damages for personal injuries: Scotland.

(1) This section applies to an action for damages for personal injuries in which—

- (a) there is proved or admitted to be a risk that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of the action, develop some serious disease or suffer some serious deterioration in his physical or mental condition; and

- Future risks arise from the asbestos exposure not missing the limitation date – The court would not allow a provisional decree against a negligent law firm in these circumstances



Smith v Hall Russell Limited, Sheriff Campbell K.C., ASPIC, 28 March 2025

- Availability of Provisional Damages was central to pursuer's 19A argument
- Court found that defender would not have been in a better position to defend the case than had it been brought in time.
- Defenders tried to make some running with the delay between the limitation date and the date proceeding were raised – court made little of that argument – *Irving v Advocate General distinguished*
- Court considered alternative remedy against solicitors [26] – “...appears to have a well-founded claim. That fact is a relevant consideration in the balancing of equities.”



Smith v Hall Russell Limited, Sheriff Campbell K.C., ASPIC, 28 March 2025

- Accepted that Provisional Damages was a relevant consideration [para.27] but noted striking that counsel has disclosed no other cases in which that had been a factor.
- *“Whilst the pursuer’s concern about the possibility of developing mesothelioma is perfectly understandable, in my view that is not determinative of the question of whether the court should exercise its discretion under section 19A. That is because it is not the measure of the pursues loss in a possible claim against his former agents...this is not a situation where, on the one hand, prejudice to the pursuer is the complete exclusion of a damages claim, and on the other prejudice to the defender is the loss of the time bar defense...Rather the court is being invited to balance a damages claim which may not be as extensive as the pursuer might have wished to have been able to pursue, on the one hand, and the loss of the time-bar defense on the other.*
- Possibility not a certainty that pursuer would develop mesothelioma (2% risk in medical report)



Smith v Hall Russell Limited, Sheriff Campbell K.C., ASPIC, 28 March 2025

- Final Point – If Provisional Damages determinative factor, then s.17 would cease to have any effect.
- Application refused





Law Commission Report

- Report on Damages for Personal Injury (Scot Law Com No.266)





Law Commission Report

- Main Proposed Changes
 - Services – broadening the scope of those who can claim
 - Harmonise law dealing with the offset/deductibility of contributions and permanent health insurance schemes with England and Wales
 - Pleural Plaques diagnosis's – proposed these would no longer time bar symptomatic asbestos conditions
 - For pursuers who are minors introduce court oversight (like English approval hearings)



Noise Induced Deafness and Tinnitus



**Hearing
protection
must be worn**



Noise Induced Deafness and Tinnitus

- Guidelines
- Coles, Lutman and Buffin (CLB): Guidelines on the diagnosis of noise-induced hearing loss for medicolegal purposes (2000) (*approach used in Baker v Quantum Clothing at first instance not departed from or adversely commented on by Supreme Court*)
- Lutman, Coles and Buffin (LCB): Guidelines for quantification of noise-induced hearing loss in a medicolegal context (2015)
- Moore, Lowe and Cox (MLC): Guidelines for Diagnosing and Quantifying Noise-Induced Hearing Loss (2022)



Noise Induced Deafness and Tinnitus

- Guidelines

MLC more permissive threshold for diagnosis – weighting for impulsive noises (military exposure and intense tones) – Noise Immision Levels

- Rebuttal Study by Lutman, De Carpentier and Green – found the MLC guidelines had a false positive rate higher than 70%
- Sidestepped in Barry v Ministry of Defence [2023] EWHC 459 – had NIHL either way so no need to decide on differing methodologies
- MLC Rejected in Cook v Ketson (County Court)
- Anecdotally has been accepted in some County Court cases
- Abbott v MOD (*ongoing trial*)



NIHL & Tinnitus: Liability and Causation: Denny v Chivas Brothers [2023] SC Edin 10

- Sheriff Campbell K.C., ASPIC, 28 February 2023

- Pursuer was aged 63
- No injurious noise exposure prior to 1990
- Worked for defenders since 1990
- Worked in various parts of plant:

1990 -2000: Newton Bottling Hall

2000 – 2018: Leven Bottling Hall with Occasional work in Clyde Bottling Hall

2018: Office based





NIHL & Tinnitus: Liability and Causation: Denny v Chivas Brothers [2023] SC Edin 10





NIHL & Tinnitus: Liability and Causation: Denny v Chivas Brothers [2023] SC Edin 10

- Liability fell to be considered under the statutory regime set by the Noise at Work Regulations 1989 and the Control of Noise at Work Regulations 2005
- Broad duties to carry out monitoring, noise level testing, risk assessments etc
- General duty to reduce noise exposure as far as reasonably practicable with hearing protection being a last resort.



