



Neutral Citation Number: [2018] EWHC 2009 (QB)

Case No: HQ15A03468

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2018

Before :

MR JUSTICE TURNER

Between :

ROBERT MERVYN PEARCE & OTHERS

Claimants

- and -

**1) THE SECRETARY OF STATE FOR
BUSINESS, ENERGY AND INDUSTRIAL
STRATEGY**

Defendants

2) COAL PRODUCTS LIMITED

**3) NATIONAL SMOKELESS FUELS
LIMITED**

**Rob Weir QC and Ivan Bowley (instructed by Hugh James/Irwin Mitchell) for the
Claimants**

**Ronald Walker QC, Nicola Greaney and James Williams (instructed by CMS) for the
Defendants**

Hearing dates: 2nd to 4th, 9th July 2018

JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this
Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE TURNER

Mr Justice Turner :

INTRODUCTION

1. As originally constituted, there were eight lead claimants in this group litigation. Six of these claims have now compromised or discontinued and the GLO issues have all fallen away. The remaining disputes between the parties have been dramatically attenuated, through a welcome combination of agreement and pragmatic capitulation, to the extent that this case is now but a shadow of its former self.
2. The two remaining lead claims relate to Mr Graham Duck, aged 68, and Mr George Nicholls, who died over twenty years ago at the age of 64. Both of them had been employed at coke oven works in South Wales. During the course of their work, they were exposed to levels of dust and fumes attributable to the breach of duty of British Coal. It is alleged that the two men both suffered from Chronic Bronchitis (“CB”) as a result of such exposure. This is denied by the defendants¹ and is a matter upon which I must adjudicate and, if appropriate, assess damages. Additionally, in the case brought by Mr Nicholls’ widow, I have to consider the issue of limitation.
3. I have been assisted by two leading experts in the field of respiratory pathologies: Professor Britton on behalf of the Claimants and Dr Moore-Gillon on behalf of the defendant, both of whom gave oral evidence at the hearing.

CHRONIC BRONCHITIS

4. CB, as defined by the Medical Research Council in 1965, involves “the production of sputum on most days for at least three months of the year for at least two successive years”. The experts in these cases have unanimously adopted this definition as the touchstone of diagnosis in these claims. It will be noted that CB is, therefore, one of those conditions defined exclusively by the signs or symptoms to which it gives rise and which is not susceptible to diagnosis through physical examination, radiology or the like.
5. It follows from this that the experts are heavily reliant on the combination of contemporaneous medical records and the recollections of witnesses of fact as the foundation upon which a positive diagnosis either flounders or flourishes.
6. The production of excess sputum which is characteristic of CB is brought about by inflammation in the bronchi which can be caused by a number of factors including smoking and exposure to dust and fumes. The effect of each factor has a cumulative impact upon the severity of the inflammation. Accordingly, where any given claimant with CB has been a smoker at the material times, he must normally accept that at least part of his condition must be attributed to smoking. Apportionment of contribution will, of course, depend upon how long he had been smoking and on what scale. In Mr Duck’s case, for example, in the event that the diagnosis of CB were to be made out, his long smoking history has given rise to an agreed apportionment which attributes only 11.9% of his symptoms to exposure to dust and fumes and the rest to smoking.

¹ To reflect that fact that the potential liability of the three defendants relates in each case to the acts and omissions of British Coal, and for the sake of convenience, I refer henceforth to the defendant in the singular.

THE BACKGROUND

7. On 23 January 1998 Mr Justice Turner delivered his judgment in what, at the time, was the longest, and probably most expensive, personal injury court case in English legal history. The claims brought by coal miners against their employers, British Coal, were in respect of respiratory conditions alleged to have been caused by exposure to coal dust at work. Eight lead cases were selected with the intention that generic issues could be resolved and thereafter applied to the very many potential claims which were waiting in the wings.
8. One of these issues concerned the recoverability of damages in respect of CB. The position of the defendant was that the condition did not merit the award of any damages because the production of sputum was not an injury but part of the normal function of the body. The court rejected this argument thereby opening the door to tens of thousands of claims for compensation for CB.

THE CLAIMS HANDLING AGREEMENT

9. The sheer number of claims in respect of CB and other respiratory conditions called for a streamlined process by which they could be processed without undue cost and delay. The solution adopted involved the implementation of a Claims Handling Agreement ("CHA"). Leading experts in the field of respiratory medicine, Dr Rudd and Dr Moore-Gillon, were involved in the production of guidance to assist respiratory specialists who had been charged with making an assessment as to whether any given worker had suffered an illness (including CB) which qualified for compensation under the CHA scheme. The first version of the scheme was published in 1999.
10. In its original form the guidance provides:

"28.4 You will need to take into account your interpretation of the Claim Questionnaire, your review of the medical records, the details of the work history provided to you and finally your own assessment of the Claimant....

28.6 The records, if available, should contain corroboration of chronic bronchitis. However, there may be circumstances when even though there is no corroborative evidence in the records the Claimant nonetheless gives you such a persuasive history that you form a clear view that he did have chronic bronchitis whilst working underground (or, in very exceptional circumstances, shortly after).

28.9 Records vary greatly in their quality and extent. You should also keep in mind that some Claimants may be more disposed to attend their GP or take time off work than others even with similar symptoms. You are accordingly expected to use your experience and judgment as a Respiratory Specialist when forming your view as to whether or not there is sufficient corroboration in the records to substantiate the Claimant's statement that, whilst working underground (or, in very exceptional circumstances, shortly after), he had symptoms

which would satisfy the MRC criteria for a diagnosis of chronic bronchitis...

