Neutral Citation Number: [2021] EWHC 811 (QB)

Case No: QB-2017-001539

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/03/2021

Before:

MR JUSTICE FREEDMAN

- -

Between:

MARK MATHER

Claimant

- and –

MINISTRY OF DEFENCE

Defendant

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- -

Michael Rawlinson QC and Kate Boakes (instructed by **Irwin Mitchell LLP**) for the **Claimant**

Caroline Harrison QC and Niazi Fetto (instructed by **Government Legal Dept**) for the **Defendant**

Hearing date: 10 March 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Wednesday 31 March 2021 at 2.00pm.

MR JUSTICE FREEDMAN:

I Introduction

1. This is an action brought by the Claimant as a former employee of the Defendant for personal injuries in the nature of multiple sclerosis ("MS") and psychiatric injury which he alleges has been suffered as a result of his use of organic solvents in the course of his work as a painter and finisher with the RAF between 1989 and 2003. His claim is that his injuries have been caused by the Defendant's breach of duty, negligence and breach of statutory duty (the Control of Substances Hazardous to Health Regulations "COSHH"). The Defendant denies breach of duty of care and negligence and/or breach of statutory duty, causation or damage for which it is responsible. The Defendant also says that the claim is statute barred.

2. Very central to the issues in the case is the question of whether the Claimant can show that his MS was *caused* by his work for the Defendant. This includes two issues, namely first whether exposure to the organic solvents to which the Claimant was exposed *can* cause MS, and, if so, (b) whether it *did* cause his MS. The Defendant expresses confidence about its defence to the claim and believes that it will succeed on causation which would render the trial of the other issues otiose. To that end, it seeks to have tried causation as a preliminary issue in one of two ways, that is either by

    (a) defining a preliminary issue on causation with the Claimant's best case on exposure being the assumed facts, and limiting oral evidence to medical causation; or
    (b) formally opening the trial, limiting oral evidence to that relevant to medical causation, and then making a ruling on causation, with other issues to follow if necessary.

3. The Claimant, whilst willing to hive off quantum, views the case as much more nuanced than the Defendant. The Claimant says (though not in these words) that a preliminary issue is an intended short cut which is liable to increase rather than decrease complexity and expense.

4. The matter comes before the Court in the following circumstances. On 20 July 2020, the Defendant issued an application to have causation tried as a preliminary issue. On 20 November 2020, Master Thornett released that application to be heard by the trial judge "drawing upon their wider case management powers as if a trial judge hearing the case on a pre-trial review". Since the case is unlikely to be tried until 2022, he did not mean that the application would necessarily be heard by the trial judge, but that it should be heard by a Judge of the Queen's Bench Division who would be used to dealing with long or complex trials.

5. There is also before the Court an application of the Claimant for permission to rely upon an addendum report from Professor Cherrie, the Claimant's occupational hygiene expert, about possible carcinogenesis of organic solvents. In view of the way that application went, I shall simply make some brief reference to it at the end of this judgment.

6. The Court has been assisted by full skeleton arguments from the Claimant and the Defendant supplemented by the high-quality oral submissions of Ms Harrison QC for the Defendant applicant and Mr Rawlinson QC for the Claimant respondent both with the assistance of junior Counsel. I heard oral argument on 10 March 2021 for most of a court day, and this is the reserved judgment.

II Causation

7. This Judgment shall consider causation by separating factual background, medical causation and applicable law.

(a) Factual background

(i) The Defendant's case

8. The Defendant says that there is considerable oral evidence regarding the solvents used and the level of exposure. In connection with breach of duty, there will be issues regarding how the chemicals were regulated and any permitted levels of exposure. The Defendant submits that the best possible case of the Claimant comes from its occupational hygiene expert, Professor Cherrie. The Claimant's first statement identifies the chemicals used and the conditions in which he worked: see paras. 4-10, 45-85. The working period of the Claimant with the Defendant was between 1989 and 2003, but the Defendant says that one can ignore the period from 1994 because the occupational hygiene experts agree that from 1994, the exposure to solvents "…would most likely have complied with the standards in place at that time": see joint statement at paras. 7-8. It also says in any event that as regards the period from 2000, the evidence is irrelevant. This is because it appears that the Claimant contracted MS from 2000, and thus no further exposure after 2000 could be taken to be causative or contributory. The Defendant says there is no evidence to the effect that once a person has MS that continued exposure to solvents could affect the progress of the disease.