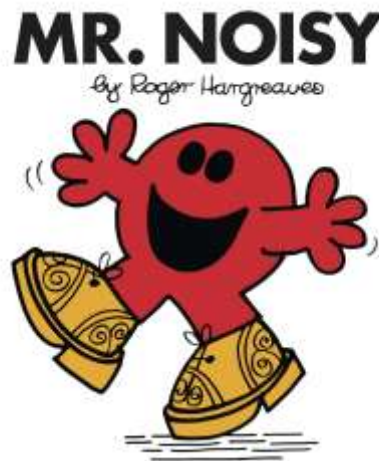
NIHL & Tinnitus: Liability and Causation: Denny v Chivas Brothers [2023] SC Edin 10

- Sources of noise:

Machinery — rinsers, fillers, labellers, packers, depalletisers, case erectors and case sealers

Bottles — knocking against each other

Breakages and Collapses





NIHL & Tinnitus: Liability and Causation: Denny v Chivas Brothers [2023] SC Edin 10

- Hearing protection provided in Newton Hall in 1995 to 1996
- Wearing this was Mandatory in Bottling Halls
- Pursuer wore hearing protection but required to remove it to scratch ears and Ear plugs worked free – when this occurred there was exposure to noise
- No training on the use of earplugs until 2015-16 (when new ear plugs introduced)
- No assessment made of hearing protection introduced in 1995/6
- No engineering measure to reduced noise of the line in Newton or Leven Halls
- No noise in Newton Hall
- No noise Survey in Level Hall until 2006



NIHL & Tinnitus: Liability and Causation: Denny v Chivas Brothers [2023] SC Edin 10

- 2006 Survey contained insufficient contextual information on operations
- 2008: first risk assessment for Leven Hall – found noise level above 85 dB(A) – ear defenders mandatory
- No extant records for noise levels in Newton Hall (similar halls in range of 85dBA to 95dBA)
- Exposure: 80-93 dB(A) in Clyde Hall
79-81 dB(A) in Leven Hall
- In Clyde hall depending on where she was working average exposure (LEP'd) could have been above 90dB(A)



NIHL & Tinnitus: Liability and Causation: Denny v Chivas Brothers [2023] SC Edin 10

- Para [60] of Judgment summaries submissions made by pursuer
- 1) There were no noise level assessments for Newton hall for 1990 to 2000.
- 2) There were no noise level assessments in Leven hall until 2006.
- 3) The adequacy of at least some of the noise assessments from 2006 was questionable.
- 4) The defender's noise surveys lack adequate description of how measurements were made, and there was no record of line speeds at the time of noise surveys.
- 5) There was no peak level assessment by the defender until 2017.
- 6) Increasing levels of noise in 2014 and 2017 were not adequately explained.
- 7) 2017 noise survey indicates levels well in excess of 90 dBA in certain areas.
- 8) The defender's decision to designate both Leven and Clyde halls mandatory hearing protection zones was significant.



NIHL & Tinnitus: Liability and Causation: Denny v Chivas Brothers [2023] SC Edin 10

- 9) There were no noise risk assessments until 2008.
- 10) The defender produced no documentation or other evidence as to any comparative exercise undertaken by them of the different types of hearing protection provided over the years.
- 11) Control measures other than provision of hearing protection were not the subject of evidence from the defender.
- 12) Making hearing protection available initially on non-mandatory and then on mandatory basis suggested concern around risk of injury from noise.
- 13) There was a significant increase in mechanisation of the lines from 2000. The line operator witnesses gave evidence there was an increase in noise levels.
- 14) The defender made no assessment of whether mechanisation was increasing or decreasing noise levels.



