THURSDAY NIGHT TRAINING

SESSION 4 THURSDAY 21 AUGUST 2014

woodward solicitors

INTRODUCTION TO LEGAL FAULT

From	To	Training
5.10pm	5.15pm	Introduction to legal fault
5.15pm	5.35pm	Role plays: (a) Mock initial conversation with client (b) Mock Court 3 minute submissions
5.35pm	5.45pm	Liability quiz
5.45pm	5.50pm	CPR refresher

Enclosures

By the end of the session you will have been given:

Mock initial conversation with client instructions

Interviewer

You have received a telephone call from Mrs Erika Ryan who wants to claim compensation as a result of developing asthma – she believes that this is due to her work for Volex. You have been asked to obtain brief initial details so that the claim can be considered at a leads meeting which is due to take place in 5 minutes.

See how much information you can obtain.

Mock initial conversation with client instructions

Interviewee

You are Mrs Erika Ryan and worked for Volex Powercords Ltd at their premises in Elizabeth Street, Leigh between February 2005 and October 2013 as a Lead Preparation Operator and Solderer. You were involved in stripping the plastic covering from electrical leads and soldering the exposed wire. The work on the soldering bench consisted of dipping the wire into liquid flux and then into the molten solder. As a result of exposure to fumes from the solder and soldering flux you suffered breathing difficulties and contracted occupational asthma.

You have spoken to a good friend whose opinions you respect and they have advised that when you speak to the Solicitors about your potential claim that you keep your answers to questions as brief as possible; that you do not volunteer information unless asked for it; that you tell the truth.

Elizabeth Street, closed for production 2 years ago but is still owned by Volex PLC who inherited liabilities for Volex Powercords. Elizabeth Street is 30,000 square feet with a cantilever roof 3 metres high to eaves and 5 metres to the apex. Part of the local extraction ventilation system (LEV) (photo 3) and the extract fan unit (photo 4) can still be seen up towards the roof. There were 3 soldering benches at Elizabeth Street and you used the one near the entrance. You worked the afternoon shift 1pm-6pm with one 15 minute break.

Volex now operate from the nearby Greenfold Way. This is a modern facility which is much more spacious and has a high roof and each soldering bench has it's own extraction system (see photo 5). 2 welders type funnels with flexible ducting are used to collect fumes which are then absorbed in a unit filled with a charcoal filter.

Photo 6 shows an Operator stripping the wire on a separate bench near to the soldering bench. The wires are then dipped into molten solder (photo 7). A metal plate is preset to the required depth to avoid the possibility of melting the plastic covering.

In October 2007 you developed a cough which became progressively worse. In early 2008 you had a few months off work and there was a significant improvement. However, upon returning to work for a few days you suffered further symptoms and had to leave work early on a particular day because your symptoms were so bad. You were directed to return to work the following day. You have continued to suffer from regular coughs and minor breathing difficulties. Your condition has fluctuated. Eventually in March 2014, after being on a waiting list for 9 months, a Consultant Respiratory Physician informed you that you

suffer from occupational asthma. You had seen the GP occasionally since 2008 but he didn't mention work as being a possible cause of your condition and didn't make a diagnosis.

You noticed a metallic/irritant effect and solvent odour. Sometimes the solder was changed and the flux changed in 2007.

The LEV didn't always work properly and had a poor or non-existent draught. You noticed the fumes more when the fan wasn't working properly.

No PPE was provided except for a full face mask after you finished work early (noted above). This mask was impractical due to the heat. No gloves, apron or goggles were made available to you. You were unaware of safety information, warning notices and risk assessments. The hygiene facilities consisted of wash basins, hot and cold water, soap, paper towels. You had to wash your hands occasionally throughout the day after contact with the flux.