9. The Defendant says that the case does not depend as regards causation on hearing from 25 lay witnesses and two occupational hygiene experts. That is relevant to duty of care, but not to the question whether the exposure to solvents may have caused the injuries and, if so, whether it did cause them. The need for that evidence could be avoided by taking the case of the Claimant at its highest. The Defendant has sought to do this by reducing the evidence of Professor Cherrie on exposure in a table so that this may form the basis for a set of assumed facts either for the trial of a preliminary issue or the determination of causation as a separate first tranche of a trial. It seeks to replicate the relevant parts of Professor Cherrie's tables 3-5.

(ii) The Claimant's case

10. The Claimant says that it is not accepted that no further exposure after 2000 could be relevant to the progress of the MS. The case on both sides may be based on assumptions or burden of proof. The Claimant relies on the absence of evidence that continued exposure could cause the progression or accelerated progression of symptoms of MS, which is premised on the Defendant bearing the onus of proof in this regard. The Defendant says that it is for the Claimant to prove this. Whichever is the case, it can be expected that this is an issue which might be addressed before trial by the clinical and epidemiological experts. In the meantime, the Claimant objects to an assumed fact that exposure post-2000 can be taken out of the equation in a causation trial.

11. Further, the Claimant also objects to an assumed fact that exposure after 1994 is irrelevant because of the evidence that this might have been below certain workplace threshold limits. For the purpose of medical causation, the Claimant says that the Court has to consider the total amount of exposure. There will be an argument on duty of care that the threshold limits are not determinative: if it were reasonably practicable for an employer to expose an employee to a level of exposure below the standard levels, then the Claimant submits that it would be a breach of the duty of care to expose the employee above the lowest level reasonably practicable. There is therefore a question of law as to whether any duty (as per the Defendant) was no higher than to keep the exposure below certain recognised standards, or (as per the Claimant) the duty was to keep exposure to the lowest level reasonably practicable (and even below the recognised standards). Thus, the degree of exposure will require consideration not only in respect of breach of duty, but also in respect of causation. The Claimant submits that this determination will require consideration of lay evidence and occupational hygiene expert evidence.

(b) Medical causation

(i) The Defendant's case

12. In any event, the Defendant submits that the precise details about exposure levels are not critical because the expert medical evidence is incapable of proving causation as a matter of principle. In that regard, the Defendant's case is summarised at para. 13 of Counsel's skeleton argument that:

> "(a) MS is a disease which is generally regarded as of unknown aetiology; and (b) when asking the question of whether an exogenous environmental factor has caused a naturally occurring disease (such as MS or cancer), the first step is to prove that the exogenous factor in question is capable of causing the disease. That requires proof that the exogenous factor more than doubles the risk of the index condition…. If it were otherwise, endogenous factors could provide a complete explanation for the manifestation of the disease. The Defendant's position is that there is no probable let alone

> provable, link between organic solvents and the Claimant's MS [see e.g. Professor Silman's evidence in the Joint Statement, at page 2, 3rd and 5th bullet points]."

13. The Defendant draws attention to most of the Claimant's evidence falling short of showing doubling of the risk: see point 4 of the joint statement of Professor Seaton for the Claimant and Professor Silman for the Defendant. Dr Schmierer does opine that organic solvents more than doubled the Claimant's risk of MS, but he is relied upon as a clinical rather than an epidemiological expert and he defers to the experts on epidemiology with whom his opinion conflicts. The Defendant says that the causative nexus cannot be proven by clinical experience. It says that whether individual causation can be proven on clinical grounds is a question of law which is suited to determination either as a preliminary issue or as an isolated preliminary point in a trial.