NIHL & Tinnitus: Liability and Causation: Denny v Chivas Brothers [2023] SC Edin 10

- Defender's Position – para. [61]
- The defender's position was that the measured noise levels do not disclose any breach of duty at common law or under the Regulations. For the pursuer to succeed, the court would need to accept Mr Dipnall's evidence about at least a bracket of exposure, and the defender invited the court not to accept that evidence. In any event, the attenuation of noise levels by ear plugs removed the risk of hearing damage.



NIHL & Tinnitus: Liability and Causation: Denny v Chivas Brothers [2023] SC Edin 10

- Court found for Pursuer
- Hearing protection – would have had some attenuation on Noise levels but could not make a finding as to the level of that.
- Side issue about the pursuer's hearings test and whether they showed NIHL. There is a suggestion in para. [73] that the defenders had at one stage been arguing the pursuer suffered from Idiopathic hearing loss but while they had lodged reports from Mr Swan, he did not give evidence, and it was clear from other evidence that he had changed his opinion.



Alexander McGlinchey v BAE Systems Marine (YSL) Limited

- Sheriff Keir, ASPIC, 25 October 2024
- Pursuer exposed to Noise between 1979 and 1992 at Defender's Shipyard
- Quantum agreed at 5k
- Proof restricted to Liability and Causation





Alexander McGlinchey v BAE Systems Marine (YSL) Limited

- Evidence heard from Pursuer, Dick Bowdler (Acoustic Consultant) and (Jonathan Newton (ENT Consultant): Stuart Robertson (ENT Consultant)
- Exposure: pursuer's evidence was superficial, he was not asked in detail about his duties and stages at which noise occurred, duration or source.
- Dick Bowdler provided modest support – did not provide noise measurements specific to work being carried out by the pursuer, on firmer ground about work when engines running. Not able to assist court with regard to pursuer's claimed greatest exposure when working outside the covered berth area. Accepted that needed to understand duration of exposure and proximity to source. No evidence on that was before the court. Also was unaware of exposure with other employers between 1992 and 2004.



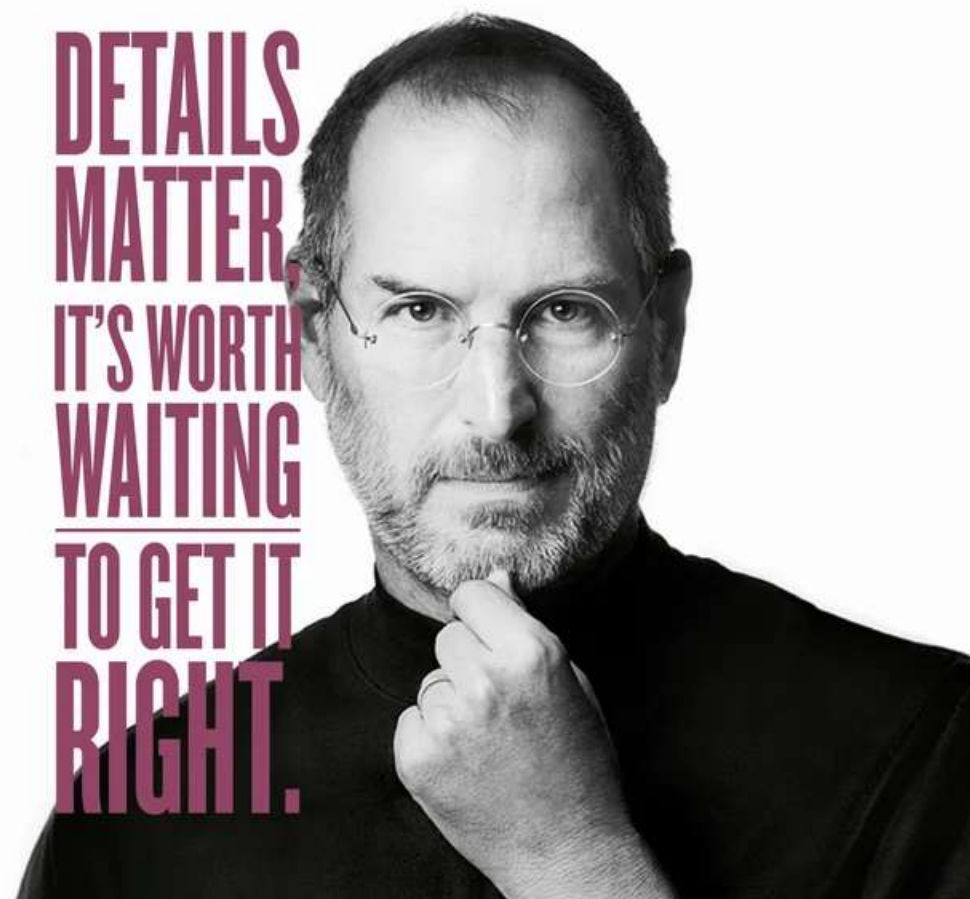
Alexander McGlinchey v BAE Systems Marine (YSL) Limited