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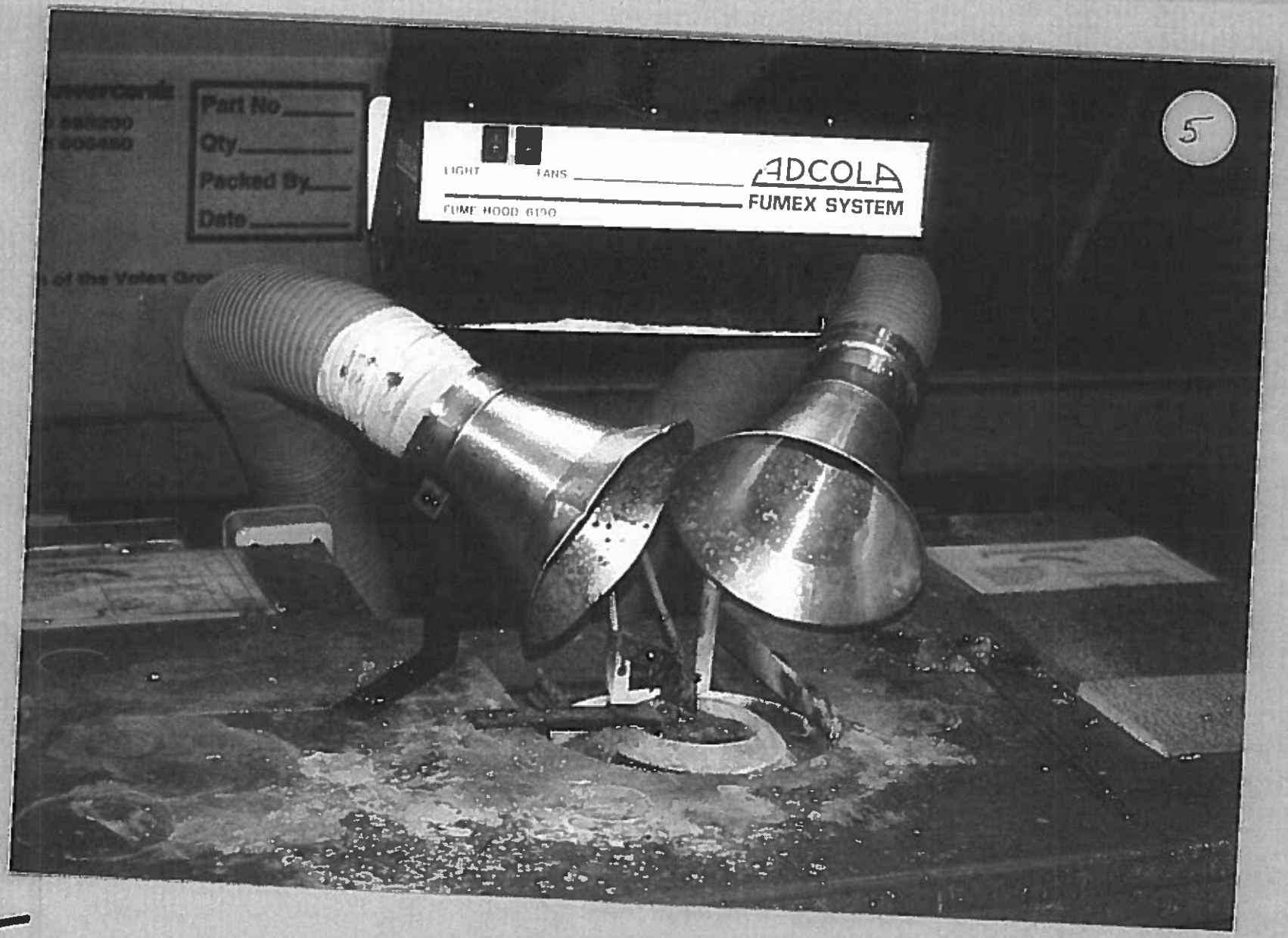
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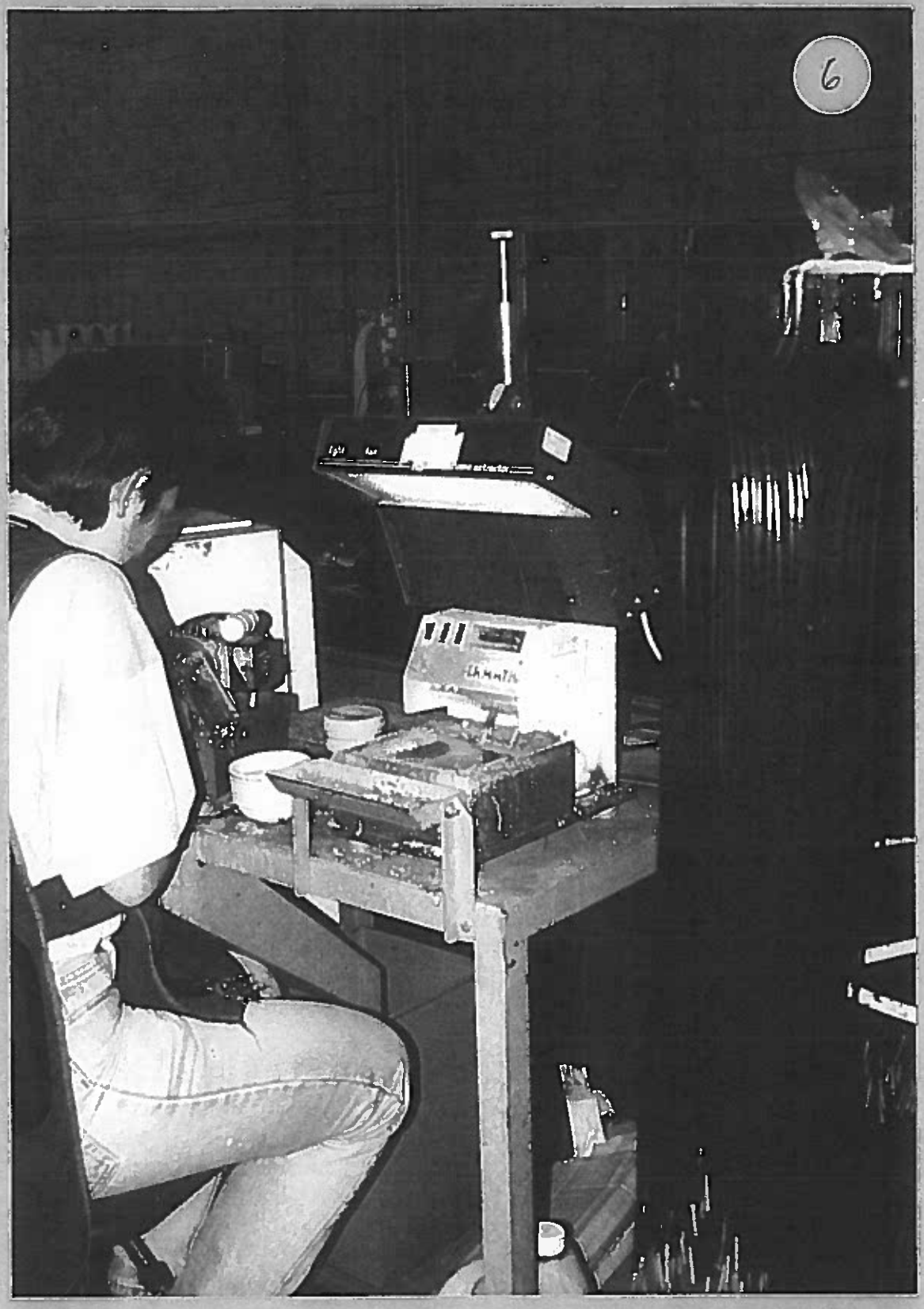