(ii) The Claimant's case

14. The Claimant says that the Court is entitled to consider the clinical evidence and to give due weight to the evidence of Dr Schmierer. In any event, the Claimant as a matter of law does not accept that his case depends on proving that the exogenous factor more than doubles the risk of the index condition.

(c) Legal arguments on causation

(i) The Defendant's case

15. The Defendant submits that MS is an indivisible disease. It takes the law as set out in *Heneghan v Manchester Dry Docks* [2016] EWCA Civ 86 at para. 23 about the ways of establishing causation in disease cases. The first category of cases is cases where the claimant is required to prove a 'but for' test that the claimant would not have suffered the disease but for the defendant's negligence. The second category is that where the disease is divisible, the defendant will be liable on the ground that its negligence made a material contribution to the disease: see *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 ("*Bonnington*"). The third category is an exception in indivisible injuries called the *Fairchild* exception applied in mesothelioma or lung cancer cases, where a material increase in the risk of the victim contracting the disease may suffice such as to obviate the need to prove that the external agency did cause or contribute directly to the disease: see *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22; [2003] 1 AC 32. The Defendant says that this is not a category 2 case because MS is an indivisible disease. It says that the case is not a category 3 case because that would involve the extension of the *Fairchild* exception, and there is no reason to do so, and there has been a noted judicial reluctance to extend the same.

16. The Defendant therefore submits that this case depends on the Claimant establishing that but for the exposure to solvents in his work with the Defendant, he would not have developed MS. It submits that this has two aspects, namely generic causation whether solvent exposure can cause MS, and, if so, individual causation, whether solvent exposure did cause the Claimant's MS.

17. Further, the Defendant submits that unless the exposure to the solvents more than doubles the risk of contracting MS, the claim must fail as a matter of law.

(ii) The Claimant's case

18. The Claimant submits that the law on causation is less clear than that advanced on behalf of the Defendant. In particular, he raises the following issues, namely:

(1) Whether MS is a divisible or indivisible condition. The Defendant's case is that it is indivisible and the Claimant's answer to this is that it is often not simple to say whether a given disease is or is not indivisible. Attention is drawn to *Bonnington* which was assumed to be a divisible disease case (pneumoconiosis), but the Privy Council in *Williams v Bermuda* [2016] AC 888 stated at [32] that there was no suggestion that it was divisible in *Bonnington*. It is therefore submitted that there is scope for uncertainty as to what is divisible and what is not.

(2) Whether the psychiatric injury in this case is divisible even if the MS is indivisible. Generally psychiatric injury has been treated as divisible. Despite this, it is difficult to understand if in fact the psychiatric injury is a consequence of the MS, how it could be treated as anything other than the designation of the MS. If the MS were then treated as indivisible, it may be difficult for the Claimant to show that the psychiatric injury was divisible.

(3) If in fact MS is indivisible, there is said still to be scope for an argument that a material contribution test may be applied to an indivisible case. This appears to be contrary to the understanding of the Court of Appeal in *Heneghan* at para. 23. However, in *Williams v Bermuda*, there is scope for this argument. There have been subsequent authorities doubting the approach of *Williams v Bermuda*, but the authorities have not all spoken with one voice.

(4) Alternatively, if MS is indivisible and even if there is no scope for the material contribution test, an issue might arise as to whether this case nonetheless comes within the third category of *Heneghan* such that causation may be established if it is proved that the exposure to solvents materially increased the risk of the Claimant contracting an indivisible disease. This would involve the extension of the *Fairchild* exception to a case of MS.

(5) The Claimant submits in respect of various diseases the Court has not required the doubling of risk to be proven e.g. mesothelioma: see *Sienkiewicz v Greif* [2011] UKSC 10; palmar arch disease: see *Transco v Griggs* [2003] EWCA

Civ 564 per Hale LJ at para. 35; dermatitis; see *McGhee v National Coal Board* [1973] 1 WLR 1. Whether it is required in connection with lung cancer is questionable: yes, per Smith LJ in the CA, but *obiter* no, per the Supreme Court at para. 35. A potentially important case of a claimant succeeding against the Ministry of Defence even although doubling of risk was not proven is the case of *Wood v Ministry of Defence* [2011] EWCA Civ 792 (a case about exposure to organic solvents and Parkinson's disease). This is therefore a controversial area which provides a focus for a debate as to whether a claimant is required to prove doubling of risk in the context of contracting MS.