- Pursuer did not establish his liability case on balance
- On Causation:
Newton and Robertson disagreed on whether audiograms showed AAHL.
- Both described as impressive witnesses
- Robertson's views were preferred
- Newton placed reliance for NIHL diagnosis on 2023 Audiogram
- Audiograms did not show a consistent pattern
- Pursuer did not establish that he had NIHL





Alexander McGlinchey v BAE Systems Marine (YSL) Limited





Tinnitus Quantum : James Nelson v John Lewis PLC – Sheriff Primrose K.C., ASPIC 12 July 2023

- NIHL and Tinnitus – claimed to be caused by a head injury
- Pursuer worked at Waitrose in Comely Bank
- Night shift Stock Replenisher
- 13 October 2018 around 10.30pm
- Hit on the side of the head by a ball – either balled up packaging or a stock item





Tinnitus Quantum : James Nelson v John Lewis PLC

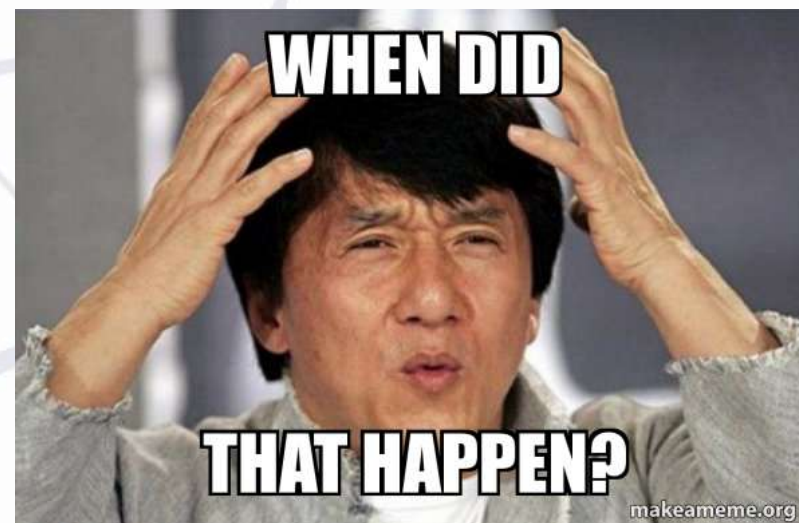
- Ball thrown by a James Moran
- Complainants about horseplay since June 2018
- Succeeded on liability





Tinnitus Quantum : James Nelson v John Lewis PLC

- Unclear on evidence when hearing loss had come on – GP records suggested that it was on the 11 October 2018
- Sheriff did not accept pursuer's evidence about when the unilateral deafness and tinnitus had started – he said after being struck by ball
- Pursuer claimed a causative link between his hearing loss/tinnitus and being struck on the head
- No mention to the GP of trauma or ball
- Failed to show causative link
- Decree of Absolvitor





Tinnitus Quantum : James Nelson v John Lewis PLC

Sheriff Primrose Commented on Quantum:

- Minor Head Injury, with injury to right ear of permanent deafness and tinnitus that could be improved with treatment
- Pursuer was aged 60 at proof (55 at injury)
- Pursuer required a hearing aid
- Struggles crossing the road, hearing on the telephone, speaking to colleagues and finds social interactions difficult
- Sleep and ability to drive were impacts
- Hobby of bagpipe making impacted as no longer able to tune instruments
- There was also a claim for hearing aids