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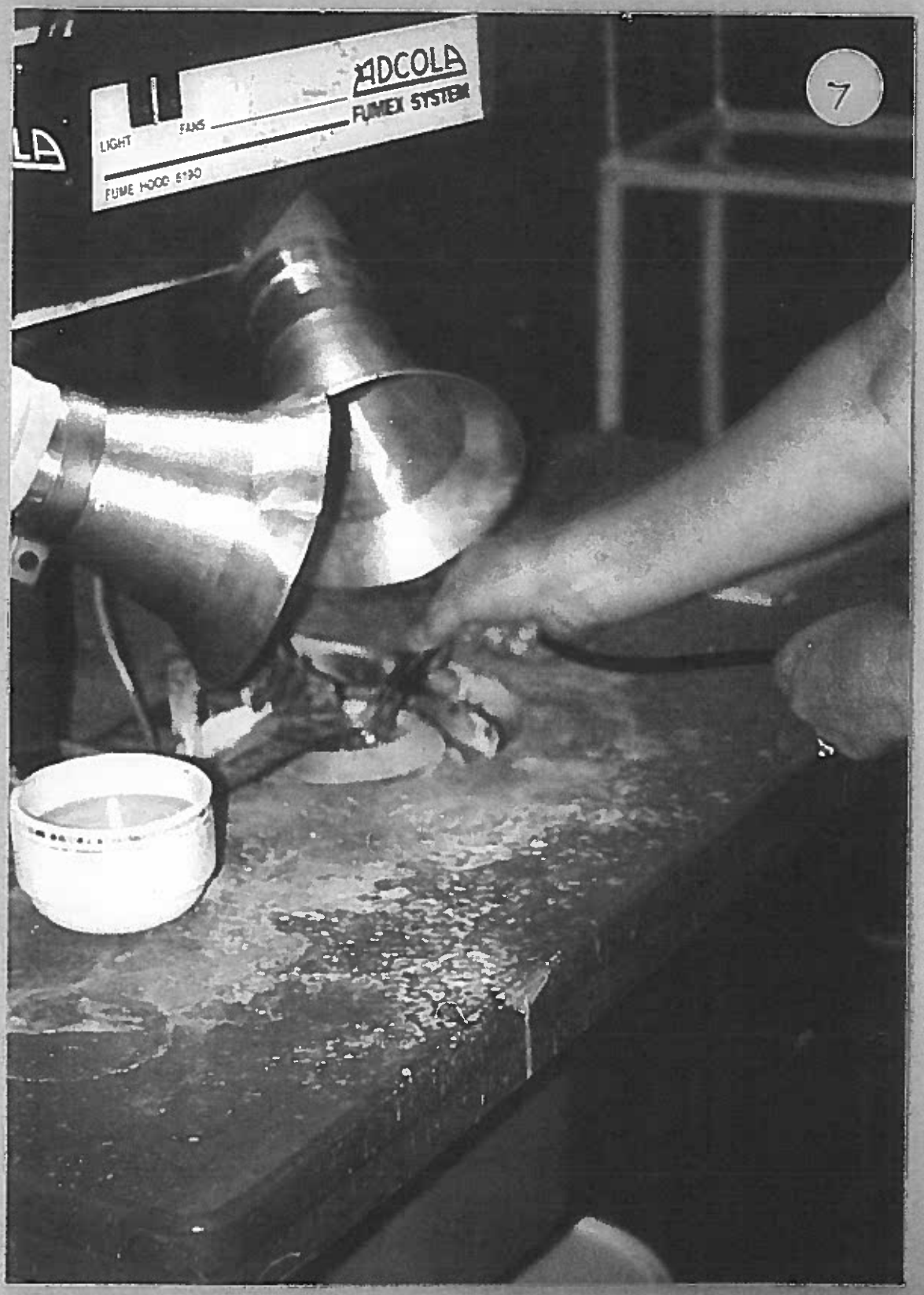
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Mock Court 3 minute submissions