28.10 Corroboration of a diagnosis of chronic bronchitis would be suggested by the use of terms like the following recorded in the notes whilst working underground:

“Chronic bronchitis” (one or more entries)

“Bronchitis” (two or more entries)

“Cough and phlegm/sputum/spit” (“ “ “)

“Productive cough” (“ “ “)

“Acute exacerbation of chronic bronchitis” (one or more entries)

11. Following a request to comment on suggestions for possible changes in this medical assessment process, Dr Rudd and Dr Moore-Gillon responded in a letter dated 3 April 2000:

“The Respiratory Specialist must see medical records in order to make an assessment of past disability, for corroboration of past chronic bronchitis and smoking history, and for accurate information about possible co-morbid conditions.”

12. Dr Rudd and Dr Moore-Gillon were thereafter joined by Professor Britton and together they continued to oversee the application of the guidance to the operation of the CHA. In a letter of November 2001 they observed:

“We can regard it as reasonable that the specialist should be asked to come to a careful judgement upon whether or not chronic bronchitis may have been present when the records are very scanty or absent. They should not, however, come to the diagnosis that chronic bronchitis was present when the records are clear and detailed, and show that chronic bronchitis was not present.”

13. In a further letter in November 2001, the three experts went on to say:

“Corroboration of chronic bronchitis

We confirm that we are happy to redraft the guidance to the RS [respiratory specialist] on this point, to make it clear that corroboration need not be present, but that the RS must still form an expert judgement on this matter and certainly cannot conclude that chronic bronchitis is present simply on the basis of the claims questionnaire and where there is clear evidence to the contrary in existing contemporaneous records.”

14. On 1 May 2002, there followed a report from the Medical Reference Panel, of which the three experts were the authors, in which they produced further guidance on the diagnosis of CB, describing how they were aware that there had been disquiet about the need for corroboration of the diagnosis of CB in the records and, indeed, about the very use of the term “corroboration”. The experts proposed that further short guidance should be circulated to the respiratory specialists to include the following:

“It should be stressed that positive entries in the medical records, as given in the detailed guidance, are there only to assist you in coming to a positive diagnosis. In order to diagnose chronic bronchitis, however, you do not need to find such evidence in the available records if it is your clinical judgment – taking into account all aspects of the case – that the claimant had chronic bronchitis whilst working for British Coal. In reaching that judgment, you will of course bear in mind anything in the records which suggests that the claimant did not have chronic bronchitis at the relevant time.”

15. I have taken the time to set out the salient parts of the guidance to the respiratory specialists under the CHA because the priority to be afforded to the consideration of the contemporaneous medical reports has featured strongly in the respective contentions of the parties before me. The claimants argue that the defendant has failed to pay adequate regard to the histories given by the claimants and has applied mechanistic weight to the medical records. They go on to contend that, in any event, the records are, if anything, supportive of the diagnosis of CB. The defendant responds by asserting that the entries in the medical records, when considered in the round, actually contraindicate a diagnosis of CB.

16. I make the following observations on the guidance given under the CHA:

- i) The guidance provides a useful distillation of the considerations likely to be relevant to the issue of diagnosis of CB in the context of the evidential basis upon which the respiratory specialists operated under the CHA;
- ii) I can see no reason in principle why similar guidance should not apply to the consideration of claims made in respect of coke oven workers where the evidential material available is the same and a streamlined process is to be adopted;
- iii) The guidance should not, however, for the purposes of these proceedings, be treated by this court as a substitute for the well-established application of common law principles in the resolution of issues arising in claims for personal injury. It should be borne in mind that the purpose of the CHA was to provide a procedure which produced fair results and which was both cost and time effective. The respiratory specialists performing their assessments under the scheme did not have the advantage, which this court has enjoyed, of hearing the testing of the evidence of witnesses, both lay and expert, by skilled counsel and the adversarial luxury of detailed analysis and nuanced argument. I am thus equipped to make a more informed decision than would any given respiratory specialist operating under the scheme. This is particularly relevant to the assessment of the importance of the medical records. More limited assistance

is to be gained from the table of suggested corroboration by the use or repeated use of the terms set out in paragraph 28.10 where, as here, a fuller and more intense investigation of all the evidence has been possible.

17. I now turn to the cases of the individual claimants.

GRAHAM DUCK

18. Mr Duck was born on 20 February 1950. In 1975, he started work at Coedely coke works where he remained until 1983 when he moved to Nantgarw until 1986. His case is that he developed CB shortly after he arrived at Coedely and that his symptoms improved markedly after he left Nantgarw. He started smoking at about the age of 18 and did not give up until his mid-sixties. Smoking is well recognised to be a cause of CB and so, even if the court were to find that Mr Duck has suffered from this condition, he would be entitled to be compensated for only a proportion of his symptoms. That proportion has, as I indicated earlier in this judgment, been agreed to be at the level of 11.9%.

MR DUCK'S EVIDENCE

19. In his witness statement, which stood as the central part of his evidence in chief, Mr Duck said that he could not recall having any chest problems before he started work at the coke works. Thereafter, he noticed that all his colleagues who worked on the coke ovens had a cough which everyone referred to as "a coke oven cough". He started coughing up phlegm which was dark in colour both when he was at work and when he was not. He was coughing all year round but the symptoms tended to improve when he took a fortnight's holiday. He did not recall ever attending his doctor to complain about his cough. Within months of finishing at the coke works, his cough had improved significantly.
20. Cross examination, however, revealed Mr Duck to be a thoroughly unreliable historian. His credibility was fatally damaged by a close examination of his previous adventures in the realms of compensation and benefit claims.
21. One such claim was in respect of the condition of Vibration White Finger ("VWF"). On 26 September 2000, Mr Duck's solicitors sent a letter of claim on his behalf in respect of VWF. In support of his claim for services, Mr Duck alleged that for about ten years he had needed significant help with gardening, window cleaning, DIY, decorating, car washing and car maintenance all of which was attributable to his VWF. The contemporaneous medical records, however, tell a very different story.
22. Mr Duck had suffered a slipping accident at work on 6 January 1986 and brought a claim in respect of his injuries. He did not go back to any form of employment thereafter until he started work as a lorry driver in 1998. The medical records relating to his back injury claim are completely irreconcilable with his VWF services claim.
23. At about the time Mr Duck was saying that he was dependant on assistance because of his VWF he was, in fact, attributing severe disabilities to his back injury. On 2 July 1990 he was seen at East Glamorgan General Hospital where it is recorded that he could not stand for long periods and unable to sit for any length of time. It was noted that he

claimed to spend the day reading the newspaper and watching TV. He made the occasional visit to the pub but was unable to throw darts because of the pain.