19. Further and in any event, the Claimant submits that the law in respect of causation is pragmatic and yields to the justice of each case. It draws attention in particular to the following, namely:

(1) Laws LJ in the Court of Appeal in *Rahman v Arearose* [2001] QB 351, albeit a case dealing with contribution between respective tortfeasors, who said:

> "31. The problem at the heart of this case rests in the law's attempts to contain the kaleidoscopic nature of the concept of causation within a decent and rational system for the compensation of innocent persons who suffer injury by reason of other people's wrongdoings. The common law has on the whole achieved just results, but the approach has been heavily pragmatic…
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> 32. … Once it is recognised that the first principle is that every tortfeasor should compensate the injured claimant in respect of that loss and damage for which he should justly be held responsible, the metaphysics of causation can be kept in their proper place: of themselves they offered in any event no hope of a solution of the problems which confront the courts in this and other areas…."

(2) A broader approach to causation in Lord Hoffmann's extra-judicial writing in Perspectives on Causation and rejecting the notion that there is one legal concept of causation, and that the cause may vary according to the context. On this basis, context may give rise to an interpretation where even but-for is not required. That is the case of the Fairchild exception.

(iii) Discussion about law

20. The Defendant is critical of the lack of precision of these submissions of the Claimant. It is all very well to say that there are assumptions, but one might look for more tangible attempts to show why they are or may be mistaken. As noted above, Ms Harrison QC submits that MS is a condition which is generally regarded as of unknown aetiology and there is no reason to believe in the light of evidence of the epidemiologists that it would be proven that the exogenous factor in question is capable of causing MS. The need to have a preliminary issue was because, the Defendant submits, the case to the contrary on causation for the Claimant is likely to

fail. An early determination of causation would be likely to bring the case to an end without the expenditure of time and costs which would be involved on the other issues including breach of duty, limitation and quantum.

21. Despite this, the Defendant has acknowledged rightly in the context of an application to change experts in which Ms Wilmott of the Government Legal Department said at para. 6 the following:

> "Not only is the claim of high value and complexity, and thus of considerable importance to the parties; but it is likely to have a much wider public interest and significance. It has the potential to become a leading precedent on causation in the law and could open the way for other sufferers with MS to argue that their own conditions were 'caused' by similar environmental exposures. It is therefore especially important that the trial judge should have the most complete evidence that it is feasible for the parties to provide."

22. When pressed about this, Ms Harrison QC recognised entirely properly and realistically that there are areas in this case of a tertiary nature, in other words, capable of going not only to a second court (a first appeal), but even to a third court (a second appeal). To that end, she recognised the scope of the third and fourth points made by the Claimant at paragraph 18 above. She could have added the fifth point too, although the Defendant does not concede that there is scope for serious argument regarding whether the doubling of the risk might not have to be proven in the instant case.

23. Whilst it is the case of the Defendant that whatever the test to be propounded, the Claimant will be unable to satisfy causation between the exposure to solvents and MS, this is not a case where there has been an application to strike out the claim or for summary judgment. Once it is recognised that the case is going to trial, then it has to be recognised that the points of law as a whole raise real questions. Those issues which might appear not to be particularly convincing must join the mix of points to be explored at trial. That includes whether MS is in fact divisible or indivisible, whether there is to be a broad-brush pragmatic approach to causation and even how the Court is to characterise the psychiatric injury.

24. In circumstances where this interim application is not going to be dispositive of any part of the claim but is simply case management about the sequence of how to try the issues, it is inappropriate to go into detail about the detailed legal submissions. This is not the occasion on which to have a mini-trial. It is not productive unless the Court could make definitive findings. The areas of law must all be explored at trial. In the interim, assumptions ought not to be made around points of law unless they are settled.

25. It therefore follows that the points of law are rather less set in stone than they appear in the Defendant's skeleton argument. As noted, in oral argument, Ms Harrison QC has been entirely fair and helpful to the Court in indicating to the Court possible areas of controversy.