See the interviewee information. You are the Barrister representing Mrs Ryan.

An Chemist has reported:

1. The employer should have carried out suitable risk assessments to properly manage risks to health and the precautions needed.

2. The risk assessments should be reviewed from time-to-time or if working conditions change. The only record of a risk assessment was completed in September 2001.

3. Without effective control solder fume rises vertically and is likely to enter the breathing zone of the Solderer.

4. There was no monitoring as to how much exposure to fumes occurred.

5. Exposure to excessive amounts of soldering fume and flux components or to their decomposition products released during soldering is likely to give rise to respiratory system irritation.

6. The levels of fume and vapour experienced by the Claimant are difficult to quantify. Significantly, on the balance of probabilities, the exposure was less than the maximum limits under the relevant occupational exposure limits.

You are aware that the start of the helpful regulation 7 of the Control of Substances Hazardous to Health Regulations states:

> "Prevention or control of exposure to substances hazardous to health
>
> 7. (1) **Every employer shall ensure that the exposure of his employees to substances hazardous to health is either prevented or, where this is not reasonably practicable, adequately controlled.**
> (2) In complying with his duty of prevention under paragraph (1), substitution shall by preference be undertaken, whereby the employer shall avoid, so far as is reasonably practicable, the use of a substance hazardous to health at the workplace by replacing it with a substance or process which, under the conditions of its use, either eliminates or reduces the risk to the health of his employees.

(3) Where it is not reasonably practicable to prevent exposure to a substance hazardous to health, the employer shall comply with his duty of control under paragraph (1) by applying protection measures appropriate to the activity and consistent with the risk assessment, including, in order of priority—

- the design and use of appropriate work processes, systems and engineering controls and the provision and use of suitable work equipment and materials;
- the control of exposure at source, including adequate ventilation systems and appropriate organisational measures; and
- where adequate control of exposure cannot be achieved by other means, the provision of suitable personal protective equipment in addition to the measures required by sub-paragraphs (a) and (b)."

Judge Harshison has considered the Trial Bundle and before any submissions were made has stated that on the basis of the Chemist's report he cannot see how the Defendant has been negligent on the basis that they cannot have breached the duty of care as any exposure was less than the relevant occupational exposure limits – no matter how bad the LEV was. He has invited you to make submissions – lasting no more than 3 minutes – to explain why the claim should not be struck out.

Prepare and then make your submissions before grumpy Judge Harshison.

Liability Quiz

1. A 5 year old child ran out between parked cars towards an ice cream van and was knocked down by a vehicle driving at 15mph. Would the driver be negligent?

2. A passenger who fails to wear as seat-belt may have their damages reduced if by wearing a seatbelt the injuries would have been lessened or prevented. What is the usual reduction?

3. Would a passenger who consents to being driven knowing that the driver's ability to drive has been adversely affected by the consumption of an excessive amount of alcohol be contributory negligent?