24. Mr Duck filled out a questionnaire on 18 December 2006 in support of his VWF claim. One part of the form stated:

“Since developing VWF / CTS, have you suffered from any of the conditions listed below to the extent that you required treatment from your GP or a hospital?”

Under the category “Back trouble or back injury” Mr Duck responded in the negative.

25. On 13 March 2008, one Dr Englebrecht concluded from the history which Mr Duck had given him that there were no co-morbid conditions which would have caused significant functional impairment which had limited his ability to carry out the tasks in respect of which he was claiming for VWF compensation for services. I have no doubt that he would not have reached this conclusion if he had seen the medical records relating to Mr Duck’s accident claim.
26. On the basis that there were no other medical conditions which had impaired Mr Duck’s ability to perform the six relevant tasks, he was awarded compensation in excess of £27,000 in respect of his VWF services claim.
27. Mr Duck also made a claim for incapacity benefit in respect of which he was medically examined and a report of 4 January 2008 sets out his medical history. Mr Duck is recorded to have said that he was suffering from Carpal Tunnel Syndrome (“CTS”) in both hands as confirmed by the results of nerve conduction studies. In fact, the opposite was true. As Mr Duck well knew, he had undergone nerve conduction studies the results of which had ruled out the diagnosis of CTS.
28. I take the view that the credibility of Mr Duck is considerably undermined by the facility with which he has shown himself able to adapt his complaints, chameleon-like, to match the criteria of whichever claim he happens to be making at any given time.
29. Recognising the shortcomings of Mr Duck’s oral evidence, it is argued on his behalf that the court should have particular regard to the entries in the medical records which are specifically relevant to the diagnosis of CB.
30. There is a reference to “cough with green sputum” in the GP records for April 1978 but this gives no indication of the period over which Mr Duck had been suffering from this condition and is not therefore determinative of the issue.
31. The high water mark of Mr Duck’s case is a medical record of 23 October 1981 of a Consultant Rheumatologist to the effect that he “had had a smokers’ cough for years.” It is rightly pointed out that Professor Britton’s evidence was that a smoker’s cough may start out as a dry cough but he would expect it to become productive if there followed persistent continued exposure to cigarette smoke. Dr Moore-Gillon accepted that it was often productive but that it depended on the person. He declined to agree that a reference to a smoker’s cough must frequently be taken as indicating a productive cough. Against this background, the entry undoubtedly provides a level of support to Mr Duck’s case. It is not, however, conclusive. The author of the report is not a chest

physician and was not concerned to take a detailed history relating to Mr Duck's respiratory complaints. The report is silent as to the persistence and duration of the cough over the previous years and the conclusion that it was productive is a matter of secondary inference depending on what the rheumatologist actually meant when he used the term smoker's cough.

32. Furthermore, this entry cannot be looked at in isolation.
33. The defendant points to the fact that between this entry and 6 January 2014 there is no record that Mr Duck made any complaint of respiratory symptoms to any of the doctors who examined him on the numerous occasions he presented himself. One explanation for this absence of evidence might be that Mr Duck simply and stoically took his cough for granted and did not think to mention it to the doctors he saw over the years. However, this approach does not account for the positive evidence that Mr Duck was not suffering from respiratory symptoms as he had alleged.
34. For example, on 5 January 1988, Mr Duck was examined by Dr McQueen, a consultant neurologist who had been instructed on his behalf for the purpose of pursuing his accident claim. Under the heading "systematic enquiry" Dr McQueen recorded:

"He smokes some 20 cigarettes per day but he denies significant chest problems, Very occasionally if there is a very big cough there is some pain in the back."
35. Furthermore, in filling out the services questionnaire in respect of his VWF claim, Mr Duck specifically disavowed any disease of the lungs.
36. Neither of these entries can be reconciled with Mr Duck's claim that he has coughed every day of his life since he started work at Coedely.
37. Finally, in an entry dated 6 January 2014, for the first time in over 32 years, there is reference in the medical records to respiratory symptoms. It records that Mr Duck was complaining of coughing up brown and greenish sputum for several months. The timescale of this complaint is inconsistent with a history of a productive cough over decades and certainly does not mandate a diagnosis of CB.
38. I am satisfied on the entirety of this evidence that Mr Duck has never suffered from CB and that his claim must fail.
39. Although it is not necessary for me to go further, I note that, despite the fact that Mr Duck's wife and three sons would have been able to corroborate his history if it were true, none of them was called to give evidence. Indeed, none of them made a witness statement relied upon in this case. Without analysing too deeply the precise evidential implications, I would predict that where a diagnosis of CB is in dispute, any claimant may well run the risk that the court would draw adverse inferences from a failure to call readily available and relevant witnesses without adequate explanation.²
40. I do not propose to assess what general damages would have been awarded if I had found that Mr Duck had been suffering from CB. This is not a case in which the level

² See for example Wisniewski v Central Manchester Health Authority [1998] P.I.Q.R. P324.

of injury is clear but the claimant has lost on the issue of liability or causation. It is a case in which I have found that there was no injury at all and, as such, is an inappropriate vehicle for a hypothetical assessment.