NIHL and Tinnitus Quantum : James Nelson v John Lewis PLC

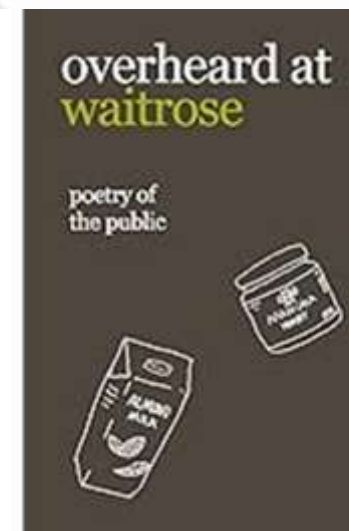
- Pursuer's submissions were £57,000 for solatium – based on JC – 21(B)(d) and JC – 63 (16th Edition)
- Defender submitted award should £5,000 – based on JC- 21(B)(d) and (e)
- Future deterioration unlikely to be related to accident
- Sheriff Primrose KC stated he would have awarded:

Solatium: £12,500

Service: £2,500

Needs and Expenses: NIL as unrelated

Inconvenience: £150





Tinnitus Quantum : DS v NHS Grampian

- Medical negligence case — missed pineal cyst on MRI scan successful at first instance - [2024] SC ABE 11, Sheriff Bovey K.C., Aberdeen Sheriff Court, 9 November 2023
- Pursuer appealed on level of damages
- Defender cross-appealed on Liability and Causation
- Sheriff Principal Wade K.C., Sheriff Fife and Sheriff Kerr — [2025] SAC (Civ) 21 — 16 July 2025





Tinnitus Quantum: DS v NHS Grampian

- Found for defender
- Pursuer's appeal centered around the loss of a career – upheld sheriff was correct to reject this as no proper basis to support a loss of past or future earnings
- Wide variety of symptoms: insomnia, visual distortion and tinnitus that resolved after 2 years: Sheriff awarded £7,500 – not commented on in appeal



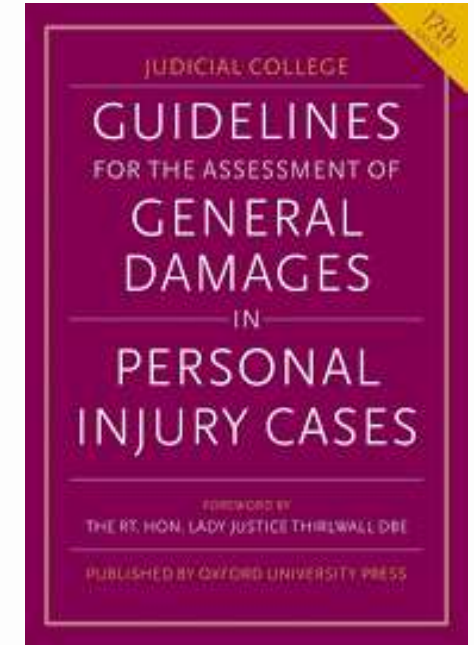
Hand Arm Vibration Syndrome





HAVS: Quantum Comment

- Starting Point: JC Guidelines
- (a) Most Serious: Persisting bilateral symptoms in a younger person which interfere significantly with daily life and lead to a change in employment.
£38,610 to £46,900
- (b) Serious: In this bracket there will have been a marked interference with work and domestic activity. Attacks may occur throughout the year.
£20,460 to £38,610
- (c) Moderate: This bracket will include claimants in their middle years where employment has been maintained or varied only to remove excess vibration. Attacks will occur mostly in cold weather.
£10,550 to £20,460
- (d) Minor: Occasional symptoms in only a few fingers with a modest effect on work or leisure.
£3,650 to £10,550





HAVS: Quantum Comment

- Burke, McCaffery and Gough v Glasgow City Council [2005] CSOH 155
- All worked for Glasgow Corporation
Mr Burke – Chargehand Blacksmith (1980 – 2002)
Mr McCafferty – Blacksmith (1985 - 2002)
Mr Gough – Hammerman (1974 - 2002)





HAVS: Quantum Comment

Vibration from: -

Pneumatic Drills (jackhammers)