4. What reduction in damages would there be to a Claimant went for a joy ride in a light aircraft piloted by the Defendant who was extremely drunk?

5. What's the difference between volenti non fit injuria and contributory negligence?

6. Can an employer be liable to an employee for injuries sustained at the hands of an aggressive customer or robber?

7. A boy was injured in a hotel lift in Spain. The relevant local safety standards had been complied with but these were not the same as and did not meet British standards. Would the claim succeed?

Quiz Answers

1. In Kite v Nolan (1983) PTR 253 a 5 year old child ran out between parked cars towards an ice cream van and was knocked down by a vehicle driving at 15mph. The Court held that the Defendant had exercised a reasonable standard despite the presence of the ice cream van.

2. 25% following the decision in Froom v Butcher (1979) 3AER 520 AC.

3. A passenger who consents to being driven when he knows that the driver's ability to drive has been adversely affected by the consumption of an excessive amount of alcohol is guilty of contributory negligence according to Owens v Brimmell (1976) AER 765. The degree of negligence should not exceed 25% in accordance with Froom v Butcher.

4. In Morris v Murray (1990) 3 AER 801 the Court of Appeal held that the risk was so extreme that the Claimant consented to the risk and could not recover.

5. Volenti non fit injuria is a complete defence; in volenti the Claimant and Defendant know the risks that they are going to face. Contributory negligence is a partial defence – the fault is divided between the Claimant and Defendant. In contributory negligence both parties are negligent. Until the incident occurs both Claimant and Defendant do not know the nature of the risk and invite the risk.

6. Yes – Keys v Shoefayre (1978) IRLR 476; Rahman v Arearose Ltd (2000) 3WLR 1184.

7. No – see Codd v Thomson Tour Operations Ltd TLR 20/10/2000 (report attached)

Duty of care

A decomposed snail in Scotland was the humble beginning of the modern English law of negligence

The case of *Donoghue v. Stevenson*[4] [1932] illustrates the law of negligence, laying the foundations of the fault principle around the Commonwealth. The Pursuer, May Donoghue, drank ginger beer given to her by a friend, who bought it from a shop. The beer was supplied by a manufacturer, a certain David Stevenson in Scotland. While drinking the drink, Donoghue discovered the remains of an allegedly decomposed slug. She then sued Stevenson, though there was no relationship of contract, as the friend had made the payment. As there was no contract the doctrine of privity prevented a direct action against Stevenson.

In his ruling, justice Lord MacMillan defined a new category of delict (the Scots law nearest equivalent of tort), (which is really not based on negligence but on what is now known as the "implied warranty of fitness of a product" in a completely different category of tort--"products liability") because it was analogous to previous cases about people hurting each other. Lord Atkin interpreted the biblical passages to 'love thy neighbour,' as the legal requirement to 'not harm thy neighbour.' He then went on to define neighbour as "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions that are called in question." Reasonably foreseeable harm must be compensated. This is the first principle of negligence.

In England the more recent case of *Caparo v. Dickman* [1990] introduced a 'threefold test' for a duty of care. Harm must be (1) reasonably foreseeable (2) there must be a relationship of proximity between the plaintiff and defendant and (3) it must be 'fair, just and reasonable' to impose liability. However, these act as guidelines for the courts in establishing a duty of care; much of the principle is still at the discretion of judges.

It Australia, this test was applied by Kirby, Hayne and Callinan JJ in the case of "Perre v Apand" [1999].[5]

Breach of duty

In *Bolton v. Stone* the English court was sympathetic to cricket players

Once it is established that the defendant owed a duty to the plaintiff/claimant, the matter of whether or not that duty was breached must be settled. The test is both subjective and objective. The defendant who knowingly (subjective) exposes the plaintiff/claimant to a substantial risk of loss, breaches that duty. The defendant who fails to realize the substantial risk of loss to the plaintiff/claimant, which any reasonable person [objective] in the same situation would clearly have realized, also breaches that duty.[6][7]]

Breach of duty is not limited to professionals or persons under written or oral contract; all members of society have a duty to exercise reasonable care toward others and their property. A person who engages in activities that pose an unreasonable risk toward others and their property that actually results in harm, breaches their duty of reasonable care. An example is shown in the facts of *Bolton v. Stone*,[8] a 1951 legal case decided by the House of Lords which established that a defendant is not negligent if the damage to the plaintiff was not a reasonably foreseeable consequence of his conduct. In the case, a Miss Stone was struck on the head by a cricket ball while standing outside her house. Cricket balls were not normally hit a far enough distance to pose a danger to people standing as far away as was Miss Stone. Although she was injured, the court held that she did not have a legitimate claim because the danger was not sufficiently foreseeable. As stated in the opinion, 'Reasonable risk' cannot be judged with the benefit of hindsight. As Lord Denning said in *Roe v. Minister of Health*,[9] the past should not be viewed through rose coloured spectacles. Therefore, there was no negligence on the part of the medical professionals in a case faulting them for using contaminated medical jars because the scientific standards of the time indicated a low possibility of medical jar contamination. Even if some were harmed, the professionals took reasonable care for risk to their patients.