III Impact on the preliminary issue

26. In my judgment, insofar as it is intended to have a preliminary issue based on assumed facts, there are significant problems. They include the following, namely it is arguably wrong to assume that:

(1) the exposure to solvents post-1994 is irrelevant. The amount of exposure, even if falling below the maximum permitted under the regulations, is still relevant in assessing the overall exposure. This is also bearing in mind that there is an argument that insofar as it was reasonably practicable to have exposed the Claimant to a level of exposure beneath the maximum permitted under the regulations, there may have been a breach of duty in not keeping the exposure to the reasonable minimum.

(2) the level of exposure after 2000 is irrelevant. It does matter in the event that (without deciding at this stage which party bears the burden of proof) continued exposure after 2000 affects the progress of the MS thereafter.

(3) the case on exposure can be no stronger than that propounded by Professor Cherrie. He is not stating the law: that is for the Court, and it is quite possible that the Court's view of what would be expected would be higher than that pitched by Professor Cherrie. Further, hearing the factual evidence may inform more as to the level of exposure which is the starting point of the case on causation. It is dangerous to cut this out (perhaps on assumptions that it is so old and anecdotal that it will not carry much weight). Such assumptions may turn out not to be justified when the evidence has been heard and the experts have given such admissible opinions about the same.

(4) the case on breach of duty does not overlap with causation. This connects with the points in time to take into account (see sub-paragraph (1) and (2) above). Such is the overlap that in the event that there was a preliminary issue on agreed or assumed facts and the Claimant won the preliminary issue, stage 2 might be embarrassing in the event that any such facts were invalidated on analysis of the breach of duty and a re-evaluation of causation. One only has to state this to imagine how the case could become more expensive and unwieldy because of the attempted shortcut.

(5) there would be no duplication of witnesses between stage 1 and stage 2. The Defendant has already said that it was unlikely that it would be necessary to call the occupational hygiene evidence in both trials. Just saying that opens up the possibility that it would be necessary to have them called twice. Further, the Defendant assumes that the factual witnesses would not be required at stage 1, but it might be dangerous to believe that a case could not be made out for the admission of their evidence on causation. As this is evaluated, the real possibility of witnesses being called twice emerges. What if a witness is reliable at stage 1 before judge A, but not reliable at stage 2 before judge B (if the logistics do not allow for the same judge to be retained for stage 2)? It could even be a problem if judge A heard both stages, but the

evidence came over less reliably at stage 2? These difficulties would be avoided by not splitting the trial between stages 1 and 2.

27. It has been assumed thus far that the two trials might last the same time as one long trial. Within the recalling of witnesses and overlapping issues, and the possibility of witnesses contradicting themselves between stage 1 and stage 2 must be the real possibility about the totality of stage 1 and stage 2 being longer than would have been the case if the two stages had been tried at the same time.

28. There is a more probable event which requires careful consideration, namely the prospect of an appeal against a ruling on stage 1. In view of the evidence of Ms Wilmott, the points of law identified and the realistic recognition of capacity for appeals whichever party might lose a preliminary issue may seek to appeal the case to the Court of Appeal. If the appealing party is the Defendant, then in tune with the application for the preliminary issue, it is likely that there would be resisted stage 2 until the appeal against stage 1 had been concluded. That would then involve a very substantial delay of the case. With the possibility of overlap between stage 1 and stage 2, the complications of that would be greater. The capacity for increases in costs and delays would be increased. If all possibilities are being considered, one also has to take into account that two stages might lead even to two appeals instead of one appeal if all matters were being heard together. By contrast, if stages 1 and 2 are heard at once, then any appeal could follow and include arguments both as regards all liability issues.

29. An answer of Ms Harrison QC to this concern was the possibility that the trial would be conducted in one go, but with the Court giving judgment on stage 1, and then moving on immediately to stage 2. In discussion, it emerged that this would be predicated on the Court giving its judgment on stage 1 within say a week of the conclusion of the trial of stage 1. I mentioned that that might be expecting too much of the Court. If the law was as difficult as appeared to be the case, it was going to take a good deal of reading of factual material and case law to bring together such a judgment. A period of perhaps a month may be more realistic (and even then, requiring the Judge to have the capacity for substantial writing time). That would be likely to rule out or put in jeopardy a rolling trial.