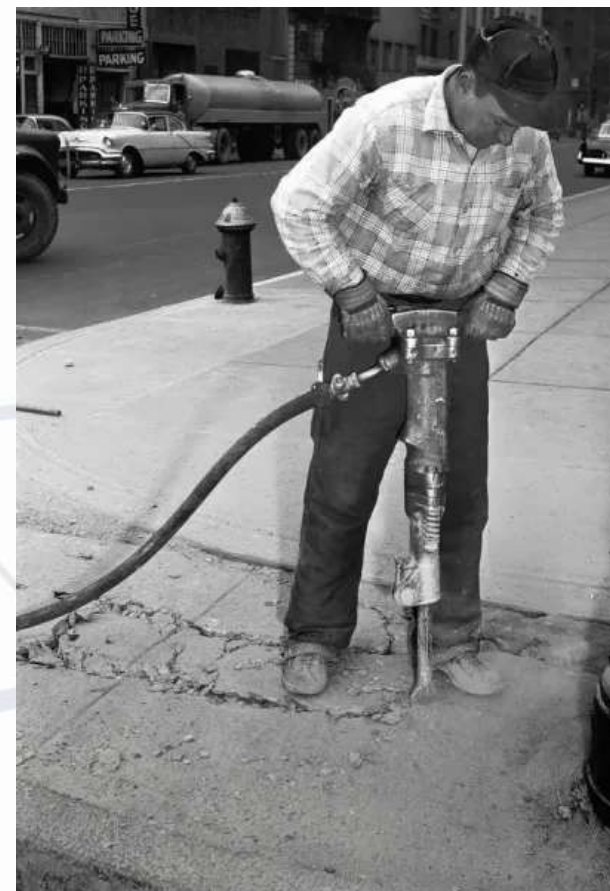
Hand Drills and Hammer Drills

Grinders – Metal and Stone

Pedestal Grinder

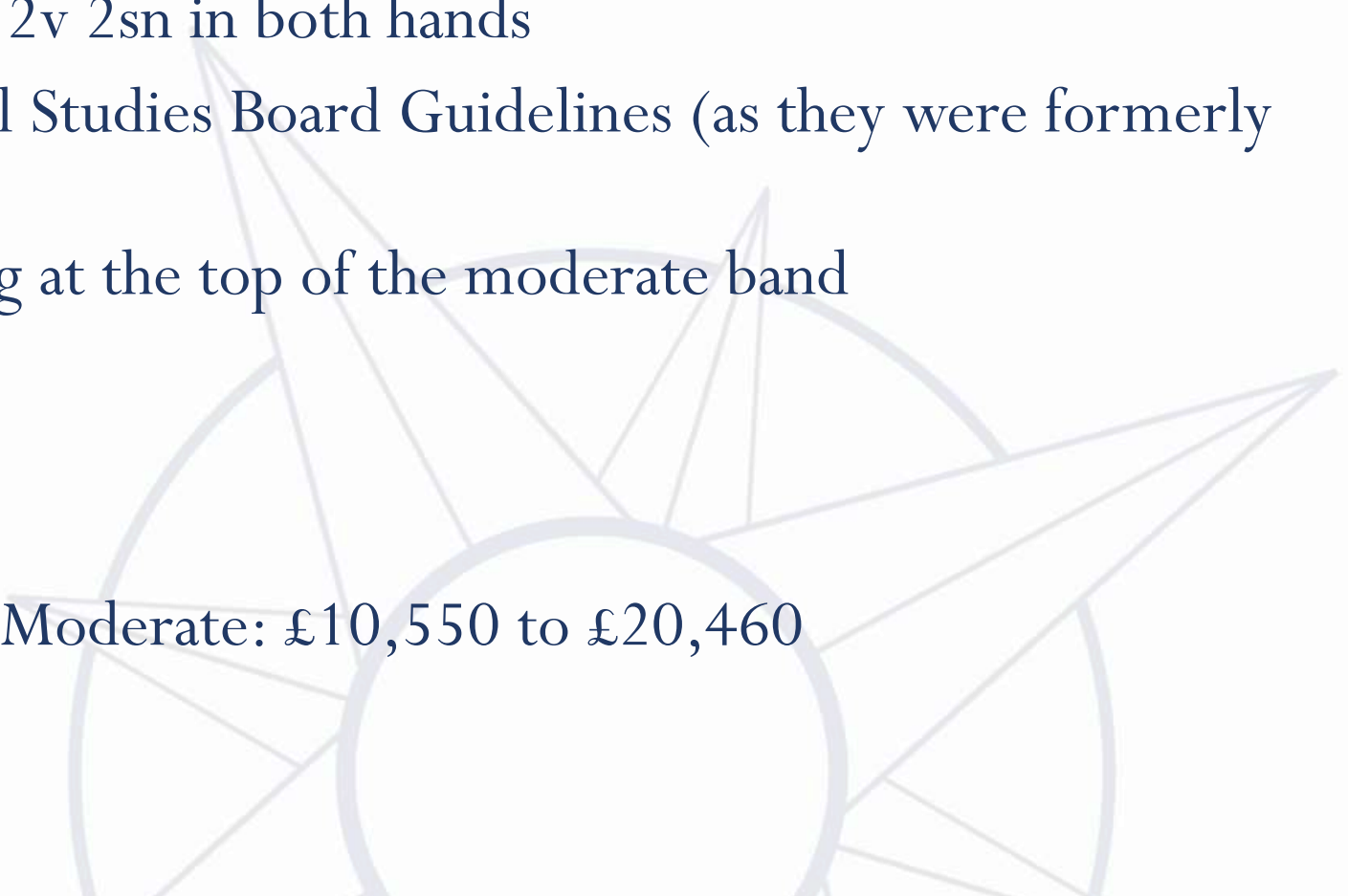
Pedestal Drill

- All suffered from HAVS





HAVS: Quantum Comment

- Mr. Burke - aged 41
 - Evidence was his staging was 2v 2sn in both hands
 - Court referred to the Judicial Studies Board Guidelines (as they were formerly called)
 - Court assessed injury as being at the top of the moderate band
 - Court Awarded: £9,000
 - Adjust for RPI: £18,878.62
 - Spot check to modern band: Moderate: £10,550 to £20,460
- 



HAVS: Quantum Comment

- Mr. McCafferty – aged 37
- Evidence was his staging was 0v 1sn in both hands
- One expert thought early signs of CTS but rejected by court
- Pursuer submitted an appropriate award was £2000, this was not disputed, and the judge considered this an appropriate figure
- Court Awarded: £2,000
- Adjust for RPI: £4,195.25
- Spot check to modern band: Minor: £3,650 to £10,550



HAVS: Quantum Comment

- Mr. Gough – aged 53
- Court found his staging was 2v 1sn in both hands – experts disagreed and OH testing had him at 3v 2sn
- Court considered the injury fell into the minor bracket
Awarded: £3,000
- Adjust for RPI: £6,292.87
- Spot check to modern band: Minor: £3,650 to £10,550



Parkinson's Disease: Holmes v Poeten Holdings Limited



- Cardiff County Court: September 2022
 - Court of Appeal: [2023] EWCA Civ 1377
-
- Mr Holmes worked for Poeten Holdings Limited between 1982 and 2020 – whole working life