Chapter 3

Breach of duty

1. General Principles

The test of determining whether a duty to take care exists:-

> "The test in every case ought to be whether the Defendant can reasonably foresee that his conduct will expose the Claimant to a risk of personal injury. If so, he comes under a duty of care to that Claimant".
>
> (As per Lord Lloyd in Page –v- Smith [1952] 2WLR 644).

It is important to note the level of risk required to create a duty to act. In Czamikow –v- Koufos [1961] AC350, Lord Reid stated as follows:-

"The modern law of tort is quite different and it imposes a much wider liability. A Defendant will be liable for any type of damage which is reasonably foreseeable as liable to happen even in the most unusual case, unless a reasonable man would in the whole circumstances feel justified in neglecting it. And there is good reason for the difference. In contract if one party wishes to protect himself against a risk which to the other party would appear immoral, he can direct the other party's attention to it before the contract is made ... But in tort, there is no opportunity for the injured party to protect himself in that way and the tortfeasor cannot reasonably complain if he has to pay for some unusual but nonetheless foreseeable damage which results from a wrongdoing".

Further, Lord Upjohn said:-

"The test in tort, as now developed in the authorities, is that the tortfeasor is liable for any damage which he can reasonably foresee may happen as a result of the breach however unlikely it may be, unless it can be brushed aside as farfetched".

When considering whether an employer has a duty to act to protect his employee from a particular risk, the passage from the Judgment of Swanick J in Stokes –v- Guest, Keen & Nettlefold [Bolts & Nuts Ltd] [1958] 1 WLR 1776 at page 1783 has been quoted with approval in many subsequent cases:-

> "From these authorities, I deduce the principles that the overall test is still the conduct of the reasonable and prudent employer taking positive thought for the safety of his workers in the light of what he knows or ought to have known, where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it unless in the light of common sense or newer knowledge, it is clearly bad; but where there is developing knowledge, he must keep reasonable abreast of it and not be too slow to apply it and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than average or standard precautions. He must weigh up the risk in terms of the likelihood of injury occurring and the potential consequence if it does; and he must balance against this the probable effectiveness of the precautions that can be taken to meet it

and the expenses and inconvenience they involve. If he has found to have fallen below the standard to be properly expected of a reasonable and prudent employer, he will be negligent".

2. Basis of the Duty

A Defendant can owe a duty to a Claimant for a wide range Torts to property and to the person. A consideration of all of the various duties that can be owed is outside the scope of this paper. However, in respect of torts relating to injuries, the following is worth noting:

In *Perrett v Collins*, where a regulatory authority was held liable for personal injury resulting from an air crash following its negligent safety inspection of the aircraft, Buxton L.J. commented that "when one turns to the judgmental issues of justice, fairness and reasonableness the importance of the fact that what is put at risk is the [claimant's] body, and not just his goods, is ... deeply embedded in the law of negligence"

On the other hand, the protection of bodily integrity is not synonymous with protection from physiological changes to the body which produce no symptoms and have no measurable effect on the body. In *Rothwell v Chemical & Insulating Co* the House of Lords concluded that symptomless pleural plaques developed by the claimants as a result of inhaling asbestos fibres did not constitute actionable damage; nor did they become actionable damage when combined with the anxiety of the claimants due to their

knowledge of the risk of developing serious disease in the future as a result of their exposure to asbestos. Lord Hoffmann observed that:

> " ... a claim in tort based on negligence is incomplete without proof of damage. Damage in this sense is an abstract concept of being worse off, physically or economically, so that compensation is an appropriate remedy. It does not mean simply a physical change, which is consistent with making one better, as in the case of a successful operation, or with being neutral, having no perceptible effect upon one's health or capability."

3. Now that we've established what a duty in Tort is, what is a breach of that duty?

A violation of an interest protected by tort is unlawful because it is a breach of a duty owed by the defendant not to violate that interest of the claimant. Lord Denning in Letang v Cooper held that intentional trespass was as much a breach of duty as negligent infliction of personal injury because all torts constituted a breach of a relevant duty.