30. These problems would not arise if there was one trial. In view of the concession of the Claimant concerning quantum, that could be shelved for later. That would significantly alter the length of the trial. The estimates so far have been 5 days for stage 1 and 7 days for stage 2 (being all of the remaining issues). Ms Harrison QC indicated that stage 2 might last up to 10 days if it is to include quantum. Mr Rawlinson QC estimated that the quantum part might last up to 4 days: Ms Harrison QC did not express a view about that. It is apparent from the foregoing that without quantum, the overall trial on liability issues might be less than 10 days or perhaps up to or just over 10 days. The price for that is in my judgment worth paying. It is to try the related issues of breach of duty, causation and limitation together, and to avoid many of the pitfalls identified in the above paragraphs of this judgment.

31. There are other problems. They will come to life by considering at this stage the procedural law regarding holding preliminary issues.

IV Power to direct trial of a preliminary issue

32. That there is a power to direct a trial of a preliminary issue is not controversial. The Claimant draws attention to the following:

> (1) The Court's general powers of management extend to the discretion to "direct a separate trial of any issue" (CPR Part 3.1(2)(i)).
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> (2) However, the exercise of that discretion is always subject to the overriding objective which, itself includes the need to ensure that litigation is dealt with both 'expeditiously' and 'fairly' (CPR 1.1(2); CPR 1.2(a)).
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> (3) The making of such a direction is an order against the norm in which the Court should be careful to avoid 'delay, anxiety and expense'. The editors of the White Book summarise the position in this way and emphasise:
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> > (i) The greater the need for findings of fact, the less likely it is that the preliminary hearing is appropriate;
> > (ii) Where the health of the Claimant makes it relevant, the fact that resolution of the preliminary issue may be delayed pending appeals is relevant.
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> (4) It is necessary to be able to formulate the preliminary issue with 'precision and care' (*Lahey v Pirelli Tyres Ltd* [2007] EWCA Civ 91 @ [4]).

33. A part of the commentary in the White Book at 3.1.10 is as follows:

> "In *McLoughlin v Grovers (A Firm) [2001] EWCA Civ 1743; [2002] Q.B. 1312* at [66], David Steele J gave the following guidance: (i) only issues which are decisive or potentially decisive should be identified; (ii) the questions should usually be questions of law; (iii) they should be decided on the basis of a schedule of agreed or assumed facts; (iv) they should be triable without significant delay, making full allowance for the implications of a possible appeal; (v) any order should be made by the court following a case management conference.
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> …
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> As to (iii) (see above, preliminary issues should be decided on the basis of a schedule of agreed or assumed facts), the first draft of the schedule is often prepared by the claimant and sent to the defendant for agreement or amendment. Before directing a preliminary issue, the court should consider how much effort will be involved in identifying the relevant facts. The greater the effort the less likely it is that the preliminary issue will lead to a saving in costs. If there are serious disputes of fact giving judgment at a trial of the preliminary issue may be unsafe or

> useless (see generally *Steele v Steele [2001] C.P. Rep 106* in which Neuberger J (as he then was) declined to give judgment at a separate trial previously directed by a deputy judge of the High Court).
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> As to (iv) (see above, triable without significant delay, making full allowance for the implications of a possible appeal) in *Re Kenyan Emergency Group Litigation [2016] EWHC 600 (QB)* (in which a direction for the trial of preliminary issues was allowed in part only) one of the factors considered was that, in the event of an appeal on one of the preliminary issues sought, the trial of all remaining issues might be delayed by three or four years by which time most of the lay witnesses for both sides (who were very elderly) may not have been capable of giving evidence."