GEORGE NICHOLLS

41. Mr Nicholls, a lifelong non-smoker, worked at Nantgarw from 1968 to 1985. He died of lung cancer in 1997. The claim is brought by his widow, Mrs Nicholls, under the provisions of the Law Reform (Miscellaneous Provisions) Act 1934 in respect of general damages arising from Mr Nicholls' alleged condition of CB. As in the case of Mr Duck, the defendant denies that Mr Nicholls ever suffered from CB and contends, in any event, that the claim is statute barred.
42. About a year after Mr Nicholls had started work at Nantgarw, he was joined there by David Harper who was called to give oral evidence at trial. Mr Harper had only recently given a witness statement in support of Mrs Nicholls' claim in circumstances which were thoroughly explored in cross examination. Suffice it to say that the defendant does not now contend that there was any sinister explanation behind his serendipitous and late contribution to the issue.
43. Mr Harper said that he worked at Nantgarw between 1969 and 1974 during which time he tended to look up to Mr Nicholls as an older man. He said that about 80% of his workmates coughed as a result of the conditions in which they were working. He noticed that Mr Nicholls had a strange rattling cough. Mr Nicholls was coughing up sputum throughout the time they were working together. Mr Harper had not gone on to develop CB but had himself coughed up sputum. He did not go to see his doctor about it.
44. Dr Moore-Gillon conceded that if Mr Harper's evidence were to be taken at face value then the persistence of a productive cough between 1969 and 1974 was capable of sustaining a diagnosis of CB in the case of Mr Nicholls.
45. Furthermore, during the time he was working with Mr Harper, Mr Nicholls visited his GP complaining of a productive cough as is evidenced by an entry dated 26 January 1970. There is no record of the period over which this productive cough had persisted.
46. It was in 1972 that Mr Nicholls met his future wife at which time he had already been working at Nantgarw for four years. She said that at that time he had a dry tickly cough which was worse in the morning and which eased off during the day. She said that the cough became productive in 1978 or 1979. She appeared to be confident about these dates but was unable to explain why. She repeatedly told him to go to the doctor's about it but he did not follow her advice. He was bringing up phlegm most days. She used to buy him linctus which smelt of aniseed although she was unable to remember the proprietary name. It is to be noted that her account of Mr Nicholls having a dry but not productive cough until 1978 or 1979 is inconsistent with the evidence of Mr Harper who had noted that Mr Nicholls had been coughing up sputum a decade earlier.
47. There is a curious and controversial episode in Mr Nicholls' medical history in 1983. In March of that year he was found to be suffering from hypertension. He was sent for X-ray examination by his GP following a consultation on 7 March. There is no evidence

in the GP notes that Mr Nicholls was complaining of respiratory symptoms at the time. The radiology report of 9 March, however, records:

“Chest: Pneumoconics (sic.) or chronic bronchitis. No other abnormality.”

When next Mr Nicholls went to see his GP on 16 March there was no reference to any respiratory complaints.

48. The significance of the reference to “chronic bronchitis” in the radiology report has proved to be very controversial. The central problem is that the agreed medical evidence is that CB is undetectable on X-ray examination. On this basis, the defendant contends that the reference must be discounted. In response, the claimant advances the proposition that the most likely explanation is that the radiologist was recording something that he or she had been told by Mr Nicholls and not reaching an insupportable diagnostic conclusion from the X-ray films.
49. On 3 October 1988, the GP notes record:

“Bit wheezy recently + cough
? Related to β blockers
but no previous history”
50. On 8 December 1988, the GP notes record: “bronchitis” without reference to the period over which the condition had persisted.
51. On 19 August 1997, the GP notes record: “acute bronchitis” and on 10 September: “[D] cough”.
52. On 26 September 1997, a registrar at East Glamorgan Hospital wrote to Mr Nicholls’ GP referring to his complaints of a “persistent dry cough” which had improved. The defendant contends that the references to a dry as opposed to a productive cough contraindicate a diagnosis of CB. The claimant suggests that the explanation for this is that the cough may have been productive historically but had become a dry cough as an effect of the antibiotics that had been prescribed.
53. There are no further medical records relevant to this claim. In due course, Mr Nicholls succumbed to a particularly aggressive form of lung cancer from which he died on 1 December 1997.
54. In January 1998, Mr Justice Turner handed down his judgment in the British Coal Respiratory Disease Litigation (“BCRDL”) which opened the door to the bringing of a very considerable number of potential claims. On 6 May 1998, Mrs Nicholls’ solicitors, Hugh James (“HJ”) intimated a claim on behalf of Mr Nicholls (now deceased) in respect of pneumoconiosis. No claim was brought in respect of CB. I note that although Mr and Mrs Nicholls had always believed that Mr Nicholls had suffered from pneumoconiosis, their confidence was not supported by the medical evidence. Unlike CB, pneumoconiosis is a diagnosis which is capable of radiological support.

55. Matters progressed at a slow pace. On 1 September 2000, Mrs Nicholls signed a Claim Questionnaire which had been completed with the assistance of a representative of HJ. Section 27 of the questionnaire related to "Medical History Symptoms". It asked:

"Did the deceased have any illnesses, including those which may have been caused by work which affected his breathing?"

To which Mrs Nicholls responded in the affirmative and she wrote in her own hand:

"Lung cancer 1997."

Beneath this in another hand, presumably that of Mrs Nicholls' solicitor, appears the entry:

"Chronic Bronchitis n/k."

56. The questionnaire went on to raise the following issues and prompted the following responses:

"34. When the deceased worked underground at a British Coal mine after 4th June 1954 did he cough up phlegm from his chest?"