In the majority of torts the claimant must establish that he suffered some actual damage, that the damage was in fact caused by the defendant's tortious conduct, and that the damage is not, in law, too remote. A small number of torts however do not require any proof of actual damage. They are said to be actionable per se, but again, that is outside the scope of this paper. For the purposes of a personal injury claim, there must be damage (the injury, of course).

4. Acts and Omissions

Direct acts can clearly breach a duty of care. Doing something such as pushing a child into a pond is a tort (battery). Driving one car too fast is also clearly a breach of duty.

What about omissions? There is no 'duty' on a stranger to be a good Samaritan and intervene to prevent harm. For example, a passer by may watch the child pushed into the pond and do nothing, even if the child were to drown.

Contrast this with the duty of a local authority to fence the pond to prevent children falling in. Or, the duty of a professional carer who is supposed to be looking after the child and who fails to do so.

Omissions are not simply restricted to the tort of negligence. They can also give rise to a breach of a statutory duty, for example the Occupier's Liability Act 1957. A failure to maintain or repair premises might constitute such a failure.

Incidentally, there is no account of the 'degree of negligence' once breach of duty has been established. So far as the common aw is concerned, once someone falls below the standard of the reasonably competent driver, for example, then he is in breach of his duty just as someone who falls far below is (contrast the criminal law, for example, which sets out different offences for different levels of culpability).

5. Do motives matter?

In the most part, no. Even if a Defendant is setting out to do harm and to commit a tort, if no damages arises from it then there is no tort committed in the main.

However, in the tort of misfeasance in public office, the motive can matter. In *Three Rivers DC v Bank of England (No.3)* Lord Steyn explained that liability rested on the bad faith of the defendant in exercising a public power with the intention of injuring the claimant or with knowledge or recklessness as to probable injury to the claimant.

There are other torts where motive can be a factor in liability, but they are not such as to be likely to concern the PI practitioner.

6. Intentional Conduct

There are torts in which the conduct has to be intentional in order for the tort to be made out. There is a distinction between the conduct being intentional and the outcome being intentional.

Someone who deliberately sets out to cross a fence into land adjacent may commit a trespass (for intentionally crossing the line) even though he was genuinely mistaken about the ownership of the land on the far side.

In contrast, someone who crosses that line without knowing that the line is there (in the dark, for example) does not commit the tort of trespass as it was accidental – there was no intention to cross.

7. Recklessness

The primary importance of carelessness as the relevant fault engaging liability in tort naturally lies in the tort of negligence itself. The defendant will be liable in negligence if he falls below the standard of care demanded by the duty of care which he owes to the claimant. What constitutes that standard of care can be said to be the degree of care, competence and skill to be expected from a person engaging in the activity or function undertaken by the defendant. The starting point remains the definition of negligence given by Alderson B. in Blyth v Birmingham Waterworks Co: "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

The measure of what is reasonable depends on context. A professional acting in conduct of his or her work is judged against the reasonable practitioner of that work, not the everyday man or woman.

Thus, an employer company, which is responsible for the health, safety and welfare of its employees is judged against the standard of the reasonably directed company and fixed with the knowledge and standards that is expected of the same.

A request for permission to appeal did not require an analysis of the grounds of the proposed appeal to ascertain whether it would succeed; the court had only to decide whether there was a real prospect of success. If so permission would be granted: if not, it would be refused.

When considering an application to set aside permission, the statement made by Lord Donaldson of Lymington, Master of the Rolls, in *The Iran Nabuvat* (*The Times* June 22, 1990; [1990] TLR 481; [1990] 1 WLR 1115, 1117) was still apposite.

To that should be added the guidance given by Lord Justice Swinton Thomas and Lord Woolf, Master of the Rolls, in *Smith v Cosworth Casting Processes Ltd* ([1997] TLR 172; [1997] 4 All ER 840, 841).

His Lordship considered and dismissed the present application.

Lord Justice Schiemann agreed.

Solicitors: Gabb & Co, Hereford.

Negligence — tour operator — holidaymaker injured abroad — local safety standards apply

COURT OF APPEAL

Published October 20, 2000

Codd v Thomson Tour Operations Ltd

In determining whether a tour operator was liable in negligence to a British holidaymaker injured abroad, the appropriate safety standards to apply were the local safety standards and not the equivalent British standards.

Accordingly, where a boy was injured in a hotel lift in Spain, and the relevant local safety standards had been complied with, the tour operators were not in breach of duty.

The Court of Appeal (Lord Justice Swinton Thomas and Lord Justice Brooke) so held on July 7, 2000 dismissing an appeal by the plaintiff, Gareth David Codd, by his next friend, against the dismissal by Judge Roach at Torquay County Court on May 21, 1999, of the plaintiff's action for damages against Thomson Tour Operations Ltd.