34. The law reports are littered with cases where a preliminary issue seemed a good cost-saving exercise, but where not sufficient attention was given to the consequences. Remarks like 'deceptively attractive short-cut' appear in the reports. In the end, that which is intended to shorten the path sometimes serves considerably to lengthen it. The result is something entirely contrary to the overriding objective despite the best of intentions. None of this means that a trial of a preliminary issue is always a bad idea: it simply has to be approached with caution. None of this means that a trial of a preliminary issue is always a bad idea: it simply has to be approached with caution.

35. Applying the criteria considered by David Steele J in *McLoughlin v Grovers (A Firm)* to the instant case and using the numbering therein, the following conclusions arise:

> (1) This is a case where a finding in favour of the Defendant on causation, whether generic or individual (as referred to in paragraph 16 above), would be decisive. However, a finding in favour of the Claimant on causation would involve going back to have to consider the nature of the duty and breach of duty, and then having to visit causation all over again to assess whether the specific breaches (if any) of the duties (to the extent that any were found) caused the loss. This would bring with it the possibility of the Judge trying stage 2 having a different view of the evidence from those found at stage 1. There would then be issues as to how far those findings bound the court at stage 2. This would create especial difficulties if stages 1 and 2 were tried by different judges but might even be challenging if they were tried by the same judge.
>
> (2) The issue on causation involves questions of law. However, it also involves complex factual and scientific issues. In the end, it is not a crisp issue to be decided, but it is multi-factorial, where the factors are a mixture of law and fact.
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> (3) This then gives rise to the difficulty of agreeing facts for a preliminary issue. There are issues regarding the period of the exposure to take into

account and in particular the issues as to whether there should be disregarded (a) any exposure after 1994, and (b) any exposure after 2000. There is the issue as to whether the evidence of the 25 factual witnesses is required and the occupational hygiene experts in the first trial. At lowest, there is great effort in identifying the relevant facts. There is no reasonable prospect of agreeing them.

(4) A split trial between causation and other liability issues would be likely to cause significant delay as a result of a likely appeal. The prospects of an appeal at the end of stage 1 are significant, and the effect of that on the trial issues is considerable and possibly intolerable delay. Further, if the Claimant succeeds at stage 1, there are the difficulties of managing the case at stage 2 (see point (i) above), especially if that follows a long delay following an appeal.

(5) Master Thornett was right to reserve this matter to a case management conference. Many issues have been thrown up. A decision not to order a trial of a preliminary issue does not mean that nearer trial matters cannot be revisited if there are changes in circumstances. However, it would have to take into account the matters set out in this judgment.

36. At the hearing the Claimant made submissions by reference to *Barrett v Enfield London Borough* [2001] 2 AC 550 at 557F-G and *Vedanta Resources PLC v Lungowe & ors.* [2019] UKSC 20 at para. 48, and with permission of the Court the Defendant has replied by a written note. The Claimant relies on these cases as reminders about the dangers of trying negligence cases on assumed or hypothetical facts. The Defendant submits that neither case provides guidance on the issues of whether to order a preliminary issue or to try causation separately from the other issues. *Barrett* was a strike-out appeal and *Vedanta* was an appeal relating to a jurisdictional challenge. The analysis of facts was much less advanced than in the instant case. The cases related to novel and controversial developments in the law of negligence. The Defendant says that any difficulties of law may turn out to be artificial constructs or Micawberism (see Lady Hale at para. 45 in *Vedanta*). Even if difficult issues of law exist, they will not be fact sensitive. All of that is possible, but in my judgment, absent applications to strike out the claim or for summary judgment which the Defendant properly recognises are inappropriate, it is premature at this stage to make assumptions that the Claimant would lose a preliminary issue or that any points of law would not be fact sensitive. At this stage, it is in my judgment more prudent to resolve the issues in this case on actual rather than assumed or hypothetical facts. In any event, the practical difficulties which would ensue from a decision on assumed facts at stage 1 and possibly a decision on fact finding of different facts at stage 2 as referred to in paragraph 35(1) above should be avoided.