Don't know

If No or Don't Know, did he cough up phlegm from his chest within a short period of stopping working underground at a British Coal mine?"

Yes

35. Did the deceased ever have treatment for his cough from a doctor?"

Yes

36. How often did he cough up phlegm?"

Every day

37. If the deceased was coughing up phlegm every day or on most days, roughly how long did this go on for each year?"

More than three months a year

38. Was the deceased still coughing up phlegm prior to death?"

Yes."

57. In the event, it was determined that Mrs Nicholls' claim did not fall within the parameters of the scheme and, on 6 September 2005, her claim was rejected and liability was denied. It is to be noted that the claim failed because Mr Nicholls had not worked as a miner and not because any adverse assessment had been made of the contention that he had been suffering from CB.

58. On 7 June 2011, Mrs Nicholls was, again, invited to pursue a claim and within 2 days she had completed the form which she had been sent for this purpose. The claim was limited to lung cancer and made no reference to CB. However, the pro forma contained no relevant box relating to a potential CB claim.

LIMITATION

59. The issue of limitation should be determined before any consideration of the issue of liability.
60. In KR v Bryn Alyn Community (Holdings) Ltd [2003] Q.B. 1441 Auld LJ held at paragraph 74:

“vii) Where a judge determines the section 33 issue along with the substantive issues in the case, he should take care not to determine the substantive issues, including liability, causation and quantum, before determining the issue of limitation and, in particular, the effect of delay on the cogency of the evidence. Much of such evidence, by reason of the lapse of time, may have been incapable of being adequately tested or contradicted before him. To rely on his findings on those issues to assess the cogency of the evidence for the purpose of the limitation exercise would put the cart before the horse. Put another way, it would effectively require a defendant to prove a negative, namely, that the judge could not have found against him on one or more of the substantive issues if he had tried the matter earlier and without the evidential disadvantages resulting from delay.”

61. In B v Nugent Care Society [2010] 1 W.L.R. 516, Lord Clarke MR, who gave the judgment of the court, observed at paragraphs 21-22 that the judge who has to determine the issue as to whether the primary limitation period should be disappled:

“21...may well conclude that it is desirable that such oral evidence as is available should be heard because the strength of the claimant’s evidence seems to us to be relevant to the way in which the discretion should be exercised. We entirely agree with the point made at vii) that, where a judge determines the section 33 application along with the substantive issues in the case he or she should take care not to determine the substantive issues, including liability, causation and quantum before determining the issue of limitation and, in particular, the effect of delay on the cogency of the evidence. To do otherwise would, as the court said, be to put the cart before the horse.

22. That is however simply to emphasise the order in which the judge should determine the issues. When he or she is considering the cogency of the claimant’s case, the oral evidence may be extremely valuable because it may throw light both on the prejudice suffered by the defendant and on the extent to which the claimant was reasonably inhibited in commencing proceedings. ...”

62. In JL v Bowen [2017] P.I.Q.R. P11 Burnett LJ (as he then was) held:

“26 The logical fallacy which Lord Clarke MR was concerned with at [21] of the Nugent Care Society case and Auld LJ at [74(vii)] of the Bryn Alyn case was proceeding from a finding on the (necessarily partial) evidence heard that the claimant should succeed on the merits to the conclusion that it would be equitable to disapply the limitation period. That would be to overlook the possibility that, had the defendant been in a position to deploy evidence now lost to him, the outcome might have been different. The same logical fallacy is most unlikely to apply in the reverse situation, especially when the case depends upon the reliability of the claimant himself. That may be illustrated by a simple example. A claimant sues for personal injury ten years after an alleged accident and seeks an order to disapply the limitation period of three years. The defendant has lost its witnesses and records, but advances a defence that the accident did not occur. The judge concludes, without the lost evidence, that indeed the accident did not occur. The burden is on the claimant to prove that it would be equitable to disapply the limitation period having regard to the balance of prejudice. In those circumstances he would not be able to do so. There would be no purpose in extending the limitation period and it would not be equitable to do so. Similarly, a full exploration at trial of, for example, the claimant’s reasons for delay may enable the judge to reach firm conclusions which could have been no more than provisional had limitation been resolved as a preliminary issue.

27 There is clear authority for this approach in the judgment of Thomas LJ (as he then was) in Raggett v Society of Jesus Trust of 1929 [2010] EWCA Civ 1002. The complaint made by the appellants was that the judge had decided the abuse in question had occurred and had then disappplied the limitation period. They advanced a literal argument based upon the words of Lord Clarke MR that because she structured her judgment by dealing with her findings of fact first and only then considered limitation, she had erred. Unsurprisingly, that argument did not prosper. It is not realistic to shut one’s eyes to findings and conclusions reached following a full trial. It is what is done with them in the context of the substance of the reasons for the limitation decision that matters. Thomas LJ, with whom Toulson and Mummery LJ agreed, indicated at [19] that the judge “did not adopt the approach ... that she was satisfied that Father Spencer had in fact sexually abused the claimant and therefore there could be no prejudice.” He continued:

“20. When this court observed that the judge must decide the issue on the exercise of the discretion under s.33 before reaching the conclusions on liability, it was enjoining a judge to decide the s.33 question on the basis, not of the

finding that the abuse had occurred, but on an overall assessment, including the cogency of the evidence and the potential effect of the delay on it.”