LORD JUSTICE SWINTON THOMAS said that the plaintiff submitted that the judge had erred in not applying British safety standards to the hotel lift with the result that there was a breach of duty according to English law.

That was not a correct approach where an accident occurred in a foreign country.

English law applied in respect of the establishment of negligence, but there was no requirement that a hotel in Majorca, for example, was obliged to comply with English standards: see *Wilson v Best Travel Ltd* ([1993] 1 All ER 353).

Landlord and tena
paid to landlord —
subsequently chall

QUEEN'S BENCH DIVISI

Published October 20, 2000

Regina v London Le
Tribunal, Ex parte D

Before Mr Justice Sullivan

Judgment October 3, 2000

A tenant who had already paid
was entitled subsequently to
tribunal for a determination a
costs incurred in respect of it

Such an application was not
yet paid the service charge dem
defined limitation period.

Mr Justice Sullivan so held i
when dismissing an applicatio
property company, for judici
determination made by the L
Tribunal on December 21, 199

(a) the applicant's tenants w
charges demanded by it in res
were entitled to apply to the tri
the Landlord and Tenant Act
83(1) of the Housing Act 199
whether those service charges w

(b) that a limitation period of
application under section 19(2A
the Limitation Act 1980.

Section 19 of the 1985 Act p
shall be taken into account in
service charge payable for a per
that they are reasonably incur
incurred on the provision of se
works, only if the services or
standard; and the amount
accordingly.

"(2) Where a service charge i
costs are incurred, no greater am
payable..."

"(2A) A tenant by whom, or a
charge is alleged to be payable
valuation tribunal for a determi
incurred for services, repairs,
management were reasonably in
or works for which costs were i
standard, or (c) whether an amo
incurred is reasonable."

Mr Stephen Jourdan for the
QC, for the tribunal.

MR JUSTICE SULLIVAN
applicant applied to the tribunal
reasonableness of management f
to major works carried out since
exceeded the fee of 10 per cent a

The applicant submitted that th
... a service charge is alleged to
tenant who had already paid the
case, could not apply to the tribun

woodward solicitors

CPR PART 4 – FORMS

CPR PART 5 – COURT DOCUMENTS

Summary

CPR Part 4 requires the forms set out in the Practice Direction to be used in cases which they apply. In other words use Court forms where possible rather than designing your own.

CPR Part 5 contains provisions about documents used in Court proceedings and obligations of a Court Officer in relation to the documents.

CPR Part 5

5.3 Where any Part of the CPR or Practice Direction requires a document to be signed, the provision is satisfied if the signature is printed by computer or other mechanical means.

5.4B A party to proceedings may obtain from the records a copy of specified documents from the Court file.

5.4C A party who is not a party to proceedings may obtain from Court records a copy of a statement of case (but not documents filed with or attached to the statement of case) and a Judgment or Order made in public. This doesn't apply to documents filed before 02/10/06. Other documents can be obtained from the Court if the Court give permission.

Practice Direction 5A

2.1 Statements of case and other documents drafted by a legal representative should bear his/her signature and if they are drafted by a legal representative as a member or employee of a firm they should be signed in the name of the firm.

2.2 Every document prepared by a party for filing or use at the Court must –

(1) Unless the nature of the document renders it impracticable, be on A4 paper of durable quality having a margin, not less than 3.5 centimetres wide,

(2) be fully legible and should normally be typed,

(3) where possible be bound securely in a manner which would not hamper filing or otherwise each page should be endorsed with the case number,

(4) have the pages numbered consecutively,

(5) be divided into numbered paragraphs,

(6) have all numbers, including dates, expressed as figures, and

(7) give in the margin the reference of every document mentioned that has already been filed.

5.1 The Court record the date on which a document was filed on the document

5.3 Lists what documents may be filed at Court by fax.

Practice Direction 5B allows certain documents to be filed at Court electronically.

4.1 The e-mail message must contain the name, telephone number and e-mail address of the sender and should be in plain text or rich text format rather than HTML.

4.2 Correspondence and documents may be sent as either text in the body of the e-mail, or as attachments, except as mentioned in paragraph 4.3.

4.3 Documents required to be in a practice form must be sent in that form as attachments.

4.8 Where proceedings have been commenced, the subject line of the e-mail must contain the following information –

(1) the case number;

(2) the parties' names (abbreviated if necessary); and

(3) the date and time of any hearing to which the e-mail relates.

Practice Direction 5C provides provisions in relation to the Electronic Working Scheme

Peter Lyons 21/08/14