 - Diagnosed with Parkinson's in 2014 but kept working until forced to retire due to ill health in 2020
 - During that work he was exposed to Trichloroethylene (TCE)
 - At first instance the trial judge held that the defender had been negligently exposed to TCE. The judge went on to find that the TCE exposure was a material contribution to the risk of the Claimant suffering from Parkinson's disease
 - The Defendant appealed arguing that the evidence fell short of establishing that the negligent exposure to TCE had materially contributed to the pursuer actual Parkinson's (as opposed to the general risk of developing the disease).



Parkinson's Disease: Holmes v Poeton Holdings Limited

- Overturned on appeal
- Liability the trial judge had made no findings as to the extent of the exposure that was said to be negligent as the exposure fell within the accepted safe limited.
- Trial judge had erred in finding that generic causation was made out – evidence had established nothing more than TCE exposure was a risk factor for Parkinsons Disease
- Individual Causation was also not made out on the evidence



Procedure: Additional Charges

- Centenary 6 Limited v TLT LLP [2024] CSIH 29
 - Lord President (Carloway), Lord Malcolm, Lord Tyre
 - Guidance to assist in how uplifts are calculated
-
- 10% to 15% per head
 - Court agreed with Sheriff Principal Taylor that 100% should be regarded as a maximum



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Fibres, Foreseeability and Family Claims INDUSTRIAL DISEASE CASE UPDATE 2025

Any Questions?



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