63. I will therefore proceed on the basis that my first task is to determine the issue of limitation and then, only if the matter is resolved in favour of Mrs Nicholls, go on to consider the question of substantive liability.
64. The primary limitation period for a personal injury claim expires three years from the date of knowledge as provided under section 11 of the 1980 Act. This is subject to the court’s power to disapply that period which is to be found in section 33.
65. Mr Nicholls had the relevant knowledge for the purposes of triggering the limitation clock by March 1983. By then, both he and his wife, on her account, were attributing his coughing to exposure to fumes at work. However, on Mrs Nicholls’ case, further, discrete injury was sustained after 1983 until her husband ceased work at the coke works in 1985. So the primary limitation periods started to run, day by day, over the period between 1983 and 1985 and expired, also day by day, from 1986 until exhausted by 1988. Mrs Nicholls is thus constrained to rely upon the power of the court to disapply this period under section 33 of the 1980 Act.
66. Section 33 provides:

“33 Discretionary exclusion of time limit for actions in respect of personal injuries or death

(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which—

(a) the provisions of section 11 ... of this Act prejudice the plaintiff or any person whom he represents; and

(b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents;

the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.”

(3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to—

(a) the length of, and the reasons for, the delay on the part of the plaintiff;

(b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11 ...

(c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests

reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;

d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;

(e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;

(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.”

67. There is a dispiriting profusion of case law on section 33. Fortunately, this court now has the benefit of the decision of Carroll v Chief Constable of Greater Manchester Police [2018] 4 WLR 32 in which Sir Terence Etherton MR set out at paragraph 42 a summary of the general principles applicable to s.33 applications:

“1. Section 33 is not confined to a “residual class of cases”. It is unfettered and requires the judge to look at the matter broadly.

2. The matters specified in section 33(3) are not intended to place a fetter on the discretion given by section 33(1), as is made plain by the opening words “the court shall have regard to all the circumstances of the case”, but to focus the attention of the court on matters which past experience has shown are likely to call for evaluation in the exercise of the discretion and must be taken into consideration by the judge.

3. The essence of the proper exercise of the judicial discretion under section 33 is that the test is a balance of prejudice and the burden is on the claimant to show that his or her prejudice would outweigh that to the defendant. Refusing to exercise the discretion in favour of a claimant who brings the claim outside the primary limitation period will necessarily prejudice the claimant, who thereby loses the chances of establishing the claim.

4. The burden on the claimant under section 33 is not necessarily a heavy one. How heavy or easy it is for the claimant to discharge the burden will depend on the facts of the particular case.

5. Furthermore, while the ultimate burden is on the claimant to show that it would be equitable to disapply the statute, the evidential burden of showing that the evidence adduced, or likely to be adduced, by the defendant is, or is likely to be, less cogent because of the delay is on the defendant. If relevant or potentially relevant documentation has been destroyed or lost by the

defendant irresponsibly, that is a factor which may weigh against the defendant.

6. The prospects of a fair trial are important. The Limitation Acts are designed to protect defendants from the injustice of having to fight stale claims, especially when any witnesses the defendant might have been able to rely on are not available or have no recollection and there are no documents to assist the court in deciding what was done or not done and why. It is, therefore, particularly relevant whether, and to what extent, the defendant's ability to defend the claim has been prejudiced by the lapse of time because of the absence of relevant witnesses and documents.

7. Subject to considerations of proportionality (as outlined in para 11 below), the defendant only deserves to have the obligation to pay due damages removed if the passage of time has significantly diminished the opportunity to defend the claim on liability or amount.

8. It is the period after the expiry of the limitation period which is referred to in sub-sections 33(3)(a) and (b) and carries particular weight. The court may also, however, have regard to the period of delay from the time at which section 14(2) was satisfied until the claim was first notified. The disappearance of evidence and the loss of cogency of evidence even before the limitation clock starts to tick is also relevant, although to a lesser degree.

9. The reason for delay is relevant and may affect the balancing exercise. If it has arisen for an excusable reason, it may be fair and just that the action should proceed despite some unfairness to the defendant due to the delay. If, on the other hand, the reasons for the delay or its length are not good ones, that may tip the balance in the other direction. I consider that the latter may be better expressed by saying that, if there are no good reasons for the delay or its length, there is nothing to qualify or temper the prejudice which has been caused to the defendant by the effect of the delay on the defendant's ability to defend the claim.

10. Delay caused by the conduct of the claimant's advisers rather than by the claimant may be excusable in this context.

11. In the context of reasons for delay, it is relevant to consider under subsection 33(3)(a) whether knowledge or information was reasonably suppressed by the claimant which, if not suppressed, would have led to the proceedings being issued earlier, even though the explanation is irrelevant for meeting the objective standard or test in section 14(2) and (3) and so insufficient to prevent the commencement of the limitation period.

12. Proportionality is material to the exercise of the discretion. In that context, it may be relevant that the claim has only a thin prospect of success, that the claim is modest in financial terms so as to give rise to disproportionate legal costs, that the claimant would have a clear case against his or her solicitors, and, in a personal injury case, the extent and degree of damage to the claimant's health, enjoyment of life and employability.

68. With this guidance in mind, I will consider each statutory factor in turn:

a) **the length of, and the reasons for, the delay on the part of the plaintiff**

The delay in this case is in the region of 25 years. When cross-examined about why a claim had not been brought earlier, Mrs Nicholls agreed with the suggestion put to her by counsel that until September 2000, when her solicitor added the words "chronic bronchitis" to the claims questionnaire, it had never occurred to her that she might have a claim in respect of CB and nor had it occurred to her husband at any time before his death. Thereafter, Mrs Nicholls was very much in the hands of her solicitors who were grappling with the enormity of the numbers of compensation claims arising from the BCRDL litigation and, subsequently, the Phurnacite litigation. I had the advantage of seeing and hearing how Mrs Nicholls reacted to cross examination and to the experience of giving evidence generally. She was timid and unassertive. I am entirely satisfied that the delay after her husband's death was not attributable to any conscious decision on her part not to pursue a case which she knew she could bring. The defendant relies on the fact that Mr Nicholls, having instructed HJ, brought a noise induced hearing loss claim in 1992 which resulted in his receiving compensation in the sum of £1,284. I attach little weight to this. Industrial disease claims are often catalysed by information disseminated by a trades union or by word of mouth within the workforce. This is in emphatic contrast to the suggestion that it would have been reasonable to expect either Mr Nicholls or his wife to show a greater level of initiative in pursuing a CB claim than in fact they did. My conclusion, therefore, is that the period of delay was very long but was not attributable to matters in respect of which Mr and Mrs Nicholls should fairly be criticised.