V Conclusion

37. The Defendant has highlighted the judgment of the Court in the case of *Saunderson & ors* ***v*** *Sonae Industria (UK) Ltd* [2015] EWHC 2264 (QB). It particularly refers to

para. 636 where Mr Justice Jay was critical at the end of a lengthy judgment of the failure on the part of the claimants to grapple with the science to see whether the case stacked up. Instead, the claimant's' legal team had "wanted to make a virtue out of uncertainty – perhaps because they clung to the notion that the litigation would settle". They may have placed undue faith on the likely cogency the lay evidence instead of concentrating on the science.

38. However confident the Defendant is about the eventual result, this rather puts the cart before the horse. First, there has to be a trial to reach a conclusion as to whether the Claimant's case fails. That still does not engage *Saunderson* because that was a case where the Claimant's conduct of the case was impugned. Absent an application for summary judgment or strike out, which there is not to be, it is premature to make any assumption that either the case will fail, or still further that following such a trial the Claimant's conduct will be impugned. Fortunately, judicial criticism of the kind quoted in para. 37 above is reserved for an unusual case, and, in that case, it was only at the end of a long and complicated trial. At this interim stage, *Saunderson* has no application to the instant case.

39. Having considered all of the matters before the Court, this is not a case where it would be just or prudent to order a trial of a preliminary issue either on the basis of assumed facts or a trial of causation alone without a trial of the other issues as regards liability. It does seem sensible to separate quantum if that can be done easily, but before making such an order, the Court would wish to hear more about how that would work in practice. Further, Ms Harrison QC has not addressed the Court about that issue because it did not arise on her application. At the same time, attention should be given as to whether the medical condition and prognosis of the Claimant is such that his evidence might need to be taken in advance of the trial or in advance of a quantum hearing. As noted above, nothing in this judgment prevents matters from being revisited nearer the trial, but in view of the matters set out above, it is likely that there would need to be a change of circumstances in order to justify trying causation as a preliminary issue in advance of other liability issues.

VI Application for addendum report of Professor Cherrie

40. In the course of argument and, according to the Defendant, in the light of the way that the matter was put at the hearing on behalf of the Claimant, the Defendant accepted that Mr Stear should be asked for his comments on paragraphs 1.4.2 and 1.4.4 only of Professor Cherrie's "Part 35 Replies" dated 10 February 2021, and whether as a consequence he considered that any change was required in the Joint Report of 2 June 2020. In a subsequent letter of Mr Stear, he stated that he did not disagree with the view of Professor Cherrie on paragraph 1.4.2. and 1.4.4. He still has to consider the papers to which Professor Cherrie refers.

41. The parties should be given the opportunity to supplement the evidence in the light of this. Since the draft judgment is being sent out within less than 21 days of the hearing, I approve paragraphs 1 and 2 of the draft order sent by the Claimant and in particular that the Claimant may rely upon Professor Cherrie's report dated 10 February 2021 and that by 4pm on 21 April 2021, Mr Stear and Professor Cherrie

shall have the discussion about whether in the light of paragraphs 1.4.2 and 1.4.4 of Professor Cherrie's report dated 10 February 2021, either of them wishes to make any additions or changes to their joint statement and if so, they shall produce a revised version within 21 days of their discussion.

42. There is a disagreement as to costs. The Defendant says that it should have its costs either because the application was unnecessary (on one limb of the Claimant's submission) or because the Claimant should have made the correction earlier in which case matters could have been agreed with Mr Stear and the application may have been unnecessary. The Claimant says that the costs should be in the case. This is a case where both parties got it wrong in the first place, and where it needed to be corrected.

43. The Court is unable at this stage to determine which party is correct in these submissions as to costs. It will not be resolved until the further discussions have taken place between the experts, and submissions as to costs revisited in the light of this. This would all be disproportionate and an unnecessary use of the court's time. In my judgment, the events which have occurred can be viewed as a part of having the experts' reports before the court in a correct and, if necessary, corrected manner. My preliminary view is that the costs of the application should be costs in the case. I shall reach an ultimate adjudication on costs when the costs of the Defendant's application are considered.

44. The parties should draft an order to give effect to the matters set out in this judgment. At the same time, they should seek to agree consequential matters. To the extent that any matters are not agreed, the Court will determine the same.