b) **the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11 ...**

The defendant points to two particular respects in which the evidence is or is likely to be less cogent than if the claim had been brought in time. Firstly, Mr Nicholls would have been able to give evidence about his alleged symptoms and could have been challenged on this and on the reasons for his infrequent visits to his doctor. Secondly, the East Glamorgan Hospital records were destroyed eight years after his death in accordance with its policy. The particular relevance of these destroyed

records relates to the possibility of shedding further light on the circumstances surrounding the 1983 X-ray and the chance that they would contain greater detail about the history set out in the letter of 26 September 1997 to Mr Nicholls' GP referring to his dry cough.

I consider that the defendant is correct to assert that the evidence in the case is likely to be less cogent than it would have been if Mr Nicholls had been alive to give evidence. It is, however, a matter of speculation as to whether his hypothetical contribution would have enhanced or diminished the strength of the defendant's case.

It is also relevant that the question as to whether or not Mr Nicholls had a productive cough which fulfilled the agreed diagnostic criteria does not depend upon the recollection of a single event such as a road traffic accident in respect of which individual memories are more likely to fade very significantly over time. Mrs Nicholls' evidence in this regard relates to salient medical signs or complaints of symptoms alleged to have stretched over many years. Her evidence is likely to have been less cogent than it would have been if given within the context of a claim brought within the primary limitation period but the extent of the evidential degradation is significantly less than it would have been in respect of an acute as opposed to a chronic condition.

With respect to the controversial reference to "chronic bronchitis" on the radiography report I am prepared to assume, in the defendant's favour, that this was a rogue entry based on a misconception held by the author that CB can be detected on X-ray films.

The absence of the contemporaneous hospital notes upon which the letter of 26 September 1997 was drafted does render the evidence in the case less cogent to the extent that it *may* have contained extra detail not set out in the letter and that such detail would have related to the history of Mr Nicholls' coughing. Once again, however, it is a matter of speculation as to whether the notes would be prejudicial to the claimant or to the defendant or to neither.

- c) **the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant**

Although the defendant has been criticised for not taking steps to preserve the hospital records after Mrs Nicholls made her ill-fated BCRDL claim, I am satisfied that this is a counsel of perfection. Indeed it would have been open to HJ to seek to preserve the records at this time and so the allegation is something of a double edged sword.

- d) **the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action**

This consideration does not arise on the facts of this case.

- e) **the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages**

I accept that Mr Nicholls never knew that he could bring a claim for damages in respect of his alleged CB and that Mrs Nicholls found out in 2000 following which the pace of the presentation of her claim was determined by the progress of the successive multiparty claims which unfolded thereafter. I am unable to categorise her actions as being unreasonable or lacking promptness.

- f) **the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received**

Mr Nicholls did not obtain medical or legal advice directed towards bringing a claim for CB. It was not until after HJ had made contact with Mrs Nicholls that, eventually, medical and expert advice was commissioned.

69. The defendant raises the additional argument that the potential value of Mrs Nicholls' claim is disproportionately low when compared to the costs involved in litigating it. I am not impressed by this contention. As the claimants rightly point out, the Court, when deciding whether to make a GLO, had to consider the issue of proportionality. A key purpose of a GLO, as recognised by the Final Access to Justice Report (July 1996), quoted in the White Book at 19.10.0 (p.657) is to "provide access to justice where large numbers of people have been affected by another's conduct, but individual loss is so small that it makes an individual action economically unviable."
70. I also struggle to understand how proportionality will normally be relevant in a case, such as this, in which the determination of the issue of the exercise of the court's discretion to disapply the limitation period has been deferred to be determined after all the evidence in the trial on both liability and quantum has been heard. The costs have, by then, already been incurred.
71. An issue has also arisen as to the extent, if at all, to which the terms of the BCRDL CHA may have operated to suspend or waive the limitation period. I will assume in favour of the defendant, without deciding the issue, that the agreement had no such effect.
72. Applying the statutory test and with the guidance in Carroll firmly in mind, I am satisfied that the claimant has discharged the burden of showing that her prejudice would outweigh that to the defendant if the limitation period were not disappplied. In particular, I am satisfied, despite some evidential deterioration over the years, that the passage of time has not significantly diminished the defendant's ability to fight this claim on either liability or quantum.

THE SUBSTANTIVE CLAIM

73. The defendant, realistically, does not suggest that Mrs Nicholls was trying to mislead the court. Rather it is contended that, with the passage of time, her memory has been contaminated to the extent that her central recollection that her late husband had a productive cough for many years is unreliable.
74. I am alert to the dangers of the impact that the passage of time may have on human memory, particularly where there is a potential that secondary gain may, even unconsciously, reshape a claimant's recollection.
75. Nevertheless, there are certain particular factors in this case which lead me to the conclusion that Mrs Nicholls' evidence is, subject to conflicting information in the contemporaneous medical records, worthy of belief. I note:
- i) Mrs Nicholls has remained consistent in the central thrust of her evidence that her husband suffered from a persistent productive cough over many years. The defendant points out that that her evidence in some other respects was somewhat vague and contradictory but I do not conclude that this significantly undermines the core of her narrative. Indeed, it would have been surprising and even, perhaps, suspicious if her evidence had been pitch perfect on every issue.
 - ii) Mrs Nicholls was describing a state of affairs which had persisted for nearly twenty years and not an isolated event.
 - iii) As someone living under the same roof as her husband throughout this period, she was in a very good position to experience at first hand the signs and reported symptoms of CB.
 - iv) Mrs Nicholls' recollection that she used to buy cough linctus for her husband to help his cough added plausible detail to her recollection.
 - v) Her description of her late husband's productive cough in 2000, although not providing independent corroboration, indicates that her present recollection is not of recent origin.
76. The defendant contends that Mr Nicholls' medical records militate against the diagnosis of CB and provide strong evidence that Mrs Nicholls' account is unreliable.
77. In particular, it is argued that if Mr Nicholls had been suffering from CB over many years then he would have had acute infective episodes necessitating medical treatment which would have been evidenced in the medical records. This is an approach supported by the evidence of Dr Moore-Gillon.
78. I accept that one would expect, in most cases, to find more evidence of medical treatment for coughs, particularly productive coughs, than can be found in Mr Nicholls' records. However, at the risk of stating the obvious, patients vary considerably in the degree of stoicism with which they deal with illness. On the one hand, all GPs are familiar with those who are uncharitably described as "heartsink" or "thick folder" patients who are frequent attenders at the surgery. On the other, there are those who regard attendance upon their GPs very much as an act of last resort. Against this

background, Dr Moore-Gillon realistically conceded from the relative infrequency with which Mr Nicholls otherwise attended his GP that he fell into the stoical category. In particular, he accepted that it was possible that Mr Nicholls coped with any exacerbations of his condition by taking the cough medicines which Mrs Nicholls obtained for him.

79. Furthermore, Dr Moore-Gillon was careful not to be dogmatic in his assessment of the significance of the relative paucity of supportive medical records in Mr Nicholls' case. He came to the view that this feature rendered a diagnosis of CB unlikely but not impossible.
80. A particular point is taken by the defendant on the implications of the medical evidence in the final months of Mr Nicholls' life. It will be recalled that on 19 August 1997, the GP notes record: "acute bronchitis" and on 10 September: "[D] cough" and that on 26 September 1997 a registrar at East Glamorgan Hospital wrote to Mr Nicholls' GP referring to his complaints of a "persistent dry cough" which had improved. The defendant contends that the references to a dry as opposed to a productive cough contraindicate a diagnosis of CB.
81. When this point was put to Professor Britton in cross examination, he suggested that the lung cancer may have been blocking the secretions and keeping them in the lung. I have, without much difficulty, reached the conclusion, as I suspect the Professor soon did, that this was an inadequate explanation for the cessation of secretions. After all, the cancer could only affect the production of secretions in that part of the lung where it had taken hold. There would be no reason to suppose that secretions from other parts of the lung would be suppressed by this mechanism.
82. More plausible, however, is that Mr Nicholls had attended his GP with a productive cough in August 1997 for which he had been prescribed courses of Cefaclor and Erythromycin both of which are antibiotics which are used to treat chest infections. The letter of 26 September 1997 makes specific reference to these prescriptions. Once again, Dr Moore-Gillon reasonably conceded that the purpose of prescribing these drugs would be to treat the production of phlegm.

CONCLUSION ON DIAGNOSIS

83. I have not dealt with every nuanced argument presented on behalf of each of the parties on the proper approach to the analysis of the oral evidence and medical records. To have done so would have engaged the law of diminishing returns. Suffice it to say that I find Mrs Nicholls' evidence credible and that the contemporaneous medical evidence is not sufficiently contraindicative of a diagnosis of CB as to dissuade me from the conclusion that it is more likely than not that Mr Nicholls suffered from the condition.
84. However, I also find that Mrs Nicholls was accurately recalling that, at first, her husband's cough was dry and became productive in about 1978 or 1979. To the extent that Mr Harper's evidence was inconsistent with that of Mrs Nicholls on this issue, I preferred the latter. Thus it is that I find that his evidence, although given honestly, was not sufficiently compelling to support a diagnosis of CB over the period between about 45 and 50 years ago when they worked together. It is unsurprising that those who work in very dusty conditions will respond by coughing. Only a minority, however, go on to develop the condition of CB. I am not satisfied, after this lapse of time, that what Mr

Harper was recalling was CB. It also follows that I consider that the visit to the GP in 1970 was in respect of an acute episode of bronchitis for which Mr Nicholls received the appropriate treatment and from which he recovered.

QUANTUM

85. It follows from my findings that the value of Mrs Nicholls' claim in respect of the general damages to which her husband would, if alive, have been entitled related to a period of about 19 years of productive cough until his death from lung cancer.
86. The claimant points to Chapter 6(B)(e) of the Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases 14th Edition which covers: bronchitis and wheezing not causing serious symptoms; little or no serious or permanent effect on working or social life; varying levels of anxiety about the future. The appropriate range of awards is identified to lie between £16,580 and £24,950. In order to avoid any point being taken by the defendant on any difficulties which may have arisen in the assessment of quantum as an argument against the disapplication of the primary limitation period, the claimant has limited her assessment to the lower end of the bracket in the sum of £17,500. I accept that this is an appropriate concession and find that the assessment falls to be reduced no further by the fact I have rejected Mr Harper's evidence on duration.
87. By late amendment, the defendant was permitted to raise the issue of contributory negligence arising out of Mr Nicholls' alleged failure to wear protective equipment in the form of a Racal helmet. Applying the reduction agreed by the parties to reflect this issue gives an award of general damages in the sum of £15,120 upon which interest of £733 has accumulated. There will therefore be judgment in favour of Mrs Nicholls in the sum of £15,853.